

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

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| <p>In re:</p> <p>BERNARD L. MADOFF INVESTMENT<br/>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<br/>Bernard L. Madoff Investment Securities LLC,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">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>                            |

Expert Report of Harrison J. Goldin  
Senior Managing Director  
Goldin Associates, LLC

November 22, 2011

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## I. Professional Qualifications

I am the Senior Managing Director of Goldin Associates, LLC (“Goldin”), a management consulting and financial advisory firm that specializes in underperforming companies and investments. I have over twenty years’ experience as a court-appointed trustee and as a corporate officer, consultant and financial advisor for diverse businesses. In those roles and in my prior role as Comptroller of The City of New York, I have been involved in retirement plan management for well over three decades.

Before founding Goldin, as Comptroller I was for 16 years the City’s chief financial officer; I managed tens of billions of dollars in invested pension assets and was a trustee of the City’s various retirement systems. My responsibilities included, *inter alia*, the selection and oversight of third party investment managers, asset custodians, pension consultants and other service providers. My duties also included assessing investment risks and returns, recommending allocations among asset classes, consulting regularly with the other pension fund trustees, rendering periodic reports on the status of invested assets and overseeing the work of both in-house and independent accountants, auditors and actuaries. In addition to the foregoing relating to defined benefit plans,<sup>1</sup> I was a trustee for defined contribution plans the City offered to certain of its employees.<sup>2</sup> I was voted the best comptroller in the United States by a panel of more than 100 experts selected by Crain’s Publications.

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<sup>1</sup> Defined benefit plans comprise aggregated pools of assets out of which obligations to plan participants are funded. These obligations generally involve specified benefits — such as a designated pension payment or the provision of healthcare insurance — without regard to the investment performance of the corpus. Typically, at regular intervals, the employer contributes designated amounts to the plan for the benefit of employees. While such plans may also involve contributions from employees, the plan sponsor (*i.e.*, the employer) is obligated to provide the promised benefits. With certain limitations, Federal insurance provided through the Pension Benefit Guaranty Corporation (“PBGC”) protects the benefits in defined benefit plans.

<sup>2</sup> Especially given the risks to employers in guaranteeing defined benefits, employers have in recent years increasingly offered retirement benefits to employees through defined contribution plans (including those commonly referred to as 401(k) plans). A distinctive feature of defined contribution plans is that they involve an individual account for each affected employee. A defined contribution plan does not promise a specific benefit level at retirement. Rather, as contributions and earnings accrue over time, the participant accumulates an account balance

At Goldin, I have been called on often to oversee retirement plans, whether as sponsor, trustee or otherwise, and to supervise their activities. For example, Thomas P. Grisea, then Chief Judge of the United States District Court for the Southern District of New York, appointed me sole trustee for the District 65 UAW Retirement Trust. In that capacity, I administered the plan and investigated claims against its former fiduciaries relating to the discharge of their obligations in connection with the plan. I have overseen retirement plans for the benefit of employees of at least ten plan sponsors. I have also been appointed a trustee or other fiduciary for numerous investment funds and investment managers, many of which managed assets for plans organized pursuant to ERISA. For example, as post-petition CEO of Refco, Inc., I oversaw and administered the company's investment activities and reviewed the conduct of prior and current fiduciaries. I was a founding Chair of the Council of Institutional Investors, the leading organization of pension fund managers in the United States, and a member of the Pension Managers Advisory Committee to the Board of Governors of the New York Stock Exchange.

I was for many years an adjunct professor of accounting at the Leonard N. Stern Graduate School of Business at New York University. I have also taught finance, as an adjunct professor of law, at Cardozo Law School and New York Law School and as a lecturer at Columbia Law School.

*My curriculum vitae* is attached as Exhibit A to this report.

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and directs its investment (either himself or through a fiduciary). Often, the employer, as plan sponsor, contributes to those accounts, in the form of matching grants or company stock. Common features of defined contribution plans are: employees can elect to defer receipt of a portion of their salary, which is instead contributed on their behalf to their respective accounts in the plan; employees' contributions are not taxed when they are contributed; taxes are levied as funds are withdrawn at retirement (except in the context of a so-called Roth 401(k)); contributions to an employee's individual account are invested on behalf of the employee, with varying levels of "self-direction" as respects investment options and allocations, depending on the characteristics of the plan; the employee ultimately receives the balance in his/her account (whether in a lump sum or through periodic payments), which is based on accumulated contributions, plus or minus investment gains or losses and fees; and benefits are not protected through the PBGC.

## II. Scope of Assignment

Baker & Hostetler LLP (“Counsel”), counsel to Irving H. Picard as Trustee (the “Trustee”) designated by the Securities Investors Protection Corporation for Bernard L. Madoff Investment Securities LLC (“BLMIS” or “Madoff”), retained Goldin Associates, LLC and asked that I review certain materials in connection with the above-captioned action. Counsel requested that I outline, based on my knowledge and experience, the standards, protocols and guidelines that are generally accepted among those responsible for administering third-party retirement plans (“Standards”). I have also been asked to render an opinion on whether the Sterling Fiduciaries<sup>3</sup> acted in a way that is consistent with those Standards in administering the Sterling Plan, particularly in connection with the investment option the Sterling Plan offered in Bernard L. Madoff Investment Securities LLC (“the” Madoff Option”). As part of that review and analysis, I have considered materials listed in Exhibit B hereto.<sup>4</sup>

I have reviewed, *inter alia*, certain filings, relevant material produced in discovery, published articles and research and relevant transcripts of depositions and examinations. For my work on this matter I am being compensated at an hourly rate of \$795, with time spent testifying and in preparation therefor billed at twice that rate. Goldin is also being compensated for the work of my staff — comprising various financial professionals — at regular hourly regular rates ranging from \$350 to \$685. No payment is conditioned on any conclusions expressed in this report.

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<sup>3</sup> “Sterling Fiduciaries” as used herein refers to Sterling Equities Associates (“Sterling”), the sponsor of the Sterling Equities Associates Employees Retirement Plan (the “Sterling Plan”), and the trustees of the Sterling Plan, Arthur Friedman and Michael Katz. At the Sterling Plan’s inception, Leonard Schreier, who later died, was also a trustee. *See* F. Wilpon Tr. 137:8. For a further discussion on fiduciary roles under the Sterling Plan, see *infra* at pp. 11-12.

<sup>4</sup> Counsel has informed me that discovery is ongoing. I reserve the right to supplement this report to reflect additional materials as they become available.

### III. Summary of Opinions

Standards have evolved and become accepted over time among those who, in a fiduciary capacity, administer third-party retirement plans (“Retirement Plan Managers”). Those Standards have been the subject of extensive comment in professional literature and can be found, among other places, in checklists and best-practices manuals.<sup>5</sup> It is on the basis of my well over three decades of experience in retirement plan asset management (“Retirement Plan Management”) that I render the opinions contained in this report, as summarized below.

- **The Sterling Fiduciaries departed from industry Standards by failing to conduct diligence on the Madoff Option.**

Retirement Plan Managers must understand, evaluate and communicate clearly to retirement plan participants the nature of the investment options they are offered and how given investment managers are compensated. Especially as to hedge-fund-like, opaque investments, this requires appropriate due diligence and consultation with experts. The Sterling Fiduciaries offered the Madoff Option without customary disclosures relating to performance, cost, risk and time horizon.

- **The Sterling Fiduciaries departed from industry Standards by failing to act in the face of warning signs.**

Pursuant to industry Standards (and their underlying principles discussed below), Retirement Plan Managers cannot be passive when confronted with credible concerns relating to the legitimacy of an investment option. In that event, they must perform additional diligence or discontinue the investment in question. Over the course of the Sterling Plan’s existence, unusual

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<sup>5</sup> See, e.g., “Report of the Working Group on Guidance in Selecting and Monitoring Service Providers,” U.S. Department of Labor, November 13, 1996, Section V; “Prudent Investment Practices: A Handbook for Investment Fiduciaries,” Foundation for Fiduciary Studies, 2003; “Prudent Practices for Investment Stewards: Defining a Global Fiduciary Standard of Excellence for Investment Stewards,” fi360.com, 2006.

circumstances relating to the Madoff Option emerged, including questions raised by financial institutions and business partners, as well as BLMIS's inability to provide customary reporting.

- **The Sterling Fiduciaries departed from industry Standards in the documentation and disclosure of the Sterling Plan's structure, administration and performance.**

Retirement Plan Managers must provide participants full, objective and reliable information as to the plans they administer. In my opinion, the Sterling Plan documents did not fully and clearly set forth the structure and operation of the Sterling Plan. The Sterling Plan documents provided inaccurate information regarding the administration of the plan, particularly regarding the Madoff Option, including respecting custodianship of assets and fees.

- **The Sterling Fiduciaries departed from industry Standards by compromising their independence and failing to make appropriate disclosure.**

A Retirement Plan Manager should avoid selecting any investment option as to which he/she may not be disinterested. Certainly, he/she must disclose any significant business or personal connections to a principal of such an investment option. The Sterling Fiduciaries had a longstanding business relationship and extensive dealings with Madoff, including investments by Madoff and his family in Sterling entities that were not fully disclosed to participants in accordance with applicable Standards.

- **The Sterling Fiduciaries departed from industry Standards by failing to promote the diversification of Sterling Plan assets.**

A significant consideration for Retirement Plan Managers is the appropriate diversification of plan assets. Heightened care in this regard is required where a Retirement Plan Manager himself/herself presents an investment option in which plan participants concentrate their assets excessively. That the Sterling Fiduciaries prepared information on the Madoff Option alone, and that thereafter up to 96% of plan assets were allocated to that option, suggests a departure from applicable Standards.

#### **IV. Principles Underlying Standards for Administration of Retirement Plans**

The core principles that underlie the aforementioned Standards can be summed up succinctly: diligence, transparency and independence (“Principles”). Retirement Plan Management Standards are not formalized in a body of canons; rather, they have evolved over time from the experiences and nuanced judgment and practices of professionals who have played that role.<sup>6</sup> In other words, such Standards arise from the commonly accepted application of the Principles, which I describe below.

##### **A. Diligence/Monitoring**

A fiduciary is responsible for exercising due diligence to ensure that a plan makes reasonable investments (or offers reasonable investment alternatives) and that those investments are properly managed, reported on and safeguarded. Among other things, diligence should focus on ensuring an appropriate level of risk in a particular portfolio. Accordingly, in conducting diligence, Retirement Plan Managers need to understand the risks, benefits and time horizons that different investment options involve and how those options relate to one another and to various investment objectives. That is inherent in the Standard emphasizing appropriate diversification.<sup>7</sup> In a self-directed plan, to encourage diversification and risk management,

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<sup>6</sup> See, e.g., Donald Stone, “Investment Selection and Monitoring: A Practical Approach to Best Practices,” Plan Sponsor Advisors, January 2005, pp. 2-3.

<sup>7</sup> See “Prudent Practices for Investment Stewards,” fi360.com, 2006, p. 10 (“Diversify assets to specific risk/return profile of client.”); Thomas R. Hoecker, “ERISA and the 401(k) Plan Fiduciary,” Snell & Wilmer L.L.P., 2006, pp. 3 & 17-18; Donald Stone, “Investment Selection and Monitoring: A Practical Approach To Best Practices,” Plan Sponsor Advisors, January 2005, pp. 5-6; Susan Stabile & Jayne Zanglein, “ERISA Fiduciary Litigation: A Three-Part Primer: Part II: What Duties Are Required of Fiduciaries?,” *Journal of Pension Planning and Compliance*, 2007, Section III: “Duty of Diversification;” “A Guide to Understanding Fiduciary Responsibility in 401(k) Plans,” OneAmerica Financial Partners, Inc., p. 4; Fred Reish & Joe Faucher, “The 401(k) Fiduciary’s Duty To Prudently Select a Broad Range of Investments,” *Journal of Pension Benefits*, Vol.7, No. 4, Summer 2000. The Sterling Fiduciaries were aware of the importance of diversification. See also Friedman Tr. 352:4-353:23 (testifying that “everybody understood the concept of diversifying and respected it and thought that it was the right thing”); Stamos Tr. 153:25-154:5 (testifying that he stressed the importance of diversification to Saul Katz); D. Katz Tr. 31:10-32:25 (noting that he had been “screaming” for diversification as respects the assets of the Sterling Fiduciaries and their affiliates).



Retirement Plan Managers should give participants access to materials that explain and describe diversification and its relevance to their investment options.

## **1. Safeguarding Plan Assets**

Another critical aspect of appropriate diligence is the safeguarding of plan assets. A Retirement Plan Manager who has an intimation of impropriety by anyone with access to those assets, such as, for example, a co-fiduciary, must act swiftly and decisively to safeguard the assets. In my experience, in such circumstances industry Standards require additional diligence to address the concern, the removal of a service provider or withdrawing the assets invested with the manager involved.<sup>8</sup>

## **2. Expert Advice**

A fiduciary who is not sufficiently knowledgeable or skilled in one or another aspect of his/her responsibilities must procure the requisite knowledge or skill — either directly or by hiring one or more qualified advisors — so he/she can faithfully administer the plan or invest (or oversee the investment of) its assets consistent with applicable Standards.<sup>9</sup> The Standards obtain universally, regardless of the size of a plan. A Retirement Plan Manager on a limited budget can outsource professional services relatively inexpensively, *i.e.*, accessing an investment platform that is highly transparent, disinterested as respects the plan and vested with requisite expertise to assist in forming, administering and reporting on the plan. Indeed, in my experience, it is

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<sup>8</sup> James O. Wood, "Where Have All the Good Fiduciaries Gone?," *Benefits Quarterly*, 1<sup>st</sup> Quarter 1998, p. 38 ("[O]nce a fiduciary knows of a co-fiduciary breach, this fiduciary is obligated to act and remedy the breach.").

<sup>9</sup> "Prudent Investment Practices: A Handbook for Investment Fiduciaries," Foundation for Fiduciary Studies, 2003, p. 17, Practice No. 1.4 ("A fiduciary is required to prudently manage investment decisions and should seek assistance from outside professionals such as investment advisors/consultants and money managers if the fiduciary lacks the requisite knowledge...."); Fred Reish, "The Fiduciary Safe Harbor for Investment Managers," Reish & Reicher, 2010, Introduction Section ("When fiduciaries lack the technical knowledge to properly select the investments, they are required to hire knowledgeable advisors."); Susan Stabile & Jayne Zanglein, "ERISA Fiduciary Litigation: A Three-Part Primer: Part II: What Duties Are Required of Fiduciaries?," *Journal of Pension Planning and Compliance*, 2007, 33.3, Section II.B: "Duty to Seek Advice;" Donald Stone, "Investment Selection and Monitoring: A Practical Approach To Best Practices," Plan Sponsor Advisors, January 2005, p. 4.

common, particularly in smaller, self-directed plans, for Retirement Plan Managers to make investment options available to plan participants through (and with the advice of) a well-recognized financial institution platform, such as Fidelity or Vanguard (or in this case, Manufacturers and Traders Trust Co. (“M&T”)). Such institutional platforms have the expertise and resources necessary to help Retirement Plan Managers (particularly those who are not experts in the industry) comply with industry Standards.

When I first assumed responsibility for the investment and management of retirement assets upon my election as New York City Comptroller in 1973, I did not have experience with Retirement Plan Management. Accordingly, to ensure that my decisions regarding Retirement Plan Management were consistent with industry Standards, I sought the counsel of various professionals. Over time, with the assistance of my staff and professional Retirement Plan Managers, I developed familiarity with various factors that are critical to proper Retirement Plan Management, including the essential role of diversification of plan assets in risk management. Over a 16 year period I acquired expertise in that regard.<sup>10</sup>

### **3. Diligencing Opaque Investments**

It is not customary to offer an opaque hedge-fund-like investment option in a self-directed defined contribution plan. If a Retirement Plan Manager intends to deviate from prevailing practice by including such an investment option in a plan, particularly one that is self-directed, substantial diligence is indicated, both before doing so and on an ongoing basis. It is only through independent diligence that the Retirement Plan Manager can become satisfied with the *bona fides* of the investment option. Absent such confidence, a responsible Retirement Plan Manager must avoid the option or divest from it.

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<sup>10</sup> It was in part to promote best practices for institutional asset managers, including Retirement Plan Managers, that I co-founded the Council of Institutional Investors.

## **B. Transparency**

Transparency relating to the activities of Retirement Plan Managers involves both how plans are organized and administered (plan transparency), on the one hand, and how plan assets are invested (investment transparency), on the other hand. Transparency is critical in Retirement Plan Management because plan participants must have access to clear, complete and accurate information about the plan and its investments, particularly so they can rely on their fiduciaries.

### **1. Plan Transparency**

As to plan transparency, documentation relating to plan formation, administration and reporting must be accurate and clear. A Retirement Plan Manager has to adhere to the policies, procedures and requirements that are set forth in such documents, provided they do not cause him/her to act in a way that is inconsistent with his/her responsibilities as a fiduciary.<sup>11</sup>

Participants should be able to rely on the accuracy and clarity of the written materials they receive and to use them to hold Retirement Plan Managers accountable.

### **2. Investment Transparency**

As to investment transparency, when investing plan assets or selecting a menu of investment options for a self-directed plan (a “Plan Menu”), a Retirement Plan Manager must review each investment option diligently to ensure that it is appropriate.<sup>12</sup> In part because this can be resource intensive for hedge-fund-like investments, investments of this kind are generally not offered in relatively smaller, self-directed plans.<sup>13</sup> The Standard for Retirement Plan

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<sup>11</sup> “Prudent Practices for Investment Stewards,” fi360.com, 2006, p. 15, Practice S-1.1 (“Investments are managed in accordance with all applicable laws, trust documents, and written investment policy statements (IPS).”).

<sup>12</sup> “Prudent Practices for Investment Stewards,” fi360.com, 2006, p. 34, Practice S-3.1 (discussing due diligence requirements); Donald Stone, “Investment Selection and Monitoring: A Practical Approach To Best Practices,” Plan Sponsor Advisors, January 2005, pp. 4-5; Martin J. Burke, “Fiduciaries Have a Duty to Monitor and Remove Investments if they Prove Unsuitable for the Plan,” *401(k) Advisor*, May 2008.

<sup>13</sup> See Jon Lukomnik, “Why Institutions Don’t Allocate To Hedge Funds,” *AIMA Journal*, 1999 (stressing that fiduciaries must understand the investments they make); “Prudent Practices for Investment Stewards,” fi360.com,

Managers as to reasonable diligence is ongoing, requiring not only initial diligence, but also the regular monitoring of investment alternatives by Retirement Plan Managers and/or their staffs or outside professionals retained for this purpose. As Comptroller, I hired independent third parties to conduct diligence on investment options and directed my staff to review and monitor such options on a regular basis. Plans with limited resources available for diligence and monitoring can efficiently and inexpensively satisfy applicable Standards, and the Principles that underly them, by utilizing investment platforms offered by large institutions that are independent, highly transparent, subject to extensive market scrutiny and regulated robustly.

### **C. Independence**

Retirement Plan Managers must avoid conflicts of interest, or the appearance of such conflicts, because they can interfere with their independent investment judgment.<sup>14</sup> The appearance of conflicts can undermine the faith of participants in the independence of the Retirement Plan Managers on whom they rely.

An important priority for me as a Retirement Plan Manager has been to ensure that neither I nor other fiduciaries I selected or with whom I worked had any such conflict. If there is the prospect of a conflict, it must be disclosed, especially when it relates in any way to a decision as to the investment or safety of plan assets. When as New York City Comptroller I oversaw the selection of investment managers, the process involved vetting prospective managers for potential conflicts of interest.

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2006, p. 28, Criterion 2.5.1 (“Individuals responsible for implementing and monitoring investment decisions have the time, inclination, and knowledge to do so effectively.”).

<sup>14</sup> “Prudent Practices for Investment Stewards,” fi360.com, 2006, p. 19, Practice S-1.3 (describing the importance of avoiding conflicts or the appearance thereof).

## V. The Sterling Fiduciaries and the Sterling Plan

A defined contribution plan like the Sterling Plan is typically initiated by an employer (who thereby becomes the plan sponsor) to provide a retirement benefit to employees. The plan sponsor, usually with expert assistance, initiates the preparation of basic plan documents and designates plan trustees; together with the sponsor, the trustees are the plan's principal fiduciaries.<sup>15</sup> The principal fiduciaries often delegate certain of their fiduciary obligations to other professionals, who are also fiduciaries, such as a plan administrator, a plan record keeper and a custodian of plan assets.

Sterling, as plan sponsor, formed the Sterling Plan on May 1, 1997. At inception, the Sterling Plan covered 191 employees<sup>16</sup> and Sterling played a number of key roles and assumed various responsibilities relating to oversight and administration. For instance, according to plan documents, in addition to being the plan sponsor, Sterling was also the plan administrator and the designated fiduciary for ERISA purposes.<sup>17</sup> Those documents designated Arthur Friedman and Michael Katz,<sup>18</sup> the Sterling Trustees, with responsibility "for the investment, administration and safekeeping of assets" of the Sterling Plan.<sup>19</sup>

Pursuant to the Sterling Plan documents, the Sterling Fiduciaries (Sterling and the Sterling Trustees) were to perform such critical plan functions as (i) selecting the investment options to be made available to employees and reviewing the performance of those investment options; (ii) hiring professionals to aid in administration; (iii) communicating with employees as

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<sup>15</sup> See David A. Hildebrandt & Richard Libert, "A Primer on ERISA Fiduciary Responsibilities, DOL Weighs in on Enron Retirement Plan Litigation," *Defined Contributions Insight Magazine*, September/October 2002, pp. 1-2 ("Power to appoint a fiduciary confers fiduciary status. Persons who have the power to appoint, retain and remove plan fiduciaries are themselves plan fiduciaries."); "Meeting Your Fiduciary Responsibilities," U.S. Department of Labor, October 2010, pp. 1-2.

<sup>16</sup> STESAA0017390 at STESAA0017415.

<sup>17</sup> STESAA0011052 at STESAA0011075 and STESAA0011143.

<sup>18</sup> STESAA0013065 at STESAA0013070; STESAA0011665 at STESAA0011668. As noted above, the third initial trustee, Leonard Schreier, died. See *supra* n.3.

<sup>19</sup> STESAA0011369 at STESAA0011476.

to their participation and benefits; (iv) maintaining Sterling Plan records; and (v) reviewing and approving financial reports.<sup>20</sup> According to plan documents, the designated custodian was M&T,<sup>21</sup> which was to (i) receive contributions; (ii) make distributions; and (iii) maintain relevant records.<sup>22</sup>

The Sterling Fiduciaries followed customary industry practice by hiring a reputable financial institution (M&T) to provide essentially a semi-customized 401(k) plan investment platform, complete with expert advice on plan formation (including prototype documents), the selection of investments and plan management. In addition, as is common, the Sterling Fiduciaries hired a third party, EBS Benefit Solutions (“EBS”) (during the relevant time period, it also apparently went by the names Excellus Benefit Services and Empire Professional Services), to provide record keeping services. EBS’s responsibilities included assembling information on the performance of the investment options and preparing reports for distribution to participants.<sup>23</sup> EBS maintained records reflecting each participant’s investment allocations<sup>24</sup> and acted as an intermediary between Sterling and M&T on the transfer of funds.<sup>25</sup>

Over time, the assets in the Sterling Plan grew. By December 11, 2008, total plan investments were valued at \$24.8 million, with \$23.7 million, or 96%, invested in the Madoff Option.<sup>26</sup>

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<sup>20</sup> STESAA0011052 at STESAA0011143.

<sup>21</sup> STESAA0013065 at STESAA0013070; Friedman Tr. p. 524:16-25.

<sup>22</sup> STESAA0011369 at STESAA0011482.

<sup>23</sup> *See, e.g.*, STESAA0021235.

<sup>24</sup> *See, e.g.*, STESAA0021237.

<sup>25</sup> *See, e.g.*, STESAA0015651 at STESAA0015656.

<sup>26</sup> STESAA0015657.

## VI. Opinions

### A. The Sterling Fiduciaries departed from industry Standards by failing to conduct diligence on the Madoff Option.

The Sterling Fiduciaries departed from applicable Standards and Principles because they offered participants in a self-directed plan an opaque, hedge-fund-like investment option (subject to minimal regulation), without conducting due diligence.<sup>27</sup> Self-directed defined contribution plans do not in the main include hedge-fund-like alternatives in their Plan Menu options. But where a Retirement Plan Manager offers such an option, he/she must understand the strategy of the investment option fully and convey that information (in understandable terms), covering such matters as investment strategy, risk, returns, time horizons and costs, to plan participants.

The Sterling Fiduciaries were advised by their 401(k) consultant that the Madoff Option was “unusual” for a 401(k) plan because there was “little information” and no “independent analysis” was available.<sup>28</sup> As discussed above, when a Retirement Plan Manager lacks requisite expertise, he/she must seek independent expert advice to ensure that he/she understands the investment options fully and can convey essential information about them to plan participants. The Sterling Fiduciaries failed to diligence the Madoff Option in connection with offering it as part of the Sterling Plan<sup>29</sup> and sought independent expert assistance from M&T only as to the Sterling Plan investment options offered through the M&T investment platform (“M&T Options”). Plan fiduciaries who offer hedge-fund-like options, such as BLMIS, must conduct due diligence and monitoring (either themselves or through an independent, qualified third party)

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<sup>27</sup> Although the BLMIS investment option was not a “hedge fund” in the traditional sense (it was set up as a brokerage account over which the investment advisor had discretion to make trades), certain features (such as the absence of meaningful reporting and the asserted use of complex hedging strategies) made it akin to a hedge fund *vis-à-vis* Retirement Plan Management. Indeed, Wilpon testified that “there was a known factor in the community that Bernie was one of the top hedge fund investors in the world.” F. Wilpon Tr. 144:8-10.

<sup>28</sup> STESBC0002006.

<sup>29</sup> See Friedman Tr. 570:5-24.

to ensure that the investment is appropriate for the plan, and, where there is self-direction, to educate plan participants.<sup>30</sup>

In my experience, investments of this kind are understandably more prevalent in large plans — such as major defined benefit (pension) plans — with billions of dollars invested. Even so, only about a quarter of defined benefit (pension) plans (which tend to be much larger than the Sterling Plan and have a scale that warrants the expenditure of significant resources for independent diligence of complex investment alternatives) allocated plan assets to hedge funds in 2008.<sup>31</sup> Tellingly, in 2000, scarcely 1% of such (pension) plans invested in hedge funds. Although I cannot point to specific data on the subject, my informed view is that the proportion of defined contribution plans — particularly small, participant-directed defined contribution plans — offering such options in 2000 would have been closer to 0% than 1%.

The Sterling Fiduciaries have said they thought Madoff was compensated by “somehow” taking commissions, but they did not know the particulars.<sup>32</sup> A critical function of Retirement Plan Managers is to gather information on fees charged to a plan, to make sure they are fair and reasonable and to communicate that information accurately to plan participants. The Sterling Fiduciaries gave plan participants the BLMIS Information Page (defined below), which represented that the Madoff Option involved no fees.<sup>33</sup> In my opinion, the failure to diligence and disclose the fee structure deviated from applicable Standards and Principles.

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<sup>30</sup> Leslie Rahl & Stephen Rahl, “Institutionalization of Hedge Funds,” *Hedge Fund Strategies: A Global Outlook*, Fall 2002, p.70 (“[I]n order to invest in hedge funds, the institutional investor needs increased transparency in order to satisfy prudent main [sic] considerations for risk controls with regard to individual investments....”). See also Jon Lukomnik, “Street Sense: Doing Diligence,” *Plan Sponsor*, July 2003, p. 1 (“[S]ince so many hedge funds are smaller shops, dependent upon one or two people, the character and motivation of those key employees is crucial. In such situations, character affects everything from how the portfolio will be managed during times of stress, to the likelihood of fraud. Combine this with the general lower level of regulation of hedge funds, and a number of hedge fund investors go so far as to hire private investigators to examine the principals of a hedge fund before investing.”).

<sup>31</sup> Vincent Bouvatier & Sandra Rigot, “Pension Funds’ Allocations to Hedge Funds: An Empirical Analysis of U.S. and Canadian Defined Benefit Plans,” SSRN.com, January 2011, p. 24 (in progress).

<sup>32</sup> Peskin Tr. 296:7-12 (explaining that “I always thought his fee was in the buy/sell somehow, somewhere. Not a fee; he just made, you know, a few cents on every share”); see also Friedman Tr. 146:9-24.

<sup>33</sup> STESAA0019533 at STESAA0019541.



**B. The Sterling Fiduciaries departed from industry Standards by failing to act in the face of warning signs.**

As discussed above, a critical aspect of Retirement Plan Management diligence is taking steps necessary to understand plan investments and safeguard plan assets. The Sterling Fiduciaries stated that they did not conduct due diligence in anticipation of offering plan participants the Madoff Option.<sup>34</sup> In my opinion, various warning signs warranted enhanced diligence on the Madoff Option.

For instance, the Sterling Fiduciaries offered BLMIS as an investment option even though BLMIS, a supposedly technically advanced firm trading exclusively in highly liquid securities,<sup>35</sup> did not provide daily performance information and at times seemed to be unable to distinguish between realized and unrealized gains;<sup>36</sup> in my experience, this type of information should have been readily available. Given the foregoing, the need for diligence was signaled loudly by the incongruous claims of BLMIS that although it was a high-tech operation and invested in relatively liquid securities that could be priced readily, it could not provide electronic account information.<sup>37</sup>

According to Friedman, more than one potential custodian refused to do business with the Sterling Plan because of the inclusion of the Madoff Option.<sup>38</sup> Even M&T restricted its role as custodian solely to assets connected to the M&T Options.<sup>39</sup> In my opinion, that warning sign

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<sup>34</sup> See Friedman Tr. 570:5-24 (because the Sterling Fiduciaries had invested much of their own money with Madoff successfully, “[i]t would seem a bit strange or unnecessary to do further diligence”). Sometime in the 1980s Friedman attempted to understand how BLMIS achieved its returns by trying to replicate them and failed. Friedman Tr. 144:14-146:8; 163:1-13. A similar unsuccessful attempt was made around 2005. Rongione Tr. 101:5-103:5.

<sup>35</sup> Compare STESAA0021018 at STESAA00210123 (1996 Madoff “company profile” noting that “Madoff Securities’ computerized transaction processing means that the firm can customize client reports and deliver them electronically in whatever format best meets the needs of customers”), with STESAO0003000 (2008 email from Sterling’s Cynthia Bernstein stating that Madoff does not provide electronic statements).

<sup>36</sup> See Friedman Tr. 555:18-19; STESAA0021235 at STESAA0021236.

<sup>37</sup> STESAA0021018-STESAA0021026; STESAA0019533 at STESAA0019541.

<sup>38</sup> Friedman Tr. 554:13-555:3.

<sup>39</sup> STESBC0001532; see also STESBC0001698 (2004 email from EBS employee inquiring “who executes the trades for the Madoff fund and who acts as custodian (holds the assets)?” in connection with an effort by EBS to provide daily reporting).

should have alerted the Sterling Fiduciaries to investigate the irregularities of the Madoff Option. I know of no other instance in which potential custodians declined an otherwise profitable business opportunity because of concerns about a Retirement Plan Manager's inclusion of a single investment option. Retirement Plan Managers acting in accordance with industry Standards and Principles would be concerned by these facts and recognize the need for great caution, leading to further diligence and potential divestment from the investment that provoked the concern.

Over the course of the Sterling Plan's existence, the Sterling Fiduciaries were told that because of Madoff's lack of transparency, BLMIS could not meet the due diligence tests applied by their own hedge fund, Sterling Stamos, and a sophisticated co-investor in that hedge fund, Merrill Lynch.<sup>40</sup> Friedman also learned that a business partner procured an insurance policy to cover fraud respecting his Madoff investment; Friedman and other Sterling principals considered doing the same.<sup>41</sup>

Faced with the unusual circumstances described above, a Retirement Plan Manager acting in accordance with industry Standards and Principles would conduct further diligence or divest from the fund at issue. Friedman testified that neither he nor Michael Katz conducted any diligence in offering the Madoff Option because it would have been "a bit strange or unnecessary," given the Sterling Fiduciaries' personal investment history with Madoff.<sup>42</sup> Such reliance on personal investment history was, in my opinion, an insufficient justification for failing to conduct the diligence that would have accorded with industry Standards.

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<sup>40</sup> See Stamos Tr. 201:22-203:24, 211:20-212:25, 226:18-21; Furthermore, articles disseminated to all Sterling partners questioned the *bona fides* of Madoff's methods. See STESAP0000203, STESAP0000204-STESAP0000208. See also, e.g., Stamos Tr. 158:15-161:17; Friedman Tr. 156:22-157:7, 579:5-23, 571:21-23 (acknowledging having read "some negative things" about Madoff).

<sup>41</sup> STESAA0021085-STESAA0021086; STESAA0021087- STESAA0021088; STESAP0000138; Friedman Tr. 419:24-420:12, 422:6-426:17, 427:25-428:13, 429:1-431:10.

<sup>42</sup> Friedman Tr. 570:5-24.

**C. The Sterling Fiduciaries departed from industry Standards in the documentation and disclosure of the Sterling Plan’s structure, administration and performance.**

The Sterling Plan provided for self-direction in the allocation of assets, meaning that participants were responsible for selecting their own investment options from the Plan Menu and determining how much of their account assets to allocate to each selected option. In that connection, the Sterling Fiduciaries were required to give participants a description of each available investment option, including: (i) investment objectives; (ii) risk and return characteristics; (iii) diversification of assets within the investment option; and (iv) costs. Pursuant to industry Standards and Principles, such disclosure must be complete, clear and accurate; the Sterling Fiduciaries were deficient in this regard.

**1. Failure to disclose that BLMIS was the putative custodian**

Custody is more than just a ministerial task; the safeguarding of plan assets is a critical function, whose faithful discharge is central to the implementation of industry Standards.<sup>43</sup> Retirement Plan Managers must fully and clearly disclose to plan participants applicable custody arrangements. While the Sterling Plan documents indicate that M&T was the custodian for Sterling Plan assets,<sup>44</sup> M&T was not in fact the custodian for over 90% of Sterling Plan money, which was invested in the Madoff Option.<sup>45</sup>

The M&T Options were listed on a document, entitled “ERISA Investment Policy Statement,”<sup>46</sup> which set forth ten mutual funds available through the M&T investment platform. Five were selected for the Sterling Plan: Vision Treasury MM, Pimco Total Return, Dodge and

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<sup>43</sup> See Tim Hatton, “The New Fiduciary Standard: the 27 Prudent Investment Practices for Financial Advisors, Trustees and Plan Sponsors,” Bloomberg Press, 2005, p.79.

<sup>44</sup> STESAA0013065 at STESAA0013070.

<sup>45</sup> STESAA0015657.

<sup>46</sup> STESAA0019901-STESAA0019903.

Cox Balanced, Vanguard’s Windsor II and Vanguard Index Trust 500 Portfolio.<sup>47</sup> In a blank space following the ten potential M&T Options, “Madoff” was written in by hand, as shown below:

|   |                                    |   |                                    |    |                             |
|---|------------------------------------|---|------------------------------------|----|-----------------------------|
| ① | Vision Treasury MM                 | ⑤ | Pimco Total Return                 | 9  | Brandywine                  |
| 2 | Vision MM                          | ⑥ | Dodge and Cox Balanced             | 10 | T. Rowe Price International |
| 3 | LaSalle Income Plus                | ⑦ | Vanguard’s Windsor II              | ⑪  | Madoff                      |
| 4 | Federated Intermediate Gov’t Trust | ⑧ | Vanguard Index Trust 500 Portfolio |    |                             |

Source: STESAA0015651 at STESAA0015654<sup>48</sup>

M&T had no involvement in the Madoff Option; indeed, in correspondence with the Sterling Fiduciaries, it stated that it acted in “no capacity” respecting the Madoff Option.<sup>49</sup> The Sterling Plan documents I have reviewed do not so indicate, nor do they disclose the “unusual” nature of the Madoff Option.<sup>50</sup> Rather, departing from industry Standards and Principles, those documents simply represent that M&T was the plan custodian, without mentioning that BLMIS was the presumptive custodian under the Madoff Option.<sup>51</sup>

Significantly, Sterling Plan audited financial statements divided the Sterling Plan’s investments into two categories: “Bernard L. Madoff Investment – Discretionary Brokerage Account” and “Manufacturers and Traders Trust Company, Custodian.”<sup>52</sup> This implied that the Madoff Option was effectively administered and reported on separately from the M&T Options and that all Sterling Plan assets were not held in common custody. Notably, in addition, the

<sup>47</sup> The available M&T Options were not changed until 2008, when the Sterling Plan also began to offer (also through M&T) ten target-date funds managed by AllianceBernstein. *See, e.g.*, STESAA0020280 at STESAA0020322.

<sup>48</sup> Another page in that document shows handwritten amendments to the typewritten terms on which M&T would charge management fees in order to accommodate the Madoff Option. *See* STESAA0015651.

<sup>49</sup> STESBC0001532.

<sup>50</sup> STESBC0002006.

<sup>51</sup> STESAA0013065 at STESAA0013070.

<sup>52</sup> *See, e.g.*, STESAA0007805 at STESAA0007824.

Sterling Plan year-end audited financial statements also indicated that Madoff Option funds were invested in either U.S. Treasury bills or a Fidelity money market fund. Yet nothing in the description on the BLMIS Information Page (defined below) or, for that matter, the notes to the audited financial statements (which also describe the stocks and options in which BLMIS supposedly invested) make any mention of periodic account liquidations into money market funds or Treasuries.

## **2. Failure to disclose adequately the nature of the Madoff Option**

Participants in the Sterling Plan were apparently given a pamphlet that provided information about each available investment option (how often such pamphlets were distributed is not clear).<sup>53</sup> The versions of the pamphlet I have seen describe each of the M&T Options on a separate page, with an additional page describing the Madoff Option (“BLMIS Information Page”).<sup>54</sup> Each page that describes one of the M&T Options (collectively, “M&T Information Pages”) includes the M&T logo at the top left and as to that fund explains (i) its investment objective; (ii) the types of securities in which it invested; and (iii) its returns over the past one, three and five year periods. Each of these M&T Information Pages also presents a comparison of the recent returns of the M&T Option described on that page to a relevant index and cautions that past results do not indicate future performance. These pages indicate that the source of the information about the M&T Options is Morningstar and provide guidance on how to look up current fund prices in *The Wall Street Journal*. The Sterling Fiduciaries utilized these M&T Information Pages, supplied by M&T, to convey information to Sterling Plan participants on the M&T Options. As Friedman testified, “The people that drew them up, supplied them, wrote up the description and history were the experts that I was relying on to supply the options and a

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<sup>53</sup> See, e.g., STESAA0019533- STESAA0019542.

<sup>54</sup> STESAF0129229 at STESAF0129230; STESAG0000400-STESAG0000401; STESAG0003216-STESAG0003218.

description of the options.”<sup>55</sup> As I noted above, such reliance on an expert is prevalent and can be consistent with Retirement Plan Management Standards and Principles.

The pamphlet also contains the BLMIS Information Page, which bears no M&T logo, but is nonetheless inserted before the back page (which contains the M&T logo). The BLMIS Information Page, unlike the M&T Information Pages, was drafted by the Sterling Fiduciaries. As Friedman explained, the Sterling Fiduciaries “added Madoff” to the pamphlet because “M&T didn’t know anything about Madoff.”<sup>56</sup> The BLMIS Information Page describes the BLMIS strategy as the purchase of S&P 100 stocks and the purchase and sale of related options. It sets forth the average and minimum returns the Sterling partners had enjoyed in their personal BLMIS accounts — calculated by Friedman<sup>57</sup> — over the past ten years, but contains no information on the overall performance of Madoff funds generally or a comparison to a benchmark or index. Unlike the M&T Information Pages, the BLMIS Information Page contains only a narrative,<sup>58</sup> stating, *inter alia*, that no management fees or expenses were associated with the Madoff Option. Noting that BLMIS aimed to minimize risk, the BLMIS Information Page indicates that BLMIS employs a sophisticated investment strategy that, like all investments in equities, entails some degree of risk.<sup>59</sup> In my opinion, this cursory, incomplete statement about risk by the Sterling Fiduciaries departed from Retirement Plan Management Standards and Principles, particularly respecting a hedge-fund-like investment option.<sup>60</sup>

Below are samples of the M&T Information Pages and of the BLMIS Information Page.

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<sup>55</sup> Friedman Tr. 536:12-537:15.

<sup>56</sup> Friedman Tr. 541:17-542:7, 543:4-7 (“[T]hey wouldn’t know how to describe Madoff. We were supplying that. . .”).

<sup>57</sup> Friedman Tr. 531:14-532:18.

<sup>58</sup> STESAA0019533 at STESAA0019541; Friedman Tr. 543:21-544:10.

<sup>59</sup> STESAA0019533 at STESAA0019541.

<sup>60</sup> The BLMIS Information Page apparently resulted from a collaborative effort between the Sterling Fiduciaries and BLMIS. Successive drafts show the evolution of the BLMIS Information Page, with the Sterling Fiduciaries apparently seeking to arrive at a description satisfactory to Madoff. *See, e.g.*, STESAF0129229-STESAF0129230; STESAG0000400-STESAG0000401; STESAG0003216-STESAG0003218.



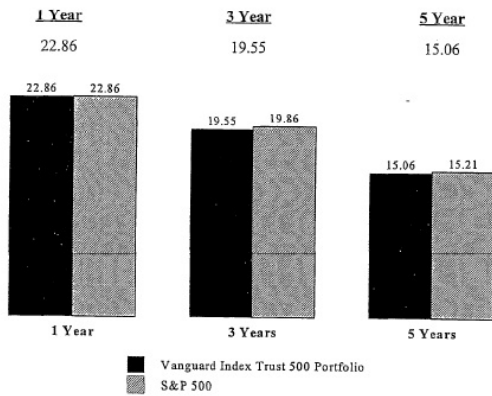
M&T Bank  
Trust & Investment Services

### The S&P Index 500 Fund Selection

#### Vanguard Index Trust 500 Portfolio Fund

The Vanguard Index Trust 500 Portfolio Fund is a no-load mutual fund which seeks to duplicate the results of the Standard & Pooors 500 Composite Stock Price Index. The portfolio holds the same 500 widely held market capitalization common stocks (in approximately the same proportions) as represented in the Index. The advisor utilizes a passive or indexing investment approach. The portfolio will remain fully invested in the common stocks that comprise the Standard & Pooors 500 Composite Stock Price Index. The stocks of the Standard & Pooors 500 Composite Stock Index represent, as of 12/31/95, approximately 70% of the market value of all United States common stock. The Vanguard Index Trust 500 Portfolio Fund had a 8.35% total return for the fourth quarter.

Total Annualized Return for Period Ending 12/31/96



*\*Past investment results of this fund are not indicative of future performance.  
Unit Value as of 12/31/96: \$69.16  
Source: Morningstar Principia™ for Mutual Funds  
Fund price can be located daily in the Mutual Fund Quotations section of the  
Wall Street Journal under Vanguard Group. The abbreviation is: Idx500.*

Source: STESAA0019533 at STESAA0019538

### DISCRETIONARY BROKERAGE ACCOUNT AT BERNARD L. MADOFF INVESTMENT SECURITIES

The strategy of Bernard L. Madoff Investment Securities (Madoff) is to invest in the top 50 of the Standard & Poor 100 stocks. At any given time, the portfolio will consist of approximately 35 of these 50 stocks. S&P 100 index puts (options to sell at a fixed price) are purchased as a hedge. The puts are designed to reduce the risk of loss. S&P index calls (options to buy at a fixed price) are sold at the same time. Although calls limit the upside potential, selling calls are designed to provide additional funds to enhance the overall yield on the hedged portfolio. The objective of the strategy is to maintain a desirable annual yield while minimizing the potential for loss.

The partners of Sterling Equities have been investing with Madoff since October 1985. Their returns in any year have never averaged lower than 16.5% and have averaged in excess of 19% during this eleven year period. Their average return on this strategy was 18.3% for 1996. There are no management fees or expenses with regard to this mode of investment. The portfolio is priced daily and statements are available monthly. An employee report is furnished quarterly and employees are able to move in and out of this investment vehicle each quarter.

All of the funds of the employees who elect this mode of investment will be placed in an account at Madoff entitled "Sterling Equities Employees Retirement Plan."

As in all investments in equities, there is some degree of risk with this strategy. It should be understood that this is a sophisticated investment strategy concerning which employees will be given an opportunity to ask questions.

Source: STESAA0019533 at STESAA0019541

The contrast between the M&T Information Pages and the BLMIS Information Page is stark. Indeed, around ten years into the Sterling Plan, the Sterling Fiduciaries caused the BLMIS Information Page to be amended after receiving advice on mitigating potential "fiduciary liability" from a 401(k) consultant.<sup>61</sup> They eliminated (i) references to the Sterling partners' personal returns from investing in BLMIS and (ii) the inaccurate assertion that BLMIS involved no fees.<sup>62</sup> While the M&T information Pages provide the sort of information contemplated by the requirements of full and clear disclosure and transparency, the pre-amendment version of the BLMIS Information Page (in place for most of the life of the Sterling Plan) provides little useful

<sup>61</sup> STESBC0002006.

<sup>62</sup> Compare STESAA0019533 at STESAA0019541 with STESAA0011998.

information and, as Sterling’s consultant suggested, could be seen as misleading and an improper “endorsement.”<sup>63</sup>

### **3. Failure to communicate information properly on the performance of the Madoff Option**

Neither plan documents nor periodic plan reports ever distinguished between how the assets in the M&T Options and in the Madoff Option, respectively, were accounted for and held. Instead, by referring to M&T as the Sterling Plan’s custodian (without qualification), the Sterling Fiduciaries created the impression that there was a single, unified system covering all investment options, when in fact there was not.<sup>64</sup>

Sterling Plan participants were apparently given a quarterly report prepared by EBS on the performance of the investment options available in the Sterling Plan.<sup>65</sup> Performance figures for BLMIS were calculated by Sterling employees and provided to EBS by Sterling Fiduciaries.<sup>66</sup> Although the BLMIS performance information appeared at the bottom of the report in a different font, I have seen no indication that the Sterling Plan participants were told that this document was compiled from different sources, possibly utilizing different metrics and methodologies. In preparing individual statements for plan participants, EBS combined the information on the Madoff Option it received from the Sterling Fiduciaries with information on the performance of the M&T Options it got from M&T, without distinguishing between the two.<sup>67</sup>

Here is an apparent example of how the Sterling Fiduciaries provided the BLMIS data to EBS; note particularly the handwritten data at the bottom of the first chart.

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<sup>63</sup> STESBC0002006.

<sup>64</sup> See, e.g., STESAA0013065 at STESAA0013070.

<sup>65</sup> See, e.g., STESAA0019507-STESAA0019513.

<sup>66</sup> STESAA0008068 at STESAA0008189; Friedman Tr. 545:5-546:25.

<sup>67</sup> Friedman Tr. 545:5-546:25.



**Sterling Equities Associates  
Employees Retirement Plan**

% Average Annual Returns  
For Period Ending 9/30/2002

*MH*  
*Please update market*  
*C*

|  | NAV     | 2002<br>3rd Qtr | 2002<br>YTD | 1 Year | 3 Year | 5 Year | 10 Year or<br>Since<br>Inception |
|--|---------|-----------------|-------------|--------|--------|--------|----------------------------------|
| <b>Money Market/Stable Value</b>                               |         |                 |             |        |        |        |                                  |
| VISION Treasury Money Market Fund                              | \$1.00  | 0.28            | 0.90        | 1.40   | 3.77   | 4.11   | 4.18                             |
| Lipper U.S. Treasury Money Market Funds Index**                |         | 0.29            | 0.94        | 1.44   | 3.69   | 4.04   | 4.08                             |
| <b>Intermediate Term Bond</b>                                  |         |                 |             |        |        |        |                                  |
| Pimco Total Return Fund  | \$10.88 | 3.43            | 7.57        | 7.81   | 9.72   | 8.25   | 8.14                             |
| Morningstar Intermediate Term Bond Peer Group Average          |         | 3.51            | 6.06        | 5.98   | 7.78   | 6.37   | 6.54                             |
| Lehman Brothers Government/Corporate Index**                   |         | 5.70            | 9.15        | 9.21   | 9.68   | 7.93   | 7.44                             |
| <b>Balanced</b>  |         |                 |             |        |        |        |                                  |
| Vanguard Balanced Index Fund                                   | \$15.01 | -8.58           | -13.99      | -8.04  | -3.30  | 2.27   | 8.23                             |
| Morningstar Domestic Hybrid Peer Group Average                 |         | -8.37           | -13.11      | -8.24  | -2.99  | 0.74   | 7.02                             |
| 60%S&P/40% Lehman Brothers Aggregate Govt/Corp (Total) Index** |         | -8.86           | -14.81      | -9.36  | -4.07  | 2.53   | 8.65                             |
| <b>Large Cap Value</b>   |         |                 |             |        |        |        |                                  |
| Vanguard Value Index Fund                                      | \$13.42 | -20.45          | -28.02      | -22.34 | -9.83  | -2.36  | 8.73 *                           |
| Morningstar Large Value Peer Group Average                     |         | -18.33          | -25.03      | -18.41 | -6.91  | -1.84  | N/A                              |
| S&P 500/BARRA Value Index**                                    |         | -20.46          | -27.98      | -22.25 | -9.75  | -2.28  | N/A                              |
| <b>S&amp;P Equity Index</b>                                    |         |                 |             |        |        |        |                                  |
| Vanguard 500 Index Fund  | \$75.26 | -17.22          | -28.17      | -20.52 | -12.90 | -1.65  | 8.92                             |
| Morningstar Large Blend Peer Group Average                     |         | -16.04          | -26.32      | -18.93 | -11.47 | -2.53  | 7.83                             |
| S&P 500 Index**  |         | -17.29          | -28.17      | -20.48 | -12.87 | -1.61  | 9.03                             |

*MADOFF*      *6.08*    *11.93*    *16.29*    *15.13*    *16.75*    *16.36*

\*Since Inception (Vanguard Value Index Fund, 11/92).  
\*\* Investments cannot be made in an index. The index is provided for comparative purposes only.

Source: STESAA0008068 at STESAA0008189

The handwritten notations at the bottom of the foregoing chart were apparently then typed in below the returns for the other investment options on a report given to plan participants.

**Sterling Equities Associates  
Employees Retirement Plan**

% Average Annual Returns  
For Period Ending 9/30/2002

|  | NAV     | 2002<br>3rd Qtr | 2002<br>YTD | 1 Year | 3 Year | 5 Year | 10 Year or<br>Since<br>Inception |
|--|---------|-----------------|-------------|--------|--------|--------|----------------------------------|
| <b>Money Market/Stable Value</b>                               |         |                 |             |        |        |        |                                  |
| VISION Treasury Money Market Fund                              | \$1.00  | 0.28            | 0.90        | 1.40   | 3.77   | 4.11   | 4.18                             |
| Lipper U.S. Treasury Money Market Funds Index**                |         | 0.29            | 0.94        | 1.44   | 3.69   | 4.04   | 4.08                             |
| <b>Intermediate Term Bond</b>                                  |         |                 |             |        |        |        |                                  |
| Pimco Total Return Fund  | \$10.88 | 3.43            | 7.57        | 7.81   | 9.72   | 8.25   | 8.14                             |
| Morningstar Intermediate Term Bond Peer Group Average          |         | 3.51            | 6.06        | 5.98   | 7.78   | 6.37   | 6.54                             |
| Lehman Brothers Government/Corporate Index**                   |         | 5.70            | 9.15        | 9.21   | 9.68   | 7.93   | 7.44                             |
| <b>Balanced</b>  |         |                 |             |        |        |        |                                  |
| Vanguard Balanced Index Fund                                   | \$15.01 | -8.58           | -13.99      | -8.04  | -3.30  | 2.27   | 8.23                             |
| Morningstar Domestic Hybrid Peer Group Average                 |         | -8.37           | -13.11      | -8.24  | -2.99  | 0.74   | 7.02                             |
| 60%S&P/40% Lehman Brothers Aggregate Govt/Corp (Total) Index** |         | -8.86           | -14.81      | -9.36  | -4.07  | 2.53   | 8.65                             |
| <b>Large Cap Value</b>   |         |                 |             |        |        |        |                                  |
| Vanguard Value Index Fund                                      | \$13.42 | -20.45          | -28.02      | -22.34 | -9.83  | -2.36  | 8.73 *                           |
| Morningstar Large Value Peer Group Average                     |         | -18.33          | -25.03      | -18.41 | -6.91  | -1.84  | N/A                              |
| S&P 500/BARRA Value Index**                                    |         | -20.46          | -27.98      | -22.25 | -9.75  | -2.28  | N/A                              |
| <b>S&amp;P Equity Index</b>                                    |         |                 |             |        |        |        |                                  |
| Vanguard 500 Index Fund  | \$75.26 | -17.22          | -28.17      | -20.52 | -12.90 | -1.65  | 8.92                             |
| Morningstar Large Blend Peer Group Average                     |         | -16.04          | -26.32      | -18.93 | -11.47 | -2.53  | 7.83                             |
| S&P 500 Index**  |         | -17.29          | -28.17      | -20.48 | -12.87 | -1.61  | 9.03                             |
| Bernard L. Madoff Investment Securities                        |         | 6.08            | 11.93       | 16.29  | 15.13  | 16.75  | 16.36                            |

\*Since Inception (Vanguard Value Index Fund, 11/92).  
\*\* Investments cannot be made in an index. The index is provided for comparative purposes only.

Source: STESAA0008068 at STESAA0008184

**D. The Sterling Fiduciaries departed from industry Standards by compromising their independence and failing to make appropriate disclosure.**

Under applicable industry Standards and Principles, fiduciaries must avoid all conflicts or even the appearance thereof. Not only did the Sterling Fiduciaries and related individuals and entities invest with BLMIS, but Mr. Madoff and his family members invested millions of dollars in Sterling entities.<sup>68</sup> Without disclosing the full extent and nature of those relationships, the BLMIS Information Page simply stated that Sterling partners had invested with BLMIS, making no mention of the Madoffs' investments in Sterling entities. Retirement Plan Management Standards and Principles mandate full and frank disclosure of facts that could be seen to render a fiduciary less than disinterested.

Indeed, their self-professed ignorance about the workings of the Madoff Option and lack of diligence aside, the Sterling Fiduciaries provided an "endorsement"<sup>69</sup> by touting their personal historical BLMIS results on the BLMIS Information Page.<sup>70</sup> Friedman testified that M&T addressed questions on only the M&T Investment Options; for the Madoff option, the Sterling Fiduciaries answered questions.<sup>71</sup> In my judgment it is irregular for a plan sponsor to have an independent, outside expert educate beneficiaries on all but one investment option, while providing that information itself for another option (here the riskiest one, with the least available information and the greatest concerns about independence), especially where over 90% of plan participant dollars end up with that option.

The Sterling Fiduciaries' lack of independence is underscored by their decision to form the Sterling Plan as a self-directed one under Section 404(c) of ERISA in part to avoid having to

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<sup>68</sup> STESAH0001860 at STESAH0001861; Friedman Tr. 219:9-17.

<sup>69</sup> STESBC0002006.

<sup>70</sup> STESAA0019533 at STESAA0019541.

<sup>71</sup> Friedman Tr. 538:1-10.

give “a thorough briefing” on Madoff<sup>72</sup> or otherwise leading people to “ask and know about BM.”<sup>73</sup> A portion of Friedman’s contemporaneous, handwritten notes referring to the concern regarding Madoff-related inquiries is reproduced below.

Participant Directed - Reg 404-c - to insulate themselves, Trustees must offer 3 diverse funds (usually 4)

Trustee Directed - All to Madoff - no choice - less popular - if it underperforms - subject to class action (cheaper to administer) Everyone will ask and know about BM

Source: STESAA0021221

Under prevailing Standards and Principles, a Retirement Plan Manager’s deference to an investment fund manager’s quest for privacy is irregular and potentially a basis for rejecting that fund outright, because it calls into question the Retirement Plan Manager’s ability to conduct appropriate diligence independently.

**E. The Sterling Fiduciaries departed from industry Standards by failing to promote the diversification of Sterling Plan assets.**

Diversification is central to portfolio theory and a cornerstone of sound Retirement Plan Management. Yet up to 96% of Sterling Plan assets were invested in BLMIS, an opaque, hedge-fund-like option. Fiduciaries must emphasize the importance of diversification, and the Sterling Fiduciaries’ failure to do so was inconsistent with industry Standards, particularly given that they admittedly did not understand the BLMIS strategy or how Madoff was compensated; conducted no diligence in connection with the Madoff Option; played a role in presenting the Madoff Option; had undisclosed personal business interests with Madoff; failed to act or to make

<sup>72</sup> Friedman Tr. 562:4-10.

<sup>73</sup> STESAA0021221.

supplemental disclosure in the face of mounting evidence of irregularity; and did not provide complete and accurate documentation to plan participants.

Failure to promote diversification among plan assets contrasts with the Sterling Fiduciaries' own undisclosed diversification of their personal assets away from Madoff on the basis of advice they received from their investment professionals.<sup>74</sup>

## **VII. Conclusion**

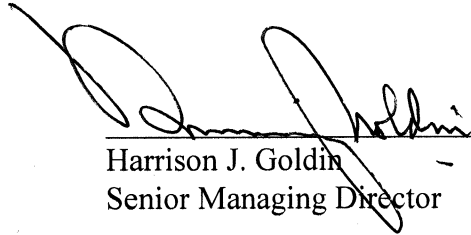
As discussed above, the way the Sterling Fiduciaries ran the Sterling Plan deviated from accepted Retirement Plan Management Standards and the Principles underlying those Standards.

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<sup>74</sup> See Stamos Tr. 200:20-201:18 (stressing importance of diversification); D. Katz Tr. 31:10-32:5 (noting that he had been “screaming” for diversification of the assets of the Sterling Fiduciaries and their affiliates); D. Katz Tr. 346:23-347:1 (explaining that Sterling Stamos was created to diversify from Madoff); Friedman Tr. 578:10-14 (“Stamos expressed” an “objection” that “Bernie Madoff was not transparent” and that “we shouldn’t have as much money in Madoff as we do”).

My work on this case is continuing and I reserve the right to revise or augment the findings and opinions set forth herein in the event additional information relevant to the issues I have examined becomes available, in response to questions raised in my deposition or for other reasons.

November 22, 2011



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Harrison J. Goldin  
Senior Managing Director