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March 12, 2013

VIA HAND DELIVERY

Hon. Victor Marrero
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: Trustee's Request to Supplement the Record in Anwar v. Fairfield Greenwich Limited, No. 09-cv-118

Dear Judge Marrero:

Pursuant to your Individual Practice Rule II A, I write again as counsel to Irving Picard, the court-appointed Trustee in the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS"), to advise the Court that the Trustee intends to file a motion to supplement the record regarding his motion to intervene in *Anwar v. Fairfield Greenwich Limited*, No. 09-cv-118, which this Court denied on March 8, 2013. Copies of this letter will be simultaneously delivered to all counsel.

Previously per your Individual Practice Rule II, the Trustee submitted a letter on February 26 requesting a pre-motion conference for a motion to intervene in the action. The parties responded to the Trustee's letter by letters to you on February 28. On Wednesday March 8 during a conference with the Court, the Trustee learned that the Court had converted the Trustee's pre-motion conference letter to a motion to intervene and denied the motion solely on the basis of the Trustee's pre-motion conference letter that set forth the legal basis for intervention. Although the Trustee believe that his letter, the parties' responses to it, and the Court's March 8 Decision and Order provide a record for any appeal, to provide context for any possible further review, the Trustee seeks to supplement the record by filing what would have been his intervention papers, which consist of a motion to intervene, a proposed statement of affirmative defenses against certain of the Plaintiffs' claims, and a proposed opposition to the Plaintiffs' motion for final approval of the settlement. To be clear, the Trustee does not request that the Court reconsider its March 8 decision regarding intervention, only that it permit these documents to be filed so as to provide further context for that decision.

Accordingly, the Trustee respectfully requests a conference on his motion to supplement the record or, in the alternative, that the Court forgo that conference and grant leave to for the filing of the Trustee's intervention papers, which are attached.

Respectfully,

David J. Sheehan

Attachments

300275229

The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the SIPA Trustee.

SO ORDERED.

3-13-13
DATE VICTOR MARRERO U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendants.

Case No. 09-cv-0118 (VM)

(ECF CASE)

MEMORANDUM OF LAW IN SUPPORT OF TRUSTEE'S MOTION FOR LIMITED INTERVENTION TO OPPOSE FINAL APPROVAL OF THE PROPOSED SETTLEMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTE

RULES

OTHER AUTHORITIES

Irving H. Picard (the "Trustee"), as trustee for the 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 the substantively consolidated estate of Bernard L. Madoff ("Madoff"), by and through his undersigned counsel, respectfully submits this memorandum of law in support of his motion to intervene under Federal Rule of Civil Procedure 24 in the above-captioned class action for the limited purpose of requesting that this Court, in part or in whole, deny the Plaintiffs' Motion for Final Approval of the proposed Settlement and Plan of Allocation, without prejudice to its refiling after the Trustee's claims to the property that is the subject of this action have been resolved. As grounds for this relief, the Trustee states the following:

PRELIMINARY STATEMENT

The ongoing SIPA proceedings to liquidate the BLMIS and Madoff estates and equitably distribute recovered customer property under the mandates of SIPA are the largest undertaking of their kind ever attempted, commensurate with the unprecedented scale, reach, and complexity of Madoff's fraud. At its collapse, BLMIS had almost five thousand open accounts; over $17 billion of investor principal was lost; and over sixteen thousand claims have been filed on the estate. The Trustee has recovered over $9.3 billion in assets, over $5 billion of which has already been or is now being distributed to customers. The Trustee has actions outstanding seeking to recover billions more, including against feeder funds, sophisticated investors, and major banks that knew or were willfully blind that a fraud was underway. The recovery initiative's achievements are made possible by Congress's decision in SIPA to establish a unitary proceeding to liquidate a failed broker-dealer like BLMIS for the benefit of its customers, thereby avoiding the litigation free-for-all that, prior to SIPA, put race-to-the-courthouse tactics ahead of customers' interests. Instead of ad hoc litigation and arbitrary awards, SIPA empowers

a single trustee to undertake all recovery efforts and then distribute the proceeds, in a fair and equitable *pro rata* fashion, to the class of investors that Congress identified as deserving special protection. Third-party lawsuits seeking to deprive a SIPA trustee of funds for equitable distribution, and to redirect those funds to a preferred group of non-customer claimants, necessarily clash with SIPA's purpose and requirements and, if allowed to proceed, would frustrate congressional intent.

Among the Trustee's many actions under SIPA to recover assets transferred from BLMIS for the benefit of its customers are claims against the defendants in this action. Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma"), Fairfield Lambda Limited ("Lambda"), Greenwich Sentry, L.P. ("GS"), and Greenwich Sentry Partners, L.P. ("GSP") (collectively, the "Fairfield Funds") were investment funds or limited partnerships founded by Walter Noel, Jeffrey Tucker, and Andres Piedrahita, and managed by the Founders and a group of individuals and entities associated with the Fairfield Greenwich Group ("Fairfield"). Collectively, the Fairfield Funds and individuals and entities related to the Fairfield Funds withdrew more than $3.2 billion from BLMIS during the six years prior to the filing date of December 11, 2008. On May 18, 2009, the Trustee sued the Fairfield Funds for the return of this money in the Trustee's Recovery Action, *Picard v. Fairfield Sentry Limited*, No. 09-01239 (Bankr. S.D.N.Y. filed May 18, 2009), and later filed an amended complaint adding as defendants various Fairfield-related entities and individuals that managed the Fairfield Funds (together, the "Fairfield Defendants").[1]

[1] A copy of the Amended Complaint is annexed to the Declaration of Mark A. Kornfeld, dated March 12, 2013 ("Kornfeld Dec.") as Exhibit 1. The Trustee's Fairfield Defendants are: Fairfield Sentry Limited, Greenwich Sentry, L.P., Greenwich Sentry Partners, L.P., Fairfield Sigma Limited, Fairfield Lambda Limited, Chester Global Strategy Fund Limited, Chester Global Strategy Fund, Irongate Global Strategy Fund Limited, Fairfield Greenwich Fund (Luxembourg), Fairfield Investment Fund Limited, Fairfield Investors (Euro) Limited, Fairfield Investors (Swiss Franc) Limited, Fairfield Investors (Yen) Limited, Fairfield Investment Trust, FIF Advanced, Ltd., Sentry Select Limited, Stable Fund, Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda), Ltd., Fairfield Greenwich Advisors LLC, Fairfield Greenwich GP, LLC, Fairfield Greenwich Partners, LLC, Fairfield Heathcliff Capital LLC,
(continued on next page)

The Plaintiffs in this action (the "Anwar Plaintiffs") pursue state common law and Securities Exchange Act claims against nearly all of the same Fairfield Defendants, alleging that they were been injured when the Funds lost their investments in BLMIS. In order to ensure that the outcome of this litigation does not prejudice the estate, the Trustee has been in regular communication with counsel for the Anwar Plaintiffs and the Fairfield Defendants in an attempt to reach a "global" settlement that would have resolved both the Trustee's and the Anwar Plaintiffs' claims against the Fairfield Defendants.

As late as October 2012, counsel for the Anwar Plaintiffs assured the Trustee that there was no non-global settlement and nothing imminent to report on the status of any settlement negotiations with the Fairfield Defendants. But on November 6, 2012, the "Representative Plaintiffs" in this action filed a motion to approve a Settlement with Fairfield Greenwich Limited and Fairfield Greenwich (Bermuda) Ltd.,[2] for themselves and on behalf of a proposed "Settlement Class."[3] The proposed Settlement contemplates an initial settlement amount of more

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Fairfield International Managers, Inc., Fairfield Greenwich (UK) Limited, Greenwich Bermuda Limited, Chester Management Cayman Limited, Walter Noel, Jeffrey Tucker, Andrés Piedrahita, Mark McKeefry, Daniel Lipton, Amit Vijayvergiya, Gordon McKenzie, Richard Landsberger, Philip Toub, Charles Murphy, Robert Blum, Andrew Smith, Harold Greisman, Gregory Bowes, Corina Noel Piedrahita, Lourdes Barreneche, Cornelis Boele, Santiago Reyes, and Jacqueline Harary.

[2] Under the Settlement, the settling defendants are defined only as Fairfield Greenwich (Bermuda) Ltd. and Fairfield Greenwich Limited (hereinafter the "Settling Defendants"). Walter M. Noel, Jr., Jeffrey H. Tucker, Andrés Piedrahita, Lourdes Barreneche, Robert Blum, Cornelis Boele, Gregory Bowes, Vianney d'Hendecourt, Yanko della Schiava, Harold Greisman, Jacqueline Harary, David Horn, Richard Landsberger, Daniel E. Lipton, Julia Luongo, Mark McKeefry, Charles Murphy, Corina Noel Piedrahita, Maria Teresa Pulido Mendoza, Santiago Reyes, Andrew Smith, Philip Toub, and Amit Vijayvergiya are defined in the Settlement as FG Individual Defendants (hereinafter the "Individual Defendants"). The Individual Defendants are funding the Settlement and with the Settling Defendants are receiving full releases. The Individual Defendants and Settling Defendants are referred to hereinafter collectively as the "Anwar Released Defendants." All Anwar Released Defendants are named as defendants in the Trustee's Recovery Action, with the exception of Mendoza, Horn, della Schiava, d'Hendecourt, and Luongo.

[3] The "Settlement Class" is generally defined in the Stipulation of Settlement as "all Persons who were Beneficial Owners of shares or limited partnership interests in the Funds as of December 10, 2008 . . . and who suffered a Net Loss of principal invested in the Funds . . . ." (Stip. of Settlement at 18, definition ss, ECF No. 996.)

than $50 million—money that comes from the same limited pool of funds sought by the Trustee in his Recovery Action and which was largely obtained from initial and subsequent transfers from BLMIS. (Stip. of Settlement, Ex. 6 ¶ 3.) Indeed, the Settlement documents themselves expressly and repeatedly refer to the limited resources of the Fairfield Defendants, strongly suggesting that any money paid to the Anwar Plaintiffs—consisting of investors in the Fairfield Funds, not BLMIS customers—will substantially deplete the amount of money available to the Trustee for distribution to customers. (Plaintiffs' Memo. in Supp. of Mot. for Prelim. Approval of the Partial Settlement at 9, ECF No. 998.) In other words, the Settlement would dissipate the same assets that are the subject of the Trustee's claims under SIPA in his Recovery Action. The Trustee immediately notified the Anwar parties of his objection and promptly sought an injunction preventing them from undermining the ongoing SIPA proceedings through consummation of this Settlement. *Picard v. Fairfield Greenwich Ltd.*, No. 12-02047 (Bankr. S.D.N.Y. filed Nov. 29, 2012) (the "Injunction Action").

The Trustee now seeks intervention in this action for the limited purpose of objecting to the Anwar Plaintiffs' motion for final approval of the Settlement. Denying that motion, without prejudice, at this time would allow the Trustee to fulfill his congressionally-prescribed role of carrying out the liquidation of BLMIS in a "prompt and orderly" fashion for the primary benefit of BLMIS customers, H.R. Rep. No. 91-1613 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5254, 5262, and would prevent actions such as this one from eroding the estate on an ad hoc basis—the very scenario that Congress sought to avoid by enacting SIPA.

For these reasons, the Court should grant the Trustee's motion for intervention and should deny the Plaintiffs' motion to approve the proposed Settlement without prejudice to its

refiling after the Trustee's claims to the property that is the subject of this action have been resolved in his Recovery Action.

STATEMENT OF FACTS

A. The Trustee Administers Proceedings Under SIPA to Recover and Return BLMIS Assets to BLMIS "Customers"

1. Madoff's Fraud Is Uncovered and SIPA Proceedings Are Initiated

On December 11, 2008, Madoff was arrested by federal agents and charged with securities fraud in this Court. That same day, the Securities and Exchange Commission (the "SEC") filed a civil complaint, alleging that Madoff and BLMIS were operating a massive Ponzi scheme through BLMIS's investment advisor activities. *See In re Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC) (In re BLMIS I)*, 424 B.R. 122, 125–32 (Bankr. S.D.N.Y. 2010); *In re Bernard L. Madoff Inv. Sec. LLC (In re BLMIS II)*, 654 F.3d 229, 231–32 (2d Cir. 2011).

Under this scheme, Madoff represented to his clients that he invested their money under a "split-strike conversion strategy" to achieve his "consistently high rates of return." 654 F.3d at 231. In reality, however, "Madoff used the investments of new and existing customers to fund withdrawals of principal and supposed profit made by other customers." *Id.* at 232. The customers' funds were never actually invested, but Madoff generated fictitious documents "in order to conceal the fact that he engaged in no trading activity whatsoever." *Id.* at 231. Integral to this scheme were the so-called "feeder funds"—outside entities, the largest of which were the Fairfield Funds, that transferred their investors' funds to Madoff. Madoff, in turn, would pass incoming customer money to the feeder funds, which would often take substantial fees (later passed on to their principals and affiliates) before passing the money on to their investors as putative return on their investments.

On December 15, 2008, the Securities Investor Protection Corporation ("SIPC") filed an application in the SEC's civil action, seeking a decree that BLMIS customers were in need of the protections afforded by SIPA. This Court granted the application that same day, appointing the Trustee to oversee the liquidation of BLMIS and the comprehensive recovery of customer assets. *In re BLMIS I*, 424 B.R. at 126. This Court also removed the SIPA liquidation proceeding to the Bankruptcy Court for the Southern District of New York. It soon became apparent that the scope of Madoff's fraud was unprecedented. At the time of its collapse, BLMIS was generating fictitious account statements for approximately 4,900 open customer accounts. "The final customer statements issued by BLMIS falsely recorded nearly $64.8 billion of net investments and related fictitious gains." *In re BLMIS II*, 654 F.3d at 232. The Madoff liquidation and subsequent recovery efforts therefore present the greatest test the SIPA regime has ever faced.

2. The Trustee Begins To Recover and Return Lost Customer Assets, Requiring Extensive Action Against So-Called "Feeder Funds"

The SIPA proceedings' scale and scope are commensurate with the magnitude of Madoff's fraud. Over sixteen thousand claims have been filed on the BLMIS estate. The Trustee has filed over a thousand adversary actions in Bankruptcy Court to recover customer property, including actions against scores of foreign and domestic "feeder funds." The largest of these are the Fairfield Funds. As recognized by this Court, the Trustee "has worked relentlessly . . . to bring assets that passed through [BLMIS] back into the customer fund, in order to restore nearly $20 billion in customer losses." *Picard v. JPMorgan Chase & Co.*, 460 B.R. 84, 88 (S.D.N.Y. 2011).

Pursuant to SIPA, the Trustee has established a "Customer Fund" from which priority distributions are made to customers of the debtor, on a pro rata basis, and, should customers be made whole, to other creditors. This fund consists of stolen or fraudulently transferred assets

recovered by the Trustee through settlements and litigation. As of September 2012, the Trustee has successfully recovered, or reached agreements to recover, over $9.2 billion dollars, a sum representing more than half of the current estimate of principal lost by all claimants on the estate. (Kornfeld Dec., Ex. 8 at 1.) Over $5 billion has been actually distributed to customers, or is now being distributed, and over one thousand accounts have been fully satisfied—around half of all accounts with allowed claims. *Id.* at 2. In performance of his duties under SIPA, the Trustee has examined over sixteen thousand claims and filed hundreds of actions to disallow claims and recover improperly transferred customer funds. *Id.* at 6.

B. The Trustee Pursues Assets Transferred to the FGG Funds for Equitable Distribution to BLMIS Customers Under SIPA

The Fairfield Funds were Madoff's largest "feeder funds," operating as an integral part of his Ponzi scheme. (Kornfeld Dec., Ex. 1 ¶ 2.) They were one of Madoff's "largest marketing and investor relations arms" and actively participated in and "substantially aided, enabled and helped sustain" the Ponzi scheme. (*Id.*) Collectively, the Fairfield Funds and related individuals and entities withdrew more than $3.2 billion from BLMIS during the six years prior to December 11, 2008, the date on which the SEC filed its civil complaint. (*Id.* ¶ 536.) On May 18, 2009, the Trustee sued the Fairfield Defendants for the return of this money in his Recovery Action. Through the Amended Complaint in the Trustee's Recovery Action, the Trustee seeks to recover, for equitable *pro rata* distribution to BLMIS customers with allowed claims, property of the BLMIS estate in excess of $3.2 billion. This figure includes claims against Fairfield Greenwich (Bermuda) Ltd. for over $950 million, against Fairfield Greenwich Limited for over $500 million, and claims against founders Noel, Tucker, and Piedrahita for over $500 million. (*Id.* ¶¶ 121–47, 198–201, 207–08, 215–16.)

In the his Recovery Action, the Trustee alleged that the Fairfield Defendants received hundreds of millions of dollars as a result of their relationship with Madoff, and that they had actual and constructive knowledge of his fraud and were willfully blind to it. Further, the Trustee alleged that all of the money purportedly "earned" as management and performance fees based on the fictitious returns of the Fairfield Funds is customer property that must be returned to the Trustee for equitable distribution. The Trustee has alleged that a significant portion, if not all, of the distributions and other payments made to the Fairfield Defendants were made with funds originally withdrawn from Sentry's, GS's, and GSP's accounts at BLMIS and, therefore, constitute property of the estate.[4] (*See, e.g., id.* ¶¶ 200, 209, 217, 223, 229, 235, 241, 246, 252, 258, 264, 270, 276.)

The Trustee reached a partial resolution of his Recovery Action through settlements of his claims against each of the Fairfield Funds. But these settlements account for only a fraction of the $3.2 billion the Trustee seeks in his adversary proceeding, due to the fact that the fraudulently transferred funds were subsequently transferred to Fairfield management entities and individuals. As a result of the settlements, Sentry has an allowed claim on the estate for $230 million, GS has an allowed claim for $35 million, and GSP has an allowed claim for $2 million. (Kornfeld Dec., Ex. 2 at 4, Ex. 3 at 6, Ex. 4 at 6.) In connection with these allowed claims, these three funds have already participated in and received distributions totaling approximately $100 million from the Trustee in the SIPA Proceedings. (Kornfeld Dec., Ex. 5 ¶ 6.) As the Bankruptcy Court noted in approving the settlements, the investors in the Fairfield

[4] By December 11, 2008, Noel, Tucker, and Piedrahita (who are among those individuals funding the proposed Settlement) had only a few million dollars still invested with Madoff—the defendants retained all other money they had unjustly collected and have kept millions of dollars in stolen property that belongs to the estate. (Kornfeld Dec., Ex. 1 ¶ 491.)

Funds (*i.e.*, the Anwar Plaintiffs) will be the ultimate beneficiaries of these distributions. The Trustee is continuing with his litigation against the remaining Fairfield Defendants in order to recover property for equitable *pro rata* distribution in accordance with SIPA. The Trustee has consented to repeated extensions of time to the Fairfield Defendants in order to allow them to pursue a global resolution of all related actions, including the instant action.

C. The Trustee Learns that the Settlement Would Dissipate the Same Assets To Settle Claims Premised on the Same Fraudulent Enterprise and Conduct as the SIPA Proceedings

On November 6, 2012, the Representative Plaintiffs in the instant action filed a motion with this Court to approve their proposed Settlement. That Settlement provides for the payment by certain of the Fairfield Defendants to the Settlement Class of an initial amount of some $50 million dollars, with an additional $30 million to be placed in escrow. The funds held in escrow will also be paid to the Settlement Class, less any amounts paid by the Defendants to settle other claims. The Settlement makes no direct provision for the claims brought against the same defendants by the Trustee in his Recovery Action—which claims, in any case, seek far more than the escrowed funds—but does purport to release these select defendants from all claims arising from the substance of the instant action. (Stip. of Settlement at 15–16, definition *ll* (definition of "Released Claims")). With few exceptions, the Anwar Released Defendants are the same defendants as in the Trustee's Recovery Action. *See supra* n.2.

Neither the Fairfield Defendants nor the Anwar Representative Plaintiffs gave the Trustee any notice that they intended to pursue a separate settlement without addressing the claims brought in his Recovery Action. Indeed, the Representative Plaintiffs' counsel expressly denied to the Trustee's counsel that any such settlement was imminent—*even after the settlement had been agreed to in principle*. (Kornfeld Dec. ¶¶ 10, 16, 17; Stip. of Settlement at 5–6.) Because, prior to November 6, 2012, there was no imminent prospect that a settlement would dissipate the

funds sought by the Trustee in his Recovery Action, the Trustee had not seen any need to intervene in the instant action.

In the instant action, as this Court is aware, many investors in the Fairfield Funds seek to recover lost principal on a variety of causes of action, including violations of federal securities law and multiple common-law claims including fraud, negligent misrepresentation and breach of fiduciary duties. These losses, and the violations of law which the plaintiffs allege caused them, all arose from the Fairfield Funds' actions as part of Madoff's Ponzi scheme. (*See* Second Consol. Am. Compl. ¶ 1, ECF No. 273.) That is to say, the claims in the instant action are premised on the same enterprise and conduct, feature the same defendants, and seek to recover the same funds as the overall SIPA proceedings and, in particular, the Trustee's Recovery Action.

The Fairfield Defendants have stated that they possess only "very limited resources," and that the instant action, "even if the claims are somewhat different," still seeks to recover from "the same pool of assets" as the Trustee's Recovery Action. Indeed, their counsel acknowledges that "there is absolutely no doubt the pool of assets which are being sought are far less than the dollar amount of the claims that are brought." (Kornfeld Dec., Ex. 6 at 3:15–19, 4:10–15.) Accordingly, the proposed Settlement in the instant action would necessarily drain these "very limited" assets available to satisfy claims brought by the Trustee in his Recovery Action to recover for the same underlying conduct.

In this way, the proposed Settlement would allow the Settlement Class members, who are the ultimate beneficiaries of the Trustee's settlement in his Recovery Action with Sentry, GS, and GSP, to keep their benefits from the Trustee's settlement, while diminishing the value of the

settlement to the Trustee's Customer Fund for the benefit of BLMIS customers and diverting additional funds from the SIPA proceedings and to themselves.

D. The Trustee Seeks To Enjoin the Settlement To Protect the Integrity of the SIPA Proceedings

Having learned only upon the public filing of the proposed Settlement of this imminent threat to his recovery actions under SIPA, the Trustee promptly filed his Injunction Action. *Picard v. Fairfield Greenwich Ltd.*, No. 12-02047 (Bankr. S.D.N.Y. filed Nov. 29, 2012). In that Action, the Trustee requested that the court preliminarily enjoin the parties to the proposed Settlement from consummating that Settlement until the Trustee's Recovery Action was complete and any settlement or judgment reached thereunder was satisfied. In their briefing in the Injunction Action, the Fairfield Defendants have confirmed that the proposed Settlement threatens to dissipate the same funds which the Trustee seeks in his Recovery Action. *See* Kornfeld Dec., Ex. 7 ¶ 4.) In seeking an injunction, the Trustee acted to protect the operation of the SIPA proceedings in the manner intended by Congress: as a single, unitary, and comprehensive scheme to recover and redistribute customer property lost due to broker-dealer failure.

ARGUMENT

I. THE TRUSTEE'S MOTION FOR LIMITED INTERVENTION TO OPPOSE APPROVAL OF THE PROPOSED SETTLEMENT SHOULD BE GRANTED

The Trustee respectfully requests that this Court grant his motion to intervene as of right under Federal Rule of Civil Procedure 24(a) because the Trustee plainly has an interest, unrepresented by the parties, in the same property and transactions that are the subject of this action that would be impaired by approval of the Settlement. He submits that he satisfies all factors required by that rule. Alternatively, he requests that this Court permit him to intervene under Rule 24(b). In either event, he seeks intervention for the limited purpose of opposing the

proposed Settlement and requesting that this Court deny the motion to approve that Settlement without prejudice to refiling upon completion of his Recovery Action.

A. The Trustee Is Entitled to Intervene

Under Rule 24 of the Federal Rules of Civil Procedure, a party may intervene in any action as a matter of right upon timely motion when the applicant:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Rule 24(a)(2) is "liberally construed" in favor of permitting intervention. *Davis v. Smith*, 431 F. Supp. 1206, 1209 (S.D.N.Y. 1977), *aff'd*, 607 F.2d 535 (2d Cir. 1978) (citing 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1924, at 473 (1972); 3B *Moore's Federal Practice* § 24.10[2] (2d ed. 1977)).

Courts consider four factors in considering intervention under Rule 24(a)(2): (1) whether the motion is timely filed; (2) the movant's interest in the litigation; (3) whether disposition of the action may, as a practical matter, impair or impede the movant's ability to protect its interest; and (4) whether the movant's interest is adequately represented by the parties to the action. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69–70 (2d Cir. 1994); *Louis Berger Grp., Inc. v. State Bank of India*, 802 F. Supp. 2d 482, 487 (S.D.N.Y. 2011) (Marrero, J.) (observing that "[u]nder Rule 24(a)(2) . . . , the Court *must* grant an intervention by right when a party" satisfies the four factors (emphasis added)). Parties may intervene for limited purposes, such as that requested by the Trustee here, in which case the intervenor participates only for the specific purposes outlined in their motion to intervene. *See, e.g., Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 538 F.2d 966 (2d Cir. 1976).

1. The Trustee's Motion Is Timely

The Court is currently considering approval of a proposed Settlement that would prejudice the customers of BLMIS, whose interests the Trustee is intended to protect. Moreover, this settlement was negotiated and executed contrary to the representations of the Anwar Representative Plaintiffs' counsel, and the Trustee was only made aware of it in November 2012. In light of these factors, the Trustee's motion to intervene for the purposes of staying the settlement until the Trustee's Recovery Action is adjudicated is timely.

The timeliness of a motion to intervene must be "evaluated against the totality of the circumstances before the court." *D'Amato*, 236 F.3d at 84. "Factors that inform the timeless determination include: how long the motion to intervene was delayed, whether the existing parties were prejudiced by that delay, whether the movant will be prejudiced if the motion is denied, and unusual circumstances militating either for or against a finding of timeliness." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 182 (2d Cir. 2001) (citation omitted). Each of these factors supports the Trustee.

First, the Trustee did not delay in filing this motion. "Among the most important factors in a timeliness decision is the length of time the applicant knew or should have known of his interest before making the motion." *Catanzano v. Wing*, 103 F.3d 223, 232 (2d Cir. 1996) (quotation omitted); *accord Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232–33 (10th Cir. 2010) (delay is measured "from when the movant was on notice that its interests may not be protected by a party already in the case" (citing similar cases from the Fourth, Fifth, Seventh, and Ninth Circuits)). While this case has been pending since 2009, the Trustee is not interested in the Court's disposition of liability in this matter, as the Trustee's claims will be adjudicated in his Recovery Action. The Trustee's interests were not implicated in any fashion until November 2012, when the Anwar Representative Plaintiffs requested

approval of a settlement that prejudiced BLMIS's customers by depleting property that is properly the subject of the BLMIS estate because it was fraudulently conveyed to Fairfield before BLMIS's dissolution. And the necessity of intervention in the interest of judicial and party economy became clear only on February 6, 2013, when this Court granted the Injunction Defendants' motion to withdraw the reference from the Bankruptcy Court of the Trustee's Injunction Application. *Picard v. Fairfield Greenwich Limited*, No. 12-09408 (S.D.N.Y. filed Dec. 27, 2012), ECF No. 30.

Similarly, the parties to the instant action are not prejudiced by the timing of this motion. "It is firmly established that the most significant criterion in determining timeliness is whether the delay in moving for intervention has prejudiced any of the existing parties." *United States v. Int'l Bus. Machs. Corp.*, 62 F.R.D. 530, 541–42 (S.D.N.Y. 1974) (citing three Fifth Circuit cases); *see also Long Island Trucking, Inc. v. Brooks Pharm.*, 219 F.R.D. 53, 55 (E.D.N.Y. 2003) (citing *United States v. IBM* to this effect); *Jones v. Richter*, No. 97-CV-0291E, 2001 WL 392079, at *3 (W.D.N.Y. Apr. 4, 2001) (same). The Trustee notified the parties to the proposed Settlement of his objection to it upon reviewing it in early November 2012, and brought his Injunction Action in the Bankruptcy Court on November 29, 2012. This Court is not scheduled to consider approval of the settlement until March 22, 2013, eliminating any possible prejudice to the parties.[5] And in certain crucial respects, the Trustee's intervention at this time may actually ameliorate potential future prejudice to the Anwar Plaintiffs and other parties.[6]

[5] Although the Court set a deadline for *objections* to the proposed Settlement by persons such as putative class members of February 15, 2013, the Trustee's proposed *opposition* to the Settlement is not subject to that order. Even if it were, for the reasons described herein, the Trustee's intervention and objection will cause the existing parties no undue prejudice.

[6] Because an order by the Court approving the Settlement would not decide whether the proceeds paid by the Fairfield Defendants are actually property of the BLMIS estate, the Trustee may ultimately be forced to bring suit against its beneficiaries, including the members of the Settlement class and any other persons who receive assets

(continued on next page)

At the same time, the Trustee would be substantially prejudiced if the motion is denied because his absence would directly impair his interest if the Settlement is approved and executed, and therefore denial of his motion to intervene would substantially prejudice him, while defeating Congress's intentions by allowing circumvention of the SIPA process and priority scheme. In evaluating the timeliness of a motion to intervene, "[a]mong the circumstances generally considered [is] . . . prejudice to the applicant if the motion is denied." *Pitney Bowes*, 25 F.3d at 70. *See also Berroyer v. United States*, 282 F.R.D. 299, 303 (E.D.N.Y. 2012) (observing in course of deeming motion under 24(a) timely that movant "may suffer prejudice if it is not permitted to intervene because neither party has an incentive to ensure that [movant's] lien is satisfied"). As the example of *Berroyer* shows, analysis of prejudice to the movant as an element of a timeliness inquiry can be informed by the threat to the movant's interest if intervention is denied. Accordingly, this factor weighs in favor of timeliness.

Finally, the "unusual circumstances" surrounding this motion militate for a finding of timeliness. *See Butler, Fitzgerald & Potter*, 250 F.3d at 182. Throughout the pendency of this action, the Trustee has regularly communicated with counsel for the Anwar Representative Plaintiffs about reaching a global settlement with the Fairfield Defendants, and they worked collectively toward that goal. (Kornfeld Dec. ¶¶ 10–13, 16–17.) In turn, the Fairfield Defendants at all times maintained that they would only settle with the Trustee as part of a global settlement that involved the Anwar Plaintiffs. That the Trustee only received notice of the proposed Settlement when it was publicly filed in November constitutes a "unique circumstance"

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from the Fairfield Defendants as a result of the Settlement, to prevent the dissipation of assets or to recoup assets. *See* Fed. R. Civ. P. 23(a) (providing that "[o]ne or more members of a class may . . . be sued as representative parties on behalf of all class members"). Moreover, to the extent that certain Anwar Plaintiffs may be outside the jurisdiction of the United States courts, there is a real possibility that approval of the Settlement at this time would benefit only certain of the Anwar Plaintiffs, not the class as a whole.

supporting a finding of timeliness. The Trustee's moving to intervene at this time is therefore attributable to the conduct of the existing parties to the instant action. *See, e.g., Consol. Edison, Inc. v. Ne. Utils.*, No. 01 Civ. 1893, 2004 WL 35445, at *5 (S.D.N.Y. Jan. 7, 2004) (deeming motion timely where movant belatedly "became aware of" existing plaintiff's "intent to recover only on behalf of" limited beneficiaries through no fault of his own); *Dow Jones & Co., Inc. v. U.S. Dep't of Justice*, 161 F.R.D. 247, 252–53 (S.D.N.Y. 1995) (motion timely where movant belatedly learned her interest was threatened after having "had some basis for believing that [existing party] would adequately protect her interest]"). Accordingly, the Trustee's motion is without undue prejudice to the parties and therefore timely.[7]

2. The Trustee Has a Direct, Substantial, and Legally Protectable Interest in the Matter of the Action Which Cannot Be Adequately Protected by the Existing Parties

A movant-intervenor under Rule 24 must show "an interest relating to the property or transaction which is the subject of the action." Such an interest must be "direct, substantial, and legally protectable," *Person v. New York State Board of Elections*, 467 F.3d 141, 144 (2d Cir. 2006) (citation omitted), and "be based on a right which belongs to the proposed intervenor rather than an existing party to the suit." *Diduck v. Kaszycki & Sons Contractors, Inc.*, 149 F.R.D. 55, 58 (S.D.N.Y. 1993) (citations omitted).

It is difficult to imagine a more direct or substantial interest than that of the Trustee in the instant case. The *Anwar* action "seeks recovery on behalf of investors who lost billions of dollars in the largest group of so-called 'feeder funds' into Madoff's fraudulent and operations,

[7] The Anwar Plaintiffs' and Fairfield Defendants' suggestion, in their February 28, 2013 letters to the Court, that "surprise" has no relevance to the timeliness inquiry misstates the case law. *Catanzano v. Wing*, 103 F.3d 223, 232–33 (2d Cir. 1996), actually held that, under the facts of that case, the proposed intervenors "were well aware long before they filed their motions for intervention" that their interests could be compromised. *See also In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 198–99, 202 (2d Cir. 2000) (discussing *Catanzano*). These cases do not establish that actual "surprise" cannot inform a finding of timeliness.

[those] marketed and operated by the Fairfield Greenwich Group." (Second Consol. Am. Compl. at 1.) Here, the Trustee has an interest in the same funds, which include the $3.2 billion conveyed to Fairfield that is rightfully the property of BLMIS's customers. As described in more detail in the Trustee's opposition to the proposed Settlement, filed herewith, SIPA provides for a unitary, comprehensive regime which prioritizes the Trustee's efforts to expeditiously and equitably recover and distribute property to the customers of registered broker-dealers, with other potential claimants having their claims deferred until after the Trustee has addressed the customers' claims. The Trustee therefore has an interest in the property that is the subject of the *Anwar* action. *See, e.g., Am. Jerex Co. v. Universal Aluminum Extrusions, Inc.*, 340 F. Supp. 524, 530 (E.D.N.Y. 1972) (granting motion to intervene under Rule 24(a) where movant "claims with some showing of substance that it has a legally protectable interest in property" at issue).[8]

3. The Trustee's Interest Is Not Represented by the Parties to This Action

It cannot be maintained that the existing parties adequately represent the Trustee's interest. *See Miller v. Silbermann*, 832 F. Supp. 663, 672 (S.D.N.Y. 1993) (stating that a party will be permitted to intervene if he is able to show that his interests are inadequately represented as a result of, among other things, an adversity of interest). The Trustee is a fiduciary to all the

[8] The cases cited in the Anwar Plaintiffs' and Fairfield Defendants' February 28, 2013 letters to the Court concern proposed intervenors who sought to intermeddle in the terms of a settlement, and not parties (like the Trustee) holding a superior "interest relating to the property . . . which is the subject of the action." *See Cent. States & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007) (non-class member sought to intervene to challenge opt-out provisions of class notice but had no cognizable interest in the litigation); *Pitney Bowes, Inc.*, 25 F.3d at 73 (denying intervention because the court was "unable to see any immediate affect (sic)" on the proposed intervenor's interest); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284–85 (4th Cir. 1989) (court "reject[ed] the blanket proposition" that proposed intervenors, "solely by virtue of their non-inclusion in the [underlying] class, have no standing as a matter of law to intervene to insure that their interests are protected," but found that they had no cognizable interest in the litigation); *In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 04 Civ. 8141-- F. Supp. 2d --, 2013 WL 68928, at *3 & n.8 (S.D.N.Y. Jan. 7, 2013) (N.Y. Attorney General failed to demonstrate any cognizable interest in the litigation); *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09–cv–230, 2011 WL 1706778, at *5 (D. Vt. May 4, 2011) (proposed intervenors sought to be included in the class).

customers and creditors of BLMIS, which do not include the Anwar Plaintiffs. The Trustee is likewise adverse to the settling Defendants, who are effectively the same group as the Fairfield Defendants against whom the Trustee has brought claims in his Recovery Action, *see supra* n.2. Finally, with the filing of the proposed Settlement it is now beyond doubt that no existing party to this action represents the Trustee's interest in recovery of customer property under SIPA—instead, they seek to devote those assets to other ends. *Cf. Butler, Fitzgerald & Potter*, 250 F.3d at 180 ("[E]vidence of collusion, adversity of interest, nonfeasance, or incompetence may suffice to overcome the presumption of adequacy."). This adversity of interest is sufficient to carry the "minimal burden required for a showing that representation by the existing parties may be inadequate." *LaRouche v. FBI*, 677 F.2d 256, 258 (2d Cir. 1982) (citation omitted).

4. The Trustee's Interests Will Be Compromised Without Limited Intervention

Because none of the existing parties can adequately protect the Trustee's interest in recovering and distributing customer property in accordance with SIPA, the Trustee will be substantially prejudiced without limited intervention. The proposed Settlement, if approved, will dissipate assets sought by the Trustee for equitable distribution according to SIPA's statutory priority scheme. This would, "as a practical matter impair or impede the [Trustee's] ability to protect [his] interest." *See* Fed. R. Civ. P. 24(a)(2).

The Trustee's argument against the Anwar Plaintiffs' claims—that their federal claims are superseded, and their state claims preempted, by SIPA—has never been considered by this Court in the instant action. Indeed, in the course of this action the Court has never been asked to give any weight to the ongoing SIPA proceedings involving these same funds. Now that the Representative Plaintiffs and certain of the Fairfield defendants have reached a settlement agreement that threatens the Trustee's interest, that interest can only be adequately represented

by allowing the Trustee to intervene and oppose the proposed Settlement. *See, e.g., Counihan v. Allstate Ins. Co.*, 907 F. Supp. 54, 56 (E.D.N.Y. 1995) ("The Court believes that the government's interest is not adequately represented by either of the parties to the action .... If the government is not permitted to intervene and plaintiff does not recover under the insurance policy in this action, there will be no proceeds against which the government may assert ownership[.]").[9]

* * *

For these reasons, the Trustee is entitled to intervene as of right under Rule 24(a). His motion to intervene is timely, he has an interest in the subject of this action represented by no party, and disposition of this action without his participation is certain to impair his ability to protect his interest. The Trustee respectfully requests that this Court grant his motion for intervention as of right for the limited purpose of denying Plaintiffs' motion to approve the proposed Settlement, without prejudice to refiling after the Trustee's Recovery Action under SIPA has been concluded and any judgment arising thereunder has been satisfied.

B. The Trustee Meets the Standard for Permissive Intervention

Federal Rule of Civil Procedure 24(b)(1)(B) authorizes the court, "[o]n timely motion," to "permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." The Rule also provides that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "The court considers substantially the same factors whether the claim for intervention is 'of right' . . . or 'permissive'[.]" *R Best*

[9] While the Trustee could potentially interplead the proceeds of the Settlement if it is approved, certain parties may be outside the jurisdiction of the United States courts, making full recovery difficult.

Produce, Inc. v. Shulman-Rabin Mktg. Corp., 467 F.3d 238, 240 (2d Cir. 2006) (citing *Beck v. Bacot (In re Bank of New York Derivative Litig.)*, 320 F.3d 291, 300 n.5 (2d Cir. 2003)).

1. The Trustee's Application Is Timely

For the reasons described above, the Trustee's application is timely, such that intervention would not cause any party undue prejudice. *See, e.g.*, *Stewart v. Atwood*, 834 F. Supp. 2d 171, 181 (W.D.N.Y. 2012) (applying same analysis to timeliness under Rule 24(a) and Rule 24(b)).

2. The Trustee's Defense Shares Common Questions of Law and Fact

The Trustee's defense is sufficiently related to the issues in this action as to merit permissive intervention. "Rule 24(b) . . . vests broad discretion in the district court to determine the fairest and most efficient manner of handling a case with multiple parties and claims." *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 457, 469 (S.D.N.Y. 2000). As described above, there are substantial similarities between the factual allegations in this action and the Trustee's Recovery Action, which seeks to recover funds that BLMIS fraudulently transferred to the Fairfield Defendants before its dissolution. Permitting the Trustee to intervene in the instant action would allow this Court to consider his argument that the Anwar Plaintiffs' claims and the proposed Settlement impermissibly conflict with the requirements of SIPA, as carried out by the Trustee. 15 U.S.C. § 78fff-1. Accordingly, intervention would efficiently resolve that issue.

3. The Trustee's Intervention Will Not Unduly Delay or Prejudice the Adjudication of the Original Parties' Rights

For the reasons described above, the Trustee's intervention will not unduly delay the action or prejudice the original parties to the instant action. Instead, it will ensure that Congress' considered decision to provide the Trustee with priority in recovering assets of the Madoff estate receives appropriate consideration in this matter. The Fairfield Funds, as Madoff customers, are

entitled to distribution from the Trustee's Customer Fund in proportion to their net equity position. As investors in the Fairfield Funds, the Anwar Plaintiffs, in turn, should benefit from the SIPA proceedings through these distributions. This is the scheme for recovery established by Congress, and intervention by the Trustee here is necessary to ensure that the Anwar Plaintiffs receive what they are entitled to receive under governing law—no more, no less. In other words, their rights *cannot* be properly adjudicated without participation at this stage by the Trustee. Thus, the equities weigh in the Trustee's favor, and he should be permitted to intervene under Rule 24(b).

CONCLUSION

Congress charged SIPA trustees, like the Trustee in this case, with overseeing the equitable distribution of the assets of failed brokerages. In order for the Trustee to fulfill Congress' directive, the Trustee must be allowed to identify and recover all assets of the estate, including those that were fraudulently conveyed to feeder funds like the Fairfield Group. This Settlement would prejudice the Trustee's efforts, thereby injuring the customers who were harmed by the Madoff Ponzi scheme and placing the Anwar Plaintiffs in a preferred position compared to both those customers and to similarly-situated investors in Madoff feeder funds.

Accordingly, the Trustee respectfully requests that this Court grant his motion for limited intervention pursuant to Federal Rule of Civil Procedure 24, file the attached Trustee's Statement of Affirmative Defenses and Trustee's Opposition to Final Approval of the Proposed Settlement, and deny the motion to approve the Settlement without prejudice, pending resolution of the Trustee's Recovery Action.

Date: New York, New York
March 12, 2013

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants.	Case No. 09-cv-0118 (VM) (ECF CASE)

TRUSTEE'S PROPOSED AFFIRMATIVE DEFENSES TO PLAINTIFF'S SECOND CONSOLIDATED AMENDED COMPLAINT

Irving H. Picard, 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 the estate of Bernard L. Madoff, individually ("Madoff"), by and through the Trustee's undersigned counsel, alleges as follows:

BACKGROUND

1. Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma"), Fairfield Lambda Limited ("Lambda"), Greenwich Sentry, L.P. ("GS"), and Greenwich Sentry Partners, L.P. ("GSP") (collectively, the "Fairfield Funds") were investment funds or limited partnerships founded by Walter Noel, Jeffrey Tucker, and Andres Piedrahita, and managed by them and a group of individuals and entities associated with Fairfield Greenwich Group ("Fairfield"). Fairfield served as one of Madoff's largest marketing and investor relations arms, significantly helping to grow and sustain the Ponzi scheme. Collectively, the Fairfield Funds and individuals and entities related thereto withdrew more than $3.2 billion from BLMIS during the six years prior to the filing date of December 11, 2008. Pursuant to his statutory authority under SIPA,

and as part of the consolidated liquidation proceedings under SIPA, on May 18, 2009, the Trustee sued the Fairfield Funds for the return of this money in the Trustee's Recovery Action, *Picard v. Fairfield Sentry Limited*, No. 09-01239 (Bankr. S.D.N.Y. filed May 18, 2009), and later filed an amended complaint adding as defendants various Fairfield-related entities and individuals which managed the FGG Funds (altogether, the "Fairfield Defendants").[1]

2. In July 2011, the Trustee finalized a settlement of his claims against Sentry, Sigma, and Lambda and later, in a separate agreement, finalized the settlement of his claims against GS and GSP. Notably, however, the vast majority of the money transferred by BLMIS to the Fairfield Funds was no longer in their possession. They had transferred large sums of that money in the form of payments of fees and redemptions to Fairfield-related entities and individuals which managed and marketed the Fairfield Funds. The Trustee's Recovery Action accordingly continues against the remaining Fairfield Defendants, including the principals and entities responsible for managing the Fairfield Funds.

3. In addition, as part of the Trustee's settlements, the Fairfield Funds assigned to the Trustee all of their claims against the Fairfield management entities and principals. As part of the settlements, the Trustee and the Fairfield Funds entered into sharing agreements with respect to different types of claims, including against the Fairfield management entities and

[1] The Trustee's Fairfield Defendants are: Fairfield Sentry Limited, Greenwich Sentry, L.P., Greenwich Sentry Partners, L.P., Fairfield Sigma Limited, Fairfield Lambda Limited, Chester Global Strategy Fund Limited, Chester Global Strategy Fund, Irongate Global Strategy Fund Limited, Fairfield Greenwich Fund (Luxembourg), Fairfield Investment Fund Limited, Fairfield Investors (Euro) Limited, Fairfield Investors (Swiss Franc) Limited, Fairfield Investors (Yen) Limited, Fairfield Investment Trust, FIF Advanced, Ltd., Sentry Select Limited, Stable Fund, Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda), Ltd., Fairfield Greenwich Advisors LLC, Fairfield Greenwich GP, LLC, Fairfield Greenwich Partners, LLC, Fairfield Heathcliff Capital LLC, Fairfield International Managers, Inc., Fairfield Greenwich (UK) Limited, Greenwich Bermuda Limited, Chester Management Cayman Limited, Walter Noel, Jeffrey Tucker, Andrés Piedrahita, Mark McKeefry, Daniel Lipton, Amit Vijayvergiya, Gordon McKenzie, Richard Landsberger, Philip Toub, Charles Murphy, Robert Blum, Andrew Smith, Harold Greisman, Gregory Bowes, Corina Noel Piedrahita, Lourdes Barreneche, Cornelis Boele, Santiago Reyes, and Jacqueline Harary.

individuals, and subsequent transferees. Under the sharing agreements, the Trustee is entitled to the first $200 million recovered from the Fairfield management entities and individuals. In addition, as part of the Trustee's settlements with the Fairfield Funds, Sentry, GS, and GSP have allowed BLMIS customer claims totaling nearly $270 million. With those allowed customer claims, the Trustee has already distributed approximately $100 million to Sentry, GS and GSP for their investors, and they will share in the Trustee's recoveries in ongoing litigations, *including* specifically claims against the remaining Fairfield Defendants.

4. Former investors in certain Fairfield Funds brought putative class actions against a number of Fairfield entities and principals, which were consolidated in a single putative class action (the "Anwar Action"). *Anwar v. Fairfield Greenwich Ltd.*, No. 09-00118 (S.D.N.Y. filed Jan. 7, 2009) (as subsequently consolidated). The Second Consolidated Amended Complaint, filed on September 29, 2009, asserts claims against the Fairfield entities and their principals under New York law and the Securities Exchange Act, 15 U.S.C. §§ 78a *et seq.*, based on the theory that these defendants defrauded investors in the Fairfield Funds. On November 6, 2012, the "Representative Plaintiffs" in the Anwar Action[2] filed a motion to approve the settlement (the "Settlement") with Fairfield Greenwich Limited and Fairfield Greenwich (Bermuda) Ltd.,[3] for themselves and on behalf of a proposed "Settlement Class." The "Settlement Class" is defined in

[2] The Representative Plaintiffs are the following: Pacific West Health Medical Center Employees Retirement Trust, Harel Insurance Company Ltd., Martin and Shirley Bach Family Trust, Natalia Hatgis, Securities & Investment Company (SICO) Bahrain, Dawson Bypass Trust, and St. Stephen's School.

[3] Under the Settlement, the settling defendants are defined only as Fairfield Greenwich (Bermuda) Ltd. and Fairfield Greenwich Limited (hereinafter the "Settling Defendants"). Walter M. Noel, Jr., Jeffrey H. Tucker, Andrés Piedrahita, Lourdes Barreneche, Robert Blum, Cornelis Boele, Gregory Bowes, Vianney d'Hendecourt, Yanko della Schiava, Harold Greisman, Jacqueline Harary, David Horn, Richard Landsberger, Daniel E. Lipton, Julia Luongo, Mark McKeefry, Charles Murphy, Corina Noel Piedrahita, Maria Teresa Pulido Mendoza, Santiago Reyes, Andrew Smith, Philip Toub, and Amit Vijayvergiya are defined in the Settlement as FG Individual Defendants (hereinafter the "FG Individual Defendants"). The FG Individual Defendants are funding the Settlement and with the FGG Settling Defendants are receiving full releases (collectively hereinafter, the FG Individual Defendants and FGG Settling Defendants, hereinafter the "Anwar Released Defendants").

the proposed Settlement, with various exclusions, as "all Persons who were Beneficial Owners of shares or limited partnership interests in the Funds as of December 10, 2008 . . . and who suffered a Net Loss of principal invested in the Funds . . . ." (*See* Stip. of Settlement at 18, ECF No. 996.) The Settlement contemplates an initial settlement amount of more than $50 million—money that appears to come from the same limited pool of funds sought by the Trustee in his Recovery Action and which was largely obtained from initial and subsequent transfers from BLMIS.

5. Indeed, the Settlement documents themselves expressly and repeatedly refer to the limited resources of the Anwar Released Defendants, strongly suggesting that any money paid to the proposed Settlement Class—consisting of investors in the Fairfield Funds, not BLMIS customers—will substantially deplete the amount of money available to the Trustee for distribution to customers. (*See* Plaintiffs' Memo. of Law in Supp. of Mot. for Prelim. Approval of the Partial Settlement at 9, ECF No. 998.)

6. In addition, the Trustee holds not only the claims of the BLMIS estate and its customers and other creditors, and all claims that are duplicative and derivative of those claims, but also holds as an assignee the Fairfield Funds' direct claims against the "Anwar Released Defendants," including for duties owed only to the Fairfield Funds. As such, not only does the Trustee have standing to bring these claims, the interest in these specific claims was part of the bargained-for exchange in the settlements approved by the United States Bankruptcy Court, as well as the court in the British Virgin Islands overseeing the liquidation of Sentry, Sigma, and Lambda. If allowed to proceed, the proposed Settlement will reduce the value of the Trustee's settlements, substantially deplete the limited assets of the Anwar Released Defendants, thwart the Trustee's efforts to recover funds for equitable distribution to the victims of the Ponzi

scheme and possibly pay the investors in the three funds that settled with the Trustee *more* than their investments.

7. The Representative Plaintiffs and the proposed Settlement Class members, who already stand to benefit from the nearly $270 million in allowed claims (of which $100 million has been paid) stemming from Trustee's settlements with the Fairfield Funds as well as the proceeds to be shared from litigation claims as provided for in the Trustee's settlement with the Funds, will be permitted to recover outside of the claims process to the detriment of other BLMIS customers, as well as diminish the value of the court-approved settlements with the Fairfield Funds and therefore distributions under SIPA's congressionally-mandated formula. Simply put, the Representative Plaintiffs, for themselves and on behalf of the proposed Settlement Class, are attempting to skim the remaining assets from the pool of funds which are the subject of the Trustee's litigations, while simultaneously obtaining the benefit of the Fairfield Funds' allowed claims and recoveries from the shared litigation claims in the SIPA proceeding. They know full well that their Settlement may be subject to the automatic stay and related injunction, having agreed that the Trustee could so move.

8. Finally, the proposed Settlement as submitted in the Anwar Action appears to set aside a limited amount of funds for the Trustee's and other claims. But such limited funds do not come close to the amount the Trustee seeks to recover for victims in the SIPA proceeding. At the same time, the Settlement purports to enjoin *any* person from bringing any claims related to the claims in the Anwar Action against the Anwar Released Defendants. The Proposed Order thus would purport to enjoin the Trustee's Recovery Action against the Anwar Released Defendants, who constitute almost the entirety of the remaining Fairfield Defendants in that action.

FIRST AFFIRMATIVE DEFENSE:
PREEMPTION

9. The Trustee incorporates by reference the allegations contained in the previous paragraphs of as if fully realleged herein.

10. Plaintiffs' claims under state law against the Anwar Released Defendants are barred by the Supremacy Clause of the United States Constitution, Article VI, clause 2, and the laws of the United States because the recovery and distribution of assets following the collapse of a broker-dealer is comprehensively regulated by the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.*, and Plaintiffs' claims against the Anwar Released Defendants conflict with SIPA, with the Bankruptcy Code, 11 U.S. C. §§ 101 *et seq.*, with the purposes and objectives of SIPA and the Bankruptcy Code, and with the Trustee's actions under SIPA to recover property transferred by BLMIS.

SECOND AFFIRMATIVE DEFENSE:
FAILURE TO STATE A CLAIM

11. The Trustee incorporates by reference the allegations contained in the previous paragraphs of as if fully realleged herein.

12. The recovery and distribution of assets following the collapse of a broker-dealer is comprehensively regulated by the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.*, which supersedes conflicting applications of other provisions of federal law, including other provisions of the Securities Exchange Act, 15 U.S.C. §§ 78a *et seq.*

13. On that basis, the Plaintiffs' allegations regarding the Anwar Released Defendants' liability under the Securities Exchange Act fail to state a claim upon which relief may be granted.

Dated: New York, New York
March 12, 2013

/s/ David J. Sheehan

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants.	Case No. 09-cv-0118 (VM) (ECF CASE)

DECLARATION OF MARK A. KORNFELD IN SUPPORT OF TRUSTEE'S MOTION FOR LIMITED INTERVENTION TO OPPOSE FINAL APPROVAL OF THE PROPOSED SETTLEMENT

MARK A. KORNFELD, under penalty of perjury, declares:

1. I am a member of the Bar of this Court and a partner at the firm of Baker & Hostetler LLP, counsel for Irving H. Picard, trustee ("Trustee") for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS")[1] under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.* ("SIPA"), and the estate of Bernard L. Madoff ("Madoff"), individually.

2. I am fully familiar with the facts set forth herein. I make this declaration to transmit to this Court true and correct copies of documents and provide relevant information in connection with the Trustee's Motion for Limited Intervention to Oppose Final Approval of the Propose Settlement (the "Trustee's Motion").

3. The Trustee has been involved in negotiations with the Movants or their counsel for several years, beginning no later than 2009, in an attempt to reach a global settlement which would have resolved not only the Trustee's claims against Fairfield Greenwich Group ("FGG")

[1] Unless otherwise defined herein, defined terms will have the meaning given to them in the Trustee's Motion.

related entities and individuals (the "Trustee's FGG Defendants"), but also the claims in the this Action against FGG related defendants (the "Anwar Released Defendants") (collectively, with the Trustee's FGG Defendants, the "FGG Defendants"),[2] claims by the joint liquidators (the "Joint Liquidators") of Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma"), and Fairfield Lambda Limited ("Lambda"), and potentially others.

4. The specific details of any settlement negotiations, communications, offers, or counteroffers between and amongst the parties are not set forth herein so as to preserve their confidentiality. A general description of relevant events leading up to the Trustee's filing of the Stay Application follows below.

5. The FGG Defendants have expressed that they have a limited pool of assets available to resolve multiple matters pending against them. Beginning in the summer 2009 and continuing through the spring 2012, the Trustee provided extensions of time for the FGG Defendants to respond to the Trustee's adversary proceeding in Bankruptcy Court (the "Trustee's Recovery Action")[3] in order to pursue settlement negotiations with the FGG Defendants, conduct extensive due diligence on the FGG Defendants' assets in furtherance of such settlement negotiations, and communicate with Anwar Representative Plaintiffs' counsel, as well as the Joint Liquidators in order to seek a global resolution of all pending cases, which the Trustee at all times understood was necessary for the FGG Defendants to settle any of the pending cases.

6. At the request of certain Sentry, Sigma, and Lambda investors, on July 21, 2009, the Eastern Caribbean Supreme Court in the High Court of Justice, British Virgin Islands (the

[2] The Anwar Released Defendants are largely coextensive with the individuals and entities named in the Trustee's Action that were responsible for the management of the FGG funds. For purposes of this Declaration and the Trustee's Opposition, the two groups of defendants are referred to interchangeably as the "FGG Defendants."

[3] *Picard v. Fairfield Sentry Limited*, No. 09-01239 (Bankr. S.D.N.Y. filed May 18, 2009).

"BVI Court") granted orders providing for the winding up of Sentry, Sigma, and Lambda and the appointment of the Joint Liquidators.

7. In December 2010, the Trustee reached an agreement in principle with the Joint Liquidators. In June 2011, the Trustee's settlement with Sentry, Sigma, and Lambda was approved by Judge Lifland of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") and Judge Bannister of the BVI Court overseeing the liquidation proceedings of Sentry, Sigma, and Lambda. As part of the consideration to the Trustee in the approved settlement, Sentry, Sigma, and Lambda assigned their direct litigation claims against the FGG Defendants to the Trustee.

8. In November 2010, Greenwich Sentry, L.P. ("GS"), and Greenwich Sentry Partners, L.P. ("GSP") filed for protection under Chapter 11 as debtors, in possession. Fairfield Greenwich (Bermuda) Ltd. ("FGB"), one of the FGG Defendants, was the general partner of both GS and GSP. The Trustee negotiated settlements with GS and GSP, which were submitted to the Bankruptcy Court for approval. As part of the consideration to the Trustee in the approved settlements, GS and GSP assigned their direct litigation claims against the FGG Defendants to the Trustee. Additionally, as part of the settlements, GS and GSP initially insisted upon provisions which would have barred the Anwar Action as to claims arising out of investments in GS and GSP. The Anwar Representative Plaintiffs' counsel objected to the settlements due to the bar provisions. The Anwar Representative Plaintiffs' counsel withdrew the objection when the bar provisions were removed, and the Bankruptcy Court entered an order which specifically stated the Trustee reserved the right to seek an injunction of the Anwar Action.

9. While global settlement negotiations were continuing, in order to assist in preserving the FGG Defendants' assets, from July 2011 through October 2011, the Trustee

assisted with the resolution of an action against the FGG Defendants alleging a breach of a lease contract against FGG. At the request of the FGG Defendants, the Trustee submitted a letter in connection with the court-ordered mediation regarding the use of assets by the FGG Defendants which the Trustee believed to be assets belonging to the BLMIS estate. With the Trustee's assistance, the FGG Defendants were able to settle the action, thereby keeping costs to a minimum, and preserving estate property.

10. On or around December 5, 2011, the Anwar Representative Plaintiffs' counsel approached Trustee's counsel to further discuss a global settlement with the FGG Defendants. The Anwar Representative Plaintiffs' counsel communicated their understanding that the FGG Defendants would only enter into a settlement which resolved any and all claims against them, including the Trustee's Action and those brought in the Anwar Action.

11. On December 12, 2011, the Trustee hosted a meeting with counsel for the Anwar Representative Plaintiffs to discuss cooperation between the Trustee and the Anwar Representative Plaintiffs with respect to their individual litigations and settlement negotiations with the FGG Defendants.

12. The Trustee continued to communicate with the Anwar Representative Plaintiffs' counsel and the FGG Defendants' counsel at various points from January 2012 through April 2012, regarding any number of important issues and concerns relating to a global settlement by the parties.

13. For example, in March 2012, FGG Defendants' counsel contacted the Trustee's counsel to discuss a potential settlement approach from certain Anwar Representative Plaintiffs' counsel. Trustee's counsel communicated with both the Anwar Representative Plaintiffs'

counsel, the FGG Defendants' counsel regarding such issues, with the collective aim of trying to reach one, unified settlement and to avoid continued exposure for the FGG Defendants.

14. In early April 2012, the FGG Defendants filed motions to withdraw the bankruptcy court reference. At the FGG Defendants' request, the motions to withdraw the reference were assigned to Judge Rakoff. Following assignment to Judge Rakoff, the issues raised in the FGG Defendants' motions to withdraw the reference were consolidated into various common briefings. These common briefings and related hearings began in June 2012, and continued through December 1, 2012.

15. In light of the common briefing occurring before Judge Rakoff, as is true with all other defendants involved in the common briefing, Trustee's counsel again extended the time for the FGG Defendants to answer, move, or otherwise respond to the Trustee's amended complaint in Bankruptcy Court.

16. Following the filing of the motions to withdraw the reference, the parties continued with settlement negotiations aimed at reaching global accord. At no time did the FGG Defendants or Anwar Representative Plaintiffs ever give any notice to the Trustee of an intention to pursue a settlement which would not include the Trustee.

17. As recently as October 2, 2012, Trustee's counsel reached out directly to the Anwar Representative Plaintiffs' counsel to inquire as to the status of the Anwar Action. As part of that discussion, the Anwar Representative Plaintiffs' counsel informed Trustee's counsel there was no settlement and nothing imminent to report on the status of any settlement negotiations with the FGG Defendants. As set forth in their request for preliminary approval of the Settlement, the Movants had, as of August 2012, already signed a settlement agreement in principle to fully and finally settle only the Anwar Action as against the FGG Defendants.

18. On November 6, 2012, the Anwar Representative Plaintiffs filed a motion for preliminary approval of a non-global Settlement between the FGG Defendants and the Anwar Representative Plaintiffs. The Trustee first learned of the non-global settlement with the public filing of the motion. Neither the Anwar Representative Plaintiffs nor the FGG Defendants' counsel informed the Trustee of the non-global Settlement prior to the filing of the motion for preliminary approval of the Settlement.

19. At no point prior to November 6, 2012 did any party indicate, suggest, or provide notice to the Trustee that a non-global settlement was imminent, or had already been reached, which could or would adversely affect the BLMIS estate.

20. After reviewing the preliminary approval motion, Trustee's counsel advised counsel for both the FGG Defendants and the Anwar Representative Plaintiffs on November 6, 7, and 12, 2012, that in view of the non-global Settlement the Trustee would likely seek injunctive relief to protect the BLMIS estate. Counsel for the Trustee indicated that he would notify the parties in advance of filing any such application, which he did in the late afternoon or early evening of November 28, 2012.

21. On November 29, 2012, the Trustee filed his Stay Application, providing counsel for the Anwar Representative Plaintiffs and FGG Defendants with courtesy copies of his filing in advance of the November 30, 2012 hearing on the motion to preliminary approve the settlement between the Anwar Representative Plaintiffs and the FGG Defendants.

22. True and correct copies of the following documents are attached:

Exhibit 1: Amended Complaint, *Picard v. Fairfield Sentry Limited*, No. 09-01239 (Bankr. S.D.N.Y. filed May 18, 2009), ECF No. 23

Exhibit 2: Settlement Agreement Between Irving Picard, Fairfield Sentry Limited, Fairfield Sigma Limited, and Fairfield Lambda Limited, *Picard v. Fairfield Sentry Limited*, No. 09-01239 (Bankr. S.D.N.Y. May 18, 2009), ECF No. 69-2

Exhibit 3: Amended Settlement Agreement Between Irving Picard and Greenwich Sentry, L.P., *Picard v. Fairfield Sentry Limited*, No. 09-01239 (Bankr. S.D.N.Y. May 18, 2009), ECF No. 107-1

Exhibit 4: Amended Settlement Agreement Between Irving Picard and Greenwich Sentry Partners, L.P., *Picard v. Fairfield Sentry Limited*, No. 09-01239 (Bankr. S.D.N.Y. May 18, 2009), ECF No. 107-2

Exhibit 5: Affidavit of Matthew Cohen, sworn to November 29, 2012, *Picard v. Fairfield Greenwich Limited*, No. 12-02047 (Bankr. S.D.N.Y. Nov. 29, 2012), ECF No. 5

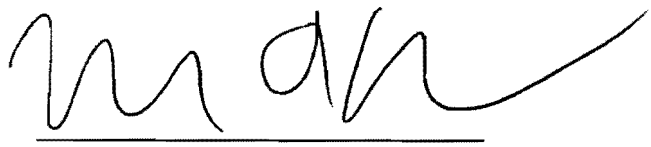
Exhibit 6: Unofficial Transcript of Oral Argument, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 12-MC-115 (S.D.N.Y. filed Apr. 13, 2012), ECF No. 404

Exhibit 7: Declaration of Mark McKeefry dated January 25, 2013, *Picard v. Fairfield Greenwich Limited*, No. 12-02047 (Bankr. S.D.N.Y. Jan. 25, 2013), ECF No. 24

Exhibit 8: Trustee's Eighth Interim Report for the Period Ending September 30, 2012 at 1, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff)*, No. 08-01789 (Bankr. S.D.N.Y. Nov. 5, 2012), ECF No. 5066.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 12, 2013
New York, New York



Mark A. Kornfeld

COURTESY COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants.	Case No. 09-cv-0118 (VM) (ECF CASE)

TRUSTEE'S PROPOSED OPPOSITION TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE PROPOSED SETTLEMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Irving H. Picard (the "Trustee"), as trustee for the 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 the substantively consolidated estate of Bernard L. Madoff ("Madoff"), by and through his undersigned counsel, respectfully submits this memorandum of law in opposition to the Plaintiffs' Motion for Final Approval of the proposed Settlement and Plan of Allocation. In that respect, the Trustee states the following:

PRELIMINARY STATEMENT

The ongoing SIPA proceedings to liquidate the BLMIS and Madoff estates and equitably distribute recovered customer property under the mandates of SIPA are the largest undertaking of their kind ever attempted, commensurate with the unprecedented scale, reach, and complexity of Madoff's fraud. At its collapse, BLMIS had almost five thousand open accounts; over $17 billion of investor principal was lost; and over sixteen thousand claims have been filed on the estate. The Trustee has recovered over $9.3 billion in assets, over $5 billion of which has already been or is now being distributed to customers. The Trustee has actions outstanding seeking to recover billions more, including claims against feeder funds, sophisticated investors, and major banks that knew or were willfully blind that a fraud was underway. Among those actions is one to recover assets transferred from BLMIS to the defendants in the instant action associated with the Fairfield Funds[1] (the "Fairfield Defendants"). *Picard v. Fairfield Sentry Limited*, No. 09-01239 (Bankr. S.D.N.Y. filed May 18, 2009) (the " Trustee's Recovery Action").[2]

[1] "Fairfield Funds" refers collectively to Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma"), Fairfield Lambda Limited ("Lambda"), Greenwich Sentry, L.P. ("GS"), and Greenwich Sentry Partners, L.P. ("GSP").

[2] A copy of the Amended Complaint in the Trustee's Recovery Action is annexed to the Declaration of Mark A. Kornfeld, dated March 12, 2013 (the "Kornfeld Dec.") as Ex. 1. The Trustee's Fairfield Defendants are: Fairfield

(continued on next page)

The recovery initiative's achievements are made possible by Congress's decision in SIPA to establish a unitary proceeding to liquidate a failed broker-dealer like BLMIS for the benefit of its customers, thereby avoiding the litigation free-for-all that, prior to SIPA, put race-to-the-courthouse tactics ahead of customers' interests. Instead of ad hoc litigation and arbitrary awards, SIPA empowers a single trustee to undertake all recovery efforts and then distribute the proceeds, in a fair and equitable *pro rata* fashion, to the class of investors that Congress identified as deserving special protection. Third-party lawsuits seeking to deprive a SIPA trustee of funds for equitable distribution, and to redirect those funds to a preferred group of non-customer claimants, necessarily clash with SIPA's purpose and requirements.

Yet the proposed Settlement in this action would dissipate the same funds sought in the Trustee's Recovery Action under SIPA, to resolve claims premised on essentially the same conduct at issue in that action. The Settlement therefore clashes with Congress's intention that, following the collapse of a broker-dealer like BLMIS, SIPA control the recovery and distribution of assets to a statutorily-defined class of "customers." Because the Anwar Plaintiffs' state law claims plainly conflict with SIPA's comprehensive remedy, they are preempted. At the same time, the Settlement resolves the Anwar Plaintiffs' Exchange Act claims in a manner that would impermissibly deprive SIPA—the later, more specific statutory scheme—of its force and effect.

Sentry Limited, Greenwich Sentry, L.P., Greenwich Sentry Partners, L.P., Fairfield Sigma Limited, Fairfield Lambda Limited, Chester Global Strategy Fund Limited, Chester Global Strategy Fund, Irongate Global Strategy Fund Limited, Fairfield Greenwich Fund (Luxembourg), Fairfield Investment Fund Limited, Fairfield Investors (Euro) Limited, Fairfield Investors (Swiss Franc) Limited, Fairfield Investors (Yen) Limited, Fairfield Investment Trust, FIF Advanced, Ltd., Sentry Select Limited, Stable Fund, Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda), Ltd., Fairfield Greenwich Advisors LLC, Fairfield Greenwich GP, LLC, Fairfield Greenwich Partners, LLC, Fairfield Heathcliff Capital LLC, Fairfield International Managers, Inc., Fairfield Greenwich (UK) Limited, Greenwich Bermuda Limited, Chester Management Cayman Limited, Walter Noel, Jeffrey Tucker, Andrés Piedrahita, Mark McKeefry, Daniel Lipton, Amit Vijayvergiya, Gordon McKenzie, Richard Landsberger, Philip Toub, Charles Murphy, Robert Blum, Andrew Smith, Harold Greisman, Gregory Bowes, Corina Noel Piedrahita, Lourdes Barreneche, Cornelis Boele, Santiago Reyes, and Jacqueline Harary.

To prevent these conflicts, and thereby carry out Congress's intentions, the Trustee must have first claim on assets fraudulently transferred from the BLMIS estate before third parties may take hold of those assets.

For these reasons, the Court should deny the motion to approve the proposed Settlement without prejudice to its refiling after the Trustee's claims to the property that is the subject of this action have been resolved.

STATEMENT OF FACTS

A. The Trustee Administers Proceedings Under SIPA to Recover and Return BLMIS Assets to BLMIS "Customers"

1. Madoff's Fraud Is Uncovered and SIPA Proceedings Are Initiated

On December 11, 2008, Madoff was arrested by federal agents and charged with securities fraud in this Court. That same day, the Securities and Exchange Commission (the "SEC") filed a civil complaint, alleging that Madoff and BLMIS were operating a massive Ponzi scheme through BLMIS's investment advisor activities. *See In re Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC) (In re BLMIS I)*, 424 B.R. 122, 125–32 (Bankr. S.D.N.Y. 2010); *In re Bernard L. Madoff Inv. Sec. LLC (In re BLMIS II)*, 654 F.3d 229, 231–32 (2d Cir. 2011).

Under this scheme, Madoff represented to his clients that he invested their money under a "split-strike conversion strategy" to achieve his "consistently high rates of return." 654 F.3d at 231. In reality, however, "Madoff used the investments of new and existing customers to fund withdrawals of principal and supposed profit made by other customers." *Id.* at 232. The customers' funds were never actually invested, but Madoff generated fictitious documents "in order to conceal the fact that he engaged in no trading activity whatsoever." *Id.* at 231. Integral to this scheme were the so-called "feeder funds"—outside entities, the largest of which were the

Fairfield Funds, that transferred their investors' funds to Madoff. Madoff, in turn, would pass incoming customer money to the feeder funds, which would often take substantial fees (later passed on to their principals and affiliates) before passing the money on to their investors as putative return on their investments.

On December 15, 2008, the Securities Investor Protection Corporation ("SIPC") filed an application in the SEC's civil action, seeking a decree that BLMIS customers were in need of the protections afforded by SIPA. This Court granted the application that same day, appointing the Trustee to oversee the liquidation of BLMIS and the comprehensive recovery of customer assets. *In re BLMIS I*, 424 B.R. at 126. This Court also removed the SIPA liquidation proceeding to the Bankruptcy Court for the Southern District of New York. It soon became apparent that the scope of Madoff's fraud was unprecedented. At the time of its collapse, BLMIS was generating fictitious account statements for approximately 4,900 open customer accounts. "The final customer statements issued by BLMIS falsely recorded nearly $64.8 billion of net investments and related fictitious gains." *In re BLMIS II*, 654 F.3d at 232. The Madoff liquidation and subsequent recovery efforts therefore present the greatest test the SIPA regime has ever faced.

2. The Trustee Begins To Recover and Return Lost Customer Assets, Requiring Extensive Action Against So-Called "Feeder Funds"

The SIPA proceedings' scale and scope are commensurate with the magnitude of Madoff's fraud. Over sixteen thousand claims have been filed on the BLMIS estate. The Trustee has filed over a thousand adversary actions in Bankruptcy Court to recover customer property, including actions against scores of foreign and domestic "feeder funds." The largest of these are the Fairfield Funds. As recognized by this Court, the Trustee "has worked relentlessly . . . to bring assets that passed through [BLMIS] back into the customer fund, in order to restore

nearly $20 billion in customer losses." *Picard v. JPMorgan Chase & Co.*, 460 B.R. 84, 88 (S.D.N.Y. 2011).

Pursuant to SIPA, the Trustee has established a "Customer Fund" from which priority distributions are made to customers of the debtor, on a *pro rata* basis, and, should customers be made whole, to other creditors. This fund consists of stolen or fraudulently transferred assets recovered by the Trustee through settlements and litigation. As of September 2012, the Trustee has successfully recovered, or reached agreements to recover, over $9.2 billion dollars, a sum representing more than half of the current estimate of principal lost by all claimants on the estate. (Kornfeld Dec., Ex. 8 at 1.) Over $5 billion has been actually distributed to customers, or is now being distributed, and over one thousand accounts have been fully satisfied—around half of all accounts with allowed claims. *Id.* at 2. In performance of his duties under SIPA, the Trustee has examined over sixteen thousand claims and filed hundreds of actions to disallow claims and recover improperly transferred customer funds. *Id.* at 6.

B. The Trustee Pursues Assets Transferred to the FGG Funds for Equitable Distribution to BLMIS Customers Under SIPA

The Fairfield Funds were Madoff's largest "feeder funds," operating as an integral part of his Ponzi scheme. (Kornfeld Dec., Ex. 1, ¶ 2.) They were one of Madoff's "largest marketing and investor relations arms" and actively participated in and "substantially aided, enabled and helped sustain" the Ponzi scheme. (*Id.*) Collectively, the Fairfield Funds and related individuals and entities withdrew more than $3.2 billion from BLMIS during the six years prior to December 11, 2008, the date on which the SEC filed its civil complaint. *Id.* at ¶ 536. On May 18, 2009, the Trustee sued the Fairfield Defendants for the return of this money in his Recovery Action. The Trustee subsequently amended his complaint to add further allegations and causes of action against these Funds, as well as claims against additional Defendants to whom the Funds had

transferred much of the money. These new Defendants include additional funds affiliated with Fairfield, as well as certain managers and affiliates thereof. As amended, the Trustee's Recovery Action seeks the return from all these parties, for equitable *pro rata* distribution to BLMIS customers with allowed claims, property of the BLMIS estate in excess of $3.2 billion. This figure includes claims against Fairfield Greenwich (Bermuda) Ltd. for over $950 million, against Fairfield Greenwich Limited for over $500 million, and claims against Walter Noel, Jeffrey Tucker, and Andres Piedrahita, founders of the Fairfield Group, for over $500 million. (Gabriel Dec., Ex. 1, ¶¶ 121–47, 198–201, 207–08, 215–16.)

The Trustee's claims in his Recovery Action are supported by the theory that the Fairfield Defendants "worked in conjunction with BLMIS and Madoff to commit, and exponentially expand, the single largest financial fraud in history." (*Id.* at ¶¶ 2–3.) Specifically, when faced with "red flags" indicating that Madoff was a fraud, the Fairfield Defendants "looked the other way, focusing only on self-interest and profit." (*Id.* at ¶ 4.) Therefore, as a practical matter, the Fairfield Defendants were not separate and apart from Madoff's fraud, and certainly were not its victims, but were instead "engaged in a systematic, purposeful enterprise with Madoff to maintain and profit from a fraud and wrongly enrich themselves." (*Id.* at ¶ 3.) The Trustee has alleged that a significant portion, if not all, of the distributions and other payments made to the Fairfield Defendants were made with funds originally withdrawn from Sentry's, GS's, and GSP's accounts at BLMIS and, therefore, constitute property of the estate.[3] (*See, e.g., id.*. ¶¶ 200, 209, 217, 223, 229, 235, 241, 246, 252, 258, 264, 270, 276.) The Fairfield Defendants'

[3] By December 11, 2008, Noel, Tucker, and Piedrahita (who are among those individuals funding the proposed Settlement) had only a few million dollars still invested with Madoff—the defendants retained all other money they had unjustly collected and have kept millions of dollars in stolen property that belongs to the estate. (Kornfeld Dec., Ex. 1 ¶ 491.)

assets are therefore recoverable under SIPA because they "originated from the purported management and performance fees drawn from fictitious returns" and so are "in fact *Customer Property*, as defined by statute [*i.e.*, SIPA], and must be returned to the Trustee for equitable distribution to BLMIS customers." (*Id.* at ¶ 2 (footnote omitted).) Based on this theory, the Trustee's Recovery Action raises claims under SIPA itself, the Bankruptcy Code (as incorporated by SIPA), and New York state law. It seeks nothing less than "the return of all Customer Property belonging to the BLMIS estate, in the form of redemptions, fees, compensation, and assets . . . and the disgorgement of all funds and properties by which the Defendants were unjustly enriched at the expense of BLMIS's customers." (*Id.* at ¶ 5.)

The Trustee reached a partial resolution of his Recovery Action through settlements of his claims against each of the Fairfield Funds. But these settlements account for only a fraction of the $3.2 billion the Trustee seeks in his adversary proceeding, due to the fact that the fraudulently transferred funds were subsequently transferred to Fairfield management entities and individuals. As a result of the settlements, Sentry has an allowed claim on the estate for $230 million, GS has an allowed claim for $35 million, and GSP has an allowed claim for $2 million. (Kornfeld Dec., Ex. 2 at 4, Ex. 3 at 6, Ex. 4 at 6.) In connection with these allowed claims, these three funds have already participated in and received distributions totaling approximately $100 million from the Trustee in the SIPA Proceedings. (Kornfeld Dec., Ex. 5 ¶ 6.) As the Bankruptcy Court noted in approving the settlements, the investors in the Fairfield Funds (*i.e.*, the Anwar Plaintiffs) will be the ultimate beneficiaries of these distributions. The Trustee is continuing with his litigation against the remaining Fairfield Defendants in order to recover property for equitable *pro rata* distribution in accordance with SIPA.

C. The Trustee Learns that the Settlement Would Dissipate the Same Assets To Settle Claims Premised on the Same Fraudulent Enterprise and Conduct as the SIPA Proceedings

On November 6, 2012, the Representative Plaintiffs in the instant action filed a motion with this Court to approve their proposed Settlement. That Settlement provides for the payment by certain of the Fairfield Defendants (the "Anwar Released Defendants")[4] to the Settlement Class of an initial amount of some $50 million dollars, with an additional $30 million to be placed in escrow. The funds held in escrow will also be paid to the Settlement Class, less any amounts paid by the Defendants to settle other claims. The Settlement makes no direct provision for the claims brought against the same defendants by the Trustee in his Recovery Action—which claims, in any case, seek far more than the escrowed funds—but does purport to release these select defendants from all claims arising from the substance of the instant action. (Stip. of Settlement at 15, definition *ll*, ECF No. 996 (definition of "Released Claims")). With few exceptions, the Anwar Released Defendants are the same defendants as in the Trustee's Recovery Action. *See supra* n.5.

Neither the Fairfield Defendants nor the Anwar Representative Plaintiffs gave the Trustee any notice that they intended to pursue a separate settlement without addressing the claims brought in his Recovery Action. Indeed, the Representative Plaintiffs' counsel expressly denied to the Trustee's counsel that any such settlement was imminent—*even after the settlement had*

[4] Under the Settlement, the settling defendants are defined only as Fairfield Greenwich (Bermuda) Ltd. and Fairfield Greenwich Limited (hereinafter the "Settling Defendants"). Walter M. Noel, Jr., Jeffrey H. Tucker, Andrés Piedrahita, Lourdes Barreneche, Robert Blum, Cornelis Boele, Gregory Bowes, Vianney d'Hendecourt, Yanko della Schiava, Harold Greisman, Jacqueline Harary, David Horn, Richard Landsberger, Daniel E. Lipton, Julia Luongo, Mark McKeefry, Charles Murphy, Corina Noel Piedrahita, Maria Teresa Pulido Mendoza, Santiago Reyes, Andrew Smith, Philip Toub, and Amit Vijayvergiya are defined in the Settlement as FG Individual Defendants (hereinafter the "Individual Defendants"). The Individual Defendants are funding the Settlement and with the Settling Defendants are receiving full releases. The Individual Defendants and Settling Defendants are referred to hereinafter collectively as the "Anwar Released Defendants." All Anwar Released Defendants are named as defendants in the Trustee's Recovery Action, with the exception of Mendoza, Horn, della Schiava, d'Hendecourt, and Luongo.

been agreed to in principle. (Kornfeld Dec. at ¶¶ 10, 16, 17; Stip. of Settlement at 5–6.) Because, prior to November 6, 2012, there was no imminent prospect that a settlement would dissipate the funds sought by the Trustee in his Recovery Action, the Trustee had not seen any need to intervene in the instant action.

In the instant action, as this Court is aware, many investors in the Fairfield Funds seek to recover lost principal on a variety of causes of action, including violations of federal securities law and multiple common-law claims including fraud, negligent misrepresentation and breach of fiduciary duties. These losses, and the violations of law which the plaintiffs allege caused them, all arose from the Fairfield Funds' actions as part of Madoff's Ponzi scheme. (*See* Second Consol. Am. Compl. ¶ 1, ECF No. 273.) That is to say, the claims in the instant action are premised on the same enterprise and conduct, feature the same defendants, and seek to recover the same funds as the overall SIPA proceedings and, in particular, the Trustee's Recovery Action.

The allegations of the Anwar complaint mirror those in the Trustee's Recovery Action. Most broadly, it acknowledges that its claims "arise[] out of" Madoff's Ponzi scheme as "facilitated by the reckless, grossly negligent, and fraudulent conduct" of the Anwar Defendants. (*Id.* at ¶ 1.) More specifically, it alleges at great length that the Defendants deliberately ignored "red flags of Madoff's fraud," *id.* ¶¶ 68–72, and "earned massive fees from funneling Plaintiffs' assets into the Madoff fraud." (*Id.* ¶ 80.) As it explains, the bulk of these fees were "performance fees" on the fictional appreciation of assets invested with Madoff, and those fees were "paid" by allocating already-invested assets to the Defendants, which were then realized through withdrawals of funds from BLMIS. (*Id.* ¶ 238.) Where the Anwar complaint differs from the Trustee's Recovery Action is that it asserts claims on behalf of Fairfield Fund investors,

alleging that the Defendants' participation in the Madoff fraud cost them losses. (*Id.* ¶ 3.) On that basis, the Anwar Plaintiffs seek to recover the fees and other assets that the Defendants withdrew from BLMIS and other sources, *id.* ¶ 4, asserting claims under New York common law and various provisions of the Securities Exchange Act.

The Fairfield Defendants have stated that they possess only "very limited resources," and that the instant action, "even if the claims are somewhat different," still seeks to recover from "the same pool of assets" as the Trustee's Recovery Action. Indeed, their counsel acknowledges that "there is absolutely no doubt the pool of assets which are being sought are far less than the dollar amount of the claims that are brought." (Kornfeld Dec., Ex. 6 at 3:15–19, 4:10–15.) Accordingly, the proposed Settlement in the instant action would necessarily drain these "very limited" assets available to satisfy claims brought by the Trustee in his Recovery Action to recover for the same underlying conduct.

In this way, the proposed Settlement would allow the Settlement Class members, who are the ultimate beneficiaries of the Trustee's settlement in his Recovery Action with Sentry, GS, and GSP, to keep their benefits from the Trustee's settlement, while diminishing the value of the settlement to the Trustee's Customer Fund for the benefit of BLMIS customers and diverting additional funds from the SIPA proceedings and to themselves.

D. The Trustee Seeks To Enjoin the Settlement To Protect the Integrity of the SIPA Proceedings

Having learned only upon the public filing of the proposed Settlement of this imminent threat to his recovery actions under SIPA, the Trustee promptly filed his Injunction Action. *Picard v. Fairfield Greenwich Ltd.*, No. 12-02047 (Bankr. S.D.N.Y. filed Nov. 29, 2012). In that Action, the Trustee requested that the court preliminarily enjoin the parties to the proposed Settlement from consummating that Settlement until the Trustee's Recovery Action was

complete and any settlement or judgment reached thereunder was satisfied. In their briefing in the Injunction Action, the Fairfield Defendants have confirmed that the proposed Settlement threatens to dissipate the same funds which the Trustee seeks in his Recovery Action. In seeking an injunction, the Trustee acted to protect the operation of the SIPA proceedings in the manner intended by Congress: as a single, unitary, and comprehensive scheme to recover and redistribute customer property lost due to broker-dealer failure.

ARGUMENT

The text and history of SIPA clearly demonstrate that Congress intended it to control the recovery and distribution of assets following the collapse of a broker-dealer. Congress knew, in particular, that the unraveling of fraudulent investment schemes could lead to a scrum of litigation at cross-purposes, to the ultimate detriment of investors and confidence in the securities market, and therefore sought to supplant that state of affairs by establishing a single proceeding to recover transferred assets and return them, on a fair and equitable basis, to the class of investors whom it deemed in need of special protection, broker-dealer "customers." Third-party lawsuits that seek to divert assets from the SIPA proceeding and direct them to the preferential benefit of other parties are necessarily and fundamentally incompatible with the comprehensive remedial scheme that Congress legislated. Because the Settlement would do precisely that to satisfy claims under state law and the Exchange Act, it may not be approved at this time, prior to the final determination of the Trustee's claims under SIPA.

I. CONGRESS INTENDED SIPA TO DISPLACE LAWS THAT WOULD CONFLICT WITH THE "PROMPT AND ORDERLY" LIQUIDATION OF FAILED BROKERAGES FOR THEIR CUSTOMERS' BENEFIT

"SIPA serves dual purposes: to protect investors, and to protect the securities market as a whole." *In re BLMIS II*, 654 F.3d at 235 (citing *Sec. Inv. Prot. Corp. v. Barbour*, 421 U.S. 412, 415 (1975)). The specific means that Congress chose to achieve those purposes was "to afford

customers . . . protection against losses they might incur as a result of the financial failure of their broker-dealer." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 574 n.16 (1979). It did this by "creat[ing] a new form of liquidation proceeding, applicable only to member firms, designed to accomplish the completion of open transactions and the speedy return of most customer property." *Barbour*, 421 U.S. at 416. Central to this scheme is that "[t]he mere filing of [a SIPA proceeding] gives the court in which it is filed exclusive jurisdiction over the member and its property, *wherever located* . . . ." *Id.* (emphasis added). Once a proceeding has been initiated, the SIPA trustee is empowered to recover property that has been transferred from the member (*i.e.*, the failed brokerage) for equitable distribution to customers and other creditors in accordance with the statutory priority scheme. 15 U.S.C. § 78fff-1; *In re BLMIS II*, 654 F.3d at 231 (describing the SIPA Trustee's "additional duties, specified by the Act"). In this way, SIPA establishes what the courts have recognized to be "a comprehensive statutory scheme governing the rights of creditors and brokers." *In re Stalvey & Assocs., Inc.*, 750 F.2d 464, 468 (5th Cir. 1985).

All of these extremely specific provisions would be deprived of their force and effect if, in any fraud that involved third parties like feeder funds, assets that had been transferred to those third parties were not fully subject to SIPA. In that case, the failed brokerage's "customers" would recover from only the limited assets held by the estate, while claimants on the third parties—that is, creditors whom Congress *denied* the special protections of SIPA—could jump to the head of the line in recovery if they were fast to file or settle lawsuits against third parties holding customer property at the time the music stopped. The best that could be said of this "musical chairs" view of the law is that, in some cases, the SIPA trustee (and thereby the brokerage's "customers") might win the race to the courthouse and, through that fluke of luck,

actually manage to carry out the terms of the SIPA statutory scheme. But in other cases, he or she would not, and some other party—whether a "customer" or not—would prevail. This kind of arbitrary and inequitable result is precisely what Congress sought to preempt by enacting a comprehensive and specific liquidation process in SIPA.

Indeed, Congress knew that its purposes could be achieved only by means of a comprehensive mechanism to protect the customers of failed brokerages. The Securities and Exchange Commission report that prompted the enactment of SIPA bemoaned, under the then-prevailing law, "the difficulty of developing a system which assures *a fair result to all claimants* against the assets of a broker-dealer" and therefore recommended that "the Bankruptcy Act should be amended to empower the Commission to petition that an insolvent broker-dealer be adjudged a bankrupt, so as to assure *equitable treatment of claimants*." Report of Special Study of Securities Markets of the S.E.C., H.R. Doc. 95, 88th Congress, 1st Session, at 414–16 (emphasis added). To that end, SIPA built on bankruptcy law—which already provides "a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights," *E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank, Bennington*, 236 F.3d 117, 120 (2d Cir. 2001)[5]—by establishing a rigid priority scheme for the benefit of certain statutorily-defined "customers" and empowering a trustee investigate transfers of customer property from the brokerage, recover wrongfully transferred assets, and distribute the proceeds in accordance with the priority scheme. 15 U.S.C. §§ 78fff-2(c)(1), (c)(3); § 78fff-1(d).

[5] As has been noted, Congress enacted SIPA as an exercise of its power under both the Commerce Clause and the Bankruptcy Clause, such that "the power of Congress to modify substantial rights [under SIPA] rests upon a broad and substantial base." *SEC v. Albert & Maguire Sec. Co.*, 378 F. Supp. 906, 911–12 (E.D. Pa. 1974).

Congress recognized that this comprehensive statutory scheme would have to override conflicting provisions of law if it was to function at all. SIPA's requirements are quite specific. It defines a special class of claimants, "customers," who receive preferential treatment over other claimants. 15 U.S.C. § 78*lll*(2). Those "customers," in turn, have first claim on "customer property," which the statute defines both expansively and precisely:

> 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.*

15 U.S.C. § 78*lll*(4) (emphasis added). "Customer property" specifically includes "any other property of the debtor which, upon compliance with applicable laws, rules, and regulations, would have been set aside or held for the benefit of customers." 15 U.S.C. § 78*lll*(4)(E). To give that definition force, SIPA specifically empowers the Trustee to reach outside of the failed broker's estate and "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." 15 U.S.C. § 78fff-2(c)(3). Finally, SIPA mandates that "customers . . . shall share ratably in such customer property on the basis and to the extent of their respective net equities." 15 U.S.C. § 78fff-2(c)(1)(B).

Indeed, several provisions of SIPA reflect Congress's understanding that SIPA would control over other remedial schemes. First, Congress expressly contemplated that federal courts would use their injunctive powers to temporarily stay outside claims while the Trustee's primary task of recovering and distributing property to customers was under way. While barring a court from abrogating "rights of setoff" and "the right to enforce a valid, non-preferential lien," Congress allowed that it "may stay enforcement of such rights" pending the resolution of customer claims. H.R. Rep. 91-1613 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5254, 5264; Pub.

L. 91-598, § 6(c)(1), 84 Stat. 1636, 1647 (1970). Second, Congress put other broker-dealers at the back of the line in any SIPA recovery, no matter their seniority under state law. *Id.*; 15 U.S.C. § 78fff-3(a)(5). *See also S.E.C. v. Packer, Wilbur & Co., Inc.*, 498 F.2d 978, 984 (2d Cir. 1974). This provision expressly recognizes that multiple entities may be involved in the collapse of a broker, but anticipates that all investor claims be resolved in the single liquidation proceeding. In these ways, Congress confirmed its intentions (1) that nothing stand in the way of a SIPA proceeding to recover and return funds to "customers," as defined in the statute, and (2) that all claims relating to a broker's failure be channeled into that single proceeding, at least as an initial matter.

In particular, Congress was not blind to the fact that persons who had wrongfully acquired customer property prior to the failure of a brokerage could be subject to competing claims, not least for securities fraud. Congress knew that fraud, conversion and other unlawful conduct might cause a broker-dealer's failure. *See, e.g.*, H.R. Rep. No. 95-746, 95th Cong., 1st Sess., 21 (Oct. 26. 1977) ("A customer generally expects to receive what he believes is in his account at the time the stockbroker ceases business. But because securities may have been lost, improperly hypothecated, misappropriated, never purchased, *or even stolen*, this is not always possible." (emphasis added)). For that reason, SIPA's expansive definition of "customer property" reaches "property transferred by the debtor, including property *unlawfully converted.*" 15 U.S.C. § 78*lll*(4) (emphasis added). And as the Chairman of the SEC repeatedly and emphatically stressed to Congress in 1970, SIPA "does not exculpate anyone in the securities industry from any liability they may have respecting financial difficulties of broker-dealers"; instead, SIPA is "a measure designed to protect investors and not a measure to protect broker-dealers in financial difficulties *or others in the securities industry who may have some legal*

responsibility to the customers of such broker-dealers." *See, e.g.*, Letter of SEC Chairman Hamer H. Budge to Sen. Edmund S. Muskie, original sponsor of SIPA, dated Oct. 2, 1970, 116 Cong. Rec. S19965, S19967 (daily ed. Dec. 10, 1970) (emphasis added).

Congress also knew well, and specifically sought to address, the dangers posed by piecemeal litigation over failed brokerages in cases involving fraud. A primary impetus for SIPA was the "Salad Oil Swindle" of 1963, which led to the failure of the broker Ira Haupt & Co. and a proliferation of lawsuits that proved an obstacle to attempts to equitably satisfy its customers' claims. *See* 1970 U.S.C.C.A.N. at 5256–57; Securities Investor Protection: Statement of Hon. John E. Moss, Chairman, House of Representatives, Subcommittee on Commerce & Finance, Committee on Interstate & Foreign Commerce, June 4, 1970, at 1. The bankruptcy trustee in that case recognized that "it was impossible to compartmentalize [his] investigation" to particular claims or claimants, *In re Ira Haupt & Co.*, 361 F.2d 164, 169 n.6 (2d Cir. 1966), and the courts charged with sorting out the competing claims acknowledged the "magnitude and difficulty" of the trustee's task. *In re Ira Haupt & Co.*, 287 F. Supp. 318, 320, 321 (S.D.N.Y. 1968). The result was a multiplication of litigation, with often-inequitable results. *Cf.* 116 Cong. Rec. 39,352 (remarks of Rep. Boland) (Dec. 1, 1970) ("When brokerage houses fail . . . the small investor is the principal victim. A veritable labyrinth of litigation awaits him should he seek redress in the courts.").

It was precisely to prevent another morass of competing claims following the failure of a brokerage that Congress established SIPA's comprehensive liquidation process that would "as promptly as possible . . . distribute customer property and . . . satisfy net equity claims of customers," 15 U.S.C. § 78fff(a)(1)(B), in a fair and equitable fashion. The whole point was to displace the operation of laws that impeded achievement of that result.

II. THE SETTLEMENT RESOLVES THE PLAINTIFFS' STATE LAW CLAIMS IN A MANNER THAT CONFLICTS WITH FEDERAL LAW

"[T]he Laws of the United States . . . shall be the supreme law of the land . . . , anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Since *Gibbons v. Ogden*, 22 U.S. 1 (1824), it has been recognized that "[a] fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Even when Congress has not expressly preempted state law or occupied the field, "state law is nevertheless preempted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California v. ARC Am. Corp.*, 490 U.S. 93, 100-01 (1989). The Settlement's resolution of state law claims fails both tests.

Congressional purpose is the "ultimate touchstone" in preemption. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). Congress enacted SIPA to supplement the already "broad scope of bankruptcy preemption." *Astor Holdings, Inc. v. Roski*, 325 F.Supp.2d 251, 262 (S.D.N.Y. 2003). "The United States Bankruptcy Code provides a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights." *E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank, Bennington*, 236 F.3d 117, 120 (2d Cir. 2001). As a result, "even a minor incursion into federal bankruptcy [is] tantamount to state courts, in effect, interfering with the whole complex, reticulated bankruptcy process itself." *In re Old Carco LLC*, 470 B.R. 688, 703 (S.D.N.Y. 2012) (quotation marks omitted). As described above, SIPA goes even further, so as to carry out its highly specific purpose.

The Settlement is preempted, first, because it would prevent the Fairfield Defendants from complying with the requirements of federal law. *See ARC Am.*, 490 U.S. at 100–01. SIPA

specifically authorizes the Trustee to avoid and recover wrongful transfers of property from the estate, 15 U.S.C. §§ 78fff-1(a), 78fff-2(c)(3), and the Trustee has brought such an action against the Fairfield Defendants. While the Trustee's duty to undertake a recovery action may be discretionary, so that he is free to act in customers' best interests, the Fairfield Defendants' obligation under federal law to return any property found to have been wrongfully transferred is not. Nor is the Trustee's obligation, upon receipt of such property, to distribute it in accordance with the statutory priority scheme discretionary. 15 U.S.C. § 78fff-2(c)(1)(B), (d). The Settlement clashes with those federal obligations, relying on state law to deny the Trustee possession of property that federal law entitles him to collect and circumventing the priority scheme that federal law mandates. And it would do this to resolve state law claims that are premised on the operation of the same fraudulent enterprise that is the subject of the SIPA liquidation proceedings, concern proceeds of that enterprise, and are for the preferential benefit of persons who may already stand to benefit from the Fairfield Funds' customer claims on the BLMIS estate. Because compliance with both federal law and the Settlement's execution of state law is not possible unless and until the Trustee's claims against the Fairfield Defendants in the Trustee's Recovery Action are resolved, the Settlement is preempted at this time.

Second, the Settlement is preempted because it is plainly "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *ARC Am.*, 490 U.S. at 100-01. Congress's avowed purpose was to end the pre-SIPA litigation free-for-all, which resulted in arbitrary and unfair recoveries and undermined investor confidence in securities markets, by establishing a comprehensive and orderly liquidation process that would rapidly and equitably recover and return property to the customers of failed brokerages. 15 U.S.C. § 78fff(a); *see also* 1970 U.S.C.C.A.N. at 5255 (describing purpose and need for SIPA).

Congress expected that this process would be used to simplify the resolution of massive fraud cases involving numerous parties in complex arrangements, like the collapse of Haupt & Co., by putting a single Trustee at the helm of the recovery process and placing "customers" (as defined in the statute) at the front of the line for distributions. The Anwar Plaintiffs, apparently dissatisfied with their place in the line as potential beneficiaries of any net equity recovery by the Fairfield Funds, brought their own claims under state law, and the Fairfield Defendants, facing liability that exceeds their assets, are indifferent as to which groups of creditors get paid off first, fully, or at all.

But that is precisely the situation that Congress sought to avoid: multiple recovery proceedings and arbitrary distributions. The Anwar Plaintiffs' race to the courthouse and to settlement cannot be allowed to defeat the requirements of federal law in SIPA.

III. THE SETTLEMENT RESOLVES THE PLAINTIFFS' EXCHANGE ACT CLAIMS IN A MANNER THAT IMPERMISSIBLY CONFLICTS WITH SIPA

The Settlement's resolution of the Anwar Plaintiffs' Exchange Act claims also violates the cardinal rule that a court "must read [purportedly conflicting] statutes to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). As described above, Congress intended SIPA to ensure that, following a brokerage's collapse, its customers could be made whole again, or at least as near as possible, in an expeditious and equitable fashion. Congress expressly intended that, to carry out this end, a SIPA trustee would attempt to recover wrongfully transferred property for the benefit of customers, 15 U.S.C. § 78fff-2(c)(3), and was not blind to the fact that those who had wrongfully acquired such property could be subject to competing claims, not least for securities fraud.

In contrast to that express provision, Section 10(b) (which provides the basis for all of the Anwar Plaintiffs' federal claims) is "a right of action Congress did not authorize when it first

enacted the statute and did not expand when it revisited the law." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 167 (2008). It therefore must be given "narrow dimensions," particularly when Congress has identified conflicting policy considerations, *e.g.*, *id.* at 162–63 (consulting PSLRA to interpret Section 10(b)'s scope of liability) or when there is a risk of bad "practical consequences." *Id.* at 163–64; *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-89 (1994).

In the circumstances of this case, Section 10(b) liability threatens to conflict with the application of the later-passed SIPA remedy by depriving the BLMIS estate of assets that Congress intended would be recovered for the benefit of "customers," as defined by statute, and distributed in accordance with the statutory preference scheme. In particular, the Anwar Plaintiffs' claims seek assets that BLMIS transferred to the Fairfield Defendants and which were denominated, variously, as "fees" or fictitious investment "profits," on the basis that these transfers were part of a scheme to defraud them in connection with the sale or purchase of securities. But those same transfers are subject to SIPA, as "customer property" that was fraudulently transferred to BLMIS feeder funds and their principals and affiliates. If "two statutes, each of which by its literal terms applies to the facts" are in irreconcilable conflict, then "the more recent of two irreconcilably conflicting statutes governs." *Watt*, 451 U.S. at 266. SIPA is, of course, the more recent, more specific, and more comprehensive statutory provision. *See United States v. Estate of Romani*, 523 U.S. 517, 532 (1998) (Tax Lien Act governs over Transportation Act because it is "the later statute, the more specific statute, and its provisions are comprehensive"). As described above, Congress contemplated that SIPA would control in precisely this situation, where multiple parties are engaged in a single fraudulent enterprise and competing liquidation threatens to deplete assets required to recover on customers' losses.

Section 10(b), the more general provision, cannot trump SIPA's specific remedial scheme on the sole basis that the Anwar Plaintiffs won the race to the courthouse and to settlement.

IV. THE PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE SETTLEMENT MUST BE DENIED AT THIS TIME

The Trustee does not seek to enjoin any possible recovery by the Anwar Plaintiffs, or even to permanently enjoin the Settlement, but only to ensure that the Anwar Plaintiffs' claims against the defendants who are also the subject of the Trustee's Recovery Action are not resolved in a manner that conflicts with the Trustee's superior entitlement under SIPA. As such, the appropriate action is to deny the Plaintiffs' motion for approval of the Settlement at this time, without prejudice and with leave for refiling after final resolution of the Trustee's claims. Only in this manner can the Court ensure that Congress's will in enacting SIPA is carried out and that assets the Trustee is entitled to recover are not dissipated prior to the resolution of his claims under SIPA.

CONCLUSION

To achieve its goals of protecting investors and promoting confidence in securities markets, Congress charged SIPA trustees, like the Trustee in this case, with overseeing the equitable distribution of the assets of failed brokerages. It empowered SIPA trustees to recover transferred customer property and required that they distribute such property to certain statutorily-identified "customers" in accordance with SIPA's statutory priority scheme. The Madoff Trustee seeks to do just that through his Recovery Action against the Fairfield Defendants, who were an integral part of Madoff's fraud. The proposed Settlement in this case, if approved, would prejudice the Trustee's efforts under SIPA by dissipating some of the very same fraudulently transferred customer property that the Trustee seeks to recover and by placing the Anwar Plaintiffs in a preferred position compared to statutorily-protected "customers" of

BLMIS and to similarly-situated feeder fund investors. This is exactly the kind of arbitrary result that Congress sought to end with SIPA. Accordingly, the Trustee respectfully requests that this Court deny the motion to approve the Settlement without prejudice, pending final resolution of the Trustee's Recovery Action.

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