

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

<p>In re:</p> <p>BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor,</p>	<p>Adv. Pro. No. 08-01789 (BRL)</p> <p>SIPA LIQUIDATION (Substantively Consolidated)</p>
<p>IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff,</p> <p>v.</p> <p>SAUL B. KATZ, et al., Defendants.</p>	<p>Adv. Pro. No. 10-5287 (BRL)</p> <p>11-CV-03605 (JSR) (HBP)</p>

**DECLARATION OF FERNANDO A. BOHORQUEZ, JR. IN SUPPORT OF THE
TRUSTEE'S OPPOSITION TO THE DEFENDANTS' MOTION TO
WITHDRAW THE REFERENCE**

I, FERNANDO A. BOHORQUEZ, JR., declare pursuant to 28 U.S.C. § 1746, that the following is true:

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

2. I respectfully submit this declaration in support of the Trustee's Memorandum of Law in Opposition to the Sterling Defendants' Motion to Withdraw the Reference pursuant to 28 U.S.C. § 157(d) from the Bankruptcy Court of the Southern District of New York with respect to *Picard v. Katz*, Adv. Pro. No. 10-5287 (BRL).

The Trustee's Claim Procedures & Net Equity

3. On December 23, 2008, Judge Lifland approved a claims procedures order specifying the procedures for the filing, determination and adjudication of BLMIS customer SIPA claims ("Claims Procedures Order"). Attached hereto as Exhibit A is a true and correct copy of the Claims Procedure Order entered in *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Adv. Pro. No. 08-01789 (BRL), dated December 23, 2008. The order provides that under section 78fff-2(a)(2) of SIPA, claims are filed with the Trustee, who determines the claims, and claimants who opposed the Trustee's determination file objections with the bankruptcy court for judicial resolution. If the claimant does not object to the determination, it is deemed approved by the Court and binding on the claimant. If the claimant objects and files an opposition, the Trustee obtains a hearing date.

4. Pursuant to the Claims Procedures Order, BLMIS customers filed over 16,000 claims. Thousands of SIPA claims were filed by BLMIS customers—including the Sterling Defendants, related individuals and entities— seeking the value of the securities reflected on each respective claimant's last BLMIS customer statement, dated November 30, 2008. From February 26, 2009 to June 18, 2009, various Sterling Defendants, related individuals, and entities filed 101 separate SIPA claims for a recovery of approximately \$500 million based on their November 30, 2008 BLMIS customer statements. Attached as an example is Exhibit B, which is a true and correct copy of Customer Claim No. 009901, submitted on behalf of BLMIS Account

No. 1KW300 held by Sterling Equities Associates, received by the Trustee on June 18, 2009 (supporting documents not attached hereto).

5. The Trustee determined each customer's net equity using the "net investment method." This method assesses a customer's actual net deposits in the scheme, calculating the total amount deposited by the customer into his BLMIS account, and subtracting any amounts withdrawn from his or her account. In contrast, the Sterling Defendants and other claimants assert that net equity is defined as the amounts reflected on customers' November 30, 2008 Statements (the "last statement method") and have objected to the Trustee's Net Investment Method on this basis.

6. Based on the Trustee's net investment method, the Trustee denied 41 claims filed by the Sterling Defendants and related individuals and entities for those BLMIS accounts from which they withdrew more funds than they deposited.

7. Following the Trustee's denial of these claims, from September 30, 2009 to November 11, 2010, certain Sterling Defendants, related individuals and entities filed 40 objections with the Bankruptcy Court. These claimants objected to the Trustee's calculation of net equity, arguing that they were entitled to an amount equal to the value of securities positions and credit balances pursuant to the calculation of the last statement method. By way of example, attached hereto as Exhibit C is a true and correct copy of the Objection to Trustee's Determination of Claim No. 009901, submitted by Sterling Equities Associates, dated April 2, 2010.

8. On September 16, 2009, the Bankruptcy Court entered the Scheduling Order establishing a briefing schedule and hearing date of February 2, 2010 to address whether Net Equity, as defined by SIPA, is calculated using the net investment method or the last statement

method. Attached hereto as Exhibit D is a true and correct copy of the Order Scheduling Adjudication of “Net Equity” Issue entered in *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Adv. Pro. No. 08-01789 (BRL), dated September 16, 2009. In the interim, the Trustee continued to process and determine customer claims in the ordinary course.

9. On November 12, 2009, certain Sterling Defendants, including the Sterling Partners, Sterling Equities Associates and the Mets Limited Partnership, filed their brief with the Bankruptcy Court, disputing the Trustee’s calculation of net equity and arguing that BLMIS customers’ net equity be calculated based on the last statement method. Attached hereto as Exhibit E is a true and correct copy of the Memorandum of Law of Sterling Equities Associates and Certain Affiliates Regarding Net Equity and Avoidance filed in *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Adv. Pro. No. 08-01789 (BRL), dated November 12, 2009 (“Defs.’ Net Equity Br.”).

10. On March 1, 2010, Judge Lifland issued a decision affirming the Trustee’s use of the net investment method. Attached hereto as Exhibit F is a true and correct copy of the Memorandum Decision Granting Trustee’s Motion for an Order (1) Upholding Trustee’s Determination Denying Customer Claims for Amounts Listed on Last Customer Statement; (2) Affirming Trustee’s Determination of Net Equity; and (3) Expunging Objections to Determinations Relating to Net Equity, issued in *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Adv. Pro. No. 08-01789 (BRL), dated on March 1, 2010 and reported at 424 B.R. 122 (Bankr. S.D.N.Y. 2010) (“Net Equity Decision”).

11. On March 8, 2010, Judge Lifland entered a final order on the net equity dispute, incorporating the Net Equity Decision. On that same date, the Bankruptcy Court, pursuant to a joint request of the Trustee and certain claimants, and on the Bankruptcy Court’s own motion,

certified an immediate appeal to the United States Court of Appeals for the Second Circuit. The Second Circuit elected to hear this appeal on June 16, 2010.

12. Several BLMIS customers, including certain Sterling Defendants—the Sterling Partners, Sterling Equities Associates and the Mets Limited Partnership—appealed the Net Equity Decision and Order and filed briefs. Attached hereto as Exhibit G is a true and correct copy of the Brief for Appellants Sterling Equities Associates, Arthur Friedman, David Katz, Gregory Katz, Michael Katz, Saul Katz, L. Thomas Osterman, Marvin Tepper, Fred Wilpon, Jeff Wilpon, Richard Wilpon and Mets Limited Partnership filed in *In re Bernard L. Madoff Inv. Sec. LLC* Adv. Pro. No. 10-2378, dated August 6, 2010 (“Defs.’ App. Net Equity Br.”).

13. Oral argument was held before the Second Circuit on March 3, 2011, with the Sterling Defendants’ counsel arguing for the appellants.

The Trustee’s Investigation and Avoidance Action Against the Sterling Defendants

14. In my role as counsel to the Trustee, I was involved in and responsible for the Trustee's investigation of the Sterling Defendants and the various Bankruptcy Rule 2004 subpoenas issued in furtherance of that investigation.

15. On October 7, 2009, following a review of the books and records of BLMIS—in particular the records concerning the 483 BLMIS accounts opened by the Sterling Partners on behalf of themselves, the other Sterling Defendants, as well as various friends, employees and business associates (“KW BLMIS accounts”)—and the thousands of transfers to and from these KW BLMIS accounts, the Trustee issued two Bankruptcy Rule 2004 subpoenas to Sterling Equities (“Sterling”) and Sterling American Property, Inc., which were later consolidated into one subpoena (the “Subpoena”).

16. This investigation culminated in the filing of a complaint under seal against the Sterling Defendants on December 7, 2010, which was later amended on March 18, 2011 (the

“Complaint”). Attached hereto as Exhibit H is a true and correct copy of the Complaint filed by the Trustee in *Picard v. Katz*, Adv. Pro. No. 10-05287 (BRL), dated March 18, 2011.

17. On March 20, 2011, the Sterling Defendants filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. Attached hereto as Exhibit I is a true and correct copy of the Memorandum of Law in Support of Sterling Defendants’ Motion to Dismiss the Amended Complaint, or, in the Alternative, for Summary Judgment filed in *Picard v. Katz*, Adv. Pro. No. 10-05287 (BRL), dated March 20, 2011 (“Defs.’ Mot. to Dismiss”).

18. On May 19, 2011, the Trustee filed a memorandum of law in opposition to the Sterling Defendants’ Motion to Dismiss, or, in the Alternative, for Summary Judgment. Attached hereto as Exhibit J is a true and correct copy of the Trustee’s Memorandum of Law in Opposition to the Sterling Defendants’ Motion to Dismiss, or, in the Alternative, for Summary Judgment in *Picard v. Katz*, Adv. Pro. No. 10-05287 (BRL), dated May 19, 2011 (“Trustee’s Mot. to Dismiss Opp.”).

The Merkin Decision and Appeal

19. On November 17, 2010, Judge Lifland issued a decision and order granting in part and denying in part the motion to dismiss filed by the defendants in the *Picard v. Merkin* adversary proceeding in this case. Attached as Exhibit K is a true and correct copy of the Memorandum Decision and Order Granting in Part and Denying in Part Defendants’ Motions to Dismiss Trustee’s Complaint entered in *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC)*, Adv. Pro. No. 09-1182 (BRL), dated November 17, 2010, and reported at 440 B.R. 243 (Bankr. S.D.N.Y. 2010) (“November 17th Merkin Decision”).

20. On December 1, 2010, Bart M. Schwartz, as receiver of Defendants Gabriel Capital, L.P. and Ariel Fund Limited sought leave to appeal Judge Lifland’s November 17th Merkin Decision. Attached as Exhibit L is a true and correct copy of the Memorandum of Law

in Support of Motion of Bart M. Schwartz, as receiver of Defendants Gabriel Capital, L.P. and Ariel Fund Limited, for Leave to Appeal the November 17, 2010 Memorandum Decision and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Trustee's Complaint, dated December 1, 2010.

21. The appeal is currently pending before Judge Kimba M. Wood in the Southern District of New York. Attached as Exhibit M is a true and correct copy of the Civil Docket Sheet for *Picard v. Merkin*, Case No. 11-mc-00012 (KMW), as of June 17, 2011.

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

Dated: June 17, 2011
New York, New York

s/Fernando A. Bohorquez, Jr.
Fernando A. Bohorquez, Jr.