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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. ERIC T. SCHNEIDERMAN, as successor to ANDREW M. CUOMO, Attorney General of the State of New York; BART M. SCHWARTZ, as Receiver for ARIEL FUND LTD. and GABRIEL CAPITAL, L.P.; DAVID PITOFSKY, as Receiver for ASCOT PARTNERS, L.P. and ASCOT FUND, LTD.; J. EZRA MERKIN; and GABRIEL CAPITAL CORPORATION, Defendants.	Adv. Pro. No. _____ **COMPLAINT**

NATURE OF THE ACTION

1. On June 25, 2012, the New York State Attorney General ("NYAG") announced a settlement with J. Ezra Merkin ("Merkin") stemming from the Madoff fraud. The State of New York and two receivers appointed with the State's approval (the "Receivers") have thrust themselves into the aftermath of the Madoff fraud by seeking pecuniary relief, for select indirect investors, in a fraud that has grievously damaged victims throughout this country and around the world. They have done so in the face of a federally mandated program, the Securities Investor Protection Act ("SIPA"), tailored specifically to protect customers of failed brokerage houses on a *pro rata* basis. SIPA's mandate is all the more compelling given the breadth of the losses in this horrendous Ponzi scheme. Every victim should be treated equally and that is the fundamental tenet of both SIPA and the Bankruptcy Code. That fundamental principle cannot be abrogated by the State of New York.

2. The Trustee commences this adversary proceeding to prevent certain parties, whose names appear in the caption above as defendants herein (the "Defendants"), including the NYAG, from undermining this Court's continuing jurisdiction over the estate of BLMIS. By commencing actions (the "Third Party Actions") and settling claims against Merkin and Gabriel Capital Corporation ("GCC," together with Merkin, the "Merkin Defendants"), as well as Ascot Partners, L.P. and Ascot Fund, Ltd. (collectively, "Ascot Fund"), Ariel Fund Ltd. ("Ariel Fund") and Gabriel Capital, L.P. ("Gabriel Fund," collectively with Ascot Fund and Ariel Fund, the "Merkin Funds"), outside the purview of this Court, the Defendants threaten the orderly administration of the BLMIS estate and seek to diminish the pool of assets from which the Trustee can make equitable and *pro rata* distributions to the victims of Madoff's fraud.

3. Consistent with this Court's exclusive jurisdiction over the administration of the BLMIS estate, the Trustee seeks to ensure that estate property is recovered and distributed to the

victims of the Madoff Ponzi scheme in a fair and efficient manner consistent with SIPA and the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. (the "Bankruptcy Code").

4. The Merkin Defendants were managers of the Merkin Funds, which invested in BLMIS. The Trustee has a pending adversary proceeding against the Merkin Defendants and the Merkin Funds in this Court, *Picard v. Merkin,* Adv. Pro. No. 09-1182 (Bankr. S.D.N.Y.) (the "Trustee's Merkin Action"), seeking to recover more than $500 million in estate property that was fraudulently transferred from BLMIS to the Merkin Defendants and the Merkin Funds.[1]

5. By commencing litigations and settling claims against the Merkin Defendants and the Merkin Funds, the Defendants have violated the automatic stay provisions of the Bankruptcy Code, section 78eee(b)(2)(B) of SIPA, and at least one of the related stay orders by the District Court for the Southern District of New York (the "District Court") dated December 15, 2008, December 18, 2008, and February 9, 2009 (the "Stay Orders").

6. On June 25, 2012, the NYAG announced a $410 million settlement with the Merkin Defendants and the Merkin Funds (the "Settlement"). If the Settlement is permitted to proceed, the NYAG will be able to recover substantial assets held by the Merkin Defendants—including hundreds of millions of dollars of BLMIS customer property—which he will distribute to select investors in the Merkin Funds ahead of the BLMIS customers who are entitled to those funds. On information and belief, neither the Merkin Defendants nor all of the Merkin Funds will have sufficient assets to satisfy the Trustee's more than $500 million claim as a result of the Settlement.

7. Under the Agreement's terms, as publicly announced, millions of dollars of estate property will not be distributed even to these select investors, but rather will be: (i) paid to the

[1] The Trustee's complaint did not specifically name Ascot Fund, Ltd.; however, Ascot Fund, Ltd. was subsumed in 2003 by Ascot Partners, L.P., and is thus a part of the Trustee's Merkin Action.

NYAG to reimburse the costs of the litigation; and (ii) used to fund a complex claims determination and distribution process.

8. The Settlement and the Third Party Actions threaten the orderly administration of the BLMIS estate and seek to diminish the pool of assets sought by the Trustee, from which he must make equitable and *pro rata* distributions to the victims of Madoff's fraud.

9. The Settlement and the Third Party Actions, including the NYAG's action (the "NYAG Action"), violate the automatic stay and otherwise threaten the BLMIS estate. They seek to recover against certain of the same defendants named in the Trustee's Merkin Action for claims arising out of the BLMIS fraud and based on substantially the same operative facts as those alleged by the Trustee.

10. The Settlement (and the actions underlying it) seeks to recover the same property sought by the Trustee. Based on the information available to the Trustee, Ascot Fund was invested nearly entirely in BLMIS, so all of its assets consist of property of the estate, and a substantial portion of the assets held by the Merkin Defendants also consists of BLMIS funds. The Settlement, and the Third Party Actions underlying it, explicitly seek BLMIS customer funds that were transferred to the Merkin Defendants or the Merkin Funds, by seeking disgorgement or restitution of fees or profits from BLMIS, a constructive trust over all assets of the Merkin Defendants or, in the case of the NYAG, the recovery of substantial assets held by the Merkin Defendants.

11. In addition, it appears that the Merkin Defendants already have paid to settle at least three other actions, and at least two third party arbitrations have resulted in a confirmed arbitration award. To permit further recovery by the Defendants before resolution of the Trustee's Merkin Action would deprive the BLMIS estate of funds, prioritize investors in the

Merkin Funds over BLMIS customers, and subvert the statutory preference for customers mandated by SIPA. It would also reward a race to the courthouse and threaten the orderly administration of the BLMIS liquidation.

12. The Merkin Funds have all filed claims in the liquidation and are participating in the claims process in place before this Court.[2] In addition, the Settlement purports, among other things, to provide a recovery for the losses of investors in the Merkin Funds. By seeking to tap into the same pool of money as the Trustee before the conclusion of the Trustee's Merkin Action, the Third Party Actions threaten the administration of the BLMIS estate and the Defendants should be enjoined.

13. Accordingly, the Trustee respectfully requests that this Court enforce the automatic stay, section 78eee(b)(2)(B) of SIPA, and the Stay Orders and otherwise preliminarily enjoin the Defendants from diminishing, if not completely depleting, the Merkin Defendants' and the Merkin Funds' assets, which should be recovered and distributed by the Trustee.

JURISDICTION AND VENUE

14. This is an adversary proceeding brought in this Court, the Court in which the main underlying SIPA proceeding, Adv. Pro. No. 08-01789 (BRL) (substantively consolidated) is pending. The SIPA proceeding is a combined proceeding with the Securities and Exchange Commission (the "SEC") and was originally brought in the District Court as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC et al.*, No. 08 CV 10791 prior to its removal to this Court. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and sections 78eee(b)(2)(A) and (b)(4) of SIPA.

[2] While Ascot Fund, Ltd. did not file a claim, as noted above, this entity was subsumed in 2003 by Ascot Partners, L.P., which did file a claim in the liquidation.

15. An action for a declaratory judgment is properly commenced as an adversary proceeding pursuant to Rules 7001(2) and 7001(9) of the Federal Rules of Bankruptcy Procedure.

16. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

17. Venue in this district is proper under 28 U.S.C. § 1409.

18. This court has personal jurisdiction over the Defendants pursuant to Federal Rule of Bankruptcy Procedure 7004(f).

BACKGROUND, THE TRUSTEE AND STANDING

19. The facts and procedural history relevant to the Madoff Ponzi scheme have been set forth numerous times and need not be repeated here.[3]

20. The Stay Orders were entered by the District Court shortly after the commencement of the liquidation. Specifically, in an order entered on December 15, 2008, the District Court declared that "all persons and entities are stayed, enjoined and restrained from directly or indirectly . . . interfering with any assets or property owned, controlled or in the possession of [BLMIS]." *SEC v. Bernard L. Madoff*, 08-CV-10791 (LLS), ECF No. 4 ¶ IV (reinforcing automatic stay); *see also* Order on Consent Imposing Preliminary Injunction Freezing Assets and Granting Other Relief Against Defendants, Dec. 18, 2008, ECF No. 8 ¶ IX ("no creditor or claimant against [BLMIS], or any person acting on behalf of such creditor or claimant, shall take any action to interfere with the control, possession or management of the assets subject to the receivership"); Partial Judgment on Consent Imposing Permanent Injunction

[3] *See Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC)*, 424 B.R. 122, 125–33 (Bankr. S.D.N.Y. 2010), *aff'd* 654 F.3d 229 (2d Cir. 2011); *Picard v. Fox*, 429 B.R. 423, 426 (Bankr. S.D.N.Y. 2010) *aff'd* No. 10 Civ. 4652 (JGK), 2012 WL 990829 (S.D.N.Y. Mar. 26, 2012).

and Continuing Other Relief, Feb. 9, 2009, ECF No. 18 ¶ IV (incorporating and making the December 18, 2008 stay order permanent).

21. Appointed under SIPA, the Trustee is charged with recovering and distributing customer property to BLMIS's customers, assessing claims, and liquidating any other assets of the firm for the benefit of the estate and its creditors. Consistent with his duties, the Trustee is marshalling BLMIS's assets, and is well underway in that process.

22. The assets recovered, however, will not be sufficient to reimburse the customers of BLMIS for the billions of dollars that they invested with BLMIS over the years. Consequently, the Trustee must use his authority under SIPA and the Bankruptcy Code to pursue avoidable transfers and other recovery actions. Absent these recovery actions, the Trustee will be unable to satisfy the claims described in subparagraphs (A) through (D) of 15 U.S.C. § 78fff-2(c)(1).

23. Pursuant to section 78fff-1(a) of SIPA, the Trustee has the general powers of a bankruptcy trustee in a case under the Bankruptcy Code. Chapters 1, 3, 5 and subchapters I and II of chapter 7 of the Bankruptcy Code are applicable to this case, to the extent consistent with SIPA.

24. In addition to the powers of bankruptcy trustee, the Trustee has broader powers granted by SIPA pursuant to 15 U.S.C. §§ 78aaa *et seq*.

THE COURT-ORDERED CLAIMS ADMINISTRATION PROCESS AND NET EQUITY DETERMINATIONS

25. The Trustee sought and obtained an order from the Court to implement a customer claims process in accordance with SIPA.

26. Pursuant to an application of the Trustee dated December 21, 2008, the Court entered the Claims Procedures Order, which directed, among other things, that on or before

January 9, 2009: (a) a notice of the commencement of this SIPA Proceeding be published; (b) a notice of the liquidation proceeding and claims procedure be given to persons who appear to have been customers of BLMIS; and (c) notice of the liquidation proceeding and a claim form be mailed to all known general creditors of BLMIS.

27. More than 16,000 potential customer, general creditor, and broker-dealer claimants, including many of the Defendants, were included in the mailing of the notice.

28. Under the Claims Procedures Order, claimants were directed to mail their claims to the Trustee. All customers and creditors were notified of the mandatory statutory bar date for filing of claims under section 78fff-2(a)(3) of SIPA, which was July 2, 2009 (the "Bar Date"). The Trustee also provided several reminder notices.

29. By the Bar Date, the Trustee had received 16,239 customer claims.

30. In accordance with the Claims Procedures Order, the Trustee developed a comprehensive claims administration process for the intake, reconciliation, and resolution of the customer claims. The Trustee determined each customer's "net equity" by crediting the amount of cash deposited by the customer into her BLMIS account, less any amounts withdrawn from her BLMIS customer account, otherwise known as the "Net Investment Method." After certain claimants objected to the Trustee's interpretation of net equity, the Trustee moved for a briefing schedule and hearing on the matter.

31. On March 1, 2010, the Court issued its decision on the net equity issue, approving the Trustee's method of determining net equity. *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC)*, 424 B.R. 122 (Bankr. S.D.N.Y. 2010):

> Because 'securities positions' are in fact nonexistent, the Trustee cannot discharge claims upon the false premise that customers' securities positions are what the account statements purport them to be. Rather, the only verifiable amounts that are manifest from the books and records are the cash deposits and withdrawals.

Id. at 135.

32. The Court also concluded that the Trustee's calculation of net equity was consistent with the avoidance powers available to him under SIPA and the Bankruptcy Code, *id.* at 135–38, and that both equity and practicality favor utilizing the Trustee's calculus:

> Customer property consists of a limited amount of funds that are available for distribution. Any dollar paid to reimburse a fictitious profit is a dollar no longer available to pay claims for money actually invested. If the Last Statement Method were adopted, Net Winners would receive more favorable treatment by profiting from the principal investments of Net Losers, yielding an inequitable result.
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> * * *
>
> Equality is achieved in this case by employing the Trustee's method, which looks solely to deposits and withdrawals that in reality occurred.

Id. at 141–42.

33. On March 8, 2010, the Court issued an order affirming the Trustee's Net Equity calculation ("Net Equity Order") and certified an appeal of the Net Equity Order directly to the United States Court of Appeals for the Second Circuit. (Net Equity Order, *Sec. Inv. Prot. Corp.*, Adv. Pro. No. 08-01789, ECF No. 2020; Certification of Net Equity Order, *Id.*, ECF No. 2022.)

34. On August 16, 2011, the Second Circuit affirmed the Net Equity Decision. *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229 (2d Cir. 2011). The Second Circuit held that:

> [I]f the Trustee had permitted the objecting claimants to recover based on their final account statements, this would have 'affect[ed] the limited amount available for distribution from the customer property fund.' [Citing *In re Bernard L. Madoff Sec., LLC*, 424 B.R. at 133.] The inequitable consequence of such a scheme would be that those who had already withdrawn cash deriving from imaginary profits in excess of their initial investment would derive additional benefit at the expense of those customers who had not withdrawn funds before the fraud was exposed.

In re Bernard L. Madoff, 654 F.3d at 238. On June 25, 2012, the United States Supreme Court denied *certiorari* review of the Second Circuit's affirmance of the Net Equity Decision. *Velvel*

v. Picard, No. 11-986, ___ S. Ct. ___, 2012 WL 425188 (U.S. Jun. 25, 2012); *Ryan v. Picard*, No. 11-969, ___ S. Ct. ___, 2012 WL 396489 (U.S. Jun. 25, 2012).

THE TRUSTEE'S ACTIONS AGAINST THE MERKIN DEFENDANTS AND THE MERKIN FUNDS

35. The Trustee commenced his Merkin Action against the Merkin Defendants and the Merkin Funds on May 6, 2009 (Adv. Pro. No. 09-1182) in this Court. The Trustee seeks to avoid and recover more than $500 million in avoidable transfers held by the Merkin Defendants and the Merkin Funds for equitable distribution to the victims of the Ponzi scheme. The Defendants represent potential beneficiaries of this recovery.

36. In his complaint (the "Trustee's Complaint"), the Trustee alleges that Merkin, a sophisticated investment manager with close business and social ties to Madoff, steered hundreds of millions of dollars from the Merkin Funds into BLMIS through his solely held corporation, GCC, and that the Merkin Funds and Merkin Defendants withdrew more than $500 million from BLMIS from at least 1995 to 2008. The Merkin Defendants knew or should have known that BLMIS was predicated on fraud, as they were on notice of myriad indicia of fraud, but failed to diligently investigate. The Merkin Defendants received substantial fees and commissions from BLMIS in connection with their management of the Merkin Funds.

37. The Trustee's Complaint seeks the recovery from the Merkin Defendants and the Merkin Funds of BLMIS customer property under SIPA §§ 78fff(b), 78fff-1(a), and 78fff-2(c)(3), §§ 105(a), 502(d), 542, 544, 547, 548(a), 550(a) and 551 of the Bankruptcy Code, the New York Fraudulent Conveyance Act (N.Y. Debt & Cred. §§ 270 *et seq.*) and N.Y. C.P.L.R. 203(g). The Trustee also seeks the imposition of a constructive trust and disallowance of claims. On December 23, 2009, the Trustee amended his Complaint to add a new count seeking recovery from Merkin personally, based upon his position as general partner of Ascot Fund and Ascot

Fund's insolvency and inability to pay any judgments rendered against it, for all preferential and fraudulent transfers made from BLMIS to Ascot Fund. These transfers total in excess of $500 million.

38. On January 25, 2010, the Merkin Defendants, Ariel Fund, and Gabriel Fund renewed Motions to Dismiss the Trustee's Amended Complaint. On November 17, 2010, this Court entered a Decision and Order denying the Motions to Dismiss as to all Counts, with the exception of claims for immediate turnover under section 542 and preferential transfers.[4] The Court held that the Trustee alleged viable claims for actual fraudulent transfers, constructive fraudulent transfers, undiscovered fraudulent transfers, subsequent transfers to the Merkin Defendants, and general partner liability of Merkin, specifically holding that voidable transfers received by Ascot Fund could be recovered from Merkin as Ascot Fund's sole general partner. Bart M. Schwartz ("Schwartz"), as receiver for Ariel Fund and Gabriel Fund, filed a Motion for Leave to Appeal with the District Court. That motion was denied on August 31, 2011.

THE SETTLEMENT AND THIRD PARTY ACTIONS

39. The NYAG Settlement relates to at least two actions, one brought by the NYAG, and one brought by Schwartz, as receiver for Ariel Fund and Gabriel Fund.[5] The Settlement appears to have a process in place to resolve other pending litigation as well.

(1) ***Eric T. Schneiderman, as successor to Andrew M. Cuomo, Attorney General of the State of New York v. J. Ezra Merkin, et al.*, Index No. 450879/2009 (N.Y. Sup. Ct.) (J. Lowe)**

[4] There were no preferential transfers made to Ariel Fund and Gabriel Fund. The only preferential transfers at issue were made to Ascot Fund.

[5] David Pitofsky, as receiver for Ascot Fund, is participating in the Settlement. Ascot Fund began investing with BLMIS sometime before 1995 and was nearly entirely invested with BLMIS.

40. On or about April 6, 2009, the NYAG commenced the NYAG Action against the Merkin Defendants on behalf of investors in the Merkin Funds in the Supreme Court of the State of New York, County of New York. The NYAG Action is pending before Judge Richard Lowe.

41. The NYAG seeks restitution and compensatory damages on behalf of the Merkin Funds' investors, attorneys' fees, and other expenses. The NYAG also seeks an accounting and an injunction prohibiting the Merkin Defendants from engaging in the securities business in the State of New York, which is not the subject of the instant application.

42. The stated purposes of the NYAG Action is to promote the "economic health and well-being of investors" and "financial well-being" of non-profit organizations and to seek restitution for the Merkin Defendants' fraudulent conduct.

43. The NYAG Complaint does not specify the dollar amount sought by the NYAG beyond seeking "all restitution and damages" caused by the complained-of acts. However, prior to the Settlement, the NYAG asserted that he sought to recover nearly $729 million in fees from the Merkin Defendants, in addition to damages sought for fictitious profits, attorneys' fees or other expenses.

44. The NYAG thus seeks the funds that allegedly were transferred by BLMIS to the Merkin Funds and Merkin Defendants—the same funds that the Trustee seeks to recover in his litigation for the benefit of all BLMIS customers and creditors. The recovery of these amounts by the NYAG would significantly reduce the Merkin Defendants' assets, and possibly exhaust available liquid assets, rendering any victory by the Trustee in his litigation pyrrhic.

45. Just as the Trustee sets forth in his Complaint, the NYAG alleges that Merkin knew or should have known of the Ponzi scheme and that he failed to conduct proper due diligence over BLMIS.

46. Notably, the NYAG alleges that "Merkin collected hundreds of millions of dollars in fees for managing investors' funds, while turning all, or a substantial portion, of those funds over to Madoff and others . . . whom Merkin failed to adequately oversee, audit, or investigate." The Trustee has alleged in his Merkin Action that the fees paid to the Merkin Defendants in connection with the Merkin Funds' BLMIS investments were withdrawn from BLMIS. Thus, the NYAG seeks the same hundreds of millions of dollars that were fraudulently transferred by BLMIS to Merkin that are sought by the Trustee.

47. On October 18, 2010, the NYAG filed a motion for summary judgment, which was *sub judice* until the time of the Settlement and has been marked off calendar in light of the Settlement.

48. Various "freeze orders" (the "Freeze Orders") were entered in the NYAG Action to preserve assets for the NYAG to recover.

49. These Freeze Orders have not been enough to prevent the dissipation of Merkin's assets to date, as the NYAG apparently agreed to allow Merkin to pay out assets of three other actions, and at least two third party arbitrations have resulted in confirmed arbitration awards, while the Freeze Orders were supposedly in effect.[6]

50. More importantly, they provide no protection against recovery by the NYAG, which has now settled with the Merkin Defendants.

(2) *Bart M. Schwartz, as Receiver for Ariel Fund Ltd. and for Gabriel Capital, L.P. v. J. Ezra Merkin, et al.*, Index No. 651516/2010 (N.Y. Sup. Ct.) (J. Lowe)

[6] The Trustee is considering whether to expend additional resources to pursue the third party plaintiffs in these actions as subsequent transferees: (1) *Congregation Machsikai Torah-Beth Pinchas v. Ascot Partners, L.P., et al.*, Index No. 09-02118 (Mass. Sup. Ct.); (2) *Sandalwood Debt Fund A, L.P., and Sandalwood Debt Fund B, L.P. v. J. Ezra Merkin*, Index No. 651441/2010 (N.Y. Sup. Ct.); and (3) *The Calibre Fund, LLC v. J. Ezra Merkin, et al.*, Index No. 107978/2011 (N.Y. Sup. Ct.).

51. Bart Schwartz, as Receiver for Ariel and Gabriel Funds, is participating in the Settlement. The Receiver's litigation, just like the NYAG's litigation, seeks fraudulently transferred customer property.

52. On or about September 16, 2010, Ariel Fund and Gabriel Fund, through their court-appointed receiver, Bart Schwartz, commenced an action against the Merkin Defendants in the Supreme Court of the State of New York, County of New York (the "Schwartz Action") by filing a complaint (the "Schwartz Complaint").

53. Through the Schwartz Action, Ariel Fund and Gabriel Fund seek unspecified compensatory, consequential and punitive damages, as well as attorneys' fees and other expenses and interest. They also seek "a constructive trust over *all assets, property, and/or cash currently in the custody and control of each Defendant*" including, among other things, "all assets or compensation received by the Defendants in connection with the business of the Funds."

54. The Schwartz Complaint therefore seeks control over the same $500 million in fraudulently transferred BLMIS customer property that the Trustee seeks in his Merkin Action. On December 17, 2010, the Merkin Defendants filed a motion to dismiss the Schwartz Action. That motion was pending at the time the Settlement was announced, and has been marked off calendar in light of the Settlement.

55. Akin to the Trustee's Complaint, the Schwartz Complaint alleges that the Merkin Defendants benefited from investing with BLMIS, even though they knew or should have known that they were benefiting from a fraud. The harm claimed by Ariel Fund and Gabriel Fund stems fundamentally from the BLMIS fraud.

56. More significantly, by seeking a constructive trust over all assets held by the Merkin Defendants, the Funds seek to recover for themselves the same fraudulent transfers

sought by the Trustee. Schwartz has readily acknowledged that the Trustee's Merkin Action is "already pending," "relatively well developed," and "will be better adjudicated" before this Court.

(3) The Settlement

57. As announced in Attorney General Schneiderman's Press Release, the NYAG "secured a $410 million settlement with J. Ezra Merkin," recovering the Merkin Defendants' management fees in connection with the Merkin Funds. The Settlement seeks to compensate select investors in these funds, paying "$405 million to compensate investors over a three-year period, and $5 million to the State of New York to cover fees and costs."

58. The Settlement consists of a complex, and no doubt costly, system, whereby David Pitofsky and Bart Schwartz, court-appointed receivers for the Merkin Funds, will direct payments to select investors depending on a determination of whether they were aware of Merkin's delegation of authority to Madoff: "Depending on the size of their losses, eligible investors will be entitled to receive over 40 percent of their cash losses. Pursuant to a claims process, investors who were not aware of Merkin's delegation to Madoff will receive a defined percentage of their losses, while those who were aware of Madoff's role will be eligible to receive a smaller recovery."

59. The New York State court is to retain continuing jurisdiction over the Settlement. The NYAG further stated that the select investors who would benefit from the Settlement "are likely to receive additional payments at a future date when the Madoff Estate is able to distribute moneys recovered by Irving Picard."

60. Thus, through the Settlement, the NYAG seeks to: (1) obtain a substantial portion of Merkin's assets; (2) for fraudulently transferred assets consisting of "other people's money;" (3) for distribution to select investors; (3) to the detriment of all other BLMIS customers; and (4)

outside the jurisdiction of this Court. The Settlement is nothing less than an out and out assault on this Court's jurisdiction over the BLMIS estate and the equitable distribution scheme put into place by this Court and affirmed by the Second Circuit.

61. The Trustee attempted to obtain a copy of the Settlement Agreement. Over nearly a one month period, the Trustee engaged in good-faith negotiations with counsel for various Defendants in an effort to see the precise terms of the Settlement. Despite agreeing to the material terms of a confidentiality agreement no later than July 11, 2012 in order to obtain the Settlement Agreement, the Trustee was informed by counsel for the NYAG on July 26, 2012 that the NYAG would not provide the Settlement Agreement to the Trustee, deeming it "premature" to do so.

THE AUTOMATIC STAY, STAY ORDERS, AND SIPA SECTION 78eee(b)(2)(B) SHOULD BE ENFORCED AND THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION

62. The Defendants' claims are inextricably linked and related to the underlying SIPA proceeding and the Trustee's Merkin Action. The Settlement will impair this Court's jurisdiction over property of the estate and the Trustee's ability to marshal such customer property on behalf of the estate.

63. The Third Party Actions violate at least the December 15, 2008 Stay Order issued by the District Court, if not all of the Stay Orders.

64. The Settlement (and the actions underlying it) threaten to allow certain indirect investors of BLMIS to recover more than their fair share of the BLMIS estate by depleting the assets of the Merkin Defendants and the Merkin Funds. Such an outcome will compromise the equitable distribution of customer property through the estate.

65. The Settlement threatens to frustrate the goals of SIPA, which seeks to return to each customer, on an equitable basis, his or her net equity in the debtor. The Settlement, as well as the continued prosecution of the Third Party Actions, would also allow the Defendants to circumvent the claims process established by the Court, undermining this Court's jurisdiction and interfering with the administration of the liquidation.

66. The Settlement seeks to recover the same funds sought by the Trustee, and concerns the same fraudulent transfers received from BLMIS. Indeed, the Settlement purports to recover fees paid to the Merkin Defendants. As the Trustee has alleged, these fees and commissions were paid to the Merkin Defendants through transfers from BLMIS and are some of the same transfers sought by the Trustee.

67. The only money held by Ascot Fund is money that was wrongfully transferred as part of Madoff's Ponzi scheme, which means that any "damages" recovered from Ascot Fund will necessarily consist of estate property.

68. The transfers that the Merkin Defendants and the Merkin Funds received in connection with BLMIS included more than $500 million of customer funds. Specifically, based on the Trustee's investigation to date, the Trustee does not believe that the Merkin Defendants can satisfy both the amount purportedly due under the Settlement and the over $500 million the Trustee seeks in his litigation. Thus, the Settlement would deplete the pool of fraudulently transferred property available for recovery by the estate.

COUNT ONE
DECLARATORY RELIEF

69. The Trustee incorporates by reference the allegations contained in the foregoing paragraphs of this Complaint as if fully realleged herein.

70. This is a claim for declaratory relief under 28 U.S.C. §§ 2201, *et seq.*

71. The Trustee seeks a declaration that the Settlement and the Third Party Actions violate at least one of the Stay Orders and the automatic stay provisions under 11 U.S.C. § 362(a) and 15 U.S.C. § 78eee(b)(2)(B). This declaratory relief is warranted for, without limitation, the following reasons:

(a) By seeking to recover from the Merkin Defendants and the Merkin Funds, the Settlement and the Third Party Actions improperly contravene the claims administration process in the SIPA proceeding and sidestep the Trustee's exclusive right to seek recovery of fraudulently transferred property in violation of 11 U.S.C. § 362(a)(1) and (6).

(b) Additionally, the Settlement and Third Party Actions improperly seek to recover on a claim against the estate of BLMIS and/or Madoff in violation of 11 U.S.C. § 362(a)(1) and seek to obtain possession of estate property in direct violation of 11 U.S.C. § 362(a)(3), 15 U.S.C. § 78eee(b)(2)(B) and the Stay Orders.

72. This Court has authority pursuant to sections 105(a) and 362(a) of the Bankruptcy Code to issue declaratory relief because this controversy is actual and justiciable, and the Court has jurisdiction over matters affecting property of the estate and the effective and equitable administration of the estate of BLMIS and/or Madoff.

COUNT TWO
PRELIMINARY INJUNCTION

73. The Trustee incorporates by reference the allegations contained in the foregoing paragraphs of this Complaint as if fully realleged herein.

74. The Trustee seeks injunctive relief by way of an order that any actions towards effectuating the terms of the Settlement, any further prosecution of the Third Party Actions, and any distribution of assets by the Merkin Defendants or Merkin Funds in connection with the Settlement and the Third Party Actions or any other actions brought against the Merkin

Defendants or Merkin Funds as a result of the BLMIS fraud, should be enjoined pursuant to section 105(a) of the Bankruptcy Code, made applicable to these proceedings by section 78fff(b) of SIPA. Specifically, the Trustee requests that this Court enjoin the Defendants from effectuating the Settlement (or prosecuting the Third Party Actions) except to the extent that the NYAG Action seeks injunctive relief and an accounting, for, without limitation, the following reasons:

(c) The Settlement and Third Party Actions improperly infringe on the jurisdiction of this Court. Any funds recovered in the Settlement or the Third Party Actions have a strong likelihood of consisting of estate property, recoverable by the Trustee. As such, further effectuation of the Settlement or prosecution of the Third Party Actions could ultimately result in another court determining how potential customer property is distributed among certain BLMIS customers and creditors.

(d) To the extent that Defendants successfully effectuate the Settlement or prevail in the Third Party Actions, section 78fff-2(c)(1)—which provides for the ratable distribution of customer property to customers—would be violated because investors in the Merkin Funds would receive more than their proportionate share of customer property to the detriment of BLMIS customers with allowed claims.

(e) The claims asserted in the Third Party Actions are so inextricably intertwined and related to the underlying SIPA proceeding and the Trustee's Merkin Action that continued efforts to fulfill the terms of the Settlement or prosecute the Third Party Actions will impair this Court's jurisdiction over this proceeding and the Trustee's ability to marshal assets on behalf of the estate.

(f) There is an inadequate remedy at law to protect and preserve the assets that constitute customer property. The Settlement and Third Party Actions threaten the administration of the liquidation, and an injunction is necessary to preserve and protect estate property and the Trustee's efforts to gather and collect estate property for the benefit of the victims who have filed claims.

(g) An injunction will prevent the substantial confusion of other investors and potential plaintiffs with respect to whether they must file separate actions to protect their interests, or participate in the Settlement, and the Settlement's separate claims administration process.

(h) An injunction will avoid the possibility of inconsistent decisions and will ensure preservation of uniformity of decision.

(i) The injunction will not harm the public interest, and, in fact, is in the best interests of BLMIS customers and will allow for the orderly administration of the claims administration process.

75. The injunction requested herein is necessary and appropriate to carry out the Trustee's duties in accordance with the provisions of SIPA and the Bankruptcy Code. The Settlement and further prosecution of the Third Party Actions would seriously impair and potentially defeat this Court's jurisdiction and the Court's ability to administer the BLMIS proceedings.

76. The Trustee also seeks to preliminarily enjoin the Defendants and their officers, agents, servants, employees, attorneys, assigns and those acting in concert or participation with them, from executing any judgments, making or receiving any settlement payments, or otherwise distributing assets in connection with the Settlement or the Third Party Actions or any other

actions brought against the Merkin Defendants and/or the Merkin Funds as a result of the BLMIS fraud, until the completion of the Trustee's Merkin Action, including the satisfaction by the Merkin Defendants and/or the Merkin Funds of any settlement or judgment obtained by the Trustee.

WHEREFORE, the Trustee respectfully requests that this Court enter judgment in favor of the Trustee and against the Defendants:

i. declaring that the Third Party Actions are void *ab initio* as against the Merkin Defendants and the Merkin Funds (except to the extent the NYAG's Action seeks injunctive relief and an accounting), as violative of the automatic stay provisions of Bankruptcy Code § 362(a), SIPA § 78eee(b)(2)(B)(i), and at least one of the Stay Orders, and that the Settlement is thus void;

ii. preliminarily enjoining, pursuant to section 105(a) of the Bankruptcy Code, the Defendants, their officers, agents, servants, employees, attorneys, and all those acting in concert or participation with them, or acting on their behalf, from consummating the Settlement, including transferring any money or property in connection with the Settlement, executing any judgments, making or receiving any settlement payments, or otherwise distributing assets in connection with the Settlement or the Third Party Actions or any other actions brought against the Merkin Defendants and/or the Merkin Funds as a result of the BLMIS fraud; and litigating the Third Party Actions or any other actions as against any of the Merkin Defendants and/or the Merkin Funds brought as a result of the BLMIS fraud, until the completion of the Trustee's Merkin Action, including the satisfaction by the Merkin Defendants and/or the Merkin Funds of any settlement or judgment obtained by the Trustee;

iii. granting the Trustee such other relief as the Court deems just and proper.

Date: New York, New York
August 1, 2012

/s/ Marc D. Powers

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