

**Exhibit B**

**Transcript of the Deposition of Richard Levin, Esq. taken on May 16, 2014**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES INVESTOR PROTECTION  
CORPORATION,

No. 08-01789 (SMB)

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

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In Re:

BERNARD L. MADOFF,

Debtor.

-----x

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

Adv.Pro.No.

10-4932 (SMB)

Plaintiff,

v.

JPMORGAN CHASE CO., JPMORGAN CHASE  
BANK, N.A., J.P. MORGAN SECURITIES  
LLC and J.P. MORGAN SECURITIES LTD.,

Defendants.

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Deposition of:  
RICHARD LEVIN, ESQ.

May 16, 2014

1 DEPOSITION of RICHARD LEVIN, ESQ., as  
2 reported by NANCY C. BENDISH, Certified Court  
3 Reporter, RMR, CRR and Notary Public of the States  
4 of New York and New Jersey, at the offices of BAKER  
5 HOSTETLER, 45 Rockefeller Plaza, New York,  
6 New York on Friday, May 16, 2014, commencing at  
7 11:06 a.m.  
8  
9

10 A P P E A R A N C E S:  
11

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13 45 Rockefeller Plaza  
14 New York, New York 10111  
15 BY: DAVID J. SHEEHAN, ESQ.  
16 SEANNA BROWN, ESQ.  
17 MARC E. HIRSCHFIELD, ESQ.  
18 For Irving H. Picard, Trustee  
19 for the Liquidation of BLMIS  
20

21 CRAVATH, SWAINE & MOORE, LLP  
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BY: EMILY R. CHEPIGA, ESQ.  
For Solus Recovery Fund

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1 R I C H A R D B. L E V I N, E S Q., s w o r n.

2 E X A M I N A T I O N B Y M R. S H E E H A N:

3 Q. Good morning, Mr. Levin. How are you  
4 today?

5 A. Good morning, Mr. Sheehan. I'm fine,  
6 and you?

7 Q. Very well, thank you very much.

8 A. Glad to hear.

9 Q. By whom are you employed?

10 A. I'm not exactly employed. I'm a  
11 partner in Cravath Swaine & Moore, LLP.

12 Q. So you're a shareholder?

13 A. No, I'm a partner.

14 Q. Partner.

15 A. So I don't consider myself employed  
16 by them. But I am a partner in that firm.

17 Q. And how long have you been a partner?

18 A. Just under seven years.

19 Q. And where were you before you were  
20 with Cravath?

21 A. Skadden Arps Slate Meagher & Flom,  
22 LLP.

23 Q. And how long were you there?

24 A. Ten years. Just under ten years.

25 Q. And in those prior 16 years, what was

1 your major area of practice?

2 A. I'm sorry, in those prior --

3 Q. 16 years working at Skadden and --

4 A. Not prior to that, okay.

5 Bankruptcy and restructure.

6 Creditors' rights, insolvency.

7 Q. Now, did you have anything to do with  
8 the writing of the Bankruptcy Code?

9 A. I did.

10 Q. And what did you do?

11 A. I was a member of the staff of the  
12 House Judiciary Committee Subcommittee on Civil and  
13 Constitutional Rights from 1975 to 1978. My  
14 principal work for the almost three years that I was  
15 there was as the majority staff on the writing of  
16 the Bankruptcy Code. And I was the principal  
17 drafter, but it was a bipartisan effort and there  
18 was a minority counsel who worked -- he and I worked  
19 very closely together and we drafted and edited each  
20 other's work.

21 Q. Would it be a fair statement that you  
22 have an intimate knowledge of the Bankruptcy Code as  
23 a result of that experience?

24 A. In part, yes.

25 Q. What part would be not so intimate?

1           A.           The Bankruptcy Code has changed a lot  
2           in 36 years. And my intimate knowledge of the later  
3           part of the code is not as a result of that  
4           experience.

5           Q.           Okay. Now, we're here talking about  
6           the equal treatment clause and a certain settlement  
7           agreement in which you participated; is that  
8           correct?

9           A.           That's what I understand the subject  
10          to be.

11          Q.           Okay. And who is your client?

12          A.           In this connection right now my  
13          client is SPV Optimal SUS, Ltd.

14          Q.           Would it be okay if I just called  
15          them Optimal?

16          A.           You can call them what you want, it's  
17          okay with me, but I will tell you that there are  
18          several Optimal entities, and if you want to talk  
19          about my current client, it would be clearer if you  
20          refer to them as SPV.

21          Q.           Okay. Your client at the time of the  
22          settlement with the Trustee that is the subject of  
23          today's deposition, is that Optimal?

24          A.           It was a different entity. And I  
25          should point out that SPV is not actually owned by

1 the same owners as my client at the time of the  
2 settlement. My client at the time of the settlement  
3 was two entities. One was called Optimal Strategic  
4 US Equities, Ltd., and the other was called Optimal  
5 Arbitrage, Ltd.

6 Q. What I'm trying to get at is, I  
7 realize, by virtue of your testimony just now, that  
8 there are multiple entities that may be involved  
9 here through successor and other variations. What I  
10 want to do is get a term that we can use, so you  
11 understand, with regard to who you were representing  
12 at the time of this settlement with the Trustee, and  
13 I want to be able to call them Optimal if I can; and  
14 would that be something we can agree upon?

15 A. If you want to refer to the two  
16 entities that I just referenced, yes, we could call  
17 them Optimal collectively.

18 Q. Fine.

19 A. But if we refer to one or the other,  
20 then I need to use one or the other name.

21 Q. All right. Directing your attention  
22 to the beginning of the year 2009, were you engaged  
23 by Optimal to represent them in connection with the  
24 BLMIS liquidation?

25 A. Yes. Well, my firm was engaged and I



1 worked on it for my firm.

2 Q. Is Optimal your client?

3 A. It is the firm's client, yes.

4 Q. Had you done work for Optimal prior  
5 to this?

6 A. No.

7 Q. And what did you understand to be the  
8 nature of Cravath's retention with Optimal?

9 A. To advise it with respect to its  
10 investments in BLMIS.

11 Q. And as part of that engagement, did  
12 you analyze those investments in BLMIS?

13 A. Analyze is a very broad word. I'll  
14 give a general answer --

15 Q. That would be fine, thank you.

16 A. Yes. But if you don't -- if you want  
17 to be more specific, then I can tell you. But  
18 generally, yes, I analyzed them.

19 Q. Did you analyze those investments in  
20 BLMIS to the extent of what the nature of the  
21 Trustee's claims might be against Optimal?

22 A. Yes.

23 Q. And did you advise them of what the  
24 nature of those claims might be?

25 A. Yes.

1 Q. Did there come a time when you  
2 recommended to your client that you reach out to the  
3 Trustee to settle those claims?

4 MR. GREENWALD: I instruct him not to  
5 answer.

6 A. Yes. That's privilege.

7 Q. The fact of it I don't think is  
8 privilege.

9 A. You asked what I recommended.

10 MR. GREENWALD: You asked what he  
11 recommended.

12 Q. Okay. Did there come a time -- it's  
13 not that important. Jousting over silly stuff. I'm  
14 not looking for a waiver of the privilege here.

15 Did there come a time when you  
16 recommended to your client that you engage in  
17 settlement negotiations?

18 A. I won't answer that question.

19 Q. How did it come about that you called  
20 the Trustee to engage in settlement negotiations?  
21 Was it unauthorized?

22 A. It was authorized.

23 Q. By the client?

24 A. Yes.

25 Q. Because you asked him?

1           A.           I won't answer that part of the  
2 question.

3           Q.           Okay. So, did the client direct you  
4 to engage in settlement negotiations?

5           A.           Yes.

6           Q.           Okay. Now, did you initiate the  
7 settlement negotiations?

8                       MR. GREENWALD: Object.

9           A.           You're going to have to be more  
10 specific in your question. I don't fully understand  
11 it.

12          Q.           Settlement negotiations began,  
13 someone made a phone call. Did you make a phone  
14 call to start the settlement negotiations?

15          A.           Yes.

16          Q.           Thank you. We can be a little bit  
17 more... I think, don't you?

18          A.           I don't know where you're going and I  
19 want to be careful.

20          Q.           All right. Well, now I understand  
21 where we're going today, fine. So now I'll be very  
22 precise.

23                       When you called the Trustee's office  
24 to start the settlement negotiations, who did you  
25 call?

11

1 A. I think I called Mr. Hirschfield, I  
2 think that was my first call. I knew he was here, I  
3 had had a prior relationship with him, I figured  
4 that was a way to open a discussion.

5 Q. And what did you say to him?

6 A. I don't remember exactly, but  
7 generally it was, we'd like to come talk to you  
8 about an offer. I think at that point the Trustee  
9 had made a demand.

10 Q. Right.

11 A. For return of -- made a demand on  
12 avoiding power claims. I think I said to  
13 Mr. Hirschfield, we'd like to talk to you about a  
14 possible resolution of this. I don't remember the  
15 exact words or how I phrased it.

16 Q. Do you recall how that demand was  
17 presented to your client?

18 A. Yes. I think there was a letter. I  
19 have not gone back and checked the file, but there  
20 was correspondence from the Trustee in February  
21 2009. I do remember that. I haven't looked at it,  
22 but I do remember that there was a letter seeking  
23 informal discovery, seeking information. I don't  
24 remember if there was also a demand in that letter  
25 or if it was a separate letter.

1 Q. Do you know Irving Picard?

2 A. Yes.

3 Q. How do you know him?

4 A. I met Mr. Picard when I was on House  
5 Committee staff and he was the general counsel for  
6 the Division of Regulation of the Securities &  
7 Exchange Commission. The Division of Regulation at  
8 the time supervised Chapter 10 proceedings under the  
9 Bankruptcy Act and so the SEC had an interest in the  
10 legislation and he was one of their principal point  
11 persons on it.

12 Q. From that point forward, did you have  
13 any kind of relationship with Mr. Picard?

14 A. Casual friendly relationship.  
15 Professional occasional lunches, you know,  
16 nothing -- no -- we weren't personal friends outside  
17 of the professional. But we had a nice  
18 relationship. We talked from time to time, we'd see  
19 each other at conferences, we'd have lunch together  
20 occasionally.

21 Q. Did your relationship with Mr. Picard  
22 come up in your initial conversation with  
23 Mr. Hirschfield?

24 A. I suspect it did.

25 Q. You mentioned that you knew him?

1           A.           Well, I might have, yeah. I don't  
2 know if I did or not, but it wouldn't surprise me if  
3 I did.

4           Q.           And why would you have done that?

5           A.           In my view the bankruptcy community  
6 is a very small community, and we -- many of us know  
7 each other. Many of us have worked together  
8 professionally or through organizations, Bar  
9 organizations and the like. And personal  
10 relationships count for a lot in getting work done.  
11 They are useful in showing credibility and bona  
12 fides, and they facilitate constructive discussions.

13           Q.           So you saw the relationship you had  
14 with Mr. Picard as a positive factor in these  
15 negotiations?

16           A.           Yes.

17           Q.           Thank you.

18                        When you called Mr. Hirschfield, did  
19 you discuss at that time what the potential claims  
20 might be by the Trustee against Optimal?

21           A.           I don't remember.

22           Q.           What was your understanding at that  
23 time of what the potential claims against Optimal  
24 might be?

25                        MR. GREENWALD: I think this goes to

1 work product, so we'll --

2 THE WITNESS: Yeah. I wasn't sure  
3 about that.

4 Q. Let me try to rephrase it then.

5 Did there come a time when you  
6 articulated to the Trustee's counsel what you  
7 understood to be the Trustee's claims?

8 A. I think so, but I don't remember  
9 specifically. I remember they were a subject of  
10 discussion between us at some point.

11 Q. Right.

12 A. And they may have been a subject of  
13 discussion either in that first phone call to  
14 Mr. Hirschfield or in the first meeting we had in  
15 late March 2009. Hard to have a discussion about  
16 settlement if you don't know what the claims are, so  
17 I'm sure they were on the table in one direction or  
18 the other.

19 Q. I agree with that. Thank you.

20 So as best you can recall March of  
21 '09, what were the nature of the claims that were  
22 discussed between you and Trustee's counsel?

23 A. There were withdrawals by the two  
24 Optimal entities. We refer to them as SUS and  
25 Arbitrage. They're referred to that way in the

1 settlement agreement.

2 Withdrawals by SUS and Arbitrage from  
3 their BLMIS customer accounts in the 90 days before  
4 the bankruptcy, before the SIPA proceeding.

5 Q. Right.

6 A. Those were the claims.

7 Q. Okay. Now, in your declaration you  
8 talk about the fact that when you settle early, you  
9 think that there should be a discount, or that's  
10 common practice?

11 A. Yes.

12 Q. Is that fair?

13 A. Yes.

14 Q. Is that why you called  
15 Mr. Hirschfield?

16 A. That is -- that's just too general a  
17 question to answer yes or no.

18 Q. Well, let me rephrase it then, try to  
19 make it better.

20 Was one of the reasons that you  
21 called Mr. Hirschfield was that your understanding  
22 of common practice was if you get in early you get a  
23 better deal?

24 A. Yes, that was one of the reasons.

25 Q. Were there other reasons besides



1 that?

2 A. Sure.

3 Q. What were they?

4 A. To prevent the incurrence of enormous  
5 litigation fees, discovery disruption, time,  
6 resources, all of those things. All the reasons you  
7 would normally settle.

8 Why did I call him in March of '09  
9 instead of March of '11? Because it was, the reason  
10 you stated, it was before discovery had started, it  
11 was in response to an informal discovery request,  
12 and it was an effort to head off the, what I refer  
13 to as the trench warfare of that kind of litigation  
14 before it got started.

15 Q. Was part of that also your assessment  
16 of the liability of the bank -- of Optimal?

17 MR. GREENWALD: Here too I think it  
18 goes to work product.

19 A. I will say it this way.

20 Q. Yes.

21 A. Part of that was my assessment of  
22 what the Trustee would assert and probably litigate  
23 over. So we didn't have to acknowledge liability to  
24 call and say we want to settle.

25 Q. I wasn't asking you for that, so let

1 me try to rephrase it.

2 You've articulated, we've understood  
3 to be, your recollection of the discussion of what  
4 the nature of the claims were that you saw the  
5 Trustee having. Using your bankruptcy experience,  
6 how would you characterize those as claims that were  
7 brought by the Trustee?

8 A. I would characterize them as  
9 difficult to defend.

10 Q. And what were the -- would they be in  
11 the nature of a preference?

12 A. Yes.

13 Q. Can you tell me what a preference is?

14 A. A preference is a transfer of  
15 property -- a transfer of an interest of the debtor  
16 in property to or for the benefit of a creditor, for  
17 or on account of an antecedent debt, made within 90  
18 days before the date of the filing of the petition  
19 that enables the creditor to receive a greater  
20 percentage than other creditors of -- than the  
21 creditor would have received in a liquidation case  
22 under Chapter 7 if the transfer had not been made.

23 Q. Now, in March of 2009, were you aware  
24 of what the nature of the BLMIS proceeding was? And  
25 I'll break that down. Did you have any

1 understanding that it was a Ponzi scheme?

2 A. Yes.

3 Q. And how did you come about -- come to  
4 that understanding?

5 A. I think primarily from press reports.

6 Q. Was that a subject of discussion with  
7 Mr. Hirschfield or other counsel?

8 A. I don't remember. It wouldn't  
9 surprise me if it were, but I simply don't remember.

10 Q. Is there something called a Ponzi  
11 presumption?

12 A. Yes, there is.

13 Q. And what is a Ponzi presumption?

14 A. Ponzi presumption is that any  
15 transfer made by the Ponzi schemer is presumed to be  
16 made with actual intent to hinder, delay or defraud  
17 creditors.

18 Q. Okay. And do you understand the term  
19 "fictitious profits" in the context of a Ponzi  
20 scheme?

21 A. Yes.

22 Q. What did you understand to be what  
23 Optimal had received during the 90-day period?

24 MR. GREENWALD: Optimal -- okay.

25 A. I understood that both -- well,

1 again, we've got two entities here.

2 Q. Yes.

3 A. So I understood that SUS had received  
4 what is referred to in this context as return of  
5 principal, and that Arbitrage had received  
6 fictitious profits.

7 Q. Now, again referring to your  
8 bankruptcy expertise, what would the Trustee have to  
9 prove in order to achieve a favorable result against  
10 Optimal based on your understanding of the claims  
11 against Optimal?

12 A. The Trustee would have to prove, if  
13 he asserted a preference claim, the seven elements  
14 that I recited a moment ago. If he asserted a  
15 fraudulent transfer claim, he would have to prove  
16 that the BLMIS was a Ponzi scheme and that would  
17 entitle him to that Ponzi scheme presumption that  
18 you referred to.

19 Q. Based on your analysis of the claims  
20 at that time, did you see value as a defense to the  
21 preference action?

22 MR. GREENWALD: For value?

23 MR. SHEEHAN: Yeah, for value.

24 A. Yes.

25 Q. In what sense? How could that be?

1           A.           The -- I'm sorry, let me -- yes.  
2                       547(c)(2) provides a defense -- well,  
3 back up.

4                       Value is not a defense to a  
5 preference action because preference presumes that  
6 the transfer is in satisfaction of a preexisting  
7 debt. So there is value. So value is irrelevant to  
8 a preference action.

9           Q.           Right. Thank you.

10          A.           You're welcome.

11          Q.           That's what I thought. Thank you.

12          A.           This is like a law school exam.

13          Q.           That's where we're going.

14                       Is intent of the transferee part of a  
15 preference action?

16          A.           No. I want to ask you --

17          Q.           I'm available to answer questions.  
18 It's a friendly deposition.

19                       MR. GREENWALD: Screw up our clock if  
20 you start asking questions.

21          A.           You're asking me as an expert.

22          Q.           No, I'm asking you as a highly  
23 trained, sophisticated bankruptcy lawyer with an  
24 in-depth knowledge of the Bankruptcy Code as a  
25 witness what you analyzed these claims to be.

1           A.           Fine. In that context, yes, that's  
2 fine.

3           Q.           I'm not trying to qualify you as an  
4 expert although, Richard, I consider you one.

5           A.           Well, thank you.

6           Q.           Now, the claim eventually was settled  
7 for payment of 85 percent of the amount -- well,  
8 instead of stating it, I'll ask you: What was the  
9 claim eventually settled for?

10          A.           85 percent of the preference amount.

11          Q.           And was that the number that was --  
12 okay. Who proposed 85 percent?

13          A.           I don't remember which side proposed  
14 it. I remember there was a negotiation over the  
15 number and we agreed on 85 percent.

16          Q.           Did you have an opening number as the  
17 person who initiated the settlement discussions?

18          A.           Yes.

19          Q.           And what was your opening number?

20          A.           80 percent.

21          Q.           And how did you arrive at that  
22 proposal? Let me break that down.

23                       MR. GREENWALD: That's also work  
24 product.

25          Q.           I agree with David it might have that

1 quality.

2                   Going back to your declaration, as  
3 you stated, it's always good to get in early if you  
4 want to settle and get the best result. I may be  
5 re -- and if you want to rephrase it or get your  
6 declaration, we can read that.

7           A.           Yes.

8           Q.           You prefer that?

9           A.           No, no. I don't think you  
10 characterized my statement correctly.

11          Q.           Well, let's get it correct. I'm not  
12 trying to mischaracterize it.

13          A.           I didn't -- the way you phrased it is  
14 more general, early in the bankruptcy case or the  
15 SIPA proceeding.

16          Q.           Right.

17          A.           I meant early in the claim process by  
18 the Trustee against a particular defendant.

19          Q.           Okay. I'm glad you clarified that.  
20 Let me ask you a different question.

21          A.           By the way, in this case -- when I  
22 said generally, because most preference litigation  
23 in bankruptcy cases occurs very late in the case.

24          Q.           Um-hum.

25          A.           In this case it was going to be

1 different. We knew that because the principal  
2 assets of the estate were going to be avoiding power  
3 recoveries. So in this case, although when I say  
4 it's common to get in early and get an advantage for  
5 settling early, I meant in a particular adversary  
6 proceeding. In this case there were two elements of  
7 it, which was early in the SIPA proceeding and early  
8 in the claim process.

9 Q. And let me ask two questions based on  
10 what you just said.

11 How did you arrive at the conclusion,  
12 as you just stated it, that the avoiding powers --  
13 avoiding power recoveries were going to be the major  
14 asset of the estate?

15 A. Well, largely based on press reports  
16 that there was very little money in the, in the  
17 debtor's possession or custody, in the debtor's  
18 coffers. And it appeared that there were -- the  
19 reason it was very little, there had been  
20 substantial withdrawals over a period of time and I  
21 know that in a Ponzi scheme case the Trustee seeks  
22 recovery under the avoiding powers of the  
23 withdrawals that have happened over a period of time  
24 before the bankruptcy. So it was based on my  
25 experience and what little I knew from publicly



1 reported information.

2 When I say press reports, I should  
3 say publicly reported information, which may have  
4 been court proceedings as well. Because there were  
5 some court proceedings at that point. Based on that  
6 public information and my experience, it seemed to  
7 me that the principal source of recovery would be  
8 avoiding power actions.

9 Q. You mentioned also that it wasn't  
10 just a stage of the litigation but the stage of the  
11 SIPA liquidation proceeding. What was your  
12 understanding what the status of the SIPA  
13 liquidation proceeding was in March of '09?

14 A. That the Trustee was just getting his  
15 arms around the facts and the underlying financial  
16 information. I knew he had a list of all of the  
17 customers because I was aware that he had sent out  
18 demand letters or informal discovery letters. I was  
19 aware that he had sent letters to banks that had --  
20 to which BLMIS had wired funds for customers, and I  
21 think he had publicly stated that they were -- that  
22 the Trustee's team was investigating the records  
23 which were in a warehouse in Queens, and the records  
24 at the Lipstick Building. So he was in the very  
25 early stages and had not formally brought any claims

1 yet.

2 Q. I want to shift our attention now to  
3 the JPMorgan Chase matter.

4 A. Um-hum.

5 Q. It might be helpful if we actually do  
6 go, I think, to your declaration at this point.

7 The objection, I'm sorry. It's your  
8 objection I'm going to.

9 A. I don't think we have that.

10 (Exhibit T-1 marked for  
11 identification.)

12 Q. Mr. Levin, I direct you attention to  
13 page 4 that we just handed you in exhibit marked  
14 T-1. I direct your attention further to the chart  
15 at the bottom third of that page. Do you see it?

16 A. The table there, yes.

17 Q. Yes, table, I'm sorry.

18 And I'm not suggesting that you have  
19 to look at this. I only wanted to present it to you  
20 so that -- because I'm going to go through each of  
21 the claims. All right?

22 A. Sure.

23 Q. What was your understanding -- first  
24 of all, are you familiar with the JPMorgan Chase  
25 complaint that the Trustee filed against that bank?

1 A. Generally familiar.

2 Q. Have you ever read it?

3 A. I believe I've read some or all of it  
4 at some point in time.

5 Q. It's very long, I know.

6 A. It is.

7 Q. Tolstoy-esque, according to one  
8 judge. But, in any event.

9 A. What's that?

10 Q. Tolstoy-esque, according to one  
11 judge.

12 MR. GREENWALD: In fairness, it's  
13 well written but not that well written.

14 (Laughter.)

15 MR. SHEEHAN: And with that we are  
16 all in agreement.

17 Q. So, starting at the top of this, I  
18 call it a chart, you're calling it a --

19 A. Table.

20 Q. Table. I'll call it a table.

21 Top of this table there is a -- it's  
22 listed banking fees. Do you see that?

23 A. Yes.

24 Q. And when you say 90 days, what are  
25 you referring to there?

1           A.           This is a shorthand that the Trustee  
2           has often used in his pleadings in court to refer --  
3           including the complaint against JPMorgan Chase to  
4           refer to three different categories of avoiding  
5           power claims: Preference claims, which are  
6           transfers made within 90 days before bankruptcy.  
7           Those are referred to and they're asserted under  
8           Section 547 of the Bankruptcy Code for avoiding the  
9           transfer, and section 550 to recover the property  
10          transferred. The two-year claims -- I'll just go  
11          down the table.

12          Q.           Sure, of course.

13          A.           I assume you're going to ask that  
14          anyway.

15          Q.           Yes, exactly.

16          A.           Two-year claims are claims asserted  
17          under section 548(a)(1) of the Bankruptcy Code which  
18          is the fraudulent transfer provision and permits the  
19          Trustee to reach back two years to avoid fraudulent  
20          transfers, and again section 550 for recovery. And  
21          six-year claims are those brought under section  
22          544(b) of the Bankruptcy Code, which incorporates  
23          applicable state fraudulent transfer law by  
24          reference, and in New York the Statute of  
25          Limitations is six years for such claims, so it

1 allows the Trustee to reach back six years before  
2 the petition date, and they're referred to as  
3 six-year claims.

4 Q. Okay. Now, in connection with the  
5 two-year claims -- well, first of all, let me back  
6 up. What do you understand, if you do have an  
7 understanding, of the nature of the banking fee  
8 claims brought by the Trustee against JPMorgan  
9 Chase?

10 A. My understanding is that they were --  
11 there were banking fees paid within the 90 days  
12 before bankruptcy, or SIPA proceeding. I'll say  
13 bankruptcy referring to the SIPA proceeding, even  
14 though it's not technically the same.

15 Q. Yes.

16 A. And there were banking fees paid  
17 within the two years before the bankruptcy. Based  
18 on the Ponzi scheme presumption, any transfer, even  
19 for value, even in payment of an ordinary operating  
20 expense such as banking fees, could be recoverable  
21 as a fraudulent transfer -- could be avoidable as a  
22 fraudulent transfer, excuse me -- if made within two  
23 years, and that's what I -- that's the claim I  
24 believe the Trustee was asserting for avoidance of  
25 the banking fees.

1 Q. What did you understand to be, if you  
2 had an understanding, of the relationship between  
3 JPMorgan Chase and BLMIS?

4 A. I understood that JPMorgan Chase was  
5 BLMIS's principal banker.

6 Q. Now, let's focus for a moment on the  
7 two-year claims for banking fees. In that situation  
8 under the bankruptcy statute, is value a defense?

9 A. It could be.

10 Q. How could that be raised as a  
11 defense?

12 A. Under section 548(c) of the  
13 Bankruptcy Code, which governs the two-year  
14 claims -- to be clear, when I described the three  
15 categories earlier, I did not mean to suggest that  
16 they were exclusive. They overlap.

17 Q. I understand.

18 A. So a 90-day claim will also be a  
19 two-year claim and a six-year claim.

20 Q. Yes.

21 A. They overlap in that direction, not  
22 in the other direction.

23 So on the two-year claims, the  
24 Trustee would have a claim under -- under section  
25 548 and under 544(b). 548 claim, the defendant has

1 a defense under section 548(c) if the defendant took  
2 for value and in good faith.

3 Q. And what would that mean in the  
4 context of the JPMorgan Chase defense?

5 A. Well, you asked about value. The  
6 answer is, if the defendant provided goods or  
7 services or money or other value to the debtor and  
8 the payment was a repayment of a legally owing  
9 obligation, that would constitute for value.

10 Q. Under 548(c), in addition to value,  
11 are there other defenses?

12 A. I don't understand your question.

13 Q. Let me just make it plain. Is good  
14 faith a defense to a fraudulent transferrer?

15 A. As I said earlier, the defense under  
16 548(c) is value and good faith. So good faith alone  
17 is not a defense; value alone is not a defense.  
18 They have to be together.

19 Q. Okay. In a preference action does  
20 either value or good faith have anything to do with  
21 it?

22 A. No. Well, let me amend that.

23 Value does not. Good faith might  
24 provide a defense, though not by those words. Under  
25 547(c)(2), the ordinary course defense, if a

1 transferee takes a transfer in the ordinary course  
2 of business for a debt that was incurred in the  
3 ordinary course of business, it is an affirmative  
4 defense to a preference recovery, but if a  
5 transferee was not in good faith, then it would be  
6 hard for the transferee to argue that the payment  
7 was made in the ordinary course of business.

8 Q. In a Ponzi scheme, does the intent of  
9 a transferee in a preference action have anything to  
10 do with the Trustee's ability to recover?

11 A. In a preference action, no, because  
12 547(c), under the Ponzi scheme presumption, if a  
13 Ponzi scheme is proved, 546(c)(2) does not apply  
14 because nothing that a Ponzi schemer does is in the  
15 ordinary course of business.

16 Q. Thank you.  
17 Now, are you familiar with the  
18 Trustee versus Katz/Wilpon matter?

19 A. Yes. Generally.

20 Q. Are you familiar with Judge Rakoff's  
21 holding with regard to the application of 546(e) to  
22 the BLMIS liquidation proceeding?

23 A. Yes.

24 Q. Under his ruling can the Trustee  
25 bring a preference action?



1 A. No.

2 Q. And can he bring a six-year action?

3 A. No. Except to the extent it's within  
4 the two years.

5 Q. Right. Well, he can certainly bring  
6 a two-year action under 546 -- under 548(a)(1)(A);  
7 is that not correct?

8 A. Yes.

9 Q. Do you consider that to be a material  
10 change in the law since March of '09?

11 A. You ask -- I don't mean to be flip  
12 here.

13 Q. That's quite all right.

14 A. But you ask what is a deep  
15 jurisprudential question.

16 Q. I ask the right kind.

17 A. Does the law change or does the court  
18 rule what the law is and always has been?

19 Q. Ah, indeed.

20 A. And so I can't answer whether it was  
21 a change in the law without getting into philosophy,  
22 which I'm not an expert in.

23 Q. Well, I guess the simple answer is  
24 that in March of '09 the Trustee could have brought  
25 a preference action and a six-year action and as we

1 sit here today at the time of the JPMorgan Chase  
2 settlement, he could not?

3 A. I don't think that's correct. I  
4 would not subscribe to your statement.

5 Q. Okay. And why is that wrong?

6 A. Because if he had brought the action  
7 in '09 and it had gone before Judge Rakoff, I  
8 presume that Judge Rakoff would have ruled the same  
9 way and that action would have been as ineffective  
10 as the Katz/Wilpon action.

11 And, yes, he can bring a claim today.  
12 We know as a practical matter if he brings it in the  
13 Southern District of New York it will be assigned to  
14 Judge Rakoff and the ruling will be the same. But  
15 if he were to bring it in another district, a  
16 different judge might come to a different  
17 conclusion. And we know the matter is pending at  
18 the Second Circuit and that may resolve it if it  
19 doesn't go to the Supreme Court.

20 Q. But in terms of -- oh, let me get  
21 back to that later. I want to just get through  
22 this.

23 Now, the six-year claim here --  
24 strike that.

25 Let me ask you, looking at the table

1 there's a six-year and it refers to a loan  
2 repayment.

3 A. Yes.

4 Q. Do you have any understanding of what  
5 the Trustee's allegations were with regard to the  
6 loan repayment?

7 A. Yes.

8 Q. And what were they?

9 A. That the loan repayment was exactly  
10 what it says it is, a loan repayment, but that  
11 the -- it is avoidable under Section 544(b) and the  
12 New York Uniform Fraudulent Conveyance Action  
13 because of the Ponzi scheme presumption that any  
14 transfer by a Ponzi schemer is made with actual  
15 intent to hinder, delay or defraud creditors.  
16 That's my understanding of the basis of his  
17 assertion.

18 Q. And as we discussed earlier, the  
19 defense is a value and a knowledge would also be in  
20 place here as well, correct?

21 A. Yes. The defendant would have those  
22 defenses.

23 Q. Let's go down to the term just below  
24 that --

25 A. Excuse me.

1 Q. I'm sorry?

2 A. I didn't answer that correctly. Not  
3 value and knowledge. Value and good faith.

4 Q. Yes. I was equating the two, and I  
5 apologize for that.

6 A. You almost had me.

7 Q. I did. But in any event, let's look  
8 at the table where it says subsequent transfers. Do  
9 you see that?

10 A. Yes.

11 Q. Before we get into those, can you  
12 tell me what your understanding of a subsequent  
13 transfer is.

14 A. Yes. It is not a phrase used in the  
15 Bankruptcy Code, but it is the general description  
16 of -- referring to Section 550(a)(2) of the  
17 Bankruptcy Code that permits a Trustee to recover an  
18 avoided transfer from any mediate or -- I'm sorry,  
19 immediate or mediate transferee, of the initial  
20 transferee from whom the Trustee -- against whom the  
21 Trustee brought the avoiding power action.

22 Q. And what is your understanding of the  
23 Trustee's burden with regard to recovering on a  
24 subsequent transferee in terms of his avoiding the  
25 initial transfer?

1           A.           Well, the law is mixed here. I think  
2 the majority view, represented by a Ninth Circuit  
3 B.A.P. decision and by Judge Rakoff's decision, and  
4 several others, which I don't recall at the moment,  
5 is that the Trustee may recover from a subsequent  
6 transferee without having obtained an avoiding power  
7 judgment against the initial transferee.

8           Q.           Does the mediate or intermediate  
9 transferee of the initial transferee have the  
10 defense of the initial transferee in that context?

11          A.           Where the courts have permitted what  
12 I just described, the subsequent transferee -- I  
13 think that's the easier way to refer to it --

14          Q.           Yes.

15          A.           -- the subsequent transferee has all  
16 of the defenses that the initial transferee would  
17 have in the underlying avoiding power action.

18          Q.           So would it be fair to state that  
19 even against the subsequent transferee, the Trustee  
20 has the burden of proving the avoidance of the  
21 initial transferee? Initial transfer.

22          A.           As a practical matter, yes.

23          Q.           Now, what did you understand to be  
24 the nature of -- if you have an understanding -- of  
25 the Trustee's claims in JPMorgan Chase that related

1 to Fairfield Century?

2 A. That within 60 days before the  
3 bankruptcy -- referred to as 90-day transfers but in  
4 fact they were within less than 90 days -- in fact,  
5 most of them were within 30 days -- that JPMorgan  
6 Chase, that an entity within the JPMorgan Chase  
7 corporate group -- and I don't remember precisely  
8 which entity -- received payments from Fairfield  
9 Century and Fairfield Sigma for redemption of its  
10 shares in those two funds.

11 MR. SHEEHAN: Can I have that answer  
12 read back.

13 (Answer read.)

14 Q. And how did those redemptions relate  
15 to JPMorgan Chase?

16 A. I don't understand the question.

17 Q. As I understood your answer, you  
18 referred to redemptions by Fairfield from BLMIS.  
19 Were you referring to something -- or maybe I didn't  
20 understand your answer.

21 A. No. I was referring to the -- and  
22 maybe I didn't understand your prior question.

23 Q. Okay.

24 A. I was referring to the payments that  
25 Fairfield Century and Fairfield Sigma made to

1 JPMorgan Chase to redeem Chase's shares in those two  
2 funds.

3 Q. All right, I'm sorry. I did  
4 misunderstand. And what was your understanding of  
5 what those redemptions were predicated upon? In  
6 other words, what was the investment that JPMorgan  
7 Chase made into Fairfield and Fairfield Sigma that  
8 resulted in those redemptions?

9 A. I don't remember. I don't recall  
10 what the investments were.

11 Q. Did you understand that they were  
12 investments by Fairfield into BLMIS?

13 A. Oh. That's not JPMorgan Chase into  
14 Fairfield. That's Fairfield into BLMIS.

15 Q. Correct.

16 A. Okay. Yes. I understood that  
17 Fairfield Century was, in fact, BLMIS's largest  
18 single customer, in terms of account balance.  
19 Fairfield Sigma, as I recall, was a feeder fund to  
20 Fairfield Century, and did not have a direct account  
21 at BLMIS, but I may be mistaken on that one. But  
22 one way or the other, both funds were directly or  
23 indirectly invested in BLMIS.

24 Q. Okay.

25 MR. SHEEHAN: Take five minutes here.

1 (Recess taken.)

2 Q. Just to stick with the JPMorgan case  
3 for a moment, and you don't need the exhibit because  
4 I want to go beyond that.

5 Are you aware of any other claims  
6 other than the ones that we've just gone through  
7 that were outlined in the JPMorgan Chase complaint  
8 by the Trustee?

9 A. Yes.

10 Q. And what were they?

11 A. What are loosely referred to as the  
12 class action claims, but they were -- in the  
13 Trustee's complaint they were asserted as common law  
14 claims. I think they were for aiding and abetting,  
15 fraud and conspiracy and related claims to that.  
16 They're primarily common law claims.

17 Q. And you are aware, I think you  
18 referenced that there was a class action that was  
19 pending parallel to the Trustee's action, also  
20 against JPMorgan Chase?

21 A. Parallel but much later, started much  
22 later.

23 Q. Much later, yes. I was actually  
24 going to start testifying but, anyway.

25 And you are also aware of the



1 Department of Justice's involvement with the  
2 JPMorgan Chase matter as well, are you not?

3 A. Yes.

4 Q. And what's your understanding that to  
5 have been?

6 A. There was a criminal investigation by  
7 the Department of Justice over Chase's involvement  
8 with BLMIS as its banker and in other relationships,  
9 resulting in a deferred prosecution agreement.

10 Q. So let's go back to March of '09, if  
11 we may. The equal treatment provision that is in  
12 the agreement that is the subject of our discussion  
13 here today, who first proposed that?

14 A. The Optimal side proposed that.

15 Q. And why did you propose it?

16 A. There were two reasons. One was as  
17 a -- at the time, hopefully early settler, we didn't  
18 want -- there was no, to use a phrase that's in the  
19 settlement agreement, there was no benchmark as to  
20 what reasonable settlements were. We didn't want to  
21 settle at a percentage of the claim and later find  
22 the Trustee settling at lower percentages similar  
23 claims, similar circumstances to ours.

24 So, it was protection. I think, as  
25 Mr. Hirschfield said in his declaration, protection

1 against looking foolish on our side.

2 Second reason, which was also  
3 important, and we argued this in the settlement  
4 negotiations, was that it would give the Trustee  
5 some leverage in negotiations with other defendants  
6 in avoiding power actions, leverage to maintain a  
7 minimum settlement percentage amount.

8 Q. Okay.

9 A. And we thought that would be helpful  
10 not only to the Trustee but indirectly then to all  
11 customers with allowed claims which we had hoped  
12 Optimal would be. So it would inure indirectly --  
13 directly to the estate's benefit and indirectly to  
14 Optimal's benefit.

15 Q. Do you recall the initial reaction of  
16 Trustee's counsel to your equal treatment proposal?

17 A. Yes.

18 Q. And what was it?

19 A. Highly skeptical.

20 Q. Could you explain what you mean by  
21 highly skeptical?

22 A. The Trustee's counsel, as I recall,  
23 expressed concern -- I'm going to use a word that's  
24 not the Trustee's counsel's word, my word --

25 Q. I asked for your understanding.

1           A.           That it would somehow hamstring the  
2           Trustee going forward and it was going to be too  
3           limiting and constraining and therefore the Trustee  
4           was concerned about putting something in like that  
5           that would limit his flexibility and options and  
6           such.

7           Q.           Um-hum. Did --

8           A.           I don't recall if it was in that  
9           first conversation or later that there was also the  
10          concern expressed about whether the provision could  
11          be drafted in a way that would be comfortable for  
12          the Trustee. So the two go together very closely.  
13          One conceptual and one the mechanics of making it  
14          happen.

15          Q.           Did the Trustee ever express to you  
16          at these early stages of your negotiations the  
17          notion that the -- if there was to be an equal  
18          treatment clause, it applied only to similar cases?

19          A.           Let me first adopt a shorthand  
20          convention. You asked if the Trustee did. No, he  
21          didn't because he was never at the settlement  
22          negotiations.

23          Q.           I thought I said counsel; if I  
24          didn't, I misspoke.

25          A.           I'm going to assume whenever you say

1 Trustee, you mean counsel.

2 Q. Absolutely.

3 A. That was the convention.

4 Q. Fine.

5 A. I don't remember exactly what was  
6 said as to the scope of the clause or provision in  
7 the settlement negotiations. I only recall what's  
8 in the written record back and forth as to the  
9 nature of how it would be described.

10 Q. Okay. Let's go to the written record  
11 then.

12 A. Sure.

13 Q. Let's go to the initial draft. I  
14 believe it's the initial draft. I'll ask you what  
15 it is, actually.

16 (Exhibit T-2 marked for  
17 identification.)

18 Q. Mr. Levin, the court reporter has  
19 handed you what has been marked as T-2, which I  
20 believe to be the initial draft of the proposed  
21 settlement agreement. Take your time, take a look  
22 at it. Could you, for purposes of the record,  
23 identify that document for me, please.

24 A. This is what you just characterized  
25 it as.

1 Q. Okay. And my characterization was  
2 correct?

3 A. Yes.

4 Q. I direct your attention to page 6 of  
5 the document, paragraph 12.

6 A. Yes.

7 Q. Do you see the heading there, "Equal  
8 Treatment"?

9 A. Yes.

10 Q. I'm going to read it in, for purposes  
11 of the record I'm just going to read this in. The  
12 heading is "Equal Treatment for SUS and Arbitrage  
13 with Other Similar Customers. "

14 Do you see that?

15 A. Yes.

16 Q. Now, is this your language that you  
17 put in there or is this the result of negotiation?

18 A. This was the initial draft that came  
19 from the Optimal side.

20 Q. Um-hum. And where did this language  
21 emanate from? Was this your language?

22 A. I believe so. I was the principal  
23 drafter, so I think it must have been, but I can't  
24 tell you specifically.

25 Q. Do you recall why you used the phrase

1 "other similar customers"?

2 A. No, I do not recall.

3 Q. Without going through each of the  
4 paragraphs A through G, would you agree with me that  
5 the term "customer" appears in each one of them?

6 A. Yes.

7 Q. I'm going to go through all three  
8 very quickly and then come back to this.

9 A. Okay.

10 Q. I now want to show you the, what I'm  
11 going to call the Trustee's version, if you will.

12 T-3.

13 (Exhibit T-3 marked for  
14 identification.)

15 Q. Again, for purposes of the record can  
16 you identify, if you can, the document T-3 for us,  
17 Mr. Levin.

18 A. This appears to be the May 4 draft  
19 that Baker Hostetler sent to me in response to -- it  
20 was part of the exchange of drafts of the settlement  
21 agreement.

22 Q. All right. Now, the heading is the  
23 same as it was in your earlier draft, is it not?

24 A. In paragraph 13, 12 of the other  
25 draft, yes.

1 Q. Okay. And if you, and take your time  
2 to read this, but -- and I'll direct your attention  
3 down to, "For purposes of this paragraph." I don't  
4 know if you can see that?

5 A. I do.

6 Q. Right after "MFN trigger event," it  
7 says: "Similar claim means a claim by the Trustee  
8 against a former BLMIS customer," says "the  
9 customer" as a defined term and then that term  
10 "customer" is used throughout this paragraph, is it  
11 not?

12 A. It's not used throughout the  
13 paragraph, but for references in the definition of  
14 similarly situated person or entity appears to refer  
15 to the defined term "customer."

16 Q. All right. Now, let's go to the  
17 final version, if we can. The one that was actually  
18 executed.

19 What we've done here is we've  
20 attached it to the email, which I'm going to also  
21 ask you a question about, the email that you sent to  
22 us. So it's combined document that I'll ask the  
23 witness to identify it after you've marked it as  
24 T-4.

25 (Exhibit T-4 marked for

1 identification.)

2 Q. Again, Mr. Levin, take your time to  
3 take a look at this but, for the record, I've handed  
4 you what purports to be an email from you -- some  
5 email correspondence between you and counsel for the  
6 Trustee, as well as a new, if you will, version of  
7 the equal treatment provision.

8 Just for purpose of the record,  
9 Mr. Levin, can you identify for us as you understand  
10 it, or what your understanding is of the two  
11 documents that are attached to T-4.

12 A. Well, the first part is email  
13 correspondence between Mr. Hirschfield and me from  
14 March 4th through March -- May, excuse me, May 4th  
15 through May 9th. And there is a one-page attachment  
16 of a draft equal treatment insert for the settlement  
17 agreement.

18 Q. Okay. Turning your attention to the  
19 settlement agreement, and particularly the page that  
20 has the heading "Draft Equal Treatment Insert for  
21 the Picard - Optimal Settlement Agreement."

22 Do you see that?

23 A. Yes.

24 Q. Do you see the heading there on  
25 paragraph -- paragraph 13?



1 A. Yes.

2 Q. And it again says, "with other  
3 similar customers," does it not?

4 A. Yes, it does.

5 Q. Now, in the body of the language does  
6 the word "customer" appear?

7 A. No, it does not.

8 Q. And does the word "defendants"  
9 appear? In other words -- let me withdraw that  
10 question.

11 Direct your attention to paragraph B  
12 little i. It begins with the phrase, and I'm  
13 reading now:

14 "If the Trustee settles one or a  
15 related series of avoiding power claims against a  
16 single defendant or group of defendants --"

17 A. Yes, the word "defendant" clearly  
18 appears.

19 Q. Right. You would agree with me,  
20 would you not, that prior to this the reference was  
21 to customer, both in your first draft and in the  
22 draft that was sent by the Trustee, was it not?

23 A. Yes. The paper is clear.

24 Q. Did you, in your transmitting this,  
25 identify the fact that you were changing "customer"

1 to "defendants"?

2 A. I did not call it out in the email  
3 traffic that accompanied it.

4 Q. Did you ever, in conversation with  
5 the Trustee, suggest to them that this was a change?

6 A. I don't recall. I note the email  
7 traffic refers to conversations we had over this  
8 provision and I recall that we did have some  
9 conversation, but I simply do not remember the  
10 content of conversations five years ago on this.

11 Q. Is it not true that when you were  
12 having these initial discussions and in the first  
13 two drafts you were talking about customers, were  
14 you not?

15 A. The drafts talked about them. As I  
16 said, I don't recall the content of discussions five  
17 years ago.

18 Q. Was it not the understanding of  
19 everyone when you sent this and retained the heading  
20 "Other Similar Customers" that the defendants you  
21 were referring to were customers?

22 MR. GREENWALD: Objection.

23 A. Read back the question, please.

24 (Question read.)

25 A. I don't know what the Trustee's or

1 his counsel's understanding was.

2 Q. Would there be any reason for them to  
3 think otherwise?

4 A. The language of the provision.

5 Q. Well, you'd retained the heading, did  
6 you not?

7 A. Yes, the heading was retained.

8 Q. And it said "other similar  
9 customers"?

10 A. Yes, it did.

11 Q. Wouldn't one, having been in these  
12 negotiations, with all of the earlier drafts and you  
13 not in any way identifying, would you not agree --  
14 let me rephrase this.

15 Would you not agree that if you were  
16 going to change the term from "customers" to  
17 "defendants," that was a material change?

18 A. Yes, it is a material change.

19 Q. Did you identify that in writing to  
20 the other side?

21 A. Yes.

22 Q. In writing?

23 A. Yes.

24 Q. How?

25 A. It's right in the draft itself.

1 Q. So, in other words, you didn't think  
2 that when they looked at it, and you used the  
3 heading "Other Similar Customers," that they thought  
4 that that meant the defendants were customers?

5 A. I don't know what they thought.

6 Q. Well, was there some slight of hand  
7 here, Mr. Levin?

8 MR. GREENWALD: Object.

9 A. You're arguing with me now. I'm not  
10 going to take that bait.

11 Q. All right. Well, in other words, the  
12 only thing you have on the record, the entire record  
13 here that would suggest that the counsel for the  
14 Trustee should know that even though you retained  
15 the heading, the fact that you turned it into  
16 defendants, that we should have known you meant  
17 other than customers?

18 A. Could you read that back.

19 (Question read.)

20 Q. Do you understand the question? I'll  
21 rephrase it.

22 A. I got lost toward the end of it.

23 Q. Okay.

24 You send us a document that retains  
25 the heading. It's the same heading for all three

1 documents, correct?

2 A. Yes.

3 Q. And it says "other similar  
4 customers"?

5 A. Yes.

6 Q. And in the third one you changed the  
7 term "customers" to "defendants"; is that correct?

8 A. Yes.

9 Q. And it's your testimony that the  
10 Trustee was supposed to divine from your change from  
11 "customer" to "defendants" that you meant to change  
12 it to defendants other than customers?

13 A. Read that back again.

14 (Question read.)

15 MR. GREENWALD: I'll pose an  
16 objection.

17 A. I sent him a document and I  
18 assumed -- counsel, a document -- I assumed counsel  
19 would read it and read what it said.

20 Q. And it said customers, did it not?

21 A. In one place, and it said defendants  
22 in others.

23 Q. Right. So, wouldn't it be fair to  
24 assume that the Trustee, without you highlighting  
25 this in any way whatsoever, that what you were

1 actually saying is that defendants, meaning  
2 defendants who were customers?

3 MR. GREENWALD: Objection.

4 A. I'm not going to say what's fair to  
5 assume or not. That's an argument. That's not what  
6 I'm here to talk about.

7 Q. I'm here to talk about why you  
8 changed it.

9 A. You know, the other --

10 Q. Why did you change it from customers  
11 to defendants?

12 MR. GREENWALD: Answer that question.  
13 That's fine.

14 A. I was waiting for the question.

15 We had a discussion, I remember we  
16 had a discussion because both sides were  
17 dissatisfied with the prior two drafts, or one side  
18 was dissatisfied with one, the other side with the  
19 other.

20 So, according to the email  
21 correspondence, and I think it, I believe it to be  
22 accurate, since I tended to be the party in the  
23 negotiation who -- the Trustee was very busy, as you  
24 may recall at the time --

25 Q. We had a few things happening.

1           A.           Yes. So I tended to be the person in  
2 the negotiation that came up with the proposals for  
3 the Trustee to react to, rather than the other way  
4 around. And I think I came -- when I saw the logjam  
5 on the two prior drafts, I came up with a new  
6 proposal and as you'll see from my email, I said to  
7 Mr. Hirschfield, I think it would be helpful if we  
8 had a discussion before going to the next step.

9                       We had a discussion. I don't  
10 remember the content of that discussion. The result  
11 of that discussion was this draft, which I then sent  
12 back, and it says what it says.

13                      I do recall, and the paper record  
14 shows this as well, that one of the big changes from  
15 the prior draft to this draft was to expand from  
16 simply preference actions to avoiding power claims.  
17 And so it was a broader set of claims that we were  
18 covering and that may have been the reason for  
19 changing it to defendants.

20           Q.           But you never called that to the  
21 attention of the Trustee?

22           A.           No. I put it in the document. You  
23 mean I called him up and said specifically, I want  
24 you to notice this? No, I did not call it out  
25 specifically. I don't remember any particular

1 conversations we had over it, but the written record  
2 is, as you presented to me in T-4, I believe is  
3 accurate.

4 Q. Let's go back to the first version,  
5 if you will.

6 A. Um-hum. T-2.

7 Q. Direct your attention to paragraph  
8 12 (b) .

9 A. Yes.

10 Q. Just so we'll have it clear for the  
11 record, since I seem to be chowdering things up  
12 here, 12 (b) reads: "The customer received transfers  
13 from BLMIS that are in excess of \$25 million in the  
14 aggregate either as fictitious profits (calculated  
15 on a cash-in/cash-out basis) or after September 11,  
16 2008 and that are recoverable under the Bankruptcy  
17 Code section 544, 547, 548 or 550 (the 'Total  
18 Recoverable Amount' of the customer)."

19 What was the significance of the date  
20 September 11, 2008?

21 A. It was 90 days before the SIPA  
22 liquidation proceeding commenced.

23 Q. So what was the purpose of paragraph  
24 12 (b) ?

25 A. To describe one of the conditions



1 that would have to be satisfied for the equal  
2 treatment provision to apply.

3 Q. And what was the condition that 12(b)  
4 described?

5 A. You just read it.

6 Q. I understand. Well, let me rephrase  
7 it. Is this description one of a preference action  
8 for fictitious profits?

9 A. Yes and no. As noted, it could be a  
10 preference action in that it was within 90 days, or  
11 it could be a fraudulent transfer action.

12 A claim for fictitious profits would  
13 not be a preference claim because a fictitious  
14 profits payment is not for or on account of an  
15 antecedent debt; therefore, it's only a fraudulent  
16 transfer claim. So, hence, the references in the  
17 latter part of the provision to Sections 544 and  
18 548.

19 Q. So those -- just to understand your  
20 testimony, is the references to 547 and 548 to the  
21 portion of the paragraph that deals with fictitious  
22 profits?

23 A. Yes.

24 Q. So the --

25 A. Excuse me. It applies to fictitious

1 profits and it applies to transfers after September  
2 11, 2008 because, as I said earlier, the Trustee's  
3 avoiding powers are cumulative.

4 Q. So, let me just -- just to finish  
5 this discussion or question -- is it fair to state  
6 that the two claims that are identified in 12(b) are  
7 claims for fictitious profits or preference claims?

8 A. Loosely, yes.

9 Q. Okay. What do you mean by loosely?

10 A. Well, preference claims in this  
11 context are also avoidable as fraudulent transfers.

12 Q. Now, going back to the -- let me jump  
13 back. If you go back to T-4.

14 A. Sure.

15 Q. I'm directing your attention now to  
16 the concerns of the Trustee. Actually I'm directing  
17 your attention to the email that you sent to  
18 Mr. Hirschfield and Mr. Lucchesi. Do you see that?

19 A. Yes.

20 Q. It's the last one in the chain.

21 A. Yes.

22 Q. It says, "Here's my rough cut." Do  
23 you see that?

24 A. Yes.

25 Q. And you state: "I've tried to be

1 accommodating to the concerns that you have  
2 previously expressed."

3 What did you understand to be the  
4 concerns of the Trustee that you're referring to  
5 here?

6 A. Let's see if I can put myself back  
7 five years and recall.

8 I don't recall the specific concerns  
9 that had been expressed with respect to the  
10 differences between the April 13 and the May 4  
11 drafts.

12 Q. Yeah.

13 A. All I recall is the general concern  
14 that the Trustee wanted a narrower equal treatment  
15 provision and Optimal wanted a broader equal  
16 treatment provision, and as a negotiator I was  
17 sensitive to trying to bridge that gap.

18 MR. SHEEHAN: Can I have that read  
19 back, please.

20 (Answer read.)

21 Q. Now, let's go back to the Trustee  
22 version, which I think is T-3.

23 A. Yes.

24 Q. Again directing your attention to the  
25 portion of paragraph 13 -- do you have that in front

1 of you?

2 A. Yes.

3 Q. -- which reads: "For the purposes of  
4 this paragraph, 'similar claim' means a claim by the  
5 Trustee against a former BLMIS customer."

6 Do you see that?

7 A. Yes.

8 Q. Would it be a fair statement that  
9 that represented a concern of the Trustee?

10 MR. GREENWALD: Objection.

11 A. I have no way of knowing.

12 Q. Well, you say the document speaks for  
13 itself when you get it. When you read that, what  
14 did it mean to you, when the Trustee says, "'similar  
15 claim' means a BLMIS former customer against whom  
16 the Trustee has a claim for over \$100 million"?

17 A. Yeah, I read that to mean that the  
18 Trustee wanted to limit this equal treatment  
19 provision to claims against customers.

20 Q. And did you see that as a material  
21 aspect of this?

22 A. I simply don't remember.

23 Q. You don't remember whether that was  
24 material to you or not?

25 A. I don't remember. I remember the 100

1 million was material, but I don't remember about the  
2 customer.

3 Q. When you sent it back, you changed  
4 that term to defendants, did you not?

5 A. Yes.

6 Q. All right.

7 A. Well, when I sent it back -- I  
8 quarrel with that a little bit because I didn't just  
9 send it back. As I described, I came up with a new  
10 concept, we had a conversation about it and then I  
11 sent a proposal. So I didn't just send this back.

12 Q. Did you in the conversation say, I'm  
13 changing it from "customer" to "defendants"?

14 A. I don't recall that I did. I don't  
15 recall that I didn't, but I have no recollection of  
16 that conversation.

17 Q. So when you say you were addressing  
18 the concerns, did you not think that changing it  
19 from "customer" to "defendant" was not addressing  
20 their concern?

21 MR. GREENWALD: Objection.

22 Q. Let me back up.

23 A. I understand the question and I'll  
24 answer it.

25 Q. Let me go all the way back to the

1 beginning.

2 What was Optimal? Was it a customer?

3 A. Optimal was a customer, yes.

4 Q. Right. And you wanted to get ahead  
5 of the game so that you could settle early but not  
6 look foolish?

7 A. In colloquial terms, yes.

8 Q. And you were talking about other  
9 customers, were you not?

10 A. Initially.

11 Q. Yes. And not only initially, was not  
12 the Trustee saying similar, meaning customers?

13 A. The Trustee did say that.

14 Q. Right. And when you changed it, you  
15 didn't think that was material enough to highlight  
16 it to the Trustee that you changed it?

17 A. Let me put it this way. I didn't  
18 highlight anything that I changed to the Trustee. I  
19 sent a revised draft after a discussion. I didn't  
20 say please note this provision, please note that  
21 provision, I didn't say any of that. I just said, I  
22 tried to be accommodating. That is what a  
23 negotiator does.

24 Q. Well then why did you leave in the  
25 phrase "other similar customers" in the heading of

1 paragraph 13 on the May 9 draft?

2 A. Ah, that I can answer.

3 Q. Yes?

4 A. Because we all have strengths and  
5 weaknesses in drafting. And one of my weaknesses is  
6 that I don't pay a lot of attention to section  
7 headings. That section heading was in the draft. I  
8 left it there. Didn't even think about it.

9 Q. Even though you changed and took  
10 "customer" out of the rest of it, you never looked  
11 at the heading?

12 A. That -- let me be really clear. I  
13 cannot tell you specifically I looked at this, I  
14 thought about it, I decided to leave the heading in.  
15 But my practice in drafting, and I've learned this  
16 from doing it for 35 or 40 years -- closer to 40 --  
17 my practice in drafting is I occasionally, more than  
18 occasionally, often, once a heading gets set, even  
19 though the provision changes, I don't go back and  
20 relook at it. And so based on my normal practice,  
21 I'm guessing that's what happened here.

22 Q. You don't think that leaving in  
23 "other similar customers" was misleading?

24 A. You know, I'm dealing with a very  
25 sophisticated law firm. I don't think anything I

1 would do to them that is on paper that they read and  
2 they have to sign off on would be misleading in any  
3 way.

4 Q. Why would they not have thought that  
5 when you said "other similar customers" in the  
6 heading, every previous draft had dealt with similar  
7 customers, that when you said defendants you didn't  
8 mean customers?

9 A. That's an argument and I'm not going  
10 to answer it.

11 MR. GREENWALD: Can we take a break?

12 MR. SHEEHAN: Sure.

13 (Recess 10:57-11:05 a.m.)

14 BY MR. SHEEHAN:

15 Q. Mr. Levin, just to turn to a  
16 different topic, in your declaration, and we're  
17 going to mark that now so you have it in front of  
18 you because we're going to ask a series of  
19 questions.

20 A. Can I put these away?

21 Q. Yes, you may, absolutely. I think --  
22 I don't think we're going back to them, but if we  
23 do...

24 T-5.

25 (Exhibit T-5 marked for



1 identification.)

2 Q. I show you, for the record,  
3 Mr. Levin, I show you what has been marked T-5 by  
4 the reporter. Can you identify that document for  
5 us, please.

6 A. Declaration of Richard Levin  
7 regarding application of the equal treatment  
8 provision to the settlement agreement between the  
9 Trustee and JPMorgan Chase & Co. et al.

10 Q. I'm going to direct your attention to  
11 paragraph 19 of the declaration. I just have a few  
12 questions about it, but you can read the whole thing  
13 if you want.

14 A. I am looking at paragraph 19.

15 Q. In there the concept of negotiation  
16 leverage is discussed. Do you see that?

17 A. Yes.

18 Q. Does the term "negotiation leverage"  
19 appear anywhere in the settlement agreement?

20 A. No, it does not.

21 Q. When you had discussions with counsel  
22 for the Trustee during the course of settlement  
23 negotiations, was the concept of negotiation  
24 leverage discussed?

25 A. I don't recall.

1 Q. Is it a fair statement that the  
2 thought or concept of negotiation leverage was in  
3 your mind and not discussed?

4 A. It's possible. I just don't  
5 remember.

6 Q. Okay. Let's turn to paragraph 21(b).

7 A. I'm there.

8 Q. Again, I'm going to, just for  
9 purposes of the record, read in what I want to talk  
10 about.

11 If you go down to page 13 and it's  
12 the start of the second paragraph. For purposes of  
13 the record I'm just going to read it in:

14 "To the best of my recollection,  
15 assisted by my review of the earlier drafts, I  
16 included the 'nature of the avoiding power claims'  
17 factor to identify the difficulty the Trustee might  
18 have in pursuing an avoiding power claim against  
19 another defendant and, with it, the concomitant  
20 reduction of the Trustee's settlement negotiating  
21 leverage. If the claim was easier to pursue, such  
22 as a 90-day transfer or a fictitious profits  
23 transfer, then the Trustee would enjoy more  
24 leverage, making the circumstances of any resulting  
25 settlement more similar to the circumstances of the

1 SUS and Arbitrage settlement. But if the claim was  
2 more difficult to pursue, such as to avoid a two- or  
3 six-year transfer that was a return of principal,  
4 then the Trustee would have less settlement  
5 negotiating leverage, making the circumstances less  
6 similar."

7 Do you see that?

8 A. I do.

9 Q. Would you not agree with me that the  
10 Optimal claim in issue was a 90-day transfer or a  
11 fictitious profits transfer?

12 A. The Optimal transferrers were either  
13 a 90-day or a fictitious profits transfers.

14 Q. And that the claims that the Trustee  
15 had against JPMorgan Chase, although there were  
16 certain portions of it that were in the 90-day  
17 realm, that the vast majority of it was either a  
18 subsequent transfer or a two- or six-year transfer?

19 A. Subsequent or two- or six-year, yes.

20 Q. So based on your paragraph, wouldn't  
21 the Optimal -- would not the JPMorgan Chase fall  
22 outside of the equal treatment clause?

23 A. Not necessarily, no. It would have  
24 fallen out had there been express conditions as in  
25 the April 13 and May 4 drafts, but in the final

1 draft that the Trustee agreed to, which listed  
2 factors and looked more generally to similar  
3 circumstances rather than to express conditions,  
4 such as was it a 90-day transfer or not, was it  
5 fictitious profits or not. Since it is written more  
6 broadly, it does not necessarily fall outside.  
7 That's what this dispute is about, is whether -- let  
8 me say it this way.

9 The equal treatment provision applies  
10 to, quote, qualifying settlements, close quote,  
11 defined term. The JPMorgan Chase settlement is a  
12 qualifying settlement. So it falls within the equal  
13 treatment provision.

14 Whether the circumstances are similar  
15 or not similar is a question of whether the --  
16 whether the Trustee is required to provide a refund.  
17 Not a question of whether it falls within the equal  
18 treatment paragraph.

19 Q. My question, though, is this: This  
20 declaration represents your thinking about -- you're  
21 stating what the negotiations represented and your  
22 understanding of the agreement. Is that not  
23 correct?

24 A. Yes.

25 Q. And your understanding is, that if

1 you have a fictitious profits or 90-day claim,  
2 that's much more similar to Optimal than a two- or  
3 six-year or subsequent transferee claim; is that not  
4 correct? You say less similar.

5 A. That particular claim -- well, I  
6 didn't say the claim was less similar. I said the  
7 circumstances were less similar.

8 Q. Uh-ha. So, you'd have to take into  
9 account, therefore, all the circumstances  
10 surrounding the claim?

11 A. That is what the equal treatment  
12 provision says.

13 Q. Okay. Would you, in your  
14 experience --

15 MR. GREENWALD: Could you please read  
16 that back, the question and answer.

17 (Record read.)

18 Q. All right. So, in assessing JPMorgan  
19 Chase, you would have to look at all the nature of  
20 the claims, as to whether it was similar or not,  
21 correct?

22 A. You have to look at whether the  
23 circumstances were similar.

24 Q. Okay. The circumstances would  
25 include an assessment of the claims, would it not?

1           A.           Yes. In fact, that's the second  
2 factor that's listed.

3           Q.           And what you're saying in this  
4 paragraph is when the claims are different, like a  
5 two- or a six-year, as a circumstance, that makes it  
6 less similar?

7           A.           Yes. Makes the circum -- you said  
8 "it." Just to be clear, it makes the circumstances  
9 less similar.

10          Q.           Right. Okay.

11                        Let's go to paragraph 21(d). The  
12 heading of this paragraph, for the record, is  
13 "Defendant's Knowledge or Complicity." Let me see  
14 where I want to pick this up.

15                        I'm going to pick it up right at the  
16 very beginning and I'll read this into the record:

17                        "This factor appeared only in the  
18 last draft, which Cravath proposed only after the  
19 expansion of the equal treatment provision's scope  
20 to include two- and six-year transfers. Again, I  
21 proposed the expansion to prevent the Trustee from  
22 settling avoiding power claims covering several  
23 transfers in a way that allocated portions of the  
24 settlement to 90-day claims, to two-year claims, and  
25 to six-year claims. Under the narrower formulation,

1 the Trustee could, for example, settle the 90-day  
2 claims for 85 percent and two-year claims for  
3 substantially less, so that the overall percentage  
4 was below 85 percent, even though the Trustee might  
5 have a solid case on the two-year transfers under  
6 548(a)(1)(A) and section 548(c), lack of good faith,  
7 based on the defendant's knowledge or complicity.

8 "The Trustee agreed in paragraph P of  
9 the agreement that SUS and Arbitrage did not know of  
10 and were not complicit in the BLMIS fraud and  
11 therefore did not pursue Arbitrage for a 35 million  
12 dollar, two-year transfer that was a return of  
13 invested principal. If another defendant knew or  
14 was complicit or otherwise did not meet the good  
15 faith requirement of Section 548(c) as a defense to  
16 a two-year or six-year claim for return of  
17 principal, the Trustee would have leverage in  
18 negotiating a settlement that was at least as strong  
19 as the leverage he had when negotiating with SUS and  
20 Arbitrage, making the circumstances of any resulting  
21 settlement more similar."

22 Let me start first with the sentence  
23 that says: "The Trustee agreed in paragraph P of  
24 the agreement that SUS and Arbitrage did not know of  
25 and were not complicit." Do you see that?

1 A. Yes.

2 Q. So, is that one of the circumstances  
3 you would have to take into account as to whether it  
4 was similar or not?

5 A. Yes.

6 Q. So the fact that Optimal didn't have  
7 knowledge and somebody else did, if somebody did  
8 have knowledge according to the Trustee, it would  
9 make it less similar?

10 A. Literally, yes.

11 Q. So that -- and if the Trustee, under  
12 the current law -- let me ask you, back up. I want  
13 to discuss 548 -- 546(e) at this point. Okay.

14 A. Yes.

15 Q. Now, when you were negotiating March  
16 of '09 do you know what the law required in terms of  
17 the Trustee approving -- once the defense of good  
18 faith had been raised, to prove bad faith on the  
19 part of the transferee?

20 A. Are you referring to 546(e)?

21 Q. No. I'm referring to the Bankruptcy  
22 Code itself. Forget 546(e).

23 At that time did 546(e) have any  
24 application to the standard that would be enunciated  
25 with regard to proving a two- or six-year transfer?



1 A. 546(e) doesn't have any application  
2 to good faith one way or the other.

3 Q. All right. You're familiar with  
4 Judge Rakoff's ruling, however, with regard to  
5 proving actual knowledge, are you not?

6 A. Yes. He's had several rulings.

7 Q. Let's deal with the last one. Strike  
8 the Katz/Wilpon reference of 546(e). The one that  
9 he just did under 548(a)(1)(A). Are you familiar  
10 with that?

11 A. Yes. Actually that was under 548(c).

12 Q. Okay, of course it was, that's right.  
13 But what is your understanding of  
14 recent ruling by Judge Rakoff as to what the  
15 Trustee's burden is, both in pleading and in proof,  
16 with regard to proving actual knowledge?

17 A. To be clear, that ruling was issued  
18 in April 2014?

19 Q. Yes.

20 A. My understanding of his ruling was  
21 that a defendant would be -- I'm sorry, did you say  
22 with respect to pleading and proof?

23 Q. Yes.

24 A. My understanding of this ruling was  
25 that a defendant would be in good faith -- in this

1 case, in this SIPA case involving the particular  
2 kind of fraud dealing with securities involved here,  
3 and he distinguished a SIPA case from an ordinary  
4 bankruptcy case on that point -- the defendant would  
5 be in good faith unless the defendant knew of the  
6 fraud or, I think his words were, was willfully  
7 blind to it. I don't remember if he used -- he used  
8 that in prior decisions, but I don't remember if he  
9 used it in this one, but I think he did. And that  
10 it was the Trustee's burden to plead the defendant's  
11 lack of good faith rather than the defendant's  
12 burden to assert good faith as an affirmative  
13 defense.

14 Q. Um-hum. Prior to that --

15 A. Did I get that right?

16 Q. I believe so.

17 In 546 -- in the context of 546(e),  
18 did he render a ruling with regard to the knowledge  
19 that was required to be proven by the Trustee in  
20 order to avoid the application of 546(e) to  
21 fraudulent transfer claims?

22 A. Read that back, please.

23 (Question read.)

24 A. I don't recall that he ruled in the  
25 context in which -- that you just described.

1 Q. What is your understanding?

2 A. My understanding is that 546(e),  
3 which is referred to as a safe harbor from avoiding  
4 powers, certain avoiding powers in certain  
5 circumstances, does not exempt or provide a safe  
6 harbor to transfers that are avoidable under Section  
7 548(a)(1)(A), which we refer to as an actual  
8 fraudulent transfer. That is, a transfer with  
9 actual intent to hinder, delay or defraud creditors.  
10 And therefore the ruling doesn't relate to 546(e) so  
11 much as it relates to what is required for the  
12 Trustee to plead and approve a 541(a)(1)(A) claim.  
13 And in his most recent ruling last month, he said  
14 the Trustee needed to plead lack of good faith in  
15 this context, in this particular kind of a SIPA  
16 case.

17 Q. Is there not a ruling by Judge Rakoff  
18 that the Trustee can actually avoid the application  
19 of 546(e) to all the fraudulent transfers for the  
20 six-year period if, in fact, he can show that the  
21 defendant possessed actual knowledge of the fraud?

22 A. I don't recall that ruling. I won't  
23 say there isn't. He's done many and I've tried to  
24 follow them, but I don't recall that one.

25 But by the way, after this is done

1 I'd be interested in getting the citation for it  
2 since I try to follow the case law on this.

3 Q. Sure, of course. Happy to provide  
4 it.

5 Were either of those decisions in  
6 place in March of '09?

7 A. The calendar speaks for itself,  
8 Mr. Sheehan, come on.

9 Q. Well, for the record, though. But if  
10 in fact --

11 MR. GREENWALD: Nothing that Rich  
12 said on that subject has been changing.

13 A. Let me see, was 2014 after 2009? I  
14 think the answer is yes.

15 Q. Thank you.

16 (Comments off the record.)

17 Q. In any event, in March of '09, if  
18 those decisions had been in place, would you have  
19 settled?

20 MR. GREENWALD: Hold on. You know,  
21 I'm going to object to that as work product.  
22 Speculation, too, but a better objection is work  
23 product. You're asking to get inside his head as to  
24 what he would have recommended.

25 A. I don't know, but I will tell you --

1 Q. Let me ask it differently. Could the  
2 Trustee have brought a preference action under these  
3 current rulings against Optimal --

4 MR. GREENWALD: Hold on, wait.

5 Q. Could the Trustee have brought a  
6 preference action against Optimal under these  
7 rulings in 2009 if those rulings were in place then?

8 MR. GREENWALD: I think we should  
9 confer about this privilege issue.

10 MR. SHEEHAN: Sure.

11 (Discussion off the record between  
12 the witness and his counsel outside the deposition  
13 room.)

14 MR. GREENWALD: Okay. We're going to  
15 stick with the instruction not to answer that on the  
16 ground of attorney work product. It's also  
17 speculative, but I'm not gonna -- that's not a basis  
18 for instruction not to answer.

19 Q. Okay. Let's say you had not settled.

20 A. I'm sorry?

21 Q. You had not settled. The case is  
22 still outstanding. We sued you. Would you make a  
23 motion to dismiss today based on the law as you know  
24 it?

25 MR. GREENWALD: That's also work

1 product. He's here to talk about the facts of the  
2 settlement.

3 Q. Let me ask it a different way.

4 When the law changes, is that a  
5 circumstance you take into account on whether it's  
6 equal or similar?

7 MR. GREENWALD: Objection.

8 MR. SHEEHAN: To what?

9 A. The agreement says similar  
10 circumstances and it says the factors are  
11 nonexclusive.

12 Q. Correct. So if the law changes and  
13 the Trustee's burden becomes substantially higher  
14 than that which existed in March of '09, that's a  
15 circumstance you take into account in terms of  
16 whether it's similar or deserves equal treatment; is  
17 that not correct?

18 A. I don't doubt that you will argue  
19 that to Judge Bernstein and that will be for him to  
20 decide.

21 Q. You don't think that's a factor?

22 MR. GREENWALD: Objection.

23 Q. I'm not asking --

24 A. You're asking what --

25 Q. You're a lawyer.

1           A.           You're asking what we're going to  
2 argue in this case. I don't think we need to answer  
3 that.

4           Q.           Is it your position then that it's  
5 not a factor?

6           A.           That is something for the briefs and  
7 the argument in this case.

8           Q.           No. You've opined on this. You've  
9 said what's similar and dissimilar. You said if  
10 it's a six-year claim or a four-year claim. Why are  
11 they dissimilar to a preference?

12          A.           Because the standards -- because what  
13 the Trustee has to prove is different.

14          Q.           Correct. So if that changes --  
15 you've already admitted that that's a circumstance,  
16 have you not, that the law changes and the elements  
17 that the Trustee has to prove, that that is a  
18 circumstance that has to be taken into account?  
19 Haven't you admitted that?

20          A.           I still think this is just argument.

21          Q.           I understand that, but you put the  
22 declaration in; I didn't, Mr. Levin. You're the one  
23 who said there was a difference. I'm asking you  
24 now. This is a fair question.

25                       MR. GREENWALD: This is now

1 argumentative and I'm going to object on that  
2 ground. If it keeps up we'll --

3 MR. SHEEHAN: Well, argumentative,  
4 are you directing him not to answer?

5 MR. GREENWALD: No, I'm not going to  
6 direct him not to answer at this point, but I do  
7 think the tenor, the tone, the nature of the  
8 questions being asked have, as he's pointed out,  
9 crossed the line from asking him factual questions  
10 about the circumstances of negotiations --

11 MR. SHEEHAN: All right. I apologize  
12 if I get a little too -- I am a passionate attorney  
13 and I apologize for my passion.

14 A. I know you are. No apology needed.  
15 I understand your position.

16 Q. Let's go back to 21(b).

17 A. Yes.

18 Q. Where you have submitted a  
19 declaration to the Court suggesting what  
20 circumstances you believe should be taken into  
21 account in terms of -- based on your negotiation,  
22 your familiarity with the agreement, as to when the  
23 equal treatment clause applies. Correct?

24 A. Not exactly correct.

25 Q. No?



1           A.           Because the lead-in, the first words  
2 of that paragraph are, "To the best of my  
3 recollection."

4           Q.           Right.

5           A.           This is what I understood it at the  
6 time to mean.

7           Q.           Well, let's pick up on this phrase.  
8 Your phrase, "If the claim was easier to pursue,  
9 such as a 90-day transfer or a fictitious profits  
10 transfer." Do you see that?

11          A.           Yes.

12          Q.           So you're positing that that kind of  
13 claim is easier to pursue, correct?

14          A.           Yes.

15          Q.           All right. In contradistinction to  
16 something that might be more difficult to prove?

17          A.           Yes.

18          Q.           And you then give an example of  
19 what's more difficult to prove, correct?

20          A.           Correct.

21          Q.           All right. So you're saying that if  
22 the burden of proof is more difficult, that's a  
23 factor that makes it less equal; is that correct?

24          A.           That is a factor that weighs on  
25 whether the circumstances are similar, yes.

1 Q. All right, fine, thanks. My fault in  
2 asking the question inappropriately. I apologize.

3 Anyway, let's go to 21(e). It's  
4 entitled "The Stage of the Litigation."

5 A. Yes.

6 Q. And I am reading, it's on page 15,  
7 starting with the phrase "As is." I think it's the  
8 second sentence.

9 A. Yes.

10 Q. "As is common in settling preference  
11 litigation with a trustee, I argued --" when you say  
12 that, you mean to my colleagues here at Baker, you  
13 were arguing with them?

14 A. That's I think what I meant by this,  
15 yes.

16 Q. "I argued that an early settlement,  
17 which reduced the resources the Trustee would have  
18 to marshal to pursue recovery, warranted a  
19 settlement more favorable to SUS and Arbitrage than  
20 one reached after lengthy litigation. The Trustee  
21 apparently agreed, settling for 85 percent of the  
22 avoiding power claims against SUS. I wanted that  
23 factor to be considered in determining whether the  
24 equal treatment provision should apply, so that if a  
25 defendant settled early in the litigation process,

1 this factor would be neutral. But if the settlement  
2 occurred after, or well after the Trustee's  
3 commencement of litigation, then the factor would  
4 weigh in favor of application of the equal treatment  
5 provision, and an early settlement discount should  
6 not be available."

7 My question is, just so I understand  
8 this, are you saying that once we settled with  
9 Optimal, that any litigation that took place after  
10 that further down the line, just by the function of  
11 period of time, it became less susceptible -- became  
12 more susceptible to equal treatment?

13 A. Let me answer your question this way.  
14 As I said earlier in my deposition, there were two  
15 factors that work here on early settlement. One was  
16 early stage of the plaintiff/defendant litigation,  
17 the avoiding power litigation, and one was early  
18 stage in the SIPA proceeding.

19 As you see, my declaration here  
20 focuses on the early stage of this -- of the  
21 adversary proceeding -- potential adversary  
22 proceeding litigation.

23 My position on this was that if a  
24 defendant came to the table quickly when the Trustee  
25 called, that would be a similar circumstance. But

1 if a defendant fought in lengthy battle before  
2 coming to the table, that would not -- that would be  
3 dissimilar and, therefore, would lean toward  
4 requiring a settlement to be at least 85 percent, or  
5 the benchmark percentage, for the equal treatment  
6 provision not to apply. I'm sorry. That got a  
7 little garbled. Obviously, if it's more than --

8 Q. I was going to ask that it be read  
9 back.

10 A. If it's more than 85 percent, equal  
11 treatment provision doesn't apply.

12 Q. Of course.

13 A. Because it's not a qualifying  
14 settlement.

15 But my point is that if the defendant  
16 came to the table only after a lengthy fight, that  
17 was not similar and, therefore, there would have to  
18 be other factors that would justify the Trustee  
19 settling for less than 85 percent to prevent the  
20 application of the equal treatment provision. Or to  
21 prevent -- to prevent the refund.

22 The reason I'm getting hung up here  
23 is because --

24 Q. I'm having a little trouble, too. Go  
25 ahead.

1           A.           When I say application of the equal  
2 treatment provision, what I said earlier in my  
3 deposition was that it applies to a qualifying  
4 settlement, which is more than the 40 million, less  
5 than 85 percent.

6                       Sometimes I've used the phrase, and  
7 you use it as well, apply the equal treatment  
8 provision means the Trustee is required to provide a  
9 refund. Or said differently, that the circumstances  
10 are sufficiently similar that the Trustee is  
11 required to provide a refund.

12                      So, in my last answer what I was  
13 referring to was not whether JPMorgan was a -- or  
14 any settlement was a qualifying settlement, 40  
15 million, 85 percent, but rather that if a defendant  
16 fought long and hard and the Trustee came to a  
17 qualifying settlement, unless the other factors  
18 justified settling for less than 85 percent, that  
19 that factor would lean to requiring the Trustee to  
20 settle for 85 percent or more or, said differently,  
21 that we would then be entitled to a refund. Was  
22 that clear?

23           Q.           I think I understand it. It's the  
24 temporal quality that I'm trying to understand  
25 because of what you've said here.

1 A. Yes.

2 Q. So let me see if I can address it a  
3 little bit differently.

4 A. I mean, the problem with the  
5 shorthands is that they sweep under a lot of  
6 concepts. And so my answer was lengthy because I  
7 didn't want the shorthand to obscure some elements  
8 that I think are required to really understand how  
9 this works.

10 Q. I think I understand it. As I  
11 understand what you're saying -- or let me rephrase  
12 that.

13 That with regard to paragraph 21(e),  
14 if the settlement takes place later, after some  
15 lengthy battle, that fact alone, as one of the many  
16 circumstances that would be taken into account, in  
17 your opinion that fact alone would weigh in favor of  
18 it applying -- getting equal treatment, but it would  
19 have to be other factors that would justify the  
20 Trustee in settling below 85 percent?

21 A. I agree with your description except  
22 for the very first part of your question where you  
23 asked if that were my opinion. What I'm discussing  
24 here is what the -- my thinking was in proposing  
25 this provision in the settlement agreement. I'm not

1 talking about the opinion -- you asked about  
2 opinion, sounds like we're arguing about what the  
3 result should be here. My declaration goes to my  
4 thinking at the time and that's what -- I'm agreeing  
5 with you in that context.

6 Q. Taking into account all the factors  
7 that you've given us here in your declaration, why  
8 do you think the JPMorgan Chase settlement qualifies  
9 as a settlement that's covered?

10 THE WITNESS: Is this argument?

11 MR. GREENWALD: It is argument.

12 THE WITNESS: Okay to answer?

13 MR. GREENWALD: Umm...

14 Q. Let me rephrase it and try to put it  
15 more in the context --

16 MR. GREENWALD: Really is what I  
17 thought the briefs would be covering.

18 MR. SHEEHAN: Well, quite frankly, I  
19 didn't know why we were taking depositions. In any  
20 event, let me ask it differently.

21 BY MR. SHEEHAN:

22 Q. If we went through the nonexclusive  
23 factors, which ones do you think -- are there  
24 certain factors that you think weigh in favor of the  
25 qualification and some factors that don't?

1           A.           That's the same question; it's just  
2           phrased differently. I think it's getting to the  
3           argument of what the briefs are going to address.

4           Q.           And I'm not looking to argue. Let me  
5           see if I can get to my question a little bit better.  
6           I don't know if I can.

7                        Just dealing with -- let me get to  
8           the -- rather than say it wrong here. Okay, I think  
9           you're probably right. Trying to phrase this in the  
10          form of a question. It's probably just emanating  
11          more from my curiosity as to why you think they're  
12          similar.

13                      MR. GREENWALD: I guess that's what  
14          it gets to, attorney work product. Essentially  
15          you're saying, can I have the outline of your brief.  
16          Clearly you asking that, we would object it's work  
17          product.

18                      MR. SHEEHAN: All right. Could we  
19          have two minutes? I think I'm done.

20                      (Recess taken.)

21          BY MR. SHEEHAN:

22           Q.           Just one last question. One or two.  
23          Whenever a lawyer says one or two, you know, that's  
24          how it goes.

25                      If we look at paragraph 13(c), which



1 lists the nonexclusive factors, we've been talking  
2 about taking into account all of the circumstances.  
3 Is there any one of these that, standing alone,  
4 would make it unqualified? For example -- I'll even  
5 give you an example. For example, if someone can't  
6 pay, do you start looking at the other examples if  
7 they can't pay? Not that that applies here, I  
8 understand that.

9 A. You asked whether that would make it  
10 not qualifying. No, it's still qualified  
11 settlement, but would the equal treatment provision  
12 not -- or would the circumstances be sufficiently  
13 dissimilar? Absolutely yes. In fact, we had one of  
14 those. We negotiated, we investigated, I think it  
15 was a settlement at like 45 percent or 50 percent of  
16 defendants who could clearly not pay, even though  
17 the factors were -- all of the other factors were  
18 very strong and we said, that one overrides  
19 everything.

20 Q. Okay.

21 A. And notice, it's listed first. And I  
22 said that in my declaration. Yes.

23 MR. SHEEHAN: Okay. Thank you.

24 We're done. Thank you very much.

25 THE WITNESS: You're welcome. Thank

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(Deposition concluded 11:42 a.m.)

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I, RICHARD LEVIN, ESQ., have read the  
foregoing deposition and hereby affix my signature  
that same is true and correct, except as noted  
above.

\_\_\_\_\_  
RICHARD LEVIN, ESQ.

THE STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

Before me, \_\_\_\_\_, on this day  
personally appeared \_\_\_\_\_, known to me  
(or proved to me on the oath of or through  
\_\_\_\_\_ (description of identity card or other  
document) to be the person whose name is subscribed  
to the foregoing instrument and acknowledged to me  
that he/she executed the same for the purpose and  
consideration therein expressed.

Given under my hand and seal of office on this  
\_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR  
THE STATE OF \_\_\_\_\_

My Commission Expires: \_\_\_\_\_.

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**REPORTER'S CERTIFICATION**

I, NANCY C. BENDISH, a Certified Court Reporter and Notary Public of the States of New York and New Jersey, do hereby certify that prior to the commencement of the aforementioned examination RICHARD LEVIN, ESQ. was sworn by me to testify the truth, the whole truth and nothing but the truth.

I DO FURTHER CERTIFY that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any party in this action and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the event nor outcome of this action.



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Notary Public of the State of New York

Dated: May 17, 2014

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