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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

TRUSTEE'S MOTION AND MEMORANDUM FOR ENTRY OF ORDER PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE AND RULES 2002(a)(3) AND 9019(a) OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE APPROVING SETTLEMENT AGREEMENT

TO: THE HONORABLE JED S. RAKOFF
UNITED STATES DISTRICT JUDGE

Irving H. Picard (the "Trustee"), as trustee for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") and Bernard L. Madoff ("Madoff," and together with BLMIS, the "Debtors"), by and through the Trustee's undersigned counsel, submits this motion and memorandum (the "Motion") seeking entry of an order, pursuant to section 105(a) of title 11, United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") and Rules 2002(a)(3) and 9019(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), approving a settlement ("Settlement"), the terms and conditions of which are set forth in the Settlement Agreement and Release (the "Agreement")[1] by and among the Trustee and Saul B. Katz, Fred Wilpon, Mets Limited Partnership, and numerous related individuals and entities (collectively, the "Defendants")[2] (each of the Trustee and each of the

[1] The Agreement with the schedules and exhibit attached is annexed hereto as Exhibit B. To the extent there is any discrepancy between this Motion and the Agreement, the Agreement controls. Capitalized terms not defined herein shall have the meaning set forth in the Agreement.

[2] By Order of this Court dated March 13, 2012 [ECF No. 175], 32 of the Defendants named in the Trustee's Amended Complaint were dismissed from the action as a result of the dismissal of various of the Trustee's claims, as follows: and Sterling Mets Associates, Sterling Mets Associates II, Mets One LLC, Mets Partners, Inc., C.D.S. Corp., Coney Island Baseball Holding Company L.L.C., Brooklyn Baseball Company L.L.C., 157 J.E.S. LLC, Air Sterling LLC, BAS Aircraft LLC, Bon-Mick, Inc., Charles 15 Associates, Charles 15 LLC, Charles Sterling LLC, Ruskin Garden Apartments LLC, SEE Holdings, I, SEE Holdings II, Sterling Brunswick Corporation, Sterling Equities Investors, Sterling Heritage L.L.C., Sterling Jet Ltd., Sterling Jet II Ltd., Sterling PathoGenesis Company, Sterling Third Associates, Valley Harbor Associates, Kimberly Wachtler, Minor 1, Minor 2, Michael Schreier, Realty Associates Madoff II, Sterling American Property III L.P., and Sterling American Property IV L.P. (collectively, "Dismissed Defendants") The remaining defendants in this action are Amy Beth Katz, Arthur Friedman, Bon Mick Family Partners L.P., Bruce N. Wilpon, Charles Sterling Sub LLC, College Place Enterprises LLC, Daniel Wilpon, David Katz, Dayle Katz, Debra Wilpon, Deyva Schreier Arthur, Edward M. Tepper, Elise C. Tepper, Estate of Leonard Schreier, FFB Aviation LLC, Fred Wilpon, Fred Wilpon Family Trust, FS Company L.L.C., Gregory Katz, Heather Katz Knopf, Howard Katz, Iris J. and Saul B. Katz Family Foundation, Inc., Iris Katz, Jacqueline G. Tepper, Jason Bacher, Jeffrey Wilpon, Jessica Wilpon, Judith Wilpon, Judy and Fred Wilpon Family Foundation, Inc., Katz 2002 Descendants' Trust, L. Thomas Osterman, Marvin B.

Defendants a "Party" and collectively, the "Parties"). In support of the Motion, the Trustee respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Parties' Settlement averted a weeks-long jury trial that was scheduled to commence on March 19, 2012. At issue in the trial was the Trustee's recovery of a maximum of approximately $303 million in withdrawals of principal invested by the Defendants with BLMIS in the two years prior to commencement of its liquidation proceeding under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA").[3] In addition, by this Court's Order dated March 5, 2012, which granted the Trustee's motion for partial summary judgment, the Defendants were liable to the Trustee for up to $83,309,162. The Court indicated that it intended to determine the amount and apportionment of the judgment debt by subsequent order, potentially after further court proceedings. It is certain that any judgment entered following the trial would have resulted in one or more appeals that could have taken years to resolve.

Tepper, Mets II LLC, Mets Limited Partnership, Michael Katz, Natalie Katz O'Brien, Philip Wachtler, Phyllis Rebell Osterman, Red Valley Partners, Richard Wilpon, Robbinsville Park LLC, Robin Wilpon Wachtler, Ruth Friedman, Saul B. Katz, Saul B. Katz Family Trust, Scott Wilpon, SEE Holdco LLC, Sterling 10 LLC, Sterling 15C L.L.C., Sterling 20 LLC, Sterling Acquisitions LLC, Sterling American Advisors II L.P., Sterling American Property V L.P., Sterling Brunswick Seven L.L.C., Sterling DIST Properties LLC, Sterling Equities, Sterling Equities Associates, Sterling Internal V LLC, Sterling Mets L.P., Sterling Thirty Venture LLC, Sterling Tracing LLC, Sterling Twenty Five, LLC, Sterling VC IV LLC, Sterling VC V LLC, Todd Katz, Valerie Wilpon, and Wilpon 2002 Descendants' Trust (collectively, "Remaining Defendants"). References to the Defendants means collectively the Dismissed Defendants and the Remaining Defendants in the Action. Information with respect to investments and receipts by specific Defendants and account holders with BLMIS is set forth in Schedules 1 and 2 to the Agreement, as discussed in the Motion.

[3] The approximate $303 million was subject to downward adjustment in accordance with the Court's March 14, 2012 Order [ECF No. 177], in which the Court ruled that Defendants had the burden of proving, by a preponderance of the evidence as part of their affirmative defense, that they received the transfers at issue in good faith. The Court also indicated that the Trustee's claim to recover withdrawals of principal was limited to withdrawals of principal invested with BLMIS within two years of the Filing Date.

2. Indeed, more than the over $386 million in two-year transfers of principal and "fictitious profits" was at stake in the appellate process when the Trustee's intended appeal of this Court's Opinion and Order dated September 27, 2011 [ECF No. 40] is taken into consideration. By that Opinion and Order, the Court dismissed various claims asserted by the Trustee against the Defendants, including claims to avoid and recover fictitious profits they withdrew from BLMIS beyond the two-year period preceding the Filing Date. The Court also held that the Trustee could avoid and recover transfers of principal during the relevant two-year period only if Defendants were "willfully blind" to the BLMIS fraud.

3. The Agreement represents a good faith, complete, and final Settlement between the Trustee and the Defendants as to any and all disputes between them on the terms and conditions as set forth in the Agreement.

4. Not only have the Parties averted a protracted and expensive trial and lengthy appeals through the Settlement, but also, and most important to the Trustee, the Settlement enables the BLMIS customer fund to recoup fictitious profits received by the Defendants during the six-year period prior to the commencement of BLMIS's SIPA proceeding. Specifically, under the Agreement, Defendants will make a settlement payment to the Trustee in the aggregate sum of $162,000,000.00 ("Settlement Payment"). The Settlement Payment will increase the total and percentage allocation to allowed claims of customers from the fund of customer property. Moreover, the Settlement has been structured in such a way as to make the full amount of the Settlement Payment collectable, despite Defendants' restrictive cash flow and lender covenants, all of which were key factors that influenced the Trustee's decision to settle on the terms set forth in the Agreement. After reviewing the evidence developed during discovery, including information not available to the Trustee at the time the complaint was filed, and a consideration

of the costs and uncertainty inherent in any litigation and the financial information of the Defendants, the Trustee, in the exercise of his business judgment, determined that it would not be appropriate to pursue the willful blindness claim and to resolve the remaining claims by this Settlement rather than continue to litigate them. For all of these reasons, the Trustee believes that the Agreement is fair and in the best interests of the BLMIS customer fund and the Estate.

BACKGROUND AND RELEVANT PROCEDURAL HISTORY

5. On December 11, 2008 (the "Filing Date"), the Securities and Exchange Commission ("Commission") filed a complaint in the United States District Court for the Southern District of New York (the "District Court") against the Debtors (Case No. 08 CV 10791). The complaint alleged that the Debtors engaged in fraud through the investment advisor activities of BLMIS.

6. On December 15, 2008, pursuant to section 78eee(a)(4)(A) of SIPA, the Commission consented to a combination of its own action with an application of the Securities Investor Protection Corporation ("SIPC"). Thereafter, pursuant to section 78eee(a)(3) of SIPA, SIPC filed an application in the District Court alleging, *inter alia*, that BLMIS was not able to meet its obligations to securities customers as they came due and, accordingly, its customers needed the protection afforded by SIPA.

7. On that date, the District Court entered the Protective Decree, to which BLMIS consented, which, in pertinent part:

(i) appointed the Trustee for the liquidation of the business of BLMIS pursuant to section 78eee(b)(3) of SIPA;

(ii) appointed Baker & Hostetler LLP as counsel to the Trustee pursuant to section 78eee(b)(3) of SIPA; and

(iii) removed the case to the United States Bankruptcy Court ("Bankruptcy Court") pursuant to section 78eee(b)(4) of SIPA.

8. At a plea hearing (the "Plea Hearing") on March 12, 2009, in the criminal action filed against him by the United States Attorney's Office for the Southern District of New York, Madoff pleaded guilty to an 11-count criminal information, which included securities fraud, money laundering, theft and embezzlement counts. At the Plea Hearing, Madoff admitted that he "operated a Ponzi scheme through the investment advisory side of [BLMIS]." (Plea Hr'g Tr. at 23:14-17). On June 29, 2009, Madoff was sentenced to a term of imprisonment of 150 years.

9. On April 13, 2009, an involuntary bankruptcy petition was filed against Madoff. On June 9, 2009, the Bankruptcy Court entered an order substantively consolidating the chapter 7 estate of Madoff into BLMIS's estate in the SIPA liquidation proceeding (the consolidated Madoff and BLMIS estates collectively are referred to as the "BLMIS Estate").

10. On or about June 18, 2009, certain Defendants filed customer claims against the BLMIS Estate in connection with the BLMIS accounts.

11. On December 7, 2010, the Trustee filed a multi-count complaint in the Bankruptcy Court (the "Action"), which was subsequently amended on March 18, 2011 ("Amended Complaint") and which asserted claims against Defendants pursuant to sections 544, 547, 548, 550, 551 of the Bankruptcy Code, SIPA § 78fff-2(c)(3), the New York Fraudulent Conveyance Act (New York Debtor and Creditor Law (§§ 273-279) and the New York Civil Procedures Law. [Bankr. ECF Nos. 1 and 34]. Specifically, the Trustee's Amended Complaint sought, among other relief, to avoid and recover all transfers of fictitious profits from BLMIS to Defendants from the beginning of their investment relationship with BLMIS until December 11, 2008, as well as all transfers of principal from BLMIS to Defendants during the six years prior to the commencement of the SIPA proceeding. Since the litigation commenced, Defendants have

disputed any liability to the BLMIS Estate under all counts alleged in the Trustee's Amended Complaint, including any liability as to transfers of fictitious profits.

12. On March 20, 2011, Defendants filed a motion in the Bankruptcy Court to dismiss the Amended Complaint or, in the alternative, for summary judgment ("Motion to Dismiss"). [Bankr ECF No. 56]

13. On May 26, 2011, Defendants filed a motion to withdraw the reference of the matter to the District Court, [ECF No. 1], and by Order dated July 5, 2011 [ECF No. 19], this Court granted the motion and withdrew the automatic reference of the adversary proceeding to the Bankruptcy Court for all purposes. Since that date, the litigation has proceeded before this Court. Certain other salient opinions and orders affecting the outcome of the litigation are mentioned below.

14. By Order dated July 12, 2011 ("Bankruptcy Court's Allocation Order") [Bankr. ECF No. 4217], the Bankruptcy Court approved the Trustee's initial allocation of property to the customer property fund and authorized the Trustee to make an interim distribution to customers. Pursuant to that Order, on or about October 5, 2011, the Trustee made a first interim distribution to customers holding allowed claims as of September 30, 2011, in the approximate amount of 4.602% per dollar of their allowed claims. No Defendant held an allowed claim as of that date, and, therefore, no Defendant received a distribution at that time.

15. By Opinion and Order dated September 27, 2011 [ECF No. 40], this Court granted in part and denied in part the Defendants' Motion to Dismiss, dismissing various claims alleged by the Trustee in the Amended Complaint, with the exception of Count 1, which sought to avoid, pursuant to section 548(a)(1)(A) of the Bankruptcy Code, alleged intentional fraudulent transfers from BLMIS to Defendants, and Count 11, which sought to equitably subordinate

Defendants' customer claims pursuant to section 510(c) of the Bankruptcy Code. By Order dated September 28, 2011 [ECF No. 41], the Court sought further briefing from the Parties as to how to calculate principal and profit during the relevant two-year period.

16. By Opinion and Order dated January 17, 2012 [ECF No 78], this Court denied the Trustee's motion to have certain key, adverse rulings addressing provisions of the Bankruptcy Code certified for interlocutory appeal under 28 U.S.C. § 1292(b) or, alternatively, to have the Court enter a final judgment as to those rulings under Federal Rule of Civil Procedure 54(b). By that Opinion and Order, the Court also *sua sponte* reconsidered, and reversed, in part, its prior decision to dismiss Count 9 of the Trustee's Amended Complaint, thereby reinstating the Trustee's claim to recover subsequent transfers pursuant to section 550(a) of the Bankruptcy Code in accordance with the Court's September 27, 2011 order.

17. As discussed above, by Order dated March 5, 2012 [ECF No. 142], the Court granted the Trustee's motion for partial summary judgment on the ground that Defendants did not provide "value" to BLMIS in return for transfers of fictitious profits they received. By the same Order, the Court denied Defendants' motion for summary judgment.

18. Since the Bankruptcy Court's Order on February 10, 2011 [Bankr. ECF No. 19] appointing former Governor Mario Cuomo as mediator, the Parties have met face-to-face on several occasions, and each Party at times has separately met with the mediator to discuss in good faith the prospects for settlement. The Parties also conducted frequent settlement negotiations by telephone. Despite proceeding at a rapid pace on all fronts to prepare for trial, including the preparation of documentary and testamentary evidence, contested pretrial motions and other submissions required under this Court's Individual Rules, the preparation of expert and

lay witnesses for trial, the negotiations not only contemporaneously continued, but also intensified as the trial date drew closer.

19. After extensive negotiations, the Parties reached a compromise. On March 16, 2012, counsel for the respective Parties signed a Memorandum of Understanding ("MOU") that was disclosed and filed on March 19, 2012 [ECF No. 180]. A copy of the MOU is attached to this Motion as Exhibit A. Even though binding and enforceable by its terms, the Parties' obligations as set forth in the MOU were made subject to Court approval pursuant to Bankruptcy Rule 9019, to be sought by no later than April 13, 2012, and any required lender approvals to be obtained by no later than that same date. The Parties also agreed to work expeditiously and in good faith to enter into definitive documentation reflecting the terms of the MOU and other terms customary for such agreements. The Agreement, including all schedules and the exhibit attached thereto and incorporated therein, is the definitive document that reflects all of the terms and conditions of the Parties' Settlement. As noted above, a copy of the Agreement is attached as Exhibit B to this Motion.

THE TRUSTEE'S CLAIMS AGAINST DEFENDANTS

20. To fulfill his statutory investigative obligation, 15 U.S.C. § 78fff-1(d), the Trustee, assisted by his counsel and consultants, investigated the investments and withdrawals by the Defendants. That investigation included, without limitation, the review and analysis of Defendants' transactional histories as reflected on the BLMIS account statements; correspondence and other records and documents available to the Trustee; interviews with third-parties, some of whom may have been called to testify at trial, a substantial review of third-party records and documents, and documents and testimony provided by certain Defendants under Bankruptcy Rule 2004.

21. As a result of that investigation, the Trustee determined that in the aggregate Defendants withdrew $162,726,768 in excess of their principal investments within six years before the Filing Date (the "Alleged Six-Year Profits"). Under the Parties' Settlement, the amount of the Alleged Six-Year Profits has been rounded to $162,000,000.

22. A detailed schedule of the Alleged Six-Year Profits reflecting the relevant BLMIS account number, the account holder's name, the Defendant or Defendants related to each such BLMIS account, the amount of the Alleged Six-Year Profits by account, and each Defendant's proportionate (percentage) share of the Alleged Six-Year Profits is attached as Schedule 2 to the Agreement. *See* Schedule 2 to Exh. B to this Motion.

DEFENDANTS' CLAIMS AGAINST THE BLMIS ESTATE

23. Defendants filed numerous customer claims against the BLMIS Estate, including with respect to accounts in which they had deposited more money than they had withdrawn. Such accounts are sometimes referred to as "net loser" accounts. A schedule of Defendant "net loser" accounts reflecting the specific account number, account holder's name, the net equity in each account, and the claim number that identifies the claim filed by each account holder is attached as Schedule 1 to the Agreement. *See* Schedule 1 to Exh. B to this Motion.

24. On March 1, 2010, the Bankruptcy Court issued an opinion affirming the Trustee's "net equity" calculation of customer claims as the difference between the amounts a customer invested with BLMIS and the amounts that customer withdrew from BLMIS (the "Net Investment Method"). On March 8, 2010, the Bankruptcy Court entered an order [Bankr. ECF No. 2020], implementing the decision and certifying it for immediate appeal to the United States Court of Appeals for the Second Circuit, which on August 16, 2011, upheld the Trustee's use of the Net Investment Method as the proper basis for allowing customer claims in *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229 (2d Cir. 2011) ("Second Circuit Net Equity Order"), *petition*

for cert. filed, Sterling Equities Assoc. v. Picard, No. 11-968, 2012 WL 396523 (Feb. 3, 2012). Consistent with the Second Circuit Net Equity Order, the Trustee has determined the Defendants' net equity claims in accordance with the Net Investment Method in the amount of $177,563,039.08 (collectively, the "Defendant Net Equity Claims").

OVERVIEW OF THE AGREEMENT

25. Certain salient terms and conditions of the Agreement are briefly summarized below. As stated above, the Agreement is attached as Exhibit B and should be reviewed for a complete account of other important terms, including with respect to mutual releases and the representations and warranties of the Parties.

Settlement Payment and Means of Satisfaction:

26. The Settlement Payment will be satisfied during the five, twelve-month periods following the Effective Date ("Settlement Payment Term"). Following the Effective Date, the Parties shall agree to specific dates for each period of the Settlement Payment Term, it being understood that the first period shall run twelve months from the Effective Date and the second through fifth periods shall each run twelve months following the end of the immediate prior twelve-month period. The first of such twelve-month periods shall be referred to as the "First Period"; the second twelve-month period shall be referred to as the "Second Period"; and so on through and including the "Fifth Period." During the Settlement Payment Term, the Settlement Payment may be made from multiple sources, as follows:

(a) Assignment of Defendant Net Equity Claims. Each Defendant unconditionally and irrevocably shall assign to the Trustee by written assignment (each an "Assignment" and collectively, the "Assignments") his, her or its Defendant Net Equity Claim (collectively, the "Assigned Claims").

(i) The Trustee will allow the Defendant Net Equity Claims, which will then be entitled to 100% of all distributions made by the Trustee from BLMIS customer property or any other source of funds available to satisfy the claims of "good faith" customers of BLMIS (collectively, the "Assigned Claim Recoveries"), meaning customers that were not complicit in the fraud that BLMIS perpetrated on its customers, except that Defendant Net Equity Claims will not be entitled to receive an advance from SIPC, as provided for in 15 U.S.C. § 78fff-3.

(ii) Specifically, without limitation, the Assigned Claim Recoveries will be entitled to a distribution (x) from any forfeiture fund established by the U.S. Department of Justice pursuant to 28 C.F.R. Part 9, up to the amount of the Settlement Payment, and (y) of the 4.602% "catch- up" distribution in the approximate amount of $8,171,451 ("Catch-Up Payment") pursuant to the Bankruptcy Court's Allocation Order but not paid to the Defendants' Net Equity Claims.

(iii) In connection with any distribution made in respect of the Assigned Claims, the Trustee shall immediately and automatically apply any and all Assigned Claim Recoveries to reduce Defendants' obligations in respect of the Settlement Payment on a dollar-for-dollar basis. Promptly thereafter (but not later than seven (7) calendar days), the Trustee shall provide written notice to Defendants (x) of any remaining balance of the Settlement Payment after Assigned Claim Recoveries have been so applied, and (y) if/when the Settlement Payment is fully satisfied.

(iv) During the First through the Third Periods of the Settlement Payment Term, Defendants' payment obligations pursuant to this Agreement are limited solely to Assigned Claim Recoveries, and, during such periods, no Defendant is obligated to make any

payment in excess of or in addition to Assigned Claim Recoveries. Upon full satisfaction of the Settlement Payment at any time during the Settlement Payment Term, the Trustee shall promptly (but not later than seven (7) calendar days) re-assign the Assigned Claims to Defendants by executing and delivering an assignment to each of the Defendants or their designee(s), limited to a maximum, potential recovery of the difference between the value of the aggregate amount of the Defendant Net Equity Claims and the value of the Defendant Net Equity Claims previously applied to reduce Defendants' obligations in respect of the Settlement Payment (such difference being the "Tail Payment"). Upon full satisfaction of the Settlement Payment, Defendants shall be entitled to receive any distributions in respect of Defendant Net Equity Claims up to the amount of the Tail Payment on the same basis as "good faith" customers of BLMIS, including any distribution made after the end of the Fifth Period.

(v) For the avoidance of doubt, unless and until the Settlement Payment is fully satisfied, the Trustee shall have no obligation to re-assign the Assigned Claims to the Defendants and the Defendants shall not be entitled to receive all or any part of the Tail Payment.

(b) Defendants' Installment Payments. If the Settlement Payment is not fully satisfied after applying all of the Assigned Claim Recoveries during the First through the Third Periods of the Settlement Payment Term, the remaining unpaid amount (the "Remaining Amount") shall be divided into two equal annual installments to be paid no later than the end of the Fourth and Fifth Periods of the Settlement Payment Term. The Trustee shall immediately and automatically apply any Assigned Claim Recoveries to the next due installment during the Fourth and Fifth Periods of the Settlement Payment Term to reduce the Remaining Amount. If the Trustee receives Assigned Claim Recoveries during the Fourth Period over the amount

necessary to satisfy the installment payment due in the Fourth Period, the Trustee will apply the excess to the installment due in the Fifth Period. The installment payments shall be made by wire transfer of immediately available funds in accordance with written instructions provided by the Trustee to Defendants no later than thirty (30) days prior to the relevant payment date.

(c) Each Defendant shall be responsible, on a several and not joint basis, for his, her, or its proportionate share of the Remaining Amount in proportion to his, her, or its proportionate share of the Alleged Six-Year Profits. With respect to accounts held jointly or as tenants in common, each Defendant shall be responsible, on a several and not joint basis, for his, her, or its proportionate share of that account's proportionate share of the Remaining Amount. A detailed schedule of the Alleged Six-Year Profits reflecting the relevant BLMIS account number, the account holder's name, the Defendant or Defendants related to each such BLMIS account, the amount of the Alleged Six-Year Profits by account, and each Defendant's proportionate (percentage) share of the Alleged Six-Year Profits is attached as Schedule 2 to the Agreement.

(d) Fred Wilpon and Saul Katz Guarantee. Fred Wilpon and Saul Katz ("Guarantors"), jointly and severally, irrevocably and unconditionally, and regardless of which Defendant fails to pay his, her, or its proportionate share of the Remaining Amount, hereby guarantee payment of the Remaining Amount owed to the Trustee up to an aggregate amount of Twenty-Nine Million United States Dollars ($29,000,000) (the "Guarantee"). The Trustee shall not recover on the Guarantee unless a Defendant has not paid in full his, her, or its proportionate share of the Remaining Amount at the end of the Fourth and/or Fifth Periods of the Settlement Payment Term. If a Defendant does not pay his, her, or its proportionate share of the Remaining Amount when it is due, the Trustee shall, within three (3) business days, make a written demand

of the Guarantors, who shall promptly (but not later than three (3) business days from the date of the Trustee's written demand) satisfy the demand.

(e) Following the Effective Date, the Parties shall agree to specific dates for each of the First through the Fifth Periods of the Settlement Payment Term as follows:

EFFECTIVE DATE: [Month/Date/2012]
END OF FIRST PERIOD: Twelve calendar months following the Effective Date, or [Month/Date/2013]
END OF SECOND PERIOD: Twelve calendar months following the end of the First Period, or [Month/Date/2014]
END OF THIRD PERIOD: Twelve calendar months following the end of the Second Period, or [Month/Date/2015]
END OF FOURTH PERIOD: Twelve calendar months following the end of the Third Period, or [Month/Date/2016]
END OF FIFTH PERIOD: Twelve calendar months following the end of the Fourth Period, or [Month/Date/2017]

(f) The Trustee will continue to apply any Assigned Claim Recoveries that he receives during the Fourth and Fifth Periods of the Settlement Payment Term to reduce the Remaining Amount and to that extent thereby reduce the respective obligations of (i) the Defendants to pay the Remaining Amount, and (ii) Fred Wilpon's and Saul Katz's obligation under their Guarantee.

Access to Financial Information

27. Pursuant to the terms of the MOU, Defendants agreed to provide the Trustee with reasonable access to financial information to enable the Trustee to confirm the financial basis for the Settlement and the representations made by Defendants in that regard. In particular, Defendants represented (a) that they did not have near-term liquidity to fund a $162 million aggregate cash settlement and (b) that restrictive loan covenants precluded further borrowings

against assets. The access to financial information afforded the Trustee by Defendants in accordance with the MOU confirmed these representations.

Conditions

28. Defendants' obligations under the Agreement are subject to lender approvals to be obtained by no later than April 13, 2012. The Agreement is subject to approval under Bankruptcy Rule 9019 by the District Court and the entry of the District Court's order approving the terms of this Agreement ("Approval Order"). A hearing before this Court to consider approval of the Agreement will be scheduled to occur as soon as practicable after April 13, 2012.

Termination of Litigation

29. On or as soon as practical after the Effective Date, the Parties will file a stipulation of dismissal dismissing the Action with prejudice and without cost to any Party. Within three (3) business days after the Effective Date, Defendants shall withdraw their petition for a writ of *certiorari* filed with the United States Supreme Court from the Second Circuit Net Equity Order. Except for certain exceptions set forth in the Agreement, Defendants agree not to pursue or join any other litigation involving the Trustee or SIPC arising out of or relating to BLMIS, Madoff, their liquidation proceeding and the BLMIS Estate, including filing any motion, memorandum or other court document in any BLMIS-related litigation to which they are not a party. The Parties have agreed not to make any disparaging statement with respect to each other or the Settlement.

Defendant General Creditor Claims

30. The Trustee has agreed to treat the Defendant General Creditor Claims, as defined in the Settlement Agreement, on the same basis as he treats the same types of claims asserted by "good faith" customers, including with respect to any recoveries to which such claims may be entitled.

31. As a result of the Trustee's and his counsel's investigation, and the Parties' successful negotiations, aided by the Bankruptcy Court-appointed mediator, and after thorough and deliberate consideration of the uncertainty, costs and risks inherent in all litigation, the Trustee, in the exercise of his business judgment, determined that it was appropriate to reach a business resolution in light of all of the facts and circumstances.

RELIEF REQUESTED

32. By this Motion, the Trustee respectfully requests that the Court enter an order, substantially in the form of the proposed order annexed to this Motion as Exhibit C approving the Settlement as memorialized in the Agreement.

LEGAL DISCUSSION

33. Bankruptcy Rule 9019(a) states, in pertinent part, that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Courts have held that in order to approve a settlement or compromise under Bankruptcy Rule 9019(a), the court should find that the compromise proposed is fair and equitable, reasonable, and in the best interests of a debtor's estate. *Air Line Pilots Assoc., Int'l v. Am. Nat'l Bank & Trust Co. of Chicago (In re Ionosphere Clubs, Inc.)*, 156 BR 414, 426 (S.D.N.Y. 1993), *aff'd*, 17 F. 3d 600 (2d Cir. 1994) (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424 (1968)).

34. The Second Circuit has stated that in determining whether to approve a compromise, the court should not decide the numerous questions of law and fact raised by the compromise, but rather should "canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" *Cosoff v. Rodman (In re W T. Grant Co.),* 699 F.2d 599, 608 (2d Cir.), *cert. denied Cosoff v. Romon,* 464 U.S. 822 (1983) (quoting *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.), *cert. denied* 409 U.S. 1039 (1972)); *see also In re Chemtura,*

439 B.R. 561, 594 (Bankr. S.D.N.Y. 2010). "[T]he court need not conduct a 'mini-trial' to determine the merits of the underlying litigation." *In re Purified Down Prods. Corp.,* 150 BR 519, 522 (S.D.N.Y. 1993).

35. The factors that courts in the Second Circuit consider when approving bankruptcy settlements are well established. These interrelated factors are:

> (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment; (3) the paramount interests of the creditors, including each affected class's relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement; (4) whether other parties in interest support the settlement; (5) the competency and experience of counsel supporting, and [t]he experience and knowledge of the bankruptcy court judge reviewing, the settlement; (6) the nature and breadth of releases to be obtained by officers and directors; and (7) the extent to which the settlement is the product of arm's length bargaining.

Fox v. Picard (In re Madoff), No. 10 Civ. 4652 (JGK), 2012 WL 990829, at *15 (S.D.N.Y. March 26, 2012) (quoting *Motorola, Inc. v. Official Comm. of Unsecured Creditors* (*In re Iridium Operating LLC)*, 478 F.3d 452, 462 (2d Cir. 2007) (internal quotation marks and citations omitted)).

36. Even though the Court has discretion to approve settlements and must independently evaluate the reasonableness of the settlement, *In re Rosenberg*, 419 B.R. 532, 536 (Bankr. E.D.N.Y. 2009), the business judgment of the trustee and his counsel should be considered in determining whether a settlement is fair and equitable. *In re Chemtura Corp.*, 439 B.R. at 594. Finally, the Court should be mindful of the principle that "the law favors compromise." *Vaughn v. Drexel Burnham Lambert Group, Inc.(In re Drexel Burnham Lambert Group, Inc.),* 134 B.R at 499, 505 (quoting *In re Blair,* 538 F.2d 849, 851 (9th Cir. 1976)).

37. This Court has presided over robust pre-trial motions in which the Parties have extensively outlined the facts and the law in support of and in opposition to the Trustee's claims, which have informed the Court of the Parties' relative positions. In light of the posture of this litigation, the Court can readily evaluate the factors discussed in paragraph 35 above and determine that each of the factors analyzed in light of the facts of this matter overwhelmingly supports approval of the Agreement. The Court also has observed and heard from experienced counsel who have advised the Parties in this matter, negotiated the MOU and the Agreement, and who seek the Court's approval of the Agreement.

38. The Settlement is fair and equitable and in the best interests of the BLMIS fund of customer property and the Estate. *See* Affidavit of Irving H. Picard in Support of the Motion (the "Picard Af'd"), ¶12, a true and accurate copy of which has been filed contemporaneously with this Motion. Overall, the terms of the Agreement fall well above the lowest point in the range of reasonableness and all of the following considerations influenced the Trustee's decision to settle:

(a) Benefit to Customer Fund. The Agreement enables the Trustee to increase the fund of customer property by the $162 million Settlement Payment, an amount that far exceeds the maximum aggregate amount of $83,309,162 of two-year transfers of "fictitious profits" to which the Trustee was entitled under the Court's summary judgment ruling. Picard Af'd ¶7. Upon the Effective Date, the Assigned Claims will be entitled to the Catch-Up Payment in the approximate amount of $8,171,451, which will immediately increase the fund of customer property while simultaneously and automatically reducing Defendants' Settlement Payment by that same amount. *Id.* ¶9. The BLMIS customer property fund similarly will benefit

each time the Trustee makes a further interim distribution during the Settlement Payment Term. *Id.*

(b) Administrative Efficiency. Through the Assignments, administering the distributions to the Assigned Claims becomes virtually an electronic book entry, which facilitates a contemporaneous paydown of Defendants' Settlement Payment with a commensurate increase to the BLMIS customer fund. *Id.* The Assignments thus enable the Assigned Claims to be centrally controlled by the Trustee, which is efficient and less costly. *Id.*

(c) Avoidance of the Cost and Delay of Further Litigation. The Agreement eliminates the expense and delay of the actual trial with the Defendants that would have lasted at least two weeks, and the Parties' counsel working close to around the clock during that time. *Id.* ¶6. The Agreement eliminates the disruption that the trial would cause to the numerous witnesses who would be standing by. The Agreement also eliminates the inevitable delay caused by appeals from judgments entered by this Court in this proceeding, which benefits the BLMIS fund of customer property and the Estate as a whole. *Id.* Regardless of which side prevailed at trial, an appeal would have been taken from a final judgment and perhaps cross appeals. *Id.*

(d) Financial Considerations. As discussed above, in accordance with the MOU, Defendants have afforded counsel for the Trustee access to certain financial information to confirm the financial basis for the Settlement and Defendants' representations related thereto. Through review of the information made available to the Trustee's counsel, the Trustee has confirmed Defendants' representations and the financial basis for the settlement. *Id.* ¶8. Defendants' lack of near-term liquidity and restrictive lender covenants were factors bearing on the Trustee's determination that the Settlement was the best means of recovering fictitious profits received by Defendants and thereby increasing the fund of customer property. *See Id.* With

collectability of a favorable judgment in doubt, the Trustee found a way to structure the Settlement from multiple payment sources that are not solely dependent upon the Defendants' financial resources but rather on the Trustee's own ability to maximize the BLMIS customer fund. *Id.*¶9. The Settlement is a practical and fair compromise of complex litigation that will increase the fund of customer property and thus in the best interests of customers holding allowed claims. *See Id.* ¶12.

(e) Finality. The Agreement puts a final end to the Trustee's litigation against Defendants and to Defendants' participation in any litigation involving the Trustee and the BLMIS liquidation proceedings and achieves peace. *Id.* ¶11. The Parties undertook good faith settlement negotiations that culminated with the signing of the MOU. Even though Defendants' agreement not to pursue further the appeal from the Second Circuit Net Equity Order, for example, alone will not enable the Trustee to free funds that he holds in reserve pending the outcome of appeals from favorable settlements, the Settlement is another positive step toward the Trustee's goal of distributing as much of the customer fund as possible, as soon as possible, to innocent investors from the approximate $9 billion in recoveries and agreements to recover that the Trustee and his counsel have achieved to date. *See Id.* The Trustee still must maintain sufficient reserves in case the Second Circuit's decision should be reversed and the claims of "net winner" customers that have been denied to date become allowable and eligible for a distribution from the customer fund. *See Id.*

39. For all of the reasons discussed above, the Agreement is well within the "range of reasonableness," *In re W.T. Grant Co.*, 699 F.2d at 608 (quoting *Newman v. Stein*, 464 F.2d at 693), and confers a substantial benefit on the BLMIS fund of customer property and the Estate. The Trustee respectfully requests that the Court approve the Agreement. *Id.*¶12.

NOTICE

40. In accordance with Bankruptcy Rules 2002 and 9019, and the Order Establishing Notice Procedures and Limiting Notice entered by the Bankruptcy Court on December 5, 2011 ("Bankruptcy Court's Order Limiting Notice") [Bankr. ECF. No. 4560], notice of this Motion has been given to (i) SIPC; (ii) the SEC; (iii) the Internal Revenue Service; (iv) the United States Attorney for the Southern District of New York; and (v) Davis Polk & Wardwell LLP, Attn: Robert F. Wise, Jr., Esq., 450 Lexington Avenue, New York, NY 10017. Also in accordance with the Bankruptcy Court's Order Limiting Notice, the Trustee has provided notice by e-mail to interested parties in the SIPA liquidation proceeding pending before the Bankruptcy Court of the following: the Motion filed with this Court and the ECF No. of the Motion on this Court's docket, together with the Case No. assigned by this Court; the date and time scheduled for the hearing at which this Court will consider the Motion; the date by which objections, if any, must be filed with this Court, and the name and address of the persons to be served with a copy of any objections.

WHEREFORE, the Trustee respectfully requests entry of an order substantially in the form of Exhibit C granting the relief requested in the Motion.

Respectfully submitted,

Dated: April 13, 2012
New York, New York

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