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for the Substantively Consolidated SIPA Liquidation
of Bernard L. Madoff Investment Securities LLC
and Bernard L. Madoff*

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

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation of
Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

ACCESS MANAGEMENT LUXEMBOURG S.A.
(f/k/a ACCESS INTERNATIONAL ADVISORS
(LUXEMBOURG) S.A.), as represented by its
Liquidator LAURENCE PAYOT, BENOIT
ENTRINGER and FERNAND ENTRINGER,
PIERRE DELANDMETER, and PATRICK
LITTAYE,

Defendants.

Adv. Pro. No. 08-01789 (BRL)

SIPA LIQUIDATION

(Substantively Consolidated)

Adv. Pro. No. _____

COMPLAINT

Irving H. Picard, as trustee (the “Trustee”) for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* (“SIPA”), and Bernard L. Madoff (“Madoff”), by and through his undersigned counsel, as and for his Complaint, alleges as follows:

NATURE OF THE ACTION

1. The Trustee commences this adversary proceeding to prevent certain third party plaintiffs, who are named as Defendants in the caption above (collectively, the “Third Party Plaintiffs”), from undermining this Court’s continuing jurisdiction over the estate of BLMIS. By commencing an action in Luxembourg (the “Luxalpha Third Party Writ”) against the Trustee as representative of the consolidated estates of BLMIS and Madoff (hereinafter referred to as the “BLMIS estate”), the Third Party Plaintiffs have willfully violated the automatic stay provision of the United States Bankruptcy Code, 11 U.S.C. § 362 (the “Bankruptcy Code”), section 78eee(b)(2)(B) of SIPA, stay orders issued in connection with these proceedings issued by the United States District Court for the Southern District of New York (the “District Court”), dated December 15, 2008, December 18, 2008 and February 9, 2009 (collectively, the “Stay Orders”), and the “*Barton doctrine*,” which prohibits an action against a trustee. The Luxalpha Third Party Writ seeks over a billion dollars in claims to be taken directly from the assets of the BLMIS estate. The Luxalpha Third Party Writ undermines the exclusive jurisdiction of this Court to adjudicate claims against the BLMIS estate and distribute customer property equitably amongst BLMIS’s victims.

2. By protecting this Court’s exclusive jurisdiction over the administration of the BLMIS estate, the Trustee seeks to ensure that customer property is distributed to the victims of

Madoff's massive Ponzi scheme in a fair and efficient manner consistent with SIPA and the Bankruptcy Code.

3. The Trustee respectfully requests that the Court: (i) enforce the automatic stay and Stay Orders; (ii) declare that the Luxalpha Third Party Writ, with respect to the Trustee as representative of the consolidated estates of BLMIS and Madoff, violates the automatic stay, the Stay Orders, SIPA and the *Barton* doctrine, and is void *ab initio* under United States law; and (iii) issue an injunction permanently enjoining the Third Party Plaintiffs and their counsel from litigating the Luxalpha Third Party Writ as against the Trustee, BLMIS or Madoff.

JURISDICTION AND VENUE

4. This is an adversary proceeding brought in this Court—the Court in which the main underlying SIPA proceeding, 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 United States District Court for the Southern District of New York as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC et al.*, No. 08 CV 10791 (LLS) (the “District Court Action”), 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.

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

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

7. The Third Party Plaintiffs are subject to the jurisdiction of this Court. By initiating the Luxalpha Third Party Writ, the Third Party Plaintiffs have taken an action that affects the administration of the BLMIS estate and was expressly aimed at the United States. Moreover, each of the Third Party Plaintiffs has undertaken acts in the United States directed at profiting from BLMIS, a New York-based investment scheme.

BACKGROUND, THE TRUSTEE, AND STANDING

8. On December 11, 2008 (the “Filing Date”), Madoff was arrested by federal agents and criminally charged with a multi-billion dollar securities fraud scheme in violation of 15 U.S.C. §§ 78j(b), 78ff, and 17 C.F.R. 240.10b-5 in the District Court, captioned *United States v. Madoff*, No. 08-2735.¹ Contemporaneously, the SEC filed a complaint in the District Court against, among others, Madoff and BLMIS. (District Court Action, ECF No. 1.) The SEC complaint alleged that Madoff and BLMIS engaged in fraud through the investment advisor activities of BLMIS.

9. On December 15, 2008, pursuant to section 78eee(a)(4)(A) of SIPA, the SEC consented to a combination of its own action with an application of SIPC. (District Court Action, ECF No. 7.) Thereafter, pursuant to section 78eee(a)(4)(B) 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 protections afforded by SIPA.

10. Also on December 15, 2008, the District Court granted the SIPC application and entered a Protective Decree, which was consented to by BLMIS. (District Court Action, ECF No. 4.) The Decree, 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 this Court pursuant to section 78eee(b)(4) of SIPA.

11. In an order entered on December 15, 2008, the District Court entered an order declaring that “all persons and entities are stayed, enjoined and restrained from directly or

¹ On March 10, 2009, the criminal case was transferred to Judge Denny Chin in the District Court and was assigned a new docket number, No. 09 CR 213 (DC).

indirectly . . . interfering with any assets or property owned, controlled or in the possession of [BLMIS].” (District Court Action, 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, District Court Action, 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 and Continuing Other Relief, Feb. 9, 2009, District Court Action, ECF No. 18 ¶ IV (incorporating and making the December 18, 2008 stay order permanent).) (These orders are collectively referred to as the “Stay Orders.”)

12. By orders dated December 23, 2008 and February 4, 2009, respectively, this Court approved the Trustee’s bond and found that the Trustee was a disinterested person. (*Secs. Inv. Prot. Corp. v. Bernard L. Madoff Secs.*, No. 08-01789 (BRL) (the “Bankruptcy Court Action”), ECF Nos. 11, 69.) Accordingly, the Trustee is duly qualified to serve and act on behalf of the estate of BLMIS.

13. On March 12, 2009, Madoff pled guilty to an 11-count criminal information. At the Plea Hearing, Madoff admitted that he “operated a Ponzi scheme through the investment advisory side of [BLMIS].” (*United States v. Madoff*, No. 09 CR 213 (DC) (the “Criminal Action”), ECF No. 57, Plea Hr’g Tr. at 23:14–17.)

14. On April 13, 2009, an involuntary bankruptcy petition was filed against Madoff in this Court, *In re Bernard L. Madoff*, 09-11893 (BRL) (the “Involuntary Proceeding”), and on June 9, 2009, this Court entered an order substantively consolidating the Chapter 7 estate of Madoff into the SIPA Proceeding. (Involuntary Proceeding, ECF No. 28.)

15. 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.

16. 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 recovery from, among others, those who enabled the Ponzi scheme to operate. 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).

17. 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.

18. 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.*

19. The Trustee is a real party in interest and has standing to bring these claims pursuant to 15 U.S.C. § 78fff-1 and the Bankruptcy Code, including sections 323(b) and 704(a)(1), because, among other reasons:

a. The Third Party Plaintiffs request relief that seeks assets of the estate and affects the distribution of customer property and the orderly administration of the estate.

b. BLMIS's customers would be injured in the absence of the Trustee's filing of this Complaint.

c. The Trustee will not be able to fully satisfy all claims.

THE PONZI SCHEME

20. Madoff founded BLMIS in 1960. Until his arrest, Madoff was the sole member and chairman of BLMIS. BLMIS had its principal place of business in New York and engaged in three primary types of business: market making, proprietary trading, and investment advisory services. BLMIS was registered with the SEC as a broker-dealer and then registered in 2006 as an investment adviser. Pursuant to its registration as a broker-dealer, BLMIS was a member of SIPC.

21. Madoff solicited billions of dollars under false pretenses and failed to invest investors' money as promised. Instead, he deposited investors' money in a bank account at J.P. Morgan Chase Manhattan Bank. (*See* Madoff Plea Allocution at 1, Criminal Action, ECF No. 5.) Madoff represented to clients and prospective clients that he would invest their money in shares of common stock, options and other securities and would, at their request, return profit and principal. *See id.* However, virtually no securities were purchased by Madoff for his customers.

22. By early December 2008, BLMIS generated statements for its approximately 4,900 active customer accounts. When added together, these statements erroneously showed that the customers of BLMIS had approximately \$64.8 billion invested with BLMIS. In reality, BLMIS had assets on hand worth only a small fraction of that amount. Madoff's massive Ponzi scheme imploded and came to an end on December 11, 2008, the date on which he was arrested.

THE COURT-ORDERED CLAIMS ADMINISTRATION PROCESS

23. The Trustee sought and obtained a Court order to implement a customer claims process in accordance with SIPA.

24. Pursuant to an application of the Trustee dated December 21, 2008 (Bankruptcy Action, ECF No. 8), this Court entered the Claims Procedures Order (Bankruptcy Action, ECF No. 12), 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.

25. More than 16,000 potential customers, general creditor and broker-dealer claimants were included in the mailing of the notice.

26. 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. On May 21, 2009, the Trustee mailed a reminder notice to customers who had not yet filed a claim that the statutory bar date was July 2, 2009. On June 22, 2009, the Trustee mailed a final bar date reminder notice (the "Final Reminder Notice") to 7,766 known past and present customers of BLMIS from whom a claim had not yet been received. In addition, the Trustee posted the Final Reminder Notice on the Trustee's website.

27. By the Bar Date, the Trustee had received 16,239 customer claims. The Third Party Plaintiffs had not filed a claim for the money they now seek in the Luxalpha Third Party Writ.

THE TRUSTEE'S ACTION AGAINST THE THIRD PARTY PLAINTIFFS

28. On November 23, 2010, the Trustee commenced an action in this Court, *Picard v. UBS AG et al.*, Adv. Pro. No. 10-04285 (BRL) (the "Trustee's Action"), against two feeder

funds, Luxalpha SICAV (“Luxalpha”) and Groupement Financier Ltd., as well as various institutional and individual defendants, including the Third Party Plaintiffs, who collectively reaped billions of dollars in fees for the services they purportedly rendered to the funds, when in reality they rendered no services other than to facilitate and/or enable Madoff’s fraud. (Trustee’s Action, ECF No. 1 ¶ 1.) The Complaint alleges that the Third Party Plaintiffs “facilitated and perpetuated the fraud by opening the door to substantial investments from Europe—investments that BLMIS needed to sustain the Ponzi scheme,” by “misrepresent[ing] the controls, oversight and procedures in place” for Luxalpha and Groupement Financier, and “willfully turning a blind eye to glaring indicators of BLMIS’s fraud.” (*Id.* ¶¶ 179, 190, 211.)

29. The Trustee’s Action against the Third Party Plaintiffs seeks the recovery of subsequent transfers, and seeks damages for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and conversion, and further asserts causes of action for unjust enrichment and money had and received. (*Id.* ¶¶ 270-74, 314-19, 356-78.)

THE LUXALPHA LIQUIDATOR ACTION

30. On or about December 18, 2009, the liquidators of Luxalpha filed an action in the District Court of Luxembourg against, among others, the Third Party Plaintiffs (the “Luxalpha Liquidator Action”) for the damage caused to Luxalpha as a result of the fraud perpetrated by Madoff and facilitated by each of the named defendants, including the Third Party Plaintiffs.

31. The Luxalpha Liquidator Action asserts that Third Party Plaintiff Access Management Luxembourg S.A. (“AML”) breached its legal and contractual obligations as portfolio manager of Luxalpha by improperly delegating its managerial responsibilities to BLMIS and then continuing to represent that it was actually managing the assets. The Luxalpha Liquidator Action further asserts that AML breached its obligations as sponsor of Luxalpha by

establishing an investment vehicle that did not comport with the relevant regulatory requirements in Luxembourg.

32. With respect to Third Party Plaintiffs Patrick Littaye (“Littaye”) and Pierre Delandmeter (“Delandmeter”), both of whom served on the Board of Directors of Luxalpha, the Luxalpha Liquidator Action asserts that they violated various Luxembourg laws by failing to exercise adequate and appropriate supervision over the management of Luxalpha, failing to ensure that Luxalpha complied with its own investment policy, performing or allowing numerous prohibited transactions, including the improper delegation of management responsibility to BLMIS, and publishing incomplete and inaccurate prospectuses.

THE LUXALPHA THIRD PARTY WRIT

33. On or around May 12, 2010, the Third Party Plaintiffs named the Trustee, on behalf of the BLMIS estate, as a third party defendant through an impleader in the Luxalpha Liquidator Action (the “Luxalpha Third Party Writ,” and together with the Luxalpha Liquidator Action, the “Luxembourg Actions”). In the Luxalpha Third Party Writ, the Third Party Plaintiffs also joined the Commission de Surveillance du Secteur Financier (the “CSSF”), the SEC, FINRA, UBS (Luxembourg) S.A., UBS Third Party Management Company S.A., UBS Fund Services (Luxembourg) S.A., UBS AG, and Ernst & Young S.A.² On or about July 8, 2010, the Third Party Plaintiffs also joined the United States as a third party intervener in the Luxembourg Actions.

34. The Third Party Plaintiffs allege that the BLMIS estate is responsible for any judgment rendered against the Third Party Plaintiffs in the Luxalpha Liquidator Action. The Luxalpha Third Party Writ seeks, among other relief, for the Trustee on behalf of the BLMIS

² Although it is unclear why, the Third Party Plaintiffs later dismissed their claims against the SEC.

estate to “have contractual liability,” “indemnify the [Third Party Plaintiffs] . . . and hold them harmless from any judgment that may be made against them in respect of principal, interest and expenses” in the Luxalpha Liquidator Action, pay personal damages, and pay the Third Party Plaintiffs’ litigation costs.

35. To date, the defendants named in the Luxembourg Actions have raised only procedural issues, including an interlocutory appeal of the District Court of Luxembourg’s first judgment regarding the disclosure of documents by the Luxembourg regulatory agency, the CSSF. Since March 2011, the District Court of Luxembourg had been considering the defendants’ motions to stay the Luxembourg Actions pending the outcome of related criminal investigations in Luxembourg.

36. On March 23, 2012, the District Court of Luxembourg issued an opinion on the defendants’ motions to stay the civil proceedings and held that the Luxembourg Actions will go forward, despite the pending related criminal investigations. The District Court of Luxembourg instructed the parties to begin briefing the substantive issues in the case and to prepare for trial. A court conference regarding the briefing schedule leading to trial is now set for July 4, 2012.

THE LUXALPHA THIRD PARTY WRIT THREATENS THIS COURT’S JURISDICTION AND THE ADMINISTRATION OF THE ESTATE AND AN INJUNCTION IS NECESSARY TO PRESERVE AND PROTECT THE ESTATE

37. The Luxalpha Third Party Writ is active and currently pending in Luxembourg.

38. The Luxalpha Third Party Writ, which is essentially a claim for indemnification from the BLMIS estate, directly violates the automatic stay and Stay Orders in this case. It is an attempt to disrupt the orderly administration of the estate by involving the Trustee in litigation abroad and obtain estate assets.

39. The Luxalpha Third Party Writ undermines this Court’s exclusive jurisdiction to adjudicate claims against the BLMIS estate by attempting to vest the District Court of

Luxembourg with such jurisdiction. The Luxalpha Third Party Writ seeks to accomplish in Luxembourg what is forbidden in the United States—to vest a court other than this Court with jurisdiction to consider such claims.

40. By initiating the Luxalpha Third Party Writ, the Third Party Plaintiffs seek to circumvent the mandatory statutory deadline established by section 78fff-2(a)(3) of SIPA for asserting claims, including contingent and unliquidated claims, for activity or conduct pre-dating the commencement of the SIPA liquidation proceeding. Because that deadline has passed, to the extent that the Third Party Plaintiffs have claims against the BLMIS estate, the proper course of action for the Third Party Plaintiffs would have been to file a motion asking this Court to lift the automatic stay or initiate an adversary proceeding in this Court.

41. Instead, the Third Party Plaintiffs seek to bypass the exclusive jurisdiction of this Court to administer the claims determination and allowance process by maintaining the Luxalpha Third Party Writ, as against the Trustee in his representative capacity, in a foreign court.

COUNT ONE
DECLARATORY RELIEF

42. The Trustee incorporates by reference the allegations contained in paragraphs 1–41 of this Complaint as if fully realleged herein.

43. The Trustee seeks a declaration that the Luxalpha Third Party Writ, as to the claims against the Trustee as representative of the BLMIS estate, violates the automatic stay provisions under 11 U.S.C. § 362(a), 15 U.S.C. § 78eee(b)(2)(B), and the Stay Orders and is therefore void *ab initio* under United States law. This declaratory relief is warranted for, without limitation, the following reasons:

a. The Luxalpha Third Party Writ improperly seeks recovery on a claim against debtors in violation of 11 U.S.C. § 362(a)(1) and seeks to obtain possession of debtor

property in direct violation of 11 U.S.C. § 362(a)(3), 15 U.S.C. § 78eee(b)(2)(B), and the Stay Orders.

b. By seeking to recover damages from the BLMIS estate, the Luxalpha Third Party Writ improperly contravenes the claims administration process in the SIPA proceeding.

44. The 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 BLMIS property and the effective and equitable administration of the debtors' estate.

COUNT TWO
PERMANENT INJUNCTIVE RELIEF

45. The Trustee incorporates by reference the allegations contained in paragraphs 1–44 of this Complaint as if fully realleged herein.

46. The Trustee seeks an Order that any further prosecution of the Luxalpha Third Party Writ, as against the Trustee as representative of the BLMIS estate, be enjoined pursuant to section 105(a) of the Bankruptcy Code, made relevant to these proceedings by section 78fff(b) of SIPA. Specifically, the Trustee requests that this Court enjoin the prosecution of the Luxalpha Third Party Writ, as against the Trustee as representative of the BLMIS estate, for, without limitation, the following reasons:

a. The Luxalpha Third Party Writ improperly infringes on the jurisdiction of this Court. It effectively grants another court jurisdiction to adjudicate claims against the BLMIS estate and seeks to affect estate assets without regard to this Court's administration of the entirety of the BLMIS liquidation proceedings.

b. There is an inadequate remedy at law to protect and preserve the estate assets. The Luxalpha Third Party Writ, as against the Trustee as representative of the BLMIS estate, threatens the administration of the liquidation, and an injunction is necessary to preserve and protect customer property and the Trustee's efforts to gather and collect customer property and other assets for the benefit of the victims who have filed claims.

c. An injunction will prevent the substantial confusion of other investors and potential plaintiffs and make clear that they cannot assert claims against the Trustee, BLMIS or Madoff in any jurisdiction other than this Court.

d. An injunction will allow the Trustee to avoid appearing in the Luxembourg Actions and thus prevent the Trustee from incurring needless litigation costs.

e. The injunction will not harm the public interest, and, in fact, is in the best interest of BLMIS customers and the orderly administration of the claims administration process.

47. The Trustee believes that the injunction requested herein is necessary and appropriate to carry out his duties in accordance with the provisions of SIPA and the Bankruptcy Code and that any further prosecution of the Luxalpha Third Party Writ, as against the Trustee as representative of the BLMIS estate, would seriously impair this Court's ability to administer the BLMIS proceedings.

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

- i.* enforcing the automatic stay and Stay Orders;
- ii.* declaring that the Luxalpha Third Party Writ, as against the Trustee as representative of the BLMIS estate, violates the automatic stay provisions under 11 U.S.C. §

362(a), section 78eee(b)(2)(B)(i) of SIPA, the Stay Orders, and the *Barton* doctrine and is void *ab initio*;

iii. issuing a permanent injunction, pursuant to section 105(a) of the Bankruptcy Code, prohibiting the Third Party Plaintiffs and those acting in concert or participation with them, or on their behalf, from pursuing the Luxalpha Third Party Writ, as against the Trustee as representative of the BLMIS estate; and

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

Dated: New York, New York
April 19, 2012

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