

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

<p>In re:</p> <p>BERNARD L. MADOFF INVESTMENT SECURITIES LLC,</p> <p style="text-align: center;">Debtor,</p>	<p>Adv. Pro. No. 08-01789 (BRL)</p> <p>SIPA LIQUIDATION</p> <p>(Substantively Consolidated)</p>
<p>IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>SAUL B. KATZ, et al.,</p> <p style="text-align: center;">Defendants.</p>	<p>Adv. Pro. No. 10-05287 (BRL)</p> <p>11 Civ. 03605 (JSR) (HBP)</p>

TRUSTEE'S STATEMENT OF UNDISPUTED MATERIAL FACTS
PURSUANT TO LOCAL RULE 56.1

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
(212) 450-4000

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

Pursuant to Southern District of New York Local Civil Rule 56.1, Irving H. Picard (“Trustee”), as trustee for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act (“SIPA”), 15 U.S.C. §§ 78aaa *et seq.*, and the estate of Bernard L. Madoff (“Madoff”), by and through his undersigned counsel, respectfully submits the following statement of undisputed material facts in support of his Motion for Partial Summary Judgment.

Background

1. Madoff founded BLMIS as a sole proprietorship in 1960 and registered BLMIS as a broker-dealer with the Securities Exchange Commission (“SEC”) as of January 19, 1960. (Initial Expert Report of Bruce G. Dubinsky, MST, CPA, CFE, CVA, CFF, CFFA, Decl., Ex. 1, Dubinsky Report (“Dubinsky Report”) attached as Ex. 1 to the Declaration of Bruce G. Dubinsky in Support of the Trustee’s Motion for Partial Summary Judgment (“Dubinsky Decl.”) ¶ 28; Dubinsky Decl., Ex. 2; Declaration of David J. Sheehan in Support of Trustee’s Motion for Partial Summary Judgment (“Sheehan Decl.”), Ex. 1, Answer, *Picard v. Katz, et al.*, No. 11 Civ. 3605 (S.D.N.Y. Oct. 11, 2011) (JSR), ECF No. 48 ¶ 29.)

2. BLMIS purported to operate three business units: a market making business, a proprietary trading business, and the investment advisory business. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶ 28; Sheehan Decl., Ex. 1, Answer ¶ 29).

3. The market making and proprietary trading businesses were referred to within BLMIS as “House 5.” (Dubinsky Decl., Ex. 1, Dubinsky Report ¶ 28.)

4. The investment advisory business was referred to within BLMIS as “House 17.” (Dubinsky Decl., Ex. 1, Dubinsky Report ¶ 28.)

5. House 5 provided execution for broker-dealers, banks, and financial institutions, and was a member of the National Association of Securities Dealers, Inc. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶ 289.)

6. In 1983, BLMIS registered Madoff Holdings Limited in London, which began operating as Madoff Securities International Limited (“MSIL”) in 1988. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶ 38; Dubinsky Decl., Exs. 3-4.)

7. In 1987, BLMIS moved from its location at 110 Wall Street to the “Lipstick Building” at 885 Third Avenue, where it eventually leased the 17th, 18th, and 19th floors. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶ 29; Dubinsky Decl., Ex. 5.)

8. BLMIS’s market making and proprietary trading businesses (House 5) were located on the 18th and 19th floors of the Lipstick Building. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶ 29.) The investment advisory business (House 17) was located on the 17th floor. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶ 29.)

9. On December 11, 2008, Madoff was arrested and charged with securities fraud, investment advisor fraud, mail fraud, wire fraud, international money laundering to promote fraud in the sales of securities, international money laundering the conceal the proceedings of fraud in the sale of securities, money laundering, making false statements, perjury, making a false filing with the SEC, and theft from an employee benefit plan. (Sheehan Decl., Ex. 2, Plea Hr’g (“Madoff Plea”) Tr. 7:21-8:12, *United States v. Madoff*, No. 09 Cr. 213 (S.D.N.Y. Mar. 12, 2009) (DC), ECF No. 57.)

10. Madoff pleaded guilty to the eleven-count information, which alleged—and he admitted—that he operated a massive Ponzi scheme through the IA Business of BLMIS. (Sheehan Decl., Ex. 2, Madoff Plea 23:14-21; 31:25-32:1.)

11. For his crimes, Madoff was sentenced to 150 years in prison. (Sheehan Decl., Ex. 3, Sentencing Tr. 49:15-22, *United States v. Madoff*, No. 09 Cr. 213 (S.D.N.Y. June 29, 2009) (DC), ECF No. 103.)

12. Five other BLMIS employees and accomplices have pleaded guilty to federal fraud charges for assisting Madoff in operating his Ponzi scheme through the IA Business of BLMIS. (Sheehan Decl., Ex. 4, Plea Hr'g Tr. ("DiPascali Plea") 65:6-17, *United States v. DiPascali*, No. 09 Cr. 764 (S.D.N.Y. Aug. 11, 2009) (RJS), ECF No. 11; Sheehan Decl., Ex. 5, Plea Hr'g Tr. ("Friedling Plea") 5:3-4, *United States v. Friedling*, 09 Cr. 700 (S.D.N.Y. Nov. 3, 2009) (AKH); Sheehan Decl., Ex. 6, Plea Hr'g Tr. ("Lipkin Plea") 39:8-40:13, *United States v. Lipkin*, No. 10 Cr. 228 (S.D.N.Y. June 6, 2011) (LTS), ECF No. 148; Sheehan Decl., Ex. 7, Plea Hr'g Tr. ("Kugel Plea") 32:4-12, *United States v. Kugel*, No. 10 Cr. 228 (S.D.N.Y. Nov. 21, 2011) (LTS), ECF No. 188; Sheehan Decl., Ex. 8, Plea Hr'g Tr. ("Cotellessa-Pitz Plea") 7:14-16, 37:18-38-15, *United States v. Cotellessa-Pitz*, No. 10 Cr. 228 (S.D.N.Y. Dec. 19, 2011) (LTS).)

13. These employees face jail sentences for their involvement in the scheme. (Sheehan Decl., Ex. 4, DiPascali Plea 67:19; *Friedling*, 09 Cr. 700, ECF No. 50; *Lipkin*, 10 Cr. 228, ECF No. 189; Sheehan Decl., Ex. 7, Kugel Plea 42:1-2; Sheehan Decl., Ex. 8, Cotellessa-Pitz Plea 40:17-18.)

14. In December 2008, BLMIS was placed into liquidation and the Trustee was appointed to, among other things, marshal estate assets and determine customer claims. (Order, *In re Bernard L. Madoff Investment Sec. LLC*, No. 08 Civ. 10791 (S.D.N.Y.) (LLS) (Dec. 15, 2008).)

There is No Genuine Dispute that BLMIS Operated a Ponzi Scheme Through Its Investment Advisory Business

15. Madoff operated a Ponzi scheme through the investment advisory business of BLMIS. (Sheehan Decl., Ex. 1, Answer ¶ 1; see generally Dubinsky Decl., Ex. 1, Dubinsky Report.)

16. Prior to the revelation of the massive fraud, BLMIS investment advisory customers would deposit money in accounts they opened with BLMIS's investment advisory business, and Madoff would purport to engage in different investment strategies on their behalf. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 34-35, 106, 111-12; Dubinsky Decl., Exs. 6-7; Sheehan Decl., Ex. 1, Answer ¶ 30; Sheehan Decl., Ex. 2, Madoff Plea 24:9-14 (“The essence of my scheme was that I represented to clients and prospective clients who wished to open investment advisory and individual trading accounts with me that I would invest their money in shares of common stock, options, and other securities of large well-known corporations, and upon request, would return to them their profits and principal.”))

17. BLMIS investment advisory customers received account statements from BLMIS that purported to reflect securities transactions and investment returns that appeared as though their investments with BLMIS were profitable. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶ 71; Sheehan Decl., Ex. 2, Madoff Plea 27:9-16 (“To further cover up the fact that I had not executed trades on behalf of my investment advisory clients, I knowingly caused false trading confirmations and client account statements that reflected the bogus transactions and position to be created and sent to clients purportedly involved in the split strike conversion strategy, as well as other individual clients I defrauded who believed they had invested in securities through me.”); Sheehan Decl., Ex. 4, DiPascali Plea 46: 21-25 (“From our office in Manhattan at Bernie Madoff’s direction, and together with others, I represented to hundreds, if not thousands, of

clients that security trades were being placed in their accounts when in fact no trades were taking place at all.”); Sheehan Decl., Ex. 7, Kugel Plea 32:1-12 (“I provided historical trade information to other BLMIS employees, which was used to create false, profitable trades in the Investment Advisory clients' accounts at BLMIS. Specifically, beginning the early '70s, until the collapse of BLMIS in December 2008, I helped create fake, backdated trades. I provided historical trade information . . . first to Annette Bongiorno, and later to Joanne Crupi, and others which enabled them to create fake trades that, when included on the account statements and trade confirmations of Investment Advisory clients, gave the appearance of profitable trading when in fact no trading had actually occurred.”)

18. None of the purported investment strategy securities transactions reflected on the BLMIS investment advisory customer statements took place. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 19-22; Sheehan Decl. Ex. 2, Madoff Plea 24:15-17 (“Those representations were false for many years. Up until I was arrested on December 11, 2008, I never invested these funds in the securities, as I had promised.”); Sheehan Decl., Ex. 4, DiPascali Plea 46:12-14 (“No purchases or sales of securities were actually taking place in their accounts. It was all fake. It was all fictitious.”))

19. As far as back as the 1970s, there is no evidence that the purported investment transactions reflected in the customer statements of BLMIS' investment advisory business customers ever occurred, and in fact the evidence reveals that those transactions did not and could not have occurred. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 19, 242; Sheehan Decl., Ex. 7, Kugel Plea 32:4-12 (“Specifically, beginning the early '70s, until the collapse of BLMIS in December 2008, I helped create fake, backdated trades. I provided historical trade information . . . to create fake trades that, when included on the account statements and trade confirmations of

Investment Advisory clients, gave the appearance of profitable trading when in fact no trading had actually occurred.”)

20. During the 1970s through the mid-1990s, BLMIS generally represented to its investment advisory customers that it was investing in a “convertible arbitrage strategy.” (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 20, 34, 71.)

21. Convertible securities are generally fixed income and preferred equity instruments that permit the purchaser to convert that security to shares of stock under pre-specified conditions and time-frames set forth by the issuer. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 66-70; Dubinsky Decl., Exs. 8-9.)

22. It was impossible for BLMIS to have engaged in the convertible arbitrage securities trades reported in the BLMIS customer statements. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 20, 74-78, Figures 1-3, Table 2; Dubinsky Decl., Ex. 10.)

23. BLMIS could not have engaged in the convertible arbitrage securities trades reported in customer statements in the 1970s-1980s because in many instances, the volume of convertible securities trades reflected in BLMIS investment advisory customer statements (both in the aggregate and on an individual customer account basis over time) exceeded the entire reported market volume for those particular securities on the days they were supposedly traded—at times by a multiple of more than *150 times* the entire market volume. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 72, 76-79, Figures 2-4; Dubinsky Decl., Ex. 11-12.)

24. BLMIS could not have engaged in the convertible arbitrage securities trades reported in customer statements in the 1970s-1980s because in many instances, on many trading days, trades were recorded at prices that were impossible, as they were outside the range of

market-reported trading prices on those given days. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 70, 80-82, 105; Dubinsky Decl., Ex. 13.)

25. BLMIS could not have engaged in the convertible arbitrage securities trades reported in customer statements in the 1970s-1980s because in many instances, dividend payments and/or accrued interest—which generally constitute a major component of a convertible arbitrage transaction—were not reported on investment advisory business customer statements even though the real convertible securities paid dividends or interest. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 85-88, Figure 5; Dubinsky Decl., Ex. 14.)

26. BLMIS could not have engaged in the convertible arbitrage securities trades reported in customer statements in the 1970s-1980s because those trades were recorded as having occurred on dates *after* the securities had already been called and converted—and therefore those securities could no longer have possibly been held by an investor. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 74, 83-84, Table 2; Dubinsky Decl., Ex. 15.)

27. BLMIS could not have engaged in the convertible arbitrage securities trades reported in customer statements in the 1970s-1980s because there were no independent transfer records evidencing that the purported convertible securities were ever converted by the IA Business into common shares, despite being shown as having been converted on the BLMIS investment advisory customer statements, again demonstrating that the purported trading activity never happened. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 89-98, Figures 6-7, Tables 3-4; Dubinsky Decl., Exs. 16-19.)

The 1990s and 2000s: The Securities Transactions Reflected on Customer Statements Purportedly Accomplished Pursuant to a “Split Strike Conversion” Strategy Did Not and Could Not Have Occurred.

28. In the early 1990s, BLMIS changed the primary purported investment strategy for customers from convertible arbitrage to a split strike conversion strategy, later stating that “the

opportunity within the marketplace to trade convertible arbitrage has decreased.” (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 21, 112; Dubinsky Decl., Exs. 7, 20-22.)

29. A split-strike conversion investment strategy typically involves buying a basket of stocks closely correlated to an index, while concurrently selling call options and buying put options on the index. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 112-14; Dubinsky Decl., Exs. 21-22; Sheehan Decl., Ex. 2, Madoff Plea 25:20-26:18 (“Through the split strike conversion strategy . . . I promised that I would select a basket of stocks that would closely mimic the price movements of the Standard & Poors 100 index. I promised that I would opportunistically time those purchases and would be out of the market intermittently, investing client funds during these periods in United States Government-issued securities, such as United States Treasury bills. In addition, I promised that as part of the split strike conversion strategy, I would hedge the investments I made in the basket of common stocks by using client funds to buy and sell option contracts related to those stocks, thereby limiting potential client losses caused by unpredictable changes in stock prices.”); Sheehan Decl., Ex. 4, DiPascali Plea 45:23-46:4 (“[Madoff] attracted a lot of these clients by telling them that the firm would apply a hedged investment strategy to their money. The clients were told that the strategy involved purchasing what we call basket of blue chip common stocks. Hedging those investments by buying and selling option contracts, getting in and out of the market at opportune times and investing in government securities at other times.”))

30. BLMIS’s investment advisory business purportedly used a split-strike strategy based on the S&P 100 equity index, which included the 100 largest U.S. stocks as determined by the S&P index committee. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶ 112; Dubinsky Decl., Ex. 21-22; Sheehan Decl., Ex. 2, Madoff Plea Tr. 25:25-26:16 (“Through the split strike conversion

strategy I promised to clients and prospective clients that client funds would be invested in a basket of common stocks within the Standard & Poors 100 index, a collection of the 100 largest publicly-traded companies in terms of their market capitalization.”))

31. BLMIS never engaged in the split-strike conversion securities trades reported in customer statements between the 1990s and 2008. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 115-122; Dubinsky Decl., Exs. 23-24; Sheehan Decl., Ex. 2, Madoff Plea 25:20-26:18 (“I therefore claimed that I employed an investment strategy I had developed, called the split strike conversion strategy, to falsely give the appearance to clients that I had achieved the results I believed they expected . . . In fact, I never made those investments I promised clients, who believed they were invested with me in the split strike conversion strategy.”); Sheehan Decl., Ex. 4, DiPascali Plea 47:9-15 (“On a regular basis I told clients over the phones and using wires that transactions were taking place in their account when I knew that no such transactions were indeed taking place. I also took steps to conceal from clients, from the SEC, and from auditors the fact that no actual security trades were taking place and to perpetuate the illusion that they actually were.”))

32. BLMIS could not have engaged in the split-strike conversion securities trades reported in customer statements in the 1990s-2008 because the available records from Depository Trust & Clearing Corporation (“DTCC”)—which, through its subsidiaries, provides clearance for almost all equity, bond, government securities, mortgage-backed securities, money market instruments and over-the-counter derivative transactions in the U.S. Market—did not record *any* security holdings for BLMIS investment advisory customers during this time. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 132-33, 138-42, Figure 15.)

33. BLMIS could not have engaged in the split-strike conversion securities trades reported in customer statements in the 1990s-2008 because the reported equity and options trades exceeded the entire reported market value for the relevant securities on numerous trading days. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 115-16.)

34. BLMIS could not have engaged in the split-strike conversion securities trades reported in customer statements in the 1990s-2008 because hundreds of thousands of purported trades affecting 5,500 accounts were recorded at impossible prices, as they were outside the range of reported trading prices on those days. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 117-22; Dubinsky Decl., Ex. Tabs 23-24.)

35. BLMIS could not have engaged in the split-strike conversion securities trades reported in customer statements in the 1990s-2008 because thousands of trades affecting over 3,700 accounts were recorded as having settled after hours or on weekends or holidays when the exchanges were closed, and thousands of trades were reported as having settled on days not within the standard required timeframe for settling transactions. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 22, 128-31; Dubinsky Decl., Exs. 25-27.)

36. BLMIS could not have engaged in the split-strike conversion securities trades reported in customer statements in the 1990s-2008 because dividends reflected on BLMIS customer statements as having been paid by the respective companies were never received by BLMIS on behalf of its investment advisory customers. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 160-68, Figure 25, Tables 5-7.)

Other Indicia of the Fraudulent Ponzi Scheme

37. Madoff perpetuated his fraud by creating false customer statements and fictitious documents. BLMIS customer statements false reported trades that were purportedly executed in a prior month's period but in actuality the trades were never recorded in that previous month's

statement (“prior month backdated trades”). (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 25, 205-11; Figures 41-43; Dubinsky Decl., Ex. 28; Sheehan Decl., Ex. 4, DiPascali Plea 47:16-19 (“On a regular basis, I used hindsight to file historical prices on stocks then I used those prices to post purchase of sales to customer accounts as if they had been executed in realtime.”); Sheehan Decl., Ex. 7, Kugel Plea 32:4-12 (“[B]eginning [in] the early '70s, until the collapse of BLMIS in December 2008, I helped create fake, backdated trades. I provided historical trade information to . . . others [BLMIS employees], which enabled them to create fake trades that, when included on the account statements and trade confirmations of Investment Advisory clients, gave the appearance of profitable trading when in fact no trading had actually occurred.”); Sheehan Decl., Ex. 2, Madoff Plea 27:9-16 (“To further cover up the fact that I had not executed trades on behalf of my investment advisory clients, I knowingly caused false trading confirmations and client account statements that reflected the bogus transactions and positions to be created and sent to clients purportedly involved in the split strike conversion strategy, as well as other individual clients I defrauded who believed they had invested in securities through me.”); Sheehan Decl., Ex. 8, Cotellessa-Pitz Plea 31:12-15 (“I made false and inaccurate entries in the books and records of BLMIS relating to transfers of funds from BLMIS’s Investment Advisory business.”)

38. The computer system for the investment advisory business — run from an IBM AS/400 with code originating from programs written in the 1970s and early-to-mid ‘80s—could not support a broker-dealer environment where actual trades were being executed because it did not link with any of the standard platforms used in a trading or investment environment, such as NASDAQ or the DTC, a subsidiary of DTCC. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 185-90, 192, Figures 33-34.)

39. The BLMIS investment advisory business' IBM's computer code allowed BLMIS to generate random trade orders used to create fictitious backdated trade histories for its customers. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 193-211, Figures 37-40; Dubinsky Decl., Exs. 28-31.)

40. The computer system for the BLMIS investment advisory business also contained software capable of generating fake DTC reports and fake DTC screen print-outs created to replicate official DTC inquiry look-ups, for which there was no legitimate business purpose. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 23, 143-53, Figures 16-24; Dubinsky Decl., Exs. 32-33; Sheehan Decl., Ex. 6, Lipkin Plea 32:2-10 ("I worked with Bernard L. Madoff Investment Securities' employees to deceive others. I created fake DTC reports in New York City. I created these documents knowingly and willingly. I knew that these documents were fake because they were created by me and not by the DTC. I created them to match documents given to me by other BLMIS employees. My understanding was that the fake DTC reports that were prepared were being given to the auditors to mislead them."))

41. BLMIS was "schtupping" certain customers' purported investment returns utilizing a process to provide those customers with extra fictitious trades that were rigged to generate additional fictitious gains in order to reach pre-determined rates of return thresholds. BLMIS employees followed DiPascali's handwritten instructions to manually increase the returns of certain accounts in order to meet these customers' expectations. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 24, 169-84, Figure 26-32, Table 8; Dubinsky Decl., Exs. 34-35; Sheehan Decl., Ex. 4, DiPascali Plea, 47: 19-22 ("On a regular basis I added fictitious trade data to account statements of certain clients to reflect the specific rate of . . . return that Bernie Madoff had directed for that client."))

42. BLMIS did not register as an Investment Adviser with the SEC when the Uniform Application for Investment Advisor Registration (“Form ADV”) became required in 1979, even though it had the requisite number of client accounts. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 212-13, Figure 14; Dubinsky Decl., Exs. 36-38.)

43. Once BLMIS registered as an investment advisor in 2006, Madoff made material misrepresentations in every report filed with the SEC regarding the number of accounts, assets under management, cash on hand, liabilities, and commissions. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 214-26, Table 9; Dubinsky Decl., Exs. 39-45; Sheehan Decl., Ex. 2, Madoff Plea 28:10-19 (“[W]hen I recently caused my firm in 2006 to register as an investment adviser with the SEC, I subsequently filed with the SEC a document called the form ADV uniform application for investment adviser registration. On this form I intentionally and falsely certified under penalty of perjury that Bernard L. Madoff Investment Securities had custody of my advisory clients' securities. That was not true, and I knew it when I completed and filed the form with the SEC . . .”); Sheehan Decl., Ex. 4, DiPascali Plea 49:16-21 (“Between September ’06 and December ’08 when the firm was also a registered as an investment adviser, it was required to make accurate books and records under the SEC rules. In January of ’06, together with others, I used data from the Internet to create fake trade blotters that were made and kept and produced for the SEC.”); Sheehan Decl., Ex. 7, Lipkin Plea 33: 22-34: 5 (The Court asked, “You indicated that the fake DTC reports that you were making were going to be given to the auditors in order to deceive auditors . . . to what persons or entities were the reports going to be made? Lipkin answered, “The SEC.”))

44. BLMIS used an accountant who was a customer of the Investment Advisory business, who was therefore not independent as required by SEC, AICPA, and New York law.

(Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 59, 231, 234; Dubinsky Decl., Exs. 46-49; Sheehan Decl., Ex. 5, Friehling Plea 35:1-4 (admitting that, while the investment advisory business's accountant, he placed all of his savings and pension fund contributions with BLMIS).)

45. BLMIS's accountant, David Friehling, pleaded guilty to several federal fraud charges for his involvement in the scheme. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 60, 227; Sheehan Decl., Ex. 5, Friehling Plea 5:3-4.)

There Is No Genuine Dispute that BLMIS Used Investment Advisory Customer's Deposits to Satisfy Other Customers' Redemption Requests.

46. BLMIS was "hopelessly" insolvent from at least December 11, 2002 because its debts were greater than the fair value of all its property. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 264-303, Appx. C.)

47. Hundreds of millions of dollars of investment advisory customer money was funneled to the other business units of BLMIS, and, by at least 2000, a significant percentage, if not a majority, of the "revenue" reported by Madoff's proprietary and market making businesses was actually customer money from the Ponzi scheme. (Collura Report ¶¶ 16, 19-20 and Ex. 4; Dubinsky Report ¶¶ 241-52, Table 10, Figure 45.)

48. BLMIS investment advisory customer funds were not used to engage in any securities transactions in furtherance of its purported investment strategies as set forth above, but instead, were deposited by BLMIS into a bank account at JPMorgan Chase Bank ("JPMorgan"), account number xxx-xxx703 (the "703 Account"). (Expert Report of Lisa M. Collura ("Collura Report") attached as Ex. 1 to the Declaration of Lisa M. Collura in Support of Trustee's Motion for Partial Summary Judgment ("Collura Decl.") ¶¶ 16, 19-20, Ex. 4; Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 241-52, Table 10, Figure 45; Sheehan Decl., Ex. 2, Madoff Plea 24:17-18 ("Instead, those funds were deposited in a bank account at Chase Manhattan Bank."); Sheehan

Decl., Ex. 4, DiPascali Plea 47:5-7 (“Most of the time the clients’ money just simply went into a bank account in New York that Bernie Madoff controlled.”))

49. BLMIS used the customer deposits in the 703 Account to fund two other BLMIS bank accounts, JPMorgan account #xxx-xxxxxx509 (the “509 Account”) and Bankers Trust account #xx-xxx-599 (the “BT Account”), which were almost exclusively used to fund redemption requests. (Collura Decl., Ex. 1, Collura Report ¶¶ 16, 24-26, 27, 29, Exs. 5-6.)

50. When BLMIS investment advisory customers submitted redemption requests seeking to withdraw funds they believed they held in their BLMIS accounts, BLMIS would use the commingled customer deposits held in the 703 Account, and often transferred to the 509 Account and/or the BT Account to satisfy their requests. (Dubinsky Decl., Ex. 1, Dubinsky Report ¶¶ 241-52, Table 10, Figure 45; Collura Decl., Ex. 1, Collura Report ¶¶ 16, 19-20, 23-29, Exhibit 4-6; Sheehan Decl., Ex. 2, Madoff Plea 24:18-22 (“When clients wished to receive the profits they believed they had earned with me or to redeem their principal, I used the money in the Chase Manhattan bank account that belonged to them or other clients to pay the requested funds”.)

There Is No Genuine Dispute that the Net Winner Defendants Received More Than \$83 Million in Transfers of Fictitious Profits from BLMIS Within The Two Year Period Prior to December 11, 2008

51. The Sterling Defendants consist of the Saul Katz (“Katz”), Fred Wilpon (“Wilpon”), other Sterling Equities partners, their family members, and related entities and trusts, who collectively held over the course of 25 years 185 investment advisory customer accounts that are the subject of this litigation. (Expert Report of Matthew B. Greenblatt (“Greenblatt Report”) attached as Ex. 1 to the Declaration of Matthew B. Greenblatt in Support of Trustee’s Motion for Partial Summary Judgment (“Greenblatt Decl.”) ¶¶ 64-65, Exhs. I-J.)

52. The Sterling Partners opened their first BLMIS investment advisory accounts in or around October 1985. (Greenblatt Decl., Ex. 1, Greenblatt Report ¶¶ 66, Ex. J; Sheehan Decl., Ex. 1, Answer ¶¶ 62, 69, 743.)

53. The Sterling Partners, their family members, and related entities each held interests in multiple IA accounts and in different capacities. (Sheehan Decl., Ex. 1, Answer ¶¶ 46, 63, 70, 1102.¹)

54. From October 1, 1985 to December 11, 2008, the Sterling Defendants engaged in 5,246 cash deposit and withdrawal transactions in the 185 accounts they held. (Collura Decl., Ex. 1, Collura Report ¶¶ 14, 31, Ex. 7; Greenblatt Decl., Ex. 1, Greenblatt Report ¶¶ 60, 63, Ex. J.)

55. All but 15 of the 5,246 cash deposit and withdrawal transactions related to the Sterling Defendants Accounts are reflected on BLMIS investment advisory customer statements, and the remaining 15 transactions which took place during the first eleven days of December 2008 were traced to BLMIS's investment advisory Checkbook File. (Greenblatt Decl., Ex. 1, Greenblatt Report ¶¶ 56-58, 60, Ex. J.)

56. For the time period December 1998 to December 2008 based on BLMIS bank record availability, FTI reconciled approximately 99% of the 225,000 cash transactions reflected on BLMIS customer statements. (Collura Decl., Ex. 1, Collura Report ¶¶ 14, 30-32, 54-56 and Exs. 7, 12; Greenblatt ¶ 62.)

¹ (See also Sheehan Decl., Ex. 2, Answer ¶¶ 4, 44, 90, 97, 104, 111, 118, 125, 132, 145, 155, 160, 203, 210, 215, 221, 226, 232, 250, 266, 274, 279, 284, 288, 293, 299, 307, 312, 320, 336, 342, 348, 357, 363, 370, 376, 382, 387, 392, 398, 403, 408, 413, 418, 424, 431, 436, 442, 447, 453, 461, 465, 469, 478, 484, 490, 496, 502, 508, 514, 520, 521, 527, 533, 539, 545, 551, 557, 563, 574, 580, 586, 592, 598, 604, 610, 616, 622, 628, 744.)

57. For the time period December 1998 to December 2008, FTI reconciled 99.4% of the Sterling Defendants' 5,246 cash transactions reflected on their BLMIS customer statements. (Collura Decl., Ex. 1, Collura Report ¶¶ 14, 30-32, 54-56 and Exs. 7, 12; Greenblatt ¶ 62.)

58. From October 1, 1985 to December 11, 2008, FTI reconciled 98 percent (or 5,147) of the Sterling Defendants' 5,246 cash transactions with available BLMIS bank records, customer files, and documents/data produced by the Sterling Defendants. (Collura Decl., Ex. 1, Collura Report ¶¶ 14, 31, 33, 37, 41, 54-56, Exs. 7, 12; Greenblatt Decl., Ex. 1, Greenblatt Report ¶¶ 63.) Due to the unavailability of relevant records, FTI was unable to complete the reconciliation process for the remaining 2% transactions, but there are no instances of the Sterling Defendants communicating to BLMIS any disagreement with respect to the accuracy of any cash deposit or withdrawal transaction reflected in their customer statements. (Collura Decl., Ex. 1, Collura Report ¶¶ 14, 41, 54-56 and Exs. 7, 12; Greenblatt Decl., Ex. 1, Greenblatt Report ¶ 63.)

59. FTI created chronological listings of all cash deposit and withdrawal transactions for every BLMIS customer account, including the accounts of the Sterling Defendants, from April 1, 1981 through December 11, 2008. (Collura Decl., Ex. 1, Collura Report ¶¶ 5, 11; Greenblatt Decl., Ex. 1, Greenblatt Report ¶ 10.) On an account-by-account, daily basis, FTI calculated every Investment Advisory customer account holder's principal balance (the "Principal Balance") from April 1, 1981 through December 11, 2008 based upon the following seven factors:

- (1) The initial investment of each customer, which for accounts opened after April 1, 1981 was either a cash deposit or an inter-account transfer;
- (2) Cash deposits made by each account holder in the form of checks or wire transfers, which were recorded on customer statements as cash deposits;
- (3) Non-cash deposits of principal, such as securities or bonds, made by customers;

- (4) Inter-account transfers “in” to one BLMIS account from another account in which no new funds entered or left BLMIS;
- (5) Cash withdrawals (or “redemptions”) made by each BLMIS holder and transferred via wire or check;
- (6) Inter-account transfers “out” of one BLMIS account to another account in which no new funds entered or left BLMIS; and
- (7) Payments made by BLMIS on behalf of an account holder to a third party for apparent legal obligations, such as to the Internal Revenue Service on behalf of foreign account holders.

(Greenblatt Decl., Ex. 1, Greenblatt Report ¶¶ 5, 16-37.)

60. “Core Account Documents” were relied upon to calculate Principal Balances for each Investment Advisory customer account, including: BLMIS customer statements from November 1978 through November 2008, supported by third party bank records for all periods that such records are available; Portfolio Management Reports generated by the BLMIS on a monthly basis; Portfolio Management Transaction Reports created by BLMIS for the time periods from January 1985 through December 1986 and from January 1990 through December 1995; Spiral bound notebooks containing handwritten transaction information related almost exclusively to cash receipts and cash disbursements for the time periods from April 1985 through September 1990 and from August 1991 through November 1994; and the “Checkbook File,” a data table within the investment advisory business’s IBM AS/400 computer system that contains manually-inputted cash receipts and cash disbursements, maintained for the time period from January 2000 through December 11, 2008. (Greenblatt Decl., Ex. 1, Greenblatt Report ¶¶ 38-59.)

61. Of the Sterling Defendants’ 185 accounts, 144 accounts were “net winners” of more than \$295 million in fictitious profits withdrawn over the life of the Sterling Defendants’ investment. (Greenblatt Decl., Ex. 1, Greenblatt Report ¶¶ 67-68, 72 and Exs. I & J.)

62. Within the Two-Year Period, the Two-Year Net Winner Defendants received transfers of \$83,309,162 in fictitious profits from 34 accounts. (Greenblatt Decl., Ex. 1, Greenblatt Report ¶¶ 67-68, 72, Exs. I-J; Greenblatt Decl., Ex. 2, Summary of Two-Year Net Winner Defendants, Accounts, and Transfers).

Dated: New York, New York
January 26, 2012

Respectfully submitted,

BAKER & HOSTETLER LLP

By: /s/ David J. Sheehan
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Email: dsheehan@bakerlaw.com

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