Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan

Attorneys for Irving H. Picard, Trustee
for the Substantively Consolidated SIPA Liquidation
of Bernard L. Madoff Investment Securities LLC
and the Estate of Bernard L. Madoff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. A&G GOLDMAN PARTNERSHIP and PAMELA GOLDMAN, Defendants.	14 Civ. 09524 (JGK) Adv. Pro. No. 14-02407 (SMB) **DECLARATION OF FERVE E. OZTURK IN SUPPORT OF TRUSTEE'S OPPOSITION TO MOTION TO WITHDRAW THE REFERENCE**

FERVE E. OZTURK, under penalty of perjury, declares:

1. I am a member of the Bar of this Court and an associate at the firm of Baker & Hostetler LLP, counsel for Irving H. Picard, Trustee for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.*, and the estate of Bernard L. Madoff, individually.

2. I make this declaration to transmit to the Court true and correct copies of documents in connection with the Trustee's Opposition to the Motion to Withdraw the Reference filed in the above-captioned case.

3. True and correct copies of the following documents are attached:

Exhibit A: Docket as of December 16, 2014, *Picard v. A&G Goldman P'ship*, Adv. Pro. No. 14-02407 (Bankr. S.D.N.Y.)

Exhibit B: Complaint, *Picard v. A&G Goldman P'ship*, Adv. Pro. No. 14-02407 (Bankr. S.D.N.Y. Nov. 17, 2014), ECF No. 1

Exhibit C: Notice of Application for Enforcement of Permanent Injunction and Automatic Stay, *Picard v. A&G Goldman P'ship*, Adv. Pro. No. 14-02407 (Bankr. S.D.N.Y. Nov. 17, 2014), ECF No. 2

Exhibit D: Memorandum of Law in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay, *Picard v. A&G Goldman P'ship*, Adv. Pro. No. 14-02407 (Bankr. S.D.N.Y. Nov. 17, 2014), ECF No. 3

Exhibit E: Declaration of Keith R. Murphy in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay, with Exhibits, *Picard v. A&G Goldman P'ship*, Adv. Pro. No. 14-02407 (Bankr. S.D.N.Y. Nov. 17, 2014), ECF No. 4

Exhibit F: Affidavit of Vineet Sehgal in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay, with Exhibits, *Picard v. A&G Goldman P'ship*, Adv. Pro. No. 14-02407 (Bankr. S.D.N.Y.), ECF No. 5

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

Executed on December 16, 2014
New York, New York

Ferve E. Ozturk
Ferve E. Ozturk

EXHIBIT A

PENAP, WDREF

U.S. Bankruptcy Court
Southern District of New York (Manhattan)
Adversary Proceeding #: 14-02407-smb

Assigned to: Judge Stuart M. Bernstein
Lead BK Case: 08-99000
Lead BK Title: Administrative Case Re: 08-01789 (Securities Invest
Lead BK Chapter: 11
Demand:

Date Filed: 11/17/14

Nature[s] of Suit: 72 Injunctive relief - other

Plaintiff

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

represented by **David J. Sheehan**
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
212 589 4200
Fax : 212 589 4201
Email: dsheehan@bakerlaw.com
LEAD ATTORNEY

V.

Defendant

A & G Goldman Partnership

represented by **Hanh V. Huynh**
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016
(212) 592-1482
Fax : (212) 592-1500
Email: hhuynh@herrick.com

Frederick E. Schmidt
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016
(212) 592-5941
Fax : (212) 592-1500
Email: eschmidt@herrick.com

Defendant

Pamela Goldman

represented by **Frederick E. Schmidt**
(See above for address)

Filing Date	#	Docket Text
11/17/2014	1 (20 pgs)	Adversary case 14-02407. Complaint against A & G Goldman Partnership, Pamela Goldman . Nature(s) of Suit: (72 (Injunctive relief - other)) Filed by David J. Sheehan on behalf of IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Sheehan, David) (Entered: 11/17/2014)
11/17/2014		Receipt of Complaint(14-02407-smb) [cmp,cmp] (350.00) Filing Fee. Receipt number 10416008. Fee amount 350.00. (Re: Doc # 1) (U.S. Treasury) (Entered: 11/17/2014)
11/17/2014	2 (4 pgs)	Statement */Notice of Application for Enforcement of Permanent Injunction and Automatic Stay* filed by David J. Sheehan on behalf of IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. with hearing to be held on 2/5/2015 at 10:00 AM at Courtroom 723 (SMB) (Sheehan, David) (Entered: 11/17/2014)
11/17/2014	3 (43 pgs)	Motion for Preliminary Injunction */Memorandum of Law in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay* filed by David J. Sheehan on behalf of IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Sheehan, David) (Entered: 11/17/2014)
11/17/2014	4 (618 pgs; 17 docs)	Declaration *of Keith R. Murphy in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay* (related document (s)3, 2) filed by David J. Sheehan on behalf of IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E # 6 Exhibit

		F # 7 Exhibit G # 8 Exhibit H # 9 Exhibit I # 10 Exhibit J # 11 Exhibit K # 12 Exhibit L # 13 Exhibit M # 14 Exhibit N # 15 Exhibit O # 16 Exhibit P) (Sheehan, David) (Entered: 11/17/2014)
11/17/2014	5 (45 pgs; 8 docs)	Affidavit *of Vineet Sehgal in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay* (related document (s)2, 3, 4) filed by David J. Sheehan on behalf of IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E # 6 Exhibit F # 7 Exhibit G) (Sheehan, David) (Entered: 11/17/2014)
11/21/2014	6 (1 pg)	Summons with Notice of Pre-Trial Conference issued by Clerk's Office with Pre-Trial Conference set for 1/6/2015 at 10:00 AM at Courtroom 723 (SMB), Answer due by 12/22/2014, (Braithwaite, Kenishia) (Entered: 11/21/2014)
11/24/2014	7 (3 pgs)	Motion to Withdraw the Reference filed by Frederick E. Schmidt on behalf of A & G Goldman Partnership, Pamela Goldman. (Schmidt, Frederick) (Entered: 11/24/2014)
11/24/2014		Receipt of Motion to Withdraw the Reference (fee)(14-02407-smb) [motion,205] (176.00) Filing Fee. Receipt number 10427941. Fee amount 176.00. (Re: Doc # 7) (U.S. Treasury) (Entered: 11/24/2014)
11/24/2014	8 (20 pgs)	Memorandum of Law *in Support of Motion to Withdraw the Reference* (related document(s)7) filed by Frederick E. Schmidt on behalf of A & G Goldman Partnership, Pamela Goldman. (Schmidt, Frederick) (Entered: 11/24/2014)
11/24/2014	9 (3 pgs)	Affidavit of Service (related document(s)1, 2, 3, 6, 5, 4) filed by David J. Sheehan on behalf of IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Sheehan, David) (Entered: 11/24/2014)
12/03/2014	10 (2 pgs)	Civil Cover Sheet from U.S. District Court, Case Number: 1409524 Judge Alison J. Nathan (related

		document(s)7) filed by Clerk's Office of the U.S. Bankruptcy Court, S.D.N.Y.. (Rouzeau, Anatin) (Entered: 12/03/2014)
12/15/2014	11 (368 pgs; 8 docs)	Objection to Motion *Defendants' Objection to Application for Enforcement of Permanent Injunction and Automatic Stay* (related document (s)3) filed by Hanh V. Huynh on behalf of A & G Goldman Partnership. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E # 6 Exhibit F # 7 Exhibit G) (Huynh, Hanh) (Entered: 12/15/2014)

EXHIBIT B

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan

Attorneys for Irving H. Picard, Trustee
for the Substantively Consolidated SIPA Liquidation
of Bernard L. Madoff Investment Securities LLC
and the Estate of Bernard L. Madoff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (SMB) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. A & G GOLDMAN PARTNERSHIP and PAMELA GOLDMAN, Defendants.	Adv. Pro. No. _____ (SMB) **COMPLAINT**

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

NATURE OF THE ACTION

1. The Trustee commences this adversary proceeding to prevent Pamela Goldman and A&G Goldman Partnership (collectively, the "Goldman Plaintiffs"), from undermining this Court's continuing jurisdiction over the estate of BLMIS and its customers' property. By filing an action (the "Class Action") and complaint (the "Goldman III Complaint") in the U.S. District Court for the Southern District of Florida ("the Florida District Court"), No. 14-81125 (S.D. Fla. filed Aug. 28, 2014), against the estate of Jeffry M. Picower ("Picower") and Capital Growth Company; Decisions, Inc.; Favorite Funds; JA Primary Limited Partnership; JA Special Limited Partnership; JAB Partnership; JEMW Partnership; JF Partnership; JFM Investment Companies; JLN Partnership; JMP Limited Partnership; Jeffry M. Picower Special Company; Jeffry M. Picower, P.C.; the Picower Foundation; the Picower Institute of Medical Research; the Trust F/B/O Gabrielle H. Picower; Barbara Picower, individually, and as executor of the estate of Jeffry M. Picower, and as Trustee for the Picower Foundation and for the Trust F/B/O Gabrielle H. Picower (collectively with Picower, the "Picower Parties"), the Goldman Plaintiffs violate the permanent injunction entered by this Court on January 13, 2011 (the "Permanent Injunction") and the automatic stay, impair this Court's jurisdiction, and threaten the orderly administration of the BLMIS estate.

2. Accordingly, the Trustee respectfully requests that the Court enforce the Permanent Injunction and the automatic stay in these proceedings.

JURISDICTION AND VENUE

3. This is an adversary proceeding commenced in this Court, in which the main underlying SIPA proceeding, No. 08-01789 (SMB) (the "SIPA Proceeding"), is pending. The SIPA Proceeding was originally brought in the United States District Court for the Southern District of New York as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC et al.*, No. 08 CV 10791, and was referred to this Court. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and (e)(1), and 15 U.S.C. § 78eee(b)(2)(A) and (b)(4).

4. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O). The Trustee consents to the entry of final orders or judgments by this Court if it is determined that consent of the parties is required for this Court to enter final orders or judgments consistent with Article III of the U.S. Constitution.

5. Venue in this judicial district is proper under 28 U.S.C. §§ 1391(b) and 1409.

6. An action for a declaratory judgment and injunctive relief is properly commenced as an adversary proceeding pursuant to Rules 7001(2), 7001(7), and 7001(9) of the Federal Rules of Bankruptcy Procedure.

7. This court has personal jurisdiction over the Goldman Plaintiffs pursuant to Bankruptcy Rule 7004(f).

DEFENDANTS

8. Defendant A & G Goldman Partnership ("A&G Goldman") is a named plaintiff in the Goldman III Complaint, *A & G Goldman Partnership, et al. v. Picower, et al.*, Case No. 14-81125 (S.D. Fla. filed Aug. 28, 2014), ECF No. 1, and was a BLMIS customer.

9. Defendant Pamela Goldman is a named plaintiff in the Goldman III Complaint and was a BLMIS customer.

BACKGROUND, THE TRUSTEE, AND STANDING

10. On December 11, 2008 (the "Filing Date"), Madoff was arrested by federal agents for criminal violations of federal securities laws, including, *inter alia*, securities fraud, investment advisor fraud, and mail and wire fraud. Contemporaneously, the Securities and Exchange Commission ("SEC") filed a complaint in the District Court for the Southern District of New York against Madoff and BLMIS, which remains pending in that court. The SEC complaint alleged that Madoff and BLMIS engaged in fraud through the investment advisor activities of BLMIS.

11. On December 12, 2008, the Honorable Louis L. Stanton of the district court entered an order that appointed Lee S. Richards, Esq., as receiver for the assets of BLMIS.

12. On December 15, 2008, pursuant to 15 U.S.C. § 78eee(a)(4)(A), the SEC consented to a combination of its own action with an application of the Securities Investor Protection Corporation ("SIPC"). Thereafter, pursuant to 15 U.S.C. § 78eee(a)(4)(B), SIPC filed an application in the district court alleging, *inter alia*, that BLMIS could not meet its obligations to securities customers as they came due, and, accordingly, its customers needed the protections afforded by SIPA.

13. Also on December 15, 2008, Judge Stanton granted SIPC's application and entered an order pursuant to SIPA (the "Protective Decree"), which, in pertinent part:

a. appointed the Trustee for the liquidation of the business of BLMIS pursuant to 15 U.S.C. § 78eee(b)(3);

b. appointed Baker & Hostetler LLP as counsel to the Trustee pursuant to 15 U.S.C. § 78eee(b)(3);

c. removed the case to this Court pursuant to 15 U.S.C. § 78eee(b)(4), and removed the receiver.

14. In an order entered on December 15, 2008, the district court declared that "all persons and entities are stayed, enjoined and restrained from directly or indirectly . . . interfering with any assets or property owned, controlled or in the possession of [BLMIS]." *SEC v. Bernard L. Madoff*, 08-CIV-10791 (LLS), ECF No. 4 ¶ IV (reinforcing automatic stay); *see also* Order on Consent Imposing Preliminary Injunction Freezing Assets and Granting Other Relief Against Defendants, Dec. 18, 2008, ECF No. 8 ¶ IX ("no creditor or claimant against [BLMIS], or any person acting on behalf of such creditor or claimant, shall take any action to interfere with the control, possession or management of the assets subject to the receivership"); Partial Judgment on Consent Imposing Permanent Injunction and Continuing Other Relief, Feb. 9, 2009, ECF No. 18 ¶ IV (incorporating and making the December 18, 2008 stay order permanent). (These orders are collectively referred to as the "Stay Orders.")

15. By orders dated December 23, 2008 and February 4, 2009, respectively, this Court approved the Trustee's bond and found that the Trustee was a disinterested person. Accordingly, the Trustee is duly qualified to serve and act on behalf of the estate of BLMIS.

16. On April 13, 2009, an involuntary bankruptcy petition was filed against Madoff, and on June 9, 2009, this Court entered an order substantively consolidating the chapter 7 estate of Madoff into the SIPA Proceeding.

17. At a plea hearing (the "Plea Hearing") on March 12, 2009, in the case captioned *United States v. Madoff*, Case No. 09-CR-213(DC), Madoff pleaded guilty to an 11-count criminal information filed against him by the United States Attorney for the Southern District of New York. At the Plea Hearing, Madoff admitted that he "operated a Ponzi scheme through the investment advisory side of [BLMIS]." (Plea Hr'g Tr. at 23: 14–17.) Additionally, Madoff

asserted "[a]s I engaged in my fraud, I knew what I was doing [was] wrong, indeed criminal." (*Id*. at 23: 20–21.) On June 29, 2009, Madoff was sentenced to 150 years in prison.

18. At a plea hearing on August 11, 2009, in the case captioned *United States v. DiPascali*, Case No. 09-CR-764 (RJS), Frank DiPascali Jr., a former BLMIS employee, pleaded guilty to a ten-count criminal information charging him with participating in and conspiring to perpetuate the Ponzi scheme. DiPascali admitted that no purchases or sales of securities took place in connection with customer accounts and that the Ponzi scheme had been ongoing at BLMIS since at least the 1980s.

19. As the Trustee appointed under SIPA, the Trustee is charged with assessing claims, recovering and distributing customer property to BLMIS's customers holding allowed customer claims, and liquidating any remaining BLMIS assets for the benefit of the estate and its creditors. The Trustee is using his authority under SIPA and the Bankruptcy Code to avoid and recover payouts of fictitious profits and/or other transfers made by the Debtors to customers and others to the detriment of defrauded, innocent customers whose money was consumed by the Ponzi scheme. Absent the recovery actions, the Trustee cannot satisfy the claims described in subparagraphs (A) through (D) of 15 U.S.C. § 78fff-2(c)(1).

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

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

22. The Trustee is a real party in interest and has standing to bring these claims under 15 U.S.C. § 78fff-1(a) and applicable provisions of the Bankruptcy Code, including 11 U.S.C. §§ 323(b) and 704(a)(1), because, among other reasons, the Class Action violates the Permanent Injunction and the automatic stay, impairs this court's jurisdiction, and threatens the orderly administration of the BLMIS estate.

THE COURT-ORDERED CLAIMS ADMINISTRATION PROCESS

23. On December 23, 2008, this Court entered a Claims Procedure Order, which implemented a customer claims process in accordance with SIPA. The Goldman Plaintiffs participated in this process. The Goldman Plaintiffs filed customer claims in the BLMIS proceeding. A&G Goldman's claim was denied. Pamela Goldman's claims were allowed and have been fully satisfied through SIPC advances and an interim distribution from the customer property fund.

THE NET EQUITY DECISION

24. In liquidation proceedings, SIPA provides that customers with allowed claims share *pro rata* in customer property to the extent of their net equity, as defined in section 78*lll*(11) of SIPA. Consistent with SIPA, the Trustee determined that each customer's net equity should be calculated by crediting the amount of cash the customer deposited into its BLMIS account, less any amounts withdrawn from the customer's BLMIS account, referred to as the "net investment method." Many customers argued that their net equity should have been calculated based on the last customer statement they received from BLMIS, including whatever fictitious profits were reflected on that statement.

25. The Bankruptcy Court approved the Trustee's use of the net investment method and affirmed the Trustee's calculation of net equity (the "Net Equity Decision"). The Second Circuit affirmed the Net Equity Decision. The Second Circuit affirmed, holding that the

Trustee's methodology is "more consistent with the statutory definition of 'net equity' than any other method advocated by the parties or perceived by this Court." On June 25, 2012, the United States Supreme Court denied *certiorari*.

THE TRUSTEE'S AVOIDANCE ACTION

26. The Trustee filed a complaint against Picower (now deceased) and the other Picower Parties on May 12, 2009 (the "Trustee's Action"). The complaint identified more than $6.7 billion in net withdrawals that the Trustee alleged the Picower Parties had received from BLMIS. The complaint alleged that the Picower Parties knew or should have known that BLMIS was engaged in fraud and sought recovery of the entire amount known at the time of filing to have been transferred from BLMIS to the Picower Parties throughout the history of the Picower Parties' BLMIS accounts.

27. After filing the complaint, the Trustee identified additional transfers from BLMIS to the Picower Parties, bringing the total amount of net withdrawals sought by the Trustee to $7.2 billion.

28. The Trustee's complaint contains numerous allegations that the Picower Parties directed backdating in their BLMIS accounts, had actual knowledge of the Ponzi scheme, were "complicit[] in the fraud," and were compensated for propping up the Ponzi scheme. And in the Trustee's brief in opposition to the Picower Defendants' motion to dismiss, the Trustee stated that Picower propped up the Ponzi scheme by accepting only a fraction of his requested redemptions when Madoff could not pay them. Significantly, with respect to the allegations in Goldman III regarding a $125 million loan in April 2006, the Trustee already alleged a backdating transaction at that time for that amount. The Trustee's Picower complaint also included allegations dealing with margin loans, as also alleged in the Goldman Complaints.

THE PICOWER SETTLEMENT

29. While the Trustee was pursuing his action against, and potential settlement with, the Picower Parties, the government also was in discussions with the Picower Parties' counsel.

30. After months of extensive negotiations, the Trustee and the Picower Parties reached an agreement under which the Picower estate agreed to return $5 billion to the BLMIS estate. Simultaneously, the Picower estate agreed to forfeit the $5 billion and an additional amount of approximately $2.2 billion to the government. When these amounts were combined in this global settlement, 100 percent of the net withdrawals received by the Picower Parties over the lifetime of their investments with BLMIS became available for eventual distribution to BLMIS victims, without the need for litigation.

31. The settlement agreement contains a release of all claims that the Trustee brought or could have brought against the Picower Parties in connection with BLMIS. Because of the importance to the Picower Parties of precluding suits on claims they were settling, the Trustee agreed to use his reasonable best efforts to seek a narrowly tailored Permanent Injunction from the Bankruptcy Court. The Permanent Injunction would exclude from its scope actions where there is an independent basis on which to bring suit against the Picower Parties. The injunction was identified by the Picower Parties as an essential part of the settlement.

32. On December 17, 2010, the Trustee moved for an order approving the settlement agreement and entering the Permanent Injunction under section 105(a) of the Bankruptcy Code and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure. Out of the approximately 16,000 creditors of the BLMIS estate, only three objections were filed to this landmark settlement.

33. The Bankruptcy Court overruled the objections and approved the settlement on January 13, 2011. The Bankruptcy Court found that the Permanent Injunction was necessary and

appropriate to carry out the provisions of the Bankruptcy Code, to prevent any entity from exercising control or possession over property of the estate, to preclude actions that would have a conceivable effect or adverse impact upon the BLMIS estate or on the administration of the liquidation proceeding, and to avoid relitigation or litigation of claims that were or could have been asserted by the Trustee on behalf of all customers and creditors.

34. The late Judge Lifland of the Bankruptcy Court stated at the hearing on the Trustee's motion to approve the settlement that: "[t]he injunction is narrow. It deals with duplicative and parallel claims of the trustee. . . . And you cannot expect any settlor to make a settlement with a potential possibility of being sued twice over the same causes of action and claims." Accordingly, Judge Lifland approved the settlement agreement and issued the following Permanent Injunction:

> [A]ny BLMIS customer or creditor of the BLMIS estate . . . is hereby permanently enjoined from asserting any claim against the Picower BLMIS Accounts or the Picower Releasees that is duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower Releasees . . . .

BACKGROUND: THIS COURT, THE DISTRICT COURT, AND THE SECOND CIRCUIT ENFORCE THE PERMANENT INJUNCTION IN THE RELATED FOX AND MARSHALL LITIGATION

35. Adele Fox ("Fox") and Susanne Stone Marshall ("Marshall")[1] (together, the "Fox Plaintiffs") are putative class action plaintiffs who brought actions against the Picower Parties similar to the Goldman III Complaint. A brief summary of the Trustee's litigation with the Fox Plaintiffs shows that this Court, the district court, and the Second Circuit all rejected the Fox Plaintiffs' complaints as derivative of the Trustee's Action.

[1] Russell Oasis and Marsha Peshkin were subsequently added as plaintiffs to the putative class action brought by Fox and Marshall.

36. On February 16 and 17, 2010, before the Goldman Plaintiffs first attempted to bring an action against the Picower Parties, Fox and Marshall each filed a putative class action against the Picower Parties in Florida District Court seeking to circumvent the anticipated net equity decision (the "Initial Fox Complaints" and "Initial Fox Actions"). (Counsel for the Goldman Plaintiffs in the Class Action was among the counsel representing Fox in the Initial Fox Actions.) Between them, Fox and Marshall sought to represent a "class" of all BLMIS customers whose claims would not be fully satisfied by the Trustee using his net equity calculation. The complaints' allegations parroted the Trustee's fraudulent transfer allegations against the Picower Parties. Fox and Marshall alleged that they and other BLMIS customers were damaged as a result of the fraudulent transfers that the Picower Parties received from BLMIS. Similar to the Goldman III Complaint, the Fox and Marshall complaints alleged that BLMIS and the Picower Parties engaged in a conspiracy to "steal the funds" of other customers.

37. On May 3, 2010, upon application by the Trustee, this Court held that Fox's and Marshall's complaints violated the automatic stay and at least one stay order of the District Court for the Southern District of New York. On appeal, Judge John G. Koeltl of the district court affirmed, holding that the Bankruptcy Court was "plainly correct in finding that the Florida Actions violated the automatic stay," because they were a "transparent effort" to pursue claims that "were duplicative of claims brought by the Trustee and that belonged to the Trustee on behalf of all creditors of BLMIS." *Fox v. Picard*, 848 F. Supp. 2d 469, 473 (S.D.N.Y. 2012). On January 13, 2014, the Second Circuit affirmed the district court's ruling and upheld the Permanent Injunction as against Fox and Marshall. *See Picard v. Marshall*, 740 F.3d 81 (2d Cir. 2014).

THE GOLDMAN I CLASS ACTION COMPLAINTS

38. While the Fox and Marshall litigation was proceeding, the Goldman Plaintiffs sought permission from this Court to file two putative class actions in Florida District Court in 2011 (the "Goldman I Actions" and "Goldman I Complaints"). While Pamela Goldman sought to represent so-called "net losers," A&G Goldman sought to represent "net winners." Together, they sought to represent customers and creditors already before the Bankruptcy Court, and for whom the Bankruptcy Court had already determined equitable distributions in accordance with the net equity method approved by the Second Circuit.

39. Instead of alleging fraudulent transfers or a conspiracy to defraud, the Goldman Plaintiffs alleged that Picower was a "control person" under section 20(a) of the Exchange Act with respect to BLMIS and is jointly and severally liable with BLMIS for BLMIS's violations of Rule 10b-5 of the Exchange Act. The purported federal securities laws violations were based on the Picower Parties' withdrawals from BLMIS: "[t]he volume, pattern and practice of the Defendants' fraudulent withdrawals from BLMIS and their control over fraudulent documentation of underlying transactions at BLMIS establishes the Defendants' 'control person' liability under the federal securities laws."

40. The alleged wrongdoing by Picower consisted of his fraudulent transfers from BLMIS, which mirrored allegations in the Trustee's complaint. They also mirrored the allegations in the Initial Fox Complaints by Fox and Marshall, which were already held to be nothing but a rehash of the Trustee's allegations.

This Court Held the Goldman Claims Duplicative and Derivative of Those of the Trustee and Enforced the Automatic Stay and Enjoined the Goldman Plaintiffs from Proceeding

41. On June 20, 2012, this Court held that the Goldman I Actions violate the Permanent Injunction and the automatic stay. *See In re Madoff*, 477 B.R. 351 (Bankr. S.D.N.Y. 2012).

42. The Court held that the Goldman Plaintiffs were violating the Permanent Injunction and the automatic stay for three main reasons. First, the Court found that despite the "nominal title" of their causes of action, the Goldman I Actions raised issues substantially "identical" to the Trustee's Picower complaint. Specifically, the Court found that "the Plaintiffs' action is based on pleadings that are nearly identical to those of the Trustee," that they "substantially parroted the Trustee's Complaint," and also "mimic those set out in the Fox and Marshall complaints, which this Court found to be duplicative of the Trustee's, a finding the District Court affirmed." The Court recounted numerous examples of overlap between the Goldman Plaintiffs' allegations and those of the Trustee, as well as those of Fox and Marshall, and cited an exhibit, originally submitted by the Trustee, which "substantially reflects and links the cloning of the pleadings."

43. Second, the Bankruptcy Court found the Goldman Plaintiffs' claims to be "derivative of the Trustee's." Indeed, the Court found that the alleged harms are "limited to 'general direction and control and action to the detriment of all [BLMIS's] creditors.'" Thus, the Court found that the Goldman Plaintiffs did not state a particularized injury against the Picower Parties.

44. Third, the Bankruptcy Court found that the Goldman I Complaints, like the Fox and Marshall complaints, were simply "yet another attempt by the same counsel to re-litigate [the] Net Equity Decision."

The District Court Affirmed the Bankruptcy Court's Decision and Order

45. On September 30, 2013, Judge Richard J. Sullivan of the district court affirmed the Bankruptcy Court's decision and upheld the Permanent Injunction as applied to the Goldman I Complaints. *A&G Goldman P'ship*, 2013 WL 5511027, at *1. The district court held that the Goldman Plaintiffs' claims were derivative of the Trustee's fraudulent transfer claims. The district court held that the Goldman Plaintiffs' claims "are not bona fide securities fraud claims," and found instead that, aside from allegations listing the elements of a securities fraud claim, "all of the allegations in the Complaint refer exclusively to the Picower Parties' fraudulent withdrawals." The district court recognized that the Goldman I Complaints pled "nothing more than that the Picower Parties traded on their *own* BLMIS accounts," allege fraudulent trading activity that BLMIS conducted "*for the Picower Parties*," and that, "[i]n other words, the Complaints plead nothing more than that the Picower Parties fraudulently withdrew money from BLMIS."

46. The district court further held that "the parts of the Complaints that do discuss aspects of the BLMIS fraud unconnected to the Picower Parties' accounts noticeably *lack* any allegation that the Picower Parties were involved in such fraud . . ." and that "with respect to the clearest examples of BLMIS's fraud to other customers, the Goldman Complaints are completely silent about the Picower Parties' involvement."

47. The district court held that the Goldman Plaintiffs had brought "simply deceptively labeled fraudulent conveyance claims." Accordingly, the district court held the claims came "within the plain scope of the [Permanent] Injunction." The Goldman Plaintiffs did not appeal the district court's decision.

THE GOLDMAN II COMPLAINT

48. On January 6, 2014, the Goldman Plaintiffs commenced a new action in the Florida District Court seeking a declaration that neither the Permanent Injunction nor the automatic stay barred the Goldman Plaintiffs from filing a "new" class action complaint against the Picower Parties. The declaratory judgment action attached a draft class action complaint (the "Goldman II Complaint") that the Goldman Plaintiffs sought to have declared not in violation of the automatic stay or the Permanent Injunction.

49. The Goldman Plaintiffs again asserted that their claims rested on different legal theories, had different elements, sought different damages, were subject to different proof, and were subject to a different statute of limitations than the Trustee's claims against the Picower Parties. The Goldman Plaintiffs added a general allegation that the Picower Parties "directly or indirectly induced" BLMIS to make misrepresentations to BLMIS customers.

50. In substance, the Goldman II Complaint was identical to the Goldman I Complaints that were held to be barred under the Permanent Injunction. It again attempted to assert a claim under section 20(a) of the Exchange Act against the Picower Parties for loss in the value of their investment in the "BLMIS Discretionary Trading Program" (their new name for BLMIS's Investment Advisory business). But again, it did not contain any factual allegations that Picower took any specific action with respect to other customers' accounts, or indeed took any action at BLMIS outside of his own accounts.

51. Instead, trying to get around the deficiencies in their prior pleading, the Goldman Plaintiffs more clearly spelled out their theory that Picower knew that the false trading in his own BLMIS accounts would result in false asset values in other BLMIS customers' accounts because those other accounts did not reflect cash transfers from their accounts to Picower. As a result of Picower's activity within his own accounts, the Goldman Plaintiffs alleged, "the account records

of other BLMIS customers falsely overstated the assets therein and their investment performance. BLMIS customers consequently unknowingly overpaid for BLMIS securities."

52. On June 23, 2014, this Court held that the Goldman II Action violated the Permanent Injunction. *Picard v. Marshall*, 511 B.R. 375 (Bankr. S.D.N.Y. 2014). After this Court determined that it had the authority to interpret its own order, and recognizing its jurisdiction to decide if the Goldman II Complaint violated the Permanent Injunction, this Court found that the "conclusory statements" that the Goldman Plaintiffs cobbled together in an attempt to again subvert the Permanent Injunction could not pass muster. Setting aside the Goldman Plaintiffs' conclusory allegations, this Court held that the Goldman II Complaint violated the Permanent Injunction for one main reason: the Goldman II Complaint, "like its predecessors, relie[d] on the Picower Parties' fraudulent withdrawals and fictitious entries in their own accounts, and if these allegations are ignored, there is nothing left." Because the Goldman II Complaint only restated the legal standard for control person liability under section 20(a) without alleging that Picower "was an officer of BLMIS" or including any "particularized allegations that Picower Parties did anything besides fraudulently withdraw money from BLMIS and cause BLMIS to make phony entries in the records of their accounts," this Court found their claim derivative. The Goldman Plaintiffs' voluntarily dismissed their appeal.[2]

THE GOLDMAN III COMPLAINT

53. On August 28, 2014, after this Court ruled on the Goldman II Complaint, the Goldman Plaintiffs made their *third* attempt to bring a securities class action against the Picower Parties. As before, the Goldman III Complaint alleges that Picower was a control person under section 20(a) of the Exchange Act. Goldman III makes six types of allegations, namely that

[2] In the same decision and order, the Court also considered and rejected a second proposed complaint by the Fox Plaintiffs that was substantially similar to the Goldman II Complaint. The Fox Plaintiffs have appealed. The appeal is currently pending before Judge John G. Koeltl of the district court.

Picower: (1) backdated trades; (2) took out margin loans; (3) knew that there was false information in BLMIS' financial disclosures; (4) referred clients to BLMIS; (5) made loans to BLMIS; and (6) agreed to be listed as an options counterparty and further agreed to notify Madoff if a regulator or anyone else asked him about his counterparty status.

54. The first three allegations were already contained in Goldman II, and every single one of these prior allegations has already been held by this Court to be a derivative claim barred by the Permanent Injunction. The fourth allegation, a conclusory statement that Picower referred clients to BLMIS, was previously pled by the Fox Plaintiffs and was held to fail to provide an independent basis for a control person claim.

55. Thus, of all the allegations, only two appear to be "new": that Picower made loans to BLMIS and that Picower agreed to be listed as an options counterparty. The two additions to the Goldman III Complaint appear to be allegations based on inferences drawn from the recent criminal testimony of Enrica Cotellessa-Pitz, Annette Bongiorno, and Frank DiPascali, Jr. These allegations aver that Picower made loans to BLMIS in order to keep it afloat and that Picower agreed to be listed as an options counterparty in BLMIS books and records and inform Madoff if anyone asked Picower about being a counterparty.

56. The essence of these allegations is that Picower propped up the Ponzi scheme, an allegation based on generalized harm to all BLMIS customers and creditors and one that the Trustee has already made in his litigation against the Picower Parties. There are no allegations that the Picower Parties had any contact with the Goldman Plaintiffs. Other than conclusory allegations, the only conduct alleged on the part of the Picower Parties is in connection with their activities *from their own accounts*.

57. Allowing the Class Action to proceed would result in the litigation of claims that were or could have been asserted by the Trustee on behalf of all customers and creditors.

58. The Goldman Plaintiffs' claims in the Class Action thus remain duplicative and derivative of the Trustee's Action and, accordingly, the Class Action is barred both by the Permanent Injunction and the automatic stay.

59. For the same reasons, the Class Action also violates the Stay Orders.

60. Further litigation of the Class Action would also allow the Goldman Plaintiffs to circumvent the Permanent Injunction and automatic stay, undermining this Court's jurisdiction and interfering with the administration of the liquidation.

COUNT ONE
DECLARATORY RELIEF

61. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully alleged herein.

62. The Trustee seeks a declaration that the Class Action violates the Permanent Injunction. This declaratory relief is warranted because the claims in the Class Action are derivative and duplicative of the Trustee's claims and hence fall within the scope of the Permanent Injunction.

63. The Trustee also seeks a declaration that the Class Action violates the automatic stay provisions under 11 U.S.C. § 362(a) and the Stay Orders, and is therefore void *ab initio.* This declaratory relief is warranted because by seeking to bring claims that are property of the estate, the Goldman Plaintiffs improperly seek to recover on a claim against BLMIS and/or Madoff in violation of 11 U.S.C. § 362(a)(1) and seek to obtain possession of property of BLMIS and/or Madoff in direct violation of 11 U.S.C. § 362(a)(3) and the Stay Orders.

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

COUNT TWO
ENFORCEMENT OF THE PERMANENT INJUNCTION

65. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully alleged herein.

66. The Trustee seeks an Order pursuant to section 105(a) of the Bankruptcy Code, made relevant to this proceeding by section 78fff(b) of SIPA, enforcing the Permanent Injunction and precluding the Class Action. This relief is warranted because the Class Action is derivative and duplicative of the Trustee's claims in the Trustee's Action and hence falls within the scope of the Permanent Injunction.

67. The Trustee requests that this Court preclude the prosecution of the Class Actions for, without limitation, the following reasons:

a. The Class Action improperly infringes on the jurisdiction of this Court by seeking to side-step this Court's jurisdiction to interpret and enforce the Permanent Injunction

b. Enforcing the Permanent Injunction will avoid the possibility of inconsistent decisions and will ensure preservation of uniformity of decision.

c. Enforcing the Permanent Injunction will avoid the risk that it is eroded by incremental exceptions by a court interpreting it other than this Court.

68. Enforcing the Permanent Injunction is necessary and appropriate to carry out the Trustee's duties in accordance with the provisions of SIPA and the Bankruptcy Code and to prevent an adverse impact on the estate and on the administration of the liquidation proceeding

from the Class Action and avoid relitigation of claims that were or could have been asserted by the Trustee on behalf of all customers and creditors.

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

i. declaring that the Class Action violates the Permanent Injunction and the automatic stay and therefore is void *ab initio*;

ii. enforcing the Permanent Injunction and automatic stay provisions under 11 U.S.C. §§ 105(a) and 362(a) and the Stay Orders against the Class Action and precluding the Goldman Plaintiffs from pursuing the Goldman III Complaint; and

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

Dated: New York, New York
November 17, 2014

/s/ David J. Sheehan

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Email: dsheehan@bakerlaw.com
Deborah H. Renner
Email: drenner@bakerlaw.com
Tracy L. Cole
Email: tcole@bakerlaw.com
Keith R. Murphy
Email: kmurphy@bakerlaw.com
Amy Vanderwal
Email: avanderwal@bakerlaw.com
Ferve Ozturk
Email: fozturk@bakerlaw.com

Attorneys for Irving H. Picard, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Estate of Bernard L. Madoff

EXHIBIT C

Hearing Date and Time: February 5, 2015 at 10:00 a.m.
Objection Deadline: December 15, 2014

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan

Attorneys for Irving H. Picard, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Estate of Bernard L. Madoff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (SMB) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. A & G GOLDMAN PARTNERSHIP and PAMELA GOLDMAN, Defendants.	Adv. Pro. No. _____ (SMB)

NOTICE OF APPLICATION FOR ENFORCEMENT OF PERMANENT INJUNCTION AND AUTOMATIC STAY

PLEASE TAKE NOTICE that upon the accompanying Memorandum of Law dated November 17, 2014 filed by Irving H. Picard, as trustee (the "Trustee") for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq*., and the estate of Bernard L. Madoff, individually; the Complaint,[1] dated November 17, 2014; the Declaration of Keith R. Murphy, dated November 17, 2014, and the exhibits thereto; the Affidavit of Vineet Sehgal, sworn to on November 13, 2014, and the exhibits thereto; together with the Memorandum of Law, dated November 17, 2014 filed in a related action (the "Picower Injunction Action") commenced by the Picower Parties;[2] the Complaint, dated November 17, 2014 filed in the Picower Injunction Action; and the Declaration of Marcy Ressler Harris, dated November 17, 2014 filed in the Picower Injunction Action, and the exhibits thereto; and upon all prior pleadings and proceedings herein and in the Picower Injunction Action[3]; the undersigned counsel to the Trustee will move before the Honorable Stuart M. Bernstein on **February 5, 2015, at 10:00 a.m.** on the Trustee's application (the "Application") for an order enforcing the permanent injunction order entered by this Court on January 13, 2011 (the "Permanent Injunction") and the automatic stay in these proceedings against Pamela Goldman and A&G Goldman Partnership

[1] Unless otherwise defined herein, defined terms have the meaning given to them in the Trustee's Memorandum of Law in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay, filed on November 17, 2014.

[2] The "Picower Parties" are: Capital Growth Company; Decisions, Inc.; Favorite Funds; JA Primary Limited Partnership; JA Special Limited Partnership; JAB Partnership; JEMW Partnership; JF Partnership; JFM Investment Companies; JLN Partnership; JMP Limited Partnership; Jeffry M. Picower Special Company; Jeffry M. Picower, P.C.; the Picower Foundation; the Picower Institute of Medical Research; the Trust F/B/O Gabrielle H. Picower; Barbara Picower, individually, and as executor of the estate of Jeffry M. Picower, and as Trustee for the Picower Foundation and for the Trust F/B/O Gabrielle H. Picower.

[3] The Picower Parties are commencing the related Picower Injunction Action simultaneously with Trustee's action and will be seeking to consolidate the Picower Injunction Action with the Trustee's action.

(the "Goldman Plaintiffs"), and anyone acting on behalf of the Goldman Plaintiffs, with respect to their putative class action against the Picower Parties recently brought in the United States District Court for the Southern District of Florida (the "Class Action"), *Goldman v. Capital Growth Col, et al.*, No. 14-CV-81125 (S.D. Fla. filed Aug. 28, 2014) (KAM); directing that the Goldman Plaintiffs are precluded from proceeding with the Class Action; and declaring that the Class Action violates the Permanent Injunction and the automatic stay and therefore is void *ab initio*.

PLEASE TAKE FURTHER NOTICE that by stipulation between the Goldman Plaintiffs and the Picower Parties in the Class Action, ECF Nos. 4, 6, written objections to the Application must be filed with the Clerk of the United States Bankruptcy Court, One Bowling Green, New York, New York 10004 by no later than **December 15, 2014** (with a courtesy copy delivered to the Chambers of the Honorable Stuart M. Bernstein) and must be served upon (a) Baker & Hostetler LLP, counsel for the Trustee, 45 Rockefeller Plaza, New York, New York 10111, Attn: David J. Sheehan, Esq.; (b) the Securities Investor Protection Corporation, 805 Fifteenth Street, NW, Suite 800, Washington, DC 20005, Attn: Kevin H. Bell, Esq.; and (c) Schulte Roth & Zabel LLP, counsel for the Picower Parties, 919 Third Avenue, New York, New York 10022, Attn: Marcy R. Harris, Esq. Any objections must specifically state the interest that the objecting party has in these proceedings and the specific basis of any objection to the Application.

PLEASE TAKE FURTHER NOTICE that replies to objections, if any, must be filed with the Clerk of the United States Bankruptcy Court, One Bowling Green, New York, New York 10004 by no later than **January 12, 2015** (with a courtesy copy delivered to the Chambers of the Honorable Stuart M. Bernstein).

Dated: November 17, 2014
New York, New York

Respectfully submitted

/s/ David J. Sheehan,

David J. Sheehan
Email: dsheehan@bakerlaw.com
Deborah H. Renner
Email: drenner@bakerlaw.com
Tracy L. Cole
Email: tcole@bakerlaw.com
Keith R. Murphy
Email: kmurphy@bakerlaw.com
Amy Vanderwal
Email: avanderwal@bakerlaw.com
Ferve Ozturk
Email: fozturk@bakerlaw.com

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201

Attorneys for Irving H. Picard, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Estate of Bernard L. Madoff

EXHIBIT D

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan

Attorneys for Irving H. Picard, Trustee
for the Substantively Consolidated SIPA Liquidation
of Bernard L. Madoff Investment Securities LLC
and the Estate of Bernard L. Madoff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (SMB) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. A & G GOLDMAN PARTNERSHIP and PAMELA GOLDMAN, Defendants.	Adv. Pro. No. _____ (SMB) **MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR ENFORCEMENT OF THE PERMANENT INJUNCTION AND AUTOMATIC STAY**

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Irving H. Picard, as trustee (the "Trustee") for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.,* and the estate of Bernard L. Madoff ("Madoff"), by his undersigned counsel, respectfully submits this memorandum of law in support of the Trustee's application seeking to enforce the permanent injunction order entered by this Court on January 13, 2011 (the "Permanent Injunction") and the automatic stay in these proceedings against plaintiffs Pamela Goldman and A&G Goldman Partnership (the "Goldman Plaintiffs"), and anyone acting on their behalf, to prevent them from proceeding with their putative class action (the "Goldman Class Action") against the Picower Parties[1] recently brought in the United States District Court for the Southern District of Florida (the "Florida District Court"), No. 14-CV-81125 (S.D. Fla. filed Aug. 28, 2014) (KAM).[2]

PRELIMINARY STATEMENT

Just two months after this Court's June 23, 2014 ruling that the Goldman Plaintiffs, along with other third-party plaintiffs Adele Fox ("Fox"), Susanne Stone Marshall ("Marshall"), Russell Oasis, and Marsha Peshkin (the "Fox Plaintiffs"), were enjoined from bringing their draft

[1] The "Picower Parties" are: Capital Growth Company; Decisions, Inc.; Favorite Funds; JA Primary Limited Partnership; JA Special Limited Partnership; JAB Partnership; JEMW Partnership; JF Partnership; JFM Investment Companies; JLN Partnership; JMP Limited Partnership; Jeffry M. Picower Special Company; Jeffry M. Picower, P.C.; the Picower Foundation; the Picower Institute of Medical Research; the Trust F/B/O Gabrielle H. Picower; Barbara Picower, individually, and as executor of the estate of Jeffry M. Picower, and as Trustee for the Picower Foundation and for the Trust F/B/O Gabrielle H. Picower.

[2] The Picower Parties and Goldman Plaintiffs entered into a stipulation agreeing that the Goldman Class Action would be stayed pending resolution of an injunction application in this court. (Declaration of Keith R. Murphy in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay, dated Nov. 17, 2014 (the "Murphy Decl.") Ex P.) The Picower Parties are filing an injunction application contemporaneously with the Trustee's filing. The Trustee consents to the Picower Parties' motion for a consolidation of the two injunction proceedings and motion practice.

amended complaint against the Picower Parties, the Goldman Plaintiffs filed a revised iteration of their complaint in the Florida District Court ("Goldman III") in the hope of evading the reach of the Permanent Injunction on this, their third attempt. With respect to the draft complaint ruled upon in June, this Court found that the allegations related solely to activity in the Picower Parties' own accounts and included no particularized allegations that Picower did anything besides fraudulently withdraw monies from BLMIS and cause BLMIS to make phony entries in the records of his accounts. The allegations were thus derivative of the Trustee's settled fraudulent transfer claims and barred by the Permanent Injunction. Goldman III is little more than a rehash of the earlier complaints. Thus, again, the Goldman Plaintiffs have failed to plead anything but derivative claims and must be enjoined from proceeding.

As the Goldman Plaintiffs would have to concede, the vast majority of the allegations in Goldman III are identical to those that this Court, the district court and the Second Circuit already have held violate the Permanent Injunction. *See Picard v. Marshall (In re Bernard L. Madoff)*, 511 B.R. 375, 395 (Bankr. S.D.N.Y. 2014); *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, 477 B.R. 351, 358 (Bankr. S.D.N.Y. 2012), *aff'd sub nom., A&G Goldman P'ship v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, No. 12 Civ. 6109 (RJS), 2013 WL 5511027, at *1 (S.D.N.Y. Sept. 30, 2013); *Marshall v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 740 F.3d 81, 93 (2d Cir. 2014). The Goldman Plaintiffs did not appeal this Court's June 23, 2014 ruling or Judge Sullivan's previous order relating to their first complaint. And their counsel (who was also counsel for some of the Fox Plaintiffs in the Second Circuit in connection with separate putative class actions against the Picower Parties) did not seek reversal of the Second Circuit's decision and order. Goldman III's allegations of backdated trades in the Picower Parties' own accounts, margin loans, the Picower Parties'

unspecified client referrals to Madoff and knowledge of false information in financial documents, (Murphy Decl. Ex. N (Goldman III) ¶¶ 82–96), have already been specifically considered by this Court (and other courts) and have been found to be derivative of the Trustee's claims as a matter of law. These allegations do not and cannot state an independent claim.

The Goldman Plaintiffs presumably rely, therefore, on the remaining "new" allegations. But these allegations, too, fail to identify any specific or independent harm and therefore are derivative of the Trustee's settled claims and violative of the Permanent Injunction. Drawing on testimony from the criminal trials of certain Madoff accomplices, the Goldman Plaintiffs allege that Jeffry Picower made loans to BLMIS to keep it afloat and that Picower agreed to be listed as an options counterparty in BLMIS' books and records. As to the loan allegations, the allegation that deposits into one's own customer account were made to prop up the Ponzi scheme is no different from any of the other allegations found to have been derivative of the Trustee's claims: it is based on the Picower Parties' transfers into and out of their own accounts and the harm alleged is generalized harm to the BLMIS estate. Nor are the counterparty allegations any different. Instead, those allegations are merely that Picower's conduct, again, through alleged actions taken with respect to his own accounts, helped prop up the Ponzi scheme and harmed the BLMIS estate.

It is in the Trustee's interest to enforce the automatic stay and Permanent Injunction to preclude others from usurping his authority to bring and settle fraudulent transfer claims. The Goldman Plaintiffs yet again attempt to arrogate the Trustee's settled claims for the purpose of obtaining for themselves and a putative class money above and beyond their net equity. The derivative nature of their claim is, again, apparent from the face of the Complaint: on behalf of a purported class of all BLMIS investors, they seek damages in the amount of all the fraudulent

transfers made by BLMIS. Recovering fraudulent transfers is precisely the role of the Trustee, as is the administration of the BLMIS estate. This is the *third* time the Goldman Plaintiffs have pursued a class action complaint stating claims that are derivative of the Trustee's claims, and each prior Goldman complaint has been rejected. The Trustee respectfully requests that the Court preclude the Goldman Plaintiffs from proceeding.[3]

FACTS

The details of Madoff's Ponzi scheme and the background of the bankruptcy proceedings have been set forth numerous times and will not be repeated here.[4] The Goldman Plaintiffs' repeated attempts to circumvent the Permanent Injunction and automatic stay also have an extensive history. The theme is simple and consistent throughout: the Goldman Plaintiffs want to sue the Picower Parties for alleged conduct that harmed every BLMIS customer in the same way, and for which the Picower Parties already settled for $7.2 billion. But such actions are barred by the Permanent Injunction and automatic stay.

The Goldman Plaintiffs' initial complaints ("Goldman I") were held to be duplicative and derivative of the Trustee's claims against the Picower Parties by both this Court and Judge Richard J. Sullivan of the district court. *See In re Madoff*, 477 B.R. at 358, *aff'd sub nom.*, *A&G Goldman P'ship*, 2013 WL 5511027, at *1. The Goldman Plaintiffs did not appeal Judge Sullivan's decision. Instead, the Goldman Plaintiffs tried again to avoid the Permanent Injunction and automatic stay by seeking to file a new complaint ("Goldman II"), and were again

[3] Though mindful of this Court's direction that it is not the "gatekeeper" of actions filed against the Picower Parties that may violate the automatic stay and Permanent Injunction, *Marshall*, 511 B.R. at 395, with what is now a trilogy, the Trustee respectfully echoes the Picower Parties' assertion that "enough is enough."

[4] *See, e.g.*, *Fox v. Picard (In re Bernard L. Madoff)*, 848 F. Supp. 2d 469, 473–77 (S.D.N.Y. 2012); *In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 125–32 (Bankr. S.D.N.Y. 2013).

enjoined by this Court. *See Marshall*, 511 B.R. at 395. Now, in Goldman III, which has been filed in Florida District Court, they repeat their previous allegations, allegations that this Court has already twice found to be barred by the Permanent Injunction, together with two seemingly new allegations—conclusory allegations that are generalized as to all customers.

I. THE NET EQUITY DECISION

In liquidation proceedings, SIPA provides that customers with allowed claims share *pro rata* in customer property to the extent of their net equity, as defined in section 78*lll*(11) of SIPA. *See In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 124–25 (Bankr. S.D.N.Y. 2013). Consistent with SIPA, the Trustee determined that each customer's net equity should be calculated by crediting the amount of cash the customer deposited into its BLMIS account, less any amounts withdrawn from the customer's BLMIS account, referred to as the "net investment method." *Id.* at 125. Many customers argued that their net equity should have been calculated based on the last customer statement they received from BLMIS, including whatever fictitious profits were reflected on that statement. *See id.*

The Bankruptcy Court approved the Trustee's use of the net investment method to calculate net equity (the "Net Equity Decision"). (*See* Order dated March 8, 2010, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, Adv. Pro. No. 08-01789 (Bankr. S.D.N.Y. Mar. 8, 2010), ECF No. 2020.) The Second Circuit affirmed, holding that the Trustee's methodology is "more consistent with the statutory definition of 'net equity' than any other method advocated by the parties or perceived by this Court." *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 235 (2d Cir. 2011).

II. THE GOLDMAN PLAINTIFFS' PARTICIPATION IN THE BANKRUPTCY PROCEEDINGS

On December 23, 2008, this Court entered a Claims Procedure Order, which implemented a customer claims process in accordance with SIPA. (*Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, Adv. Pro. No. 08-01789 (Bankr. S.D.N.Y. Dec. 23, 2008), ECF No. 12.) By July 2, 2009, the bar date for filing claims under SIPA, the Trustee had received more than 16,000 customer claims. (Trustee's Amended Third Interim Report at 25, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC. (In re Bernard L. Madoff)*, Adv. Pro. No. 08-01789 (Bankr. S.D.N.Y. Apr. 14, 2010), ECF No. 2207.) The Goldman Plaintiffs participated in the claims procedure process.

A&G Goldman Partnership submitted a customer claim for its BLMIS account, which was denied by the Trustee because it had withdrawn more funds than it deposited. (Affidavit of Vineet Sehgal in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay, dated Nov. 13, 2014 (the "Sehgal Aff.") Ex. F.) Pamela Goldman submitted two customer claims for BLMIS accounts with which she was associated, which the Trustee allowed. (Sehgal Aff. Exs. A–D.) Through SIPC advances and an interim distribution from the fund of customer property, Pamela Goldman's allowed claims have been fully satisfied. (Sehgal Aff. ¶ 3.)

As creditors and customers, the Goldman Plaintiffs are represented by the Trustee. The customer claims of Pamela Goldman were satisfied. And although A&G Goldman Partnership's net equity claims were denied because it was a "net winner," like all other net winners, it may still participate in the estate as a general creditor (as could Pamela Goldman, for an amount above her net equity) if the Trustee is able to recover more property than is required to satisfy net

equity claims. SIPA § 78fff-2(c)(1) ("Any customer property remaining after allocation in accordance with this paragraph shall become part of the general estate of the debtor . . .").

III. THE TRUSTEE'S AVOIDANCE ACTION

The Trustee filed a complaint against Jeffry M. Picower (now deceased) and the other Picower Parties on May 12, 2009. (Murphy Decl. Ex. A.) The complaint identified more than $6.7 billion in net withdrawals that the Trustee alleged the Picower Parties had received from BLMIS. (*Id.* ¶¶ 63(b), 67.) The complaint alleged that the Picower Parties knew or should have known that BLMIS was engaged in fraud and sought recovery of the entire amount known at the time of filing to have been transferred from BLMIS to the Picower Parties throughout the history of the Picower Parties' BLMIS accounts. (*Id.* ¶¶ 3, 4, 28, 57, 65–67.)

After filing the complaint, the Trustee identified additional transfers from BLMIS to the Picower Parties, bringing the total amount of net withdrawals sought by the Trustee to $7.2 billion. (*See* Murphy Decl. Ex. B. at 2.)

The Trustee's complaint contains numerous allegations that the Picower Parties directed backdating in their BLMIS accounts, had actual knowledge of the Ponzi scheme, were "complicit[] in the fraud," and were compensated for propping up the Ponzi scheme:

> 63(a). On information and belief, the high returns reported on Defendants' accounts were a form of compensation by Madoff to Picower for perpetuating the Ponzi scheme by investing and maintaining millions of dollars in BLMIS.

(Murphy Decl. Ex. A ¶ 63(a); *see also id.* ¶ 63(i).) And in the Trustee's brief in opposition to the Picower Defendants' motion to dismiss, the Trustee stated that Picower propped up the Ponzi scheme by accepting only a fraction of his requested redemptions when Madoff could not pay them:

> As to Picower's argument that his withdrawals must have strained the Ponzi scheme, it is worth noting that Picower's largest withdrawals were generally made quarterly. (*See* Compl. Ex. A.) Accordingly, BLMIS could anticipate Picower's

> withdrawals and there was no need for Madoff to raise money on short notice. It is significant, moreover, that as early as 2003 – even before Madoff's scheme began to unravel – BLMIS could not pay Picower the quarterly sums that he was demanding. Instead, on several occasions starting in September 2003, BLMIS paid Picower only a fraction of the amount that he originally requested. BLMIS' failure to pay Picower sums that purportedly were in his accounts or otherwise available to him is further evidence that Picower knew or should have known of Madoff's fraud. This evidence becomes even more compelling given Picower's apparent lack of complaint about his inability to access billions of dollars reported on his BLMIS account statements.

(Murphy Decl. Ex. B at 4–5.) Significantly, with respect to the allegations in Goldman III regarding a $125 million loan in April 2006, the Trustee already alleged a backdating transaction at that time for that amount:

> 63(i). One account combined outrageous returns with backdating to create trades that 'occurred' before the account was even opened by BLMIS. On or about April 24, 2006, Decisions opened a sixth account with BLMIS ("Decisions 6") by wire transfer on April 18 of $125 million. BLMIS promptly began 'purchasing' securities in the account, but it backdated the vast majority of these purported transactions to January 20, 2006. By the end of April, a scant 12 days later, the purported net equity value of the account was over $164 million, a gain of $39 million, or a return of more than 30% in less than two weeks of purported trading.

(Murphy Decl. Ex. A ¶ 63(i).) The Trustee's Picower complaint also included allegations dealing with margin loans, as also alleged in the Goldman Complaints (*See e.g.*, *id.* ¶ 63(i)(*ii*) ("In December 2005, BLMIS also created backdated 'purchases' on margin . . . ."); Murphy Decl. Ex. H (Goldman I) ¶¶ 52–55; Murphy Decl. Ex. L (Goldman II) ¶¶ 73–75.)

IV. THE PICOWER SETTLEMENT AND ISSUANCE OF THE PERMANENT INJUNCTION

While the Trustee was pursuing his action against, and potential settlement with, the Picower Parties, the government also was in discussions with the Picower Parties' counsel. (Murphy Decl. Ex. C at 3.)

After months of extensive negotiations, the Trustee and the Picower Parties reached an agreement under which the Picower estate agreed to return $5 billion to the BLMIS estate. (*Id.*)

Simultaneously, the Picower estate agreed to forfeit the $5 billion and an additional amount of approximately $2.2 billion to the government. (*Id.*) When these amounts were combined in this global settlement, 100 percent of the net withdrawals received by the Picower Parties over the lifetime of their investments with BLMIS became available for eventual distribution to BLMIS victims, without the need for litigation. (*Id.*)

The settlement agreement contains a release of all claims that the Trustee brought or could have brought against the Picower Parties in connection with BLMIS. (*Id.* at 15.) Because of the importance to the Picower Parties of precluding suits on claims they were settling, the Trustee agreed to use his reasonable best efforts to seek a narrowly tailored Permanent Injunction from the Bankruptcy Court. (*Id.*) The Permanent Injunction would exclude from its scope actions where there is an independent basis on which to bring suit against the Picower Parties. (*Id.*) The Permanent Injunction was identified by the Picower Parties as an essential part of the settlement. (*Id.* at 25–28.)

On December 17, 2010, the Trustee moved for an order approving the settlement agreement and entering the Permanent Injunction under section 105(a) of the Bankruptcy Code and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure. (Murphy Decl. Ex. C.) Fox and Marshall filed objections. (*Picard v. Picower*, Adv. Pro. No. 09-1197 (Bankr. S.D.N.Y. Jan. 6, 2011) ECF Nos. 32, 34.) Out of the approximately 16,000 creditors of the BLMIS estate (*see* Transcript of Settlement Hearing, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC.*, Adv. Pro. No. 08-01789, (Bankr. S.D.N.Y. Jan. 14, 2011), ECF No. 3815, at 6), only one other objection was filed to this landmark settlement.

Judge Lifland found that the Permanent Injunction was necessary and appropriate to carry out the provisions of the Bankruptcy Code, to prevent any entity from exercising control or

possession over property of the estate, to preclude actions that would have a conceivable effect or adverse impact upon the BLMIS estate or on the administration of the liquidation proceeding, and to avoid relitigation or litigation of claims that were or could have been asserted by the Trustee on behalf of all customers and creditors. (Murphy Decl. Ex. D at 6–7.) Judge Lifland stated at the hearing that: "[t]he injunction is narrow. It deals with duplicative and parallel claims of the trustee . . . . And you cannot expect any settlor to make a settlement with a potential possibility of being sued twice over the same causes of action and claims." (Transcript of Settlement Hearing, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC.*, Adv. Pro. No. 08-01789, (Bankr. S.D.N.Y. Jan. 14, 2011), ECF No. 3815, at 40–41.) Accordingly, Judge Lifland overruled the objections and approved the settlement, issuing the following Permanent Injunction:

> [A]ny BLMIS customer or creditor of the BLMIS estate . . . is hereby permanently enjoined from asserting any claim against the Picower BLMIS Accounts or the Picower Releasees that is duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower Releasees . . . .

(Murphy Decl. Ex. D at 7.)

V. THIS COURT AND THE DISTRICT COURT ENFORCE THE PERMANENT INJUNCTION AGAINST THE GOLDMAN PLAINTIFFS

A. Related Action: This Court, the District Court, and the Second Circuit Enforce the Permanent Injunction in the Fox and Marshall Litigation

In seeking to bring claims against the Picower Parties, the Goldman Plaintiffs asserted claims similar to a set of third-party plaintiffs represented by Fox and Marshall[5] who brought multiple similar actions against the Picower Parties. This Court, the district court, and the

[5] Russell Oasis and Marsha Peshkin were subsequently added as plaintiffs in a putative class action brought by Fox and Marshall.

Second Circuit all rejected the Fox Plaintiffs' complaints as derivative of the Trustee's claims, and provide background and precedent for now enforcing the Permanent Injunction against the Goldman Plaintiffs.

On February 16 and 17, 2010, before the Goldman Plaintiffs first attempted to bring an action against the Picower Parties, Fox and Marshall each filed a putative class action against the Picower Parties in Florida District Court seeking to circumvent the anticipated net equity decision. (Murphy Decl. Exs. E–F.) Between them, Fox and Marshall sought to represent a "class" of all BLMIS customers whose claims would not be fully satisfied by the Trustee using his net equity calculation. The complaints' allegations parroted the Trustee's fraudulent transfer allegations against the Picower Parties. Fox and Marshall alleged that they and other BLMIS customers were damaged as a result of the fraudulent transfers that the Picower Parties received from BLMIS. (Murphy Decl. Ex. E (Initial Fox Compl.) ¶¶ 5–9;[6] Murphy Decl. Ex. F (Initial Marshall Compl.) ¶¶ 5–9; *see In re Madoff*, 477 B.R. 351 at Ex. A (chart comparing allegations in Trustee's complaint with the Fox and Marshall complaints).) Similar to the Goldman Plaintiffs' complaints, the Fox and Marshall complaints alleged that BLMIS and the Picower Parties engaged in a conspiracy to "steal the funds" of other customers. (Murphy Decl. Ex. E ¶ 9; Murphy Decl. Ex. F ¶ 9.)

On May 3, 2010, upon application by the Trustee, this Court held that Fox's and Marshall's complaints violated the automatic stay and at least one stay order of the District Court for the Southern District of New York. *Picard v. Fox*, 429 B.R. 423, 437 (Bankr. S.D.N.Y.

[6] Fox and Marshall amended their complaints on March 15, 2010, making only clerical changes to the original versions. (*See* Murphy Decl. Ex. E at 29, Ex. F at 29.) References to Exhibits E and F refer to the amended complaints.

2010). On appeal, Judge John G. Koeltl of the district court affirmed, holding that the Bankruptcy Court was "plainly correct in finding that the Florida Actions violated the automatic stay," because they were a "transparent effort" to pursue claims that "were duplicative of claims brought by the Trustee and that belonged to the Trustee on behalf of all creditors of BLMIS." *Fox v. Picard*, 848 F. Supp. 2d 469, 473 (S.D.N.Y. 2012).

The district court examined the Fox and Marshall complaints and determined that, "[p]ut bluntly, the wrongs pleaded in the Florida Actions and in the Trustee's action are the same." *Id.* at 479. The factual allegations, which were "virtually identical" to those in the Trustee's complaint, alleged no act directed specifically toward Fox and Marshall or any duty owed specifically to them. *Id.* Instead, the district court held that the wrongful acts alleged in their complaints "harmed every BLMIS investor (and BLMIS itself) in the same way: by withdrawing billions of dollars in customer funds from BLMIS and thus substantially diminishing the assets available to BLMIS . . . ." *Id.* at 480. Accordingly, the court concluded that the claims asserted by Fox and Marshall could have been asserted by any creditor of BLMIS.

On January 13, 2014, the Second Circuit affirmed the district court's ruling and upheld the Permanent Injunction as against Fox and Marshall. *See Marshall*, 740 F.3d at 84. The Second Circuit held that the Fox and Marshall complaints "impermissibly attempt to 'plead around'" the Permanent Injunction because they "allege nothing more than steps necessary to effect the Picower Parties' fraudulent withdrawals of money from BLMIS, instead of 'particularized' conduct directed at BLMIS customers." *Id.* Importantly, it found that "[t]he only allegations of the Picower [D]efendants' direct involvement in the Ponzi scheme are that they prepared false documentation, recorded and withdrew fictional profits, and filed false

statements in connection with their tax returns." *Id.* at 92. Citing the district court's decision in *Goldman*, discussed below, the Second Circuit held that:

> [t]he . . . Complaints plead nothing more than that the Picower Defendants traded on their *own* BLMIS accounts, knowing that such "trades" were fraudulent, and then withdrew the "proceeds" of such falsified transactions from BLMIS. All the "book entries" and "fraudulent trading records" that the Complaints allege refer to nothing more than the fictitious records BLMIS made, *for the Picower Defendants*, to document these fictitious transactions. In other words, the Complaints plead nothing more than that the Picower Defendants fraudulently withdrew money from BLMIS.

Id. (citing *A&G Goldman P'ship*, 2013 WL 5511027, at *7). The Second Circuit ruled that the Fox and Marshall complaints did not contain particularized claims because they "do not allege that the Picower Defendants made . . . misrepresentations to BLMIS customers," and found rather that the "alleged injuries are inseparable from, and predicated upon, a legal injury to the estate namely, the Picower Defendants' fraudulent withdrawals from their BLMIS accounts of what turned out to be other BLMIS customers' funds." *Id.* The Second Circuit further held that Fox's and Marshall's complaints "have not alleged that the Picower Defendants took any . . . 'particularized' actions aimed at BLMIS customers," such as making misrepresentations to Fox and Marshall. *Id.* at 93.

B. Goldman I Complaints

In the midst of the Fox /Marshall injunction litigation, in 2011, the Goldman Plaintiffs sought permission from this Court to file two putative class actions in Florida District Court (the "Goldman I Actions"). (Murphy Decl. Ex. H.) While Pamela Goldman sought to represent so-called "net losers," A&G Goldman Partnership sought to represent "net winners." (*See id.*) Together, they sought to represent customers and creditors already before the Bankruptcy Court, and for whom the Bankruptcy Court had already determined equitable distributions in accordance with the net equity method approved by the Second Circuit.

The Goldman I Actions alleged that the Picower Parties received billions of dollars of transfers from BLMIS under circumstances that suggest Picower knew that BLMIS was engaged in fraud. (*See, e.g.*, Murphy Decl. Ex. H, Ex. A thereto ¶¶ 40–51.) As demonstrated in Exhibit A annexed to the Bankruptcy Court's order in *In re Madoff*, 477 B.R. 351, the Goldman I complaints were virtual carbon copies of the Fox and Marshall Complaints.

The only thing different in the Goldman I Actions was the labeling of the claims as securities fraud claims instead of fraudulent transfers or conspiracy to defraud. The Goldman Plaintiffs claimed that Picower was a "control person" under section 20(a) of the Exchange Act with respect to BLMIS and is jointly and severally liable with BLMIS for BLMIS's violations of Rule 10b-5 of the Exchange Act. (*See, e.g.*, Murphy Decl. Ex. H, Ex. A thereto ¶¶ 89–96.) The purported federal securities laws violations were based on the Picower Parties' withdrawals from BLMIS: "The volume, pattern and practice of the Defendants' fraudulent withdrawals from BLMIS and their control over fraudulent documentation of underlying transactions at BLMIS establishes the Defendants' 'control person' liability under the federal securities laws." (*Id.* ¶ 41.)

The alleged wrongdoing by Picower consisted of his fraudulent transfers from BLMIS, which mirrored allegations in the Trustee's complaint. (*See, e.g.*, *id.* ¶ 44 ("Jeffry Picower knew of the existence of [Madoff's] scheme and . . . Jeffry Picower was taking fraudulent profits from the BLMIS customer accounts"); *id.* ¶ 45 ("Picower was able to control BLMIS and use BLMIS as 'a personal piggy bank' by withdrawing funds for various entities he controlled, even if there was no legitimate underlying profitable transaction warranting a distribution of such funds."); *id.* ¶ 51 ("The pattern of transactions in the Defendants' accounts reveals their fraudulent nature. Each quarter, Picower, directly and through the other Defendants and other agents, directed the

withdrawal of large sums of money divided into odd numbers spread over many of the Defendant accounts."); *see also* Murphy Decl. Ex. A ¶ 66 ("The Transfers were, in part, false and fraudulent payments of nonexistent profits supposedly earned in the Accounts . . . .").) The Goldman I allegations mirrored the allegations in the first Fox and Marshall complaints, which were already held to be nothing more than a rehash of the Trustee's allegations. *See In re Madoff*, 477 B.R. at 355–57, Ex. A.

C. The Bankruptcy Court Holds that the Goldman I Actions Violate the Permanent Injunction

On June 20, 2012, the Bankruptcy Court held that the Goldman I Actions violate the Permanent Injunction and the automatic stay. *See id.* at 352–53. The Bankruptcy Court expressed frustration at the tactics of the Goldman Plaintiffs and their counsel, who had represented the Fox Plaintiffs in their attempts to bring derivative claims against the Picower Parties. The Court rejected the Goldman Plaintiffs' attempts to circumvent the Net Equity Decision and disrupt the *pro rata* distribution provided by SIPA by pleading around the Permanent Injunction: "It's *déjà vu* all over again. The Class Action Plaintiffs are attempting to use inventive pleading to sidestep the automatic stay and the [Permanent] Injunction." *Id.* at 354 (internal quotations omitted). The Bankruptcy Court emphasized that the Goldman Plaintiffs "have simply repeated, repackaged, and relabeled the wrongs alleged by the Trustee [against the Picower Parties] in an attempt to create independent claims where none exist." *Id.* The Court found that the Goldman Plaintiffs "re-iterate" the Trustee's allegations "almost verbatim." *Id.*

The Bankruptcy Court held that the Goldman I Actions violated the Permanent Injunction and the automatic stay for three main reasons. First, the Court found that despite the "nominal title" of their causes of action, the Goldman I Actions raised issues substantially "identical" to the Trustee's Picower complaint. *Id.* at 355. Specifically, the Court found that "the Plaintiffs'

action is based on pleadings that are nearly identical to those of the Trustee," that they "substantially parroted the Trustee's Complaint," and also "mimic those set out in the Fox and Marshall complaints, which this Court found to be duplicative of the Trustee's, a finding the District Court affirmed." *Id.* The Court recounted numerous examples of overlap between the Goldman Plaintiffs' allegations and those of the Trustee, as well as those of Fox and Marshall, and cited an exhibit, originally submitted by the Trustee, which "substantially reflects and links the cloning of the pleadings." *Id.* at 356 n.12, Ex. A.

Second, the Bankruptcy Court held the Goldman Plaintiffs' claims to be "derivative of the Trustee's." *Id.* at 356. Indeed, the Court found that the alleged harms are "limited to 'general direction and control and action to the detriment of all [BLMIS's] creditors.'" *Id.* at 357. Thus, the Court found that the Goldman Plaintiffs did not state a particularized injury against the Picower Parties.

Third, the Bankruptcy Court found that the Goldman I Complaints, like the Fox and Marshall complaints, were simply "yet another attempt by the same counsel to re-litigate [the] Net Equity Decision." *Id.*

D. The District Court Holds that the Goldman I Complaints Violate the Permanent Injunction

Judge Sullivan affirmed the Bankruptcy Court and upheld the Permanent Injunction as applied to the Goldman I Complaints. *A&G Goldman P'ship*, 2013 WL 5511027, at *1. The district court held that the Goldman Plaintiffs' claims were derivative of the Trustee's fraudulent transfer claims. *Id.* at *6–11. Rejecting "a purely formalistic approach" that looks only at the nominal title of a cause of action, the court determined that the Goldman Plaintiffs' claims "are not bona fide securities fraud claims," and found instead that, aside from allegations listing the elements of a securities fraud claim, "all of the allegations in the Complaint refer exclusively to

the Picower Parties' fraudulent withdrawals." *Id.* at *6–7. The court recited the standard for determining the legal sufficiency of a control person claim to determine if they were *bona fide* securities law claims or merely disguised fraudulent transfer claims, and not because it was reviewing to determine if the allegations were adequately pled for purposes of a Rule 12(b)(6) motion. *See id.* at *6. The district court recognized that the Goldman I Complaints pled "nothing more than that the Picower Parties traded on their own BLMIS accounts," allege fraudulent trading activity that BLMIS conducted "for the Picower Parties," and that, "[i]n other words, the Complaints plead nothing more than that the Picower Parties fraudulently withdrew money from BLMIS." *Id.* at *7.

The district court further held that "the parts of the Complaints that do discuss aspects of the BLMIS fraud unconnected to the Picower Parties' accounts noticeably lack any allegation that the Picower Parties were involved in such fraud . . ." and that "with respect to the clearest examples of BLMIS's fraud to other customers, the Goldman Complaints are completely silent about the Picower Parties' involvement." *Id.* at *8. Hence, the district court found that:

> [t]his examination of the Goldman Complaints makes clear that Class Action Plaintiffs do not in fact claim that the Picower Parties directed BLMIS to make misrepresentations above and beyond what was necessary to document the Picower Parties' false withdrawals. The fraudulent representations Class Action Plaintiffs point to were incident to the fraudulent withdrawals. Regardless of what Class Action Plaintiffs call their claims, the Goldman Complaints plead fraudulent conveyance claims. Accordingly, they are clearly derivative of the Trustee's already-settled claims.

Id. at *9. As a result, the court found that the Goldman Plaintiffs had brought "simply deceptively labeled fraudulent conveyance claims." *Id.* at *10. Accordingly, the district court held the claims came "within the plain scope of the [Permanent] Injunction" and that the Bankruptcy Court had jurisdiction to enjoin them. *Id.* at *10–11. The Goldman Plaintiffs did not appeal the district court's decision.

VI. THIS COURT REJECTS THE GOLDMAN II COMPLAINT AND FINDS THAT IT VIOLATES THE PERMANENT INJUNCTION

A. The Goldman II Complaint

On January 6, 2014, the Goldman Plaintiffs commenced a new action in the Florida District Court seeking a declaration that neither the Permanent Injunction nor the automatic stay barred the Goldman Plaintiffs from filing a "new" class action complaint against the Picower Parties. (Murphy Decl. Ex. K.) The declaratory judgment action attached a class action complaint, the Goldman II Complaint, that the Goldman Plaintiffs sought to have declared not in violation of the automatic stay or the Permanent Injunction. (*See* Murphy Decl. Exs. K–L.)

The Goldman Plaintiffs again asserted that their claims rested on different legal theories, had different elements, sought different damages, were subject to different proof, and were subject to a different statute of limitations than the Trustee's claims against the Picower Parties. The Goldman Plaintiffs added a general allegation that the Picower Parties "directly or indirectly induced" BLMIS to make misrepresentations to BLMIS customers. (Murphy Decl. Ex. L. ¶ 14.)

In substance, the Goldman II Complaint was identical to the Goldman I Complaint that was held to be barred under the Permanent Injunction. It again attempted to assert a claim under section 20(a) of the Exchange Act against the Picower Parties for loss in the value of their investment in the "BLMIS Discretionary Trading Program" (their new name for BLMIS's Investment Advisory business). (*Id.* ¶¶ 62, 83–94.) But again, it did not contain any factual allegations that Picower took any specific action with respect to other customers' accounts, or indeed took any action at BLMIS outside of his own accounts.

Instead, trying to get around the deficiencies in their prior pleading, the Goldman Plaintiffs more clearly spelled out their theory that Picower knew that the false trading in his own BLMIS accounts would result in false asset values in other BLMIS customers' accounts because

those other accounts did not reflect cash transfers from their accounts to Picower. (*See id.* ¶¶ 65–66.) As a result of Picower's activity within his own accounts, the Goldman Plaintiffs alleged, "the account records of other BLMIS customers falsely overstated the assets therein and their investment performance. BLMIS customers consequently unknowingly overpaid for BLMIS securities." (*Id.* ¶ 66; *see also id.* ¶ 2 (Picower's own transactions in his own accounts "(1) directly resulted in additional material misrepresentations to other BLMIS investors as to their account values and profits and (2) required defalcation of funds from other BLMIS investors to pay Picower and his affiliates."); *id.* ¶ 3 (Picower's knowledge that his transactions would cause other BLMIS customers to be defrauded and Picower's control over BLMIS together "amount to Picower making direct misrepresentations to those customers."); *id.* ¶ 65 ("Picower caused BLMIS to book phony transactions with phony profits in his accounts. From time to time, Picower withdrew these phony profits from his BLMIS account."); *id.* ¶¶ 69–70, 72–73 (providing specific examples of Picower directing false trading in his own accounts).)

B. This Court Holds that the Goldman II Complaint Violates the Permanent Injunction

On June 23, 2014, the Bankruptcy Court held that the Goldman II Action violated the Permanent Injunction. *See Marshall*, 511 B.R. at 394. After this Court determined that it had the authority to interpret its own Permanent Injunction order, and recognizing its jurisdiction to decide if the Goldman II Complaint violated that order, this Court found that the "conclusory statements" that the Goldman Plaintiffs cobbled together in an attempt to again subvert the Permanent Injunction could not pass muster. *Id.* at 392–93. Setting aside the Goldman Plaintiffs' conclusory allegations, this Court held that the Goldman II Action violated the Permanent Injunction for one main reason: the Goldman II Action, "like its predecessors, relie[d] on the Picower Parties' fraudulent withdrawals and fictitious entries in their own accounts, and if

these allegations are ignored, there is nothing left." *Id.* at 393. Because the Goldman II Complaint only restated the legal standard for control person liability under section 20(a) without alleging that Picower "was an officer of BLMIS" or including any "particularized allegations that Picower Parties did anything besides fraudulently withdraw money from BLMIS and cause BLMIS to make phony entries in the records *of their accounts*," this Court found their claim derivative. *Id.* (emphasis added). The Goldman Plaintiffs' voluntarily dismissed their appeal of that decision.[7]

VII. THE GOLDMAN III COMPLAINT

On August 28, 2014, after the Second Circuit ruled on the Fox Plaintiffs' action and this Court ruled on the Goldman II Complaint, the Goldman Plaintiffs made their *third* attempt to bring a securities class action against the Picower Parties. As before, the Goldman III Complaint alleges that Jeffry Picower was a control person under section 20(a) of the Exchange Act. (Murphy Decl. Ex. N ¶ 1.) Goldman III makes six types of allegations, namely that Picower: (1) backdated trades (*id.* ¶¶ 82–87); (2) took out margin loans (*id.* ¶¶ 88–90); (3) knew that there was false information in BLMIS' financial disclosures (*id.* ¶¶ 91–96); (4) referred clients to BLMIS (*id.* ¶ 64); (5) made loans to BLMIS (*id.* ¶¶ 10, 67–70); and (6) agreed to be listed as an options counterparty and further agreed to notify Madoff if a regulator or anyone else asked him about his counterparty status (*id.* ¶¶ 11, 79–81.).

The first three allegations were already contained in Goldman II, (*compare* Murphy Decl. Ex. L ¶¶ 65–69, *with* Ex. N ¶¶ 82–87 (alleging backdated trades); *compare* Murphy Decl. Ex. L

[7] The Court also considered and rejected a new proposed complaint by the Fox Plaintiffs that was substantially similar to the Goldman II Complaint in the same decision and order. The Fox Plaintiffs have appealed. The appeal is currently pending before Judge John G. Koeltl of the district court. *See Marshall v. Picard*, No. 14-CV-06790 (JGK) (S.D.N.Y. 2014).

¶¶ 73–75, *with* Ex. N ¶¶ 88–90 (alleging margin loans); *compare* Murphy Decl. Ex. L ¶¶ 64, 67–68, 71 *with* Ex. N ¶¶ 91–96 (alleging knowledge of false financial disclosures)), and every single one of these prior allegations has already been held by this Court to be a derivative claim barred by the Permanent Injunction. *See Marshall*, 511 B.R. at 391–93. The fourth allegation, a conclusory statement that Picower referred clients to BLMIS, was previously pled by the Fox Plaintiffs and was held to fail to provide an independent basis for a control person claim. (C*ompare Marshall*, 511 B.R. at 394–95, *with* Murphy Decl. Ex. N ¶ 64.)

Thus, of all the allegations, only two appear to be new: that Picower made loans to BLMIS and that Picower agreed to be listed as an options counterparty. The two additions to the Goldman III Complaint appear to be allegations based on inferences drawn from the recent criminal testimony of Enrica Cotellessa-Pitz, Annette Bongiorno, and Frank DiPascali, Jr.. (*See* Murphy Decl. Ex. N at 1–2.) These allegations aver that Picower made loans to BLMIS in order to keep it afloat and that Picower agreed to be listed as an options counterparty in BLMIS books and records (*id.* ¶¶ 68, 70) and inform Madoff if anyone asked Picower about being a counterparty. (*Id.* ¶¶ 11, 78–81.) The essence of these allegations is that Picower propped up the Ponzi scheme, an allegation based on generalized harm to all BLMIS customers and creditors and one that the Trustee has already made in his litigation against the Picower Parties.

ARGUMENT

THE PERMANENT INJUNCTION AND AUTOMATIC STAY BAR THE GOLDMAN PLAINTIFFS FROM PROCEEDING

I. ALMOST ALL OF THE GOLDMAN III COMPLAINT HAS ALREADY BEEN HELD TO VIOLATE THE PERMANENT INJUNCTION

A. The Goldman Plaintiffs' General Allegations of "Control" Have Been Rejected as Conclusory

This Court and the district court have specifically considered and rejected the majority of the allegations asserted once again by the Goldman Plaintiffs in the Goldman III Complaint. The essence of the Goldman III Complaint can be found at paragraphs 5, 7 and 12 and are nothing more than bald allegations of Picower's "control" over BLMIS:

> 5. Through his close relationship with Madoff, Picower had uncommon access to BLMIS' books and records, directed the affairs of BLMIS, and became Madoff's de facto partner.
>
> 7. Picower is liable under Section 20(A) because Picower knew that BLMIS was operating a fraud, and because Picower caused the dissemination of material misrepresentations and documents containing material omissions relied on by BLMIS customers that are the basis of BLMIS' securities law violations.
>
> 12. In short, Picower directly and indirectly controlled the viability of the Ponzi scheme. Picower caused and directed material misrepresentations and omissions relating to BLMIS' general trading activity, balance sheet, assets, capital, and solvency, all of which gave investors and regulators the false appearance that BLMIS was engaged in profitable and legitimate trading and investment activity, and all of which induced Plaintiffs and the class members to invest or remain invested in BLMIS.

(Murphy Decl. Ex. N ¶¶ 5, 7, 12.) These general allegations are no different from what the Goldman Plaintiffs alleged previously, allegations that were rejected by this Court and the district court. (*See A&G Goldman P'ship*, 2013 WL 5511027, at *6, *8–9; *Marshall*, 511 B.R. at 393; Murphy Decl. Ex. L ¶¶ 2, 63–64, 91–92; Murphy Decl. Ex. H, Ex. A thereto. ¶¶ 2–4, 42.)

The Goldman Plaintiffs contend that their action is different from the Trustee's because the Trustee's action "did not involve allegations that Picower exercised control over BLMIS." (Murphy Decl. Ex. N ¶ 100.) But this Court and the district court have ruled that conclusory allegations of control do not provide enough support for the Goldman Plaintiffs to escape the reach of the Permanent Injunction. *See A&G Goldman P'ship*, 2013 WL 5511027, at *6; *Marshall*, 511 B.R. at 393.

B. Nearly All of the Goldman Plaintiffs' Remaining Allegations Have Been Rejected as Conclusory and Derivative of the Trustee's Claims

The Goldman Plaintiffs next allege that the Picower Parties: (1) backdated trades in their accounts; (2) took out margin loans; (3) knew about false information in FOCUS Reports; and (4) referred unspecified clients to Madoff. (Murphy Decl. Ex. N ¶¶ 64, 82–96.) These allegations are nothing new, and were rejected by this Court and the district court. (*See A&G Goldman P'ship*, 2013 WL 5511027 at *6–9; *Marshall*, 511 B.R. at 391–94; *see also* Murphy Decl. Ex. L ¶¶ 69–73; Murphy Decl. Ex. H, Ex. A thereto ¶¶ 52–61, 75.)

As to the backdating allegations, the Goldman Plaintiffs again rely on the exact same allegations of backdating made by the Trustee, and use these allegations to contend that the Picower Parties' backdating in their own accounts had an effect on other BLMIS accounts. For example, paragraph 84 of their complaint alleges that:

> 84. Picower knew and intended that each phony recording of a fictitious profitable transaction in his accounts resulted directly in the recording of false transactions and false asset values in the accounts of other BLMIS customers, because these customer accounts did not reflect the resulting cash transfer from their accounts to Picower.

(Murphy Decl. Ex. N ¶ 84. *Compare* Murphy Decl. Ex. A ¶¶ 63(d)–(i), *with* Ex. L. ¶ 65. *See Marshall*, 740 F.3d at 93.) The Goldman Plaintiffs also use backdating allegations to further allege that "Picower . . . had extensive contact with BLMIS employees and had the power to direct their actions." (Murphy Decl. Ex. N ¶ 82.) This sort of allegation, relying on the transfers in Picower's own accounts to support an inference of greater liability, has been rejected by this Court, the district court, and the Second Circuit. Indeed, as the Second Circuit held, this sort of harm is quintessentially derivative: "[A]ppellants' claimed damages, also suffered by all BLMIS customers . . . remain mere secondary harms flowing from the Picower Parties' fraudulent withdrawals and the resulting depletion of BLMIS funds." *Marshall*, 740 F.3d at 93.

Paragraph 87 of the Goldman III Complaint deals with the alleged backdating of a $125 million transaction in April 2006, which the Goldman Plaintiffs also use as the basis for a "loan" allegation:

> 87. Similarly, on or about April 24, 2006, Defendant Decisions Incorporated opened a new account with BLMIS known as 'Decisions, Inc. 6' account. This account was opened with a wire transfer of $125 million. Defendants instructed BLMIS to back date trades in this account to January 2006, which was four months prior to the date the account was actually opened. BLMIS employees carried out Defendants' direct instructions and fabricated and back dated trades in the 'Decisions, Inc. 6' account. This resulted in the net value of the account increasing by almost $40 million, or 30% in less than two weeks after it opened.

(Murphy Decl. Ex. N ¶ 87.) This allegation is virtually identical to the Trustee's allegation regarding this transaction:

> 63(e). On or about April 24, 2006, Decisions opened a sixth account with BLMIS ("Decisions 6") by wire transfer on April 18 of $125 million. BLMIS promptly began "purchasing" securities in the account, but it backdated the vast majority of these purported transactions to January 2006. By the end of April, a scant 12 days later, the purported net equity value of the account was over $164 million, a gain of $39 million, or a return of more than 30% in less than two weeks of purported trading.

(Murphy Decl. Ex. A ¶ 63(e).) Again, the allegations regarding backdating relate only to Picower's conduct with respect to his own BLMIS accounts, and as such, already have been rejected as providing no independent basis for a third party complaint. *See Fox*, 848 F. Supp. 2d at 479–80; *Marshall*, 740 F.3d at 93. Furthermore, this transaction was alleged and therefore considered in connection with the Trustee's settlement with the Picower Parties.

Regarding margin loans, the Goldman Plaintiffs allege that "Picower also directed BLMIS to make a margin 'loan' of approximately $6 billion to Defendant Decisions Inc., even though the account had no trading activity or cash or securities to support such borrowing." (Murphy Decl. Ex. N ¶ 88.) This allegation is identical to the Goldman Plaintiffs' allegations in the previous iterations of their complaints (*see* Murphy Decl. Ex. L ¶¶ 73–75; Murphy Decl. Ex.

H, Ex. A thereto ¶¶ 52–55), which were already rejected by this Court and the district court as derivative of the Trustee's claim. *See A&G Goldman P'ship*, 2013 WL 5511027, at *7–9; *see also* Murphy Decl. Ex. A ¶¶ 63(c)–(d) (describing margin loans).

While the Goldman Plaintiffs' allegations concerning BLMIS's FOCUS reports are not copied from the Trustee's complaint, they are conclusory and based on the premise that Picower used backdated trades in his own accounts. As in the prior iteration of the complaint, the Goldman Plaintiffs rely on an allegation of Picower's conduct with respect to his own accounts to support the general inference that he controlled other accounts at BLMIS. For example, the Goldman III Complaint alleges:

> 94. Picower's ability to direct the creation and dissemination of false and misleading trading and financial documentation which he knew would be incorporated in financial disclosures made by BLMIS, establishes that Picower exercised direct and indirect control over the day-to-day operations of BLMIS and specifically over the activity that constituted a violation of the securities laws.

(Murphy Decl. Ex. N ¶ 94.) This is the same conclusory allegation that did not suffice in previous versions of the Goldman Plaintiffs' complaint, and cannot escape the reach of the Permanent Injunction now. *See A&G Goldman P'ship,* 2013 WL 5511027, at *7–9; *Marshall*, 511 B.R. at 394–95.

Finally, the Goldman Plaintiffs allege, as before, that "Picower also used his extensive connections in Palm Beach and his stature on Wall Street to recruit and refer clients to the BLMIS scheme, despite his knowledge it was a fraud." (Murphy Decl. Ex. N ¶ 64.) This allegation is entirely conclusory and fails to name a single investor with BLMIS as a result of Picower's referral. This allegation was also made before (by the Fox Plaintiffs), and failed to provide a basis for an independent control person claim. *See Marshall*, 511 B.R. at 394–95.

In sum, without their conclusory allegations, the Goldman Plaintiffs can solely allege activity within the Picower Parties' own accounts. There are no allegations here that are

independent of the Trustee's claims. As this Court held only a few months ago with respect to the last version of the complaint: "[t]he New Goldman Complaint, like its predecessors, relies on the Picower [Parties'] fraudulent withdrawals and fictitious entries in their own accounts, and if these allegations are ignored, there is nothing left." *Marshall*, 511 B.R. at 393; *see also id.* at 392 ("[B]eyond conclusory statements that the Picower [Parties'] fraudulent transactions related to their own accounts caused BLMIS to send false statements to other customers, the *New Goldman Complaint* does not allege that the Picower [Parties] 'directed or were at all involved in the creation or dissemination of these statements to other BLMIS customers.'").

II. THE FACIALLY NEW ALLEGATIONS ARE NO DIFFERENT FROM THE TRUSTEE'S ALLEGATIONS THAT THE PICOWER PARTIES PROPPED UP THE PONZI SCHEME

The only allegations in the Goldman III Complaint that do not facially duplicate allegations in the earlier iterations of the complaint are that Picower made loans to BLMIS to keep it afloat, agreed to be listed as an options counterparty in BLMIS' books and records, and agreed to let Madoff know if anyone asked Picower about being a counterparty. (*See* Murphy Decl. Ex. N ¶¶ 67–74, 78–81.) The crux of these allegations, however, is that Picower propped up the Ponzi scheme, an allegation made by the Trustee in his settled litigation against the Picower Parties and a claim that, if true, harmed BLMIS and all of its customers and creditors in the same way. These allegations are thus no less derivative of the Trustee's complaint than the allegations already rejected by this Court and the district court.

A. The Loan Allegations Are Derivative

The Goldman Plaintiffs allege that the Picower Parties bolstered the Ponzi scheme through two loans they provided to BLMIS in 1992 and 2006, respectively. (*Id.* ¶¶ 67–74.) The Goldman III Complaint alleges:

> 10. Picower made approximately $200 million in sham "loans" to BLMIS in order to prop up the Ponzi scheme and enable BLMIS to pay off redeeming investors. But for the Picower 'loans,' BLIMS [sic] and the Ponzi scheme would have collapsed long ago. The 'loans' also resulted in direct misrepresentations to BLMIS customers about BLMIS' solvency and financial condition.
>
> 67. In order to prop up the Ponzi scheme, Picower engaged in a series of 'lending' transactions amounting to more than $200 million. But for these "loans," BLMIS would have been unable to pay off redeeming investors and the Ponzi scheme would have collapsed. The loans gave Picower control over BLMIS as his potential to either refuse to make the illicit 'loans' or to call them would have resulted in the end of the Ponzi scheme.

(*Id.* ¶¶ 10, 67.) The Goldman Plaintiffs further allege that these loans demonstrated Picower's control over BLMIS and caused misrepresentations about BLMIS's financial condition to BLMIS customers. (*Id.* ¶¶ 73–74.)

Specifically, the Goldman Plaintiffs allege that Picower gave BLMIS a $125 million loan in April 2006 to bolster the Ponzi scheme during a liquidity crunch:

> 70. Picower also made a $125 million 'loan' to BLMIS in April 2006 (without consideration) in order to keep BLMIS afloat when it was short on cash to pay its redeeming customers. Picower was quickly repaid on his 'loan' when BLMIS wired him $125 million in September 2006. Like the earlier 1993 'loan,' this loan was necessary to perpetuate the Ponzi scheme by concealing BLMIS' inability to pay its redeeming customers their fictitious gains.

(*Id.* ¶ 70.) But this allegation merely puts a different spin on the April 2006 backdating allegation already made by the Trustee in 2009. (*Compare* Murphy Decl. Ex. A ¶ 63(i), *with* Ex. N ¶ 87.) Moreover, this allegation concerns purported trading activity—the deposit of $125 million, the withdrawal of $125 million and backdating trades—*in the Picower Parties' own accounts*. Again, such activity has been rejected by the Second Circuit, the district court, and this Court as providing a basis for an independent claim. *Marshall*, 740 F.3d at 93; *A&G Goldman P'ship*, 2013 WL 5511027, at *1; *Marshall*, 511 B.R. at 394.

The Goldman Plaintiffs further allege that Picower made another loan to BLMIS in 1992 in connection with the SEC's investigation of BLMIS feeder fund Avellino & Bienes:

> 68. Specifically, in 1992, one of BLMIS' largest feeder funds, Avellino & Bienes ('Avellino'), failed and was under SEC investigation. BLMIS needed cash to pay back Avellino investors and deflect suspicion away from the Ponzi scheme. After conferring with Madoff, Picower sent $76 million worth of securities from a non-BLMIS account to BLMIS, without consideration.
>
> 69. The Picower securities were held in a BLMIS general account, and they were then pledged as security to obtain a bank loan (or multiple loans) to repay the Avellino clients who had invested in BLMIS. BLMIS falsely represented to a lending bank that BLMIS owned the securities. The securities that Picower 'loaned' to BLMIS perpetuated the fraud and allowed BLMIS to continue to bringing [*sic*] new victims into the Ponzi scheme.

(Murphy Decl. Ex. N ¶¶ 68–69.) As a threshold matter, this allegation is contradicted by the testimony of Frank DiPascali, Jr.—testimony upon which the Goldman Plaintiffs rely. (*See* Transcript of Proceedings, *United States v. Bonventre*, Case No. 10 Cr. 228 (LTS) (S.D.N.Y. Apr. 3, 2014), ECF No. 856, at 4706–07 ("[Madoff] instructed Annette to receive [the securities] into Mr. Picower's account at Madoff . . . .").) As with the allegations about the loan in April 2006, these allegations aver nothing more than that the Picower Parties bolstered the Ponzi scheme, which mirrors allegations by the Trustee in his litigation against the Picower Parties. For instance, in the Trustee's brief in opposition to the Picower Parties' motion to dismiss, the Trustee argued that Picower helped further the Ponzi scheme by accepting only a fraction of his requested redemptions when Madoff could not pay them:

> It is significant, moreover, that as early as 2003 – even before Madoff's scheme began to unravel – BLMIS could not pay Picower the quarterly sums that he was demanding. Instead, on several occasions starting in September 2003, BLMIS paid Picower only a fraction of the amount that he originally requested. BLMIS' failure to pay Picower sums that purportedly were in his accounts or otherwise available to him is further evidence that Picower knew or should have known of Madoff's fraud. This evidence becomes even more compelling given Picower's apparent lack of complaint about his inability to access billions of dollars reported on his BLMIS account statements.

(Murphy Decl. Ex. B at 4–5.)[8] Just like any customer whom the Trustee has alleged to have invested with BLMIS without good faith or with knowledge of the Ponzi scheme, Picower's alleged conduct with respect to his own accounts can be (and has been) alleged to have propped up the Ponzi scheme.[9] This harm damaged all BLMIS customers and creditors in the same way: by furthering the fraud and ultimately depleting BLMIS's ability to pay its creditors. *See Fox*, 848 F. Supp. 2d at 480.[10]

B. The Counterparty Allegations Are Conclusory and Derivative

The Goldman Plaintiffs further allege that Picower agreed to be identified in BLMIS's books and records as a counterparty for purported options transactions:

> 11. Picower also acted as a 'counterparty' to phony options trading transactions on BLMIS' books that were critical to the 'split-strike' options trading strategy that Madoff and BLMIS purported to engage in on a day to day basis, and which Madoff touted to investors as his primary investment strategy.
>
> 78. Madoff was continually concerned that those who BLMIS identified as counterparties to the phony options transactions, such as institutional broker-dealers throughout the world, would become subject to heightened scrutiny from regulators and from large institutions that did business with BLMIS. Madoff believed that BLMIS needed to frequently name new counterparties for its fake

[8] The case settled before the Trustee had the chance to amend his complaint accordingly. Nevertheless, these claims were considered and settled by the Trustee. (*See* Murphy Decl. Ex. C.)

[9] Moreover, the Goldman III Complaint does not clearly allege that Picower became a control person until approximately 1995, well after the alleged 1992 loan, and as such, the 1992 loan allegations cannot support the control person claim. (*See* Murphy Decl. Ex. N ¶ 103 ("December 1, 1995 [is] the approximate date that Picower first became a control person of BLMIS"); *id.* ¶ 65 (alleging that Picower was a control person "at least by December 1, 1995").)

[10] These "new" loan allegations were previously raised by the Goldman Plaintiffs in their brief relating to the Goldman II Complaint. (Objection to Motion for Enforcement of Permanent Injunction and Automatic Stay, *Picard v. Marshall*, Adv. Pro. No. 14-01840-smb (Bankr. S.D.N.Y. Apr. 18, 2014) ECF No. 20, at 23 ("Picower also loaned BLMIS $125 million . . . .").) They arguably were thus considered by the Court in enforcing the Permanent Injunction in Goldman II.

> option trades to continue tricking regulators, and the public and prospective and existing customers, into believing BLMIS was actually engaged in large scale options trading necessary to implement BLMIS' purported split-strike options strategy.
>
> 79. BLMIS and Picower agreed that Picower, who was a billionaire, would be listed on BLMIS' fabricated books and records as a counterparty for a large volume of options trading. Picower knew that there was no such options trading, but agreed to participate in this falsification of BLMIS trading records to deceive auditors, regulators, and BLMIS customers and potential investors and to preserve the Ponzi scheme. Picower expressly agreed not to disclose the counterparty fraud and that he would warn Madoff if he was questioned by regulators or anyone else about the options transactions.
>
> 80. By agreeing to act as a party to fraudulent options transactions, Picower knowingly controlled the falsification of the books of BLMIS and participated in the preparation and dissemination of false information and material omissions about the legitimacy of the split-strike strategy used to induce BLMIS customers to invest. This also made Picower an essential element of the Ponzi scheme.
>
> 81. These misrepresentations and omissions were not related to cash withdrawals from Picower's BLMIS accounts and are, therefore, not incident to the fraudulent withdrawal of funds from Picower's BLMIS accounts.

(Murphy Decl. Ex. N ¶¶ 11, 78–81.) In short, Picower allegedly allowed Madoff to falsely use his name and promised Madoff to back up Madoff's misrepresentations. Notably, no specifics are alleged as to whether such misrepresentations were made, to whom, or in connection with what transactions Madoff allegedly falsely identified Picower as a counterparty. Nor are there any allegations as to whether Picower was actually "questioned by regulators or anyone else," *id.* ¶ 79, about any alleged transactions.

Mindful that allegations of conduct by Picower related to his own accounts have repeatedly been found insufficient, the Goldman Plaintiffs state that this alleged conduct was "not related to cash withdrawals from Picower's BLMIS accounts." *Id.* ¶ 81. But on their face, these allegations, if true, would be consistent with Picower's ability to withdraw billions of dollars from his own accounts. And, in fact, the testimony relating to use of customers as counterparties that was adduced at the criminal trial, upon which the Goldman Plaintiffs purport

to rely, relate to the deposit of fictitious treasury bills in the customers' own accounts. (*See, e.g.*, Transcript of Proceedings, *United States v. Bonventre*, Case No. 10 Cr. 228 (LTS) (S.D.N.Y. Apr. 3, 2014), ECF No. 862, at 5341–46 (discussing Madoff's instruction to DiPascali to internalize option trades by placing "treasury bills" in client accounts).)

Goldman III's allegations that Picower knowingly permitted Madoff to make misrepresentations about him do not include any facts suggesting that such conduct was directed specifically towards or actually affected any other particular BLMIS customer. Rather, the suggestion is that Picower's permission to Madoff generally made it easier for Madoff to continue the fraud, thus harming BLMIS and all BLMIS customers and creditors the same way. In sum, the allegations amount to little more than allegations that Picower supported the Ponzi scheme, which the Trustee, too, alleged in his litigation against the Picower Parties. (*See, e.g.*, Murphy Decl. Ex. A ¶¶ 63(a), 63(i).) Moreover, as with their allegations about "loans" from the Picower Parties to BLMIS, these allegations are generalized—there is no allegation that any BLMIS customer, much less the Goldman Plaintiffs, was harmed in any specific manner by the identification of Picower as a counterparty to options transactions.

Every court that has considered such "generalized" claims has regarded them as claims that belong to the Trustee. In *Fox*, 848 F. Supp. 2d at 480, Judge Koeltl ruled that the Fox Plaintiffs' claims were derivative because they sought "to recover for an injury that was inflicted not by specific acts of the Picower [Parties] directed toward the Appellants themselves, and not by violating a duty owed directly to the Appellants, but by a single set of actions that harmed BLMIS and all BLMIS customers in the same way and for the same reason." He reasoned that the "[t]he alleged wrongful acts harmed every BLMIS investor (and BLMIS itself) in the same way: by withdrawing billions of dollars in customer funds from BLMIS and thus substantially

diminishing the assets available to BLMIS to pay its customers and creditors, and to continue to function." *Id.* (citing *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989)). This reasoning was affirmed by the Second Circuit, which held that the Fox Plaintiffs' claims rested on a "secondary effect from harm done to [the debtor]." *See Marshall*, 740 F.3d at 89 (citing *St. Paul Fire & Marine Ins. Co.*); *id.* at 93.

The Second Circuit contrasted the Fox Plaintiffs' claims with the claims by the Trustee against JPMorgan in *Picard v. JPMorgan Chase & Co.*, 721 F.3d 54 (2d Cir. 2013). There, the Second Circuit recognized that Judge Koeltl found the Fox Plaintiffs' claims "to be 'general' in the sense articulated in *St. Paul*, in that they arose from 'a single set of actions that harmed BLMIS and all BLMIS customers in the same way.'" *Id.* at 70 n.20 (internal citations omitted).[11]

This reasoning applies with equal force to the Goldman III allegations. Like the Goldman II Complaint, the Goldman III Complaint does not allege any specific acts by the Picower Parties towards any BLMIS customer, much less towards the Goldman Plaintiffs. They have not cured the deficiency found by this Court: "beyond conclusory statements that the Picower [Parties'] fraudulent transactions related to their own accounts caused BLMIS to send false statements to other customers, the *New Goldman Complaint* does not allege that the Picower [Parties] 'directed or were at all involved in the creation or dissemination of these statements to other BLMIS customers." *Marshall*, 511 B.R. at 393 (quoting *A&G Goldman P'ship*, 2013 WL 5511027, at *8).

[11] It contrasted the Trustee's claims against JPMorgan, reasoning that BLMIS customers' claims against JPMorgan would be particularized because the bank "handl[ed] individual investments made on various dates in varying amounts." *Id.* at 70. Thus, the Second Circuit twice recognized that third-party claims based on common harms to all customers and the estate are derivative. *See id.*; *see also Marshall*, 740 F.3d at 89.

Like the Fox Plaintiffs' claims reviewed by the Second Circuit, the claims in the Goldman III Complaint are based on alleged acts by Picower to prop up the Ponzi scheme. This alleged misconduct injured all BLMIS customers and creditors, and BLMIS itself, in the same way, by perpetuating the fraud and depleting customer property that constituted assets of the estate. These "alleged injuries are inseparable from, and predicated upon, a legal injury to the estate namely, the Picower [Parties'] fraudulent withdrawals from their BLMIS accounts of what turned out [to] be other BLMIS customers' funds." *Id.* at 393 (quoting *Marshall*, 740 F.3d at 92.)

III. THE GOLDMAN III COMPLAINT ATTEMPTS TO CIRCUMVENT THE NET EQUITY DECISION AND SEEKS RECOVERY OF ALL FRAUDULENT TRANSFERS

It is little wonder that the Goldman Plaintiffs' claims are generalized. As they did with the previous versions of their complaints, the Goldman Plaintiffs yet again seek to represent a "shadow estate" of BLMIS customers and creditors based on generalized harms. The "damages" allegations in the Goldman III Complaint amount to allegations that the Goldman Plaintiffs should be entitled to recover *for every fraudulent transfer made by BLMIS*, not just those to the Picower Parties:

> 13. The net amount of customer cash lost in the Ponzi scheme was approximately $18 billion. Picower is responsible for *all* $18 billion of the losses suffered by BLMIS customers: not because he stole $7.2 billion of the $18 billion lost, but because he controlled BLMIS and directed the fraud in numerous ways.

(Murphy Decl. Ex. N. ¶ 13.) No doubt worried that their efforts duplicate those of the Trustee, the Goldman Plaintiffs conversely plead that:

> 14. . . . BLMIS investors lost $11 billion that is separate and apart from any amount fraudulently transferred from BLMIS to Picower. This action seeks recovery of this distinct loss.

(*Id.* ¶ 14.) But what is that "distinct loss" if not an amount above the Goldman Plaintiffs' ratable share under the Net Equity Decision? The Goldman Plaintiffs clearly seek to represent essentially all customers who did not receive the amounts on their last account statements:

> 103. The definition of the Plaintiff Class in this action is: (1) all brokerage customers of BLMIS who entrusted securities or cash to BLMIS between December 1, 1995, the approximate date that Picower first became a control person of BLMIS, and December 15, 2008, the date that BLMIS entered into SIPA liquidation ("Class Period"), and who at such time granted to BLMIS or its employees or agents trading authority or discretion with respect to assets in such brokerage accounts for trading in the BLMIS Discretionary Trading Program; and (2) who have not received the full reported account value of their BLMIS account(s) as of the date of the BLMIS bankruptcy/SIPC liquidation (the "Class").

(*Id.* ¶ 103.)

The Goldman Plaintiffs have previously endeavored to create a "shadow" estate of all customers of BLMIS in order to circumvent the Net Equity Decision. And each time, the ruling court has rejected their efforts. *See In re Madoff*, 477 B.R. 351; *Marshall*, 511 B.R. 375. As the late Judge Lifland succinctly put it in reviewing the Goldman I Complaint, "this appears to be yet another attempt by the [counsel for the Goldman Plaintiffs] to re-litigate this Court's Net Equity Decision." *In re Madoff*, 477 B.R. at 357. The Goldman Plaintiffs' efforts to usurp the fraudulent transfer claims brought by the Trustee to recover amounts exceeding their ratable share of customer property under the Net Equity Decision should be rejected here too.

IV. THE GOLDMAN CLASS ACTION VIOLATES THE AUTOMATIC STAY AND IS VOID *AB INITIO*

Because the claims alleged in the Goldman III Complaint are generalized claims that are duplicative and derivative of those of the Trustee, they violate the automatic stay, 11 U.S.C. § 362(a). (*See Fox*, 848 F. Supp. 2d at 480–81; Murphy Decl. Ex. D ¶ 8 (injunction was issued

under section 105(a) and section 362(a) of the Bankruptcy Code).)[12] This Court's issuance of the Permanent Injunction in connection with the Trustee's settlement with the Picower Parties effectively made the automatic stay permanent as to derivative and duplicative claims brought against the Picower Parties. *See In re Dreier LLP*, 429 B.R. 112, 133 (Bankr. S.D.N.Y. 2010) (ruling that the Bankruptcy Court has jurisdiction to "make the automatic stay permanent following the settlement of a fraudulent transfer claim"); *In re Mrs. Weinberg's Kosher Foods, Inc.*, 278 B.R. 358, 365 (Bankr. S.D.N.Y. 2002) (Bernstein, J.) (holding that a bankruptcy court in approving a settlement "may enjoin creditors from prosecuting the settled claims derivatively in another court"). Here, application of the automatic stay would also make the Goldman action void *ab initio*. *See FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 137 (2d. Cir 1992).

As to the application of the automatic stay, section 362(a)(3) bars "any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). "Property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1), "wherever located and by whomever held," 11 U.S.C. § 541(a), including causes of

[12] The Goldman III Complaint also violates certain stay orders entered by the district court. The district court issued stay orders on December 15, 2008, December 18, 2008, and February 9, 2009 (the "Stay Orders") to facilitate the administration of the BLMIS estate. Specifically, on December 15, 2008, the district court entered a stay order declaring that "all persons and entities are stayed, enjoined and restrained from directly or indirectly . . . interfering with any assets or property owned, controlled or in the possession of [BLMIS]." (*See* December 15 Stay Order ¶ IV, *SEC v. Bernard L. Madoff*, No. 08-CIV-10791 (reinforcing the automatic stay), ECF No. 4; *see also* December 18 Stay Order ¶ IX ("no creditor or claimant against [BLMIS], or any person acting on behalf of such creditor or claimant, shall take any action to interfere with the control, possession, or management of the assets subject to the receivership"), ECF No. 8; February 9 Stay Order ¶ IV (incorporating and making permanent the December 18 Stay Order), ECF No. 18) *See Fox*, 429 B.R. at 433 (holding that the Fox Plaintiffs' derivative claims violated the automatic stay and certain of the Stay Orders).

action possessed by the debtor at the time of filing. *Jackson v. Novak (In re Jackson)*, 593 F.3d 171, 176 (2d Cir. 2010). These provisions are sweeping in scope. "Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within reach of § 541." *Kagan v. Saint Vincents Catholic Med. Ctrs. of NY (In re Saint Vincents Catholic Med. Ctrs. of NY)*, 449 B.R. 209, 217 (S.D.N.Y. 2011) (quoting *Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008)); *see also In re Quigley Co.*, 676 F.3d 45, 57 (2d. Cir 2012) (central purpose of extending bankruptcy jurisdiction to third party actions is to protect the assets of the estate). Critically, courts look to the substance and not the form of the purported action to determine whether it would have an adverse impact on the estate and be barred by the automatic stay. *See 48th St. Steakhouse, Inc. v. Rockefeller Grp., Inc. (In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987).

The Second Circuit has held that the automatic stay "extends to common claims against the debtor's alter ego or others who have misused the debtor's property in some fashion." *St. Paul Fire & Marine Ins. Co.*, 884 F.2d at 701; *see Keene Corp. v. Coleman (In re Keene Corp.)*, 164 B.R. 844, 854 (Bankr. S.D.N.Y. 1994) (Bernstein, J.) ("The Court cannot sanction a practice which permits creditors to assert general, indirect claims in order to achieve a greater distribution on a first come, first serve basis from assets which the trustee has standing to recover, and which, if recovered, will be available to satisfy the claims of all creditors."); *A&G Goldman P'ship*, 2013 WL 5511027, at *5 n.7. Actions taken in violation of the automatic stay are void *ab initio*. *In re Colonial Realty Co.*, 980 F.2d at 137.

Similarly, section 362(a)(1) bars "the commencement or continuation . . . of a judicial . . . or other action or proceeding against the debtor . . . or to recover a claim against the debtor . . . ." 11 U.S.C. § 362(a)(1). A "claim against the debtor" encompasses claims against third parties

that, as with those at issue here, are tantamount to claims against the debtor, including fraudulent transfer actions. *See, e.g.*, *In re Colonial Realty Co.*, 980 F.2d at 137. As this Court found in *Keene*, "[e]ven if [such] claims are not, themselves, property of the estate, they represent attempts by creditors to collect claims against the debtor from third parties which the trustee is authorized to recover under his or her 'strong arm' or avoiding powers" and are stayed by section 362(a)(1). *In re Keene Corp*, 164 B.R. at 855.

The claims in the Goldman III Complaint are, insofar as they are derivative of the Trustee's claims, property of the estate, and thus they violate the automatic stay under section 362(a)(3). *See, e.g.*, *Fox*, 848 F. Supp. 2d at 479 (Fox Plaintiffs' claims violate section 362(a)(3)); *In re The 1031 Tax Grp. LLC*, 397 B.R. 670, 679 (Bankr. S.D.N.Y. 2008); *In re Keene Corp.*, 164 B.R. at 850–55; *Fisher v. Apostolou*, 155 F.3d 876, 879 (7th Cir. 1998); *In re Swallen's, Inc.*, 205 B.R. 879, 884 (Bankr. S.D. Ohio 1997); *In re Madoff*, 477 B.R. at 357. Likewise, to the extent the claims are nothing more than disguised fraudulent transfer claims, they violate the automatic stay under section 362(a)(1). *See A&G Goldman P'ship*, 2013 WL 5511027, at *11 (the Goldman Plaintiffs' claims are "deceptively labeled fraudulent conveyance claims that the Trustee already brought and settled.").[13] For all the same reasons Goldman III violates the Permanent Injunction, it violates the automatic stay and should not be permitted to proceed.

[13] In addition, even claims owned by the Trustee but not brought would be encompassed both by the automatic stay and the Permanent Injunction, which reaches claims the Trustee "could" have brought. Accordingly, claims based on alter ego liability (akin to control person claims) would belong to the Trustee. *See e.g., In re Cabrini Med. Ctr.*, No. 09-14398 (ALG), 2012 WL 2254386, *1 (Bankr. S.D.N.Y. June 15, 2012) (Gropper, J.).

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court declare that the Class Action violates the automatic stay and thus is void *ab initio*; declare that the Class Action violates the Permanent Injunction; and specifically enforce the Permanent Injunction and automatic stay in these proceedings against the Goldman Plaintiffs and anyone acting on their behalf.

Dated: November 17, 2014
New York, New York

Respectfully submitted,

/s/ David J. Sheehan

David J. Sheehan
Email: dsheehan@bakerlaw.com
Deborah H. Renner
Email: drenner@bakerlaw.com
Tracy L. Cole
Email: tcole@bakerlaw.com
Keith R. Murphy
Email: kmurphy@bakerlaw.com
Amy Vanderwal
Email: avanderwal@bakerlaw.com
Ferve Ozturk
Email: fozturk@bakerlaw.com

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201

Attorneys for Irving H. Picard, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Estate of Bernard L. Madoff

EXHIBIT E

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan

Attorneys for Irving H. Picard, Trustee
for the Substantively Consolidated SIPA Liquidation
of Bernard L. Madoff Investment Securities LLC
and the Estate of Bernard L. Madoff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (SMB) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. A & G GOLDMAN PARTNERSHIP and PAMELA GOLDMAN, Defendants.	Adv. Pro. No. _____ (SMB) **DECLARATION OF KEITH R. MURPHY IN SUPPORT OF APPLICATION FOR ENFORCEMENT OF THE PERMANENT INJUNCTION AND AUTOMATIC STAY**

KEITH R. MURPHY, under penalty of perjury, declares:

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

2. As an attorney of record in these proceedings, I am fully familiar with the facts set forth herein. I make this declaration to provide certain information to the Court and to transmit true and correct copies of the documents identified herein.

3. The Picower Parties[1] are simultaneously filing a related action that seeks enforcement of the Permanent Injunction against the Goldman Plaintiffs. The Picower Parties are filing a motion to consolidate their action with the Trustee's action. The Trustee consents to the consolidation of the actions. Counsel for the Goldman Plaintiffs was unwilling to take a position on the proposed consolidation of the actions until after the actions are filed.

4. True and correct copies of the following documents are attached:

Exhibit A: Complaint, *Picard v. Picower*, Adv. Pro. No. 09-1197 (Bankr. S.D.N.Y. May 12, 2009), ECF No. 1

Exhibit B: Memorandum of Law in Opposition to Defendants' Partial Motion to Dismiss Under Fed. R. Bankr. P. 7012(b) and 7009, *Picard v. Picower*, Adv. Pro. No. 09-1197 (Bankr. S.D.N.Y. Sept. 30, 2009), ECF No. 11

Exhibit C: Memorandum of Law in Support of Motion for Entry of an Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure Approving an Agreement By and Between the Trustee and the Picower BLMIS Account Holders and Enjoining Certain Claims, *Picard v.*

[1] Unless otherwise defined herein, defined terms have the meaning given to them in the Trustee's Memorandum of Law in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay, filed on November 17, 2014.

Picower, Adv. Pro. No. 09-1197 (Bankr. S.D.N.Y. Dec. 17, 2010), ECF No. 25

Exhibit D: Permanent Injunction Order and Exhibit, *Picard v. Picower*, Adv. Pro. No. 09-1197 (Bankr. S.D.N.Y. Jan. 13, 2011), ECF No. 43

Exhibit E: *Fox v. Picower*, Adv. Pro. No. 10-80252 (S.D. Fla.), Initial Complaint, filed Feb. 16, 2010 (ECF No. 1) (without exhibits), and Amended Complaint, filed Mar. 15, 2010 (ECF No. 5) (without exhibits)

Exhibit F: *Marshall v. Picower*, Adv. Pro. No. 10-80254 (S.D. Fla.) (without exhibits), Initial Complaint, filed Feb. 17, 2010 (ECF No. 1), and Amended Complaint, filed Mar. 15, 2010 (ECF No. 7) (without exhibits)

Exhibit G: Fox Plaintiffs' Proposed Second Amended Complaint, *Fox v. Picower*, No. 10-80252 (S.D. Fla. Feb. 5, 2014), ECF No. 28-3

Exhibit H: Motions of A&G Goldman Partnership and Pamela Goldman to Determine Application of Automatic Stay and Exhibit A, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Adv. Pro. No. 08-1789 (Bankr. S.D.N.Y. Dec. 13, 2011), ECF Nos. 4580, 4581

Exhibit I: Oral Argument Transcript, *Goldman v. Picard*, No. 12-6109 (S.D.N.Y. Sept. 24, 2013), ECF No. 34

Exhibit J: "Goldman II" Docket *as of* November 17, 2014, *Goldman v. Capital Growth Co.*, No. 14-80012 (S.D. Fla. filed Jan. 6, 2014)

Exhibit K: Complaint for Declaratory Judgment (without exhibits), *Goldman v. Picower*, No. 14-80012 (S.D. Fla. filed Jan. 6, 2014), ECF No. 1

Exhibit L: Second Goldman Complaint, *Goldman v. Capital Growth Co.*, No. 14-80012 (S.D. Fla. filed Jan. 6, 2014), ECF No. 1-2

Exhibit M: "Goldman III" Docket *as of* November 17, 2014, *Goldman v. Picard*, No. 14-81125 (S.D. Fla. filed Aug. 28, 2014)

Exhibit N: Third Goldman Complaint, *Goldman v. Capital Growth Co.*, No. 14-81125 (S.D. Fla. filed Aug. 28, 2014), ECF No. 1

Exhibit O: Joint Stipulation and Agreed Motion for Stay, *Goldman v. Capital Growth Co.*, No. 14-81125 (S.D. Fla. Sept. 24, 2014), ECF No. 4

Exhibit P: Order on Joint Stipulation and Agreed Motion for Stay, *Goldman v. Capital Growth Co.*, No. 14-81125 (S.D. Fla. Sept. 29, 2014), ECF No. 6

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

Executed on November 17, 2014
New York, New York

/s/ Keith R. Murphy
Keith R. Murphy

EXHIBIT A

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Email: dsheehan@bakerlaw.com
Marc E. Hirschfield
Email: mhirschfield@bakerlaw.com

Attorneys for Irving H. Picard, Esq.,
Trustee for the SIPA Liquidation of
Bernard L. Madoff Investment Securities LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor.	SIPA LIQUIDATION No. 08-01789 (BRL)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. JEFFRY M. PICOWER, individually and as trustee for the Picower Foundation; BARBARA PICOWER, individually and trustee for the Trust FBO Gabrielle H. Picower and the Picower Foundation; CAPITAL GROWTH COMPANY; FAVORITE FUNDS; JA PRIMARY LIMITED PARTNERSHIP; JA SPECIAL LIMITED PARTNERSHIP;	Adv. Pro. No. _____ (BRL)

JAB PARTNERSHIP;

JEMW PARTNERSHIP;

JF PARNERSHIP;

JFM INVESTMENT COMPANY;

JLN PARTNERSHIP;

JMP LIMITED PARTNERSHIP;

JEFFRY M. PICOWER SPECIAL CO.;

JEFFRY M. PICOWER, P.C.;

DECISIONS INCORPORATED;

THE PICOWER FOUNDATION;

THE PICOWER INSTITUTE FOR MEDICAL RESEARCH;

THE TRUST FBO GABRIELLE H. PICOWER; and DOES 1-25.

Defendants.

COMPLAINT

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

NATURE OF PROCEEDING

1. This adversary proceeding arises from the massive Ponzi scheme perpetrated by Bernard L. Madoff ("Madoff"). In early December 2008, BLMIS generated client account statements for its nearly 7,000 client accounts at BLMIS. When added together, these statements purportedly show that clients of BLMIS had approximately $64.8 billion invested with BLMIS.

In reality, BLMIS had assets on hand worth a small fraction of that amount. On March 12, 2009, Madoff admitted to the fraudulent scheme and pled guilty to 11 felony counts. Defendants received avoidable transfers from BLMIS, and the purpose of this proceeding is to recover the avoidable transfers received by one or more of the Defendants.

2. Jeffry Picower ("Picower") was a beneficiary of this Ponzi scheme for more than 20 years. Since December 1995, he and the other Defendants collectively profited from this scheme through the withdrawal of more than $6.7 billion dollars. The Trustee's investigation to date has revealed that at least five billion dollars of this amount was fictitious profit from the Ponzi scheme. In other words, Defendants have received, at a minimum, more than five *billion* dollars of other people's money.

3. Among other reasons, Defendants knew or should have known that they were profiting from fraud because of the implausibly high rates of return that their accounts supposedly achieved. Picower was one of a handful of BLMIS clients with special access to information from BLMIS, including access to information about BLMIS' 'target' rates of return for Defendants' accounts. In several cases, Defendants' purported annual rates of return were more than 100%, with some annual returns as high as 500% or even 950% per year. The average annual rate of return for Defendants' regular trading accounts between 1996 and 2007 was approximately 22%, even taking into account extremely low rates of return in 2000 (ranging as low as *negative* 770%). These anomalous and astronomical rates of return – both positive and negative – were neither credible nor consistent with legitimate trading activity, and should have caused any reasonable investor to inquire further.

4. Picower and the other Defendants also knew or should have known that they were reaping the benefits of manipulated purported returns, false documents and fictitious profit. For

example, some purported "trades" in Defendants' accounts supposedly took place before the relevant direction from the Defendants, or even before the relevant account was opened or funded. BLMIS records further suggest that not only was Picower aware (or at a minimum, should have been aware) that BLMIS was creating backdated transactions, but that Picower and/or his agent may have used backdated documents to direct such backdated trades themselves.

5. This adversary proceeding is brought pursuant to 15 U.S.C. §§ 78fff(b) and 78fff-2(c)(3), sections 105(a), 502(d), 542, 544, 547, 548(a), 550(a) and 551 of 11 U.S.C. §§ 101 *et seq*. (the "Bankruptcy Code"), the New York Fraudulent Conveyance Act (N.Y. Debt & Cred. §270 *et seq*. (McKinney 2001)) and other applicable law, for turnover, accounting, preferences, fraudulent conveyances, damages and objection to claim in connection with certain transfers of property by BLMIS to or for the benefit of Defendants. The Trustee seeks to set aside such transfers and preserve the property for the benefit of BLMIS' defrauded customers.

JURISDICTION AND VENUE

6. This is an adversary proceeding brought in this Court, the Court in which the main underlying SIPA proceeding, No. 08-01789 (BRL) (the "SIPA Proceeding") is pending. The SIPA Proceeding was originally brought in the United States District Court for the Southern District of New York as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC et al.*, No. 08 CV 10791 (the "District Court Proceeding"). This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and 15 U.S.C. §§ 78eee(b)(2)(A), (b)(4).

7. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (C), (E), (F), (H) and (O).

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

BACKGROUND, THE TRUSTEE AND STANDING

9. On December 11, 2008 (the "Filing Date"), Madoff was arrested by federal agents for violation of the criminal securities laws, including, *inter alia*, securities fraud, investment adviser fraud, and mail and wire fraud. Contemporaneously, the Securities and Exchange Commission ("SEC") filed a complaint in the District Court which commenced the District Court Proceeding against Madoff and BLMIS. The District Court Proceeding remains pending in the District Court. The SEC complaint alleged that Madoff and BLMIS engaged in fraud through the investment advisor activities of BLMIS.

10. On December 12, 2008, The Honorable Louis L. Stanton of the District Court entered an order appointing Lee S. Richards, Esq. as receiver for the assets of BLMIS.

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

12. Also on December 15, 2008, Judge Stanton granted the SIPC application and entered an order pursuant to SIPA (the "Protective Decree"), which, in pertinent part:

a. appointed the Trustee for the liquidation of the business of BLMIS pursuant to 15 U.S.C.§78eee(b)(3);

b. appointed Baker & Hostetler LLP as counsel to the Trustee pursuant to 15 U.S.C. § 78eee(b)(3); and

c. removed the case to this Bankruptcy Court pursuant to 15 U.S.C. §78eee(b)(4).

13. By orders dated December 23, 2008 and February 4, 2009, respectively, the Bankruptcy Court approved the Trustee's bond and found that the Trustee was a disinterested person. Accordingly, the Trustee is duly qualified to serve and act on behalf of the estate of BLMIS.

14. At a plea hearing (the "Plea Hearing") on March 12, 2009 in the case captioned *United States v. Madoff*, Case No. 09-CR-213(DC), Madoff pled guilty to an 11-count criminal information filed against him by the United States Attorneys' Office for the Southern District of New York. At the Plea Hearing, Madoff admitted that he "operated a Ponzi scheme through the investment advisory side of [BLMIS]." (Plea Hr'g Tr. at 23:14-17.) Additionally, Madoff asserted "[a]s I engaged in my fraud, I knew what I was doing [was] wrong, indeed criminal." (Id. at 23:20-21.)

15. As the Trustee appointed under SIPA, the Trustee has the job of recovering and paying out customer property to BLMIS' customers, assessing claims, and liquidating any other assets of the firm for the benefit of the estate and its creditors. The Trustee is in the process of marshalling BLMIS' assets, and the liquidation of BLMIS' assets is well underway. However, such assets will not be sufficient to reimburse the customers of BLMIS for the billions of dollars that they invested with BLMIS over the years. Consequently, the Trustee must use his authority under SIPA and the Bankruptcy Code to pursue recovery from customers who received preferences and/or payouts of fictitious profits to the detriment of other defrauded customers whose money was consumed by the Ponzi scheme. Absent this or other recovery actions, the Trustee will be unable to satisfy the claims described in subparagraphs (A) through (D) of 15 U.S.C. § 78fff-2(c)(1).

16. Pursuant to 15 U.S.C. § 78fff-1(a), the Trustee has the general powers of a bankruptcy trustee in a case under the Bankruptcy Code in addition to the powers granted by SIPA pursuant to 15 U.S.C. § 78fff(b). Chapters 1, 3, 5 and Subchapters I and II of Chapter 7 of the Bankruptcy Code are applicable to this case.

17. Pursuant to 15 U.S.C. § 78*lll*(7)(B), the Filing Date is deemed to be the date of the filing of the petition within the meanings of sections 547 and 548 of the Bankruptcy Code and the date of the commencement of the case within the meaning of section 544 of the Bankruptcy Code.

18. The Trustee has standing to bring these claims pursuant to 15 U.S.C. § 78fff-1 and the Bankruptcy Code, including 11 U.S.C. § 101 *et seq*. and sections 323(b) and 704(a)(1), because, among other reasons:

a. BLMIS incurred losses as a result of the claims set forth herein;

b. The Trustee is a bailee of customer funds entrusted to BLMIS for investment purposes; and

c. The Trustee is the assignee of claims paid, and to be paid, to customers of BLMIS who have filed claims in the liquidation proceeding (such claim-filing customers, collectively, "Accountholders"). As of this date hereof, the Trustee has received multiple express unconditional assignments of the applicable Accountholders' causes of action, which actions could have been asserted against Defendants. As assignee, the Trustee stands in the shoes of persons who have suffered injury in fact, and a distinct and palpable loss for which the Trustee is entitled to reimbursement in the form of monetary damages.

THE FRAUDULENT PONZI SCHEME

19. BLMIS is a New York limited liability company that is wholly owned by Madoff. Founded in 1959, BLMIS operated from its principal place of business at 885 Third Avenue,

New York, New York. Madoff, as founder, chairman, and chief executive officer, ran BLMIS together with several family members and a number of additional employees. BLMIS was registered with the SEC as a securities broker-dealer under Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*o*(b). By that registration, BLMIS is a member of SIPC. BLMIS had three business units: investment advisory (the "IA Business"), market making and proprietary trading.

20. For certain accounts in the IA Business, BLMIS purported to participate in a capital appreciation/depreciation strategy, depending on whether the customer sought to generate gains or losses. For example, the strategy was executed by either purporting to purchase small groups of securities transactions near lows and then purporting to sell those same securities at highs, or by purporting to sell securities near highs and then purporting to repurchase those securities near lows.

21. Although clients of the IA Business received monthly or quarterly statements purportedly showing the securities that were held in – or had been traded through – their accounts, as well as the growth of and profit from those accounts over time, the trades reported on these statements were a complete fabrication. The security purchases and sales depicted in the account statements virtually never occurred and the profits reported were entirely fictitious. At the Plea Hearing, Madoff admitted that he never in fact purchased any of the securities he claimed to have purchased for customer accounts. Indeed, based on the Trustee's investigation to date and with the exception of isolated individual trades for certain clients other than the Defendants, there is no record of BLMIS having cleared any purchase or sale of securities at the Depository Trust & Clearing Corporation, the clearing house for such transactions, or any other trading platform on which BLMIS could have reasonably traded securities.

22. Prior to his arrest, Madoff assured clients and regulators that he conducted all trades on the over-the-counter market after hours. To bolster that lie, Madoff periodically wired tens of millions of dollars to BLMIS's affiliate, Madoff Securities International Ltd. ("MSIL"), a London based entity wholly owned by Madoff. There are no records that MSIL ever used the wired funds to purchase securities for the accounts of the IA Business clients.

23. Additionally, based on the Trustee's investigation to date, there is no evidence that BLMIS ever purchased or sold any of the options that Madoff claimed on customer statements to have purchased.

24. For all periods relevant hereto, the IA Business was operated as a Ponzi scheme and Madoff concealed the ongoing fraud in an effort to hinder and delay other current and prospective customers of BLMIS from discovering the fraud. The money received from investors was not set aside to buy securities as purported, but instead was primarily used to make the distributions to – or payments on behalf of – other investors. The money sent to BLMIS for investment, in short, was simply used to keep the operation going and to enrich Madoff, his associates and others, including Defendants, until such time as the requests for redemptions in December 2008 overwhelmed the flow of new investments and caused the inevitable collapse of the Ponzi scheme.

25. During the scheme, certain investors requested and received distributions of the "profits" listed for their accounts which were nothing more than fictitious profits. Other investors, from time to time, redeemed or closed their accounts, or removed portions of the purportedly available funds, and were paid consistently with the statements they had been receiving. Some of those investors later re-invested part or all of those withdrawn payments with BLMIS.

26. When payments were made to or on behalf of these investors, including the Defendants, the falsified monthly statements of accounts reported that the accounts of such investors included substantial gains. In reality, BLMIS had not invested the investors' principal as reflected in customer statements. In an attempt to conceal the ongoing fraud and thereby hinder, delay, and defraud other current and prospective investors, BLMIS paid to or on behalf of certain investors, such as the Defendants, the inflated amounts reflected in the falsified financial statements, including non-existent principal and fictitious profits, not such investors' true depleted account balances.

27. BLMIS used the funds deposited from investors or new investments to continue operations and pay redemption proceeds to or on behalf of other investors and to make other transfers. Due to the siphoning and diversion of new investments to pay requests for payments or redemptions from other investors, particularly longer-term account holders like the Defendants, BLMIS did not have the funds to pay investors on account of their new investments. BLMIS was able to stay afloat only by using the principal invested by some clients to pay other investors or their designees.

28. Picower and the other Defendants were among the primary beneficiaries of this scheme, reaping billions of dollars of other people's money. Defendants knew or should have known that the activity purportedly conducted in their accounts was patently false on its face, and that their purported returns and profits were fictitious.

29. In an effort to hinder, delay and defraud authorities from detecting the fraud, BLMIS did not register as an Investment Advisor until September 2006.

30. In or about January 2008, BLMIS filed with the SEC a Uniform Application for Investment Adviser Registration. The application represented, *inter alia*, that BLMIS had 23

customer accounts and assets under management of approximately $17.1 billion. In fact, in January 2008, BLMIS had over 4,900 active client accounts with a purported value of approximately $68 billion under management.

31. Not only did Madoff seek to evade regulators, Madoff also had false audit reports "prepared" by Friehling & Horowitz, a three-person accounting firm in Rockland County, New York. Of the three employees at the firm, one employee was an assistant and one was a semi-retired accountant living in Florida.

32. At all times relevant hereto, the liabilities of BLMIS were billions of dollars greater than the assets of BLMIS. At all relevant times, BLMIS was insolvent in that (i) its assets were worth less than the value of its liabilities; (ii) it could not meet its obligations as they came due; and (iii) at the time of the transfers, BLMIS was left with insufficient capital.

33. This and similar complaints are being brought to recapture monies paid to or for the benefit of certain investors so that this customer property can be equitably distributed among all of the victims of BLMIS in accordance with the provisions of SIPA.

RELEVANT INDIVIDUALS, THE DEFENDANTS AND THE TRANSFERS

34. Defendant Jeffry M. Picower ("Picower") is a sophisticated investor and businessman who invested in BLMIS over many decades through 24 entity and/or personal accounts. According to a 2002 *Forbes* article entitled "Unaccountable," Picower is a former attorney, accountant and tax shelter promoter who has been active in the financial industry for more than 25 years. He maintains residences at 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 4900 Congress Street, Fairfield, Connecticut 06824. Upon information and belief, Picower has been closely associated with Madoff on both a business and social level for the last 30 years. Picower holds an individual BLMIS account in the name "Jeffry M. Picower," with the account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

Upon information and belief, Picower is trustee for the Picower Foundation and Chairman of the Board of Defendant Decisions Incorporated.

35. Defendant Barbara Picower is a person residing at 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Upon information and belief, Barbara Picower is married to Picower. Upon information and belief, Barbara Picower holds an individual account at BLMIS in the name "Barbara Picower," with the account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Upon information and belief, Barbara Picower is trustee for Defendant Trust FBO Gabrielle H. Picower, an officer and/or director of Defendant Decisions Incorporated and trustee and Executive Director of the Picower Foundation.

36. Not named as a defendant herein, but relevant to this adversary proceeding, April C. Freilich ("Freilich") is a person residing in Armonk, New York. Upon information and belief, Freilich is an officer and/or director of Defendant Decisions Incorporated, and a Limited Partner of Defendants Capital Growth Company, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, and JLN Partnership.

37. Defendant Decisions Incorporated ("Decisions") is a corporation organized under the laws of Delaware with a principal place of business at 950 Third Avenue, New York, New York 10022 and an alternate mailing address or its BLMIS account listed as 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, the Decisions office in Hawthorne was merely a store-front office through which little or no business was conducted. Upon information and belief, Decisions is a general partner of Defendants Capital Growth Company, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, JMP Limited Partnership and Jeffry M. Picower Special Co.

38. Upon information and belief, Defendant Capital Growth Company purports to be a limited partnership with a mailing address for its BLMIS account listed at 22 Saw Mill River Road, Hawthorne, New York, 10532, care of Decisions Incorporated. Upon information and belief, Defendant Decisions Incorporated and/or Defendant Picower serves as General Partner or Director of Capital Growth Company, and Decisions Incorporated, Picower, and/or Freilich transact business through this entity.

39. Defendant JA Primary Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. Upon information and belief, Defendant Decisions Incorporated and/or Defendant Picower serves as General Partner or Director of JA Primary Partnership, and Decisions Incorporated, Picower, and/or April Freilich transact business through this defendant entity.

40. Defendant JA Special Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York, New York 10594. Upon information and belief, Defendant Decisions Incorporated and/or Defendant Picower serves as General Partner or Director of JA Special Limited Partnership, and Decisions Incorporated, Picower, and/or Freilich transact business through this defendant entity.

41. Upon information and belief, Defendant JAB Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Defendant Picower serves as General Partner or Director of JAB

Partnership, and Decisions Incorporated, Picower, and/or Freilich transact business through this defendant entity.

42. Upon information and belief, Defendant JEMW Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Defendant Picower serves as General Partner or Director of JEMW Partnership, and Decisions Incorporated, Picower, and/or Freilich transact business through this defendant entity.

43. Upon information and belief, Defendant JF Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Defendant Picower serves as General Partner or Director of JF Partnership, and Decisions Incorporated, Picower, and/or Freilich transact business through this defendant entity.

44. Upon information and belief, Defendant JFM Investment Company is an entity through which Decisions Incorporated, Picower and/or Freilich transact business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, JFM Investment Company is a Limited Partner of Capital Growth Company, and Decisions Incorporated and/or Picower serves as General Partner or Director of JFM Investment Company.

45. Upon information and belief, Defendant JLN Partnership is a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Decisions Incorporated and/or

Picower serves as General Partner or Director of JLN Partnership, and Decisions Incorporated, Picower, and/or Freilich transact business through this defendant entity.

46. Defendant JMP Limited Partnership is a limited partnership organized under the laws of Delaware, with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. Upon information and belief, Decisions Incorporated and/or Picower serves as General Partner or Director of JMP Partnership, and Decisions Incorporated, Picower, and/or Freilich transact business through this defendant entity.

47. Upon information and belief, Defendant Jeffry M. Picower Special Co. is an entity through which Decisions Incorporated, Picower and/or Freilich transact business, with a mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Decisions Incorporated and/or Picower serves as General Partner or Director of Jeffry M. Picower Special Co.

48. Defendant Favorite Funds is an entity through which Picower transacts business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Decisions Incorporated and/or Picower serves as General Partner or Director of Favorite Funds.

49. Upon information and belief, Defendant Jeffry M. Picower P.C. purports to be a limited partnership with a listed mailing address at 25 Virginia Lane, Thornwood, New York, New York 10594. Upon information and belief, Decisions Incorporated and/or Picower serves as General Partner or Director of Jeffry M. Picower P.C., and Decisions Incorporated, Picower, and/or Freilich transact business through this defendant entity.

50. Upon information and belief, Defendant Picower Foundation is a trust organized for charitable purposes with Picower listed as donor and Picower and Barbara

Picower, among others, listed as Trustees. Picower Foundation's addresses are reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 9 West 57th Street, Suite 3800, New York, New York 10019.

51. Upon information and belief, Defendant Picower Institute for Medical Research is a nonprofit entity organized under the laws of New York, with a principal place of business at 350 Community Drive, Manhasset, New York 11030.

52. Defendant Trust FBO Gabrielle H. Picower is a trust established for beneficiary Gabrielle H. Picower, who upon information and belief is the daughter of Picower and Barbara Picower, with Defendant Barbara Picower listed as trustee and the trust's BLMIS account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

53. On information and belief, the Defendants described in Paragraphs 37 through 52 (collectively the "Picower Entities") in dealing with BLMIS have been dominated by and used merely as the instrument of Picower to advance his personal interests rather than corporate ends. As set forth herein, Picower exercised complete dominion over the Picower Entities in dealing with BLMIS, which he knew or should have known was predicated on fraud. As a result, the Picower Entities functioned as alter egos of Picower and no corporate veil can be maintained between them.

54. On information and belief, Freilich's conduct alleged herein was undertaken as the agent of Picower and/or the other Defendants, as it was within the scope of her employment by and/or her responsibilities to Picower and other Defendants, she was authorized by Picower and/or other Defendants to engage in such conduct, and her conduct was for the benefit of Picower and/or other defendants, who accepted the benefit of such conduct. Indeed, as described

below and on information and belief, at least certain of Freilich's conduct alleged herein was at Picower's express direction.

55. At all times relevant hereto, one or more of the Defendants was a client of the IA Business. According to BLMIS' records, Defendants maintained the accounts with BLMIS set forth on Exhibit A (the "Accounts"). The Accounts were opened on or about the dates set forth on Exhibit A. Upon information and belief, for each Account, either Freilich and/or one or more of the Defendants executed a Customer Agreement, an Option Agreement, and/or a Trading Authorization Limited to Purchases and Sales of Securities and Options, (the "Account Agreements"), and delivered such documents to BLMIS at BLMIS' headquarters at 885 Third Avenue, New York, New York.

56. The Account Agreements were to be performed in New York, New York through securities trading activities that would take place in New York, New York. The Accounts were held in New York, New York, and the Defendants consistently wired funds to BLMIS' account at JPMorgan Chase & Co., Account #000000140081703 (the "BLMIS Bank Account") in New York, New York for application to the Accounts and the conducting of trading activities. Between December 1, 1995 and the Filing Date, the Defendants made deposits to BLMIS through multiple checks and wire transfers into the BLMIS Bank Account. Defendants have intentionally taken advantage of the benefits of conducting transactions in the State of New York and have submitted themselves to the jurisdiction of this Court for purposes of this proceeding.

57. Prior to the Filing Date, BLMIS made payments or other transfers (collectively, the "Transfers") totaling over $6.7 billion to one or more of the Defendants. The Transfers were made to or for the benefit of one or more of the Defendants and include, but are not limited to, the Transfers listed on Exhibit B.

58. Defendant Picower is a sophisticated investor, accountant and lawyer who has organized buyouts of healthcare and technology companies since at least the 1980s. He has reportedly known Madoff for decades, and has been invested in BLMIS since at least the 1980s. Madoff served as a trustee of the Picower Institute for Medical Research.

59. Picower and, through him, the other Defendants, therefore enjoyed an unusually close relationship with Madoff, and were privy to information and dealings not known to other BLMIS investors including, for example, BLMIS' targeted rates of return for Defendants' accounts. As a result of this access to information and Picower's relationship to Madoff, among other reasons, Defendants knew or should have known that Madoff's IA Business was predicated on fraud, that they were benefitting from fraudulent transactions in their accounts, and that their purported account activity was inconsistent with legitimate trading activity and credible returns.

60. Among other things, Picower, both directly and through his agent Freilich and/or others, directed purported purchases and sales of securities within Defendants' accounts, including direction that sales or purchases be made for purposes of achieving gains or losses; directed that funds be transferred among Defendants' accounts; directed and received withdrawals of funds from Defendants' accounts; directed payments to and among various Defendants from their own and other Defendants' accounts; executed Customer Agreements, Trade Authorization Agreements and tax related documentation for the Accounts; and otherwise communicated with and provided direction to BLMIS regarding Defendants' accounts.

61. Defendants Picower and Freilich maintained a "client appraisal" or "portfolio appraisal" system through which they tracked and monitored Defendants' accounts at BLMIS. Picower and Freilich relied on their own monitoring of BLMIS accounts to point out apparent

inconsistencies with BLMIS customer statements and portfolio reports, or to issue direction to BLMIS employees about the accounts.

62. The source of funds in many of Defendants' accounts was fictitious profits received by Picower as a consequence of his participation in the Ponzi scheme.

63. The Defendants knew or should have known that they were benefitting from fraudulent activity or, at a minimum, failed to exercise reasonable due diligence with respect to BLMIS and its auditors in connection with the Ponzi scheme. Among other things, the Defendants were on notice of the following indicia of irregularity and fraud in their own accounts but failed to make sufficient inquiry:

a. Defendants' accounts regularly earned extraordinary and implausibly high rates of return. For example, Picower's "Decision Inc. #3" and "Decision Inc. #4" regular trading accounts purportedly earned annual rates of return over 100% for four consecutive years, from 1996-1999, inclusive. The annual rates of return for these accounts during the period from 1996 to 1999 ranged from a "low" of approximately 120% to a high of over 550%. Nor were these isolated or unusual occurrences; Picower's "Decision Inc. #2" account, for example, purported to earn *over 950%* in 1999. Indeed, between 1996 and 2007, Defendants' 24 regular trading accounts enjoyed 14 instances of supposed annual returns of more than 100% and 25 in which the annual returns purportedly exceeded 50%. On information and belief, the high returns reported on Defendants' accounts were a form of compensation by Madoff to Picower for perpetuating the Ponzi scheme by investing and maintaining millions of dollars in BLMIS.

b. These implausibly high purported returns have enabled Picower and the other Defendants to collectively withdraw more than $6.7 billion since December 1995. At

least $5.1 billion of that sum was over and above any funds deposited by Defendants and constituted money belonging to victims of the fraud.

c. Even Defendants' low annual rates of return were anomalous. In 2000, several of Defendants' regular trading accounts reported significantly *negative* annual rates of return, ranging from negative 74% to negative 779%. A contributing factor to these negative returns was the unwinding in January 2000 of close to $11 billion in short "sales" created in December 1999. As of November 1999, these accounts reflected a total negative cash balance of approximately $3.8 billion. In December 1999, however, Defendants "executed" $8.5 billion of short sales, resulting in the cash balance in these accounts moving from net negative to net positive. In January 2000, Defendants "completed" the short trades, resulting in a new net cash deficit of approximately $6.3 billion. The net effect of the January 2000 transactions was to increase the net cash deficit across these accounts by $2.5 billion over the net cash deficit in November 1999. In other words, Defendants "executed" short trades that reversed Defendants' year-end net cash, making it net positive as of December 31, 1999, but which then resulted in a net loss of $2.5 billion a month later. Such unusual year-end activity reflecting a multi-billion dollar loss would have caused a reasonable investor to question such trades.

d. Picower and the other Defendants knew or should have known that fictitious and backdated trading activity was being reported in their accounts, and that their accounts reflected fictitious holdings. For example, Decisions maintained several accounts with BLMIS. One of those accounts, "Decisions Inc.," was used by Picower and the other Defendants as the primary source of cash withdrawals from BLMIS. The account reflected little trading activity and relatively few holdings, but Picower directed quarterly distributions from this account in the millions to hundreds of millions of dollars throughout the 1990s and

2000s. Indeed, as of the date of Madoff's arrest, the account had a reported negative net cash balance of more than $6 billion. Most distribution requests were signed by Picower and faxed to BLMIS by Freilich, although some were signed by Freilich and in other cases Picower directed that any questions should be addressed to "April [Freilich]."

e. Even more brazenly, one account combined outrageous returns with backdating to create trades that "occurred" before the account was even opened by BLMIS. On or about April 24, 2006, Decisions opened a sixth account with BLMIS ("Decisions 6") by wire transfer on April 18 of $125 million. BLMIS promptly began "purchasing" securities in the account, but it backdated the vast majority of these purported transactions to January 2006. By the end of April, a scant 12 days later, the purported net equity value of the account was over $164 million, a gain of $39 million, or a return of more than 30% in less than two weeks of purported trading. The reason for this massive gain: the Decisions 6 April 2006 customer account statement reflected 57 purported purchases of securities between January 10 and January 24, 2006, almost three months before the account was opened or funded. Defendants knew or should have known that the account that they opened in April could not legitimately have purchased securities in January, and that the $125 million deposited on April 18 could not legitimately have grown by more than 30% in less than two weeks, which, annualized, would have resulted in a rate of return of more than 750%. The majority of the securities "purchased" in January were "purchased" near the lowest prices for the period from January to April 2006, and were purportedly chosen in order to create an unusually high unrealized gain by the end of April.

f. Additionally, on information and belief, Picower, directly and/or through and/or with the assistance of Freilich, directed fictitious, backdated trades in order to achieve

fictitious gains or losses in earlier periods. For example, BLMIS records reflect several conversations beginning around May 14, 2007 between "April" and BLMIS employees about gains that the Picower Foundation "need[ed] during Jan & Feb [20]06." On information and belief, "April" is [Defendant] April Freilich. Since any legitimate gains or losses in January or February 2006 had to have been achieved more than one year before these conversations even occurred, Freilich and Defendants knew or should have known that they were participating in fraudulent activity.

i. On May 18, 2007, Freilich indicated the Foundation needed "$20 mil in gains" for January and February and "want[ed] 18% for year[] 07 appreciation," but that she had to check the numbers "with Jeff." On information and belief, "Jeff" is Defendant Jeffry Picower. Five days later, on May 23, Freilich told BLMIS that the numbers she had provided earlier were wrong, and the Foundation "needs only $12.3 mil [in gains] for" January and February 2007.

ii. Accordingly, the Picower Foundation's May 2007 statement reflected millions of dollars in securities transactions for the months of January and February 2007 that collectively resulted in a purported gain to the account of $12.6 million. These transactions had not appeared on the January or February 2007 statements, nor on any prior monthly customer statements that had been generated before May 2007, nor were the corresponding equity positions or values reflected on those earlier statements. With these "new" positions, the reported value of the Picower Foundation's account appeared to increase by $54.6 million – from $711.3 million in April 2007 to $765.9 million in May 2007 – because the May 2007 statement was (and subsequent statements were) based on an entirely different account history: one in which various trades had taken

place more than 15 months earlier, resulting in entirely different positions and values. The mysterious appearance of securities transactions months after the purported trades settled—and which had not appeared on the earlier statements during the relevant trade period—was not credible and would have raised questions by an accountholder who was not complicit in the manipulation.

g. BLMIS' statements to Defendants reflected a consistent ability to buy stocks near their monthly lows, and to sell stocks near their monthly highs (or, when requested by Defendants to generate losses, to do the opposite). No experienced investment professional could reasonably have believed that this could have been accomplished legitimately.

h. Indeed, BLMIS records suggest that Picower and Freilich knew that "trades" were being backdated, and that they took steps to hide the backdating and their knowledge of it. For example, on or around December 22, 2005, Picower and/or Freilich faxed to BLMIS a letter signed by Picower and bearing a date of December 1, 2005. The letter directed the sale of specific positions across at least 4 accounts, and purported "sales" consistent with those instructions are reported on Defendants' December 2005 account statement as having settled on December 2, and thus "sold" before December 1, as the settlement date is usually 3 business days after the trade date. But Defendants' letter, though dated December 1, references and attaches Defendants' "portfolio appraisal" dated December 16, 2005, which purports to show the dates and purchase prices of the stocks that Defendants sought to sell, apparently to assist BLMIS in calculating the gains from the sales of these positions. Notably, the December 16 "portfolio appraisal" purports to show the respective accounts still holding the positions, *as of December 16*, that were purportedly sold by December 2. Thus, even if the letter had been delivered to BLMIS on December 1, 2005

instead of December 22, 2005 as noted by the fax header and suggested by the December 16 "portfolio appraisal," the sale would have predated the letter.

i. BLMIS records, together with Picower's own documents, further suggest Picower's and his agents' complicity in the fraud, through two additional backdated trades in December 2005. On or around December 29, 2005, April Freilich, acting on behalf of Picower, faxed to BLMIS a letter signed by Picower that directed BLMIS to "pick up long term capital gains in the accounts listed below before December 31, 2005" across five Decisions accounts. The letter further directed BLMIS to realize $50,000,000 in gains, and attached the relevant "portfolio appraisal" statements for the five Decisions accounts listed in the letter. Each "portfolio appraisal," created by Picower and/or his agents, purported to show the securities held in each account, the date they were "purchased," the quantity held, and also purported to calculate the unrealized gain or loss on each security based on the market values as of November 30, 2005, the date of the "portfolio appraisal." According to Picower's own "portfolio appraisals," none of these Decisions accounts held more than 11 different securities, and three of these accounts held 5 or fewer securities as of November 30, 2005.

i. Upon Picower's instruction, BLMIS "sold" Agilent Technologies ("Agilent") and Intel Corporation ("Intel") across these accounts, realizing a long-term gain of approximately $46.3 million, a significant majority of the requested gain. According to the account statements generated by BLMIS for December 2005 – and forwarded to Picower and his agents – these trades purportedly settled around December 8 and 9, 2005, approximately 3 weeks before the relevant instruction was sent to BLMIS. Picower's failure to question BLMIS' apparent clairvoyance suggests that Picower knew that BLMIS was backdating trades.

ii. In December 2005, BLMIS also created backdated "purchases" on margin of Google, Diamond Offshore Drilling ("Diamond") and Burlington Resources, Inc. ("Burlington") across all of the referenced accounts. These "purchases" – with purported settlement dates between January 12 and January 20, 2005 – were entirely fictitious and were reflected for the first time in the BLMIS-created account statements issued at the end of December 2005. This backdated trading activity resulted in an immediate purported 12-month unrealized "gain" for Picower of approximately $79 million and a portfolio value of over $155 million as of the end of December as a result of the increase in the market value of these securities during the calendar year. BLMIS' December 2005 account statements also credited the Decisions accounts with $82,000 of Burlington quarterly dividends for March, June and September 2005, which also had not appeared on any BLMIS account statement or "portfolio appraisal" in any of the preceding months because these accounts did not "hold" Burlington until December 2005. The new Burlington, Diamond and Google positions continued to be reported in subsequent account statements. Picower was aware of the fictitious nature of the transactions because none of the purported purchases or dividend payments had been reflected in any previous BLMIS monthly account statements and, further, were not reflected in Picower's own "portfolio appraisal" statements that he created and used to track his investments during that year. Moreover, because the "portfolio appraisal" statements for these particular accounts reflected relatively few positions, the sudden and inexplicable appearance of these positions in Picower's accounts is clear evidence that BLMIS was engaged in a fraud, and could not have gone unnoticed. Picower's failure to question or to repudiate these trades – indeed, he benefited from them by being paid dividends and by

selling the positions years later – is evidence of Picower's awareness of BLMIS' fraudulent activities.

64. Beyond these indicia of fraud in Defendants' own accounts, Defendants ignored numerous other indicia of irregularity and fraud from the general manner in which BLMIS operated. Among other things, Defendants were on notice of the following additional indicia of irregularity and fraud but failed to make sufficient inquiry:

a. Financial industry press reports, including a May 27, 2001 article in Barron's entitled "Don't Ask, Don't Tell: Bernie Madoff is so secretive, he even asks investors to keep mum," and a May, 2001 article in MAR/Hedge, a widely read industry newsletter entitled "Madoff Tops Charts; Skeptics Ask How," raised serious questions about the legitimacy of BLMIS and Madoff and their ability to achieve the IA Business returns they purportedly had achieved using the investment strategy Madoff claimed to employ for most clients. Picower and many of the other Defendants were invested in BLMIS when these reports were issued.

b. BLMIS functioned as both investment manager and custodian of securities. This arrangement eliminated another frequently utilized check and balance in investment management by excluding an independent custodian of securities from the process, and thereby furthering the lack of transparency of BLMIS to other investors, regulators and outside parties.

c. All of the Defendants received far higher purported annual rates of return on their investments with BLMIS, approximating 22%, as compared to the interest rates BLMIS could have paid to commercial lenders during the relevant time period. Upon information and belief, Picower and the other Defendants never questioned why Madoff

accepted their investment capital in lieu of other available alternatives, including commercial loans at far lower interest rates, that would have been more lucrative for BLMIS.

d. BLMIS, which reputedly ran the world's largest hedge fund, was purportedly audited by Friehling & Horowitz, an accounting firm that had three employees, one of whom was semi-retired, with offices located in a strip mall. No experienced business person, especially one with an accounting background, could have reasonably believed it possible for any such firm to have competently audited an entity the size of BLMIS.

e. At no time did Picower or the other Defendants conduct a performance audit of BLMIS or match any trade confirmations provided by BLMIS with actual trades executed through any domestic or foreign public exchange despite the fact that Defendants' accounts purportedly had billions of dollars in assets and easily could have afforded to do this.

f. Based on all of the foregoing factors, many banks and industry advisors who made an effort to conduct reasonable due diligence flatly refused to deal with BLMIS and Madoff because they had serious concerns that their IA Business operations were not legitimate. In contrast, Picower and the other Defendants, who had more visibility into the incredibility of their reported trading activity on their account statements and their outsized rates of return, continued to do business with BLMIS until Madoff could no longer sustain the Ponzi scheme and the fraud was publicly disclosed.

65. The Transfers were and continue to be customer property within the meaning of 15 U.S.C. § 78*lll*(4), and are subject to turnover pursuant to section 542 of the Bankruptcy Code.

66. The Transfers were, in part, false and fraudulent payments of nonexistent profits supposedly earned in the Accounts ("Fictitious Profits").

67. The Transfers are avoidable and recoverable under sections 544, 550(a)(1) and 551 of the Bankruptcy Code, applicable provisions of SIPA, particularly 15 U.S.C. § 78fff-2(c)(3), and applicable provisions of N.Y. CPRL 203(g) (McKinney 2001) and N.Y. Debt. & Cred. §§ 273 – 276 (McKinney 2001). From December 1995 to the Filing Date, Defendants withdrew approximately $6.5 billion from their accounts at BLMIS, at least $5 billion of which was other people's money.

68. Of the Transfers, more than 220 transfers in the collective amount of at least $2.4 billion (the "Six Year Transfers") were made during the six years prior to the Filing Date and are avoidable and recoverable under sections 544, 550(a)(1) and 551 of the Bankruptcy Code, applicable provisions of SIPA, particularly 15 U.S.C. § 78fff-2(c)(3), and applicable provisions of N.Y. Debt. & Cred. §§ 273 – 276.

69. Of the Six Year Transfers, more than 50 transfers in the collective amount of at least approximately $250.6 million (the "Two Year Transfers") were made during the two years prior to the Filing Date, and are additionally recoverable under sections 548(a)(1), 550(a)(1) and 551 of the Bankruptcy Code and applicable provisions of SIPA, particularly 15 U.S.C. 78fff-2(c)(3).

70. Of the Two Year Transfers, two transfers in the collective amount of at least approximately $6.85 million (the "90 Day Transfers") were made during the 90 days prior to the Filing Date, and are additionally recoverable under sections 547, 550(a)(1) and 551 of the Bankruptcy Code and applicable provisions of SIPA, particularly 15 U.S.C. § 78fff-2(c)(3).

71. To the extent that any of the recovery counts may be inconsistent with each other, they are to be treated as being pled in the alternative.

72. The Trustee's investigation is on-going and the Trustee reserves the right to (i) supplement the information regarding the Transfers and any additional transfers, and (ii) seek recovery of such additional transfers.

COUNT ONE
TURNOVER AND ACCOUNTING – 11 U.S.C. § 542

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

74. The Transfers constitute property of the estate to be recovered and administered by the Trustee pursuant to section 541 of the Bankruptcy Code and 15 U.S.C. § 78fff-2(c)(3).

75. As a result of the foregoing, pursuant to section 542 of the Bankruptcy Code, the Trustee is entitled to the immediate payment and turnover from the Defendants of any and all Transfers made by BLMIS, directly or indirectly, to any Defendant.

76. As a result of the foregoing, pursuant to section 542 of the Bankruptcy Code, the Trustee is also entitled to an accounting of all such Transfers received by any Defendant from BLMIS, directly or indirectly.

COUNT TWO
PREFERENTIAL TRANSFERS - 11 U.S.C. §§ 547(b), 550 AND 551

77. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

78. At the time of each of the 90 Day Transfers (hereafter, the "Preference Period Transfers"), the Defendants were each a "creditor" of BLMIS within the meaning of section 101(10) of the Bankruptcy Code and pursuant to 15 U.S.C. § 78fff-2(c)(3).

79. Each of the Preference Period Transfers constitutes a transfer of an interest of BLMIS in property within the meaning of section 101(54) of the Bankruptcy Code and pursuant to 15 U.S.C. § 78fff-2(c)(3).

80. Each of the Preference Period Transfers was to or for the benefit of a Defendant.

81. Pleading in the alternative, each of the Preference Period Transfers was made on account of an antecedent debt owed by BLMIS before such transfer was made.

82. Each of the Preference Period Transfers were made while BLMIS was insolvent.

83. Each of the Preference Period Transfers were made during the preference period under section 547(b)(4) of the Bankruptcy Code.

84. Each of the Preference Period Transfers enabled Defendant to receive more than the receiving Defendant would receive if (i) this case was a case under chapter 7 of the Bankruptcy Code, (ii) the transfers had not been made, and (iii) the applicable Defendant received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

85. Each of the Preference Period Transfers constitutes a preferential transfer avoidable by the Trustee pursuant to section 547(b) of the Bankruptcy Code and recoverable from the applicable Defendant pursuant to section 550(a).

86. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to sections 547(b), 550, and 551 of the Bankruptcy Code: (a) avoiding and preserving the Preference Period Transfers, (b) directing that the Preference Period Transfers be set aside and (c) recovering the Preference Period Transfers, or the value thereof, for the benefit of the estate of BLMIS.

COUNT THREE
FRAUDULENT TRANSFERS – 11 U.S.C. §§ 548(a)(1)(A), 550 AND 551

87. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

88. The Two Year Transfers were made on or within two years before the filing date of BLMIS' case.

89. The Two Year Transfers were made by BLMIS with the actual intent to hinder, delay, and defraud some or all of BLMIS' then existing or future creditors.

90. The Two Year Transfers constitute a fraudulent transfer avoidable by the Trustee pursuant to section 548(a)(1)(A) of the Bankruptcy Code and recoverable from the Defendants pursuant to section 550(a).

91. As a result of the foregoing, pursuant to sections 548(a)(1)(A), 550(a), and 551 of the Bankruptcy Code, the Trustee is entitled to a judgment: (a) avoiding and preserving the Two Year Transfers, (b) directing that the Two Year Transfers be set aside, and (c) recovering the Two Year Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS.

COUNT FOUR
FRAUDULENT TRANSFER – 11 U.S.C. §§ 548(a)(1)(B), 550 AND 551

92. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

93. The Two Year Transfers were made on or within two years before the Filing Date.

94. BLMIS received less than a reasonably equivalent value in exchange for each of the Two Year Transfers.

95. At the time of each of the Two Year Transfers, BLMIS was insolvent, or became insolvent as a result of the Two Year Transfer in question.

96. At the time of each of the Two Year Transfers, BLMIS was engaged in a business or a transaction, or was about to engage in business or a transaction, for which any property remaining with BLMIS was an unreasonably small capital.

97. At the time of each of the Two Year Transfers, BLMIS intended to incur, or believed that it would incur, debts that would be beyond BLMIS' ability to pay as such debts matured.

98. The Two Year Transfers constitute fraudulent transfers avoidable by the Trustee pursuant to section 548(a)(1)(B) of the Bankruptcy Code and recoverable from the Defendants pursuant to section 550(a).

99. As a result of the foregoing, pursuant to sections 548(a)(1)(B), 550(a), and 551 of the Bankruptcy Code, the Trustee is entitled to a judgment: (a) avoiding and preserving the Two Year Transfers, (b) directing that the Two Year Transfers be set aside, and (c) recovering the Two Year Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS.

COUNT FIVE
FRAUDULENT TRANSFER – NEW YORK DEBTOR AND CREDITOR LAW §§ 276, 276-a, 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(a) AND 551

100. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

101. At all times relevant to the Six Year, there have been one or more creditors who have held and still hold matured or unmatured unsecured claims against BLMIS that were and are allowable under section 502 of the Bankruptcy Code or that were and are not allowable only under section 502(e).

102. The Six Year Transfers were made by BLMIS with the actual intent to hinder, delay, or defraud the creditors of BLMIS. BLMIS made the Six Year Transfers to or for the benefit of the Defendants in furtherance of a fraudulent investment scheme.

103. As a result of the foregoing, pursuant to sections 276, 276-a, 278 and/or 279 of the New York Debtor and Creditor Law, sections 544(b), 550(a), and 551 of the Bankruptcy

Code, and 15 U.S.C. § 78fff-2(c)(3), the Trustee is entitled to a judgment: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside; (c) recovering the Six Year Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS, and (d) recovering attorneys' fees from the Defendants.

COUNT SIX
FRAUDULENT TRANSFER --NEW YORK DEBTOR AND CREDITOR LAW §§ 273 AND 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(A), 551 AND 1107

104. The Trustee incorporates by reference the allegations contained in the previous paragraphs of the Complaint as if fully rewritten herein.

105. At all relevant times there was and is at least one or more creditors who held and hold matured or unmatured unsecured claims against BLMIS that were and are allowable under section 502 of the Bankruptcy Code or that were and are not allowable only under section 502(e).

106. BLMIS did not receive fair consideration for the portion of the Six Year Transfers.

107. BLMIS was insolvent at the time it made each of the Six Year Transfers or, in the alternative, BLMIS became insolvent as a result of each of the Six Year Transfers.

108. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to sections 273, 278 and 279 of the New York Debtor and Creditor Law and sections 544(b), 550, 551 of the Bankruptcy Code: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, for the benefit of the estate of BLMIS.

COUNT SEVEN
FRAUDULENT TRANSFERS—NEW YORK DEBTOR AND CREDITOR LAW §§274, 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(A), 551 AND 1107

109. The Trustee incorporates by reference the allegations contained in the previous paragraphs of the Complaint as if fully rewritten herein.

110. At all relevant times there was and is at least one or more creditors who held and hold matured or unmatured unsecured claims against BLMIS that were and are allowable under section 502 of the Bankruptcy Code or that were and are not allowable only under section 502(e).

111. BLMIS did not receive fair consideration for the Six Year Transfers.

112. At the time BLMIS made each of the Six Year Transfers, BLMIS was engaged or was about to engage in a business or transaction for which the property remaining in its hands after each of the Six Year Transfers was an unreasonably small capital.

113. As a result of the foregoing, pursuant to sections 274, 278 and/or 279 of the New York Debtor and Creditor Law and sections 544(b) and 550(a) of the Bankruptcy Code, the Trustee is entitled to a judgment: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS.

COUNT EIGHT
FRAUDULENT TRANSFERS-NEW YORK DEBTOR AND CREDITOR LAW §§ 275, 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(A) AND 551

114. The Trustee incorporates by reference the allegations contained in the previous paragraphs of the Complaint as if fully rewritten herein.

115. At all relevant times there was and is at least one or more creditors who held and hold matured or unmatured unsecured claims against BLMIS that were and are allowable under

section 502 of the Bankruptcy Code or that were and are not allowable only under section 502(e).

116. BLMIS did not receive fair consideration for the Six Year Transfers.

117. At the time BLMIS made each of the Six Year Transfers, BLMIS had incurred, was intending to incur, or believed that it would incur debts beyond its ability to pay them as the debts matured.

118. As a result of the foregoing, pursuant to sections 275, 278 and/or 279 of the New York Debtor and Creditor Law and sections 544(b), 550(a) and 551 of the Bankruptcy Code, the Trustee is entitled to a judgment: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS.

COUNT NINE
UNDISCOVERED FRAUDULENT TRANSFERS – NEW YORK CIVIL PROCEDURE LAW AND RULES 203(g) AND NEW YORK DEBTOR AND CREDITOR LAW §§ 276, 276-a, 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(a) AND 551

119. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

120. At all times relevant to the Transfers, the fraudulent scheme perpetrated by BLMIS was not reasonably discoverable by at least one unsecured creditor of BLMIS.

121. At all times relevant to the Transfers, there have been one or more creditors who have held and still hold matured or unmatured unsecured claims against BLMIS that were and are allowable under section 502 of the Bankruptcy Code or that were and are not allowable only under section 502(e).

122. The Transfers were made by BLMIS with the actual intent to hinder, delay, or defraud the creditors of BLMIS. BLMIS made the Transfers to or for the benefit of the Defendants in furtherance of a fraudulent investment scheme.

123. As a result of the foregoing, pursuant to NY CPLR 203(g) sections 276, 276-a, 278 and/or 279 of the and New York Debtor and Creditor Law, sections 544(b), 550(a), and 551 of the Bankruptcy Code, and 15 U.S.C. § 78fff-2(c)(3), the Trustee is entitled to a judgment: (a) avoiding and preserving the Transfers, (b) directing that the Transfers be set aside; (c) recovering the Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS, and (d) recovering attorneys' fees from the Defendants.

COUNT TEN
RECOVERY OF SUBSEQUENT TRANSFERS - NEW YORK DEBTOR AND CREDITOR LAW § 278 AND 11 U.S.C. §§ 544, 547, 548, 550(a) AND 551

124. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

125. Each of the Transfers are avoidable under sections 544, 547 and/or 548 of the Bankruptcy Code.

126. On information and belief, some or all of the Transfers were subsequently transferred by one or more Defendants to other Defendants in the form of transfers from one account to another or other means (collectively, the "Subsequent Transfers").

127. Each of the Subsequent Transfers were made directly or indirectly to one or more Defendants

128. One or more Defendants are immediate or mediate transferees of the Subsequent Transfers from Defendant Picower and/or other Defendants.

129. As a result of the foregoing, pursuant to section 278 of the New York Debtor and Creditor Law, sections 550(a) and 551 of the Bankruptcy Code, and 15 U.S.C. § 78fff-2(c)(3),

the Trustee is entitled to a judgment against one or more Defendants (a) preserving the Subsequent Transfers, (b) recovering the Subsequent Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS, and (c) recovering attorneys' fees from Defendants.

COUNT ELEVEN
OBJECTION TO DEFENDANTS' SIPA CLAIMS

130. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

131. One or more Defendants has filed, or will file, a claim under SIPA.

132. Defendants' claims (the "Claims") are not supported by the books and records of BLMIS nor the claim materials submitted by Defendants, and, therefore, should be disallowed.

133. The Claims also should not be allowed as general unsecured claims. Defendants are the recipients of transfers of BLMIS' property which are recoverable under sections 547, 548 and 550 of the Bankruptcy Code, and Defendants have not returned the Transfers to the Trustee. As a result, pursuant to section 502(d) the Claim must be disallowed unless and until the Defendants return the Transfers to the Trustee.

134. As a result of the foregoing, the Trustee is entitled to an order disallowing the Claims.

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

i. On the First Claim for Relief, pursuant to sections 542, 550(a) and 551 of the Bankruptcy Code: (a) that the property that was the subject of the Transfers be immediately delivered and turned over to the Trustee, and (b) for an accounting by the Defendants of the property that was the subject of the Transfers or the value of such property;

ii. On the Second Claim for Relief, pursuant to sections 547, 550(a) and 551 of the Bankruptcy Code: (a) avoiding and preserving the Preference Period Transfers, (b) directing that the Preference Period Transfers be set aside, and (c) recovering the Preference Period Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS;

iii. On the Third Claim for Relief, pursuant to sections 548(a)(1)(A), 550(a) and 551 of the Bankruptcy Code: (a) avoiding and preserving the Two Year Transfers, (b) directing that the Two Year Transfers be set aside, and (c) recovering the Two Year Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS;

iv. On the Fourth Claim for Relief, pursuant to sections 548(a)(1)(B), 550(a) and 551 of the Bankruptcy Code: (a) avoiding and preserving the Two Year Transfers, (b) directing that the Two Year Transfers be set aside, and (c) recovering the Two Year Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS;

v. On the Fifth Claim for Relief, pursuant to sections 276, 276-a, 278 and/or 279 of the New York Debtor & Creditor Law and sections 544(b), 550(a) and 551 of the Bankruptcy Code: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, (c) recovering the Six Year Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS, and (d) recovering attorneys' fees from the Defendants;

vi. On the Sixth Claim for Relief, pursuant to sections 273, 278 and/or 279 of the New York Debtor and Creditor Law and sections 544(b), 550 and 551 of the Bankruptcy Code: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS;

vii. On the Seventh Claim for Relief, pursuant to sections 274, 278 and/or 279 of the New York Debtor and Creditor Law and sections 544(b), 550, 551 and 1107 of the Bankruptcy Code: (a) avoiding and preserving the Six Year Fraudulent Transfers, (b) directing the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, from the Defendants for the benefit of the state of BLMIS;

viii. On the Eighth Claim for Relief, pursuant to New York Debtor and Creditor Law §§ 275, 278 and/or 279 and Bankruptcy Code §§ 544(b), 550, 551, and 1107: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS;

ix. On the Ninth Claim for Relief, pursuant to NY CPLR 203(g) and sections 276, 276-a, 278 and/or 279 of the New York Debtor & Creditor Law and sections 544(b), 550(a), and 551 of the Bankruptcy Code: (a) avoiding and preserving the Transfers, (b) directing that the Transfers be set aside, (c) recovering the Transfers, or the value thereof, from the Defendants for the benefit of the estate of BLMIS, and (d) recovering attorneys' fees from the Defendants.

x. On the Tenth Claim for Relief, pursuant to section 278 of the New York Debtor and Creditor Law, sections 550(a) and 551 of the Bankruptcy Code, and 15 USC § 78fff-2(c)(3): (a) preserving the Subsequent Transfers, (b) directing that the Subsequent Transfers be set aside; (c) recovering the Subsequent Transfers, or the value thereof, from Defendants for the benefit of the estate of BLMIS, and (d) recovering attorneys' fees from Defendants.

xi. On the Eleventh Claim for Relief, that the claim or claims of Defendants be disallowed;

xii. On all Claims for Relief, pursuant to federal common law and N.Y. CPLR 5001 and 5004 awarding the Trustee prejudgment interest from the date on which the Transfers were received;

xiii. On all Claims for Relief, establishment of a constructive trust over the proceeds of the transfers in favor of the Trustee for the benefit of BLMIS's estate;

xiv. On all Claims for Relief, assignment of Defendants' income tax refunds from the United States, state and local governments paid on fictitious profits during the course of the scheme;

xv. Awarding the Trustee all applicable interest, costs, and disbursements of this action; and

xvi. Granting Plaintiff such other, further, and different relief as the Court deems just, proper, and equitable.

Date: May 12, 2009

s/David J. Sheehan
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Email: dsheehan@bakerlaw.com
Marc E. Hirschfield
Email: mhirschfield@bakerlaw.com

Attorneys for Irving H. Picard, Esq., Trustee for the SIPA Liquidation of Bernard L. Madoff Investment Securities LLC

EXHIBIT A

Bernard L. Madoff Investment Securities, LLC
Summary of Defendants' Accounts Maintained with BLMIS

A/C#	Account Name	Opening Date
1P0019	Barbara Picower	January 1, 1988
1C1006	Capital Growth Company	January 1, 1988
1D0010	Decisions Incorporated	January 1, 1988
1D0011	Decision Inc #2	January 1, 1992
1D0030	Decision Inc #3	January 1, 1993
1D0032	Decision Inc #4	January 1, 1993
1D0036	Decisions Inc #5	January 1, 1995
1D0082	Decisions Incorporated #6	April 18, 2006
1F0002	Favorite Fund	N/A
1J0004	J F Partnership	January 1, 1988
1J0001	Ja Primary Ltd Partnership	January 1, 1988
1J0024	Ja Special Ltd Partnership	January 1, 1993
1J0002	Jab Partnership	January 1, 1988
1P0021	Jeffry M Picower	December 31, 1995
1P0023	Jeffry M Picower Special Co	January 1, 1988
1P0022	Jeffry M Picower, P. C.	January 1, 1988
1J0003	Jemw Partnership	January 1, 1988
1J0005	Jfm Investment Co	N/A
1J0008	Jln Partnership	January 1, 1988
1J0009	Jmp Limited Partnership	January 1, 1988
1P0024	The Picower Foundation	January 1, 1990
1P0017	The Picower Institute For Medical Research	August 1, 1991
1P0018	Trust Fbo Gabrielle H Picower	January 1, 1988
1P0020	Trust Fbo Gabrielle H Picower	January 1, 1988

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1C1006	Capital Growth Company	1/2/96	CHECK	$ 53,500
1C1006	Capital Growth Company	4/1/96	CHECK	72,000
1C1006	Capital Growth Company	7/1/96	CHECK	52,500
1C1006	Capital Growth Company	10/1/96	CHECK	33,000
1C1006	Capital Growth Company	1/2/97	CHECK	60,000
1C1006	Capital Growth Company	4/1/97	CHECK	79,500
1C1006	Capital Growth Company	7/1/97	CHECK	56,500
1C1006	Capital Growth Company	10/1/97	CHECK	31,500
1C1006	Capital Growth Company	1/2/98	CHECK	53,000
1C1006	Capital Growth Company	4/1/98	CHECK	72,000
1C1006	Capital Growth Company	7/1/98	CHECK	54,500
1C1006	Capital Growth Company	10/1/98	CHECK	32,000
1C1006	Capital Growth Company	1/4/99	CHECK	69,000
1C1006	Capital Growth Company	4/1/99	CHECK	95,250
1C1006	Capital Growth Company	7/1/99	CHECK	48,250
1C1006	Capital Growth Company	10/1/99	CHECK	53,250
1C1006	Capital Growth Company	1/3/00	CHECK	68,250
1C1006	Capital Growth Company	4/3/00	CHECK	96,250
1C1006	Capital Growth Company	7/3/00	CHECK	102,529
1C1006	Capital Growth Company	10/2/00	CHECK	36,250
1C1006	Capital Growth Company	1/2/01	CHECK	46,250
1C1006	Capital Growth Company	4/2/01	CHECK	109,750
1C1006	Capital Growth Company	7/2/01	CHECK	33,750
1C1006	Capital Growth Company	10/1/01	CHECK	56,250
1C1006	Capital Growth Company	1/2/02	CHECK	33,750
1C1006	Capital Growth Company	4/1/02	CHECK	83,250
1C1006	Capital Growth Company	7/1/02	CHECK	121,689
1C1006	Capital Growth Company	10/1/02	CHECK	37,250
1C1006	Capital Growth Company	1/2/03	CHECK	116,201
1C1006	Capital Growth Company	4/1/03	CHECK	58,500
1C1006	Capital Growth Company	7/1/03	CHECK	6,000
1C1006	Capital Growth Company	10/1/03	CHECK	52,500
1C1006	Capital Growth Company	1/2/04	CHECK	6,000
1C1006	Capital Growth Company	7/1/04	CHECK	117,385
1C1006	Capital Growth Company	4/3/06	CHECK	4,000
1C1006	Capital Growth Company	7/3/06	CHECK	2,000
1C1006	Capital Growth Company	10/2/06	CHECK	3,000
1C1006	Capital Growth Company	1/2/07	CHECK	4,036,441
1C1006	Capital Growth Company	10/1/07	CHECK	2,500
ACCOUNT TOTAL				$ 6,145,495

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1D0010	Decisions Incorporated	12/11/95	WIRE	$ 50,000,000
1D0010	Decisions Incorporated	1/2/96	CHECK	50,000,000
1D0010	Decisions Incorporated	3/20/96	WIRE	50,000,000
1D0010	Decisions Incorporated	4/1/96	CHECK	50,000,000
1D0010	Decisions Incorporated	7/1/96	CHECK	50,000,000
1D0010	Decisions Incorporated	10/1/96	CHECK	88,153,381
1D0010	Decisions Incorporated	1/2/97	CHECK	94,421,978
1D0010	Decisions Incorporated	4/1/97	CHECK	98,846,425
1D0010	Decisions Incorporated	7/1/97	CHECK	102,981,269
1D0010	Decisions Incorporated	10/1/97	CHECK	50,000,000
1D0010	Decisions Incorporated	10/1/97	CHECK	59,550,855
1D0010	Decisions Incorporated	1/2/98	CHECK	50,000,000
1D0010	Decisions Incorporated	1/2/98	CHECK	61,248,231
1D0010	Decisions Incorporated	4/1/98	CHECK	50,000,000
1D0010	Decisions Incorporated	4/1/98	CHECK	68,332,425
1D0010	Decisions Incorporated	7/1/98	CHECK	63,395,646
1D0010	Decisions Incorporated	7/1/98	CHECK	60,000,000
1D0010	Decisions Incorporated	10/1/98	CHECK	60,000,000
1D0010	Decisions Incorporated	10/1/98	CHECK	69,466,958
1D0010	Decisions Incorporated	1/4/99	CHECK	68,240,752
1D0010	Decisions Incorporated	1/4/99	CHECK	65,000,000
1D0010	Decisions Incorporated	4/1/99	CHECK	69,123,333
1D0010	Decisions Incorporated	4/1/99	CHECK	70,000,000
1D0010	Decisions Incorporated	7/1/99	CHECK	74,054,669
1D0010	Decisions Incorporated	7/1/99	CHECK	70,000,000
1D0010	Decisions Incorporated	10/1/99	CHECK	74,038,969
1D0010	Decisions Incorporated	10/1/99	CHECK	75,000,000
1D0010	Decisions Incorporated	1/3/00	CHECK	56,828,747
1D0010	Decisions Incorporated	1/3/00	CHECK	60,000,000
1D0010	Decisions Incorporated	4/3/00	CHECK	80,000,000
1D0010	Decisions Incorporated	4/3/00	CHECK	78,677,125
1D0010	Decisions Incorporated	7/3/00	CHECK	88,459,640
1D0010	Decisions Incorporated	7/3/00	CHECK	80,000,000
1D0010	Decisions Incorporated	10/2/00	CHECK	83,429,231
1D0010	Decisions Incorporated	10/2/00	CHECK	90,000,000
1D0010	Decisions Incorporated	1/2/01	CHECK	87,137,329
1D0010	Decisions Incorporated	1/2/01	CHECK	90,000,000
1D0010	Decisions Incorporated	4/2/01	CHECK	90,000,000
1D0010	Decisions Incorporated	4/2/01	CHECK	94,011,325
1D0010	Decisions Incorporated	7/2/01	CHECK	98,660,469
1D0010	Decisions Incorporated	7/2/01	CHECK	95,000,000
1D0010	Decisions Incorporated	10/1/01	CHECK	75,000,000
1D0010	Decisions Incorporated	10/1/01	CHECK	75,000,000

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1D0010	Decisions Incorporated	10/1/01	CHECK	53,709,331
1D0010	Decisions Incorporated	1/2/02	CHECK	80,000,000
1D0010	Decisions Incorporated	1/2/02	CHECK	80,000,000
1D0010	Decisions Incorporated	1/2/02	CHECK	53,420,663
1D0010	Decisions Incorporated	4/1/02	CHECK	70,000,000
1D0010	Decisions Incorporated	4/1/02	CHECK	70,000,000
1D0010	Decisions Incorporated	4/1/02	CHECK	79,429,038
1D0010	Decisions Incorporated	7/1/02	CHECK	75,000,000
1D0010	Decisions Incorporated	7/1/02	CHECK	75,000,000
1D0010	Decisions Incorporated	7/1/02	CHECK	74,008,953
1D0010	Decisions Incorporated	10/1/02	CHECK	80,000,000
1D0010	Decisions Incorporated	10/1/02	CHECK	80,000,000
1D0010	Decisions Incorporated	10/1/02	CHECK	74,164,194
1D0010	Decisions Incorporated	4/1/03	CHECK	88,950,184
1D0010	Decisions Incorporated	4/1/03	CHECK	80,000,000
1D0010	Decisions Incorporated	4/1/03	CHECK	80,000,000
1D0010	Decisions Incorporated	7/1/03	CHECK	88,879,022
1D0010	Decisions Incorporated	7/1/03	CHECK	80,000,000
1D0010	Decisions Incorporated	7/1/03	CHECK	80,000,000
1D0010	Decisions Incorporated	10/1/03	CHECK	89,130,925
1D0010	Decisions Incorporated	10/1/03	CHECK	80,000,000
1D0010	Decisions Incorporated	10/1/03	CHECK	80,000,000
1D0010	Decisions Incorporated	1/2/04	CHECK	75,000,000
1D0010	Decisions Incorporated	1/2/04	CHECK	72,058,497
1D0010	Decisions Incorporated	4/1/04	CHECK	65,000,000
1D0010	Decisions Incorporated	4/1/04	CHECK	65,000,000
1D0010	Decisions Incorporated	4/1/04	CHECK	68,903,540
1D0010	Decisions Incorporated	7/1/04	CHECK	48,980,109
1D0010	Decisions Incorporated	1/3/05	CHECK	84,915,314
1D0010	Decisions Incorporated	1/3/05	CHECK	80,000,000
1D0010	Decisions Incorporated	1/3/05	CHECK	80,000,000
1D0010	Decisions Incorporated	4/1/05	CHECK	94,901,875
1D0010	Decisions Incorporated	10/3/05	CHECK	74,523,732
1D0010	Decisions Incorporated	1/3/06	CHECK	6,305,661
1D0010	Decisions Incorporated	4/17/07	WIRE	150,000,000
ACCOUNT TOTAL				$ 5,771,339,795
1D0082	Decisions Incorporated #6	9/12/06	WIRE	$ 125,000,000
ACCOUNT TOTAL				$ 125,000,000

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1J0001	Ja Primary Ltd Partnership	1/2/96	CHECK	$ 22,487,543
1J0001	Ja Primary Ltd Partnership	4/1/96	CHECK	27,922,377
1J0001	Ja Primary Ltd Partnership	7/1/96	CHECK	33,642,819
ACCOUNT TOTAL				$ 84,052,739
1J0002	Jab Partnership	1/2/96	CHECK	$ 182,450
1J0002	Jab Partnership	4/1/96	CHECK	176,700
1J0002	Jab Partnership	7/1/96	CHECK	175,700
1J0002	Jab Partnership	10/1/96	CHECK	176,200
1J0002	Jab Partnership	1/2/97	CHECK	176,200
1J0002	Jab Partnership	4/1/97	CHECK	127,000
1J0002	Jab Partnership	7/1/97	CHECK	631,000
1J0002	Jab Partnership	10/1/97	CHECK	64,726
1J0002	Jab Partnership	1/2/98	CHECK	115,514
1J0002	Jab Partnership	4/1/98	CHECK	126,000
1J0002	Jab Partnership	7/1/98	CHECK	244,623
1J0002	Jab Partnership	10/1/98	CHECK	146,623
1J0002	Jab Partnership	1/4/99	CHECK	199,623
1J0002	Jab Partnership	4/1/99	CHECK	296,586
1J0002	Jab Partnership	7/1/99	CHECK	566,850
1J0002	Jab Partnership	10/1/99	CHECK	577,362
1J0002	Jab Partnership	1/3/00	CHECK	1,374,085
1J0002	Jab Partnership	4/3/00	CHECK	569,600
1J0002	Jab Partnership	7/3/00	CHECK	577,600
1J0002	Jab Partnership	10/2/00	CHECK	586,100
1J0002	Jab Partnership	1/2/01	CHECK	1,408,823
1J0002	Jab Partnership	4/2/01	CHECK	582,750
1J0002	Jab Partnership	7/2/01	CHECK	611,050
1J0002	Jab Partnership	10/1/01	CHECK	571,500
1J0002	Jab Partnership	1/2/02	CHECK	710,693
1J0002	Jab Partnership	4/1/02	CHECK	180,637
1J0002	Jab Partnership	7/1/02	CHECK	190,627
1J0002	Jab Partnership	10/1/02	CHECK	174,637
1J0002	Jab Partnership	1/2/03	CHECK	19,848,893
1J0002	Jab Partnership	4/1/03	CHECK	130,691
1J0002	Jab Partnership	7/1/03	CHECK	117,307
1J0002	Jab Partnership	10/1/03	CHECK	123,845
1J0002	Jab Partnership	1/2/04	CHECK	819,573
1J0002	Jab Partnership	4/1/04	CHECK	125,335
1J0002	Jab Partnership	7/1/04	CHECK	295,335
1J0002	Jab Partnership	10/1/04	CHECK	118,085
1J0002	Jab Partnership	1/3/05	CHECK	1,542,885

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1J0002	Jab Partnership	10/3/05	CHECK	19,288
1J0002	Jab Partnership	1/3/06	CHECK	17,788
1J0002	Jab Partnership	4/3/06	CHECK	18,106
1J0002	Jab Partnership	7/3/06	CHECK	18,344
1J0002	Jab Partnership	10/2/06	CHECK	16,349
1J0002	Jab Partnership	1/2/07	CHECK	455,303
1J0002	Jab Partnership	4/2/07	CHECK	19,345
1J0002	Jab Partnership	7/2/07	CHECK	19,345
1J0002	Jab Partnership	10/1/07	CHECK	15,845
ACCOUNT TOTAL				$ 35,242,921
1J0003	Jemw Partnership	1/2/96	CHECK	$ 41,575
1J0003	Jemw Partnership	4/1/96	CHECK	45,575
1J0003	Jemw Partnership	7/1/96	CHECK	44,075
1J0003	Jemw Partnership	10/1/96	CHECK	44,575
1J0003	Jemw Partnership	1/2/97	CHECK	44,109
1J0003	Jemw Partnership	4/1/97	CHECK	55,075
1J0003	Jemw Partnership	7/1/97	CHECK	55,575
1J0003	Jemw Partnership	10/1/97	CHECK	56,575
1J0003	Jemw Partnership	1/2/98	CHECK	55,075
1J0003	Jemw Partnership	4/1/98	CHECK	70,075
1J0003	Jemw Partnership	7/1/98	CHECK	57,075
1J0003	Jemw Partnership	10/1/98	CHECK	56,575
1J0003	Jemw Partnership	1/4/99	CHECK	58,575
1J0003	Jemw Partnership	4/1/99	CHECK	44,075
1J0003	Jemw Partnership	7/1/99	CHECK	44,575
1J0003	Jemw Partnership	10/1/99	CHECK	45,075
1J0003	Jemw Partnership	1/3/00	CHECK	996,479
1J0003	Jemw Partnership	4/3/00	CHECK	48,525
1J0003	Jemw Partnership	7/3/00	CHECK	78,075
1J0003	Jemw Partnership	10/2/00	CHECK	51,575
1J0003	Jemw Partnership	1/2/01	CHECK	985,779
1J0003	Jemw Partnership	4/2/01	CHECK	25,275
1J0003	Jemw Partnership	7/2/01	CHECK	54,075
1J0003	Jemw Partnership	10/1/01	CHECK	43,075
1J0003	Jemw Partnership	1/2/02	CHECK	113,575
1J0003	Jemw Partnership	4/1/02	CHECK	51,075
1J0003	Jemw Partnership	7/1/02	CHECK	89,075
1J0003	Jemw Partnership	10/1/02	CHECK	70,575
1J0003	Jemw Partnership	1/2/03	CHECK	1,214,889
1J0003	Jemw Partnership	4/1/03	CHECK	209,625
1J0003	Jemw Partnership	7/1/03	CHECK	134,625

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1J0003	Jemw Partnership	10/1/03	CHECK	160,625
1J0003	Jemw Partnership	1/2/04	CHECK	305,625
1J0003	Jemw Partnership	4/1/04	CHECK	229,625
1J0003	Jemw Partnership	7/1/04	CHECK	160,625
1J0003	Jemw Partnership	10/1/04	CHECK	163,625
1J0003	Jemw Partnership	1/3/05	CHECK	217,125
1J0003	Jemw Partnership	4/1/05	CHECK	245,625
1J0003	Jemw Partnership	7/1/05	CHECK	159,875
1J0003	Jemw Partnership	10/3/05	CHECK	171,375
1J0003	Jemw Partnership	1/3/06	CHECK	268,375
1J0003	Jemw Partnership	4/3/06	CHECK	157,138
1J0003	Jemw Partnership	7/3/06	CHECK	110,138
1J0003	Jemw Partnership	10/2/06	CHECK	103,138
1J0003	Jemw Partnership	1/2/07	CHECK	972,647
1J0003	Jemw Partnership	4/2/07	CHECK	113,138
1J0003	Jemw Partnership	7/2/07	CHECK	227,000
1J0003	Jemw Partnership	10/1/07	CHECK	160,750
ACCOUNT TOTAL				$ 8,910,980
1J0004	J F Partnership	1/2/96	CHECK	$ 1,023,830
1J0004	J F Partnership	4/1/96	CHECK	396,448
1J0004	J F Partnership	7/1/96	CHECK	14,750
1J0004	J F Partnership	10/1/96	CHECK	13,500
1J0004	J F Partnership	1/2/97	CHECK	110,150
1J0004	J F Partnership	4/1/97	CHECK	10,500
1J0004	J F Partnership	7/1/97	CHECK	13,000
1J0004	J F Partnership	10/1/97	CHECK	14,000
1J0004	J F Partnership	1/2/98	CHECK	115,500
1J0004	J F Partnership	4/1/98	CHECK	8,500
1J0004	J F Partnership	7/1/98	CHECK	25,500
1J0004	J F Partnership	10/1/98	CHECK	19,000
1J0004	J F Partnership	1/4/99	CHECK	512,000
1J0004	J F Partnership	4/1/99	CHECK	14,000
1J0004	J F Partnership	7/1/99	CHECK	20,000
1J0004	J F Partnership	10/1/99	CHECK	17,500
1J0004	J F Partnership	1/3/00	CHECK	113,000
1J0004	J F Partnership	4/3/00	CHECK	10,000
1J0004	J F Partnership	7/3/00	CHECK	22,500
1J0004	J F Partnership	10/2/00	CHECK	24,500
1J0004	J F Partnership	1/2/01	CHECK	112,500
1J0004	J F Partnership	4/2/01	CHECK	10,900
1J0004	J F Partnership	7/2/01	CHECK	33,000

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1J0004	J F Partnership	10/1/01	CHECK	40,500
1J0004	J F Partnership	1/2/02	CHECK	117,500
1J0004	J F Partnership	4/1/02	CHECK	42,000
1J0004	J F Partnership	7/1/02	CHECK	31,000
1J0004	J F Partnership	10/1/02	CHECK	158,000
1J0004	J F Partnership	1/2/03	CHECK	178,500
1J0004	J F Partnership	4/1/03	CHECK	31,000
1J0004	J F Partnership	7/1/03	CHECK	16,500
1J0004	J F Partnership	10/1/03	CHECK	20,000
1J0004	J F Partnership	1/2/04	CHECK	37,000
1J0004	J F Partnership	4/1/04	CHECK	21,000
1J0004	J F Partnership	7/1/04	CHECK	21,500
1J0004	J F Partnership	10/1/04	CHECK	17,000
1J0004	J F Partnership	1/3/05	CHECK	17,500
1J0004	J F Partnership	4/1/05	CHECK	21,000
1J0004	J F Partnership	7/1/05	CHECK	13,000
1J0004	J F Partnership	10/3/05	CHECK	21,000
1J0004	J F Partnership	1/3/06	CHECK	162,000
1J0004	J F Partnership	4/3/06	CHECK	35,000
1J0004	J F Partnership	7/3/06	CHECK	17,000
1J0004	J F Partnership	10/2/06	CHECK	10,000
1J0004	J F Partnership	1/2/07	CHECK	160,000
1J0004	J F Partnership	4/2/07	CHECK	26,100
1J0004	J F Partnership	7/2/07	CHECK	6,000
1J0004	J F Partnership	10/1/07	CHECK	13,000
ACCOUNT TOTAL				$ 3,887,678
1J0008	Jln Partnership	1/2/96	CHECK	$ 1,131,102
1J0008	Jln Partnership	4/1/96	CHECK	641,900
1J0008	Jln Partnership	7/1/96	CHECK	1,012,156
1J0008	Jln Partnership	10/1/96	CHECK	1,510,844
1J0008	Jln Partnership	1/2/97	CHECK	113,563
1J0008	Jln Partnership	4/1/97	CHECK	614,500
1J0008	Jln Partnership	7/1/97	CHECK	1,089,656
1J0008	Jln Partnership	10/1/97	CHECK	110,344
1J0008	Jln Partnership	1/2/98	CHECK	3,312,680
1J0008	Jln Partnership	4/1/98	CHECK	1,286,000
1J0008	Jln Partnership	7/1/98	CHECK	1,100,656
1J0008	Jln Partnership	10/1/98	CHECK	188,844
1J0008	Jln Partnership	1/4/99	CHECK	825,050
1J0008	Jln Partnership	4/1/99	CHECK	298,756
1J0008	Jln Partnership	7/1/99	CHECK	180,656

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1J0008	Jln Partnership	10/1/99	CHECK	170,844
1J0008	Jln Partnership	1/3/00	CHECK	514,439
1J0008	Jln Partnership	4/3/00	CHECK	534,500
1J0008	Jln Partnership	7/3/00	CHECK	649,656
1J0008	Jln Partnership	10/2/00	CHECK	735,344
1J0008	Jln Partnership	1/2/01	CHECK	197,319
1J0008	Jln Partnership	4/2/01	CHECK	173,000
1J0008	Jln Partnership	7/2/01	CHECK	519,656
1J0008	Jln Partnership	10/1/01	CHECK	512,344
1J0008	Jln Partnership	1/2/02	CHECK	508,819
1J0008	Jln Partnership	4/1/02	CHECK	109,000
1J0008	Jln Partnership	7/1/02	CHECK	391,156
1J0008	Jln Partnership	10/1/02	CHECK	75,344
1J0008	Jln Partnership	1/2/03	CHECK	1,378,852
1J0008	Jln Partnership	4/1/03	CHECK	195,000
1J0008	Jln Partnership	7/1/03	CHECK	421,546
1J0008	Jln Partnership	10/1/03	CHECK	392,105
1J0008	Jln Partnership	1/2/04	CHECK	1,555,305
1J0008	Jln Partnership	4/1/04	CHECK	295,500
1J0008	Jln Partnership	7/1/04	CHECK	220,046
1J0008	Jln Partnership	10/1/04	CHECK	221,105
1J0008	Jln Partnership	1/3/05	CHECK	212,176
1J0008	Jln Partnership	4/1/05	CHECK	236,500
1J0008	Jln Partnership	7/1/05	CHECK	10,107,046
1J0008	Jln Partnership	10/3/05	CHECK	149,605
1J0008	Jln Partnership	1/3/06	CHECK	146,176
1J0008	Jln Partnership	4/3/06	CHECK	458,500
1J0008	Jln Partnership	7/3/06	CHECK	2,695,196
1J0008	Jln Partnership	10/2/06	CHECK	2,767,513
1J0008	Jln Partnership	1/2/07	CHECK	145,609
1J0008	Jln Partnership	4/2/07	CHECK	9,761,417
1J0008	Jln Partnership	7/2/07	CHECK	9,507,655
1J0008	Jln Partnership	10/1/07	CHECK	9,677,905
ACCOUNT TOTAL				$ 69,052,885
1J0024	Ja Special Ltd Partnership	1/12/96	CHECK	$ 120,000
1J0024	Ja Special Ltd Partnership	2/2/96	CHECK	264,000
1J0024	Ja Special Ltd Partnership	4/11/96	CHECK	120,000
1J0024	Ja Special Ltd Partnership	5/6/96	CHECK	264,000
1J0024	Ja Special Ltd Partnership	7/11/96	CHECK	144,000
1J0024	Ja Special Ltd Partnership	8/5/96	CHECK	264,000
1J0024	Ja Special Ltd Partnership	10/4/96	CHECK	264,000

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1J0024	Ja Special Ltd Partnership	10/17/96	CHECK	144,000
1J0024	Ja Special Ltd Partnership	1/17/97	CHECK	144,000
1J0024	Ja Special Ltd Partnership	2/4/97	CHECK	264,000
1J0024	Ja Special Ltd Partnership	3/4/97	CHECK	19,445
1J0024	Ja Special Ltd Partnership	1/2/03	CHECK	75,000,000
1J0024	Ja Special Ltd Partnership	1/2/03	CHECK	75,000,000
1J0024	Ja Special Ltd Partnership	1/2/03	CHECK	51,842,665
1J0024	Ja Special Ltd Partnership	10/1/04	CHECK	49,410,185
ACCOUNT TOTAL				$ 253,264,295
1P0017	The Picower Institute For Medical Research	12/7/95	CHECK	$ 170,000
1P0017	The Picower Institute For Medical Research	1/4/96	CHECK	350,000
1P0017	The Picower Institute For Medical Research	1/22/96	CHECK	320,000
1P0017	The Picower Institute For Medical Research	2/7/96	CHECK	430,000
1P0017	The Picower Institute For Medical Research	3/7/96	CHECK	365,000
1P0017	The Picower Institute For Medical Research	4/5/96	CHECK	545,000
1P0017	The Picower Institute For Medical Research	5/7/96	CHECK	618,000
1P0017	The Picower Institute For Medical Research	6/6/96	CHECK	430,000
1P0017	The Picower Institute For Medical Research	7/5/96	CHECK	330,000
1P0017	The Picower Institute For Medical Research	8/7/96	CHECK	510,000
1P0017	The Picower Institute For Medical Research	9/4/96	CHECK	310,000
1P0017	The Picower Institute For Medical Research	10/4/96	CHECK	630,000
1P0017	The Picower Institute For Medical Research	11/6/96	CHECK	540,000
1P0017	The Picower Institute For Medical Research	12/4/96	CHECK	600,000
1P0017	The Picower Institute For Medical Research	12/12/96	CHECK	1,000,000
1P0017	The Picower Institute For Medical Research	1/6/97	CHECK	625,000
1P0017	The Picower Institute For Medical Research	2/5/97	CHECK	520,000
1P0017	The Picower Institute For Medical Research	3/5/97	CHECK	370,000
1P0017	The Picower Institute For Medical Research	4/4/97	CHECK	505,000
1P0017	The Picower Institute For Medical Research	5/6/97	CHECK	480,000
1P0017	The Picower Institute For Medical Research	6/4/97	CHECK	475,000
1P0017	The Picower Institute For Medical Research	7/3/97	CHECK	335,000
1P0017	The Picower Institute For Medical Research	8/12/97	CHECK	710,000
1P0017	The Picower Institute For Medical Research	8/20/97	CHECK	1,000,000
1P0017	The Picower Institute For Medical Research	9/10/97	CHECK	480,000
1P0017	The Picower Institute For Medical Research	10/9/97	CHECK	560,000
1P0017	The Picower Institute For Medical Research	11/10/97	CHECK	490,000
1P0017	The Picower Institute For Medical Research	12/10/97	CHECK	515,000
1P0017	The Picower Institute For Medical Research	1/12/98	CHECK	650,000
1P0017	The Picower Institute For Medical Research	2/10/98	CHECK	710,000
1P0017	The Picower Institute For Medical Research	3/10/98	CHECK	275,000
1P0017	The Picower Institute For Medical Research	4/9/98	CHECK	385,000
1P0017	The Picower Institute For Medical Research	5/12/98	CHECK	365,000
1P0017	The Picower Institute For Medical Research	6/10/98	CHECK	355,000

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	Account Name	Date	Transfer	Amount
1P0017	The Picower Institute For Medical Research	7/10/98	CHECK	490,000
1P0017	The Picower Institute For Medical Research	8/11/98	CHECK	525,000
1P0017	The Picower Institute For Medical Research	9/10/98	CHECK	795,000
1P0017	The Picower Institute For Medical Research	10/9/98	CHECK	750,000
1P0017	The Picower Institute For Medical Research	11/9/98	CHECK	640,000
1P0017	The Picower Institute For Medical Research	12/9/98	CHECK	671,000
1P0017	The Picower Institute For Medical Research	1/11/99	CHECK	797,000
1P0017	The Picower Institute For Medical Research	2/8/99	CHECK	742,000
1P0017	The Picower Institute For Medical Research	3/10/99	CHECK	695,000
1P0017	The Picower Institute For Medical Research	4/9/99	CHECK	637,000
1P0017	The Picower Institute For Medical Research	5/10/99	CHECK	658,000
1P0017	The Picower Institute For Medical Research	6/9/99	CHECK	527,000
1P0017	The Picower Institute For Medical Research	8/9/99	CHECK	424,000
1P0017	The Picower Institute For Medical Research	9/9/99	CHECK	530,000
1P0017	The Picower Institute For Medical Research	10/12/99	WIRE	696,000
1P0017	The Picower Institute For Medical Research	11/8/99	WIRE	809,000
1P0017	The Picower Institute For Medical Research	12/8/99	WIRE	717,000
1P0017	The Picower Institute For Medical Research	1/10/00	WIRE	818,000
1P0017	The Picower Institute For Medical Research	2/9/00	WIRE	593,000
1P0017	The Picower Institute For Medical Research	3/9/00	WIRE	497,000
1P0017	The Picower Institute For Medical Research	4/10/00	WIRE	471,500
1P0017	The Picower Institute For Medical Research	5/9/00	WIRE	553,500
1P0017	The Picower Institute For Medical Research	5/11/00	WIRE	500,000
1P0017	The Picower Institute For Medical Research	6/12/00	WIRE	890,100
1P0017	The Picower Institute For Medical Research	7/11/00	WIRE	788,100
1P0017	The Picower Institute For Medical Research	8/9/00	WIRE	825,500
1P0017	The Picower Institute For Medical Research	9/11/00	WIRE	638,500
1P0017	The Picower Institute For Medical Research	10/10/00	WIRE	735,000
1P0017	The Picower Institute For Medical Research	11/9/00	WIRE	777,000
1P0017	The Picower Institute For Medical Research	12/11/00	WIRE	622,000
1P0017	The Picower Institute For Medical Research	1/8/01	WIRE	677,000
1P0017	The Picower Institute For Medical Research	2/12/01	WIRE	637,000
1P0017	The Picower Institute For Medical Research	3/12/01	WIRE	634,000
1P0017	The Picower Institute For Medical Research	4/9/01	WIRE	705,000
1P0017	The Picower Institute For Medical Research	5/9/01	WIRE	395,000
1P0017	The Picower Institute For Medical Research	6/11/01	WIRE	479,000
1P0017	The Picower Institute For Medical Research	7/9/01	WIRE	614,000
1P0017	The Picower Institute For Medical Research	8/10/01	WIRE	752,000
1P0017	The Picower Institute For Medical Research	9/12/01	WIRE	480,000
1P0017	The Picower Institute For Medical Research	10/10/01	WIRE	617,000
1P0017	The Picower Institute For Medical Research	11/5/01	WIRE	685,000
1P0017	The Picower Institute For Medical Research	12/11/01	WIRE	624,000
1P0017	The Picower Institute For Medical Research	5/14/02	CHECK	29,319
ACCOUNT TOTAL				$ 44,093,519

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1P0019	Barbara Picower	1/2/96	CHECK	$ 65,000
1P0019	Barbara Picower	4/1/96	CHECK	60,000
1P0019	Barbara Picower	7/1/96	CHECK	40,000
1P0019	Barbara Picower	10/1/96	CHECK	50,000
1P0019	Barbara Picower	1/2/97	CHECK	55,000
1P0019	Barbara Picower	4/1/97	CHECK	65,000
1P0019	Barbara Picower	7/1/97	CHECK	60,000
1P0019	Barbara Picower	10/1/97	CHECK	150,000
1P0019	Barbara Picower	1/2/98	CHECK	80,000
1P0019	Barbara Picower	4/1/98	CHECK	75,000
1P0019	Barbara Picower	7/1/98	CHECK	95,000
1P0019	Barbara Picower	10/1/98	CHECK	55,000
1P0019	Barbara Picower	1/4/99	CHECK	60,000
1P0019	Barbara Picower	4/1/99	CHECK	90,000
1P0019	Barbara Picower	7/1/99	CHECK	60,000
1P0019	Barbara Picower	10/1/99	CHECK	65,000
1P0019	Barbara Picower	1/3/00	CHECK	70,000
1P0019	Barbara Picower	4/3/00	CHECK	45,000
1P0019	Barbara Picower	7/3/00	CHECK	60,000
1P0019	Barbara Picower	10/2/00	CHECK	100,000
1P0019	Barbara Picower	1/2/01	CHECK	75,000
1P0019	Barbara Picower	4/2/01	CHECK	40,000
1P0019	Barbara Picower	7/2/01	CHECK	50,000
1P0019	Barbara Picower	10/1/01	CHECK	40,000
1P0019	Barbara Picower	1/2/02	CHECK	40,000
1P0019	Barbara Picower	4/1/02	CHECK	50,000
1P0019	Barbara Picower	7/1/02	CHECK	70,000
1P0019	Barbara Picower	10/1/02	CHECK	300,000
1P0019	Barbara Picower	1/2/03	CHECK	250,000
1P0019	Barbara Picower	4/1/03	CHECK	150,000
1P0019	Barbara Picower	7/1/03	CHECK	350,000
1P0019	Barbara Picower	10/1/03	CHECK	80,000
1P0019	Barbara Picower	1/2/04	CHECK	100,000
1P0019	Barbara Picower	4/1/04	CHECK	70,000
1P0019	Barbara Picower	7/1/04	CHECK	80,000
1P0019	Barbara Picower	10/1/04	CHECK	35,000
1P0019	Barbara Picower	1/3/05	CHECK	100,000
1P0019	Barbara Picower	1/3/05	CHECK	25,000
1P0019	Barbara Picower	4/1/05	CHECK	45,000
1P0019	Barbara Picower	7/1/05	CHECK	100,000
1P0019	Barbara Picower	10/3/05	CHECK	60,000
1P0019	Barbara Picower	1/3/06	CHECK	100,000
1P0019	Barbara Picower	4/3/06	CHECK	60,000

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1P0019	Barbara Picower	7/3/06	CHECK	50,000
1P0019	Barbara Picower	10/2/06	CHECK	50,000
1P0019	Barbara Picower	1/2/07	CHECK	70,000
1P0019	Barbara Picower	4/2/07	CHECK	50,000
1P0019	Barbara Picower	7/2/07	CHECK	125,000
1P0019	Barbara Picower	10/1/07	CHECK	130,000
1P0019	Barbara Picower	2/11/08	CHECK	75,000
1P0019	Barbara Picower	4/11/08	CHECK	60,000
1P0019	Barbara Picower	7/24/08	WIRE	150,000
ACCOUNT TOTAL				$ 4,430,000
1P0020	Trust Fbo Gabrielle H Picower	4/1/96	CHECK	$ 665,000
1P0020	Trust Fbo Gabrielle H Picower	6/7/96	CHECK	167,000
1P0020	Trust Fbo Gabrielle H Picower	4/1/97	CHECK	182,000
1P0020	Trust Fbo Gabrielle H Picower	7/1/97	CHECK	90,000
1P0020	Trust Fbo Gabrielle H Picower	1/4/99	CHECK	5,000
1P0020	Trust Fbo Gabrielle H Picower	1/3/00	CHECK	5,000
1P0020	Trust Fbo Gabrielle H Picower	7/3/00	CHECK	5,000
1P0020	Trust Fbo Gabrielle H Picower	1/2/01	CHECK	5,000
1P0020	Trust Fbo Gabrielle H Picower	4/2/01	CHECK	15,000
1P0020	Trust Fbo Gabrielle H Picower	7/2/01	CHECK	5,000
1P0020	Trust Fbo Gabrielle H Picower	4/15/02	CHECK	80,000
1P0020	Trust Fbo Gabrielle H Picower	6/14/02	CHECK	10,000
1P0020	Trust Fbo Gabrielle H Picower	7/1/02	CHECK	22,500
1P0020	Trust Fbo Gabrielle H Picower	1/2/03	CHECK	20,000
1P0020	Trust Fbo Gabrielle H Picower	4/1/03	CHECK	220,000
1P0020	Trust Fbo Gabrielle H Picower	7/1/03	CHECK	50,000
1P0020	Trust Fbo Gabrielle H Picower	1/2/04	CHECK	53,000
1P0020	Trust Fbo Gabrielle H Picower	4/1/04	CHECK	330,000
1P0020	Trust Fbo Gabrielle H Picower	7/1/04	CHECK	95,000
1P0020	Trust Fbo Gabrielle H Picower	1/3/05	CHECK	95,000
1P0020	Trust Fbo Gabrielle H Picower	4/1/05	CHECK	4,450,000
1P0020	Trust Fbo Gabrielle H Picower	7/1/05	CHECK	840,000
1P0020	Trust Fbo Gabrielle H Picower	4/3/06	CHECK	190,000
1P0020	Trust Fbo Gabrielle H Picower	4/2/07	CHECK	30,000
1P0020	Trust Fbo Gabrielle H Picower	7/2/07	CHECK	115,000
1P0020	Trust Fbo Gabrielle H Picower	4/11/08	CHECK	300,000
1P0020	Trust Fbo Gabrielle H Picower	9/11/08	CHECK	100,000
ACCOUNT TOTAL				$ 8,144,500

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	Account Name	Date	Transfer	Amount
1P0021	Jeffry M Picower	1/19/96	CHECK	$ 1,300
1P0021	Jeffry M Picower	1/23/96	CHECK	1,069
1P0021	Jeffry M Picower	1/23/96	CHECK	1,700
1P0021	Jeffry M Picower	2/7/96	CHECK	1,550
1P0021	Jeffry M Picower	2/7/96	CHECK	1,440
1P0021	Jeffry M Picower	4/25/96	CHECK	1,600
1P0021	Jeffry M Picower	4/25/96	CHECK	1,844
1P0021	Jeffry M Picower	5/6/96	CHECK	1,594
1P0021	Jeffry M Picower	7/8/96	CHECK	1,700
1P0021	Jeffry M Picower	7/8/96	CHECK	1,069
1P0021	Jeffry M Picower	7/19/96	CHECK	1,138
1P0021	Jeffry M Picower	8/5/96	CHECK	1,440
1P0021	Jeffry M Picower	8/5/96	CHECK	1,550
1P0021	Jeffry M Picower	10/4/96	CHECK	1,600
1P0021	Jeffry M Picower	11/7/96	CHECK	1,594
1P0021	Jeffry M Picower	1/8/97	CHECK	1,069
1P0021	Jeffry M Picower	1/16/97	CHECK	1,138
1P0021	Jeffry M Picower	2/4/97	CHECK	1,550
1P0021	Jeffry M Picower	2/4/97	CHECK	1,280
1P0021	Jeffry M Picower	5/5/97	CHECK	809
1P0021	Jeffry M Picower	5/6/97	CHECK	1,594
1P0021	Jeffry M Picower	7/8/97	CHECK	1,069
1P0021	Jeffry M Picower	7/18/97	CHECK	1,138
1P0021	Jeffry M Picower	7/18/97	CHECK	582
1P0021	Jeffry M Picower	8/7/97	CHECK	1,280
1P0021	Jeffry M Picower	10/29/97	CHECK	30,600
1P0021	Jeffry M Picower	1/15/98	CHECK	1,138
1P0021	Jeffry M Picower	2/5/98	CHECK	1,120
1P0021	Jeffry M Picower	7/20/98	CHECK	1,138
1P0021	Jeffry M Picower	8/12/98	CHECK	1,120
1P0021	Jeffry M Picower	1/27/99	CHECK	1,138
1P0021	Jeffry M Picower	2/4/99	CHECK	960
1P0021	Jeffry M Picower	7/19/99	CHECK	1,138
1P0021	Jeffry M Picower	1/18/00	CHECK	1,138
1P0021	Jeffry M Picower	7/18/00	CHECK	975
1P0021	Jeffry M Picower	1/17/01	CHECK	975
1P0021	Jeffry M Picower	7/20/01	CHECK	975
1P0021	Jeffry M Picower	1/16/02	CHECK	975
1P0021	Jeffry M Picower	7/17/02	CHECK	813
1P0021	Jeffry M Picower	1/16/03	CHECK	813
1P0021	Jeffry M Picower	7/16/03	CHECK	650
1P0021	Jeffry M Picower	1/16/04	CHECK	650
1P0021	Jeffry M Picower	7/16/04	CHECK	650

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1P0021	Jeffry M Picower	1/14/05	CHECK	650
1P0021	Jeffry M Picower	7/15/05	CHECK	488
1P0021	Jeffry M Picower	7/17/06	CHECK	488
1P0021	Jeffry M Picower	1/17/07	CHECK	488
1P0021	Jeffry M Picower	7/18/07	CHECK	488
1P0021	Jeffry M Picower	1/17/08	CHECK	488
1P0021	Jeffry M Picower	7/17/08	CHECK	488
ACCOUNT TOTAL				$ 84,231
1P0023	Jeffry M Picower Special Co	1/2/96	CHECK	$ 15,000
1P0023	Jeffry M Picower Special Co	4/1/96	CHECK	20,000
1P0023	Jeffry M Picower Special Co	7/1/96	CHECK	18,000
1P0023	Jeffry M Picower Special Co	10/1/96	CHECK	18,500
1P0023	Jeffry M Picower Special Co	1/2/97	CHECK	19,000
1P0023	Jeffry M Picower Special Co	4/1/97	CHECK	20,000
1P0023	Jeffry M Picower Special Co	7/1/97	CHECK	23,000
1P0023	Jeffry M Picower Special Co	10/1/97	CHECK	22,000
1P0023	Jeffry M Picower Special Co	1/2/98	CHECK	20,000
1P0023	Jeffry M Picower Special Co	4/1/98	CHECK	30,000
1P0023	Jeffry M Picower Special Co	7/1/98	CHECK	27,000
1P0023	Jeffry M Picower Special Co	10/1/98	CHECK	35,000
1P0023	Jeffry M Picower Special Co	1/4/99	CHECK	30,000
1P0023	Jeffry M Picower Special Co	4/1/99	CHECK	38,000
1P0023	Jeffry M Picower Special Co	7/1/99	CHECK	25,000
1P0023	Jeffry M Picower Special Co	10/1/99	CHECK	32,000
1P0023	Jeffry M Picower Special Co	1/3/00	CHECK	30,000
1P0023	Jeffry M Picower Special Co	4/3/00	CHECK	19,000
1P0023	Jeffry M Picower Special Co	7/3/00	CHECK	45,000
1P0023	Jeffry M Picower Special Co	10/2/00	CHECK	37,000
1P0023	Jeffry M Picower Special Co	1/2/01	CHECK	32,000
1P0023	Jeffry M Picower Special Co	4/2/01	CHECK	32,000
1P0023	Jeffry M Picower Special Co	7/2/01	CHECK	33,000
1P0023	Jeffry M Picower Special Co	10/1/01	CHECK	27,000
1P0023	Jeffry M Picower Special Co	1/2/02	CHECK	55,000
1P0023	Jeffry M Picower Special Co	4/1/02	CHECK	55,000
1P0023	Jeffry M Picower Special Co	7/1/02	CHECK	75,000
1P0023	Jeffry M Picower Special Co	10/1/02	CHECK	20,000
1P0023	Jeffry M Picower Special Co	1/2/03	CHECK	25,150,000
1P0023	Jeffry M Picower Special Co	4/1/03	CHECK	55,000
1P0023	Jeffry M Picower Special Co	7/1/03	CHECK	25,000
1P0023	Jeffry M Picower Special Co	10/1/03	CHECK	40,000
1P0023	Jeffry M Picower Special Co	1/2/04	CHECK	65,000

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1P0023	Jeffry M Picower Special Co	4/1/04	CHECK	25,000
1P0023	Jeffry M Picower Special Co	7/1/04	CHECK	30,000
1P0023	Jeffry M Picower Special Co	10/1/04	CHECK	35,000
1P0023	Jeffry M Picower Special Co	1/3/05	CHECK	2,900,000
1P0023	Jeffry M Picower Special Co	4/1/05	CHECK	100,000
1P0023	Jeffry M Picower Special Co	7/1/05	CHECK	20,000
1P0023	Jeffry M Picower Special Co	10/3/05	CHECK	55,000
1P0023	Jeffry M Picower Special Co	1/3/06	CHECK	3,000,000
1P0023	Jeffry M Picower Special Co	4/3/06	CHECK	160,000
1P0023	Jeffry M Picower Special Co	10/2/06	CHECK	50,000
1P0023	Jeffry M Picower Special Co	1/2/07	CHECK	4,160,000
1P0023	Jeffry M Picower Special Co	2/11/08	CHECK	4,750,000
ACCOUNT TOTAL				$ 41,472,500
1P0024	The Picower Foundation	12/18/95	CHECK	$ 70,000
1P0024	The Picower Foundation	2/29/96	CHECK	225,000
1P0024	The Picower Foundation	5/28/96	CHECK	200,000
1P0024	The Picower Foundation	6/11/96	CHECK	450,000
1P0024	The Picower Foundation	7/23/96	CHECK	100,000
1P0024	The Picower Foundation	8/29/96	CHECK	250,000
1P0024	The Picower Foundation	9/24/96	CHECK	150,000
1P0024	The Picower Foundation	11/26/96	CHECK	250,000
1P0024	The Picower Foundation	12/10/96	CHECK	300,000
1P0024	The Picower Foundation	12/23/96	CHECK	75,000
1P0024	The Picower Foundation	3/19/97	CHECK	150,000
1P0024	The Picower Foundation	5/6/97	CHECK	150,000
1P0024	The Picower Foundation	7/3/97	CHECK	850,000
1P0024	The Picower Foundation	10/28/97	CHECK	325,000
1P0024	The Picower Foundation	12/4/97	CHECK	450,000
1P0024	The Picower Foundation	12/16/97	CHECK	1,500,000
1P0024	The Picower Foundation	2/2/98	CHECK	150,000
1P0024	The Picower Foundation	3/30/98	CHECK	200,000
1P0024	The Picower Foundation	4/27/98	CHECK	100,000
1P0024	The Picower Foundation	7/1/98	CHECK	1,500,000
1P0024	The Picower Foundation	9/9/98	CHECK	300,000
1P0024	The Picower Foundation	11/9/98	CHECK	1,700,000
1P0024	The Picower Foundation	12/15/98	CHECK	5,500,000
1P0024	The Picower Foundation	3/9/99	CHECK	1,200,000
1P0024	The Picower Foundation	5/4/99	CHECK	1,000,000
1P0024	The Picower Foundation	6/24/99	CHECK	2,000,000
1P0024	The Picower Foundation	8/31/99	CHECK	700,000
1P0024	The Picower Foundation	11/1/99	WIRE	2,100,000

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1P0024	The Picower Foundation	12/15/99	WIRE	6,600,000
1P0024	The Picower Foundation	2/29/00	WIRE	2,000,000
1P0024	The Picower Foundation	5/11/00	WIRE	1,500,000
1P0024	The Picower Foundation	7/6/00	WIRE	2,750,000
1P0024	The Picower Foundation	7/10/00	WIRE	3,000,000
1P0024	The Picower Foundation	8/21/00	WIRE	2,300,000
1P0024	The Picower Foundation	10/31/00	WIRE	1,000,000
1P0024	The Picower Foundation	11/6/00	WIRE	4,300,000
1P0024	The Picower Foundation	12/18/00	WIRE	7,500,000
1P0024	The Picower Foundation	3/5/01	WIRE	2,000,000
1P0024	The Picower Foundation	4/25/01	WIRE	3,000,000
1P0024	The Picower Foundation	5/10/01	WIRE	2,700,000
1P0024	The Picower Foundation	6/13/01	WIRE	2,000,000
1P0024	The Picower Foundation	6/26/01	WIRE	5,000,000
1P0024	The Picower Foundation	6/29/01	WIRE	3,000,000
1P0024	The Picower Foundation	8/21/01	WIRE	6,000,000
1P0024	The Picower Foundation	11/2/01	WIRE	5,000,000
1P0024	The Picower Foundation	12/17/01	WIRE	10,000,000
1P0024	The Picower Foundation	12/26/01	WIRE	10,000,000
1P0024	The Picower Foundation	5/9/02	CHECK	1,500,000
1P0024	The Picower Foundation	7/1/02	CHECK	2,500,000
1P0024	The Picower Foundation	9/11/02	WIRE	1,500,000
1P0024	The Picower Foundation	10/28/02	WIRE	2,300,000
1P0024	The Picower Foundation	12/9/02	WIRE	2,800,000
1P0024	The Picower Foundation	12/23/02	WIRE	16,500,000
1P0024	The Picower Foundation	3/5/03	WIRE	2,000,000
1P0024	The Picower Foundation	5/5/03	WIRE	1,500,000
1P0024	The Picower Foundation	7/1/03	WIRE	3,000,000
1P0024	The Picower Foundation	9/15/03	WIRE	1,600,000
1P0024	The Picower Foundation	11/5/03	WIRE	3,500,000
1P0024	The Picower Foundation	12/12/03	WIRE	3,700,000
1P0024	The Picower Foundation	12/23/03	WIRE	10,000,000
1P0024	The Picower Foundation	3/9/04	WIRE	1,000,000
1P0024	The Picower Foundation	5/4/04	WIRE	2,600,000
1P0024	The Picower Foundation	7/7/04	WIRE	6,500,000
1P0024	The Picower Foundation	9/8/04	WIRE	2,850,000
1P0024	The Picower Foundation	11/3/04	WIRE	3,900,000
1P0024	The Picower Foundation	12/21/04	WIRE	13,300,000
1P0024	The Picower Foundation	3/8/05	WIRE	2,000,000
1P0024	The Picower Foundation	5/3/05	WIRE	3,000,000
1P0024	The Picower Foundation	7/6/05	WIRE	6,750,000
1P0024	The Picower Foundation	9/7/05	WIRE	2,300,000
1P0024	The Picower Foundation	11/3/05	WIRE	4,750,000

EXHIBIT B

Bernard L. Madoff Investment Securities, LLC
Summary of Cash Transfers to Defendants

For the Period from 12/1/95 - 12/11/08				
A/C#	**Account Name**	**Date**	**Transfer**	**Amount**
1P0024	The Picower Foundation	12/15/05	WIRE	2,250,000
1P0024	The Picower Foundation	12/27/05	WIRE	11,000,000
1P0024	The Picower Foundation	3/14/06	WIRE	1,700,000
1P0024	The Picower Foundation	5/16/06	WIRE	1,600,000
1P0024	The Picower Foundation	7/18/06	WIRE	9,500,000
1P0024	The Picower Foundation	9/7/06	WIRE	2,000,000
1P0024	The Picower Foundation	11/14/06	WIRE	4,750,000
1P0024	The Picower Foundation	12/15/06	WIRE	1,500,000
1P0024	The Picower Foundation	12/18/06	WIRE	2,000,000
1P0024	The Picower Foundation	3/9/07	WIRE	2,000,000
1P0024	The Picower Foundation	5/8/07	WIRE	3,600,000
1P0024	The Picower Foundation	6/19/07	WIRE	1,100,000
1P0024	The Picower Foundation	7/17/07	WIRE	7,750,000
1P0024	The Picower Foundation	9/5/07	WIRE	3,000,000
1P0024	The Picower Foundation	11/6/07	WIRE	4,500,000
1P0024	The Picower Foundation	12/13/07	WIRE	4,500,000
1P0024	The Picower Foundation	3/17/08	WIRE	2,000,000
1P0024	The Picower Foundation	3/31/08	WIRE	2,000,000
1P0024	The Picower Foundation	5/7/08	WIRE	3,000,000
1P0024	The Picower Foundation	7/8/08	WIRE	8,000,000
1P0024	The Picower Foundation	9/9/08	WIRE	3,500,000
1P0024	The Picower Foundation	11/4/08	WIRE	6,750,000
ACCOUNT TOTAL				$ 290,945,000
GRAND TOTAL				$ 6,746,066,538

EXHIBIT B

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201

David J. Sheehan
Email: dsheehan@bakerlaw.com
Thomas Lucchesi
Email: tlucchesi@bakerlaw.com

Lauren Resnick
Email: lresnick@bakerlaw.com
Tracy Cole
Email: tcole@bakerlaw.com
Marc Hirschfield
Email: mhirschfield@bakerlaw.com

Attorneys for Irving H. Picard, Esq.,
Trustee for the SIPA Liquidation of
Bernard L. Madoff Investment Securities LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor.	SIPA LIQUIDATION No. 08-01789 (BRL)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. JEFFRY M. PICOWER, individually and as trustee for the Picower Foundation, et al. Defendants.	Adv. Pro. No. 09-1197 (BRL)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS UNDER FED. R. BANKR. P. 7012(b) AND 7009

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Rules

Treatises

PRELIMINARY STATEMENT

Jeffry Picower took from Bernard L. Madoff Investment Securities ("BLMIS") more than $7 billion of other investors' money under circumstances that, at a minimum, should have put him on notice of fraud. In response to the Trustee's avoidance action, Picower (together with the other Defendants, all of which are controlled by him) has moved to dismiss many of the causes of action asserted by the Trustee.[1] Picower's motion, however, is, by its own admission, little more than a public relations exercise designed to cast Picower as an innocent victim of Madoff's scheme.[2]

Although his motion presents a myriad of supposed background facts – almost all of which are irrelevant to the question of whether the Trustee has stated a claim and some of which are directly contradictory to what is asserted in the Trustee's Complaint – Picower fails to acknowledge the billions of dollars of other investors' money that he received from BLMIS. Despite Picower's contention that the Complaint fails to plead fraud properly, Picower also fails even to acknowledge – let alone respond to – the stark evidence of fraud that occurred in his BLMIS accounts and that is described throughout the Trustee's Complaint. The few arguments

---

[1] The Trustee seeks recovery of avoidable transfers from each Defendant. Based on the evidence available to the Trustee, it is apparent that Picower controlled all of the BLMIS accounts at issue. In addition to Picower's control of the accounts described herein, and as alleged in the Complaint, Picower and/or Decisions Inc. ("Decisions") (described in Picower's motion as "the principal entity through which Mr. Picower transacts his investment business") is a general partner or director of Capital Growth Company, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JFM Investment Company, JLN Partnership, JMP Limited Partnership, Jeffry M. Picower Special Co., Favorite Funds, Jeffry M. Picower P.C. (collectively, and together with Decisions, the "Picower Corporate Entities") and a Trustee of the Picower Foundation. (Compl. ¶¶ 37–49, 53.) According to publicly available filings with the U.S. Securities and Exchange Commission, Picower is the sole stockholder, sole director, and Chairman of the Board of Decisions. *See, e.g.*, Alaris Medical System Inc., Statement of Changes in Beneficial Ownership (Form 4) (June 25, 2004) (Jeffry M. Picower), *available at* http://sec.gov/Archives/edgar/data/817161/000090266404001043/xslF345X02/srz04-0471_ex.xml. Decisions and most of the Picower Corporate Entities maintained an address at 22 Saw Mill River Road, Hawthorne, New York, a store front office where little or no business was conducted. (Compl. ¶ 37 *et seq.*) Throughout this response, the Trustee may refer to "Picower" and "the Defendants" interchangeably.

[2] (*See* Def.'s Mot. to Dismiss at 4 n.2 [hereinafter "MTD"] (acknowledging that the "facts provided herein are not offered or relied upon as bases for dismissal of the Complaint. Rather, these background facts are simply presented to correct and provide context to facts alleged in the Complaint.").)

by Picower that do acknowledge the factual allegations in the Complaint are not cognizable bases for a motion to dismiss.

Though Picower's alleged facts generally are, as Picower concedes, irrelevant to the determination of the motion, it would be irresponsible for the Trustee to let the most egregious misrepresentations stand uncorrected. Accordingly, some of them are addressed in the following section.

BACKGROUND

I. PICOWER BENEFITED TREMENDOUSLY FROM MADOFF'S FRAUD AND IS NOT A VICTIM.

The theme of Picower's motion to dismiss is that he, like other BLMIS investors, is a "victim" of Madoff's fraud, suffering "devastating" and "immeasurable" loss. Nothing could be further from the truth. Many investors were damaged by the BLMIS fraud, but Picower was not one of them. Based upon the Trustee's investigation to date, Picower was instead the biggest beneficiary of Madoff's scheme, having withdrawn either directly or through the entities he controlled more than $7.2 billion of other investors' money. Of this amount, more than $2.4 billion was received by Picower within the past six years alone. The sums received by Picower are staggering by any measure. Given that Picower withdrew more of other investors' money than any other customer of BLMIS, Picower's repeated references to himself as a "victim" ring hollow.

Picower also claims that he is a victim of "overreaching" by the Trustee. Picower contends that this action is driven by the Trustee's desire to "favor later BLMIS investors over earlier ones." (MTD at 2.) The Trustee, Picower claims, unfairly paints him as a villain in "a frenzied effort to deliver to the estate unprecedented sums from one of Madoff's wealthiest investors." (MTD at 4.) Picower is mistaken. It is the Trustee's obligation to bring actions on

behalf of the estate to recover avoidable transfers. Seeking the recovery of fictitious profits received by investors in a Ponzi scheme is wholly appropriate. Indeed, the law is well-settled that the Trustee can recover such payments within the relevant periods regardless of the investors' good faith or lack of knowledge of the scheme. Even if Picower were, as he claims, "taken in" by Madoff, and even putting aside the evidence of patent fraud discovered by the Trustee and alleged in the Complaint, the Trustee would still be entitled to recover the billions of dollars in false profits – funds obtained from other investors – that BLMIS paid to Picower. If Picower is correct that recovery by the Trustee in this case will "deliver to the estate unprecedented sums" (*see* MTD at 4), that is only because Picower received an unprecedented amount of other investors' money from BLMIS.

II. PICOWER KNEW OR SHOULD HAVE KNOWN THAT HE WAS BENEFITING FROM A FRAUD.

As alleged in the Complaint, Picower's accounts were riddled with blatant and obvious fraud. The Complaint alleges, among other things, that Picower's accounts reported: profitable trading before they were opened or funded (*see* Compl. ¶ 63(e)); execution of trading instructions that hadn't yet been given (*see, e.g.*, Compl. ¶¶ 63(f), (h), (i)); inexplicable changes in account positions (*see, e.g.*, Compl. ¶ 63(i)); outlandish returns (*see, e.g.*, Compl. ¶¶ 3, 63(a)-(c), (e)); and – at Picower's direction – the accomplishment of investment results over time periods that already had expired (*see* Compl. ¶ 63(f)). Indeed, the Complaint alleges purported trading that is so inconsistent with normal trading activity as to compel the conclusion that Picower had to have known that improper trading activity was occurring. Faced with these allegations of fraud, Picower argues only that his withdrawal of large sums of money is inconsistent with his participation in the Ponzi scheme and challenges certain examples of purported rates of return. The allegations of irregular account activity are otherwise completely

disregarded. Presumably, this is because the facts alleged in the Complaint indisputably establish, at a minimum, that Picower was – or should have been – on notice that he was participating in a fraud.

A. Picower's profit from the Ponzi scheme does not prove his innocence.

Picower makes the paradoxical argument that he could not have been complicit in the Ponzi scheme because he made too much money from it. His enormous withdrawals, he argues, would have placed a strain on BLMIS because they required BLMIS to raise additional billions of dollars on short notice. Thus, Picower contends, the fact of his large withdrawals establishes that he must have been unaware of the fraud. This argument does not speak to the legal sufficiency of the allegations in the Complaint, as is required in a motion to dismiss. Nonetheless, Picower's premise that making billions of dollars from a Ponzi scheme is a badge of innocence is dubious at best. And it is not merely the sheer amount of profit he reaped that should have put Picower on notice of fraud. As alleged in the Complaint, the unusual (if not unlawful) activity in his accounts, including one reported *negative* net cash balance of approximately $6 billion at the time of Madoff's arrest (Compl. ¶ 63(d)), was clear evidence that something was seriously amiss at BLMIS. No legitimate broker-dealer would allow this investor to maintain such a staggering margin balance.

As to Picower's argument that his withdrawals must have strained the Ponzi scheme, it is worth noting that Picower's largest withdrawals were generally made quarterly. (*See* Compl. Ex. A.) Accordingly, BLMIS could anticipate Picower's withdrawals and there was no need for Madoff to raise the funds on short notice. It is significant, moreover, that as early as 2003 – even before Madoff's scheme began to unravel – BLMIS could not pay Picower the quarterly sums that he was demanding. Instead, on several occasions starting in September 2003, BLMIS paid Picower only a fraction of the amount that he originally requested. BLMIS' failure to pay

Picower sums that purportedly were in his accounts or otherwise available to him is further evidence that Picower knew or should have known of Madoff's fraud. This evidence becomes even more compelling given Picower's apparent lack of complaint about his inability to access billions of dollars reported on his BLMIS account statements.

B. Picower knew or should have known of obvious fictitious activity in his own accounts.

Picower complains that the Trustee has failed to allege with specificity facts that would demonstrate that he was on notice of fraud at BLMIS. Among the many flaws in this argument is that Picower simply ignores the pages of detailed factual allegations in the Complaint describing patent fraud in his accounts. While not apparent from Picower's lone allusion to "what the Trustee refers to as Madoff's 'backdating' of certain trades" in certain years (MTD at 16), the Complaint describes numerous examples of conduct specific to Picower's accounts that should have made it clear that he was participating in a fraud.

Despite Picower's attempts to wave them off, the instances of "backdating" alleged in the Complaint are far from minor or isolated events. For example, the Complaint alleges that on April 18, 2006, Picower wired $125 million to BLMIS in order to open an account. (Compl. ¶ 63(e).) This deposit constituted more than 1/4 of the total cash that Picower ever invested in BLMIS. Within two weeks, the $125 million deposit had purportedly grown to $164 million because of a dramatic "gain" on the securities held in the account – all of which supposedly had been purchased three months earlier, in January. (Compl. ¶ 63(e).) So Picower, who carefully monitored these accounts through his own portfolio appraisal system as well as through portfolio management reports and customer statements received from BLMIS, knew or should have known that within two weeks after he opened his account, he had made almost $40 million from trading that supposedly occurred months before the account was opened or funded. Because of

this spectacular – and obviously fictitious – trading success, Picower was able to withdraw his original $125 million within five months of investing it, leaving a purported $81 million in the account to enjoy continued "growth" in value. This is but one example of patently fraudulent activity. Numerous other incidents are alleged in the Complaint and otherwise known to the Trustee based on his continued investigation. There is no legitimate explanation for these events nor any possibility that they escaped Picower's notice.

1. Picower closely monitored his BLMIS accounts.

As a threshold matter, the Complaint alleges that Picower knew or should have known about the fraud in Defendants' accounts because he controlled and closely monitored each account. The Complaint alleges that Picower directed withdrawals from and transfers among the various accounts; directed supposed trading activity within the accounts, including direction that sales or purchases be made for purposes of achieving gains or losses; directed payments to and among various Defendants from various accounts; and executed customer agreements, trade authorization agreements and other documentation for the accounts. (Compl. ¶ 60.) The Complaint also alleges that, together with his agent April Freilich, Picower maintained his own computerized client appraisal or portfolio appraisal system, through which he tracked and monitored each account, including the securities purportedly held in each account, the date they were supposedly purchased, the price, the quantity, and the unrealized gain or loss. (Compl. ¶ 61.) In addition, Picower was one of a select few BLMIS investors who, according to BLMIS records, received the full "portfolio management report" generated by BLMIS. Among other things, these BLMIS reports included a target rate of return (Compl. ¶ 59) against which the purported actual rate of return, which also was included, could be tracked. Thus, as alleged in the Complaint, due to his active involvement in his BLMIS accounts and investments, Picower was or should have been aware of all of the activity alleged in each of his accounts.

2. Picower was aware of fraudulent activity in his accounts.

Picower fails to address in any way the Trustee's allegations of specific fraudulent activity in his accounts because they alone suffice to defeat his motion, even without all of the other indicia of fraud alleged in the Complaint. The Complaint identifies specific fraudulent transactions, generally including date, account, and amount at issue, in more than sufficient detail to put Picower on notice of the basis of the Trustee's claims. For example:

- The Complaint alleges that according to BLMIS records, in May 2007, Picower and Freilich asked BLMIS employees to change the trading activity that had supposedly occurred in the Picower Foundation Account for January and February 2006 in order to generate additional gains. (Compl. ¶ 63(f).) After some discussion about the exact amount of gain Picower wanted, and clarification that the gains should be for 2007, Freilich directed BLMIS to generate $12.3 million in gains for January and February.[3] (Compl. ¶ 63(f)(*i*).) Although it was several months too late to make any actual trades in January or February, BLMIS created statements that reported new transactions in January and February 2007 resulting in a purported gain of $12.6 million. (Compl. ¶ 63(f)(*ii*).) Putting aside the fact that Picower and his agent *specifically directed* such fictitious activity, this revisionist history was or should have been obvious to Picower, who monitored these accounts through customer statements, his own portfolio appraisal system, and BLMIS' full portfolio management report. Picower knew or should have known that the Picower Foundation's May 2007 statement reflected different holdings than had been reflected in its account statements for January through April 2007.

[3] Although the Complaint specifies that the trades took place in 2007 (Compl. ¶ 63(f)(*ii*) ("transactions for the months of January and February 2007")), elsewhere it suggests that they took place in 2006, consistent with Freilich's original suggestion. (Compl.¶ 63(f)(*ii*) ("…more than 15 months earlier").) For clarity, the trades were reported by BLMIS as taking place in January and February 2007, three to four months before the conversations at issue.

(Compl. ¶ 63(f)(*ii*).) The total value of the account was $54.6 million higher on May 31, 2007 than it had been in April 2007 largely because of these newly fabricated holdings and new history. (Compl. ¶ 63(f)(*ii*).) This "new" account information should have been inconsistent with the information in Picower's own portfolio appraisal system. These allegations indicate fraud.

- The Complaint alleges several other examples of evidently fictitious trading activity. For example, Picower faxed a letter dated December 1, 2005 directing various sales across various accounts. BLMIS reported the sales as having settled on December 2. This alone is suspicious, as settlement is typically three business days after the trade date, and the sales would thus have had to take place before December 1. But the letter was not actually faxed to BLMIS on December 1– it was faxed on December 22 and backdated by Picower to December 1. (Compl. ¶ 63(h).) In case there was any question as to the timing, attached to the faxed letter (and referenced in it) was a copy of pages from Picower's portfolio appraisal report dated December 16. Picower's own independently maintained records reflect the stock that was supposedly sold before December 2 was still held by the accounts as of December 16. (Compl. ¶ 63(h).) In other words, Picower knew or should have known that certain stock was supposedly held in his accounts on December 16; that on December 22 he faxed a letter (that was backdated to December 1) requesting that the stock be sold; and that the stock was reported as having been sold before December 1. These allegations indicate fraud.

- Similarly, the Complaint alleges that in December 2005, BLMIS created backdated "purchases" of stock in certain accounts, recording them as having settled almost a full year earlier– between January 12 and January 20, 2005. (Compl. ¶ 63(i)(*ii*).) Along with an instant unrealized gain of about $79 million, the accounts were instantly credited, in December

2005, with quarterly dividends for March, June and September 2005, totaling about $82,000. (Compl. ¶ 63(i)(*ii*).) Neither the dividends nor the purchases appear on Picower's 2005 account statements for the months from January 2005 through November 2005 from BLMIS. (Compl. ¶ 63(i)(ii).) Nor do the stock positions, which supposedly would have been held since January, appear on the portfolio appraisal system that Picower maintained as of November 30, 2005. We know this because Picower attached printouts from his system to a fax he sent to BLMIS on December 29, 2005. (Compl. ¶ 63(i).) These allegations indicate fraud.

These allegations are separate from and in addition to the other indicia of fraud alleged in the Complaint, including, among other things, implausible reported returns and trading success, an enormous negative equity balance, and specified irregularities in BLMIS' general operations.

3. Picower's accounts reported implausible rates of return.

Instead of engaging in any discussion of the specified fraudulent activity alleged in his accounts, Picower challenges the reported rates of return alleged in the Complaint. Specifically, he disputes the Complaint's allegations that one account purported to earn over 950% in 1999 and that two other accounts reported annual rates of return over 100% for the years 1996 through 1999. The account statements for these accounts, he argues, show that the first account only earned a 37.6% return in 1999 and that neither of the other accounts earned an annual return of more than 100% in any of the listed years. (*See* MTD at 14.)

Putting aside the fact that the rates of return reported by these three accounts in these years are only a small fraction of the implausibly high rates of return reported by Picower's more than twenty-four accounts over at least twenty-five years, Picower misses the point. No account at BLMIS actually "earned" *any* rate of return: BLMIS did not engage in any securities trading activity. At issue in this case is what BLMIS told Picower his accounts were earning. The purported rates of return (both actual and target) for each account were specified on the portfolio

management reports that Picower received from BLMIS. The Complaint correctly alleges that these outrageously high fabricated rates of return – including over 100%, over 550%, and over 950% – were reported to Picower on these documents. (Other accounts, as alleged in the Complaint, reported wildly low rates of return). If the rates of return reported in the portfolio management reports were inconsistent with information contained in Picower's customer account statements, this in itself was or should have been an independent sign to Picower that BLMIS was not engaged in legitimate trading activity.

Moreover, if Picower did in fact attempt to calculate his accounts' rates of return based on the information contained in customer statements, or for that matter his own portfolio appraisal system, this exercise alone would have emphasized the irregularities in Picower's accounts. One of the factors that must be considered in determining an account's rate of return is the equity that it holds at various points in time. Since reports of purchases and sales of stock were created in Picower's accounts months after the transactions that they supposedly described, he should have had great difficulty calculating comprehensible rates of return based on his account statements, and any attempt to do so would have emphasized the already obvious irregularities.

Picower also argues that the returns reported in his accounts, even as alleged in the Complaint, were not too far out of line with the results of investment managers such as the legendary James Simons and others – although, as the SEC and the media have widely reported, James Simons himself found Madoff's investment returns so unusual and suspicious that he investigated them, withdrew his funds from BLMIS and urged other investors to do so as well.[4]

[4] *See* Office of Investigations, U.S. Securities and Exchange Commission, Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme (Public Version), Rep. No. OIG-509, 145-57 (Aug. 31, 2009), *available at* http://www.sec.gov/news/studies/2009/oig-509.pdf; Jenny Strasburg and Scott Patterson, *The Madoff Fraud:*

Picower's argument once again fails to address the legal sufficiency of the Complaint. Moreover, aside from the fundamental flaws in Picower's premise, his own motion demonstrates the inherent nonsense of this comparison. As Picower points out, "Defendants' account statements reflected investments mostly in blue chip corporate equity securities and low-risk securities such as short-term U.S. Treasury Bills or money market funds" and "did not reflect any options trading." (MTD at 7.) Picower's own argument in defense of the credibility of his returns, therefore, is that BLMIS purported to surpass the returns achieved by the most successful investment managers in the world, and purported to do so based entirely on low risk conservative buy-and-hold investments in blue chip stocks and Treasury Bills. This is a feat that has been accomplished by no one. Picower knew or should have known that this scheme was far too good to be true.

SUMMARY OF ARGUMENT

Picower's motion is a concoction of irrelevant counter-facts, arguments that ignore both the allegations in the Complaint and the relevant legal standards, and factual challenges that are not properly before the Court on a motion to dismiss. Picower also makes multiple attempts to raise here the question of how claims submitted by investors should be evaluated by the Trustee pursuant to the Securities Investor Protection Act, 15 U.S.C. § 78*aaa et seq.* (2009) ("SIPA"). None of this is a basis for a motion to dismiss the Complaint.

Point I: Every Allegation of Fraud in the Complaint is Supported by Specific Facts
(responding to MTD Point I)

Picower challenges the particularity of the allegations of fraud against him, although he does not identify which allegations he challenges. The fraud at issue in this case is the fraud

---

Renaissance Worried About Madoff in '03, Wall St. J., Sept. 8, 2009, at C3; Aaron Luchetti & Jenny Strasburg, *Simons' Notion: All In, Then All Out*, Wall St. J., Feb. 25, 2009, at C1.

committed by Bernard Madoff and BLMIS, which is indisputably alleged in the Complaint and conceded by Picower. Each allegation concerning what Picower knew or should have known regarding Madoff's fraud is supported by ample factual allegations, most of which are ignored by Picower in his motion.

Point II: The Complaint Alleges Avoidance Claims Based on Constructive Fraud
(responding to MTD Point VII)

Picower also claims that the Trustee's constructive fraud claims are insufficient because he has not and cannot allege that Picower did not provide "fair consideration" for the Transfers. Like many other claims challenged by Picower, whether investors provided fair consideration is a factual determination that is not properly before the Court on a motion to dismiss. But here again, Picower fails to acknowledge, much less address, the Complaint's allegations, which establish both that Picower failed to provide reasonably equivalent value for the Transfers in excess of his investment and that he lacked good faith. The Trustee is entitled to alternatively plead a preference claim, as he did. Picower's argument based on how net equity should be calculated under SIPA (the "Net Equity Dispute") is not properly raised in a motion to dismiss and is already before the Court pursuant to the Scheduling Order dated September 10, 2009.

Point III: The Complaint Alleges Picower's Alter Ego Liability
(responding to MTD Point II)

Picower's remaining arguments attempt, with equal futility, to nibble away at the edges of the Complaint. In Point II of his motion (addressed at Point III herein), Picower argues that the Trustee has failed to allege an alter ego claim against him. The Complaint alleges facts sufficient to state a claim that the Defendants, under the dominion and control of Picower, were both used for fraud and other wrongful conduct and served as mere instrumentalities of Picower. To the extent that Picower challenges the facts in the Complaint supporting those allegations, his motion in this regard is not properly before the Court. Notably, Picower does not challenge the

Trustee's agency allegations, which require imputation of his knowledge and conduct to all Defendants and pursuant to which he is liable for his own conduct.

Point IV: All Defendants Received Avoidable Transfers
(responding to MTD Point III)

Picower complains that Exhibit B to the Complaint fails to identify transfers to four defendants, but ignores the Complaint's allegations that Exhibit B is not exhaustive and that the Trustee's investigation is continuing; specific transfers to these four defendants have been identified and are attached to this response as Exhibit 1.

Point V: The Trustee's Turnover Claim is Properly Stated
(responding to MTD Point IV)

Picower's argument that the Trustee's turnover claim is not ripe until after the avoidance claim is decided ignores the express language of SIPA that such property is property of the debtor, and should also be denied for reasons of judicial economy.

Point VI: The Relevant Date for the Six Year Conveyances is Correctly Alleged
(responding to MTD Point V)

Picower's argument that the period for the "six year transfers" should begin six years prior to May 12, 2009 (the filing of the adversary complaint against Picower) rather than six years prior to December 11, 2008 (the filing of the SIPA proceeding) is wholly without merit. Picower's position, as he tacitly concedes, is contradicted by 25 years of case law, and it finds no support in the statute or legislative intent. Moreover, it is irrelevant since the state statute of limitations period has not yet run, having been tolled under New York law, Section 108(c) of the Bankruptcy Code, and having been equitably tolled under the C.P.L.R. and Section 544(a) of the Code.

Point VII: The Trustee Has Sufficiently Alleged a Cause of Action Based on the Discovery Rule
(responding to MTD Point VI)

Similarly meritless is Picower's argument that the Trustee may not rely on the discovery rule. The Trustee is not required under the law of this District to identify in the Complaint a specific creditor who could not reasonably have learned of Madoff's fraud. The fact that the Trustee has alleged "red flags" that would have been apparent to investors other than Picower in no way suggests that "every single other BLMIS investor" (*see* MTD at 45) could have discovered – or, like Picower, knew or should have known – of the fraud. Like many of Picower's other challenges, this is a fact-specific inquiry that is not properly before the Court on this motion to dismiss. (MTD at 45.)

Point VIII: The Complaint Adequately Alleges Subsequent Transfers
(responding to MTD Point VIII)

Similarly, Picower's argument that the Trustee's subsequent transfer claim must be dismissed ignores that the Defendants are alleged on information and belief to be subsequent transferees based on the pattern of activity, transfers and mutual control within BLMIS, as described in the Complaint. These allegations are sufficient to state a claim.

Point IX: The Complaint Properly Alleges Disallowance of Defendants' SIPA Claims
(responding to MTD Point IX)

Picower ignores the fact that the Trustee's cause of action to disallow Picower's SIPA claim is based not only on the inadequacy of the claims but on Section 502 of the Bankruptcy Code, which prevents the transferee of an avoidable transfer from receiving a distribution unless he first returns the transfer. Picower's second attempt to raise the Net Equity Dispute, which is already before this Court and scheduled for a separate hearing involving all interested parties, must also fail.

Point X: Picower's Motion to Dismiss Certain Remedies is Improper and Without Merit
(responding to MTD Point X)

Finally, a motion to dismiss for facial insufficiency cannot be based on the Trustee's choice of remedies sought in his prayer for relief, including a constructive trust and the return of tax refunds, both of which are justified in this action.

ARGUMENT

In determining whether a motion to dismiss should be granted, a court must analyze whether a complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 1950. In considering a motion to dismiss under Rule 12(b)(6), "[t]he Court's function . . . is 'not to weigh the evidence that might be presented at [a] trial but merely to determine whether the complaint itself is legally sufficient.'" *Jenkins v. New York City Transit Authority*, --- F. Supp. 2d ---, No. 08 Civ. 6814, 2009 WL 1940103, at *1 (July 1, 2009) (*quoting Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985)).

I. THE ALLEGATIONS AGAINST PICOWER ARE PLED WITH SPECIFICITY

In Point I of his motion, Picower argues that the Complaint lacks factual support for claiming that "Mr. Picower was a participant in Madoff's fraud." (MTD at 13.) This argument is not offered in support of the dismissal of any particular claim; rather, Picower demands that the Trustee's "fraud allegations" should be dismissed for failure to comply with the particularity required by Rule 9(b).[5] Fed. R. Civ. P. 9(b) (2009); (MTD at 13-17.) Picower contests the

[5] Rule 9(b) is applicable to fraud pleadings in the bankruptcy context, although such pleadings are extended greater liberality because a trustee is "a third party outsider to the fraudulent transaction, that must plead fraud on

Trustee's allegations regarding reported rates of return (and argues that they are "unremarkable" in any event (MTD at 15)), argues that his ability to withdraw funds from the Ponzi scheme in fact shows his innocence, and asserts that the allegations of "backdating" do not support the inference that Picower knew that Madoff was running a Ponzi scheme. (MTD at 14-16.) Given Madoff's reputation and Picower's pattern of withdrawals, he concludes, the Trustee has failed to allege facts supporting "claims of complicity" and fraud against Picower. (MTD at 17.)

Although not apparent from Picower's motion, the Trustee has not brought a claim seeking damages from Picower as a co-conspirator of BLMIS. Rather, the Complaint alleges that BLMIS engaged in fraud (*see, e.g.*, Compl. ¶¶ 1, 14, 19-32) and that Picower knew or should have known that he was benefiting from and being compensated for fraudulent activity.[6] (*See, e.g.*, Compl. ¶¶ 3, 4, 59, 63.) Madoff's fraud is alleged in the Complaint and is conceded by Picower. The allegations in the Complaint concerning what Picower knew or should have known are amply supported by specific factual allegations, as described above.

Picower nonetheless demands that the Trustee's "fraud allegations against Mr. Picower and the Defendants" be stricken. (MTD at 17.) But, since Picower ignores most of the factual allegations demonstrating his fraudulent intent or knowledge, and since his attempt to contradict

---

secondhand knowledge for the benefit of the estate and all of its creditors." *Hassett v. Zimmerman (In re OPM Leasing Servs., Inc.*), 32 B.R. 199, 203 (Bankr. S.D.N.Y. 1983) (Lifland, J.).

[6] Notably, Picower makes no legal argument challenging the sufficiency of the Trustee's claims for avoidance of the Transfers based on actual fraudulent intent. This is because Picower has no basis to raise any such challenge. *See, e.g.*, *Bear, Stearns Sec. Corp. v. Gredd (In re Manhattan Inv. Fund Ltd.)*, 397 B.R. 1, 8 (S.D.N.Y. 2007) (where debtor is engaged in a Ponzi scheme, actual intent to defraud may be presumed as a matter of law); *Drenis v. Haligiannis*, 452 F. Supp. 2d 418, 429 (S.D.N.Y. 2006) (same). This so-called "Ponzi presumption" is based on the recognition that "transfers made in the course of a Ponzi scheme could have been made for no purpose other than to hinder, delay, or defraud creditors." *Bear, Stearns Sec. Corp. v. Gredd (In re Manhattan Investment Fund Ltd.)*, 397 B.R. at 8 (*quoting Gredd v. Bear, Stearns Sec. Corp. (In re Manhattan Fund Ltd)*, 359 B.R. 510, 517-18 (Bankr. S.D.N.Y. 2007) (Lifland, J.)).

others is concededly irrelevant to his motion,[7] it is difficult to ascertain what allegations he wishes to strike. For example, Picower references Paragraph 63(f) of the Complaint and asserts, "[a]s with the Trustee's other unsupported fraud allegations, he pleads no facts to support his rank speculation that the Defendants believed those trades to be fictitious and concluded, based on those trades, that Madoff was running a Ponzi scheme."[8] (MTD at 16.) Paragraph 63(f) alleges that Defendants "knew or should have known that they were participating in fraudulent activity" because Picower and his agents "directed fictitious, backdated trades in order to achieve fictitious gains or losses in earlier periods." (Compl. ¶ 63(f).) It then details, over more than a page, an example in which Picower and Freilich directed BLMIS to engage in trading activity for a period that had already passed. There is no "unsupported fraud allegation" in this paragraph that could be stricken.

The one allegation Picower specifically identifies as "conclusory" is the Trustee's allegation on information and belief that Picower was being compensated for perpetuating the Ponzi scheme by investing and maintaining millions of dollars in BLMIS. (Compl. ¶ 63(a).) Contrary to Picower's argument, the basis for the Trustee's belief is indeed specified in the Complaint. For clarity, any allegation by the Trustee about what Picower knew or should have known is based not just on any particular sentence in the Complaint but on the totality of all of

[7] *See* MTD at 4 n.2, 14 ("Although the Trustee's allegations must be taken as true for purposes of this motion to dismiss, it should be noted that numerous alleged 'facts' in the Complaint are contradicted by [BLMIS account records].").

[8] Picower suggests repeatedly in his motion that the Trustee must prove that Picower was aware of and complicit in the full extent and every aspect of BLMIS' Ponzi scheme. This is not so. An investor who becomes aware of circumstances that should trigger further inquiry into whether there is a fraud is deemed to be on "inquiry notice" of the entire fraud. *See, e.g.*, *Bayou Accredited Fund, LLC v. Redwood Growth Partners, L.P. (In re Bayou Group, LLC)*, 396 B.R. 810, 845 (Bankr. S.D.N.Y. 2008) ("a transferee may be on 'inquiry notice' without actual knowledge of a fraud or other circumstance. Rather, a transferee is on 'inquiry notice' if it knew or should have known of information placing it objectively on alert that there was a potential problem . . . such that the transferee should have attempted to learn more") (internal citations omitted; emphasis omitted). Accordingly, an investor may be on inquiry notice of fraud even if he does not know or suspect the fraud is a Ponzi scheme as opposed to front running, record-keeping violations, or another type of fraud.

the facts alleged. *See, e.g., Iqbal*, 129 S. Ct. at 1949 (noting that "for the purposes of a motion to dismiss," courts "must take *all* of the factual allegations in the complaint as true") (emphasis added); *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that *all* the allegations in the complaint are true . . . .") (emphasis added) (internal citations omitted). These facts include but are not limited to the facts that Picower profited by billions of dollars of other investors' money; that Picower directed fraudulent trading in his accounts; that his accounts reported implausibly high and anomalously low rates of return; and that he was or should have been aware of the multiple instances of obvious and indisputable fraud specified in the Complaint.

II. THE TRUSTEE HAS ADEQUATELY ALLEGED CONSTRUCTIVE FRAUD

In Point VII of his motion, Picower claims that the Trustee's fraudulent conveyance claims based on constructive fraud are insufficient because the Complaint does not adequately allege that the relevant transfers were made without "fair consideration" to BLMIS. (MTD at 45-50.) Picower is mistaken. The Trustee has alleged both that Picower failed to provide reasonably equivalent value for the transfers (as required by the Bankruptcy Code) and that Picower failed to exchange fair value in good faith (as required by New York Debtor and Creditor Law), and the ultimate success of these claims will depend on a fact-based inquiry that cannot be determined on a motion to dismiss. Picower does not address, much less challenge, the Trustee's allegations. Instead, this argument is one of multiple attempts to gratuitously insert a challenge to the Trustee's methods of determining claims, an issue that is neither ripe nor relevant to this motion. Like the rest of Picower's arguments, it fails.

A. Picower has received ample notice pleading of the constructive fraud claims.

A transfer may be avoided as constructively fraudulent under the Bankruptcy Code if, among other things, the transferee received money from the debtor for which the transferee did not provide "reasonably equivalent value." 11 U.S.C. § 548(a)(1)(B) (2009). The parallel provision in the New York Debtor and Creditor Law permits a trustee to avoid a conveyance that was made without "fair consideration." N.Y. Debt. & Cred. Law § 273 (McKinney 2009). "Fair consideration" under New York law is defined generally the same as "reasonably equivalent value" under the Bankruptcy Code, except that it also requires that the transferee provided the value or consideration "in good faith." N.Y. Debt. & Cred. Law § 272 (McKinney 2009); *Mendelsohn v. Jacobowitz (In re Jacobs)*, 394 B.R. 646 (Bankr. E.D.N.Y. 2008). The question of whether the debtor received fair consideration for a transfer is a highly fact based inquiry that requires an examination into the totality of circumstances, and therefore is not properly before the Court on a motion to dismiss. *See, e.g.*, 5 *Collier on Bankruptcy* ¶ 548.05(1)(b) (2009) ("In order to determine if a fair economic exchange has occurred in a case of a suspected fraudulent transfer, the bankruptcy court must analyze all the circumstances surrounding the transfer in question.").

When a complaint alleges constructive fraud, the heightened requirements of Federal Rule of Civil Procedure 9(b) do not apply. *See*, *e.g., Drenis,* 452 F. Supp. 2d at 428-29; *Spanierman Gallery, PSP v. Love*, 320 F. Supp. 2d 108, 113 (S.D.N.Y. 2004); *Sec. Investor Protect. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 319 (Bankr. S.D.N.Y. 1999). The plaintiff need not provide specific facts to support its allegations, *see Erickson v. Pardus*, 551 U.S. 89, 93 (2007); rather, the plaintiff need only "give the defendant fair notice of what the . . .

claim is and the grounds upon which it rests," *Twombly*, 550 U.S. at 555 (*quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

It is virtually a universally-accepted rule – indeed, Picower himself concedes – that when investors invest in a Ponzi scheme, payments that exceed their investments are not made for reasonably equivalent value and constitute fraudulent conveyances that may be recovered by the Trustee. *See, e.g., Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 640 (2008) ("Where causes of action are brought . . . against Ponzi scheme investors, the general rule is that to the extent innocent investors have received payments in excess of the amounts of principal that they originally invested, those payments are avoidable as fraudulent transfers . . ."); *Sender v. Buchannan (In re Hedged-Investments Assocs.)*, 84 F.3d 1286, 1290 (10th Cir. 1996); *Scholes v. Lehmann*, 56 F.3d 750, 757-58 (7th Cir. 1995) (Posner, J.); *Bayou Superfund, LLC v. WAM Long/Short Fund II, LLP (In re Bayou Group, LLC)*, 362 B.R. 624, 636 (Bankr. S.D.N.Y. 2007) ("Plaintiffs are correct in asserting in their brief that virtually every court to address the question has held unflinchingly that to the extent that investors have received payments in excess of the amounts they have invested, those payments are voidable as fraudulent transfers.") (internal quotations omitted); *In re Taubman*, 160 B.R. 964, 986 (Bankr. S.D. Ohio 1993).

Each Defendant withdrew fictitious profits in excess of that Defendant's investment in BLMIS. The Trustee has alleged that Picower controlled the accounts of each of the Defendants. (*See* Compl. ¶¶ 60-61.) The Complaint alleges that Picower's accounts withdrew a total of more than $5 billion in fictitious profit (*see, e.g.*, Compl. ¶ 2), and the Trustee's continuing investigation indicates that the actual number is greater than $7 billion. The Trustee has alleged that this entire amount consists of fictitious profit generated by a Ponzi scheme and is, in reality,

nothing more than money obtained from other investors. (*See, e.g.*, Compl. ¶¶ 2, 66.) The Trustee specified initial dates, methods of payment, and amounts of avoidable Transfers in the Complaint. (*See* non-exhaustive list of transfers (the "Transfers") included in the Complaint at Exhibit B and list of Defendants' accounts at Exhibit A.) These allegations put Picower on ample notice of the claims against him and the basis of these claims, and satisfies the Trustee's pleading obligations. *See, e.g., Drenis,* 452 F. Supp. 2d at 428-29 ("There is no argument that plaintiffs' pleadings fail to meet" constructive fraud pleading standard where plaintiffs alleged that defendants received distributions that exceeded their contributions to a Ponzi scheme); *Jalbert v. Zurich Am. Ins. Co. (In re Payton Constr. Corp.),* 399 B.R. 352, 365 (Bankr. D. Mass. 2009) (identification of time frame and nature of the transfers sought to be avoided was sufficient notice to defendant). The Trustee has additionally alleged that the specified Transfers were made for less than fair consideration because Picower failed to act in good faith. *See In re Jacobs*, 394 B.R. at 662. As discussed above, the Complaint details numerous facts demonstrating that Picower knew or should have known that he was participating in a fraudulent enterprise, an enterprise that the debtor has admitted and sworn was a Ponzi scheme. These allegations are sufficient to show Picower's lack of fair consideration for each transfer alleged.

B. <u>The preference claim is pled in the alternative.</u>

Picower seizes on the fact that the Trustee has brought a claim to recover transfers made within 90 days of the filing as voidable preferences.[9] Because a preference exists only when there is an antecedent debt, Picower argues, the Trustee has conceded the existence of an antecedent debt for the 90 day transfers – and for every other transfer alleged in the Complaint.

[9] Contrary to Picower's claim, the Transfers made during the 90-day preference period include transfers by check that cleared during the relevant period, even if the check was dated earlier. *See Barnhill v. Johnson*, 503 U.S. 393,

Picower, of course, ignores that this count has been pled "[i]n the alternative" (Compl. ¶¶ 71, 81), as specifically permitted under the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 8(b)(2) and (3) (2009). The ultimate question of whether there was or was not an antecedent debt is a question of fact to be determined at trial and is not properly before the Court in a motion to dismiss. *See, e.g., Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 351 F. Supp. 2d 79, 106 (S.D.N.Y. 2004) ("whether a transfer is for reasonably equivalent value is largely a question of fact") (internal quotation omitted); *Orbach v. Pappa,* 482 F. Supp. 117, 120 (S.D.N.Y. 1979) ("What constitutes fair consideration under this section must be determined upon the facts and circumstances of each particular case."). Picower's motion suggests that he intends to argue that every Transfer was on account of an antecedent debt, regardless of whether or not the Transfer constituted fictitious profit and although the Trustee has alleged Picower's lack of good faith. Accordingly, alternative pleading of these causes of action, to preserve every alternative claim the Trustee has to these funds, is appropriate.

C. Fictitious profit does not constitute fair consideration.

As discussed above, virtually every court to address the issue has held that investors in a Ponzi scheme, regardless of their good faith, must surrender to the trustee the false profit they obtained during their participation in the scheme. *See Donell*, 533 F.3d at 770; *In re Hedged-Investments Assocs.*, 84 F.3d at 1290; *Scholes*, 56 F.3d at 757-58; *Bayou Superfund, LLC v. WAM Long/Short Fund II, LLP (In re Bayou Group, LLC)*, 362 B.R. at 636; *In re Taubman*, 160 B.R. at 986. While a good faith transferee has the right to retain payment for a bona fide antecedent debt, fictitious profits from a Ponzi scheme do not constitute such a debt. This is because an investor in a Ponzi scheme has no legitimate claim to fictitious profits that in fact

---

394-95 (1992) (in determining if a transfer occurred within the 90-day preference period, a transfer made by check

consist of money invested by other investors. To the extent the debtor promised such profits to the investor, the promise was fraudulent, and courts will not enforce a fraud to the detriment of other innocent creditors. *See Donell*, 533 F.3d at 770; *In re Hedged-Investments Assocs.*, 84 F.3d at 1290; *Scholes*, 56 F.3d at 757-58; *Bayou Superfund, LLC v. WAM Long/Short Fund II, LLP (In re Bayou Group, LLC)*, 362 B.R. at 636; *In re Taubman*, 160 B.R. at 986.

The single case relied on by Picower is inapposite. In *Visconsi v. Lehman*, No. 06-3304, 2007 WL 2258827 (6th Cir. Aug. 8, 2007), the circuit court affirmed enforcement of an arbitration award against what was at the time a solvent entity. Lehman Brothers was alleged to have failed to supervise a stockbroker in its employ. The investor brought an arbitration claim against Lehman, and the arbitrator was urged to award the investor the full amount of his expectancy damages as remedy for the broker's fraud. *Id.* at *4-5. Picower claims, based on *Lehman*, that there is some distinction between the trustee's generally accepted right to recover fictitious profits in a Ponzi scheme, and his rights to recovery "when the Ponzi scheme operator is a broker dealer." (MTD at 47.) But the fact that a Ponzi scheme involves the sale of securities does not preclude a trustee from recovering fictitious profit. *See, e.g.*, *Donell,* 533 F.3d at 770; *In re Hedged-Investments Assocs.*, 84 F.3d at 1290; *Scholes*, 56 F.3d at 757-58; *Bayou Superfund, LLC v. WAM Long/Short Fund II, LLP (In re Bayou Group, LLC)*, 362 B.R.at 636; *In re Taubman*, 160 B.R. at 986.

The difference between *Lehman* and the vast body of case law supporting the Trustee's avoidance claim is not that *Lehman* involved a broker dealer. It is that *Lehman* had to do with the enforceability of an arbitrator's award and nothing whatsoever to do with bankruptcy. The main issue in *Lehman* was whether the defendants, having fought to enforce the arbitration

---

should be deemed to occur on the date the drawee bank honors the check).

clause in their contract with the plaintiffs, would be bound by the arbitrator's determination of damages. Enforcing the arbitrator's award was neither against public policy nor to the detriment of other creditors since Lehman was not in bankruptcy and the rights of other creditors were not implicated. *See, e.g., Scholes*, 56 F.3d at 757-58 (argument that it may seem "only fair" that investor be entitled to profits on trades made with his money was true as between investor and Ponzi scheme operator, but was not true as between investor and other investors); *In re Taubman*, 160 B.R. at 986.

The case that is analogous to Picower's situation is not *Lehman* but *In re Hedged Investments Associates*, 84 F.3d 1286 (10th Cir. 1996). There, an investor in an investment fund that turned into a Ponzi scheme attempted to defend against a trustee's avoidance claim for fictitious profit. Like Picower, the investor argued that under applicable law (in her case, Colorado), she would have had a claim for her full expectancy damages and that therefore the full amount of the transfers had been for value. The Tenth Circuit rejected her argument, reasoning that as a matter of public policy, a Colorado state court would not permit an investor in a bankrupt Ponzi scheme to enforce her fraudulent contract with the defendant at the expense of other investors. Since she had no enforceable claim for amounts beyond her initial investment, the debtor had no debt to her for those amounts and she had not provided value for those transfers. *Id.* at 1289. Whatever rights to expectancy damages an investor theoretically may have as a fraud plaintiff, in other words, do not overcome the rule that payments to investors in a Ponzi scheme in excess of the amounts of their investments are avoidable as fraudulent transfers.

D. The Net Equity Dispute is irrelevant to the Trustee's claims and cannot be determined in a motion to dismiss.

Picower also claims that he is entitled to the "expectancy measure of damages" under the SIPA statute, and therefore to establish lack of fair consideration the Trustee must allege that the

transfers exceeded the value of securities reflected on the accounts' last BLMIS account statements. This is one of several attempts by Picower to challenge, in the context of this motion to dismiss, the Trustee's interpretation of "net equity" as defined under Section 78*lll*(11) of SIPA in its determination of customer claims. *See* 15 U.S.C. § 78*lll*(11) (2009). The Net Equity Dispute is irrelevant to Picower's argument, and in any event cannot be determined in the context of this motion.

Like some other investors, Picower claims that each account's "net equity" for purposes of the SIPA statute is the amount shown on the last customer statement issued by BLMIS. (MTD at 10, 51-52.) Because those customer statements issued by BLMIS included fictitious profits and were entirely fraudulent, however, the Trustee is not relying on the account balances appearing on the customer statements for purposes of claims determinations. Instead, the Trustee is evaluating claims based on the amounts that a customer actually deposited with BLMIS, less the amounts that the customer withdrew from the account, sometimes referred to as the "cash in/cash out" approach. (MTD at 52.)

The issue of "net equity" applies to the determination of all customer claims in this SIPA liquidation, as well as litigations brought by the Trustee. Accordingly, it will be heard by the Court, after briefing by interested parties in accordance with this Court's September 10, 2009 Scheduling Order. (*See* Mem. Dec. & Order Granting Trustee's Mot. to Dismiss, Sept. 10, 2009 [hereinafter "Peskin Order"].) As this Court stated in its decision adopting the Scheduling Order and dismissing a complaint by another investor, "[w]ith more than 15,000 claims filed in the Madoff proceeding and multi-billions of dollars at stake, the issue of how the Trustee determines claimants' 'net equity' for distribution purposes is a central question to be determined in this

SIPA liquidation." (Peskin Order at 2.) The Court's reasoning in that decision, dismissing an investor's complaint for a declaration of the scope of her claims, is equally applicable here:

> The Scheduling Motion will address the concerns of a variety of customers with different account histories and balances, including both net winners and net losers, and will provide everyone involved with the benefits from the submission of a comprehensive and complete record on this issue. Allowing Plaintiffs, who represent only one group of customers…to proceed with the adversary proceeding to determine the Net Equity Issue that will apply to all customer claims will yield an incomplete record that might result in piecemeal litigation on this issue. Moreover, Plaintiffs will suffer no prejudice in having the Net Equity Issue decided pursuant to the Scheduling Motion while other customers will suffer great harm if Plaintiffs are permitted to proceed without their participation.

(*Id*. at 12-13, as amended per the Errata Order dated Sept. 11, 2009.) Moreover, the precise amount of equity in the customer accounts – under whatever method – is a heavily factual issue that remains under investigation and cannot be decided in the context of a motion to dismiss. *See, e.g., Higazy v. Templeton*, 505 F.3d 161, 174 (2d Cir. 2007) ("Where there is a dispute about the material facts, this question must be resolved by the fact finder.") (citation omitted).

In any event, whatever remedies Picower may or may not have under SIPA do not answer the question whether Picower provided "fair consideration" to BLMIS for the transfers at issue. The concept of fair consideration refers to the value received by the debtor in exchange for the transfer. The amount of value given by an investor is not altered based on whether or not a brokerage firm is registered with SIPC, whether or not a SIPA action is commenced, or whether any or all of the investor's investments are protected under SIPA or for how much, because none of this affects the value that the investor gave to the debtor in exchange for the transfer. *See, e.g.,* 5 *Collier on Bankruptcy* ¶ 548.05(1)(b) (2009) ("Because the ultimate issue is the impact of the transfer on the debtor's estate, the court must thus determine whether the debtor, as opposed to some other entity, received such value."); *Scholes*, 56 F.3d at 757-58 (a party is entitled to retain profit from a Ponzi scheme only if the payment of that profit, which reduced the net assets

of the estate, was offset by an equivalent value to the estate). The value that Picower gave to BLMIS and its impact on the BLMIS estate is not greater because this action takes place under SIPA, regardless of what remedies Picower may ultimately be determined to have under the statutory scheme.

Finally, in addition to requiring that a transfer be made in satisfaction of an antecedent debt by the debtor, "fair consideration" under New York law requires both that the transfer be made "in good faith" and be a "fair equivalent" to the obligation. N.Y. Debt. & Cred. Law § 272. The Trustee has amply alleged that the Transfers to Picower were utterly disproportionate to any consideration provided by him to BLMIS and that the Transfers were received by him in bad faith. The motion to dismiss this count therefore should be denied.

III. THE TRUSTEE HAS ALLEGED FACTS SUFFICIENT TO PIERCE THE CORPORATE VEIL AND HOLD PICOWER LIABLE FOR THE TRANSFERS TO ALL DEFENDANTS, AND DEFENDANTS FAIL TO CHALLENGE THE SUFFICIENCY OF THE TRUSTEE'S AGENCY ALLEGATIONS

Picower incorrectly claims, in Point II of his motion, that the Complaint fails to allege adequate cause for piercing the corporate veils of the various partnerships, funds, foundations and other entities named in the Complaint (the "Picower Entities"). (*See* MTD at 17-23.) Whether or not Picower and the other Defendants are liable under the alter ego theory, like most of the challenges raised in Picower's motion, requires a fact-specific analysis and cannot be resolved in a motion to dismiss. But the Complaint amply alleges both that the Picower Entities were mere instrumentalities of Picower and that they were used to achieve fraud, each of which constitutes an independent basis for alter ego liability.

In any event, Picower fails to challenge the sufficiency of the Trustee's allegations that Picower and/or his agent Freilich acted as Defendants' authorized agents in numerous capacities, including without limitation director, partner, officer and trustee (Compl. ¶¶ 34-54, 60), and that

in such capacities they engaged in transactions with BLMIS that they knew or should have known were false, fraudulent and fictitious (*see id.* ¶¶ 3-4, 28, 53-55, 59-64). These allegations establish that Picower's knowledge and conduct must be imputed to all Defendants. They also establish that Picower is personally liable for his own fraudulent and tortious conduct, performed both on behalf of himself and the Picower Entities.

A. The Trustee has pled facts sufficient to pierce the corporate veil of each Defendant and impose alter ego liability upon Picower and other Defendants.

The U.S. Supreme Court has declared that it is a "fundamental principle of corporate law . . . that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *United States v. Bestfoods,* 524 U.S. 51, 62 (1998). In general, the state of formation of the entity determines whether its form may be disregarded and its liability-limiting veil may be pierced. *See Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995).[10] Under Delaware law, "a court can pierce the corporate veil of an entity where there is fraud or where a subsidiary is in fact a mere instrumentality or alter ego of its owner." *Geyer v. Ingersoll Publications Co*., 621 A.2d 784, 793 (Del. Ch. 1992) (shareholder was corporate alter ego where he dealt with substantial corporate assets and obligations as his own).

[10] Analysis of Defendants' "alter ego" liability herein is based on Delaware law as expounded by state and federal courts construing Delaware as well as New York law, which are substantially similar. *See Wassau Business Ins. Co. v. Turner Const. Co*., 141 F. Supp. 2d 412, 417 (S.D.N.Y. 2001) (Delaware and New York law "substantially similar" on piercing corporate veil). This is necessary because the "law of piercing the corporate veil has not been as fully developed in Delaware as in many other jurisdictions" and "it is rare for the Delaware courts to spell out in any detail how the determination to pierce the corporate veil is to be made." Stephen B. Presser, *Piercing the Corporate Veil* § 2.8, at 2-73 & 2-76 (2009). To the extent that this Court may be required to apply Florida law in imposing alter ego or similar liability on any of the Defendants, it should be observed that such law is also substantially similar to New York and Delaware law. *See William Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 137 (2d Cir. 1991) (New York and Florida law of piercing corporate veil "virtually

The test for piercing the veil is disjunctive: courts may disregard corporate form either where there is fraud or something like it, as discussed below, or where the entity or entities are used as mere instrumentalities or alter egos of their owner. *See Acciai Speciali Terni USA, Inc. v. Momene*, 202 F. Supp. 2d 203, 207-208 (S.D.N.Y. 2002) (collecting cases).

Notwithstanding Defendants' assertions to the contrary,[11] it is generally acknowledged that actual intent to defraud is not essential where evidence of constructive fraud or other similar inequitable conduct is present, *see* William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 41.32 (2009) (collecting cases), and conduct short of active intent to deceive required to establish fraud may justify piercing the corporate veil. *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 987 (Del. Ch. 1987). Moreover, courts may disregard corporate form and pierce the veil for a wide range of unlawful and inequitable conduct, ranging from fraudulent activity such as that engaged in by Defendants, to contravention of law or contract generally, to public wrong and situations where equitable considerations among members of a corporate entity require it. *See Mobil Oil Corp.*, 718 F. Supp. at 268 ("fraud or something like fraud," such as injustice or inequity, justifies disregard of corporate form);

---

identical"); *Robertson-Ceco Corp. v. Cornelius*, No. 3:03cv475, 2007 WL 1020326, at *7 n.7 (N.D. Fla. Mar. 30, 2007) (Delaware and Florida law "the same" on the issue of veil-piercing).

[11] Relying on overly broad dicta in *Wallace v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999), Defendants claim that all of the activities of Picower and the Picower Entities must constitute an unqualified fraud and sham for alter ego liability to attach to him and for the veil of the various entities to be pierced. (*See* MTD at 19-20.) This is incorrect. "[F]raud or a sham, strictly speaking, need not be shown to justify the piercing of a corporate veil under Delaware law." *Brown v. General Elec. Capital Corp. (In re Foxmeyer Corp.*), 290 B.R. 229, 236 (Bankr. D. Del. 2003) (*citing Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989) and *Fletcher*, 68 F.3d at 1458). All that the Trustee needs to show is "an overall element of injustice or unfairness." *Id.* (citations omitted). The reason why the limited partner plaintiffs' attempt to pierce the corporate veil of their general partner and impose personal liability on its officers in *Wallace v. Wood* failed is that plaintiffs "merely state[d] that the purpose of the General Partner [was] to manage and operate the Partnership" and pled no other "facts that if true would justify disregarding the corporate form of the General Partner." 752 A.2d at 1184. Defendants are also incorrect when they claim that Delaware courts will not disregard corporate entities unless they are complete shams created solely for the purpose of defrauding others. (*See* MTD at 18-19 (*citing Tese-Milner v. TPAC, LLC (In re Ticketplanet.com)*, 313 B.R. 46, 70 (Bankr. S.D.N.Y. 2004) and *Crosee v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003).) As the Second Circuit recently declared, to pierce the corporate veil, "the plaintiff need not prove that the corporation was created

Mabon, Nugent & Co. v. Texas Am. Energy Corp., 1998 WL 5492, at *3 (Del. Ch. 1988) (under Delaware law, fraud is not the only basis to pierce corporate veil); *Pauley Petroleum, Inc. v. Continental Oil Co.,* 231 A.2d 450, 452-53 (Del. Ch. 1967), *aff'd*, 239 A.2d 629 (Del. 1968). *See also Publicker Indus. v. Roman Ceramics Corp.,* 603 F.2d 1065, 1069 (3d Cir. 1979) (appropriate to disregard corporate existence when "court must prevent fraud, illegality, or injustice, or when recognition of corporate entity would defeat public policy or shield someone from liability for a crime" (*quoting Zubik v. Zubik*, 384 F.2d 267, 272 (3d Cir. 1967))).

In cases where liability is premised, not on fraud or something like it, but on the mere instrumentality doctrine, a two-prong test must be met. The owner and entity must be shown to have operated as a single economic unit and an overall element of injustice or unfairness must be present. *See Acciai Speciali Terni*, 202 F. Supp. 2d at 207; *cf. Passalacqua*, 933 F.2d at 138 (under New York law, corporate veil may be pierced either when corporate form is used to achieve fraud, or when control and domination of entity by owner are used to commit wrong, fraud, breach of duty or dishonest or unjust act).

1. <u>The determination of whether to ignore the corporate forms requires a fact specific inquiry into the totality of the circumstances.</u>

The legal test for determining when corporate form should be ignored in equity cannot be reduced to a single formula. *Irwin & Leighton*, 532 A.2d at 989. No single factor can justify a decision to disregard the corporate entity but some combination of them is required and, as stated above, an overall element of injustice or unfairness must be present if the corporate veil is to be pierced. *United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988), *aff'd*, 879 F.2d 857 (3d Cir. 1989). Although courts have variously identified certain considerations that

---

with fraud or unfairness in mind. It is sufficient to prove that it was so used." *Netjets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 177 (2d Cir. 2008) (citations omitted).

may be relevant to determining when a parent and subsidiary, or owner and entity, operate as an economic unit for purposes of the instrumentality test, they are not conclusive. *See Union Carbide Corp. v. Montell N.V.*, 944 F. Supp. 1119, 1144-45 (S.D.N.Y. 1996).

Just as there is no talismanic set of factors for determining when it is appropriate to pierce the corporate veil, there is no single test for determining the sufficiency of pleading an alter ego claim. Again, the considerations identified by courts as potentially relevant to determining when a parent and subsidiary, or owner and entity, operate as an economic unit for purposes of the instrumentality test are not conclusive. *See Union Carbide Corp.*, 944 F. Supp. at 1144-45. Moreover, there is no judicial authority requiring dismissal of alter ego allegations where they do not happen to fit the misleading version of Delaware's corporate disregard doctrine that Defendants are attempting to foist upon this Court.[12] *See id.*

Given the intensively factual inquiry required, the nature and extent of Picower's wrongdoing and his dominion and control over the other Defendants are not proper subjects for resolution on a motion to dismiss. *See id.*; *see also Official Comm. of Unsecured Creditors v. Reliance Capital Group, Inc. (In re Buckhead America Corp.)*, 178 B.R. 956, 975 (D. Del. 1994); *Geyer*, 621 A.2d at 793; *Mabon, Nugent & Co. v. Texas Am. Energy Corp.*, CIV.A. No. 8578 1990 WL 44267, at *5 (Del. Ch. Apr. 12, 1990). The Complaint more than adequately sets forth facts that, if true, establish a basis to pierce the corporate veil under any relevant law; the ultimate success of this claim will depend upon the totality of facts and circumstances discovered through trial.

[12] Defendants quote the incomplete and, in part, irrelevant factors set forth in *Trevino v. Merscorp, Inc.*, 583 F. Supp. 2d 521, 528-29 (D. Del. 2008), and then demand that the Trustee conform his Complaint to their theory of the case at risk of dismissal. (*See* MTD at 18-19.) The far more comprehensive and relevant factors discussed in *Netjets Aviation,* 537 F.3d 168, the most authoritative analysis of alter ego liability yet handed down by the Second

2. The Complaint amply pleads a basis for piercing the corporate veil.

The Complaint pleads facts that amply support alter ego liability. The Second Circuit recently, and exhaustively, explored many of the factors considered under Delaware law when considering imposing alter ego liability in *Netjets Aviation, Inc. v. LHC Communications, LLC*, 537 F.3d 168 (2d Cir. 2008). It conducted a similarly thorough analysis of the same issue under virtually identical principles of New York law in *Passalacqua*, 933 F.2d at 139, where the plaintiff sought to pierce the corporate veil of the contracting defendant corporation and impose alter ego liability on its family real estate business owners, operating through a web of partnerships and corporations, all controlled either directly or indirectly by the family members. The Second Circuit reversed the district court's dismissal of plaintiff's claim, finding plaintiff's alter ego allegations sufficient to go to the jury. The allegations in the Trustee's Complaint are clearly sufficient under the analysis conducted in these cases. Indeed, they largely track the alter ego indicia that the Second Circuit held sufficient to require that the issue of piercing the corporate veil and imposing alter ego liability be presented to the factfinder. For example:

> The Complaint asserts that Picower knew or should have known that he was a major beneficiary of Madoff's fraud for over 25 years and withdrew more than $6 billion of Madoff's victims' money. (Compl. ¶¶ 2-4, 28, 53-55, 59-64.)
>
> The Complaint alleges that Picower knew or should have known that he was engaged, directly and through the other Defendants, which are entities he directly or indirectly owns and/or controls, in profiting from BLMIS's fraud. (*See, e.g.*, Compl. ¶¶ 3-4; compare the collective control and management of affiliates in *Netjets Aviation*, 537 F.3d at 179-80, 182 and *Passalacqua*, 933 F.2d at 139-40.)
>
> The Complaint avers that Picower and/or one of his agents were the managers of all of the Picower Entities. (*See, e.g.*, Compl. ¶¶ 37-52; compare the limited number of identical directors and officers in *Netjets Aviation*, 537 F.3d at 179 and *Passalacqua*, 933 F.2d at 139-40.)

Circuit, are nowhere discussed in Defendant's papers, perhaps, we suggest, because they are too uncomfortably similar to the facts specifically alleged in the Complaint.

The Complaint states that in the course of perpetrating his wrongful conduct – which for purposes of alter ego theory constitute fraud in law – Picower used his controlling personal and corporate authority to direct the opening of accounts for and manage the investments of Defendants. (*See, e.g.*, Compl. ¶¶ 34-52, 55-56, 60; compare the collective accounting methods and lack of arm's length dealing in *Netjets Aviation*, 537 F.3d at 179-80 and *Passalacqua*, 933 F.2d at 139-40.)

The Complaint alleges that many of the Defendants shared office space and mailing addresses with each other, including 1410 South Ocean Boulevard, Palm Beach, Florida; 950 Third Avenue, New York, New York; and/or 22 Saw Mill River Road, Hawthorne, New York. (*See, e.g.*, Compl. ¶¶ 34-52; compare the shared office space and employee resources in *Netjets Aviation*, 537 F.3d at 179 and *Passalacqua*, 937 F.2d at 140.)

The Complaint asserts that Picower and his agent maintained a portfolio appraisal system which enabled Picower to centralize, coordinate and direct all of the investments of the Defendants with BLMIS. (*See, e.g.*, Compl. ¶ 61; compare the centralized and intermingled financial management at *Netjets Aviation*, 537 F.3d at 179-82 and *Passalacqua*, 933 F.2d at 140.)

The Complaint asserts that Picower used one of his BLMIS accounts as the primary source of cash withdrawals for all of the Defendants, and that he personally managed and supervised such withdrawals, which totaled more than $6 billion. (*See, e.g.*, Compl. ¶¶ 60, 63(d); compare the similar cash management and withdrawal systems in *Netjets Aviation*, 537 F.3d at 179-82 and *Passalacqua*, 933 F.2d at 140.)

The Complaint states that Picower engaged in extraordinarily heavy margin call borrowing to finance his speculative trading positions. (*See, e.g.*, Compl. ¶ 63(c)-(d); compare the heavy margin and debt positions in *Netjets Aviation*, 537 F.3d at 181-82 and *Passalacqua*, 933 F.2d at 139-40.)

The Complaint alleges that Picower's purported borrowings from BLMIS on behalf of defendants exceeded $6 billion, which, in light of the fictitious nature of their assets, raises the overwhelming presumption that they were severely undercapitalized, if not entirely insolvent (*See, e.g.*, Compl.¶ 63(c)-(d); compare finding of severe undercapitalization in *Passalacqua,* 933 F.2d at 139-40.)

The Complaint avers that Picower directed back-dated, fictitious and fraudulent trades with BLMIS for his own accounts and the accounts of other Defendants. (*See, e.g.*, Compl. ¶ 63(e)-(f); compare the deceptive and unlawful accounting fictions in *Netjets Aviation*, 537 F.3d at 179-83.)

The Complaint affirms that in dealing with BLMIS, Picower exercised complete dominion over and used the Picower Entities as instruments to advance his personal interests; accordingly, they functioned as his alter egos and no corporate veil can be maintained between them. (*See, e.g.*, Compl. ¶ 53; compare the

findings in *Netjets Aviation*, 537 F.3d at 182-84 and *Passalacqua*, 933 F.2d at 140.)

Given the Second Circuit's analysis in *Netjets Aviation* and *Passalacqua,* the allegations of the Complaint are more than sufficient to warrant denial of Defendants' motion to dismiss.

B. Defendants fail to challenge the Trustee's agency allegations.

As discussed above, the Complaint is replete with specific allegations of the facts and circumstances giving rise to actual or constructive knowledge on the part of Picower and Freilich regarding their fraudulent transactions with BLMIS. The Defendants do not attack the sufficiency of the Trustee's allegations that Picower was an agent of the Picower Entities, acting within the scope of his authority, and that all Defendants were the primary beneficiaries of wrongful conduct and in fact accepted and enjoyed the benefits thereof for decades. (*See, e.g.,* Compl. ¶¶ 28, 54.) Under such circumstances, it is black letter law that the acts and knowledge of agents are imputed to their principals, and that the principals cannot retain the fruits of their agent's conduct. *Center v. Hampton Affiliates, Inc*., 488 N.E.2d 828, 829 (N.Y. 1985); *546-552 West 146th Street LLC v. Arfa*, 863 N.Y.S.2d 412, 414 (1st Dep't 2008); *Capital Wireless v. Deloitte*, 627 N.Y.S.2d 794, 797 (3d Dep't 1995); *see also Apollo Fuel Oil v. United States*, 195 F.3d 74, 76-77 (2d Cir. 1999) (when agent acquires knowledge material to employment, such knowledge is imputed to the principal, and corporation can be guilty of knowing violations of law through doctrine of respondeat superior).

Not only does the Complaint establish that Defendants are liable for Picower's conduct, it also establishes that Picower is liable for his own participation in fraudulent or tortious conduct (both on behalf of himself and on behalf of the Picower Entities). New York law imposes individual personal liability on officers, directors and other corporate agents who engage in fraudulent acts or other torts, even if such conduct is in the course of their duties. *Bano v. Union*

Carbide Corp., 273 F.3d 120, 133 (2d Cir. 2001); *Lopresti v. Terwilliger*, 126 F.3d 34, 42 (2d Cir. 1997); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1177 (2d Cir. 1993). Moreover, this liability may be imposed on officers and directors whether they actually participate in the fraud or tort, or merely have knowledge of it. *See, e.g., Cohen v. Koenig*, 25 F.3d 1168, 1173 (2d Cir. 1994); *Polonetsky v. Better Homes Depot, Inc.*, 760 N.E.2d 1274, 1278 (N.Y. 2001); *Marine Midland Bank v. John E. Russo Produce Co.*, 405 N.E.2d 205, 212 (N.Y. 1980); *Ideal Steel Supply Corp. v. Fang*, 767 N.Y.S.2d 644, 645 (2d Dep't 2003) (sole shareholders and officers of corporation that allegedly engaged in fraud necessarily participated in such fraud themselves and may be individually liable).

Given that Picower has confined his objection to the assertion of liability against him solely on alter ego grounds (*see* MTD at 17-23), it should be noted that agents who direct, participate or know of a corporation's fraudulent, tortious or other inequitable conduct are personally liable irrespective of whether alter ego liability is imposed on them. *Am. Express Travel Related Servs. Co., Inc. v. N. Atl. Resources, Inc.,* 691 N.Y.S.2d 403, 404 (1st Dep't 1999). Corporate agents who participate in the commission of a tort are held individually liable regardless of whether they acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced. *Id.*; *see also Espinosa v. Rand*, 806 N.Y.S.2d 186, 187 (1st Dep't 2005). Accordingly, Picower may not escape individual personal liability for fraudulent and tortious conduct committed by him as an agent of the Defendants in the course of controlling, directing, or participating in their false, fictitious and fraudulent transactions with BLMIS, and this liability exists in addition to any alter ego liability the Court may impose upon him when it pierces, as it is amply justified in doing here, the corporate veil.

IV. ALL DEFENDANTS, INCLUDING THE FOUR NOT LISTED ON EXHIBIT B TO THE COMPLAINT, RECEIVED AVOIDABLE TRANSFERS

Picower argues in Point III of his motion that four of the defendants should be dismissed because they are not alleged to have received any transfers. Here he misreads the Complaint, which states that the Transfers identified in Exhibit B are not an all-inclusive list of direct transfers of estate property to defendants. (Compl.¶ 57.) Indeed, the Trustee's investigation into BLMIS' books and records is ongoing, and additional information continues to become available. At the time the Complaint was filed, certain accounts were alleged to be transferees on information and belief based on then available information. Since filing, the Trustee has obtained additional information from records going back substantially further in time and now provides particulars that underlie the fraudulent transfer allegations in the Complaint.

It is telling that Picower stops short of asserting that the "Non-Transferee" Defendants received no transfers from BLMIS. As he should be aware, prior to 1995 there were transfers from BLMIS to each of the Non-Transferee Defendants totaling more than $100 million, evidence of which the Trustee has discovered since the Complaint was filed. A list of the initial dates, methods of payment, and amounts of transfers to these Defendants is attached to this memorandum as Exhibit 1. If the Court finds that the allegations against the "Non-Transferee" Defendants as pleaded in the Complaint, together with the additional particulars provided here, are insufficient, the Trustee would amend to include these recently-identified transfers.

V. THE TRUSTEE'S TURNOVER CLAIM IS PROPERLY STATED

Picower argues in Point IV of his motion that the Trustee's claim for turnover of the Transfers is not ripe because the Court has not yet avoided those Transfers pursuant to Sections 544, 547, and 548 of the Bankruptcy Code 11 U.S.C. §§ 544, 547-8 (2009). Each of the

Transfers in question, however, is the subject of separate avoidance counts in this same action. The inclusion of a turnover count, therefore, is appropriate.

Picower's argument also ignores express provisions of the SIPA statute concerning the status of property transferred by a debtor when funds are insufficient to satisfy claims in full. In relevant part, the statute provides:

> …the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of title 11. … For purposes of such recovery, *the property so transferred shall be deemed to have been the property of the debtor*…

15 U.S.C. § 78*fff*-2(c)(3) (2009) (emphasis added). The key here is that the statute makes plain that as to property that was customer property prior to the transfer, that property when "so transferred" is deemed to have been property of the estate prior to the transfer, and therefore subject to the turnover provisions of Section 542. See 11 U.S.C. § 542 (2009). In other words, if there were any doubt about the nature of customer property, this SIPA provision makes it clear that for the purpose of avoidance actions, customer property is always property of the estate. Here, in the context of a Ponzi scheme, it could not be otherwise.

Even aside from the SIPA statute, however, it is appropriate under the Bankruptcy Code to pair a turnover claim with an avoidance action. The core function of a turnover claim pursuant to Section 542 is to permit the Trustee to recover "property that the trustee may use, sell, or lease" from any persons holding that property. *See* 11 U.S.C. § 542(a) . While the case law pertaining to this subject is not uniform, *see, e.g., Andrew Velez Constr., Inc. v. Consolidated Edison Co. of New York (In re Andrew Velez Constr., Inc.)*, 373 B.R. 262, 273 (Bankr. S.D.N.Y. 2007), a number of cases stand for the proposition that a turnover claim may be properly paired with an avoidance claim. For example, in *In re Jacobs*, the court granted summary judgment to the trustee in an avoidance action and held that a transfer of property from the debtors to the

defendants was both actually and constructively fraudulent. *In re Jacobs*, 394 B.R. at 664-72. In the same ruling, the court also granted summary judgment on the trustee's turnover and accounting claim for that property. *Id.* In so ruling, the court observed that by virtue of its ruling on the avoidance claim, the property was a transfer of property of the debtor and subject to turnover and avoidance. *Id.* at 674. This basic principle was also set forth in *Doyle v. Paolino (In re Energy Savings Center, Inc.)*, 61 B.R. 732 (E.D. Pa. 1986), where the court noted that:

> A claim made under Section 542, however, is not necessarily distinct from claims under other sections. For example, if a particular transfer of property is voidable as a fraudulent transfer under Section 548, then this property, now deemed property of the estate, becomes subject to the "turnover" authority contained in Section 542.

Id. at 735.

In challenging the Trustee's claim for turnover, Picower relies on dicta in the Second Circuit's decision in *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125 (2d Cir. 1992), in which the Second Circuit noted that only once a transfer is avoided and recovered does the property that was subject to that claim become "property of the estate" within the meaning of Section 541(a)(3). *Id.* at 131; 11 U.S.C. § 541(a)(3) (2009). *In re Colonial Realty*, however, was not a turnover case. Rather, the issue the Court determined in that case was that the automatic stay applied to a prepetition fraudulent transfer claim regardless of whether the fraudulently transferred property was, or was not, property of the estate. *In re Colonial Realty Co.*, 980 F.2d. at 131-2. *In re Colonial Realty* thus does not address the issue here: whether a turnover claim may be properly paired with an avoidance claim.

The pairing of these claims is appropriate for reasons of judicial economy. By the Defendants' logic, the Trustee also could not bring a recovery claim under Section 550 until the transfer is avoided. But it is commonly recognized that this can be done, *see* 5 *Collier's on Bankruptcy* ¶ 550.07 (2009), since requiring the Trustee to bring one adversary proceeding to

avoid the transfer and then a separate proceeding to recover the transfer or its value would be a waste of resources. *See generally Woods & Erickson LLP v. Leonard (In re Avi, Inc.)*, 389 B.R. 721, 734-35 (B.A.P. 9th Cir. 2008) (holding that an avoidance and recovery action may be brought simultaneously to "avoid absurd results" and to "protect the trustee from attempts to impede recovery" and to "afford[] flexibility when a transferee or its assets have disappeared."). The same rationale should apply to permit Section 542 claims to be paired with avoidance claims.

For these reasons, the Trustee requests that this Court follow the SIPA statute, and the reasoning of *In re Jacobs* and *In re Energy Savings Center,* and deny the Defendants' motion to dismiss Count One.

VI. THE RELEVANT DATE FOR THE SIX YEAR CONVEYANCES IS CORRECTLY ALLEGED

In Point V of his motion, Picower expends much energy in arguing that transfers that occurred within six years of the filing of the bankruptcy case on December 11, 2008, but more than six years before the adversary filing on May 12, 2009, should not be recoverable under 11 U.S.C. § 544(b) (2009). In other words, Picower challenges this basis for recovering transfers made to him in the period between December 11, 2002 and May 12, 2003. The motivation for this argument is understandable, since the Transfers at issue total more than $520 million dollars. Nonetheless, Picower's argument is illogical and finds no support in the statute or the caselaw. It is also irrelevant, since contrary to Picower's assumption, the underlying state law statute of limitations on such transfers did not actually expire before the adversary proceeding was filed, having been tolled by, among other things, the very fact of the filing of the bankruptcy petition.

A. State law limitations periods are relevant only until the bankruptcy case is filed.

The Bankruptcy Code not only creates the causes of action referred to by 11 U.S.C. § 544(b), it specifically provides the limitations period within which they are to be brought. Accordingly, the case law properly holds that if the cause of action exists at the petition date, the only applicable statute of limitations for bringing it thereafter is 11 U.S.C. § 546(a) (2009).

Under New York state law, as in most other states, a transferor cannot avoid its own transfers – the right belongs to the creditors or, following bankruptcy, debtor in possession. Consequently, a cause of action for a trustee in bankruptcy is created by the Bankruptcy Code, and it comes into being at the same time as the bankruptcy case itself. *See, e.g. Mahoney, Trocki & Assocs., Inc. v. Kunzman (In re Mahoney, Trocki & Assocs., Inc.)*, 111 B.R. 914, 920 (Bankr. S.D. Cal. 1990) ("a fraudulent transfer action maintained by a debtor-in-possession under 11 U.S.C. section 544(b) is clearly the creation of the Bankruptcy Code"); *Rosania v. Haligas (In re Dry Wall Supply, Inc.)*, 111 B.R. 933, 935 n.2 (D. Colo. 1990) (cause of action under Section 546(b) is not one that could have been brought by the debtor).

A federal cause of action is governed by federal statute of limitations, where one exists. Only if no federal statute of limitations applies do the federal courts look to a state statute. *See e.g., Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 414 (2005); *DelCostello v. Int'l Broth. Of Teamsters*, 462 U.S. 151, 158-161 (1983); *DirecTV, Inc. v. Webb*, 545 F.3d 837, 847 (9th Cir. 2008). In this instance, 11 U.S.C. § 546 specifically provides a statute of limitations for, among other things, proceedings under Section 544. 11 U.S.C. § 546(a). Neither Section 544 nor Section 546, nor any other provision of the Bankruptcy Code, provides that the Trustee must continue to look to the procedural limitations of state law once the Trustee has acquired the substantive rights given to him by Section 544 of the Bankruptcy

Code.[13] Instead, Section 546(a) specifically provides the operative limitations period for the rights created by Section 544. In other words, and contrary to the assumption of the Defendants, Section 544(a) does not so much toll the state statute as supersede it.[14]

1. Picower's argument contravenes 25 years of bankruptcy case law.

More than 25 years of case law under the Bankruptcy Code confirms that the state law statute of limitations does not have any continued effect after the bankruptcy case is filed and the Trustee's Section 544(b) rights arise. The following cases are all directly on point and all so hold: *Eisenberg v. Feiner (In re Ahead By A Length, Inc.*), 100 B.R. 157, 164 (Bankr. S.D.N.Y. 1989); *Bloom v. Fry (In re Leach)*, 380 B.R. 25, 29-30 (Bankr. D.N.M. 2007); *Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 677-78 (S.D. Tex. 2007); *Sears Petroleum & Trans. Co. v. Burgess Constr. Servs., Inc.*, 417 F. Supp. 2d 212, 225 (D. Mass. 2006); *Mi-Lor Corp. v. Gottsegen (In re Mi-Lor Corp.)* 233 B.R. 608 (Bankr. D. Mass. 1999); *Tsai v. Buildings By Jamie, Inc. (In re Buildings by Jamie, Inc.)*, 230 B.R. 36, 45 (Bankr. D.N.J. 1998); *In re Princeton-N.Y. Inv., Inc.*, 219 B.R. at 65-66; *Levit v. Spatz (In re Spatz)*, 222 B.R. 157, 164 (N.D. Ill. 1998); *Bay State Milling Co. v. Martin (In re Martin)*, 142 B.R. 260, 265-66 (Bankr. N.D. Ill. 1992); *Mancuso v. Cont'l Bank Nat'l Ass'n Chicago (In re Topcor, Inc.)*, 132 B.R. 119 (Bankr. N.D. Tex. 1991); *In re Mahoney, Trocki & Assocs., Inc.*, 111 B.R. at 914, 917-18 ; and *In re Dry Wall Supply, Inc.*, 111 B.R. at 936-37. In each of these cases, the trustee filed an avoidance

[13] The applicable New York statute of limitations, N.Y. C.P.L.R. § 213(8), is strictly a procedural statute of limitations. *See First Union Nat'l. Bank v. Gibbons (In re Princeton-New York Invs., Inc.*), 219 B.R. 55, 66 (D.N.J. 1998). In contrast to provisions such as 11 U.S.C. § 548 (two year reachback from bankruptcy filing date), it does not create a "reachback" period measured by a particular event. It just sets a time within which, as to any given transfer, an action must be commenced. Therefore, where a creditor has the right to avoid transfers under the New York Uniform Fraudulent Conveyance Act, the transfers in question continue to be voidable as to that creditor even after the limitations period expires, and if the applicable statute of limitations is waived (such as by the defendant not pleading it), changed, or is otherwise rendered inapplicable, the substantive rights remain.

[14] *Cf. In re Princeton-New York Inv., Inc*., 219 B.R. at 66, and *Am. Founders Fin., Corp*., 365 B.R. at 677-78, finding that Section 546(a), because of preemption, provides the only relevant time period within which a trustee

action to overturn a transfer that had taken place longer ago than the period specified by the primary state statute of limitations. However, at the time the bankruptcy petition was filed, the creditors in whose shoes the trustee was standing were not yet barred. Each of these courts accordingly held that the trustee's action under Section 544(b) was timely because it was filed within the period prescribed by 11 U.S.C. § 546(a).

Moreover, numerous cases in other contexts have also stated plainly that so long as the applicable statute of limitations has not expired prior to the filing of the bankruptcy case, the trustee may bring a Section 544(b) avoidance action at any point during the period set out in Section 546(a). *E.g., O'Connell v. Shallo (In re Die Fleidermaus LLC),* 323 B.R. 101, 107 (Bankr. S.D.N.Y. 2005); *G-I Holdings, Inc. v. Those Parties Listed on Exhibit A (In re G-I Holdings, Inc.)*, 313 B.R. 612, 646 (Bankr. D.N.J. 2004); *Orr v. Bernstein (In re Bernstein)*, 259 B.R. 555, 558 (Bankr. D.N.J. 2001); *Glosser v. S. & T. Bank (In re Ambulatory Medical & Surgical Health Care)*, 187 B.R. 888, 901 (Bankr. W.D. Pa. 1995); *Kaliner v. Load Rite Trailers, Inc. (In re Sverica Acquisition Corp.),*179 B.R. 457, 466 (Bankr. E.D. Pa. 1995); *Tabas v. Gigi Advertising Partnership (In re Kaufman & Roberts, Inc.)*, 188 B.R. 309, 312, 314 (Bankr. S.D. Fl. 1995); *Browning v. Williams (In re Silver Wheel Freightlines, Inc.)*, 64 B.R. 563, 568 (Bankr. D. Or. 1986); *L.A. Clarke & Son, Inc. v. Donald (In re L.A. Clarke & Son, Inc.)*, 59 B.R. 856, 860-862 (Bankr. D.D.C. 1986). Collier's also agrees unequivocally. 5 *Collier on Bankruptcy* ¶ 546.02[1][b] (2009) ("If the state law limitations period governing a fraudulent transfer action has not expired at the commencement of a bankruptcy case, the trustee may bring the action

---

must bring a Section 544(b) action, even if the time limits are set by state law pursuant to a statute of repose rather than a statute of limitations. Under either theory, the result is the same.

pursuant to Section 544(b), provided that it is commenced within the Section 546(a) limitations period.")[15]

Defendants have conceded, as they must, that much case law is against them. What may not be apparent from Defendants' brief, however, is that of the more than 20 cases they rely upon in attempting to make the contrary argument, *not a single one* actually supports their position: not one case considers the Section 546(a) statute of limitations and concludes – even in dicta – that a trustee's right to bring a recovery adversary complaint that existed on the filing date can potentially expire before the time set out in Section 546(a).

Most of the cases Picower relies upon are so far afield that they do not even mention Section 546 and are patently not attempting to make a pronouncement that deals with what happens if the state law statute of limitations expires between the bankruptcy filing date and when the Trustee must bring his or her claim.[16]

---

[15] Defendants make much of the fact that Section 544(a) includes specific reference to the commencement of the case, while Section 544(b) does not. However, this is likely attributable to the fact that they derive from two different Sections of the Act – 70(c) and 70(e) respectively, which historically had similar differences in language –- 70(c), the predecessor of Section 544(a), *see*. e.g., H.R. REP. NO. 95–595, at 371 (1977), defined the trustee's powers and the hypothetical creditors' powers as of the date of the bankruptcy, while Section 70(e), the predecessor of Section 544(b), did not. Section 544(a), and its predecessor, Section 70(c) of the Bankruptcy Act, primarily define powers the precise scope of which are determined by relative priorities among lien creditors, bona fide purchasers, and other secured creditors or claimants. The exact date on which the hypothetical lien or other power arose and attached is crucial to the determination of respective priorities, and thus had to be specified exactly in the statutory language, or the provision could have been rendered wholly ineffectual. Section 544(b), which referenced rights of an actual creditor, did not suffer from the same imperative.

[16] *See, e.g. Baldi v. Samuel Son & Co. (In re McCook Metals, LLC)* No. 05 C 2990, 2007 WL 4287507, *3 n. 7 (N.D. Ill. Dec. 4, 2007) (says only that "The UFTA, however, provides a different timeline than section 548 of the Bankruptcy Code. . . . Under section 6 of the UFTA, an action must be brought within four years of the disputed transfer. . . . There is no allegation here that the Longview Trustee did not bring this action within the proper timeframe."), *aff'd* 548 F.3d 579 (7th Cir. 2008); *Fink v. Graven Auction Co. (In re Graven)*, 64 F.3d 453, 455-56, and n. 5 (8th Cir. 1995) (in a case with no limitations issues, merely commenting, without discussing Section 546, "section 544 may allow the trustee to reach back to transfers made more than one year before the bankruptcy filing, because the statute of limitations from the state or applicable nonbankruptcy law applies and may allow the avoidance of transfers more than one year old."); *Hirsch v. Gersten (In re Centennial Textiles, Inc.)*, 220 B.R. 165, 171 (Bankr. S.D.N.Y. 1998) (in a case without statute of limitations issues or discussions, stating that Section 544(b) incorporates and makes applicable nonbankruptcy law.); *In re O.P.M. Leasing Servs., Inc.*, 32 B.R. at 201-2 (in a case not raising Section 546 issues, stating that a six year statute of limitations applies under Section 544, thus permitting the Trustee to state a cause of action for something that was beyond the Section 548 reachback period.); *Old Orchard Bank & Trust Co. v. Josefik (In re Josefik)*, 72 B.R. 393, 395, 397 (Bankr. N.D. Ill. 1987) (state statute

The few cases cited that mention Section 546 do nothing to further Picower's arguments. To the contrary, they acknowledge that the state statute of limitations under Section 544 has no relevance after the bankruptcy petition date. *See, e.g., Barr v. Charterhouse Group Int'l, Inc. (In re Everfresh Beverages, Inc.)*, 238 B.R. 558, 571-3 (Bankr. S.D.N.Y. 1999) (refers to Section 546 as the "only relevant" statute of limitations while holding that the plaintiff cannot use the state statute of limitations or Section 108(a) to extend his time for bringing Section 544(b) suits past the limit that Section 546 sets); *Global Crossing Estate Rep. v. Winnick*, No. 04 Civ. 2558, 2006 WL 2212776, at *6, *6 n. 6 (S.D.N.Y. Aug. 3, 2006) (citing 4 *Collier on Bankruptcy* ¶ 544.03[2] at 544-21, 544-22 (L. King 15th ed. 1989) for the proposition that "[o]nce the case has commenced, section 546(a) . . . specifies the time within which the trustee must act under section 544(b)" and further commenting at footnote 6, "On the other hand, a state statute of limitations may be relevant to a section 544(b) claim if it expires before the bankruptcy case commences . . . ."); *Steege v. Lyons (In re Lyons)*, 130 B.R. 272, 278 (Bankr. N.D. Ill. 1991) ("If the creditor into whose shoes the trustee seeks to step . . . still had time to pursue the remedy at the time of the petition, the trustee must bring the action within the time fixed by section 546."); *Hunter v.*

---

of limitations expired before the filing of the bankruptcy case; §546 neither relevant nor discussed); *T.C.I. Ltd. v. Sears Bank & Trust Co. (In re T.C.I. Ltd.)*, 21 B.R. 876 (Bankr. N.D. Ill. 1982) (does not deal with either Section 544 or Section 546); *Dzikowski v. Friedlander (In re Friedlander Capital Mgmt.)*, Adv. No. 05-03088-PGH, 2009 WL 1231085, *3, *10 n. 1 (Bankr. S.D. Fla. Apr. 29, 2009) (stating only, "Defendants do not dispute the Trustee's assertion that the applicable statute of limitation is four years, or that the Trustee's claim is timely brought" and then reciting in the corresponding footnote, "The applicable state law limitations period applies to actions brought under section 544(b).' 5 *Collier on Bankruptcy* ¶ 544.09 (2009)"); and *Bash v. Cunningham (In re Cunningham)*, Adv. No. 07-01146, 2008 WL 2746023, 2008 Bankr. LEXIS 4125 at *25-26 and n.5 (Bankr. N.D. Ohio July 11, 2008) (in a case expressly disclaiming any statute of limitations issues under either §544 or §548, *id.* at *26 note 5, remarking, without ever mentioning Section 546, "Once a fraudulent transfer is made, a trustee in bankruptcy generally must bring a claim within four years of the transfer, *See* O.R.C. § 1336.09."). In addition, of course, the Bankruptcy Act cases cited by the defendants also are inapposite to the §546 issue. These include *Buchman v. Am. Foam Rubber Corp.*, 250 F. Supp. 60 (S.D.N.Y. 1965); *Feldman v. First Nat'l City Bank*, 511 F.2d 460 (2d Cir. 1975); *Halpert v. Engine Air Serv., Inc.*,116 F. Supp. 13 (E.D.N.Y. 1953); *Lawler v. RepublicBank Dallas (In re Lawler)*, 53 B.R. 166 (Bankr. N.D. Tex. 1985); *MacLeod v. Kapp*, 81 F. Supp. 512 (S.D.N.Y. 1948); and *Seligson v. N.Y. Produce Exch.*, 378 F. Supp. 1076 (D.C.N.Y. 1974).

Hansen (In re Hansen), 114 B.R. 927, 933 (Bankr. N.D. Ohio 1990) ("The state limitations period is also extended by § 546(a) when the trustee is proceeding under 544(b) . . . ").

2. There is no evidence of contrary Congressional intent.

As most of the cases point out, the policies of the Bankruptcy Code also strongly support allowing the trustee (or debtor in possession as the case might be) adequate time to determine what causes of action are viable and should be brought. Otherwise, valuable rights that could be asserted for the benefit of all the creditors would simply expire without recognition.

No legislative history indicates that Congress intended any other result. Moreover, Congress has had many opportunities to "correct" the statute as part of its periodic overhauls of the Bankruptcy Code if the many, many courts that have ruled on the issue over the decades were doing so contrary to its intentions – and it has not done so. Defendants misrepresent the 1994 amendment of Section 546(a) in 1994 as "*shortening* [the two year] limitations period to 1 year after the appointment or election of the first trustee." (MTD at 39 (citation omitted).) The 1994 amendment resolved a dispute among competing lines of cases whether the two year limit of Section 546(a) was supposed to run from when a bankruptcy case was first filed by a debtor in possession or whether it was supposed to begin to run only when a trustee was appointed. *Compare, e.g., In re Topcor, Inc.,* 132 B.R. at 124-25 (statute begins to run when trustee is appointed) *with Zilkha Energy Co. v. Leighton,* 920 F.2d 1520, 1524 (10th Cir. 1990) (statute begins to run when a debtor in possession files for bankruptcy). The compromise provision confirmed that the statute should be two years from the bankruptcy case filing in most situations (and not more than three years at the outside), but at the same time ensured that a trustee who was appointed to take over from a debtor-in-possession within the first two years would have at least a year's worth of "breathing time" to determine which causes of action to bring. In certain factual situations, therefore, the amendment *extended* the statute beyond the strict two year limits

that would have been accorded to it by the *Zilkha* line of cases, and in no event restricted the statute to less than two years from the petition date. *See generally 5 Collier on Bankruptcy* ¶ 546.02[1][c], n.10; 546.LH[1][a] (2009). Defendants are simply incorrect to categorize this amendment as evidence of Congress' desire to further cut back the estate's time to sue.

Moreover, Congress did nothing in its 1994 amendments – nor has it at any time since – to alter the interpretation of the Section that had been rendered already by such cases as *In re Martin*, 142 B.R. at 265-66; *In re Topcor, Inc.*, 132 B.R. at 123-24; *In re Mahoney, Trocki & Assocs., Inc.*, 111 B.R. at 917-18; and *In re Dry Wall Supply, Inc.*, 111 B.R. at 936-37. In each of these cases, the court held squarely that a Section 544(b) action could be filed despite the argument that the state statute of limitations had already expired post-petition because the adversary proceeding was filed within the two year limit of Section 546(a). While later amendments are not considered the best evidence of original legislative intent, they still accorded interpretive weight. *See, e.g., Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 808 (9th Cir. 1989) (noting that amendments that dealt with the topic at issue but left existing interpretations undisturbed should be considered when analyzing prior congressional intent).

In short, the many courts who have considered the issue over the last quarter century have found against the Defendants' position, and Congress has never acted to change the effect of such cases, despite repeatedly having the opportunity to do so in other amendments to Section 546. This Court should reject Defendants' position as well.

B. <u>The state statute of limitations has not run.</u>

In any event, Picower's entire Section 546 argument is irrelevant because the state law statute of limitations *has not expired*. Defendant's entire argument is falsely premised on the belief that, as to certain transactions, the New York state statute of limitations applicable to

fraudulent transfer expired between the filing of the bankruptcy case and the commencement of the instant adversary proceeding. Because of the tolling provisions provided by both New York and bankruptcy law, however, no underlying creditor has had his or her New York law avoidance claim expire. So even if Picower could overcome the vast body of case law discussed above, his argument fails because avoidance actions against transfers occurring more than six years prior to the adversary filing, and less than six years prior to the filing of the instant bankruptcy case, are indisputably timely.

1. The Bankruptcy case filing stays the running of the statute of limitations under New York law.

New York law provides that "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." N.Y. C.P.L.R. § 204 (McKinney 2009). Section 362 of the Bankruptcy Code, which automatically stays all creditors from filing fraudulent conveyance recovery cases while the bankruptcy case is proceeding as to their debtor, *see In re Colonial Realty Co.*, 980 F.2d 125, is precisely the type of stay that tolls New York statutes of limitations pursuant to N.Y. C.P.L.R § 204(a). *E.g.*, *Mercury Capital Corp. v. Shepherds Beach, Inc.*, 723 N.Y.S.2d 48 (2d Dep't 2001); *CDS Recoveries L.L.C. v. Davis*, 715 N.Y.S.2d 517, 519 (3d Dep't 2000); *Zuckerman v. 234-6 W. 22nd St. Corp.*, 645 N.Y.S.2d 967, 971 (Sup. Ct. 1996) (automatic stay tolls statutes of limitations under New York law). Because a creditor's state law fraudulent conveyance action is subject to the automatic stay of the Bankruptcy Code, C.P.L.R. § 204(a) stays the running of the statute of limitations as to that creditor.

When a state law statute of limitations is tolled as to a creditor, a Trustee who is standing in the shoes of that creditor pursuant to 11 U.S.C. § 544(b) likewise gets the benefit of that

tolling.[17] Because C.P.L.R. § 204(a) stayed the running of the six year statute of limitations applicable to the Trustee's claims under Section 544(b), that statute of limitations could not have expired in the period between the commencement of this SIPA case and the filing of the instant adversary proceeding, no matter which transfers are considered.

2. Section 108(c) of the Bankruptcy Code also stays the running of the New York statute of limitations.

The same result is reached pursuant to 11 U.S.C. § 108(c) (2009), which likewise suspends the running of statutes of limitations against creditors when they are prevented by Section 362's automatic stay from commencing or continuing a civil action in a court other than in a bankruptcy court on a claim against the debtor.[18] The reason for this is set out in *In re Colonial Realty Co.,* 980 F.2d at 127-8. In that case, the FDIC sought pursuant to its own statutory avoidance authority to recover assets alleged to have been fraudulently conveyed, prepetition, by a bankruptcy debtor. *Id*. Although the court concluded that neither the FDIC action nor the property it sought to recover were technically "property of the estate," it nonetheless held the action barred because the FDIC was effectively acting "to recover a claim against the debtor" and the automatic stay therefore applied. *Id.* at 132.

[17] *See, e.g., In re G-I Holdings, Inc.*, 313 B.R. at 639-40 (holding a creditor committee standing in the shoes of a trustee could benefit from the one year tolling of the state statute of limitations for asbestos claims); *In re Bernstein*, 259 B.R. at 560 (denying defendant's motion to dismiss because the trustee standing in the shoes of an unsecured creditor may have been able to prove that the unsecured creditor could have availed himself of a one year tolling provision and timely filed its complaint alleging fraudulent transfers as of the petition date); *In re Sverica Acquisition Corp.*,179 B.R. at 470 (noting the common law "adverse domination" tolling doctrine may apply to a trustee standing in the shoes of a creditor); *In re Lyons*, 130 B.R. at 279-81 (stating that the doctrine of equitable tolling could apply to a trustee standing in the shoes of a creditor).

[18] While Defendants cite to many cases holding the tolling provision of 11 U.S.C. § 108(a) is inapplicable to extend the state statutes of limitations relating to fraudulent conveyance cases, neither Defendants nor those cases discuss Section 108(c). The reason may well be that a discussion of this provision is normally unnecessary because of the courts' universal endorsement of the proposition that Section 546(a) allows Section 544(b) actions to be brought for two years after the petition date so long as the action was viable on the petition date. See 11 U.S.C. §§ 544(b) & 546(a).

For the same reason, a fraudulent conveyance action, even though the debtor is not a defendant, is an action to recover "a claim against the debtor," within the meaning of Section 108(c), thus triggering the automatic stay. New York state law fixes a period for commencing fraudulent conveyance actions outside of bankruptcy court, and the automatic stay prevents the creditor from bringing such actions. Such an action therefore fits squarely within both the wording[19] and the intended purpose of the Section 108(c) savings provision. Absent such a provision, a bankruptcy filing which is later dismissed could cost a creditor its only chance to file such a fraudulent conveyance recovery action.

The Second Circuit has expressly recognized that during the pendancy of a bankruptcy case, Section 108(c) protects a creditor's right to bring a state law fraudulent conveyance action against expiration, and that as a result the trustee's right to bring an action under 11 U.S.C. § 544(a) also is preserved by Section 108(c). In *Belford v. Martin-Trigona* (*In re Martin-Trigona*), 763 F.2d 503 (2d Cir. 1985), a non-debtor defendant argued that the statute of limitations barred a fraudulent conveyance claim because the trustee did not bring the action until 1983, five years after the allegedly fraudulent conveyance and after the three year state law limitations would have expired. *Id.* at 506. The Second Circuit dismissed this argument as invalid because of the effect of Section 108(c), stating "[t]his argument ignores the tolling of the statute of limitations

---

[19] Section 108(c) provides:

> (c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108(c).

on December 2, 1980, when the bankruptcy petition was filed. The complaint was timely filed." *Id.* (citing 11 U.S.C. § 108(c) (1982)).

Accordingly, Section 108(c) of the Bankruptcy Code also has prevented the running of the New York state statute of limitations as to fraudulent conveyance actions that could have been brought by a creditor up through the bankruptcy filing date.

3. The state statute of limitations is also equitably tolled as to both real and hypothetical creditors for claims based on actual fraud.

Finally, the running of the statute of limitations is also equitably tolled under New York law. N.Y. C.P.L.R. §§ 213(8) and 203(g) both permit a plaintiff to assert a fraud claim that would otherwise be untimely if the plaintiff does so within two years of the time when the plaintiff discovered the fraud or could with reasonable diligence have done so. N.Y. C.P.L.R. §§ 203(g) & 213(8) (McKinney 2009). As pled by the Trustee and discussed below, actual creditors exist who could not reasonably have known of the fraud and, thus, have two years from discovery to bring their causes of action.

For that matter, the statute also is tolled as to hypothetical creditors, in whose shoes the Trustee may stand pursuant to 11 U.S.C. § 544(a) (Trustee has the right to "avoid any transfer of property of the debtor . . . that is voidable by" certain hypothetical creditors, including a creditor who extends credit and has an execution returned unsatisfied). Such rights of the Trustee are "without regard to any knowledge of the trustee or of any creditor." 11 U.S.C. § 544(a).[20] Both

[20] While the provisions of 11 U.S.C. § 544(a) are not commonly used to avoid fraudulent transfers, cases have acknowledged that fraudulent conveyance actions may also be brought under Section 544(a) by asserting the rights of hypothetical creditors. *See, e.g., In re Vitreous Steel Prods. Co.,* 911 F.2d 1223, 1235 n. 5 (7th Cir. 1990) ("The Trustee may also have additional powers to avoid fraudulent transfers using the 'strong arm clause'. . . ."); *Collins v. Kohlberg & Co. (In re Southwest Supermarkets, LLC)*, 325 B.R. 417, 420, 424-27 (Bankr. D. Ariz. 2005) (permitting trustee to bring fraudulent conveyance action under Section 544(a)(2) and holding that "the discovery rule applicable to actual fraudulent transfers prevents the running of limitations against the hypothetical creditor of Section 544(a)(2), who is statutorily defined to lack knowledge of any wrongdoing"); *Fitzgibbons v. Thomason (In re Thomason)*, 202 B.R. 768, 770 (Bankr. D. Colo. 1996) (rejecting defendant's argument that the trustee's

Sections 275 and 276 of the New York Debtor and Creditor Law make transfers available as to "future creditors," such as a prior claim under 11 U.S.C. § 544(a), and Section 274 makes available as to persons who become creditors during the continuation of the business transaction referenced by that Section. *See* N.Y. Debt. & Cred. Law §§ 274-6 (McKinney 2009).

VII. THE TRUSTEE HAS SUFFICIENTLY PLED A CAUSE OF ACTION BASED ON THE DISCOVERY RULE

Section 544(b) of the Bankruptcy Code bestows standing on the Trustee to avoid transfers that are voidable under applicable law by a creditor holding an unsecured claim that is allowable under Section 502 of the Bankruptcy Code. *See In re OPM Leasing Servs., Inc.*, 32 B.R. at 201. A creditor under New York law may set aside fraudulent conveyances made by a debtor, *see, e.g.*, N.Y. Debt. & Cred. Law §§ 276, 276-a, 278, & 279 (McKinney 2009), and may bring his action within six years from the commission of the fraud, or two years from the time of discovery of the fraud, whichever is later. N.Y. C.P.L.R. § 213(8) & 203(g); *see also Hoffenberg v. Hoffman & Pollok*, 288 F.Supp.2d 527, 535-6 (S.D.N.Y. 2003); *Lefkowitz v. Appelbaum*, 685 N.Y.S.2d 460, 461 (2d Dep't 1999); *Phillips v. Levie*, 593 F.2d 459, 462 n.12 (2d Cir. 1979); *Schmidt v. McKay*, 555 F.2d 30, 36-37 (2d Cir. 1977); *Lippe v. Bairnco Corp.*, 225 B.R. 846, 852-3 (S.D.N.Y. 1998).

Picower claims in Point VI of his motion that the Trustee cannot rely on the "discovery rule" to pursue transfers that took place more than six years prior to the filing date because (i) the Trustee has not named a particular creditor or category of creditor in the Complaint and a basis for why they could not have discovered the fraud; and (ii) the "red flags" identified by the

---

avoidance action, brought under Section 544(b), should be dismissed because Section 544(a) "also provides that the trustee may avoid any transfer of property of the debtor that such a hypothetical perfected lien creditor could avoid," thus making the trustee a creditor by operation of law who has the power to exercise any right that a creditor could exercise, including the right to pursue an action under the Colorado Uniform Fraudulent Transfer Act).

Trustee as putting Picower on notice of Madoff's fraudulent scheme essentially preclude the Trustee from asserting that any investor could not have discovered the fraud. (*See* MTD at 40-41.) Both of these arguments are unavailing and should be rejected by the Court.

A. There is no requirement at this stage of the action to specifically identify the creditor(s) whose claims are being asserted.

The Complaint alleges that "[a]t all times relevant to the Transfers, the fraudulent scheme perpetrated by BLMIS was not reasonably discoverable by at least one unsecured creditor of BLMIS" (Compl. ¶ 120) and that "[a]t all times relevant to the Transfers, there have been one or more creditors who have held and still hold matured or unmatured unsecured claims against BLMIS that were and are allowable . . . ." *Id.* ¶ 121. Picower claims that these allegations are insufficient and that the Trustee must further identify the investor(s) whose claim(s) the Trustee is asserting pursuant to Section 544(b) at the very inception stage of this litigation. Picower is incorrect.

The United States Bankruptcy Court for the Southern District of New York recently reiterated that there is no need at the complaint stage to specifically identify the creditor(s) upon whose claims a trustee bases his standing for purposes of Section 544(b). *See Responsible Person of Musicland Holding Corp. v. Best Buy Co. (In re Musicland Holding Corp.),* 398 B.R. 761, 780-81 (Bankr. S.D.N.Y. 2008); *see also Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 673-4 (D.R.I. 1998) ("a probing inquiry into who the creditors are, and what claims they hold, is inappropriate" at the pleading stage; denying motion to dismiss). Picower's concession that "[c]ourts in this District have been reluctant to require trustees to identify the creditor(s) giving rise to the trustee's claims" (MTD at 42) is an understatement. As the *In re Musicland* court stated: "[t]he Court has not been able to locate a case in this district supporting the proposition

that the plaintiff must name the qualifying creditor in the complaint, or suffer dismissal." 398 B.R. at 780. Nor has any such case been found by the Trustee or, evidently, by Picower.

Nor does the single case from this District relied on by Picower, *Young v. Paramount Commc'ns, Inc. (In re Wingspread Corp.)*, 178 B.R. 938 (Bankr. S.D.N.Y. 1995), support his argument. In *In re Wingspread*, the trustee's complaint did not specifically identify any actual qualifying creditor. *Id.* at 945. Rather, during discovery, the Trustee identified categories of qualifying creditors and listed names of specific creditors. *Id.* The defendants moved for summary judgment, claiming that the trustee had not identified a single unsecured creditor into whose shoes he could step. *Id.* While the *In re Wingspread* court agreed that the trustee ultimately had to prove the existence of an actual unsecured creditor with standing, the court did not dismiss the trustee's complaint even though the complaint failed to name any such creditor. *Id.* at 946. Nor did it grant summary judgment. Instead, the court concluded that factual issues surrounding whether the debtor's hundreds of trade creditors might have such standing precluded summary judgment, and noted that "at trial, the Trustee must prove the existence of at least one unsecured creditor" who would have had standing. *Id.* "Thus, although the court first framed the issue as one of pleading, *Wingspread* must be read to mean that the complaint does not have to name the qualifying creditor, and instead, it is sufficient to prove the creditor's existence at trial." *In re Musicland*, 398 B.R. at 779.

Contrary to Picower's argument, judicial authority in this District approves of almost the very language used by the Trustee. In *In re RCM Global Long Term Capital Appreciation Fund, Ltd.*, 200 B.R. 514 (Bankr. S.D.N.Y. 1996), the court held that the debtor had adequately pleaded the existence of an unsecured creditor with an allowable claim by pleading that "as of the date of

the purported fraudulent conveyance, the Debtor had at least one or more creditors holding unsecured claims against it." *Id.* at 519, 522-525.

While the identification of a "category" of creditors has been found to be "unquestionably enough" to put defendants on notice of the creditors who supply the standing to sue, *see Global Crossing*, 2006 WL 2212776, at *11 (court held that it was sufficient to refer to a group of creditor noteholders that engaged in an exchange offer), there is no requirement that any such category be specified.[21] In any event, the Complaint provides ample notice to Picower of at least one category of creditors on whose claims the Trustee founds his standing: the customers of BLMIS. (*See, e.g.,* Compl. ¶ 5 ("The Trustee seeks to set aside such transfers and preserve the property for the benefit of BLMIS' defrauded customers"); Compl. ¶ 15 ("…the Trustee must …pursue recovery from customers who received preferences and/or payouts of fictitious profits to the detriment of other defrauded customers whose money was consumed by the Ponzi scheme"); Compl. ¶ 18.) Indeed, Picower can hardly assert that he will have trouble identifying, for purposes of discovery and trial, a relevant category of potential creditors. For clarity, the Trustee reiterates that one category of qualified creditor is defrauded customers of BLMIS – discussed throughout the Complaint – who had and still hold unsecured claims against BLMIS.

There will be more than sufficient opportunity during discovery for the Defendants to identify customers to whom the Trustee is referring and/or at trial for the Defendants to put forth an argument that the identified creditors do not satisfy the requirements of Section 544(b) of the

[21] Even though the *In re Musicland* court found that three categories of creditors were identified in the complaint, the court did not mandate such a pleading standard. Rather, it merely acknowledged that the complaint satisfied the *In re RCM Global* case standard as well as the somewhat more encompassing standard in the *Global Crossing* case. *See In re Musicland*, 398 B.R. at 780-81. As set forth above, the Complaint here also identifies at least one category of creditor, thus satisfying both the *In re RCM Global* and *Global Crossing* standards.

Bankruptcy Code if the Defendants so desire. At this stage of the proceeding, the Trustee has alleged in the Complaint all that is required under the law of this District.

B. While the Trustee has adequately alleged the existence of creditors who could not reasonably have discovered the fraud, evaluation of this issue is premature.

The Defendants next argue that the Trustee is precluded from relying on the discovery rule because he does not sufficiently allege and will be unable to establish that there are BLMIS investors who could not have discovered Madoff's fraud with reasonable due diligence. First, Picower claims that the Complaint contains no factual basis from which it could be inferred that any reasonable investor exists who could not have discovered Madoff's fraud. Given that Picower devotes several pages of his motion to hiding behind just those investors, this appears to be a self-defeating argument. But more to the point, it is spurious: the Complaint amply alleges the operation of the Ponzi scheme and Madoff's steps to conceal it, which were designed to and did deceive reasonable investors for decades. (*See, e.g.*, Compl. ¶¶ 19–27, 29–32, 64(b).)

Picower's main argument is that having identified certain "red flags" that were available to other investors as well as Picower, the Trustee is precluded from arguing that any investor was misled. If this information put Picower on notice of fraud, he argues, then "every single other BLMIS investor" was also on inquiry notice. (MTD at 45.) This argument is simply another attempt by Picower to falsely equate himself with the ordinary investors who have been financially ruined by BLMIS. This intent is particularly transparent since the issue of whether there is an investor who could not have discovered the fraud is a question that cannot be determined on this motion to dismiss.

1. The evaluation of which investors could or could not have discovered the fraud cannot be made on this motion to dismiss.

The evaluation of whether there is an unsecured creditor of BLMIS who could not have discovered the fraud is not an analysis that is appropriate to consider in the context of Picower's motion to dismiss. The question to be determined – whether a specific creditor acting with reasonable diligence could reasonably have inferred the existence of the fraud – is an inquiry involving a mixed question of law and fact that ordinarily should not be disposed of by summary judgment. *See Schmidt*, 555 F.2d at 37; *Trepuk v. Frank*, 376 N.E.2d 924, 926 (N.Y. 1978) ("Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts."), *rev'd on other grounds*, 437 N.E.2d 278 (N.Y. 1982); *Erbe v. Lincoln Rochester Trust Co.,* 144 N.E.2d 78, 80-1 (N.Y. 1957) (reversing order of dismissal because court would not speculate as to sufficiency of evidence at trial). The determination of what a particular investor should have known requires examination of the totality of the facts and circumstances relating to that individual investor. This is especially true given that issues such as the level of an investor's experience affects "the extent to which a court may properly conclude that a particular event should have influenced that investor to inquire into the likelihood of fraud involving his or her investment." *See Tab P'ship v. Grantland Fin. Corp*., 866 F. Supp. 807, 811 n. 3 (S.D.N.Y. 1994)

Given that the Trustee is not required, at this juncture, even to identify any specific creditor upon whose claim he relies, it is premature to delve into what any specific creditor reasonably could or could not have known. *See Zahn*, 218 B.R. at 673 ("a probing inquiry into who the creditors are, and what claims they hold, is inappropriate" in context of motion to dismiss).

2. Picower is a sophisticated investor who had access to information – including fraud in his own accounts – that other investors lacked.

As Picower acknowledges, whether an investor could have discovered the fraud for purposes of the discovery rule depends on whether "*that* creditor was not aware of facts from which a person of ordinary intelligence reasonably could have inferred the Madoff fraud." (MTD at 41 (emphasis in original).) The standing of each creditor, in other words, is evaluated based on the facts of which he was or should have been aware, and what those facts should have signified to that creditor assuming he is a person of ordinary intelligence. *See, e.g., Schmidt*, 555 F.2d at 36-37 (when a plaintiff could have, acting with reasonable diligence, discovered an alleged fraud depends upon whether he possessed knowledge of facts from which he reasonably could have inferred the fraud). Picower fails to recognize, here as throughout his motion, that he is not the same as "every single other BLMIS investor." (MTD at 45.) He is differently situated from other investors, both in the information available to him about BLMIS and his level of sophistication and experience.

First, as discussed above, the Complaint alleges that the *totality* of information available to Picower should have put him on notice that he was benefiting from fraud. The information available to him was not limited to published articles or any single piece of information that could have been discovered by others. Rather, information that indicated or should have indicated to Picower that he was benefiting from fraud included information obtained because of his own unusual knowledge of and access to Madoff and BLMIS employees; information received from the additional reporting from BLMIS that he received for his accounts; the anomalous rates of return (both high and low) in his own accounts; the prescient stock picking ability reported by BLMIS in his own accounts; the vast sums of money he was able to extract from BLMIS in excess of his investment; and, of course, the blatant fraud in his own accounts.

Second, Picower – unlike many other BLMIS investors – is a sophisticated and experienced investor who by his own account netted more than $1 billion in a single corporate transaction. In determining what facts should have prompted an investor to inquire into the likelihood of fraud in investment transactions, as well as the scope and depth of inquiry that the investor should have undertaken, the sophistication of that investor is critical. *See Tab P'ship.*, 866 F. Supp. at 811 n. 3; *see also Thompson v. Metro. Life Ins. Co.*, 149 F. Supp. 2d 38, 49 (S.D.N.Y. 2001).

This principle is well-settled both in the securities context and throughout New York law. "The law is indulgent of the simple or untutored; but the greater the sophistication of the investor, the more inquiry that is required." *Crigger v. Fahnestock & Co.*, 443 F.3d 230, 235-6 (2d Cir. 2006) (Jacobs, J.) (jury was correctly charged that sophisticated investors in a Ponzi scheme had duty to inquire further where guaranteed investment returns were "pretty amazing," investors failed to consult with outside advisers to confirm legitimacy of returns, Ponzi operators refused to issue written offering documents or memoranda and warned investors not to discuss investments with broker-dealer/custodian that allegedly was sponsoring the scheme "on pain of being automatically disqualified from investing."); *see also Granite Partners, L.P. v. Bear, Stearns & Co.,* 58 F. Supp. 2d 228, 260-61 (S.D.N.Y. 1999); *Shlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 98 (2d Cir. 1997) (New York courts are "particularly disinclined to entertain claims of justifiable reliance" by "sophisticated businessmen" who "engag[e] in major transactions" and "enjoy access to critical information but fail to take advantage of that access." (*quoting Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir. 1984))); *Solutia Inc. v. FMC Corp.*, 456 F. Supp. 2d 429, 448 (S.D.N.Y. 2006) (in evaluating duty of full disclosure: "the more sophisticated the buyer, the less accessible the information must be to be

considered within the seller's peculiar knowledge")(citation omitted); *Most v. Monti*, 456 N.Y.S.2d 427, 428 (2d Dep't 1982) (rejecting as implausible the claim that an experienced businessman assuming a major interest in a commercial enterprise would rely on verbal assurances that property was assessed). The Trustee's allegations against any defendant of what that defendant knew or should have known are based on that defendant's own access to information and sophistication and do not implicate other investors at BLMIS.[22] Picower was not like "every single other BLMIS investor" and allegations against him therefore are irrelevant to the Trustee's ability to rely on the discovery rule in this or any other action.

VIII. THE TRUSTEE HAS PROPERLY ALLEGED A CLAIM TO AVOID SUBSEQUENT TRANSFERS

Under the plain language of 11 U.S.C. § 550, a prima facie claim against a subsequent or mediate transferee requires the pleading of an initial transfer that is avoidable, and that the initial transfer was later made to – or for the benefit of – the subsequent or mediate transferee. 11 U.S.C. § 550 (2009); *Silverman v. K.E.R.U. Realty, Corp. (In re Allou Distribs.),* 379 B.R. 5, 28-30 (Bankr. E.D.N.Y. 2007). An exact dollar-for-dollar tracing of funds from the estate is not required, so long as there are sufficient allegations that the funds at issue originated with the debtor. *Id. at* 30.

Under Federal Rule of Civil Procedure 8(a), all that is required is that the complaint give the opposing party "fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 31 (quoting *Erickson*, 551 U.S. at 93)(omission in original); Fed. R. Civ. P. 8(a) (2009). A complaint has satisfied the pleading requirement under Rule 8(a) if it contains sufficient factual allegations to enable a defendant to respond. Wright and Miller, 5 Fed. Prac. & Proc. Civ.3d §

[22] Contrary to Picower's suggestion that the Trustee seeks to favor later investors over earlier investors (MTD at 2), the length of time an investor was involved with BLMIS is not, in the Trusteee's view, dispositive of whether that

1215 (2009). Put another way, a complaint need plead "only enough facts to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

Here, the Trustee has alleged numerous specific and direct transfers totaling more than $6.7 billion, and identified a subset of those transfers on Exhibit B.[23] (Compl. ¶ 57.) As discussed above, all of the Transfers listed on Exhibit B constitute avoidable direct transfers of estate property to or for the benefit of the Defendants. *Id.*

The Trustee has further alleged that Picower or Decisions controlled each of the other Picower Corporate Entities, which had an address either at 22 Saw Mill River Road, Hawthorne, New York, a store front office where little or no business was conducted, or at 25 Virginia Lane, Thornewood, New York; that Picower and Decisions conducted business through each of the Picower Corporate Entities; and that Picower or Decisions was the general partner or director of each of the Picower Corporate Entities. (Compl. ¶ 37 *et seq.*) There is no indication that any of the Picower Corporate Entities engaged in any business of any kind, other than to act as entities that could hold funds derived from BLMIS or conduct Picower's personal investments. The Trustee has further alleged that the Picower Foundation, Picower Institute for Medical Research, and Trust FBO Gabrielle H. Picower were or are nonprofit entities or trusts that have been dominated and controlled by Picower. (*See* Compl. ¶ 53 and discussion at Point III above.) The Trustee has alleged that Picower, through Freilich and/or Decisions, controlled and directed withdrawals and transfers of purported cash and securities among and between the Defendants and the Defendants' BLMIS accounts. Defendants should be well aware of these transfers and

---

investor could have discovered the fraud.

[23] Nor, as explained in the Complaint, is Exhibit B expected to be an all-inclusive list of all transfers of estate property to all of the Defendants. (Compl. ¶ 57.)

withdrawals because Picower and Freilich routinely directed BLMIS to make them, identifying the accounts and amounts that should be transferred.

In light of the Picower Entities' common address, common control, apparent lack of indicia of any other business or profit-making activities, and the backdrop of numerous transfers directed by Picower and/or Freilich among Picower Entities, the Trustee has plausibly alleged on information and belief that these entities received and benefited from subsequent transfers of BLMIS funds. *See Carr v. Equistar Offshore Ltd.*, No. 94 Civ. 5567, 1995 WL 562178, at *2 (S.D.N.Y. Sept. 21, 1995) (even under heightened pleading standard of Fed. R. Civ. P. 9(b), "allegations may be based on information and belief when the facts are peculiarly within the opposing party's knowledge." (*quoting IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1057 (2d Cir. 1993))).

Where, as here, the detailed transactional information regarding transfers outside of BLMIS is uniquely in the hands of the defendants and not the Trustee, and the Trustee has identified the nature of the transfers sought to be avoided, dismissal is improper and the parties should be permitted to proceed with discovery. *See In re Payton*, 399 B.R. at 365 (denying motion to dismiss constructively fraudulent transfers; although specific transfers were not identified, "Jalbert [the trustee] cannot at this stage be required to do more" than "give a time frame and specify the nature of the transfers" because "[h]e is an outsider to these transactions and will need discovery to identify the specific transactions by date, amount and the manner in which they were effected."). Like the trustee in *In re Payton*, the Trustee here has only very limited information beyond the documentary evidence in BLMIS' possession, but has identified the nature of the transfers sought to be avoided. The information provided in the Complaint is sufficient to permit the parties "to distinguish the transactions at issue from those that are not."

Id. Accordingly, because the pleading is sufficient for the Defendants to frame a response, Defendants' motion to dismiss the subsequent transfer claims should be denied.

IX. THE TRUSTEE HAS PROPERLY ALLEGED DISALLOWANCE OF DEFENDANTS' SIPA CLAIMS

In order to have the opportunity to participate in this SIPA liquidation, BLMIS customers and creditors must have filed claims with the Trustee in accordance with this Court's December 23, 2008 Order on or before the statutory July 2, 2009 bar date. (Order, Dec. 23 2008 [hereinafter "Claims Procedures Order"].) The following Defendants filed timely customer claims for their BLMIS accounts with the Trustee in accordance with the Claims Procedures Order: Jeffry Picower, Barbara Picower, Capital Growth Company, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, Jeffry M. Picower Special Co., and The Picower Foundation. (MTD at 11.) No claims were filed with the Trustee on behalf of the remaining Defendants. *Id.* The Trustee's objection in Count Eleven applies only to those claims that were filed.[24]

The Complaint alleges two separate grounds on which Picower's SIPA claims should be disallowed: (i) that the claims are supported neither by the books and records of BLMIS nor the claims materials submitted, and (ii) that the claims should be disallowed pursuant to Section 502(d) of the Bankruptcy Code. (Compl. ¶¶ 122-3.); 11. U.S.C. § 502(d) (2009). Picower does not acknowledge, much less dispute, the second basis for this claim. The thrust of Defendants' argument instead focuses on the Trustee's interpretation of "net equity," as defined under Section 78*lll*(11) of SIPA. *See* 15 U.S.C. § 78*lll*(11). In addition to presenting factual issues that preclude dismissal under Rule 12(b)(6), and that should properly be decided in the context of a

[24] This Count was included in the Complaint to preserve the Trustee's rights to assert its objections, and to protect against any arguments by Picower based on claim preclusion principles.

claims proceeding, the Net Equity Dispute is squarely before this Court in a separate proceeding involving all interested parties. As discussed at Point II, above, the legal issue underlying Picower's arguments will be decided by this Court in due course in accordance with the Peskin Order, which established a schedule and guidelines for the consideration of this issue. (Peskin Order at 16). Because Count Eleven is sufficient on its face, and the Net Equity Dispute should not be resolved within the confines of this motion, Count Eleven cannot be dismissed.

A. The plain language of Section 502(d) defeats Defendants' argument.

Picower makes the baseless statement that the Trustee "has not pleaded . . . a legal basis for disallowing Defendants' SIPA claims." (MTD at 51.) To the contrary, the Trustee has pleaded, among other things, that the claims filed by Defendants should be disallowed under Section 502(d) of the Bankruptcy Code. (Compl. ¶ 133.)

Section 502(d) explicitly mandates the disallowance of Defendants' claims, as it prevents the transferee of an avoidable transfer from receiving a distribution unless he first returns the transfer:

> Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

11 U.S.C. § 502(d). The purpose of § 502(d) is to "preclude entities that have received voidable transfers from sharing in the distribution of assets unless or until the voidable transfer has been returned to the estate." *In re Mid Atlantic Fund, Inc.*, 60 B.R. 604, 609 (Bankr. S.D.N.Y. 1986).

In his Complaint, the Trustee has brought claims against Defendants for the receipt of more than $5 billion of transfers of BLMIS's property which are recoverable under Sections 547, 548, and 550 of the Bankruptcy Code. 11 U.S.C. §§ 547-8, 550. Defendants have not returned

such transfers to the Trustee. Thus, Section 502(d) clearly applies to any claims filed by Defendants, as they have failed to repay or turn over property recoverable under Sections 547, 548, and 550 of the Bankruptcy Code. *See, e.g., In re Asia Global Crossing, Ltd.*, 333 B.R. 199, 202 (Bankr. S.D.N.Y. 2005) (stating that Section 502(d) prevents transferee of an avoidable transfer from receiving distribution unless he first returns transfer). Accordingly, the Trustee has pled a legal basis for disallowing Defendants' SIPA claims, and Defendants' motion to dismiss this Count should be denied.

B. The Net Equity Dispute is not properly before the Court in the context of a motion to dismiss.

Here again, Defendants argue that the Trustee must allow their customer claims in the amount shown on their last customer statements issued by BLMIS.[25] (MTD at 10, 51-52.) As discussed above, the issue of "net equity" applies to the determination of all customer claims in this SIPA liquidation, as well as litigations brought by the Trustee, and will be heard by the Court after briefing by all interested parties in accordance with this Court's September 10, 2009 Order. This Court already has rejected another attempt to raise the Net Equity Dispute outside of the appropriate forum. (Peskin Order at 16.) Moreover, as discussed above, the precise amount of equity in the customer accounts is a heavily factual issue that remains under investigation and cannot be decided in the context of a motion to dismiss. Since Count Eleven is sufficient as a matter of law in any event, the motion to dismiss this count should be denied.

[25] Defendants also assert that the only records relevant under SIPA for purposes of this determination are the customer's last BLMIS statement. (MTD at 51.) There is nothing in the statute, however, that limits the Trustee to review of the last customer statement in determining customer claims. The plain terms of SIPA state that payments to customers may be paid "insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the Trustee." 15 U.S.C. § 78*fff*-2(b) (2009). The "books and records" of a brokerage are comprised of more than merely the last customer account statements and include all of the financial and corporate records of the Debtor. Finally, in a fraud case such as this, relying on the customer statements as the only source of "books and records" is a nonsensical proposition.

X. DEFENDANTS' MOTION TO DISMISS CERTAIN REQUESTED REMEDIES IN THIS CASE IS PROCEDURALLY IMPROPER AND WITHOUT MERIT

Picower argues that the Trustee is not entitled to a constructive trust or to an assignment of the Defendants' tax refunds. As a threshold matter, the Trustee has not brought a cause of action for a constructive trust or for Picower's tax refunds; these are merely among the remedies requested on the Trustee's claims for relief. (*See* Compl. ¶ 40, prayers xiii & xiv.) A demand for relief is not a part of the plaintiff's claim, and a prevailing party shall be granted any relief to which it is entitled regardless of whether that relief has been demanded in its pleadings. *See, e.g.*, Fed. R. Civ. P. 54(c) (2009) (except in the case of a default judgment, the "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings"); Wright & Miller, 5 Fed. Prac. & Proc. Civ.3d § 1255 (2009) (sufficiency of a pleading is tested by claim for relief and the demand for judgment is not considered part of the claim for that purpose; thus, if pleader is entitled to any relief demand for improper remedy will not be fatal to a party's pleading). As the Trustee has pled numerous causes of action entitling him to relief, no motion to dismiss can be based upon his selection of remedy. He will be entitled to all appropriate remedies, regardless of the Complaint's demand for relief, upon judgment. Fed. R. Civ. P. 54(c).

In any event, the remedies sought by the Trustee are not improper. The imposition of a constructive trust is an equitable remedy that is warranted by the facts of this case, and the Trustee's request for an assignment of tax refunds will not result in a "windfall" to the estate, but rather is a means to ensure recovery of all avoidable transfers received by the Defendants.

Funds transferred to Picower represent the fruits of a long-running and convoluted fraud. As detailed in the Complaint, Picower knew or should have known that he was benefiting from fraud, and the imposition of a constructive trust to assist in the recovery of the ill-gotten gains

held by the Defendants is both supported in law, and required by the circumstances to effect equity. The elements for a constructive trust relied upon by Defendants are guideposts, *see In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 352-53 (2d Cir. 1992), and every element need not be satisfied in all cases. *Tekinsight.com, Inc. v. Stylesite Mktg., Inc*. (*In re Stylesite Mktg., Inc*.), 253 B.R. 503, 508 (Bankr. S.D.N.Y. 2000); *see ESI, Inc. v. Coastal Power Prod. Co.*, 995 F. Supp. 419, 436-7 (S.D.N.Y. 1998). The overriding purpose of a constructive trust is the prevention of unjust enrichment, and the Trustee has clearly alleged sufficient grounds warranting its imposition. *See Simonds v. Simonds*, 380 N.E.2d 189, 194 (N.Y. 1978); *In re Koreag*, 961 F.2d at 354. A simple assertion that a constructive trust should be imposed, together with sufficient detail giving notice that the money being sought is improperly held as a matter of equity, sufficiently states a cause of action, *see Dampskibsselskabet AF 1912 v. Black & Geddes, Inc. (In re Black & Geddes, Inc*.), 16 B.R. 148, 152-3 (Bankr. S.D.N.Y. 1981), and therefore is more than sufficient to support the assertion of a requested remedy.

As to Defendants' tax refunds, the Trustee is not seeking any double recovery that could contravene Section 550 of the Bankruptcy Code. To the contrary, the Trustee is trying to ensure that he can recover all of the property, or the value of property, transferred in accordance with Section 550. As the Defendants note, Section 550 is intended to restore the estate to the financial condition that it would have enjoyed if the transfer had not occurred. *In re Andrew Velez Constr., Inc*., 373 B.R. at 274; *In re Centennial Textiles*, 220 B.R. at 176. The Trustee believes the income tax refunds sought by the Trustee result from payments made by Defendants to the United States, state and local governments based on fictitious profits that the Defendants received from BLMIS. Any overpayment or right to a refund constitutes a return to the Defendants of these fictitious profits. Recovery of these amounts is therefore necessary to

restore the estate to the financial condition that it would have been in had the transfer not occurred. The Trustee is permitted to recover the full value of an avoidable transfer, even if composite elements of that value must come from more than one transferee. *Bertrum v. Laughlin (In re Laughlin)*, 18 B.R. 778, 781 (Bankr. W.D. Mo. 1982). In this case, the income tax refunds constitute a component of the avoidable transfers and should be returned for the benefit of the estate.

CONCLUSION

For the reasons discussed above, Picower's motion to dismiss should be denied in its entirety.

Dated: New York, New York
September 30, 2009

s/Marc E. Hirschfield

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201

David J. Sheehan
Email: dsheehan@bakerlaw.com
Thomas Lucchesi
Email: tlucchesi@bakerlaw.com
Lauren Resnick
Email: lresnick@bakerlaw.com
Tracy Cole
Email: tcole@bakerlaw.com
Marc Hirschfield
Email: mhirschfield@bakerlaw.com

Attorneys for Irving H. Picard, Esq.,
Trustee for the SIPA Liquidation of Bernard L. Madoff Investment Securities LLC

EXHIBIT C

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Email: dsheehan@bakerlaw.com
Marc E. Hirschfield
Email: mhirschfield@bakerlaw.com
Deborah H. Renner
Email: drenner@bakerlaw.com
Keith R. Murphy
Email: kmurphy@bakerlaw.com
Amy E. Vanderwal
Email: avanderwal@bakerlaw.com
Seanna R. Brown
Email: sbrown@bakerlaw.com

Attorneys for Irving H. Picard, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-1789 (BRL) SIPA Liquidation (Substantively Consolidated)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff,	Adv. Pro. No. 09-1197 (BRL)

v.

JEFFRY M. PICOWER, individually and as trustee for the Picower Foundation, *et al*.

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE AND RULES 2002 AND 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE APPROVING AN AGREEMENT BY AND BETWEEN THE TRUSTEE AND THE PICOWER BLMIS ACCOUNT HOLDERS AND ENJOINING CERTAIN CLAIMS

Irving H. Picard (the "Trustee"), as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"), and the substantively consolidated estate of Bernard L. Madoff ("Madoff," and together with BLMIS, collectively, the "Debtors"), by and through his undersigned counsel, respectfully submits this memorandum of law in support of his motion (the "Motion") seeking entry of an order, pursuant to section 105(a) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. (the "Bankruptcy Code"), and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), (i) approving an agreement (the "Agreement")[1] by and between the Trustee on the one hand and Barbara Picower, as the executor (the "Executor" or "Mrs. Picower") of the estate (the "Picower Estate") of Jeffry M. Picower ("Mr. Picower" and, together with Mrs. Picower, the "Picowers"), and certain other related entities that held BLMIS accounts and the accounts they maintained (together with the Picowers, the "Picower BLMIS Account Holders," identified on Attachment A to the Agreement), on the other hand, and (ii) enjoing customers

[1] The form of Agreement is annexed hereto as Exhibit "A."

and creditors of BLMIS, who filed or could have filed claims in the BLMIS SIPA proceeding, from pursuing certain claims against the Picower BLMIS Account Holders or the Picower Releasees that arise from or are related to BLMIS or the Madoff Ponzi scheme, and, in support thereof, the Trustee respectfully represents as follows:

PRELIMINARY STATEMENT

The Trustee has settled his claims against the Picower BLMIS Account Holders for $5 billion (the "Picower Settlement"). The importance of this event cannot be overstated. The $5 billion that the Picowers have agreed to return to the estate through the Picower Settlement is easily the single largest recovery to date. Moreover, when the $5 billion Picower Settlement is combined with the approximately $1.5 billion the Trustee has already recovered on behalf of BLMIS customers,[2] the Trustee will have collected a third of the total principal lost in the Ponzi scheme, currently calculated to be approximately $20 billion. Finally, when the amount of the Picower Settlement is combined with the additional funds, in excess of $2.0 billion, that the Picower Estate is forfeiting to the Government, as described more fully herein, the Picowers will have repaid **one hundred percent** of fictitious profits received by the Picower BLMIS Account Holders over the lifetime of the relationship between Picower and BLMIS. Thus, the Picower Settlement not only makes good financial sense for the BLMIS estate and the victims of Madoff's fraud, it also sets a high bar for future settlements in this case. Therefore, the Trustee respectfully requests that the Court approve the Picower Settlement.

[2] The Trustee has entered into two settlements that are pending approval by the Bankruptcy Court that, if approved, would bring an over $1 billion into the estate for distribution to BLMIS customers with allowed claims.

BACKGROUND

On December 11, 2008 (the "Filing Date"),[3] the Securities and Exchange Commission ("SEC") filed a complaint in the United States District Court for the Southern District of New York (the "District Court") against the Debtors (Case No. 08 CV 10791). The complaint alleged that the Debtors engaged in fraud through investment advisor activities of BLMIS.

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

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

> (i) appointed the Trustee for the liquidation of the business of BLMIS pursuant to section 78eee(b)(3) of SIPA;
>
> (ii) appointed Baker & Hostetler LLP as counsel to the Trustee pursuant to section 78eee(b)(3) of SIPA; and
>
> (iii) removed the case to this Court pursuant to section 78eee(b)(4) of SIPA.

At a plea hearing (the "Plea Hearing") on March 12, 2009 in the criminal action filed against him by the United States Attorney's Office for the Southern District of New York, Madoff pled guilty to an 11-count criminal information, which counts included securities

[3] In this case, the Filing Date is the date on which the SEC commenced its suit against BLMIS, December 11, 2008, which resulted in the appointment of a receiver for the firm. *See* section 78*lll*(7)(B) of SIPA.

fraud, money laundering, theft and embezzlement. At the Plea Hearing, Madoff admitted that he "operated a Ponzi scheme through the investment advisory side of [BLMIS]." (Plea Hr'g Tr. at 23:14-17). On June 29, 2009, Madoff was sentenced to a term of imprisonment of 150 years.

On April 13, 2009, an involuntary bankruptcy petition was filed against Madoff. On June 9, 2009, this Court entered an order substantively consolidating the Chapter 7 estate of Madoff into the BLMIS SIPA proceeding.

THE CLAIMS AGAINST THE PICOWER BLMIS ACCOUNT HOLDERS

Mr. Picower was an attorney, accountant and businessman who invested with BLMIS over several decades through numerous accounts (identified on Attachment A to the Agreement) held in Mr. Picower's name, in the name of family members, associates, corporations or partnerships through which Mr. Picower transacted business, not-for-profit entities he founded and funded, or retirement plans for which he served as a trustee. For purposes of this Motion and this Memorandum of Law, the Picower Estate shall be considered to be one of the Picower BLMIS Account Holders.

On May 12, 2009, the Trustee filed a Complaint (the "Complaint") commencing an adversary proceeding against certain of the Picower BLMIS Account Holders (the "Picower Defendants"), captioned *Picard v. Picower, et al.*, No. 09-1197 (BRL), in which he alleged that prior to the Filing Date, BLMIS made payments or other transfers (the "Transfers") totaling more than $6.7 billion to one or more of the Picower Defendants. [ECF No. 1]. The details with regard to the Transfers are principally set forth in the Complaint and are incorporated herein by reference. The Picower Defendants filed a motion seeking to dismiss the Complaint (the "Motion to Dismiss") on July 31, 2009. [ECF No. 6]. The Trustee filed

his Opposition to the Motion to Dismiss on September 30, 2009 (the "Opposition"), in which the Trustee identified additional Transfers to the Picower Defendants, bringing the total value of Transfers received by them to more than $7.2 billion. [ECF No. 11]. Subsequently, the Picower Defendants filed a Reply on November 25, 2009. [ECF No. 16].

The Trustee believes that all of the Transfers are recoverable as set forth in the Complaint and the Opposition. The Picower Defendants dispute that they are liable for the return of the Transfers. After a review of the relevant records and discussions with Picowers' counsel concerning the factual background and certain legal arguments, as well as certain records not available to the Trustee at the time of the filing of the Complaint and the Opposition, and a consideration of the costs and uncertainty inherent in any litigation, the Trustee, in the exercise of his business judgment, has determined that it is appropriate to resolve this matter rather than litigate the allegations in the Complaint.

In the course of the Trustee's investigation into the accounts held by the Picower BLMIS Account Holders, certain margin loans owed by certain of the Picower BLMIS Account Holders to BLMIS were identified (the "Margin Loans"). The Trustee determined that certain Picower BLMIS Account Holders borrowed on margin from BLMIS and, when the Ponzi scheme collapsed in December of 2008, there was a considerable balance owed on these Margin Loans.

The Trustee's investigation disclosed that the Margin Loans were funded by the investments of other customers in connection with Madoff's Ponzi scheme, and appear to have been the primary vehicle through which Transfers were made to the Picower BLMIS Account Holders.

The Trustee, Mrs. Picower, or their respective professional advisors have analyzed the debits and credits in the relevant accounts, have identified those withdrawals that were taken from the accounts on margin, and have reached an agreement regarding the amount of the Margin Loans.

The settlement, as described below, involves the repayment of a substantial portion of the value of the Margin Loans and will return $5 billion to the BLMIS estate for distribution to defrauded customers. This represents a most significant recovery for the victims of the Ponzi scheme, while at the same time it collects a substantial debt owed to the BLMIS estate. Moreover, when combined with the monies that the Picower Estate is forfeiting to the Government, one hundred percent of the net withdrawals received by the Picower BLMIS Account Holders will have been returned for distribution to Madoff victims, whether by the Trustee or by the Government.

SETTLEMENT DISCUSSIONS

In September 2009, the Picowers, through their counsel, approached the Trustee to discuss the resolution of the Picower Adversary Proceeding. While the Picowers vigorously disputed that the Picower Defendants had any liability to the BLMIS estate, they indicated that they nevertheless wished to engage in good faith negotiations with the Trustee, in the hope that an amicable resolution of the dispute could be achieved.[4] The Trustee had the opportunity, with the assistance of the United States Attorney's Office for the Southern District of New York (the "Government"), to investigate the circumstances surrounding the

[4] Following Mr. Picower's death, Mrs. Picower was appointed as the executor of his estate. In such capacity, she and her counsel continued the settlement discussions with the Trustee that had been commenced prior to the death of her husband.

Picower BLMIS Account Holders' investments with BLMIS. Since settlement discussions began with the Picowers, the Trustee, through his investigation, has uncovered facts which the Picowers claim show that Mr. Picower did not know of or participate in the Ponzi scheme.

For example, the Complaint alleged that Mr. Picower, through a certain entity, had received at one point a 950% return on certain investments. Informal discovery and further research has confirmed that the 950% return that BLMIS reported to Mr. Picower in certain BLMIS documents was inconsistent with the much lower rate of return that Mr. Picower purportedly received based on the entirety of BLMIS records for that account. Further research has also confirmed that other rates of return reported by BLMIS to the Picower BLMIS Account Holders in certain documents were not consistent with lower rates of return recorded by BLMIS for the same such accounts based on the entirety of the relevant documents.

In addition, since the time that the Complaint was filed, the Trustee has been directed to evidence that the Picower Defendants believe raises questions about the allegations in the Complaint that Mr. Picower knew the accounts of the Picower Defendants were being manipulated by BLMIS to maintain artificially high account values. For instance, whereas the account statements of certain of BLMIS's split-strike investors reflected consistent gains throughout 2008, the account statements of the primary entity through which Mr. Picower invested in BLMIS reflected a decrease in value of nearly $3 billion over the course of 2008, as the securities reflected on the entity's account statements sharply decreased with the collapse of the stock market that year. The reported value of the Picower Foundation's

BLMIS account likewise decreased nearly 40% during 2008 according to its BLMIS account statements.

Similarly, as the Trustee's investigation went further back in time, the Trustee became aware of evidence showing that several decades ago Mr. Picower transferred real securities into certain BLMIS accounts. The Picower Defendants contend that evidence supports their claim that their BLMIS accounts contained real securities. In addition, the Trustee became aware of records showing that the Picower BLMIS Account Holders reported income tax gains or losses to the Internal Revenue Service ("IRS") in connection with the securities transactions reported on their BLMIS account statements, and paid millions of dollars in taxes to the IRS based on the information reported on their BLMIS account statements. The Picower BLMIS Account Holders assert that such conduct reflects that they were unaware that the securities transactions reflected on their BLMIS account statements were fictitious.

In addition, Mrs. Picower has advised the Trustee that she engaged accountants and a tax attorney to amend tax returns for open years so as to remove gains and losses that had been reported previously on the United States federal tax returns of the Picower BLMIS Account Holders, and filed the amended returns with the IRS. The amended returns report additional amounts of tax liabilities due and, together with interest, result in additional payments to the IRS of more than $45 million.

Finally, the Trustee was able to confirm that for decades prior to Mr. Picower's death last October, Mr. Picower had arranged to leave the vast majority of his estate to charity upon his death and thereby give away his great wealth to a number of worthy organizations and endeavors.

As the Trustee was analyzing this new information, settlement negotiations were continuing. During that period, the focus evolved from the Trustee's fraudulent transfer allegations in the Complaint to include the new information the Trustee learned from his ongoing investigation and the fact that there was a very significant debit balance in one of Mr. Picower's accounts relating to the Margin Loans. The parties met on numerous occasions to analyze the Margin Loans and to discern to the best of their abilities the number to which both Mrs. Picower and the Trustee could agree was the amount of the Margin Loan balance. After multiple meetings and the sharing of information by Mrs. Picower, including tax returns and financial information pertaining to the withdrawals on margin, Mrs. Picower and the Trustee came to an agreement as to the value of the Margin Loans.

In reconciling these facts and figures, coupled with the fact that Mrs. Picower genuinely wanted to assist the victims of Madoff's fraud, the Trustee concluded that further examination and debate with regard to the allegations in the Complaint would be counterproductive, particularly in light of the additional information that had come to the Trustee's attention, including evidence that Mr. Picower had contributed real securities to certain BLMIS accounts. The parties thereupon agreed to the amount of the Margin Loans, viewed within the context of the Complaint and the Transfers, and once it was determined, a meeting of the minds for the settlement took place. In connection with such settlement, it was also agreed that all Picower BLMIS Account Holders' customer claims would be deemed withdrawn with prejudice.

The Trustee appreciates that Mrs. Picower has made a powerful statement on behalf of the victims of the Madoff fraud by putting a substantial portion of the wealth that she and her husband accumulated over their lifetimes into the fund of customer property for

distribution to Madoff victims. By virtue of this settlement, and that with the Government, more fully described below, Mrs. Picower has now returned **every cent** of net payments the Picower BLMIS Account Holders received from BLMIS in excess of their investments. This settlement is significant with regard to the collaborative efforts of the Trustee and the Government to assemble the largest fund possible for the benefit of customers of BLMIS. The Trustee notes that Mrs. Picower has embraced this concept and has set an appropriately high standard for going forward.

GOVERNMENT FORFEITURE

By March 2010, the Trustee had reached an agreement with Mrs. Picower that she would resolve the Trustee's claims against the Picower BLMIS Account Holders by payment to the Trustee of between $4.8 billion and $5 billion. Ultimately, Mrs. Picower agreed that the Picower Estate would pay to the Trustee the sum of $5 billion to resolve the Picower Adversary Proceeding. Mrs. Picower's agreement with the Trustee, however, was contingent on Mrs. Picower reaching an agreement with the Government to resolve potential civil forfeiture liability of certain of the Picower Estate pursuant to 18 U.S.C. § 981(a)(1)(C). As a result of subsequent negotiations with the Government, Mrs. Picower, on behalf of the Picower Estate and the Picower BLMIS Account Holders, agreed to forfeit to the Government the amount of $7,206,157,717 (the "Forfeited Funds"), of which $5 billion will be credited and paid over to the Trustee (the "Bankruptcy Settlement Amount") while the remainder represents Mrs. Picower's settlement with the Government on behalf of the Picower Estate (the "Government Settlement Funds").

To effectuate that agreement and the Picower Settlement, the Government has commenced a forfeiture action captioned *United States of America v. $7,206,157,717 On*

Deposit at JPMorgan Chase, NA in the Account Numbers Set Forth on Schedule A, No. 10 CV 9398, in the District Court. The Government and Mrs. Picower have also entered into a Stipulation and Order of Settlement (the "Forfeiture Stipulation," attached hereto as Exhibit B), which the Government has presented to the District Court and has been "so ordered" by the District Court.

Simultaneous upon the execution of the Forfeiture Stipulation, Mrs. Picower caused the Forfeited Funds to be wired into one or more escrow accounts (the "Escrow Accounts") that have been established at JPMorgan Chase Bank, N.A. (the "Escrow Agent") pursuant to an escrow agreement (the "Escrow Agreement," attached to the Forfeiture Stipulation as Exhibit B) executed by and among the Picower Estate, the Trustee, the Government and, with respect to certain sections only, SIPC. The Escrow Agent will release the funds (a) to the Trustee upon written notice provided jointly by the Trustee and Mrs. Picower, with a copy of a final and non-appealable 9019 Order (the "Final 9019 Order") attached; or (b) to the Government upon written notice jointly provided by the Trustee, Mrs. Picower, and the Government, with a copy of a final, non-appealable order of forfeiture attached. Because the Bankruptcy Settlement Amount was derived from the Forfeited Funds, the Bankruptcy Settlement Amount will never revert to Mrs. Picower or the Picower BLMIS Account Holders even if the Court denies this Application, or issues the 9019 Order but that order is overturned on appeal. Rather, the Bankruptcy Settlement Amount will remain available for distribution to victims of Madoff's fraud.

The Government Settlement Funds, as well as any Forfeited Funds remaining in the escrow account after payment to the Trustee of the Bankruptcy Settlement Amount, will be

distributed to customers of BLMIS through the process of remission, consistent with applicable Department of Justice regulations.

THE AGREEMENT AND PERMANENT INJUNCTION

The principal terms and conditions of the Agreement are contained in the form of Agreement attached as Exhibit A and should be reviewed for a complete account of its terms).[5] Under the Agreement, the Picower Settlement takes effect and is binding after the Bankruptcy Court approves the Agreement (the "9019 Order").

The Agreement provides:

- Upon execution of the Forfeiture Stipulation, Mrs. Picower, as Executor, will cause the Forfeited Funds, in the amount of $7,206,157,717, to be wired into the Escrow Accounts. The Escrow Agent will release the funds up to the Bankruptcy Settlement Amount within two (2) business days (a) to the Trustee upon written notice provided jointly by the Trustee and Mrs. Picower, with a copy of the Final 9019 Order attached; or (b) to the Government upon written notice jointly provided by the Trustee, Mrs. Picower, and the Government, with a copy of a final, non-appealable order of forfeiture attached. For purposes of the Agreement, an order will be considered "final and non-appealable" when (i) the time to appeal the order has expired, or (ii) if any appeal has been taken, any and all such appeals have been fully and finally resolved without material modification of the order.

- The Picower BLMIS Account Holders' Customer Claims will be deemed withdrawn with prejudice.

- Each of the Picower Releasees (listed on Exhibit C to the Agreement), through the execution by an authorized representative of a Release Subscription (the form of which is annexed to the Agreement), will release, acquit and absolutely discharge the Trustee and all his agents and BLMIS and its consolidated estate, from any and all actions or causes of action asserted or unasserted, known or unknown, now existing or arising in the future in any

[5] Terms not otherwise defined in this section shall have the meaning ascribed in the Agreement. In the event of any inconsistency between the summary of terms provided in this section and the terms of the Agreement, the Agreement shall prevail.

way related to the affairs of BLMIS. Subject to Section 6 of the Agreement (Bankruptcy Court Approval; Effective Date), the Release will become effective upon the Trustee's or the Government's actual receipt of funds up to the Bankruptcy Settlement Amount without further action by any of the Parties.

- The Trustee will release the Picower Releasees from any and all past, present or future claims or causes of action that are, have been, could have been or might in the future be asserted by the Trustee or that are duplicative or derivative of a claim that could be asserted by the Trustee against any of the Picower Releasees and that are based on, arise out of or relate in any way to the affairs of BLMIS or the Picower BLMIS Accounts. Subject to Section 6 of the Agreement (Bankruptcy Court Approval; Effective Date), the Release will become effective upon the Trustee's or the Government's actual receipt of funds up to the Bankruptcy Settlement Amount without further action by any of the Parties.

- All BLMIS account agreements between the Picower BLMIS Account Holders and BLMIS will be terminated.

- In the event no Final 9019 Order is entered, but the final, non-appealable order of forfeiture has been entered, then funds in the amount of the Bankruptcy Settlement Amount will be released to the Government from the account of the Trustee, except to the extent the BLMIS estate lacks sufficient funds to pay such amount, for distribution to Madoff fraud victims. In such circumstances. the releases contained in Sections 3 and 4 of the Agreement will remain in full force and effect and be fully binding on the Parties.

- The only circumstance in which the Agreement will not become effective and binding is in the event that no final and non-appealable orders are entered approving either the Final 9019 Order or the Forfeiture Stipulation. In such case, and only in such case, (i) the Forfeited Funds would be returned to the Picower Estate, less any amounts paid by the Trustee to Mrs. Picower for or in reimbursement of tax payments made by Mrs. Picower during the escrow of the Forfeited Funds; (ii) the Agreement, including the releases in Sections 3 and 4 of the Agreement will not take effect and will be null and void for all purposes; (iii) the stay of the Picower Adversary Proceeding would be lifted and the Trustee, on the one hand and the Picower Defendants, on the other hand, would continue to litigate their respective claims and defenses in the Picower Adversary Proceeding; (iv) the Picower Account Holders' Customer Claims would not be withdrawn; and (v) the Parties could not use or rely on any statement in the Agreement in the Picower Adversary Proceeding or in any public statement or other litigation relating to BLMIS or Madoff.

In addition, within six (6) business days of the earlier to occur of (a) the entry of the Final 9019 Order, or (b) the Government's actual receipt of funds up to the Bankruptcy

Settlement Amount, the Trustee will file a Notice of Dismissal, dismissing the Picower Adversary Proceeding with prejudice and without costs to any Party. From the date of the Agreement through the earlier to occur of (a) or (b) of this paragraph, the Picower Adversary Proceeding shall be stayed and not further actions may be taken by any of the Parties thereto.

As part of the Agreement, the Trustee is seeking a permanent injunction from this Court, pursuant to Section 105(a) of the Bankruptcy Code (the "Permanent Injunction"), permanently enjoining any BLMIS customer or creditor of the BLMIS estate who filed or could have filed a claim, anyone acting on their behalf or in concert or participation with them, or anyone whose claim in any way arises from or is related to BLMIS or the Madoff Ponzi scheme, from asserting any claim against the Picower BLMIS Account Holders or the Picower Releasees that is duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee against the Picower BLMIS Account Holders or the Picower Releasees, and which arises from or relates to BLMIS or the Madoff Ponzi scheme. Moreover, the Trustee has agreed to use his reasonable best efforts to obtain the Permanent Injunction and litigate any appeals of the Permanent Injunction Order.

In connection with the Agreement, Mrs. Picower, on behalf of the Picower BLMIS Account Holders, will submit to the Bankruptcy Court's jurisdiction with respect to the SIPA Proceeding and the Picower Adversary Proceeding. The Trustee also agrees to reasonably cooperate with Mrs. Picower, the Picower BLMIS Account Holders, and the Picower Releasees to enforce the terms of the Permanent Injunction and extinguish any claim that may be asserted against Mrs. Picower, the Picower BLMIS Account Holders, or the Picower Releasees in violation of the Permanent Injunction.

ARGUMENT

THE AGREEMENT IS FAIR AND EQUITABLE AND IN THE BEST INTERESTS OF THE BLMIS ESTATE

I. The Terms Of The Agreement Are Fair And Reasonable And Will Confer A Significant Benefit On BLMIS Customers.

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

The Second Circuit has stated that a bankruptcy court, in determining whether to approve a compromise, should not decide the numerous questions of law and fact raised by the compromise, but rather should "canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir.), *cert. denied sub nom. Cosoff v. Rodman*, 464 U.S. 822 (1983) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.), *cert. denied sub nom. Benson v. Newman*, 409 U.S. 1039 (1972)); *accord Nellis v. Shugrue*, 165 B.R. 115, 121-22 (S.D.N.Y. 1994); *In re Ionosphere Clubs*, 156 B.R. at 426; *In re Purofied Down Prods. Corp.*, 150 B.R. 519, 522 (S.D.N.Y. 1993) ("[T]he court need not conduct a 'mini-trial' to determine the merits of the underlying litigation"); *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991).

In deciding whether a particular compromise falls within the "range of reasonableness," courts consider the following factors:

(i) the probability of success in the litigation;

(ii) the difficulties associated with collection;

(iii) the complexity of the litigation, and the attendant expense, inconvenience, and delay; and

(iv) the paramount interests of the creditors (or in this case, customers).

Nellis v. Shugrue, 165 B.R. at 122 (citing *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993)).

The bankruptcy court may credit and consider the opinions of the trustee or debtor and their counsel in determining whether a settlement is fair and equitable. *See In re Purofied Down Prods.*, 150 B.R. at 522; *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. at 505. The competency and experience of counsel supporting the settlement may also be considered. *Nellis v. Shugrue*, 165 B.R. at 122. Finally, the court should be mindful of the principle that "the law favors compromise." *In re Drexel Burnham Lambert Group, Inc*., 134 B.R. at 505 (quoting *In re Blair*, 538 F.2d 849, 851 (9th Cir. 1976)).

The Trustee believes that the terms of the Picower Settlement fall well above the lowest point in the range of reasonableness and, accordingly, the Agreement should be approved by this Court. The Agreement resolves all issues regarding the Trustee's asserted and unasserted claims against the Picower BLMIS Account Holders (the "Claims") without the need for protracted, costly, and uncertain litigation. When the Bankruptcy Settlement Amount and the Government Settlement Funds are combined, one hundred percent of the net funds withdrawn from BLMIS by the Picower BLMIS Account Holders will be available for distribution to customers. *See* Affidavit of the Trustee in Support of the Motion (the "Picard

Affidavit"), ¶ 5. A true and accurate copy of the Picard Affidavit is attached hereto as Exhibit D. Litigating the Claims would require a significant commitment of time by the various professionals involved in the matter, and involves litigation risk. *Id.*

Based on his investigation, the Trustee believes that the Bankruptcy Settlement Amount represents a significant percentage of the agreed upon value of the Margin Loans. *Id.* ¶ 5. The Agreement also furthers the interests of the customers of BLMIS by adding a substantial amount of money to the fund of customer property. *Id.* ¶ 7. Specifically, as a result of the Agreement, when combined with the amounts already recovered by the Trustee, over 30% of the currently estimated $20 billion value of BLMIS net liabilities to customers should be available for distribution to customers, with an initial distribution forthcoming.[6] *Id*. In addition, the Picower BLMIS Account Holders have agreed to withdraw the customer claims that they filed in the liquidation. While most of the entities that filed claims were "net winners" in the parlance of this case, the withdrawal of those customer claims will result in a decrease of over billions of dollars in the amount for which the Trustee will have to reserve pending final determination of the net equity issue. This will allow the Trustee to distribute significantly more funds to victims in the initial distribution. *Id*. ¶ 8.

Given the cost and complexities involved in proceeding with litigation, the Trustee has determined that the proposed settlement with the Picower BLMIS Account Holders represents a fair compromise of the Claims. The Trustee's analysis of the proposed

[6] If, as anticipated, the Trustee completes a distribution of funds, including a portion of the proceeds of the Picower Settlement, prior to the resolution of the net equity issue, the Trustee will reserve an appropriate amount as a contingency in the event the Trustee's and Bankruptcy Court's view of the issue is found to be erroneous. Thus, should the Bankruptcy Court's net equity decision (*SIPC v. BLMIS*, 424 B.R. 122 (Bankr. S.D.N.Y. 2010)) be reversed, the Trustee will have sufficient reserves to make a *pro rata* distribution to all customers with valid claims.

settlement reveals that the BLMIS estate will recover the majority of the net monies owed to the estate by the Picower BLMIS Account Holders. When combined with the Government Settlement Funds Payment, the Picowers will have returned one hundred percent of the monies that they received from BLMIS for distribution to BLMIS customers, an unquestionably positive result. In light of those facts, The Trustee submits that it is in the best interests of the estate to settle the Picower Adversary Proceeding according to these terms.

The Trustee maintains that he would have prevailed at trial in recovering all transfers to the Picower Defendants. Yet there is always a litigation risk, which risk could be higher for transfers that occurred beyond the six year period. The Agreement allows the Trustee to avoid potentially protracted litigation and resolves all of the issues raised by the Picower Defendants in the Motion to Dismiss. The ability to avoid the time and expense associated with continuing to litigate this matter, combined with the fact that the Agreement will result in a very substantial recovery, makes the settlement embodied by the Agreement extremely beneficial to BLMIS customers.

II. An Injunction Under Section 105(a) Is Warranted and Necessary.

The Trustee seeks a narrowly tailored injunction, which, given the unique circumstances of the BLMIS liquidation in general and the Picower Settlement in particular, is both appropriate and necessary.

The Agreement requires the Trustee to use his best efforts to obtain approval of the Final 9019 Order as promptly as practicable, which shall contain a permanent injunction from the Bankruptcy Court, pursuant to Section 105(a) of the Bankruptcy Code "permanently enjoining any customer or creditor of the BLMIS estate, anyone acting on their behalf or in concert or participation with them, or person whose claim in any way

arises from or relates to BLMIS or the Madoff Ponzi scheme, from asserting any claim against the [Picower] Estate, the Picower BLMIS Accounts, the Picower Adversary Defendants or the Picower Releasees that is duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee against the [Picower] Estate, the Picower BLMIS Accounts, the Picower Defendants or the Picower Releasees." Agreement, ¶ 7.

a. The Injunction Is Narrowly Tailored And All Claims Subject To The Injunction Are Derivative Of The Trustee's Claims.

This Court has subject matter jurisdiction to grant the injunction because the claims that the Trustee seeks to enjoin are direct claims over which the Trustee has "exclusive standing" to assert.

Pursuant to 28 U.S.C. § 1334(b), district courts (and therefore bankruptcy courts) have original jurisdiction over civil proceedings "arising under" and "arising in" and "related to" cases under title 11. 28 U.S.C. § 1334(b). *See also In re Adelphia Commc'ns Corp.*, 2006 WL 1529357, at *6 (Bankr. S.D.N.Y. June 5, 2006). "Related to" jurisdiction to enjoin a third party dispute exists where the subject of the third party dispute is property of the estate or the dispute would have an effect on the estate. *In re Johns Manville Corp.*, 517 F.3d 52, 65 (2d Cir. 2008), *vacated & remanded on other grounds,* --- U.S. ---, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009), *aff'g in part & rev'g in part,* 600 F.3d 135 (2d Cir. 2010); *In re Delta Airlines, Inc.*, 374 B.R. 516, 525 (S.D.N.Y. 2007).

This Court's recent decision in *In re Dreier LLP*, 2010 WL 1707737 (Bankr. S.D.N.Y. April 28, 2010), is instructive on the issue of subject matter jurisdiction in a situation similar to that created by Madoff's Ponzi scheme and a situation in which the settlement also involved an interlocking agreement with the Government to forfeit money.

Marc S. Dreier ("Dreier"), who was the sole equity partner of Dreier LLP ("Dreier LLP"), committed an extensive fraud against his clients by selling them sham promissory notes (the "Notes") from 2004 to 2008. *Id*. at *1. GSO, an investment manager for certain purchasers of Notes, transferred over a hundred million dollars to Dreier LLP accounts. *Id*. at *3. When the fraud was revealed, Dreier and Dreier LLP filed bankruptcy cases. In an effort to settle potential avoidance actions against GSO, the Chapter 11 Trustee and Chapter 7 Trustee, along with GSO, entered into a settlement agreement, whereby GSO would contribute approximately $10 million, plus artwork with an approximate value of $3 million, to the debtors' estates in exchange for a release and injunction against third-party claims. *Id.* at *4.

In considering subject-matter jurisdiction, the Court first found that it "plainly" had jurisdiction to bar general creditors of the estates from seeking to recover their claims from the funds at issue—the funds transferred by Dreier LLP to GSO. *Id.* at *15. The Court explained that principles stated in *Hirsch v. FDIC (In re Colonial Realty Co.)*, 980 F.2d 125 (2d Cir. 1992), which recognized that the automatic stay barred an action by the FDIC to recover property that the debtor had transferred before bankruptcy, and *Keene Corp. v. Coleman (In re Keene Corp.)*, 164 B.R. 844, 850 (Bankr. S.D.N.Y. 1994), which held that a bankruptcy trustee alone has standing to maintain avoidance actions, supported the *Dreier* holding. *Id.* at *15-16. Based on these principles, the Court reasoned, the bankruptcy court could permanently enjoin "derivative" creditor claims on avoidance funds because "[a]bsent that power, the Trustees will be hampered in their ability to pursue and ultimately settle fraudulent transfer claims from a transferee fearful of paying twice for the same transfer—once on the Trustees' claim and a second time on the derivative claim." *Id.* at *16 (citing

SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Lambert Group, Inc.), 960 F.2d 285, 293 (2d Cir. 1992).[7]

The Agreement specifically provides that the injunction would preclude the assertion of "any claim against the Picower Estate, the Picower BLMIS Accounts, the Picower Adversary Defendants or the Picower Releasees that is duplicative or derivative of any claim brought by the Trustee, or which could have been brought by the Trustee against the Estate, the Picower BLMIS Accounts, the Picower Adversary Defendants or the Picower Releasees." Agreement, ¶ 7. The Trustee has "exclusive standing" to assert such causes of action, which belong to the Debtors' estate. *Picard v. Fox*, 2010 WL 1740885, at *5 (Bankr. S.D.N.Y. May 3, 2010); *McHale v. Alvarez (In re The 1031 Tax Group, LLC)*, 397 B.R. 670, 679 (Bankr. S.D.N.Y. 2008); *Goldin v. Primavera Familienstiftung, Tag Assocs. Ltd. (In re Granite Partners L.P.)*, 194 B.R. 318, 324-25 (Bankr. S.D.N.Y. 1996). The Second Circuit has stated that "[i]f a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action."

[7] The Court in *Dreier* went on to determine that the injunction sought exceeded the Court's jurisdiction for reasons not applicable in this case. Specifically, the Court found that the *Dreier* injunction did not sufficiently identify the entities being released and was not limited to claims affecting the property of the estate or the administration of the estate. *In re Dreier LLP*, 2010 WL 1707737, at *16-17. Following this decision, the *Dreier* trustee filed a renewed motion for approval of the settlement agreement with a more tailored injunction. By order dated June 8, 2010, the Court approved the settlement and entered the injunction sought by the *Dreier* trustee [Case No. 08-15051 (SMB) ECF No. 610]. The injunction entered enjoined all creditors and parties in interest in the case from commencing or continuing any action against any of the released parties where the action is based on Marc Dreier's or Dreier LLP's misconduct and for which there is no independent basis to bring suit. The order granting the modified injunction was recently upheld by the District Court. *See In re Dreier LLP*, 2010 WL 3835179, at *4-5 (S.D.N.Y. Sept. 10, 2010).

Picard v. Fox, 2010 WL 1740885, at *5 (*quoting St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc*., 884 F.2d 688, 701 (2d Cir. 1989)).

In addition to the above authorities, the proposed injunction is consistent with the injunction recently entered by the Court in *Dreier*, which excluded from the scope of the injunction actions where there an independent basis on which to bring suit. *In re Dreier LLP*, 2010 WL 1707737, at *16-17, *aff'd,* 2010 WL 3835179, at *4-5 (S.D.N.Y. Sept. 10, 2010) (upholding injunction and endorsing *pro rata* distribution for similarly situated victims of a Ponzi scheme). The Trustee, in exercising his exclusive jurisdiction, has asserted claims for the benefit of all customers of BLMIS against the Picower BLMIS Account Holders and has reached an agreement regarding the settlement of those claims. An injunction is appropriate to avoid the re-litigation of claims asserted on behalf of all customers and creditors that have been resolved by the Trustee, particularly where the Trustee has resolved those claims in a manner enormously beneficial to the estate.

Further, the claims that the Trustee seeks to enjoin are those that would impact the administration of the liquidation. Courts have repeatedly enjoined suits against non-debtor third parties to protect the administration of the estate. *See, e.g.*, *In re Adelphia*, 2006 WL 1529357, at *4 ("The Bankruptcy Court's injunctive powers . . . include 'the power to enjoin the Defendants from proceeding against non-debtor third parties . . . where, as here, the actions against such third parties have at least a conceivable effect upon the Debtors or implicate the interpretation or enforcement of this Court's orders.'") (internal citation omitted); *In re AP Indus.*, 117 B.R. at 801–02 ("The large majority of the courts which have considered the question have held that the bankruptcy courts have the power to restrain legal action by creditors of the debtor against non-debtor third parties, in certain circumstances . .

. .") (quoting *In re Monroe Well Serv., Inc.*, 67 B.R. 746, 751 (Bankr. E.D. Pa. 1986)); *In re Calpine Corp.*, 365 B.R. at 409 n.20. Enjoining such claims is necessary to protect the proper administration of this liquidation.

If these claims were allowed to be asserted, claimants would be permitted to side-step the jurisdiction of this Court, the processes this Court has put into place, and the SIPA distribution scheme mandated by Congress. *See generally SIPC v. BLMIS,* 424 B.R. 122 (Bankr. S.D.N.Y. 2010).[8] In essence, those claimants would be inequitably obtaining property that should not be available to them based on the previous decisions of this Court regarding the claims administration process and the net equity calculation, to the detriment of other claimants that play by the rules. *See SIPC v. BLMIS*, 424 B.R. 122 (Bankr. S.D.N.Y. 2010); Order on Application for an Entry of an Order Approving Form and Manner of Publication and Mailing of Notices, Specifying Procedures For Filing, Determination, and Adjudication of Claims; and Providing Other Relief entered on December 23, 2008 [ECF No. 12]. As this Court noted with respect to the defendants in *Picard v. Fox*, "any judgment awarded to the [*Fox* defendants] would exceed their entitlement to BLMIS distribution under SIPA and this Court's Net Equity Decision."

[8] The standard for a Rule 7065 injunction is inapplicable when an injunction is sought under section 105 of the Bankruptcy Code. *See In re Lyondell Chem. Co.*, 402 B.R. 571, 588 n.37 (Bankr. S.D.N.Y. 2009). The Court may enjoin actions against the Picower BLMIS Account Holders if (i) a third party suit would impair the court's jurisdiction with respect to a case before it or (ii) the third party suits threaten to thwart or frustrate the debtor's reorganization efforts and the injunction is necessary to preserve or protect the debtor's estate. *See In re Keene Corp.*, 162 B.R. 935, 944 (Bankr. S.D.N.Y. 1994*)*; *In re Calpine Corp*., 354 B.R. 45, 48 (Bankr. S.D.N.Y. 2006); *Garrity v. Leffler (In re Neuman)*, 71 B.R. 567, 571 (S.D.N.Y. 1987). The Second Circuit recently upheld an anti-litigation injunction in the receivership context, finding that the injunction assisted the receiver in managing the receivership and maintaining control over receivership assets. *SEC v. Byers*, 609 F.3d 87,92-93 (2d Cir. 2010). Similarly, in the instant case, the injunction sought would prevent interference with the administration of the BLMIS estate.

Picard v. Fox, 2010 WL 1740885, at *10. Indeed, permitting those with allowable customer claims to pursue the Picower BLMIS Account Holders outside of the liquidation would create the potential for double recovery. Thus, in the absence of an injunction, potential claimants would be able to eviscerate the equitable distribution scheme that lies at the core of both SIPA and the Bankruptcy Code to their own individual benefit.

Finally, the injunction is narrowly tailored, protecting only the Picower BLMIS Account Holders, which are those entities related to Mr. Picower which held BLMIS accounts and which are identified on Attachment A to the Agreement, and the Picower Releasees identified on Attachment C to the Agreement, and only those claims that are derivative of Madoff, BLMIS or the Madoff Ponzi scheme. These entities have, through the Bankruptcy Settlement Amount and the Government Settlement Funds, agreed to return all of the net profits that they received from BLMIS. Other than claims arising from the Ponzi scheme — which derivatively injure all BLMIS customers — it is difficult to see what claims would possibly be appropriate to pursue. Given this fact and the fact that the injunction and releases are "narrowly drawn and are necessary to prevent relitigation of precisely the claims that were negotiated and resolved by the Settlement Agreement," *In re Delta Airlines, Inc.*, 374 B.R. at 526, this Court has the authority to grant the injunction sought.

b. The BLMIS Estate Will Receive Substantial Benefit From The Picower Settlement And The Unique Circumstances Of The Case Make The Injunction Appropriate.

The Picower Settlement will bring $5 billion into the estate for distribution to customers under SIPA. This amount alone represents a quarter of the currently estimated $20 billion value of BLMIS net liability to customers. As such, the principles set forth in the controlling Second Circuit case, *Deutsche Bank AG v. Metromedia Fiber Network Inc.*

(In re Metromedia Fiber Network, Inc.), 416 F.3d 136 (2d Cir. 2005), are satisfied. In *Metromedia*, the Second Circuit held that nonconsensual nondebtor releases and injunctions are proper in "in truly unusual circumstances" where, among other things, the debtor's estate has received substantial consideration. 416 F.3d at 141-143; *see also SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Lambert Group, Inc.),* 960 F.2d 285, 293 (2d Cir. 1992); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 657-58 (6th Cir. 2002).[9]

The Picower Settlement represents an incredibly significant milestone in this liquidation proceeding. The demand amount in the adversary proceeding commenced against Picower is among the highest of the actions commenced by the Trustee thus far and the Picower Settlement would constitute, by far, the Trustee's largest recovery to date. The increase in customer property by virtue of the Picower Settlement is dramatic and would constitute a significant increase in the amounts of the *pro rata* distribution that will be made to BLMIS's defrauded customers. As this Court has already recognized in the *Picard v. Fox* proceedings, the Picower Settlement would provide a unique benefit to the estate that is certainly worthy of the protection of a carefully tailored injunction. As the Court observed, an injunction pursuant to section 105(a) "is appropriate and necessary to preserve the integrity of the SIPA proceedings and the Trustee's settlement negotiations for the benefit of

[9] Although certain of the cited case law addresses injunctions in the context of a plan of reorganization, it is clear that injunctions pursuant to section 105 are not limited to reogarganization proceedings. *See, e.g.*, *Apostolou*, 155 F.3d at 882 (section 105 injunction applicable in liquidation proceeding); *In re AP Indus.*, 117 B.R. at 201 ("The court will have ample power to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process whether in a liquidation or in a reorganization case."). The same principles apply to injunctions required in settlement agreements. *See In re Dreier LLP*, 2010 WL 1707737 (Bankr. S.D.N.Y. April 28, 2010); *see also In re Mrs. Weinberg's Kosher Foods, Inc*., 278 B.R. 358 (Bankr. S.D.N.Y. 2002).

the BLMIS estate and all of its customer claimants." *Picard v. Fox*, 2010 WL 1740885, at *9.

There is no doubt that the injunction is necessary and fair. Mrs. Picower has made it clear to the Trustee that the injunction is an essential part of the settlement. Given the value of the proposed settlement, it is not surprising that Mrs. Picower wishes to have finality and be certain that, on behalf of the Picower Estate, she will not be required to satisfy the same claims twice. As this Court noted in *Picard v. Fox*, without an injunction, the Picower BLMIS Account Holders would be "fearful of paying twice for the same transfer." *Picard v. Fox*, 2010 WL 1740885, at *9 (quoting *In re Dreier LLP*, 2010 WL 1707737, at *16). The Second Circuit has held that an injunction is appropriate in situation where, but for the injunction, the settlement would be less likely to occur. *See e.g., SEC v. Drexel Burnham Lambert Group, Inc*., 960 F.2d at 293. In such circumstances, the Court may use its powers to enjoin in order to foster the conclusion of a settlement by providing the finality sought by the Picower BLMIS Account Holders. *See, e.g.*, *In re Johns-Mansville Corp*., 68 B.R. 618, 626 (Bankr. S.D.N.Y. 1986) (Lifland, J.) (enjoining further actions against settling defendants under § 105(a) in order to "preserve the rights of all asbestos claimants by establishing a corpus of funds from which all can collect" and to "prevent[] the inequitable, piece-meal dismemberment of the debtor's estate . . . "), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987*), aff'd sub nom. Kane v. Johns-Manville Corp*., 843 F.2d 636 (2d Cir. 1988).

Accordingly the terms of the injunction sought satisfy the *Metromedia* requirements: the opportunity offered to the estate by the Picower Settlement must be considered "unusual circumstances" and the settlement will provide a substantial benefit to the BLMIS estate and

in turn, BLMIS's customers. As such, the narrow injunction sought by the Trustee should be granted.

CONCLUSION

The Trustee submits that the Agreement should be approved for two overarching reasons: (a) to avoid lengthy and burdensome litigation, and (b) and because it represents a reasonable compromise of the Claims that benefits the estate and the customers of BLMIS. Accordingly, since the Agreement is well within the "range of reasonableness" and confers a substantial benefit on the estate, the Trustee respectfully requests that the Court enter an Order (i) approving the Agreement, and (ii) issuing the permanent injunction.

NOTICE

In accordance with Bankruptcy Rules 2002 and 9019, notice of this Motion has been given to (i) SIPC; (ii) the SEC; (iii) the Internal Revenue Service; and (iv) the United States Attorney for the Southern District of New York. The Trustee shall also serve, by way of the ECF filing that will be made, each person or entity that has filed a notice of appearance in this case. The Trustee submits that no other or further notice need be given and respectfully requests that the Court find that such notice is proper and sufficient.

WHEREFORE, the Trustee respectfully requests entry of an Order (i) approving the settlement agreement between the Trustee on the one hand and Mrs. Picower, on behalf of the Picower BLMIS Account Holders on the other and (ii) enjoining customers and creditors of BLMIS who filed or could have filed claims in the liquidation from pursuing claims against the Picower BLMIS Account Holders and the Picower Releasees, substantially in the form of Exhibit C.

Dated: New York, New York
December 17, 2010

Respectfully submitted,

/s/ David J. Sheehan

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Email: dsheehan@bakerlaw.com
Marc E. Hirschfield
Email: mhirschfield@bakerlaw.com
Deborah H. Renner
Email: drenner@bakerlaw.com
Keith R. Murphy
Email: kmurphy@bakerlaw.com
Amy E. Vanderwal
Email: avanderwal@bakerlaw.com
Seanna R. Brown
Email: sbrown@bakerlaw.com

Attorneys for Irving H. Picard, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff

EXHIBIT D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-1789 (BRL) SIPA Liquidation (Substantively Consolidated)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. JEFFRY M. PICOWER, individually and as trustee for the Picower Foundation, ***et al***., Defendants.	Adv. Pro. No. 09-1197 (BRL)

ORDER PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE AND RULES 2002 AND 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE APPROVING AN AGREEMENT BY AND AMONG THE TRUSTEE AND THE PICOWER BLMIS ACCOUNT HOLDERS AND ISSUING A PERMANENT INJUNCTION

Upon the motion dated December 17, 2010 (the "Motion") of Irving H. Picard (the "Trustee"), as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa ***et seq.*** ("SIPA"), and the substantively consolidated estate of Bernard L. Madoff ("Madoff," and together with BLMIS, collectively, the "Debtors"), seeking entry of an order, pursuant to

sections 105(a) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq. and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), approving the agreement dated as of December 17, 2010, by and among the Trustee on the one hand and Barbara Picower, the executor (the "Executor") of the estate of Jeffry M. Picower (the "Picower Estate") and the other Picower BLMIS Accounts[1] on the other hand, in the form annexed hereto (the "Agreement") [also at ECF No. 25, at Exhibit A][2]; and the Court having considered the Affidavit of Irving Picard dated December 17, 2010 in support of the Motion [ECF No. 25, at Exhibit D], all objections to the Motion and responses thereto (collectively, the "Objections"), including those by Adele Fox ("Fox") as representative of a putative class of similarly situated plaintiffs, Susanne Stone Marshall ("Marshall") as representative of a putative class of similarly situated plaintiffs, and Steven, Richard and Martin Surabian (all collectively, the "Objectors"); and it further appearing that the relief sought in the Motion is appropriate based upon the record of the hearing held before this Court on January 13, 2011 to consider the Motion; and after due deliberation and sufficient cause appearing therefor; the Court hereby makes the following findings of fact and conclusions of law. The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the following conclusions of law constitute findings of fact, they are adopted as such.

FINDINGS OF FACT:

A. Mr. Picower was an attorney, accountant and businessman who invested with BLMIS over several decades through numerous accounts (identified on Attachment A to the

[1] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Agreement.
[2] References herein to "ECF No. ___" shall refer to docket entry numbers in the above-captioned adversary proceeding, 09-1197 (BRL).

Agreement) held in Mr. Picower's name, in the name of family members, associates, corporations or partnerships through which Mr. Picower transacted business, not-for-profit entities he founded and funded, or retirement plans for which he served as a trustee. For purposes of this Order, the Picower Estate shall be considered to be one of the Picower BLMIS Accounts.

B. On May 12, 2009, the Trustee filed a Complaint (the "Complaint") commencing an adversary proceeding against certain of the Picower BLMIS Accounts (the "Adversary Proceeding Defendants" or "Picower Defendants"), captioned ***Picard v. Picower, et al.***, No. 09-1197 (BRL), in which he alleged that prior to the Filing Date, BLMIS made payments or other transfers (the "Transfers") totaling more than $6.7 billion to one or more of the Picower Defendants. [ECF No. 1]. The details with regard to the Transfers are principally set forth in the Complaint and are incorporated herein by reference.

C. The Picower Defendants filed a motion seeking to dismiss the Complaint (the "Motion to Dismiss") on July 31, 2009. [ECF No. 6]. The Trustee filed his Opposition to the Motion to Dismiss on September 30, 2009 (the "Opposition"), in which the Trustee identified additional Transfers to the Picower Defendants, bringing the total value of Transfers received by them to more than $7.2 billion. [ECF No. 11]. Subsequently, the Picower Defendants filed a Reply on November 25, 2009. [ECF No. 16].

D. The Trustee believes that all of the Transfers are recoverable as set forth in the Complaint and the Opposition. The Picower Defendants dispute that they are liable for the return of the Transfers. After a review of the relevant records and discussions with Picowers' counsel concerning the factual background and certain legal arguments, as well as certain records not available to the Trustee at the time of the filing of the Complaint and the Opposition, and a

consideration of the costs and uncertainty inherent in any litigation, the Trustee, in the exercise of his business judgment, has determined that it is appropriate to resolve this matter rather than litigate the allegations in the Complaint.

E. In the course of the Trustee's investigation into the Picower BLMIS Accounts, certain margin loans owed by certain of the Picower BLMIS Accounts to BLMIS were identified (the "Margin Loans"). The Trustee determined that certain Picower BLMIS Accounts borrowed on margin from BLMIS and, when the Ponzi scheme collapsed in December of 2008, there was a considerable balance owed on these Margin Loans.

F. According to the Trustee, the Margin Loans were funded by the investments of other customers in connection with Madoff's Ponzi scheme, and appear to have been the primary vehicle through which Transfers were made to the Picower BLMIS Accounts.

G. The Picower Settlement involves the repayment of a substantial portion of the value of the Margin Loans and will return $5 billion to the BLMIS estate for distribution to customers with allowed claims. This represents a significant recovery for the victims of the Ponzi scheme, while at the same time it collects a substantial debt owed to the BLMIS estate. Moreover, when combined with the monies that the Picower Estate is forfeiting to the Government, one hundred percent of the net withdrawals received by the Picower BLMIS Accounts will have been returned for distribution to Madoff victims, whether by the Trustee or by the Government.

H. The Government has commenced a forfeiture action captioned ***United States of America v. $7,206,157,717 On Deposit at JPMorgan Chase, NA in the Account Numbers Set Forth on Schedule A***, No. 10 CV 9398, in the District Court. The Government and Mrs. Picower have also entered into a Stipulation and Order of Settlement ("Forfeiture

Stipulation"), which the Government has presented to the District Court and has been "so ordered" by the District Court.

I. Because the Bankruptcy Settlement Amount was derived from the Forfeited Funds, the Bankruptcy Settlement Amount will never revert to Mrs. Picower or the Picower BLMIS Account Holders. Rather, the Bankruptcy Settlement Amount will remain available for distribution to customers with allowed claims.

J. The Picower BLMIS Accounts have agreed to withdraw the Picower Customer Claims that they filed in the liquidation proceeding, resulting in a decrease of over billions of dollars in the amount for which the Trustee will have to reserve pending final determination of the Net Equity issue.

K. The Trustee believes that the terms of the Picower Settlement fall well above the lowest point in the range of reasonableness and, accordingly has stated that the Agreement should be approved by this Court.

L. Three objections by Objectors were filed and received by this Court prior to the deadline for objections. The Court has fully considered each of these objections.

CONCLUSIONS OF LAW:

1. This Court has subject matter jurisdiction to consider the Motion and the relief requested therein, including granting the permanent injunction sought, in accordance with 28 U.S.C. §§ 157 and 1334 and the Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York dated July 10, 1984 (Ward, Acting C.J.).

2. Venue of this case in this district is proper pursuant to 28 U.S.C. §§ 1409.

3. Proper, timely, adequate and sufficient notice of the Motion, the hearing thereon, and the related objection deadline has been given in accordance with Bankruptcy Rules

2002 and 9019. The foregoing notice constitutes good, appropriate and sufficient notice, and no other or further notice need be given.

4. The suggestion by certain Objectors that the negotiations among the Trustee, the Government and the Picower Defendants were not at arms' length is not credible, particularly given that the Agreement and forfeiture to the Government will result in the recovery of one hundred percent of the Picower Defendants' net withdrawals from BLMIS. Accordingly, no discovery in connection with either the settlement negotiations or the adversary proceeding is warranted, nor is discovery necessary or warranted for any other reason raised by any of the Objectors.

5. The Court has considered the probability of success in the litigation, the difficulties associated with collection, the complexity of the litigation, and the attendant expense, inconvenience, and delay, and the paramount interest of the customers and other creditors. In addition, the Court may credit and consider the opinion of the Trustee and his counsel in determining whether a settlement is fair and equitable.

6. The Court concludes that the Settlement falls well above the lowest point in the range of reasonableness, and is fair, reasonable, equitable and in the best interests of the BLMIS Estate.

7. The Agreement will confer a significant benefit on BLMIS customers.

8. An injunction under Sections 105(a) and 362(a) of the Bankruptcy Code is warranted and necessary. Issuance of the permanent injunction, precluding prosecution of actions by third parties against the Picower BLMIS Accounts or the Picower Releasees that are duplicative or derivative of claims belonging to the Trustee, is necessary and appropriate to carry out the provisions of the Bankruptcy Code, to prevent any entity from exercising control or

possession over property of the estate, to preclude actions that would have a conceivable effect or adverse impact upon the Debtors' estate or on the administration of the liquidation proceeding, and/or to avoid relitigation or litigation of claims that were or could have been asserted by the Trustee on behalf of all customers and creditors.

9. The injunction sought is narrowly tailored and is necessary to prevent third parties from commencing actions that would adversely impact on the Debtors' estate and interfere with its orderly administration.[3]

10. Objectors Fox and Marshall are creditors of BLMIS over whom this Court has personal jurisdiction and against whom the Court can issue a permanent injunction.

For all of the foregoing reasons, it is hereby

ORDERED, that the Motion is granted in its entirety; and it is further

ORDERED, that the Agreement between the Trustee on the one hand and the Picower BLMIS Accounts on the other hand is hereby approved, and the parties to the Agreement are authorized and directed to take such action as is necessary to effectuate the terms of the Agreement; and it is further

ORDERED, that any BLMIS customer or creditor of the BLMIS estate who filed or could have filed a claim in the liquidation, anyone acting on their behalf or in concert or participation with them, or anyone whose claim in any way arises from or is related to BLMIS or the Madoff Ponzi scheme, is hereby permanently enjoined from asserting any claim against the Picower BLMIS Accounts or the Picower Releasees that is duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower Releasees; and it is further

[3] To the extent that Federal Rule of Bankruptcy Procedure 7065 applies, the injunction provided for in this Order satisfies subsection (d) thereof by setting forth the reasons for its issuance, the specific terms thereof, and describes in reasonable detail the act or acts restrained or required.

ORDERED, that all Objections to the Motion are overruled; and it is further

ORDERED, that this Court shall retain jurisdiction over any and all disputes arising under or otherwise relating to this Order.

Dated: New York, New York
January 13, 2011

/s/Burton R. Lifland
HONORABLE BURTON R. LIFLAND
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A

AGREEMENT BETWEEN TRUSTEE AND THE PICOWER BLMIS ACCOUNT HOLDERS

AGREEMENT

This AGREEMENT, dated as of December 17, 2010, is made by and among IRVING H. PICARD, in his capacity as trustee ("Trustee") for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa et seq., as amended ("SIPA"), and the substantively consolidated estate of Bernard L. Madoff ("Madoff"), on the one hand, and the ESTATE OF JEFFRY M. PICOWER (the "Picower Estate"), by Barbara Picower ("Mrs. Picower"), as Executor of the Picower Estate and on behalf of the Picower BLMIS Accounts (defined in paragraph E hereof), on the other hand (each of the Trustee and Mrs. Picower, a "Party", and both, the "Parties").

BACKGROUND

A. BLMIS and its predecessor was a registered broker-dealer and a member of the Securities Investor Protection Corporation ("SIPC").

B. On December 11, 2008, Madoff was arrested by federal agents for criminal securities laws violations including securities fraud, investment adviser fraud, and mail and wire fraud. On December 11, 2008 (the "Filing Date"), the Securities and Exchange Commission (the "Commission") filed a complaint in the United States District Court for the Southern District of New York (the "District Court") against, among others, BLMIS and Madoff, captioned SEC v. BLMIS, et al., No. 08-CV-10791(LLS).

C. On December 15, 2008, pursuant to section 78eee(a)(4)(A) of SIPA, the Commission consented to a combination of its own action with the application of SIPC. Thereafter, SIPC filed an application in the District Court under section 78eee(a)(3) of SIPA alleging, *inter alia*, that BLMIS was not able to meet its obligations to securities customers as they came due and, accordingly, its customers needed the protections afforded by SIPA. On December 15, 2008, the District Court granted the SIPC application and entered an order under SIPA, which, in pertinent part, appointed the Trustee for the liquidation of the business of BLMIS under section 78eee(b)(3) of SIPA and removed the case to the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") under section 78eee(b)(4) of SIPA, where it is currently pending as *SIPC v. BLMIS*, No. 08-01789 (BRL) (the "SIPA Proceeding"). The Trustee is duly qualified to serve and act on behalf of the estate of BLMIS.

D. At a plea hearing on March 12, 2009, in the case captioned United States v. Madoff, No. 09-CR-213 (DC), Madoff pled guilty to an 11-count criminal information filed against him by the United States Attorneys' Office for the Southern District of New York and admitted that he "operated a Ponzi scheme through the investment advisory side of [BLMIS]" and engaged in fraud in the operation of BLMIS. On June 29, 2009, Madoff was sentenced to 150 years in prison.

E. Jeffry M. Picower ("Mr. Picower") was an attorney, accountant and businessman who maintained accounts at BLMIS on behalf of himself, his family members, corporations, and partnerships; pension plans for which he served as a trustee; and not-for-profit entities he founded and funded (the account holders and their accounts, collectively, the

"Picower BLMIS Accounts"), identified on Attachment A hereto. Mr. Picower made decisions concerning deposits into and withdrawals from the Picower BLMIS Accounts. For purposes of this Agreement, the Picower Estate shall be considered to be one of the Picower BLMIS Accounts.

F. On May 13, 2009, the Trustee filed a complaint (the "Complaint") commencing an adversary proceeding captioned Picard v. Picower, et al., No. 09-1197 (BRL) (the "Picower Adversary Proceeding") against Mr. Picower and certain of the Picower BLMIS Account Holders (collectively, the "Adversary Proceeding Defendants") seeking to avoid and recover under 11 U.S.C. §§ 544(b), 547, 548 and 550 and the New York Uniform Fraudulent Conveyance Act (New York Debtor and Creditor Law §§ 270-281) (collectively, the "Avoiding Powers Claims") more than $6.7 billion of transfers or other payments (the "Transfers") made to one or more of the Adversary Proceeding Defendants prior to the collapse of BLMIS. The amount that the Trustee seeks to avoid in the Picower Adversary Proceeding was subsequently increased to $7.2 billion.

G. Prior to July 2, 2009, SIPA customer claims were filed with the Trustee with respect to the following Picower BLMIS Accounts: Jeffry M. Picower, Barbara Picower, Capital Growth Company, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, Jeffry M. Picower Special Co., The Picower Foundation and ACF Services Corporation Money Purchase Pension Plan (collectively, the "Picower Customer Claims"). The Picower Customer Claims numbers are indicated on Attachment A hereto.

H. On July 31, 2009, the Adversary proceeding Defendants moved to dismiss the Complaint on a variety of grounds (the "Motion to Dismiss"). The Trustee responded to the Motion to Dismiss on September 30, 2009 and on November 25, 2009, the Adversary Proceeding Defendants filed a reply. A hearing on the Motion to Dismiss has not been held and the Court has not ruled on the Motion to Dismiss.

I. In September 2009, Mr. and Mrs. Picower initiated discussions with the Trustee aimed at resolving the issues set forth in the Complaint and the Motion to Dismiss.

J. On October 25, 2009, Mr. Picower passed away. Mr. Picower's Last Will and Testament dated October 15, 2009, was submitted for probate to the Surrogate's Court of the State of New York, New York County, and Mrs. Picower was thereafter duly appointed as the executor of the Estate. Through counsel, Mrs. Picower continued the discussions with the Trustee for the purposes of clarifying some of the facts alleged in the Complaint and to resolve the outstanding issues to reach a settlement with the Trustee.

K. Mrs. Picower, on behalf of the Adversary Proceeding Defendants, disputed the legal and factual bases of liability set forth in the Complaint. In the months since the Complaint was filed, the Trustee has conducted extensive additional investigation. As a result, he has become aware of information, not known to him previously, that provides context for some of the allegations made in the Complaint concerning rates of return for certain of the Adversary Proceeding Defendants. While the Trustee believes that he would prevail at trial in recovering the Transfers from the Adversary Proceeding Defendants, he recognizes that there is

always litigation risk, particularly with respect to the Transfers that occurred beyond the six-year period preceding the Filing Date.

L. By March 2010, the Trustee had reached agreement with Mrs. Picower that the Picower Estate would resolve the Trustee's claims against the Adversary Proceeding Defendants by payment to the Trustee of an amount between $4.8 billion and $5.0 billion. Ultimately, Mrs. Picower agreed that the Picower Estate would pay to the Trustee the sum of $5.0 billion to resolve the Picower Adversary Proceeding. Mrs. Picower's agreement with the Trustee, however, was contingent on Mrs. Picower reaching an agreement with the United States Attorney's Office for the Southern District of New York (the "Government") to resolve potential civil forfeiture liability of the Picower Estate pursuant to 18 U.S.C. § 981(a)(1)(C). As a result of subsequent negotiations with the Government, Mrs. Picower, on behalf of the Estate and the Picower BLMIS Accounts, agreed to forfeit to the Government $7,206,157,717 (the "Forfeited Funds") for distribution to Madoff fraud victims, representing an amount equal to the net funds withdrawn from BLMIS by the Picower BLMIS Accounts. The Government, and the Trustee further agreed that up to $5.0 billion of the Forfeited Funds (the "Bankruptcy Settlement Amount") would be credited to the Trustee and would thereafter be paid over to the Trustee for distribution to Madoff fraud victims.

M. The proposed Stipulation and Order of Settlement between the Government and Mrs. Picower that effectuates the forfeiture agreement (the "Forfeiture Stipulation," annexed hereto as Attachment B), will be submitted to the District Court for approval. It requires Mrs. Picower, upon execution of the Forfeiture Stipulation, to cause the Forfeited Funds to be wired into one or more escrow accounts (the "Escrow Accounts") that have been established at JPMorgan Chase Bank, N.A. (the "Escrow Agent") pursuant to an escrow agreement (the "Escrow Agreement") executed by and among the Picower Estate, the Trustee, the Government, and, with respect to certain sections only, SIPC. Once Mrs. Picower has fulfilled her obligations as Executor under this Agreement and the Forfeiture Settlement to cause the Forfeited Funds to be wired into the Escrow Accounts, Mrs. Picower, the Estate, the Picower BLMIS Accounts, the Picower Adversary Defendants, and the Picower Releasees shall have no further payment obligations whatsoever under this Agreement.

N. On March 31, 2010, the Trustee filed a complaint ("Fox/Marshall Complaint") commencing an adversary proceeding in the Bankruptcy Court captioned Picard v. Fox, et al., No. 10-3114 (BRL), seeking a temporary restraining order and preliminary injunction ("Preliminary Injunction") preventing the continuation of certain lawsuits commenced against certain of the Adversary Proceeding Defendants, as more particularly set forth in the Fox/Marshall Complaint. The Bankruptcy Court issued a temporary restraining order on April 1, 2010 and a Preliminary Injunction was entered on April 27, 2010.

O. Based on the foregoing, the Parties wish to settle their disputes about the matters described above without the expense, delay, and uncertainty of litigation.

NOW, THEREFORE, in consideration of the foregoing, of the mutual covenants, promises and undertakings set forth herein, and for good and valuable consideration, the mutual receipt and sufficiency of which are hereby acknowledged, the Trustee and Mrs. Picower agree as follow:

AGREEMENT

1. Agreement To Bankruptcy Court Jurisdiction. Mrs. Picower, on behalf of the Picower Estate and the Picower BLMIS Accounts, agrees to the jurisdiction of the Bankruptcy Court for purposes of the SIPA Proceeding and the Picower Adversary Proceeding.

2. Payment. Upon execution of the Forfeiture Stipulation, Mrs. Picower will cause the Forfeited Funds to be wired into the Escrow Accounts. The Escrow Agent will release funds up to the Bankruptcy Settlement Amount within two (2) business days (a) to the Trustee upon receipt of written notice provided jointly by the Trustee and Mrs. Picower, with a copy of a final and non-appealable 9019 Order (as defined in paragraph 6 hereof) (the "Final 9019 Order") attached; or (b) to the Government upon written notice jointly provided by the Trustee, Mrs. Picower, and the Government, with a copy of a final, non-appealable order of forfeiture attached. For purposes of this Agreement, an order shall be considered "final and non-appealable" when (i) the time to appeal the order has expired, or (ii) if any appeal has been taken, any and all such appeals have been fully and finally resolved without material modification of the order.

3. Release By Trustee. In consideration for the covenants and agreements in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, except with respect to any rights arising under this Agreement, upon the Trustee's or the Government's receipt of funds up to the Bankruptcy Settlement Amount, the Trustee, on behalf of himself, his attorneys, agents and advisors, and BLMIS and its estate, shall release, remit and forever discharge each of the persons and entities listed on Attachment C hereto (collectively, the "Picower Releasees") and each of their executors, administrators, attorneys, agents, trustees, heirs and assigns, from any and all past, present and future claims or causes of action (including any suit, petition, demand, or other claim in law, equity or arbitration) and from any and all allegations of liability or damages (including any allegation of duties, debts, reckonings, contracts, controversies, agreements, promises, damages, responsibilities, covenants, or accounts), of whatever kind, nature or description, direct or indirect, asserted or unasserted, known or unknown, absolute or contingent, in tort, contract, federal or state statutory liability, including, without limitation, under SIPA or the Bankruptcy Code, or otherwise, based on strict liability, negligence, gross negligence, fraud, breach of fiduciary duty, unjust enrichment, constructive trust, fraudulent transfer, or otherwise (including attorneys' fees, costs or disbursements), that are, have been, could have been or might in the future be asserted by the Trustee, on behalf of himself, his attorneys, agents and advisors, and BLMIS and its estate, against any of the Picower Releasees and each of their executors, administrators, attorneys, agents, trustees, heirs and assigns, and that arise out of, are based on, or relate in any way to BLMIS, the Picower BLMIS Accounts, the Adversary Proceeding Defendants, or the Picower Releasees. Subject to paragraph 6 below, the releases contained herein shall become effective upon the Trustee's or the Government's actual receipt of funds up to the Bankruptcy Settlement Amount without any further action by any of the Parties.

4. Release By The Picower Releasees. In consideration for the covenants and agreements in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, except with respect to any rights arising under this Agreement, upon the Trustee's or the Government's receipt of funds up to the Bankruptcy Settlement Amount, each of the Picower Releasees, by having an authorized representative sign

a Release Subscription for each Picower Releasee, hereby releases, remits and forever discharges the Trustee and all his agents, BLMIS and its estate, from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, damages, judgments, and claims whatsoever, asserted or unasserted, known or unknown, now existing or arising in the future, arising out of or in any way related to BLMIS. Subject to paragraph 6 hereof, the release contained herein shall become effective upon the Trustee's or the Government's actual receipt of funds up to the Bankruptcy Settlement Amount without any further action by any of the Parties.

5. Dismissal Of Picower Adversary Proceeding. Within six (6) business days of the earlier to occur of (a) the entry of the Final 9019 Order (as defined in Paragraph 6) by a court of competent jurisdiction, or (b) the Government's actual receipt of funds up to the Bankruptcy Settlement Amount, the Trustee will file a Notice of Dismissal dismissing the Picower Adversary Proceeding with prejudice and without costs to any of the Parties. From the date of this Agreement through the earliest to occur of (a) or (b) of this paragraph, the Picower Adversary Proceeding shall be stayed and no further actions may be taken by any of the Parties thereto.

6. Bankruptcy Court Approval; Effective Date. This Agreement is subject to, and shall become effective and binding on the Parties, upon the earliest to occur of (a) the entry of a final and non-appealable order by a court of competent jurisdiction approving the Trustee's Motion for Entry of an Order Pursuant to Section 105(a) of the Bankruptcy Code and Rule 2002 and 9019 of the Federal Rules of Bankruptcy Procedure Approving an Agreement By and Between the Trustee and the Picower Estate and Enjoining Certain Claims (the "Final 9019 Order"); or (b) the entry of a final and non-appealable order approving the Forfeiture Stipulation. Once this Agreement becomes effective and binding on the Parties hereto, all of the provisions herein, including the releases contained in paragraphs 3 and 4, shall become and remain effective and binding on the Parties, and shall remain in full force and effect, even if no Final 9019 Order ever is entered, and even if funds up to the Bankruptcy Settlement Amount are released to the Government under paragraph 6 of the Forfeiture Stipulation, and not to the Trustee under this Agreement. The only circumstance in which this Agreement shall *not* become effective and binding is in the event that no final and non-appealable orders are entered approving either the Final 9019 Order or the Forfeiture Stipulation. In such case, and only in such case, (i) the Forfeited Funds would be returned to the Estate, less any amounts paid by the Trustee to Mrs. Picower for or in reimbursement of tax payments made by Mrs. Picower during escrow of the Forfeited Funds; (ii) this Agreement, including the releases in paragraphs 3 and 4 hereof, would not take effect and would become null and void for all purposes; (iii) the stay of the Picower Adversary Proceeding would be lifted and the Trustee, on the one hand, and the Adversary Proceeding Defendants, on the other hand, would continue to litigate their respective claims and defenses in the Picower Adversary Proceeding; (iv) the Picower Customer Claims would not be withdrawn; and (v) the Parties could not use or rely on any statement herein in the Picower Adversary Proceeding or in any public statement or other litigation relating to BLMIS or Madoff.

7. Permanent Injunction. The Trustee shall use his reasonable best efforts to obtain approval of the Final 9019 Order as promptly as practicable after the date of this Agreement. The Final 9019 Order shall include an order by the Bankruptcy Court pursuant to, *inter alia*, section 105(a) of the Bankruptcy Code and Bankruptcy Rules 7001 and 7065 (the

"Permanent Injunction Order"), permanently enjoining any customer or creditor of the BLMIS estate, anyone acting on their behalf or in concert or participation with them, or any person whose claim in any way arises from or relates to BLMIS or the Madoff Ponzi scheme, from asserting any claim against the Estate, the Picower BLMIS Accounts, the Picower Adversary Defendants or the Picower Releasees that is duplicative or derivative of any claim brought by the Trustee, or which could have been brought by the Trustee against the Estate, the Picower BLMIS Accounts, the Picower Adversary Defendants or the Picower Releasees (the "Permanent Injunction"). Following entry of the Final 9019 Order, the Trustee shall use his reasonable best efforts to oppose challenges, if any, to the scope, applicability or enforceability of the Permanent Injunction.

8. Cooperation. Upon reasonable request of the Trustee, Mrs. Picower agrees reasonably to cooperate with the Trustee in connection with any efforts to obtain approval of the Final 9019 Order and to enforce it to extinguish any claims that may be asserted in violation of the Final 9019 Order.

9. Withdrawal Of Claims. Each of the Picower Customer Claims shall be deemed withdrawn with prejudice when the releases in paragraphs 3 and 4 hereof become binding and effective, without any further action necessary by any of the Parties.

10. Termination Of BLMIS Account Agreements with BLMIS. All agreements between the Picower BLMIS Accounts and BLMIS shall be deemed terminated when the releases in paragraphs 3 and 4 hereof become binding and effective, without any further action necessary by any of the Parties

11. Authority. Mrs. Picower hereby represents and warrants to the Trustee as of the date hereof that she has the full power, authority and legal right to execute and deliver, and to perform obligations on behalf of the Picower Estate and the Picower BLMIS Accounts under this Agreement.

12. Further Assurances. The Trustee and Mrs. Picower shall execute and deliver any document or instrument reasonably requested by any of them after the date of this Agreement to effectuate the intent of this Agreement.

13. Entire Agreement. This Agreement constitutes the entire agreement and understanding between and among the Parties hereto and supersedes all prior agreements, representations and understandings concerning the subject matter hereof.

14. Amendments, Waiver. This Agreement may not be terminated, amended or modified in any way except in a writing signed by all the Parties. No waiver of any provision of this Agreement shall be deemed to constitute a waiver of any other provision hereof, whether or not similar, nor shall such waiver constitute a continuing waiver.

15. Assignability. No Party hereto may assign its rights under this Agreement without the prior written consent of each of the other Parties hereto.

16. Successors Bound. This Agreement shall be binding upon and inure to the benefit of each of the Parties and the Picower Releasees, and on and their respective successors and permitted assigns.

17. No Third Party Beneficiary. Except as expressly provided in paragraphs 3 and 4, the Parties do not intend to confer any benefit by or under this Agreement upon any person or entity other than the Parties and the Picower Releasees and their respective successors and permitted assigns.

18. No Admission of Liability or Wrongdoing. By entering into this Agreement, Mrs. Picower does not admit and she expressly denies that she, Mr. Picower, the Picower BLMIS Accounts, the Picower Adversary Defendants, or any of the Picower Releasees have any liability to the Trustee, owe any sums to the Trustee other than sums up to the Bankruptcy Settlement Amount, or have any liability or owe any sums to any other persons or entities, other than to the Government under the terms of the Forfeiture Stipulation, arising from or related to BLMIS or the Madoff Ponzi scheme. Furthermore, Mrs. Picower does not admit and expressly denies that she, Mr. Picower, any of the Picower BLMIS Accounts, or any of the Picower Releasees engaged in any wrongdoing arising from or related to BLMIS or the Madoff Ponzi scheme, or had any knowledge thereof.

19. Applicable Law. This Agreement shall be construed and enforced in accordance with the laws of the State of New York.

20. Exclusive Jurisdiction. The Parties agree that any action for breach or enforcement of this Agreement may be brought only in the Bankruptcy Court. No Party shall bring, institute, prosecute or maintain any action pertaining to the enforcement of any provision of this Agreement in any court other than the Bankruptcy Court.

21. Captions and Rules Of Construction. The captions in this Agreement are inserted only as a matter of convenience and for reference and do not define, limit or describe the scope of this Agreement or the scope or content of any of its provisions. Any reference in this Agreement to a paragraph is to a paragraph of this Agreement. "Includes" and "including" are not limiting.

22. Counterparts; Electronic Copy Of Signatures. This Agreement and attachments may be executed and delivered in any number of counterparts, each of which so executed and delivered shall be deemed to be an original and all of which shall constitute one and the same document. The Parties may evidence their execution of this Agreement by delivery to the other Parties of scanned or faxed copies of their signatures, with the same effect as the delivery of an original signature. The Picower Releasees may evidence their execution of the Release Subscription by delivery to the Parties of scanned or faxed copies of their signatures, with the same effect as the delivery of an original signature.

23. Notices. Any notices under this Agreement shall be in writing, shall be effective when received and may be delivered only by hand, by overnight delivery service, by fax or by electronic transmission to:

If to the Trustee:

Irving H. Picard
E: ipicard@bakerlaw.com
Baker & Hostetler LLP
45 Rockefeller Center, Suite 1100
New York, NY 10111
F: (212) 589-4201

If to Mrs. Picower or the Picower Releasees, c/o:

William D. Zabel
E: william.zabel@srz.com
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
F: (212) 610-1459

with copies to:

David J. Sheehan
E: dsheehan@bakerlaw.com
Marc Hirschfield
E: mhirschfield@bakerlaw.com
Baker & Hostetler LLP
45 Rockefeller Center, Suite 1100
New York, NY 10111
F: (212) 589-4201

Marcy Ressler Harris
E: marcy.harris@srz.com
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
F: (212) 593-5955

[*Signature page follows*]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first above written.

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

By: Irving H. Picard

Name: Irving H. Picard

Title: Trustee

ESTATE OF JEFFRY M. PICOWER

Barbara Picower

Barbara Picower, as Executor

RELEASE SUBSCRIPTION

The undersigned is a "Picower Releasee" as defined in the Agreement dated as of December 17, 2010, by and among Irving H. Picard, in his capacity as Trustee for the liquidation under the Securities Investor Protection Act of 1970, as amended, of Bernard L. Madoff Investment Securities LLC (the "Trustee"), on the one hand, and Barbara Picower, as executor of the Estate of Jeffry M. Picower and on behalf of the Picower BLMIS Accounts, on the other hand. For and in consideration of the Trustee's release of the undersigned under paragraph 3 of the Agreement, the undersigned subscribes to the release set forth in paragraph 4 of the Agreement (and only to such release) with the same force and effect as if the undersigned were a party to the Agreement. By signing this Subscription, the undersigned does not become a Party to the Agreement and is not undertaking any rights or obligations under any other provisions of the Agreement, except that paragraphs 10, 19, 20, 22, and 23 of the Agreement apply to this Subscription as though such paragraphs were a part of this Subscription.

Dated _____, 201_.

_____

By: _____
Name:
Title:

ATTACHMENT A: PICOWER BLMIS ACCOUNTS

Account Number	Account Name	Claim No.
100407	DECISIONS INC SPECIAL	
100416	JEFFRY M. PICOWER	
101006	JMP INVESTMENT CO	
101007	JEFFRY M. PICOWER	
101017	JMP PERSONAL	
101607	JEFFRY M. PICOWER	
101610	PICSON MANAGEMENT GROUP	
101615	JEFFRY M. PICOWER #2	
1C1006	CAPITAL GROWTH COMPANY	012674, 013298
1D0010	DECISIONS INCORPORATED	
1D0011	DECISIONS INC #2	
1D0030	DECISIONS INC #3	
1D0032	DECISIONS INC #4	
1D0036	DECISIONS INC #5	
1D0082	DECISIONS INCORPORATED #6	
1E0123	ACF SERVICES CORPORATION MONEY PURCHASE PENSION PLAN	12672, 013401
1F0002	FAVORITE FUND	
1J0001	JA PRIMARY LTD PARTNERSHIP	
1J0002	JAB PARTNERSHIP	012670, 013311
1J0003	JEMW PARTNERSHIP	012673, 013299
1J0004	J F PARTNERSHIP	012677, 013400
1J0005	JFM INVESTMENT CO	
1J0008	JLN PARTNERSHIP	012676, 013649
1J0009	JMP LIMITED PARTNERSHIP	
1J0024	JA SPECIAL LTD PARTNERSHIP	012678, 013547
1M0046	THE RETIREMENT INCOME PLAN FOR EMPLOYEES OF MONROE SYSTEMS FOR BUSINESS, INC.	
1P0017	THE PICOWER INSTITUTE FOR MEDICAL RESEARCH	
1P0018	TRUST FBO GABRIELLE H PICOWER	
1P0019	BARBARA PICOWER	012675, 013312
1P0020	TRUST FBO GABRIELLE H PICOWER	
1P0021	JEFFRY M PICOWER	012669, 013313
1P0022	JEFFRY M PICOWER, P. C.	
1P0023	JEFFRY M PICOWER SPECIAL CO	012671, 013671
1P0024	THE PICOWER FOUNDATION	012939

ATTACHMENT B: FORFEITURE STIPULATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - against - $7,206,157,717 ON DEPOSIT AT JP MORGAN CHASE BANK, N.A., IN THE ACCOUNTS SET FORTH ON SCHEDULE A, Defendant in rem.	**STIPULATION AND ORDER OF SETTLEMENT** No. 10 Civ. 9398 (TPG) ECF CASE

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 12/17/10

The United States Attorney's Office for the Southern District of New York, by Preet Bharara, United States Attorney (the "Office" or the "Government"); and the estate of Jeffry M. Picower (the "Estate"), by its representative, Barbara Picower (in such capacity, the "Estate Representative"), and its attorneys, Schulte Roth & Zabel LLP, hereby enter into this stipulation and order (the "Stipulation") and stipulate and agree as follows:

WHEREAS, on December 17, 2010, the Government filed a verified complaint seeking forfeiture of all right, title, and interest in $7,206,157,717 on deposit at JP Morgan Chase Bank, N.A., in the accounts set forth on Schedule A to the complaint, and all property traceable thereto (the "Defendant in rem"), pursuant to 18 U.S.C. § 981(a)(1)(C), as property that constitutes and is derived from proceeds traceable to specified unlawful activity, as that term is defined in 18 U.S.C. § 1956(c)(7) (the "Complaint");

WHEREAS, the Complaint alleges that the Defendant in rem is derived from proceeds traceable to offenses orchestrated by Bernard L. Madoff ("Madoff") that were part of a scheme

to defraud investors of Bernard L. Madoff Investment Securities LLC and its predecessor, Bernard L. Madoff Investment Securities (collectively and separately, "BLMIS");

WHEREAS, the Complaint further alleges that the Defendant in rem is property traceable to transfers made from accounts at BLMIS held or controlled, directly or indirectly, by Jeffry M. Picower (collectively, the "Picower Accounts," which, for the avoidance of doubt, are the accounts set forth in Schedule B to the Complaint);[1]

WHEREAS, after Jeffry M. Picower's death on October 25, 2009, the Estate Representative was duly appointed as the Executor of the Estate by the New York County Surrogate's Court on or about January 4, 2010;

WHEREAS, the Estate Representative understands that the Government seeks to forfeit the Defendant in rem, and that the Office will request that such property, if forfeited to the United States, be distributed to victims of the BLMIS fraud through the process of remission, consistent with applicable Department of Justice regulations;

WHEREAS, in light of information made public after the BLMIS fraud was uncovered in December 2008, the Estate Representative does not dispute (a) that the Picower Accounts received funds from BLMIS that were proceeds of, and traceable to, conduct constituting specified unlawful activity perpetrated by Madoff and others; and (b) that the Defendant in rem (i) constitutes property that is the proceeds of, or traceable to, conduct constituting specified

[1] In certain instances, multiple BLMIS account numbers were associated with a particular Picower Account. In certain other instances, the name of the account holder associated with a particular Picower Account at BLMIS changed. The Parties acknowledge that the list of account numbers and account names in Schedule B to the Complaint does not identify each separate account number or account name for the Picower Accounts.

unlawful activity perpetrated by Madoff, and/or (ii) may be considered a substitute *res* for such property;

WHEREAS, however, were this matter to be litigated, the Estate Representative would assert that Jeffry M. Picower and the other Picower Parties, as that term is defined in paragraph 9, below, (a) had no involvement in, knowledge of, or participation in the BLMIS fraud, the conduct constituting specified unlawful activity committed by Madoff and others, or any other criminal or unlawful activity occurring at BLMIS, and (b) were innocent owners of all assets transferred to them from BLMIS at all relevant times;

WHEREAS, the Estate Representative nevertheless wishes to divest the Estate of any and all funds received from BLMIS so that such funds may be returned to the victims of the fraud, and to use the remaining assets of the Estate primarily to establish a charitable foundation in accordance with Jeffry M. Picower's last Will and wishes;

WHEREAS, the Estate Representative and the Office (each a "Party," and together, the "Parties") wish to resolve this action without litigation on the terms set forth herein and to further the goal of compensating the victims of the fraud perpetrated through BLMIS;

WHEREAS, simultaneously with entering into this Stipulation, the Estate Representative is entering into an agreement with the trustee appointed under section 5(b)(3) of the Securities Investor Protection Act of 1970, as amended ("SIPA"), in the consolidated liquidations of BLMIS and Madoff (the "SIPA Trustee") providing for the transfer of funds from the Estate to the SIPA Trustee in settlement of an adversary proceeding filed by the SIPA Trustee against certain of the Picower Parties (the "Bankruptcy Settlement," a copy of which is attached hereto as Exhibit A), which is subject to the approval of the United States Bankruptcy Court for the Southern District of New York; and

WHEREAS, the Office intends to credit against the amount being forfeited to the Government (the "Forfeiture Amount," which, for the avoidance of doubt, is equal to $7,206,157,717) the amount actually transferred to the SIPA Trustee pursuant to the Bankruptcy Settlement, up to $5,000,000,000 (the "Bankruptcy Settlement Amount"), and understands that the SIPA Trustee intends to distribute those funds to the victims of the fraud perpetrated through BLMIS, in accordance with SIPA;

The Parties hereby stipulate and agree, and the Court orders, as follows:

1. The recitals above form an integral part of this Stipulation and are fully incorporated herein.

2. The Estate Representative agrees to forfeit the Defendant in rem to the Government, on the terms set forth herein, in full satisfaction of the Government's claims for forfeiture as alleged in the Complaint. The Clerk of this Court is hereby directed to forthwith issue a Warrant for the Arrest of the Defendant in rem (the "Warrant"). In the event that, for whatever reason, the Government is unable to execute the Warrant on the full Forfeiture Amount, this Stipulation shall be null and void just as if the Court had not approved it, pursuant to paragraph 17, below.

3. Simultaneously with her execution of this Stipulation, the Estate Representative shall cause the Forfeiture Amount to be wired into one or more escrow accounts (the "Escrow Accounts") that shall be established at JP Morgan Chase Bank, N.A. (the "Escrow Agent"), pursuant to that certain escrow agreement by and among the Estate Representative, the Government, the SIPA Trustee, the Escrow Agent, and, as set forth therein, the Securities Investor Protection Corporation ("SIPC") (the "Escrow Agreement," a copy of which is attached hereto as Exhibit B). Any and all costs associated with the Escrow Accounts, including but not

limited to any and all costs for its establishment and operation (the "Escrow Costs"), are to be paid by SIPC and are, in no event, to be paid by the Government or the Estate Representative, or to be paid from the Forfeiture Amount or any other funds or property in the Escrow Accounts. Once the Estate Representative has caused the full Forfeiture Amount to be deposited into the Escrow Accounts, the Estate Representative shall have no further obligation under this Stipulation to provide any funds or property for forfeiture.

4. The Government agrees to credit the Bankruptcy Settlement Amount against the Forfeiture Amount. The Forfeiture Amount less the Bankruptcy Settlement Amount is referred to in this Stipulation as the "Settlement Funds."

5. Within three business days of the date that the Court approves this Stipulation, the Government and the Estate Representative shall each execute a Notice For Release of Settlement Funds, in the form annexed to the Escrow Agreement as Exhibit A. The Government shall then cause the fully-executed Notice For Release of Settlement Funds to be delivered to the Escrow Agent pursuant to the terms of the Escrow Agreement, whereupon the Escrow Agent shall confirm the instructions and release the Settlement Funds, plus any interest or appreciation that has been accrued or paid and is attributable to such property, by wire in same day funds to the following account maintained by the United States Marshals Service, or to such other accounts that may be designated by the Government pursuant to the terms of the Escrow Agreement ("the USMS Account"):

ABA #021030004
ALC #00008154
U.S. Marshals Service
c/o Federal Reserve Bank of New York
33 Liberty Street
New York, New York 10045
Reference: To Be Supplied by the Government

6. The Escrow Agent shall release funds in the Bankruptcy Settlement Amount, not to exceed $5,000,000,000, to or at the direction of the SIPA Trustee, upon satisfaction of all conditions precedent to the Bankruptcy Settlement and pursuant to the terms of the Bankruptcy Settlement and the Escrow Agreement. Within five business days thereafter, pursuant to the terms of the Escrow Agreement, the Escrow Agent shall transfer to the USMS Account, for forfeiture in accordance with the instructions in the preceding paragraph, any remaining funds in the Escrow Accounts, including but not limited to funds attributable to interest or appreciation accrued or paid in connection with any portion of the Forfeiture Amount. The Escrow Agent shall thereafter terminate the Escrow Accounts in accordance with the Escrow Agreement.

7. In the event that this Stipulation has been approved by the Court, but (a) the Bankruptcy Settlement Amount has not been paid to the SIPA Trustee pursuant to the terms of the Bankruptcy Settlement within three years of the date hereof, or (b) the Bankruptcy Settlement is rejected by a final and non-appealable order of a court of competent jurisdiction, whichever is sooner, then within five business days thereof, the Government and the Estate Representative shall each execute a Notice For Release of Forfeited Funds, in the form annexed to the Escrow Agreement as Exhibit C. The Government shall then cause the fully-executed Notice For Release of Forfeited Funds to be delivered to the Escrow Agent pursuant to the terms of the Escrow Agreement, whereupon the Escrow Agent shall confirm the instructions and release the Bankruptcy Settlement Amount, together with any remaining funds in the Escrow Accounts, including but not limited to funds attributable to interest or appreciation accrued or paid in connection with any portion of the Forfeiture Amount, by wire in same day funds to the USMS Account, for forfeiture in accordance with the instructions in paragraph 5, above. The

Escrow Agent shall thereafter terminate the Escrow Accounts in accordance with the Escrow Agreement.

8. The Estate and the Estate Representative shall not file, or cause any other person or entity to file, or assist any other person or entity in filing, any claim to the Defendant in rem, or in any other way interfere with or delay the forfeiture of the Defendant in rem.

9. The Parties hereby fully and finally compromise, settle, release, and dispose of:

(a) any and all civil claims under the asset forfeiture and/or money laundering statutes that the United States has asserted or could assert in connection with BLMIS, Madoff, and the specified unlawful activity described in the Complaint, including any receipt of money and any transfers of money received from BLMIS (collectively, beginning with the phrase "in connection with," referred to herein as the "Covered Conduct") against any of the following people, entities, or property:

(i) Jeffry M. Picower, the Estate, the Estate Representative, Barbara Picower, Capital Growth Company, Favorite Fund, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JFM Investment Company, JLN Partnership, JMP Limited Partnership, Jeffry M. Picower Special Co., Jeffry M. Picower, P.C., Decisions Incorporated, Decisions Incorporated #2, Decisions Incorporated #3, Decisions Incorporated #4, Decisions Incorporated #5, Decisions Incorporated #6, the Picower Foundation, the Picower Institute for Medical Research, Trust FBO Gabrielle H. Picower, Trust FBO Abe Picower, Picson Management Group, Decisions Incorporated Special, Jeffry M. Picower D P Partnership, Jeffry M. Picower #2, Decisions Incorporated L Account, JMP Investment, Jeffry M. Picower, P.C., Employee Profit Sharing Plan, Jeffry M. Picower Money-Purchase

Pension Plan, Decisions Incorporated Money Purchase Pension Plan, Explanations Incorporated Money Purchase Pension Plan, April C. Freilich, ACF Services Corporation, ACF Services Corporation Money-Purchase Pension Plan, Apple Securities Management Incorporated, and the Retirement Income Plan for Employees of Monroe Systems for Business, Inc., and each of their respective officers, employees, partners, agents, predecessors, successors, assigns, heirs, and representatives (collectively, the "Picower Parties");

(ii) any property currently in the custody, control, or possession of any of the Picower Parties; and

(iii) any property currently in the custody, control, or possession of any other person or entity that was received from any of the Picower Parties, including but not limited to recipients of any grants made by the Picower Foundation or the Picower Institute for Medical Research, solely to the extent that such property is traceable to the Picower Accounts; and

(b) any and all claims or defenses that any of the Picower Parties (to the extent that such Picower Parties are within the control of the Estate Representative) may or could assert against the Government related to the Covered Conduct.

The claims and defenses encompassed in subparagraphs (a) and (b) shall be referred to as the "Settled Claims." For the avoidance of doubt, (i) no employee or insider of BLMIS is a Picower Party within the meaning of this Stipulation and this Stipulation is not intended to release, and the Settled Claims do not include, any claim against any employee or insider of BLMIS, or any property in the custody, control, or possession of any employee or insider of BLMIS; (ii) this Stipulation is not intended to release, and the Settled Claims do not include, any criminal liability

for any individual or entity whatsoever; and (iii) notwithstanding the existence or outcome of any claims to the Forfeiture Amount or the Defendant in rem, the releases set forth in this paragraph shall remain in full force and effect.

10. The Estate Representative represents and warrants that (a) to the best of her knowledge and belief, the Estate is currently the sole owner of the Defendant in rem; and (b) the Estate Representative is authorized to enter into this Stipulation and each of its terms and conditions, and to legally bind the Estate, herself in her individual capacity (as to paragraphs 9(b), 12, and 13), and the Picower Parties (to the extent such Picower Parties are within the control of the Estate Representative), thereto. In the event that either of these representations or warranties is untrue, then, notwithstanding paragraphs 3 and 9 above, any and all claims of the United States described therein shall not be released and shall not be part of the term "Settled Claims," but this Stipulation shall in all other respects remain in full force and effect.

11. The Defendant in rem represents the total net amount of withdrawals received by the Picower Parties from BLMIS through, and as reflected in account statements for, the Picower Accounts. The Estate Representative represents and warrants that she is not aware that any of the Picower Parties received property or funds from BLMIS except through, and as reflected in account statements for, the Picower Accounts. In the event that information is received or discovered by the Government after the date of this Stipulation showing that the Picower Parties received additional funds or property from BLMIS or Madoff, directly or indirectly, other than through, and as reflected in account statements for, the Picower Accounts, then, notwithstanding paragraphs 3 and 9 above, the Government shall be free to assert any and all claims, including but not limited to civil forfeiture claims, against such funds or property, or against property traceable thereto, or to bring any and all claims against the Picower Parties and seek any and all

available remedies (which shall not be limited to the value of such funds or property), provided, however, that any such claims asserted against the Picower Parties and any remedies sought shall be on account of such funds or property and not on account of the Defendant in rem, but the releases set forth in paragraph 9 of this Stipulation shall otherwise remain in full force and effect.

12. Upon reasonable request of the Government, the Estate Representative agrees, on behalf of the Estate, the Picower Accounts, and each of the Picower Parties (to the extent they are within the control of the Estate Representative), to reasonably cooperate with the Government in connection with responding to any claims asserted against the Forfeiture Amount or the Defendant in rem. Nothing in this paragraph shall require any of the Picower Parties to waive the attorney-client privilege, the work product doctrine, or any other privilege, immunity, or statutory or constitutional right or protection.

13. The Picower Parties (to the extent that they are within the control of the Estate Representative) are hereby barred from asserting any claim against the United States of America or any agency, instrumentality, agent, or employee thereof, and from assisting others in asserting any such claim, in connection with the Settled Claims, including but not limited to any claims for costs or attorneys' fees.

14. This Stipulation does not constitute an admission of liability or fault on the part of the Picower Parties. Notwithstanding any other provision of this Stipulation, the forfeiture provided for herein does not constitute a fine, penalty, or punitive damages.

15. The Parties hereby agree that this Stipulation, including the Exhibits hereto, is the entire understanding of the Parties with respect to the subject matter of this Stipulation and it is intended to be the complete and exclusive statement thereof. The Parties agree that each

participated equally in the preparation of this Stipulation, and that no provision shall be construed against any other Party as draftsman.

16. The Parties do not intend to confer any benefit by or under this Stipulation upon any person or entity other than the Government and the Picower Parties. No person or entity shall be entitled to assert any rights under this Stipulation other than the Government and the Picower Parties, nor shall any person or entity other than the Government and the Picower Parties be permitted to use this Stipulation as evidence of an admission regarding any claim, right, or defense that such person or entity may assert.

17. Notwithstanding anything to the contrary herein, this Stipulation is expressly subject to and contingent upon approval of the Court. If this Stipulation, or any portion hereof, is rejected by the Court or if it is overturned or modified on appeal, then (i) all funds transferred to the Government by the Escrow Agent pursuant to this Stipulation shall be returned to the Estate, and (ii) this Stipulation shall be null and void and have no further force and effect and, in such event, neither this Stipulation nor any negotiations and writings in connection herewith shall in any way be construed as or deemed to be evidence of an admission on behalf of any Party hereto regarding any claim or right that such Party may have against any other Party hereto. Notwithstanding the foregoing sentence, to the extent that the USMS Account lacks sufficient funds to return to the Estate the full amount of the funds transferred to the Government by the Escrow Agent pursuant to this Stipulation, then (a) the Government shall, solely to that extent, be relieved of its obligation to return funds to the Estate pursuant to clause (i) of the foregoing sentence, and (b) any civil liability of the Picower Parties to the Government for any claim referred to in the releases set forth in paragraph 9, above, shall be reduced to the extent of any funds not so returned to the Estate. In the event that this Stipulation, or any portion hereof, is

rejected by the Court or if it is overturned or modified on appeal, the Parties hereto agree to negotiate in good faith to revise the terms of this Stipulation accordingly, such that in full satisfaction of the Picower Parties' civil liability the full Forfeiture Amount will be available for distribution to victims of the fraud perpetrated through BLMIS.

18. For purposes of this Stipulation, an order shall be considered "final and non-appealable" when (a) the time to appeal the order has expired, or (b) if any appeal has been taken, any and all such appeals have been fully and finally resolved without material modification of the order.

19. After (a) the time for filing claims to the Defendant in rem has expired, or (b) if any claims have been filed, any and all such claims have been resolved, the Government shall seek entry of a final order of forfeiture in respect of any property forfeited in this action.

20. This Agreement shall be binding upon and inure to the benefit of each of the Parties and their successors and permitted assigns.

21. This Stipulation may not be changed, modified, or amended except in a writing signed by the Parties and/or their counsel and approved by the Court.

22. This Stipulation may be executed in any number of counterparts and shall constitute one agreement, binding upon all Parties hereto as if all Parties signed the same document. Further, all facsimile and digital images of signatures shall be treated as originals for all purposes.

23. The Court shall retain exclusive jurisdiction with respect to any and all issues or disputes that may arise in connection with this Stipulation and its enforcement.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

SO ORDERED:

Dated: December 17, 2010
New York, New York

HON. THOMAS P. GRIESA
UNITED STATES DISTRICT JUDGE

AGREED TO BY:

Dated: December 17, 2010
New York, New York

PREET BHARARA
United States Attorney
Attorney for the United States of America

MATTHEW L. SCHWARTZ
BARBARA A. WARD
Assistant United States Attorneys
One Saint Andrew's Plaza
New York, New York 10007
Tel.: (212) 637-1945/1048
Facsimile: (212) 637-2937
E-mail: matthew.schwartz@usdoj.gov

Dated: December __, 2010
New York, New York

BARBARA PICOWER, in her capacity as Estate Representative.

Dated: December __, 2010
New York, New York

SCHULTE, ROTH & ZABEL LLP
Attorneys for the Estate Representative

MARCY RESSLER HARRIS, ESQ
GARY STEIN, ESQ.
919 Third Avenue
New York, New York 10022
Tel.: (212) 756-2000
Facsimile: (212) 593-5955
E-mail: marcy.harris@srz.com

SO ORDERED:

Dated: December __, 2010
New York, New York

HON. THOMAS P. GRIESA
UNITED STATES DISTRICT JUDGE

AGREED TO BY:

Dated: December __, 2010
New York, New York

PREET BHARARA
United States Attorney
Attorney for the United States of America

MATTHEW L. SCHWARTZ
BARBARA A. WARD
Assistant United States Attorneys
One Saint Andrew's Plaza
New York, New York 10007
Tel.: (212) 637-1945/1048
Facsimile: (212) 637-2937
E-mail: matthew.schwartz@usdoj.gov

Dated: December __, 2010
New York, New York

Barbara Picower
BARBARA PICOWER, in her capacity as
Estate Representative

Dated: December 17, 2010
New York, New York

SCHULTE, ROTH & ZABEL LLP
Attorneys for the Estate Representative

Marcy R Harris
MARCY RESSLER HARRIS, ESQ
GARY STEIN, ESQ.
919 Third Avenue
New York, New York 10022
Tel.: (212) 756-2000
Facsimile: (212) 593-5955
E-mail: marcy.harris@srz.com

EXHIBIT A

BANKRUPTCY STIPULATION

AGREEMENT

This AGREEMENT, dated as of December 17, 2010, is made by and among IRVING H. PICARD, in his capacity as trustee ("Trustee") for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa et seq., as amended ("SIPA"), and the substantively consolidated estate of Bernard L. Madoff ("Madoff"), on the one hand, and the ESTATE OF JEFFRY M. PICOWER (the "Picower Estate"), by Barbara Picower ("Mrs. Picower"), as Executor of the Picower Estate and on behalf of the Picower BLMIS Accounts (defined in paragraph E hereof), on the other hand (each of the Trustee and Mrs. Picower, a "Party", and both, the "Parties").

BACKGROUND

A. BLMIS and its predecessor was a registered broker-dealer and a member of the Securities Investor Protection Corporation ("SIPC").

B. On December 11, 2008, Madoff was arrested by federal agents for criminal securities laws violations including securities fraud, investment adviser fraud, and mail and wire fraud. On December 11, 2008 (the "Filing Date"), the Securities and Exchange Commission (the "Commission") filed a complaint in the United States District Court for the Southern District of New York (the "District Court") against, among others, BLMIS and Madoff, captioned SEC v. BLMIS, et al., No. 08-CV-10791(LLS).

C. On December 15, 2008, pursuant to section 78eee(a)(4)(A) of SIPA, the Commission consented to a combination of its own action with the application of SIPC. Thereafter, SIPC filed an application in the District Court under section 78eee(a)(3) of SIPA alleging, *inter alia*, that BLMIS was not able to meet its obligations to securities customers as they came due and, accordingly, its customers needed the protections afforded by SIPA. On December 15, 2008, the District Court granted the SIPC application and entered an order under SIPA, which, in pertinent part, appointed the Trustee for the liquidation of the business of BLMIS under section 78eee(b)(3) of SIPA and removed the case to the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") under section 78eee(b)(4) of SIPA, where it is currently pending as *SIPC v. BLMIS*, No. 08-01789 (BRL) (the "SIPA Proceeding"). The Trustee is duly qualified to serve and act on behalf of the estate of BLMIS.

D. At a plea hearing on March 12, 2009, in the case captioned United States v. Madoff, No. 09-CR-213 (DC), Madoff pled guilty to an 11-count criminal information filed against him by the United States Attorneys' Office for the Southern District of New York and admitted that he "operated a Ponzi scheme through the investment advisory side of [BLMIS]" and engaged in fraud in the operation of BLMIS. On June 29, 2009, Madoff was sentenced to 150 years in prison.

E. Jeffry M. Picower ("Mr. Picower") was an attorney, accountant and businessman who maintained accounts at BLMIS on behalf of himself, his family members, corporations, and partnerships; pension plans for which he served as a trustee; and not-for-profit entities he founded and funded (the account holders and their accounts, collectively, the

"Picower BLMIS Accounts"), identified on Attachment A hereto. Mr. Picower made decisions concerning deposits into and withdrawals from the Picower BLMIS Accounts. For purposes of this Agreement, the Picower Estate shall be considered to be one of the Picower BLMIS Accounts.

F. On May 13, 2009, the Trustee filed a complaint (the "Complaint") commencing an adversary proceeding captioned Picard v. Picower, et al., No. 09-1197 (BRL) (the "Picower Adversary Proceeding") against Mr. Picower and certain of the Picower BLMIS Account Holders (collectively, the "Adversary Proceeding Defendants") seeking to avoid and recover under 11 U.S.C. §§ 544(b), 547, 548 and 550 and the New York Uniform Fraudulent Conveyance Act (New York Debtor and Creditor Law §§ 270-281) (collectively, the "Avoiding Powers Claims") more than $6.7 billion of transfers or other payments (the "Transfers") made to one or more of the Adversary Proceeding Defendants prior to the collapse of BLMIS. The amount that the Trustee seeks to avoid in the Picower Adversary Proceeding was subsequently increased to $7.2 billion.

G. Prior to July 2, 2009, SIPA customer claims were filed with the Trustee with respect to the following Picower BLMIS Accounts: Jeffry M. Picower, Barbara Picower, Capital Growth Company, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, Jeffry M. Picower Special Co., The Picower Foundation and ACF Services Corporation Money Purchase Pension Plan (collectively, the "Picower Customer Claims"). The Picower Customer Claims numbers are indicated on Attachment A hereto.

H. On July 31, 2009, the Adversary proceeding Defendants moved to dismiss the Complaint on a variety of grounds (the "Motion to Dismiss"). The Trustee responded to the Motion to Dismiss on September 30, 2009 and on November 25, 2009, the Adversary Proceeding Defendants filed a reply. A hearing on the Motion to Dismiss has not been held and the Court has not ruled on the Motion to Dismiss.

I. In September 2009, Mr. and Mrs. Picower initiated discussions with the Trustee aimed at resolving the issues set forth in the Complaint and the Motion to Dismiss.

J. On October 25, 2009, Mr. Picower passed away. Mr. Picower's Last Will and Testament dated October 15, 2009, was submitted for probate to the Surrogate's Court of the State of New York, New York County, and Mrs. Picower was thereafter duly appointed as the executor of the Estate. Through counsel, Mrs. Picower continued the discussions with the Trustee for the purposes of clarifying some of the facts alleged in the Complaint and to resolve the outstanding issues to reach a settlement with the Trustee.

K. Mrs. Picower, on behalf of the Adversary Proceeding Defendants, disputed the legal and factual bases of liability set forth in the Complaint. In the months since the Complaint was filed, the Trustee has conducted extensive additional investigation. As a result, he has become aware of information, not known to him previously, that provides context for some of the allegations made in the Complaint concerning rates of return for certain of the Adversary Proceeding Defendants. While the Trustee believes that he would prevail at trial in recovering the Transfers from the Adversary Proceeding Defendants, he recognizes that there is

always litigation risk, particularly with respect to the Transfers that occurred beyond the six-year period preceding the Filing Date.

L. By March 2010, the Trustee had reached agreement with Mrs. Picower that the Picower Estate would resolve the Trustee's claims against the Adversary Proceeding Defendants by payment to the Trustee of an amount between $4.8 billion and $5.0 billion. Ultimately, Mrs. Picower agreed that the Picower Estate would pay to the Trustee the sum of $5.0 billion to resolve the Picower Adversary Proceeding. Mrs. Picower's agreement with the Trustee, however, was contingent on Mrs. Picower reaching an agreement with the United States Attorney's Office for the Southern District of New York (the "Government") to resolve potential civil forfeiture liability of the Picower Estate pursuant to 18 U.S.C. § 981(a)(1)(C). As a result of subsequent negotiations with the Government, Mrs. Picower, on behalf of the Estate and the Picower BLMIS Accounts, agreed to forfeit to the Government $7,206,157,717 (the "Forfeited Funds") for distribution to Madoff fraud victims, representing an amount equal to the net funds withdrawn from BLMIS by the Picower BLMIS Accounts. The Government, and the Trustee further agreed that up to $5.0 billion of the Forfeited Funds (the "Bankruptcy Settlement Amount") would be credited to the Trustee and would thereafter be paid over to the Trustee for distribution to Madoff fraud victims.

M. The proposed Stipulation and Order of Settlement between the Government and Mrs. Picower that effectuates the forfeiture agreement (the "Forfeiture Stipulation," annexed hereto as Attachment B), will be submitted to the District Court for approval. It requires Mrs. Picower, upon execution of the Forfeiture Stipulation, to cause the Forfeited Funds to be wired into one or more escrow accounts (the "Escrow Accounts") that have been established at JPMorgan Chase Bank, N.A. (the "Escrow Agent") pursuant to an escrow agreement (the "Escrow Agreement") executed by and among the Picower Estate, the Trustee, the Government, and, with respect to certain sections only, SIPC. Once Mrs. Picower has fulfilled her obligations as Executor under this Agreement and the Forfeiture Settlement to cause the Forfeited Funds to be wired into the Escrow Accounts, Mrs. Picower, the Estate, the Picower BLMIS Accounts, the Picower Adversary Defendants, and the Picower Releasees shall have no further payment obligations whatsoever under this Agreement.

N. On March 31, 2010, the Trustee filed a complaint ("Fox/Marshall Complaint") commencing an adversary proceeding in the Bankruptcy Court captioned Picard v. Fox, et al., No. 10-3114 (BRL), seeking a temporary restraining order and preliminary injunction ("Preliminary Injunction") preventing the continuation of certain lawsuits commenced against certain of the Adversary Proceeding Defendants, as more particularly set forth in the Fox/Marshall Complaint. The Bankruptcy Court issued a temporary restraining order on April 1, 2010 and a Preliminary Injunction was entered on April 27, 2010.

O. Based on the foregoing, the Parties wish to settle their disputes about the matters described above without the expense, delay, and uncertainty of litigation.

NOW, THEREFORE, in consideration of the foregoing, of the mutual covenants, promises and undertakings set forth herein, and for good and valuable consideration, the mutual receipt and sufficiency of which are hereby acknowledged, the Trustee and Mrs. Picower agree as follow:

AGREEMENT

1. Agreement To Bankruptcy Court Jurisdiction. Mrs. Picower, on behalf of the Picower Estate and the Picower BLMIS Accounts, agrees to the jurisdiction of the Bankruptcy Court for purposes of the SIPA Proceeding and the Picower Adversary Proceeding.

2. Payment. Upon execution of the Forfeiture Stipulation, Mrs. Picower will cause the Forfeited Funds to be wired into the Escrow Accounts. The Escrow Agent will release funds up to the Bankruptcy Settlement Amount within two (2) business days (a) to the Trustee upon receipt of written notice provided jointly by the Trustee and Mrs. Picower, with a copy of a final and non-appealable 9019 Order (as defined in paragraph 6 hereof) (the "Final 9019 Order") attached; or (b) to the Government upon written notice jointly provided by the Trustee, Mrs. Picower, and the Government, with a copy of a final, non-appealable order of forfeiture attached. For purposes of this Agreement, an order shall be considered "final and non-appealable" when (i) the time to appeal the order has expired, or (ii) if any appeal has been taken, any and all such appeals have been fully and finally resolved without material modification of the order.

3. Release By Trustee. In consideration for the covenants and agreements in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, except with respect to any rights arising under this Agreement, upon the Trustee's or the Government's receipt of funds up to the Bankruptcy Settlement Amount, the Trustee, on behalf of himself, his attorneys, agents and advisors, and BLMIS and its estate, shall release, remit and forever discharge each of the persons and entities listed on Attachment C hereto (collectively, the "Picower Releasees") and each of their executors, administrators, attorneys, agents, trustees, heirs and assigns, from any and all past, present and future claims or causes of action (including any suit, petition, demand, or other claim in law, equity or arbitration) and from any and all allegations of liability or damages (including any allegation of duties, debts, reckonings, contracts, controversies, agreements, promises, damages, responsibilities, covenants, or accounts), of whatever kind, nature or description, direct or indirect, asserted or unasserted, known or unknown, absolute or contingent, in tort, contract, federal or state statutory liability, including, without limitation, under SIPA or the Bankruptcy Code, or otherwise, based on strict liability, negligence, gross negligence, fraud, breach of fiduciary duty, unjust enrichment, constructive trust, fraudulent transfer, or otherwise (including attorneys' fees, costs or disbursements), that are, have been, could have been or might in the future be asserted by the Trustee, on behalf of himself, his attorneys, agents and advisors, and BLMIS and its estate, against any of the Picower Releasees and each of their executors, administrators, attorneys, agents, trustees, heirs and assigns, and that arise out of, are based on, or relate in any way to BLMIS, the Picower BLMIS Accounts, the Adversary Proceeding Defendants, or the Picower Releasees. Subject to paragraph 6 below, the releases contained herein shall become effective upon the Trustee's or the Government's actual receipt of funds up to the Bankruptcy Settlement Amount without any further action by any of the Parties.

4. Release By The Picower Releasees. In consideration for the covenants and agreements in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, except with respect to any rights arising under this Agreement, upon the Trustee's or the Government's receipt of funds up to the Bankruptcy Settlement Amount, each of the Picower Releasees, by having an authorized representative sign

a Release Subscription for each Picower Releasee, hereby releases, remits and forever discharges the Trustee and all his agents, BLMIS and its estate, from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, damages, judgments, and claims whatsoever, asserted or unasserted, known or unknown, now existing or arising in the future, arising out of or in any way related to BLMIS. Subject to paragraph 6 hereof, the release contained herein shall become effective upon the Trustee's or the Government's actual receipt of funds up to the Bankruptcy Settlement Amount without any further action by any of the Parties.

5. Dismissal Of Picower Adversary Proceeding. Within six (6) business days of the earlier to occur of (a) the entry of the Final 9019 Order (as defined in Paragraph 6) by a court of competent jurisdiction, or (b) the Government's actual receipt of funds up to the Bankruptcy Settlement Amount, the Trustee will file a Notice of Dismissal dismissing the Picower Adversary Proceeding with prejudice and without costs to any of the Parties. From the date of this Agreement through the earliest to occur of (a) or (b) of this paragraph, the Picower Adversary Proceeding shall be stayed and no further actions may be taken by any of the Parties thereto.

6. Bankruptcy Court Approval; Effective Date. This Agreement is subject to, and shall become effective and binding on the Parties, upon the earliest to occur of (a) the entry of a final and non-appealable order by a court of competent jurisdiction approving the Trustee's Motion for Entry of an Order Pursuant to Section 105(a) of the Bankruptcy Code and Rule 2002 and 9019 of the Federal Rules of Bankruptcy Procedure Approving an Agreement By and Between the Trustee and the Picower Estate and Enjoining Certain Claims (the "Final 9019 Order"); or (b) the entry of a final and non-appealable order approving the Forfeiture Stipulation. Once this Agreement becomes effective and binding on the Parties hereto, all of the provisions herein, including the releases contained in paragraphs 3 and 4, shall become and remain effective and binding on the Parties, and shall remain in full force and effect, even if no Final 9019 Order ever is entered, and even if funds up to the Bankruptcy Settlement Amount are released to the Government under paragraph 6 of the Forfeiture Stipulation, and not to the Trustee under this Agreement. The only circumstance in which this Agreement shall *not* become effective and binding is in the event that no final and non-appealable orders are entered approving either the Final 9019 Order or the Forfeiture Stipulation. In such case, and only in such case, (i) the Forfeited Funds would be returned to the Estate, less any amounts paid by the Trustee to Mrs. Picower for or in reimbursement of tax payments made by Mrs. Picower during escrow of the Forfeited Funds; (ii) this Agreement, including the releases in paragraphs 3 and 4 hereof, would not take effect and would become null and void for all purposes; (iii) the stay of the Picower Adversary Proceeding would be lifted and the Trustee, on the one hand, and the Adversary Proceeding Defendants, on the other hand, would continue to litigate their respective claims and defenses in the Picower Adversary Proceeding; (iv) the Picower Customer Claims would not be withdrawn; and (v) the Parties could not use or rely on any statement herein in the Picower Adversary Proceeding or in any public statement or other litigation relating to BLMIS or Madoff.

7. Permanent Injunction. The Trustee shall use his reasonable best efforts to obtain approval of the Final 9019 Order as promptly as practicable after the date of this Agreement. The Final 9019 Order shall include an order by the Bankruptcy Court pursuant to, *inter alia*, section 105(a) of the Bankruptcy Code and Bankruptcy Rules 7001 and 7065 (the

"Permanent Injunction Order"), permanently enjoining any customer or creditor of the BLMIS estate, anyone acting on their behalf or in concert or participation with them, or any person whose claim in any way arises from or relates to BLMIS or the Madoff Ponzi scheme, from asserting any claim against the Estate, the Picower BLMIS Accounts, the Picower Adversary Defendants or the Picower Releasees that is duplicative or derivative of any claim brought by the Trustee, or which could have been brought by the Trustee against the Estate, the Picower BLMIS Accounts, the Picower Adversary Defendants or the Picower Releasees (the "Permanent Injunction"). Following entry of the Final 9019 Order, the Trustee shall use his reasonable best efforts to oppose challenges, if any, to the scope, applicability or enforceability of the Permanent Injunction.

8. Cooperation. Upon reasonable request of the Trustee, Mrs. Picower agrees reasonably to cooperate with the Trustee in connection with any efforts to obtain approval of the Final 9019 Order and to enforce it to extinguish any claims that may be asserted in violation of the Final 9019 Order.

9. Withdrawal Of Claims. Each of the Picower Customer Claims shall be deemed withdrawn with prejudice when the releases in paragraphs 3 and 4 hereof become binding and effective, without any further action necessary by any of the Parties.

10. Termination Of BLMIS Account Agreements with BLMIS. All agreements between the Picower BLMIS Accounts and BLMIS shall be deemed terminated when the releases in paragraphs 3 and 4 hereof become binding and effective, without any further action necessary by any of the Parties

11. Authority. Mrs. Picower hereby represents and warrants to the Trustee as of the date hereof that she has the full power, authority and legal right to execute and deliver, and to perform obligations on behalf of the Picower Estate and the Picower BLMIS Accounts under this Agreement.

12. Further Assurances. The Trustee and Mrs. Picower shall execute and deliver any document or instrument reasonably requested by any of them after the date of this Agreement to effectuate the intent of this Agreement.

13. Entire Agreement. This Agreement constitutes the entire agreement and understanding between and among the Parties hereto and supersedes all prior agreements, representations and understandings concerning the subject matter hereof.

14. Amendments, Waiver. This Agreement may not be terminated, amended or modified in any way except in a writing signed by all the Parties. No waiver of any provision of this Agreement shall be deemed to constitute a waiver of any other provision hereof, whether or not similar, nor shall such waiver constitute a continuing waiver.

15. Assignability. No Party hereto may assign its rights under this Agreement without the prior written consent of each of the other Parties hereto.

16. Successors Bound. This Agreement shall be binding upon and inure to the benefit of each of the Parties and the Picower Releasees, and on and their respective successors and permitted assigns.

17. No Third Party Beneficiary. Except as expressly provided in paragraphs 3 and 4, the Parties do not intend to confer any benefit by or under this Agreement upon any person or entity other than the Parties and the Picower Releasees and their respective successors and permitted assigns.

18. No Admission of Liability or Wrongdoing. By entering into this Agreement, Mrs. Picower does not admit and she expressly denies that she, Mr. Picower, the Picower BLMIS Accounts, the Picower Adversary Defendants, or any of the Picower Releasees have any liability to the Trustee, owe any sums to the Trustee other than sums up to the Bankruptcy Settlement Amount, or have any liability or owe any sums to any other persons or entities, other than to the Government under the terms of the Forfeiture Stipulation, arising from or related to BLMIS or the Madoff Ponzi scheme. Furthermore, Mrs. Picower does not admit and expressly denies that she, Mr. Picower, any of the Picower BLMIS Accounts, or any of the Picower Releasees engaged in any wrongdoing arising from or related to BLMIS or the Madoff Ponzi scheme, or had any knowledge thereof.

19. Applicable Law. This Agreement shall be construed and enforced in accordance with the laws of the State of New York.

20. Exclusive Jurisdiction. The Parties agree that any action for breach or enforcement of this Agreement may be brought only in the Bankruptcy Court. No Party shall bring, institute, prosecute or maintain any action pertaining to the enforcement of any provision of this Agreement in any court other than the Bankruptcy Court.

21. Captions and Rules Of Construction. The captions in this Agreement are inserted only as a matter of convenience and for reference and do not define, limit or describe the scope of this Agreement or the scope or content of any of its provisions. Any reference in this Agreement to a paragraph is to a paragraph of this Agreement. "Includes" and "including" are not limiting.

22. Counterparts; Electronic Copy Of Signatures. This Agreement and attachments may be executed and delivered in any number of counterparts, each of which so executed and delivered shall be deemed to be an original and all of which shall constitute one and the same document. The Parties may evidence their execution of this Agreement by delivery to the other Parties of scanned or faxed copies of their signatures, with the same effect as the delivery of an original signature. The Picower Releasees may evidence their execution of the Release Subscription by delivery to the Parties of scanned or faxed copies of their signatures, with the same effect as the delivery of an original signature.

23. Notices. Any notices under this Agreement shall be in writing, shall be effective when received and may be delivered only by hand, by overnight delivery service, by fax or by electronic transmission to:

If to the Trustee:

Irving H. Picard
E: ipicard@bakerlaw.com
Baker & Hostetler LLP
45 Rockefeller Center, Suite 1100
New York, NY 10111
F: (212) 589-4201

with copies to:

David J. Sheehan
E: dsheehan@bakerlaw.com
Marc Hirschfield
E: mhirschfield@bakerlaw.com
Baker & Hostetler LLP
45 Rockefeller Center, Suite 1100
New York, NY 10111
F: (212) 589-4201

If to Mrs. Picower or the Picower Releasees, c/o:

William D. Zabel
E: william.zabel@srz.com
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
F: (212) 610-1459

Marcy Ressler Harris
E: marcy.harris@srz.com
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
F: (212) 593-5955

[*Signature page follows*]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first above written.

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

By: Irving H. Picard

Name: Irving H. Picard

Title: Trustee

ESTATE OF JEFFRY M. PICOWER

Barbara Picower

Barbara Picower, as Executor

RELEASE SUBSCRIPTION

The undersigned is a "Picower Releasee" as defined in the Agreement dated as of December 17, 2010, by and among Irving H. Picard, in his capacity as Trustee for the liquidation under the Securities Investor Protection Act of 1970, as amended, of Bernard L. Madoff Investment Securities LLC (the "Trustee"), on the one hand, and Barbara Picower, as executor of the Estate of Jeffry M. Picower and on behalf of the Picower BLMIS Accounts, on the other hand. For and in consideration of the Trustee's release of the undersigned under paragraph 3 of the Agreement, the undersigned subscribes to the release set forth in paragraph 4 of the Agreement (and only to such release) with the same force and effect as if the undersigned were a party to the Agreement. By signing this Subscription, the undersigned does not become a Party to the Agreement and is not undertaking any rights or obligations under any other provisions of the Agreement, except that paragraphs 10, 19, 20, 22, and 23 of the Agreement apply to this Subscription as though such paragraphs were a part of this Subscription.

Dated _____, 201_.

_____

By: _____
Name:
Title:

ATTACHMENT A: PICOWER BLMIS ACCOUNTS

Account Number	Account Name	Claim No.
100407	DECISIONS INC SPECIAL	
100416	JEFFRY M. PICOWER	
101006	JMP INVESTMENT CO	
101007	JEFFRY M. PICOWER	
101017	JMP PERSONAL	
101607	JEFFRY M. PICOWER	
101610	PICSON MANAGEMENT GROUP	
101615	JEFFRY M. PICOWER #2	
1C1006	CAPITAL GROWTH COMPANY	012674, 013298
1D0010	DECISIONS INCORPORATED	
1D0011	DECISIONS INC #2	
1D0030	DECISIONS INC #3	
1D0032	DECISIONS INC #4	
1D0036	DECISIONS INC #5	
1D0082	DECISIONS INCORPORATED #6	
1E0123	ACF SERVICES CORPORATION MONEY PURCHASE PENSION PLAN	12672, 013401
1F0002	FAVORITE FUND	
1J0001	JA PRIMARY LTD PARTNERSHIP	
1J0002	JAB PARTNERSHIP	012670, 013311
1J0003	JEMW PARTNERSHIP	012673, 013299
1J0004	J F PARTNERSHIP	012677, 013400
1J0005	JFM INVESTMENT CO	
1J0008	JLN PARTNERSHIP	012676, 013649
1J0009	JMP LIMITED PARTNERSHIP	
1J0024	JA SPECIAL LTD PARTNERSHIP	012678, 013547
1M0046	THE RETIREMENT INCOME PLAN FOR EMPLOYEES OF MONROE SYSTEMS FOR BUSINESS, INC.	
1P0017	THE PICOWER INSTITUTE FOR MEDICAL RESEARCH	
1P0018	TRUST FBO GABRIELLE H PICOWER	
1P0019	BARBARA PICOWER	012675, 013312
1P0020	TRUST FBO GABRIELLE H PICOWER	
1P0021	JEFFRY M PICOWER	012669, 013313
1P0022	JEFFRY M PICOWER, P. C.	
1P0023	JEFFRY M PICOWER SPECIAL CO	012671, 013671
1P0024	THE PICOWER FOUNDATION	012939

ATTACHMENT B: FORFEITURE STIPULATION

ATTACHMENT C: PICOWER RELEASEES

Jeffry M. Picower
Estate of Jeffry M. Picower
Barbara Picower as Executor of Estate of Jeffry M. Picower
Barbara Picower
Capital Growth Company
Favorite Fund
JA Primary Limited Partnership
JA Special Limited Partnership
JAB Partnership
JEMW Partnership
JF Partnership
JFM Investment Company
JLN Partnership
JMP Limited Partnership
Jeffry M. Picower Special Co.
Jeffry M. Picower, P.C.
Decisions Incorporated
Decisions Inc #2
Decisions Inc #3
Decisions Inc #4
Decisions Inc #5
Decisions Incorporated #6
The Picower Foundation
The Picower Institute for Medical Research
Gabrielle Picower
Trust FBO Gabrielle H. Picower
Trust FBO Abe Picower
Picson Management Group
Decisions Incorporated Special
Jeffry M. Picower D P Partnership
Jeffry M. Picower #2
Decisions Incorporated L Account
JMP Investment
Jeffry M. Picower, P.C. Employee Profit Sharing Plan
Jeffry M. Picower Money Purchase Pension Plan
Decisions Incorporated Money Purchase Pension Plan
Explanations Incorporated Money Purchase Pension Plan
April C. Freilich
ACF Services Corporation
ACF Services Corporation Money-Purchase Pension Plan
Apple Securities Management Incorporated
The Retirement Income Plan for Employees of Monroe Systems for Business, Inc.

EXHIBIT B

ESCROW AGREEMENT

ESCROW AGREEMENT
(Litigation Settlement Escrow)

THIS ESCROW AGREEMENT (as the same may be amended or modified from time to time pursuant hereto, this "Escrow Agreement") is made and entered into as of December 17, 2010, by and among Barbara Picower, as Executor of the Estate of Jeffry M. Picower (the "Estate Representative"), the United States Attorney's Office for the Southern District of New York, by Preet Bharara, United States Attorney (the "Government"), and Irving H. Picard, the SIPA Trustee ("SIPA Trustee") for the liquidation proceeding pending in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.* ("SIPA"), of Bernard L. Madoff Investment Securities LLC and the substantively consolidated Chapter 7 case of Bernard L. Madoff ("Madoff"), and the Securities Investor Protection Corporation ("SIPC") (the SIPA Trustee, the Estate Representative, the Government, and, solely for purposes of Sections 5, 7-10, 12, and 13 but not any other Section of this Escrow Agreement, SIPC, each a "Party" and collectively, the "Parties"), and JPMorgan Chase Bank, National Association (the "Escrow Agent").

WHEREAS, in connection with entry into (i) a Stipulation and Order of Settlement (the "Stipulation") executed by and among the Estate Representative and the Government and (ii) an Agreement executed by and among the Estate Representative and the SIPA Trustee (the "Agreement"), the Estate Representative agreed to establish two escrow accounts (collectively, the "Escrow Account") subject to the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants hereinafter set forth, each of the Parties and the Escrow Agent agree as follows:

1. **Appointment.** The Parties hereby appoint the Escrow Agent as their escrow agent for the purposes set forth herein, and the Escrow Agent hereby accepts such appointment under the terms and conditions set forth herein.

2. **Total Forfeiture Fund.** The Estate Representative agrees to deposit with the Escrow Agent the sum of $7,206,157,717 (the "Escrow Deposit"). The Escrow Agent shall hold the Escrow Deposit in two non-interest bearing accounts, one in the name of "JPM AS ESC AGT FOR B PICOWER, AS EST EXEC OF J PICOWER, US GOVT, IRVING PICARD, AS SIPA TRUSTEE, AND SIPC" in the amount of $2,206,157,717 (the "Settlement Funds") and one in the name of "JPM AS ESC AGT FOR B PICOWER, AS EST EXEC OF J PICOWER, US GOVT, IRVING PICARD, AS SIPA TRUSTEE, AND SIPC" in the amount of $5,000,000,000 (the "Bankruptcy Settlement Amount"), and, subject to the terms and conditions hereof, shall invest and reinvest the Escrow Deposit and the proceeds thereof (the "Total Forfeiture Fund") as directed in Section 3. The Escrow Agent agrees to hold the Total Forfeiture Fund as Escrow Agent for the Estate Representative, the SIPA Trustee, and the Government subject to the terms and conditions of this Escrow Agreement. The Escrow Agent shall not distribute or release the Total Forfeiture Fund except in accordance with the express terms and conditions of this Escrow Agreement.

3. **Investment of Total Forfeiture Fund.** During the term of this Escrow Agreement, the Total Forfeiture Fund shall be invested in obligations issued or guaranteed by the United States of America. The Settlement Funds shall be invested by the Escrow Agent in overnight repurchase agreements to the extent possible, and segregated from the remainder of the Total Forfeiture Fund. The Bankruptcy Settlement Amount shall be invested in United States Treasury securities with a maturity of ninety days if possible and if not, shall remain in the applicable account. The Escrow Agent is hereby authorized to execute purchases and sales of investments through the facilities of its own trading or capital markets operations or those of any affiliated entity. The Parties recognize and agree that the Escrow Agent will not provide supervision, recommendations or advice relating to either the investment of moneys held in the Total Forfeiture Fund or the purchase, sale, retention or other disposition of any investment described herein. The Escrow Agent shall not have any liability for any loss sustained as a result of any investment made pursuant to the terms of this Escrow Agreement or for the failure of the Parties to give the Escrow Agent instructions to invest or reinvest the Total Forfeiture Fund. The Escrow Agent shall have the right to liquidate any

investments held only in order to provide funds necessary to make required payments under Section 4 of this Escrow Agreement.

4. **Disposition and Termination.** (a) Within two (2) Business Days after receipt (and confirmation of instructions pursuant to Section 11) by the Escrow Agent of a Notice for Release of Settlement Funds in the form of Exhibit A hereto, duly executed by the Estate Representative and an authorized representative of the Government, and attaching a copy of the Stipulation that has been "so ordered" by the United States District Court for the Southern District of New York (the "Court"), the Escrow Agent shall release the Settlement Funds plus any interest or appreciation that has been accrued and paid and is attributable to the Settlement Funds, by wire of same day funds to the accounts maintained by the United States Marshals Service, or to such other accounts that may be designated by the Government (the "USMS Accounts").

(b) Within [two (2)] Business Days after receipt (and confirmation of instructions pursuant to Section 11) by the Escrow Agent of a Notice for Release of the Bankruptcy Settlement Amount in the form of Exhibit B hereto, duly executed by the Estate Representative and the SIPA Trustee and (a) attaching a final, non-appealable order of the Bankruptcy Court or another court of competent jurisdiction approving the Agreement by and between the SIPA Trustee and the Estate Representative (the "Bankruptcy Settlement"), or (b) attaching a final, non-appealable order of forfeiture, whichever occurs first, the Escrow Agent shall release the Bankruptcy Settlement Amount to an account maintained by the SIPA Trustee (the "SIPA Trustee Account").

(c) If the Settlement Funds previously have been released to the USMS Account pursuant to Section 4(a) above, and (i) the Bankruptcy Settlement Amount has been released by the Escrow Agent to the SIPA Trustee in accordance with Section 4(b), (ii) no order was entered by the Bankruptcy Court prior to the entry of a final, non-appealable order of forfeiture, or (iii) a final non-appealable order was entered rejecting the Bankruptcy Settlement, the Escrow Agent shall transfer within two (2) Business Days after receipt (and confirmation of instructions pursuant to Section 11) by the Escrow Agent of a Notice for Release of Forfeited Funds any and all funds in the Escrow Account to the USMS Account in accordance with the instructions set forth in Section 4(a) above, and shall terminate the Escrow Account. For the avoidance of doubt, such funds shall include, in the events described in clause (i) hereof, any interest or appreciation that has been accrued and paid and is attributable to the Bankruptcy Settlement Amount. If the events described in paragraphs (ii) or (iii) occur, any funds up to the Bankruptcy Settlement Amount that were transferred to the Trustee by the Escrow Agent pursuant to Section 4(b) will be, to the extent they have not been distributed by the Trustee, transferred to the USMS Account from the SIPA Trustee Account in accordance with the Stipulation, and consistent with SIPA and the forfeiture laws, in same day funds, within five (5) business days of receipt of instructions from the Government by the Trustee.

(d) In the event that the Stipulation has been approved by the District Court, but (a) the Bankruptcy Settlement Amount has not been paid to the SIPA Trustee pursuant to the terms of the Bankruptcy Settlement within three years of the date hereof, or (b) the Bankruptcy Settlement is rejected by a final and non-appealable order, whichever is sooner, then within five business days thereof, the Government and the Estate Representative shall each execute a Notice For Release of Forfeited Funds, in the form annexed to the Escrow Agreement as Exhibit C. Within two (2) Business Days after receipt (and confirmation of instructions pursuant to Section 11) by the Escrow Agent of a fully-executed Notice for Release of Forfeited Funds, the Escrow Agent shall transfer to the USMS Account any remaining funds in the Escrow Account, including the Bankruptcy Settlement Amount plus any interest or appreciation that has been accrued and paid and is attributable to the Bankruptcy Settlement Amount, by wire in same day funds to the USMS Account, for forfeiture in accordance with the instructions in the Stipulation. The Escrow Agent shall thereafter terminate the Escrow Accounts.

(e) For the avoidance of doubt, any order of any court shall be considered final and non-appealable for purposes of the Stipulation, the Agreement, and this Escrow Agreement only when (i) the time to appeal such order has expired, or (ii) if any appeal of such order has been taken, any and all such appeals have been fully and finally resolved without material modification of the order.

5. **Escrow Agent.** (a) The Escrow Agent shall have only those duties as are specifically and expressly provided herein, which shall be deemed purely ministerial in nature, and no other duties shall be implied. The Escrow Agent shall neither be responsible for, nor chargeable with, knowledge of, nor have any requirements to

comply with, the terms and conditions of any other agreement, instrument or document between the Parties, in connection herewith, if any, including without limitation the Stipulation and/or the Agreement, nor shall the Escrow Agent be required to determine if any person or entity has complied with any such agreements, nor shall any additional obligations of the Escrow Agent be inferred from the terms of such agreements, even though reference thereto may be made in this Escrow Agreement. The Escrow Agent may rely upon and shall not be liable for acting or refraining from acting upon any written notice, document, instruction or request furnished to it hereunder and believed by it to be genuine and to have been signed or presented by the proper Party or Parties without inquiry and without requiring substantiating evidence of any kind. The Escrow Agent shall not be liable to any Party, any beneficiary or other person for refraining from acting upon any instruction setting forth, claiming, containing, objecting to, or related to the transfer or distribution of the Total Forfeiture Fund, or any portion thereof, unless such instruction shall have been delivered to the Escrow Agent in accordance with Section 11 below and the Escrow Agent has been able to satisfy any applicable security procedures as may be required thereunder. The Escrow Agent shall be under no duty to inquire into or investigate the validity, accuracy or content of any such document, notice, instruction or request. The Escrow Agent shall have no duty to solicit any payments which may be due it or the Total Forfeiture Fund, including, without limitation, the Escrow Deposit, nor shall the Escrow Agent have any duty or obligation to confirm or verify the accuracy or correctness of any amounts deposited with it hereunder, provided, however, that nothing in this Section 5(a) is intended to relieve the Escrow Agent of any duties or obligations arising under Section 11 of this Escrow Agreement.

(b) The Escrow Agent shall not be liable for any action taken, suffered or omitted to be taken by it in good faith except to the extent such conduct constitutes gross negligence or willful misconduct. The Escrow Agent may execute any of its powers and perform any of its duties hereunder directly or through affiliates or agents. The Escrow Agent may consult with counsel, accountants and other skilled persons to be selected and retained by it. The Escrow Agent shall not be liable for any action taken, suffered or omitted to be taken by it in accordance with, or in reliance upon, the advice or opinion of any such counsel, accountants or other skilled persons. In the event that the Escrow Agent shall be uncertain or believe there is some ambiguity as to its duties or rights hereunder or shall receive instructions, claims or demands from any party hereto which, in its opinion, conflict with any of the provisions of this Escrow Agreement, it shall refrain from taking any action and its sole obligation shall be to keep safely the Total Forfeiture Fund until it shall be given a direction in writing by the Parties which eliminates such ambiguity or uncertainty to the satisfaction of Escrow Agent or by a final and non-appealable order or judgment of a court of competent jurisdiction. The Parties agree to pursue any redress or recourse in connection with any dispute between or among the Parties without making the Escrow Agent a party to the same. Anything in this Escrow Agreement to the contrary notwithstanding, in no event shall the Escrow Agent be liable for special, incidental, punitive, indirect or consequential loss or damage of any kind whatsoever (including but not limited to lost profits), even if the Escrow Agent has been advised of the likelihood of such loss or damage and regardless of the form of action.

6. **Succession.** (a) The Escrow Agent may resign and be discharged from its duties or obligations hereunder by giving ninety (90) days advance notice in writing of such resignation to the Parties, specifying a date when such resignation shall take effect. If the Parties have failed to appoint a successor escrow agent prior to the expiration of ninety (90) days following receipt of the notice of resignation, the Escrow Agent may petition any court of competent jurisdiction for the appointment of a successor escrow agent or for other appropriate relief, and any such resulting appointment shall be binding upon all of the Parties hereto. Escrow Agent's sole responsibility after such ninety (90) day notice period expires shall be to hold the Total Forfeiture Fund (without any obligation to reinvest the same) and to deliver the same to a designated substitute escrow agent, if any, or in accordance with the directions of a final order or judgment of a court of competent jurisdiction, at which time of delivery Escrow Agent's obligations hereunder shall cease and terminate. In accordance with Section 7, the Escrow Agent shall have the right to repayment of an amount equal to any amount due and owing to the Escrow Agent, plus any costs and expenses the Escrow Agent shall reasonably believe may be incurred by the Escrow Agent in connection with the termination of this Escrow Agreement.

(b) The Escrow Agent may be removed (with or without cause) and a new escrow agent appointed by an agreement by and between the Government and the SIPA Trustee. In such event, the Government the SIPA Trustee shall deliver ten (10) days advance written notice to the Escrow Agent and the Estate Representative of such removal together with written instructions authorizing delivery of this Escrow Agreement together with the Total

Forfeiture Fund and any interests earned thereon, and any and all related instruments or documents to a successor escrow agent.

(c) Any entity into which the Escrow Agent may be merged or converted or with which it may be consolidated, or any entity to which all or substantially all the escrow business may be transferred, shall be the Escrow Agent under this Escrow Agreement without further act.

7. **Compensation and Reimbursement.** SIPC agrees to advance to the SIPA Trustee, in accordance with SIPA, and the SIPA Trustee agrees to pay to the Escrow Agent funds sufficient to pay or reimburse the Escrow Agent's written requests for repayment submitted to the SIPA Trustee, for all expenses, disbursements and advances, including, without limitation, reasonable attorney's fees and expenses, incurred or made by the Escrow Agent in connection with (a) the establishment of the Escrow Account and the execution of this Escrow Agreement and (b) the performance of services under this Escrow Agreement, including reasonable compensation for services rendered hereunder, along with any fees or charges for accounts, including those levied by any governmental authority which the Escrow Agent may impose, charge or pass-through, which unless otherwise agreed in writing, shall be described in Schedule 2 attached hereto. The obligations set forth in this Section 7 (such amounts, the "Escrow Costs") shall survive the termination of this Escrow Agreement and the resignation, replacement or removal of the Escrow Agent.

8. **Indemnity.** SIPC shall indemnify, defend and save harmless the Escrow Agent and its affiliates and their respective successors, assigns, agents and employees (the "Indemnitees") from and against any and all losses, damages, claims, liabilities, penalties, judgments, settlements, litigation, investigations, costs or expenses (including, without limitation, the reasonable and documented fees and expenses of outside counsel and experts and their staffs and all expense of document location, duplication and shipment) (collectively "Losses") arising out of or in connection with (i) the Escrow Agent's execution of and performance under this Escrow Agreement, including for tax reporting or withholding, the enforcement of any rights or remedies under or in connection with this Escrow Agreement, or as may arise by reason of any act, omission or error of the Indemnitee, except in the case of any Indemnitee to the extent that such Losses are finally adjudicated by a court of competent jurisdiction to have been caused by the gross negligence or willful misconduct of such Indemnitee, or (ii) its following any instructions or other directions, whether joint or, to the extent expressly permitted by this Escrow Agreement, singular, from the Parties, except to the extent that its following any such instruction or direction is expressly forbidden by the terms hereof. The indemnity obligations set forth in this Section 8(a) shall survive the resignation, replacement or removal of the Escrow Agent or the termination of this Escrow Agreement.

9. **Patriot Act Disclosure/Taxpayer Identification Numbers/Tax Reporting.**

Patriot Act Disclosure. (a) Section 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") requires the Escrow Agent to implement reasonable procedures to verify the identity of any person that opens a new account with it. Accordingly, the Parties acknowledge that Section 326 of the USA PATRIOT Act and the Escrow Agent's identity verification procedures require the Escrow Agent to obtain information which may be used to confirm the Parties identity including without limitation name, address and organizational documents ("identifying information"). The Parties agree to provide the Escrow Agent with and consent to the Escrow Agent obtaining from third parties any such identifying information required as a condition of opening an account with or using any service provided by the Escrow Agent.

(b) Prior to the date, if any, upon which a final and non-appealable order of forfeiture is entered, all interest or other income earned on the Total Forfeiture Fund shall be allocated, solely for tax purposes, to the Estate Representative in accordance with applicable law, and such allocated income shall be reported, as and to the extent required by law, by the Escrow Agent to the IRS, or any other taxing authority, on IRS Form 1099 or 1042S (or other appropriate form) as income earned from the Escrow Deposit by the Estate Representative as if such income had been distributed during such year, notwithstanding that such income has not been so distributed. Any other tax returns required to be filed will be prepared and filed by the Estate Representative with the IRS and any other taxing authority as required by law. The Parties acknowledge and agree that the Escrow Agent shall have no responsibility

for the preparation and/or filing of any income, franchise or any other tax return with respect to the Escrow Account or the Total Forfeiture Fund or for any income earned by the Escrow Deposit. The Parties further acknowledge and agree that SIPC agrees to advance to the SIPA Trustee, in accordance with SIPA, and the SIPA Trustee agrees to pay to the Estate Representative, funds sufficient to pay or reimburse the Estate Representative's written requests for payment or repayment submitted to the SIPA Trustee for amounts equal to the taxes payable, on a quarterly basis, with respect to the income reported on IRS Form 1099 or 1042S (or such other appropriate form) as income earned on the investment of any sums held in the Total Forfeiture Fund for such quarter, which taxes shall in turn be paid by the Estate Representative with such tax distribution. The Escrow Agent shall not be responsible for calculating any amounts due to the Estate Representative under the foregoing sentence The Escrow Agent shall withhold any taxes it deems appropriate from any distributions made pursuant to this Escrow Agreement, including but not limited to required withholding in the absence of proper tax documentation, and shall remit such taxes to the appropriate authorities. The Escrow Agent shall provide the Estate Representative with customary information rights and access to the Escrow Account, including information related to income earned on the Escrow Deposit, to permit the Estate Representative to prepare any tax or other filing deemed necessary or advisable by the Estate Representative with respect to the Total Forfeiture Fund, the Escrow Deposit or the Escrow Accounts.

10. **Notices.** All communications hereunder shall be in writing and except for communications from the Parties setting forth, claiming, containing, objecting to, or in any way related to the transfer or distribution of funds, including but not limited to funds transfer instructions (all of which shall be specifically governed by Section 11 below), shall be deemed to be duly given when sent:

(a) by facsimile;
(b) by overnight courier; or
(c) by prepaid registered mail, return receipt requested;

to the appropriate notice address set forth below or at such other address as any Party hereto may have furnished to the other Parties in writing by registered mail, return receipt requested.

If to Estate Representative	Barbara Picower, as Executor of the Estate of Jeffry M. Picower c/o Schulte Roth & Zabel LLP 919 Third Avenue New York, New York 10022 Attention: Marcy R. Harris, Esq. Tel No.: (212) 756-2000 Fax No.: (212) 593-5955
If to Government	United States Attorney's Office Southern District of New York One St. Andrew's Plaza New York, New York 10007 Attention: Matthew L. Schwartz Tel No.: (212) 637-1945 Fax No.: (212) 637-2937
If to the SIPA Trustee	Irving H. Picard, as Trustee Baker & Hostetler LLP 45 Rockefeller Plaza New York, New York 10111 Attention: David J. Sheehan Tel No.: (212) 589-4616 Fax No.: (212) 589-4201
If to SIPC	Securities Investor Protection Corporation 805 Fifteenth Street, N.W.

Suite 800
Washington, DC 20005
Attention: Josephine Wang
Tel No.: (202) 371-8300
Fax No.: (202) 371-6728

If to the Escrow Agent

JPMorgan Chase Bank, N.A.
Escrow Services
4 New York Plaza
21st Floor
New York, New York 10004
Attention: Christopher Fasouletos/Greg Kupchynsky
Fax No.: 212- 623- 6168

Notwithstanding the above, in the case of communications delivered to the Escrow Agent, such communications shall be deemed to have been given on the date received by an officer of the Escrow Agent or any employee of the Escrow Agent who reports directly to any such officer at the above-referenced office. For purposes of this Escrow Agreement, "Business Day" shall mean any day other than a Saturday, Sunday or any other day on which the Escrow Agent located at the notice address set forth above is authorized or required by law or executive order to remain closed.

11. **Security Procedures.** (a) Notwithstanding anything to the contrary as set forth in Section 10, any instructions setting forth, claiming, containing, objecting to, or in any way related to the transfer or distribution of funds, including but not limited to any such funds transfer instructions that may otherwise be set forth in a written instruction permitted pursuant to Section 4 of this Escrow Agreement, may be given to the Escrow Agent only by confirmed facsimile and no instruction for or related to the transfer or distribution of the Total Forfeiture Fund, or any portion thereof, shall be deemed delivered and effective unless the Escrow Agent actually shall have received such instruction by facsimile at the number provided to the Parties by the Escrow Agent in accordance with Section 10 and as further evidenced by a confirmed transmittal to that number.

(b) In the event funds transfer instructions, including funds transfer instructions in the form annexed hereto in Exhibits A and B, are so received by the Escrow Agent by facsimile, the Escrow Agent shall seek confirmation of such instructions by telephone call-back to the person or persons designated on Schedule 1 hereto, and the Escrow Agent may rely upon the confirmation of anyone purporting to be the person or persons so designated. Each funds transfer instruction shall be executed by an authorized signatory identified on the list of such authorized signatories set forth on Schedule 1 hereto. The persons and telephone numbers for authorized signatures and call-backs may be changed only in a writing actually received and acknowledged by the Escrow Agent. If the Escrow Agent is unable to contact any of the authorized signatories identified in Schedule 1, the Escrow Agent is hereby authorized both to receive written instructions from and seek confirmation of such instructions by telephone call-back to, for the Government, the Chief of the Asset Forfeiture Unit, United States Attorney's Office for the Southern District of New York, (212) 637-2800; and for the SIPA Trustee, Marc E. Hirschfield, Esq., Baker & Hostetler LLP, (212) 589-4610. The Escrow Agent may rely upon the confirmation of anyone purporting to be such person. The Escrow Agent may rely solely upon any account numbers or similar identifying numbers provided by the Parties to identify (i) the beneficiary, (ii) the beneficiary's bank, or (iii) an intermediary bank. The Parties acknowledge that the security procedures set forth in this Section 11 are commercially reasonable.

12. **Compliance with Court Orders.** In the event that any funds in the Escrow Account shall be attached, garnished or levied upon by any court order, or the delivery thereof shall be stayed or enjoined by an order of a court, or any order, judgment or decree shall be made or entered by any court order affecting the property deposited under this Escrow Agreement, the Escrow Agent is hereby directed to promptly notify the Parties to this Escrow Agreement and to cooperate with any r easonable request of any or all of the Parties to oppose, challenge or vacate such attachment, garnishment, levy or court order, judgment or decree. Notwithstanding the foregoing, the Escrow Agent shall be authorized, in its reasonable discretion, to obey and comply with all writs, orders or decrees so entered or issued, which it is advised by legal counsel of its own choosing is binding upon it, whether with or without jurisdiction, and shall make reasonable best efforts to notify the Parties as set forth in the preceding

paragraph prior to doing so. In the event that the Escrow Agent obeys or complies with any such writ, order or decree it shall not be liable to any of the Parties hereto or to any other person, entity, firm or corporation, by reason of such compliance notwithstanding such writ, order or decree be subsequently reversed, modiried, annulled, set aside or vacated.

13. **Miscellaneous.** (a)(i) Until such time as entry of (A) a final non-appealable order regarding forfeiture, or (B) a final non-appealable order approving the Bankruptcy Settlement, the provisions of this Escrow Agreement may be waived, altered, amended or supplemented, in whole or in part, only by a writing signed by the Escrow Agent and the Parties. (ii) Upon entry of (A) a final non-appealable order regarding forfeiture final, or (B) a final non-appealable order approving the Bankruptcy Settlement, whichever is earlier, the provisions of this Escrow Agreement may be waived, altered, amended or supplemented, in whole or in part, only by a writing signed by the Escrow Agent, the Government, the SIPA Trustee, and SIPC. Neither this Escrow Agreement nor any right or interest hereunder may be assigned in whole or in part by the Escrow Agent or any Party, except as provided in Section 6, without the prior consent of the Escrow Agent and the other Parties.

(b) This Escrow Agreement and any claim related directly or indirectly to this Escrow Agreement (including any claim concerning advice provided pursuant to this Agreement) shall be governed by and construed in accordance with the laws of the United States, or to the extent that state law controls, the laws of the State of New York. Each Party and the Escrow Agent irrevocably waives any objection on the grounds of venue, forum non-conveniens or any similar grounds. No claim shall be commenced, prosecuted, or continued in any forum other than the United States District Court for the Southern District of New York or the United States Bankruptcy Court for the Southern District of New York and, to the extent those courts lack jurisdiction, in the courts of the State of New York located in the City and County of New York, and each of the Parties and the Escrow Agent hereby submits to the jurisdiction of such courts, except that the Government does not submit to jurisdiction of the courts of the State of New York. The Parties and the Escrow Agent hereby waives on behalf of itself and its successors and assigns any and all right to argue that the choice of forum provision is or has become unreasonable in any legal proceeding. The Parties and the Escrow Agent further hereby waives all right to a trial by jury in any action, lawsuit, proceeding or counterclaim (whether based on contract, tort, or otherwise) arising or relating to this Escrow Agreement. To the extent that in any jurisdiction, the Estate Representative, the SIPA Trustee, or SIPC may now or hereafter be entitled to claim for itself or its assets, immunity from suit, execution, attachment (before or after judgment) or other legal process, such party shall not claim, and it hereby irrevocably waives, such immunity only insofar as it relates to or arises out of this Escrow Agreement.

(c) No party to this Escrow Agreement is liable to any other party for losses due to, or if it is unable to perform its obligations under the terms of this Escrow Agreement because of, acts of God, fire, war, terrorism, floods, strikes, electrical outages, equipment or transmission failure, or other causes reasonably beyond its control.

(d) This Escrow Agreement and its Exhibits and Schedules may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. All signatures of the parties to this Escrow Agreement or its Exhibits or Schedules may be transmitted by facsimile, and such facsimile will, for all purposes, be deemed to be the original signature of such party whose signature it reproduces, and will be binding upon such party.

(e) If any provision of this Escrow Agreement is determined to be prohibited or unenforceable by reason of any applicable law of a jurisdiction, then such provision shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions thereof, and any such prohibition or unenforceability in such jurisdiction shall not invalidate or render unenforceable such provisions in any other jurisdiction. A person who is not a party to this Escrow Agreement shall have no right to enforce any term of this Escrow Agreement. The Parties represent, warrant and covenant that each document, notice, instruction or request provided by such Party to Escrow Agent shall comply with applicable laws and regulations. Where, however, the conflicting provisions of any such applicable law may be waived, they are hereby irrevocably waived by the Parties hereto to the fullest extent permitted by law, to the end that this Agreement shall be enforced as written. Except as expressly provided in Section 8 above, nothing in this Escrow Agreement, whether express or implied, shall be construed to give to any person or entity other than the Escrow Agentand the Parties any legal or equitable right, remedy, interest or claim under or in respect of this Escrow Agreement or any funds escrowed hereunder.

IN WITNESS WHEREOF, the Parties hereto have executed this Escrow Agreement as of the date set forth above.

ESTATE OF JEFFRY M. PICOWER,
Barbara Picower, as Executor

By: Barbara Picower as Executor

PREET BHARARA
United States Attorney
Attorney for the United States of America

By:_____

Name:_____

Title: _____

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

By:_____

Name: Irving H. Picard

Title: Trustee

SECURITIES INVESTOR PROTECTION CORPORATION,
(Only as to Sections 5, 7-10, 12, and 13)

By:_____

Name:_____

Title: _____

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
as Escrow Agent

By:_____

Name:_____

Title: _____

IN WITNESS WHEREOF, the Parties hereto have executed this Escrow Agreement as of the date set forth above.

ESTATE OF JEFFRY M. PICOWER,
Barbara Picower, as Executor

By:_____, as Executor

PREET BHARARA
United States Attorney
Attorney for the United States of America

By:_____

Name: Matthew L. Schwartz

Title: Assistant United States Attorney

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

By:_____

Name: Irving H. Picard

Title: Trustee

SECURITIES INVESTOR PROTECTION CORPORATION,
(Only as to Sections 5, 7-10, 12, and 13)

By:_____

Name: Stephen Harbeck

Title: President and CEO

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
as Escrow Agent

By:_____

Name:_____

Title: _____

IN WITNESS WHEREOF, the Parties hereto have executed this Escrow Agreement as of the date set forth above.

ESTATE OF JEFFRY M. PICOWER,
Barbara Picower, as Executor

By:_____, as Executor

PREET BHARARA
United States Attorney
Attorney for the United States of America

By:_____

Name: Matthew L. Schwartz

Title: Assistant United States Attorney

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

By:_____

Name: Irving H. Picard

Title: Trustee

SECURITIES INVESTOR PROTECTION CORPORATION,
(Only as to Sections 5, 7-10, 12, and 13)

By:_____

Name: Stephen Harbeck

Title: President and CEO

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
as Escrow Agent

By:_____

Name:_____

Title:_____

IN WITNESS WHEREOF, the Parties hereto have executed this Escrow Agreement as of the date set forth above.

ESTATE OF JEFFRY M. PICOWER,
Barbara Picower, as Executor

By:_____, as Executor

PREET BHARARA
United States Attorney
Attorney for the United States of America

By:_____

Name: Matthew L. Schwartz

Title: Assistant United States Attorney

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

By:_____

Name: Irving H. Picard

Title: Trustee

SECURITIES INVESTOR PROTECTION CORPORATION,
(Only as to Sections 5, 7-10, 12, and 13)

By:_____

Name: Stephen Harbeck

Title: President and CEO

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
as Escrow Agent

By: P. Kelly

Name: P. Kelly

Title: Executive Director

SCHEDULE 1

Telephone Number(s) and authorized signature(s) for
Person(s) Designated to give and confirm Instructions

[REDACTED]

[redacted]

Fee Schedule

Based upon our current understanding of your proposed transaction, our fee proposal is as listed below. Please note that the fees quoted are based on a review of the transaction documents provided and an internal due diligence review.

Account Acceptance Fee * . . . . . ~~$5,000~~ ***Waived***

Encompassing review, negotiation and execution of governing documentation, opening of the account, and completion of all due diligence documentation. * Payable upon closing.

Annual Administration Fee ** **$10,000**

The Administration Fee covers our usual and customary ministerial duties, including record keeping, distributions, document compliance and such other duties and responsibilities expressly set forth in the governing documents for each transaction.

*** Payable upon closing and annually in advance thereafter, without pro-ration for partial years*

Annual Collateral Fee ***(Only Applicable to the extent that a non-J.P. Morgan Investment Vehicle is selected)*** . . . . . **1.5 bps *****

For all Escrow Balances not held in a J.P. Morgan Money Market Deposit Account and / or a J.P. Morgan Mutual Fund, an annual fee applies at highest collateral balance held.

**** Fee is payable quarterly in arrears based on the highest balance held during such quarter.*

Additional Charges

Standard Escrow Legal Fees & Contract Review . . . . . ***Waived***

Account Transaction Fees . . . . . ***Waived***

Investment Sweep Fees *(if applicable)* . . . . . ***Waived***

Including, but not limited to, deposits, disbursements, book transfers, etc.. The Parties acknowledge and agree that they are permitted by U.S. law to make up to six (6) pre-authorized withdrawals or telephonic transfers from an MMDA per calendar month or statement cycle or similar period. If the MMDA can be accessed by checks, drafts, bills of exchange, notes and other financial instruments ("Items"), then no more than three (3) of these six (6) transfers may be made by an Item. The Escrow Agent is required by U.S. law to reserve the right to require at least seven (7) days notice prior to a withdrawal from a money market deposit account.

Account Statement Fees . . . . . ***Waived***

1099 Tax Reporting Fees . . . . . ***Waived***

Extraordinary Expenses . . . . . ***At Cost***

Any reasonable out-of-pocket expenses including attorney's fees required outside of the scope of typical Escrow requirements will be considered extraordinary services for which related costs, transaction charges, and additional fees will be billed at cost.

Modification of Fees

Circumstances may arise necessitating a change in the foregoing fee schedule. The Bank will maintain the fees at a level that is fair and reasonable in relation to the responsibilities assumed and the duties performed.

EXHIBIT A

NOTICE FOR RELEASE OF SETTLEMENT FUNDS

to

JPMorgan Chase Bank, National Association
as Escrow Agent

Each of the undersigned, Barbara Picower, as executor of the Estate of Jeffry M. Picower (the "Estate Representative") and the United States Attorney's Office for the Southern District of New York, by Preet Bharara, United States Attorney (the "Government"), pursuant to Sections 4(a)) of the Escrow Agreement dated December __, 2010 among the Estate Representative, the Government, Irving H. Picard, as Trustee for the Substantively Consolidated Liquidation of Bernard L. Madoff Investment Securities and Bernard L. Madoff, and you (terms defined in the Escrow Agreement have the same meanings when used herein), hereby:

(a) certifies that attached hereto is a copy of the Stipulation that has been "so ordered" by the United States District Court for the Southern District of New York; and

(b) instructs you to (i) release and pay the Settlement Funds, in the amount of $2,206,157,717, and any interest or appreciation that has been accrued or paid attributable to the Settlement Funds by wire of same day funds to the USMS Accounts as set forth below, within two Business Days of your receipt (and confirmation of instructions pursuant to Section 11) of this Certificate.

(c) USMS Wire Transfer Instructions:

ABA #021030004
ALC #00008154
U.S. Marshals Service
c/o Federal Reserve Bank of New York
33 Liberty Street
New York, New York 10045
Reference: _____

IN WITNESS WHEREOF, the parties hereto have executed this Notice of Release of Forfeiture Funds as of the date set forth below.

ESTATE OF JEFFRY M. PICOWER

By:_____, as Executor

Name:_____

UNITED STATES OF AMERICA

By:_____

Name:_____

Title: _____

Dated: _____, ____

EXHIBIT B

NOTICE FOR RELEASE OF FUNDS CONSTITUTING
THE BANKRUPTCY SETTLEMENT AMOUNT

to

JPMorgan Chase Bank, National Association
as Escrow Agent

Each of the undersigned, Barbara Picower, as executor of the Estate of Jeffry M. Picower (the "Estate Representative"), and Irving H. Picard, as Trustee for the Substantively Consolidated Liquidation of Bernard L. Madoff Investment Securities and Bernard L. Madoff, (the "SIPA Trustee"), pursuant to Section 4(b)and 4(c) of the Escrow Agreement dated as of December __, 2010 among the Estate Representative, the SIPA Trustee, the United States Attorney's Office for the Southern District of New York, by Preet Bharara, United States Attorney, and you (terms defined in the Escrow Agreement have the same meanings when used herein), hereby:

(a) certifies that attached hereto is (i) a final, non-appealable order of the Bankruptcy Court or another court of competent jurisdiction approving the Bankruptcy Settlement, or (ii) a final, non-appealable order of forfeiture; and

(b) instructs you to release the Bankruptcy Settlement Amount, in the amount of $5,000,000,000, by wire of same day funds to the SIPA Trustee Account as set forth below, within two Business Days of your receipt (and confirmation of instructions pursuant to Section 11) of this Certificate.

(c) SIPA Trustee Account Instructions:

Bank Name

ABA#
Account #
Account Name

IN WITNESS WHEREOF, the parties hereto have executed this Notice for Release of Funds Constituting the Bankruptcy Settlement Amount as of the date set forth below.

ESTATE OF JEFFRY M. PICOWER

By:_____, as Executor

Name:_____

SIPA TRUSTEE

By:_____

Name:_____

Title: _____

Dated: _____, ____

EXHIBIT C

NOTICE FOR RELEASE OF FORFEITED FUNDS

to

JPMorgan Chase Bank, National Association
as Escrow Agent

Each of the undersigned, Barbara Picower, as executor of the Estate of Jeffry M. Picower (the "Estate Representative") and the United States Attorney's Office for the Southern District of New York, by Preet Bharara, United States Attorney (the "Government"), pursuant to Section 4(b) of the Escrow Agreement dated as of December __, 2010 among the Estate Representative, the Government, and Irving H. Picard, as Trustee for the Substantively Consolidated Liquidation of Bernard L. Madoff Investment Securities and Bernard L. Madoff (the "SIPA Trustee"), and you (terms defined in the Escrow Agreement have the same meanings when used herein), hereby:

(a) certifies that attached hereto is a copy of the final, non-appealable order of forfeiture; and

(b) instructs you to release and pay any and all funds in the Escrow Account by wire of same day funds to the USMS Account as set forth below, within two Business Days of your receipt (and confirmation of instructions pursuant to Section 11) of this Certificate.

(c) USMS Wire Transfer Instructions:

ABA #021030004
ALC #00008154
U.S. Marshals Service
c/o Federal Reserve Bank of New York
33 Liberty Street
New York, New York 10045
Reference: _____

IN WITNESS WHEREOF, the parties hereto have executed this Notice for Release of Forfeited Funds Constituting the Bankruptcy Settlement Amount as of the date set forth below.

ESTATE OF JEFFRY M. PICOWER

By:_____, as Executor

Name:_____

UNITED STATES OF AMERICA

By:_____

Name:_____

Title: _____

Dated: _____, ____

ATTACHMENT C: PICOWER RELEASEES

Jeffry M. Picower
Estate of Jeffry M. Picower
Barbara Picower as Executor of Estate of Jeffry M. Picower
Barbara Picower
Capital Growth Company
Favorite Fund
JA Primary Limited Partnership
JA Special Limited Partnership
JAB Partnership
JEMW Partnership
JF Partnership
JFM Investment Company
JLN Partnership
JMP Limited Partnership
Jeffry M. Picower Special Co.
Jeffry M. Picower, P.C.
Decisions Incorporated
Decisions Inc #2
Decisions Inc #3
Decisions Inc #4
Decisions Inc #5
Decisions Incorporated #6
The Picower Foundation
The Picower Institute for Medical Research
Gabrielle Picower
Trust FBO Gabrielle H. Picower
Trust FBO Abe Picower
Picson Management Group
Decisions Incorporated Special
Jeffry M. Picower D P Partnership
Jeffry M. Picower #2
Decisions Incorporated L Account
JMP Investment
Jeffry M. Picower, P.C. Employee Profit Sharing Plan
Jeffry M. Picower Money Purchase Pension Plan
Decisions Incorporated Money Purchase Pension Plan
Explanations Incorporated Money Purchase Pension Plan
April C. Freilich
ACF Services Corporation
ACF Services Corporation Money-Purchase Pension Plan
Apple Securities Management Incorporated
The Retirement Income Plan for Employees of Monroe Systems for Business, Inc.

EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. _____

ADELE FOX, individually and
on behalf of a class of similarly situated,

Plaintiffs,
v.

JEFFRY M. PICOWER ESTATE, through its
Executor, William D. Zabel;
BARBARA PICOWER, individually and as
Trustee for the Picower Foundation
and for the Trust f/b/o Gabriel H. Picower;
CAPITAL GROWTH COMPANY;
DECISIONS, INC.;
FAVORITE FUNDS;
JA PRIMARY LIMITED PARTNERSHIP;
JA SPECIAL LIMITED PARTNERSHIP;
JAB PARTNERSHIP;
JEMW PARTNERSHIP;
JF PARTNERSHIP;
JFM INVESTMENT COMPANIES;
JLN PARTNERSHIP;
JMP LIMITED PARTNERSHIP;
JEFFRY M. PICOWER SPECIAL COMPANY;
JEFFRY M. PICOWER, P.C.;
THE PICOWER FOUNDATION;
THE PICOWER INSTITUTE OF MEDICAL RESEARCH;
THE TRUST F/B/O GABRIELLE H. PICOWER.
_____/

COMPLAINT—CLASS ACTION

Jury Trial Demanded

Plaintiff Adele Fox, through her undersigned attorneys, on her own behalf and on behalf of a similarly situated class of plaintiffs, hereby sues the Defendants. Upon knowledge, information and belief, and based upon investigation of counsel (including, *inter alia*, review of news accounts, account statements, publicly available documents, and court papers), Plaintiff alleges as follows:

BACKGROUND AND SUMMARY OF CLAIMS

1. This action arises from Defendants' participation in the now admitted massive Ponzi scheme that occurred under the direction of Bernard L. Madoff ("Madoff") and through Madoff's registered securities firm, Bernard L. Madoff Investment Securities Corporation LLC ("BLMIS"). Defendants were, as a group, the largest beneficiaries of the Ponzi scheme, converting and receiving billions of dollars from the accounts of innocent Madoff and BLMIS customers.

2. BLMIS is currently insolvent and is being liquidated by Irving H. Picard, Esq. (the "Trustee") as Trustee for the liquidation of the business of BLMIS, under the Securities Investor Protection Act, 15 U.S.C. § 78aaa, *et seq.* ("SIPA"), in the bankruptcy proceedings styled *In re: Bernard L. Madoff Investments Securities LLC*, Case No. 08-01789 (BRL), pending in the United States Bankruptcy Court, Southern District of New York (the "SIPA Liquidation").

3. The Trustee has commenced an adversary proceeding against the Picowers and their related entities named herein in the SIPA Liquidation (Adv. Pro. No. 09-1197) (the "Trustee's Complaint"). A copy of the Trustee's Complaint is attached as **Exhibit "A"**. The Trustee seeks damages only on behalf of BLMIS customers who have filed recognized claims in the SIPA Liquidation proceeding (the "SIPA Payees"). However, the Trustee does not have standing to bring claims on behalf of parties other than the SIPA Payees. Of the 4,903 SIPA claims, the Trustee has allowed only 2,568 such claims.

4. The Plaintiff and class members are non-SIPA Payees with independent claims against Defendants for, *inter alia*, conspiracy, unjust enrichment, conversion and violations of the Florida RICO statute that are separate and distinct from those asserted by the Trustee, and that have not been, and cannot be, asserted by the Trustee.

5. Jeffry M. Picower ("Picower") knew, and the other Defendants knew or should have known, that they were participating in and profiting from Madoff's fraudulent scheme because of the absurdly high rates of return that their accounts supposedly, but could not have legitimately, achieved. These rates of return sometimes exceeded 100% annually, and were even as high as 950% per year. (Picower shall hereinafter be included in references to "Defendants".)

6. Defendants knew that their rates of return were dramatically higher than those that BLMIS reported to its "ordinary investors." Defendants, and Picower specifically, were among a small group of Madoff investors with direct access to BLMIS's trading records. Defendants knew that their extra-ordinary returns were illegitimate and that BLMIS was running an illegitimate investment operation; Defendants could not have believed otherwise.

7. In fact, relevant documents and information show that Picower and the Defendants directed BLMIS to prepare account statements for the Defendants reflecting not actual trading results but the rates of return Picower "wanted to achieve". BLMIS complied with these directions, and the vast majority of the purported "profits" in the Defendants' accounts were not a result of the actual purchase and sale of securities.

8. The Defendants' account records reflect, and Defendants were aware of, or should have been of, the fact that Madoff and BLMIS booked in their accounts fictional profits from fictional trading. Upon information and belief, no purchases or sales of securities in the Defendants' BLMIS accounts ever actually occurred. Upon information and belief, no purchases or sales of securities in the class members' BLMIS accounts ever actually occurred.

9. Picower, the other Defendants, and their agents directly participated in the Madoff Ponzi scheme, and knew or should have known that the funds used to pay the Defendants' fictional profits could have only come from the accounts of other BLMIS customers. Picower

and Defendants converted the cash in other innocent BLMIS customer accounts for their own personal benefit with the acquiescence and assistance of Madoff and BLMIS.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d)(2)(A) because: (1) the matter in controversy between the class members and Defendants exceeds $5,000,000 exclusive of interest, attorneys' fees, and costs, and (2) many of the class members are citizens of a State other than the States of citizenship of the Defendants. The actions complained of herein are violations of Florida's RICO statute and took place in part in Palm Beach County, Florida. Personal jurisdiction also exists under Florida's long arm statute.

11. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 1391, because a substantial part of the events comprising Defendants' wrongful conduct giving rise to the claims alleged herein occurred in the Southern District of Florida. At the time of his death, Picower and his wife were residents of Palm Beach County, Florida, and his related-entity Defendants transact business in Palm Beach County, Florida. The main Defendants maintained their primary offices or residences in this district. Defendants have directly and indirectly made use of the means and instrumentalities of interstate commerce, or of the mails and wires, in connection with the transactions, acts, practices and courses of business alleged herein.

THE PARTIES

12. Plaintiff Adele Fox is a citizen and resident of Tamarac, Florida. Fox is an 86-year old retired New York City school secretary who had BLMIS accounts. Plaintiff brings this class action on behalf of herself and a putative class of persons similarly situated for damages and other relief arising from the Defendants' wrongful conduct as described herein.

13. Jeffry M. Picower ("Picower") was a resident of Palm Beach, Florida, and

Fairfield, Connecticut, prior to and at the time of his death on October 25, 2009. Picower was a highly sophisticated investor, accountant and attorney who participated in the Madoff Ponzi scheme for over 20 years, knowing that he was participating in a fraud. Picower had vast experience in the purchase and sale of businesses, including health care and technology companies. He had also been personally responsible for managing hundreds of millions, if not billions, of dollars of assets, and he had developed uncommon sophistication in trading securities and evaluating returns therefrom. Upon information and belief, Picower was closely associated with Madoff, both in business and socially, for the last 30 years. Picower held an individual BLMIS account in the name of "Jeffry M. Picower," with an account address of 1410 South Ocean Boulevard, Palm Beach, Florida. Picower was a trustee of the Picower Foundation, and Chairman of the Board of Defendant Decisions Incorporated.

14. Upon information and belief, Defendant William D. Zabel is the Executor of the Estate of Jeffry M. Picower, which is being probated in the State of New York.

15. Defendant Barbara Picower is a person residing at 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Barbara Picower is Picower's surviving spouse. According to the Trustee, Barbara Picower holds an individual account at BLMIS in the name "Barbara Picower," with the account address of 1410 South Ocean Boulevard, Palm Beach, Florida 33480, and Barbara Picower is trustee for Defendant Trust f/b/o Gabrielle H. Picower, an officer and/or director of Defendant Decisions Incorporated, and trustee and Executive Director of the Picower Foundation.

16. Defendant Decisions Incorporated is a corporation organized under the laws of Delaware with a principal place of business at 950 Third Avenue, New York, New York 10022 and an alternate mailing address on its BLMIS account listed as 22 Saw Mill River Road,

Hawthorne, New York, 10532. According to the Trustee, the Decisions Incorporated office in Hawthorne was merely a store-front office through which little or no business was conducted, and Decisions Incorporated is a general partner of Defendants Capital Growth Company, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, JMP Limited Partnership and Jeffry M. Picower Special Co.

17. Defendant Capital Growth Company purports to be a limited partnership with a mailing address for its BLMIS account listed at 22 Saw Mill River Road, Hawthorne, New York, 10532, care of Decisions Incorporated. According to the Trustee, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of Capital Growth Company, and Decisions Incorporated and Picower transact/transacted business through this entity.

18. Defendant JA Primary Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Defendant Decisions Incorporated and/or Picower serves/served as General Partner or Director of JA Primary Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this entity.

19. Defendant JA Special Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York, New York 10594. According to the Trustee, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JA Special Limited Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

20. According to the Trustee, Defendant JAB Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JAB Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

21. According to the Trustee, Defendant JEMW Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JEMW Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

22. According to the Trustee, Defendant JF Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JF Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

23. According to the Trustee, Defendant JFM Investment Company is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and JFM Investment Company is a Limited Partner of Capital Growth Company, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JFM Investment Company.

24. According to the Trustee, Defendant JLN Partnership is a limited partnership with

a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JLN Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

25. Defendant JMP Limited Partnership is a limited partnership organized under the laws of Delaware, with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Decisions Incorporated and/or Picower serve/served as General Partner or Director of JMP Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

26. According to the Trustee, Defendant Jeffry M. Picower Special Co. is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower Special Co.

27. According to the Trustee, Defendant Favorite Funds is an entity through which Picower transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Favorite Funds.

28. According to the Trustee, Defendant Jeffry M. Picower P.C. purports to be a limited partnership with a listed mailing address at 25 Virginia Lane, Thornwood, New York, New York 10594, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower P.C., and Decisions Incorporated, and/or Picower transact/transacted business through this defendant entity.

29. Defendant Picower Foundation is a trust organized for charitable purposes with Picower listed as donor, and Picower and Barbara Picower, among others, listed as Trustees during the relevant time period. Picower Foundation's addresses are reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 9 West 57th Street, Suite 3800, New York, New York 10019.

30. According to the Trustee, Defendant Picower Institute for Medical Research is a nonprofit entity organized under the laws of New York, with a principal place of business at 350 Community Drive, Manhasset, New York 11030.

31. According to the Trustee, Defendant Trust f/b/o Gabrielle H. Picower is a trust established for beneficiary Gabrielle H. Picower, who is the daughter of Picower and Barbara Picower, with Defendant Barbara Picower listed as trustee, and the trust's BLMIS account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

32. On information and belief, the Defendants listed in paragraphs 16 through 30 (collectively the "Picower Entity Defendants") were dominated, controlled and used as a mere instrumentality of Picower to advance his interests in, and to participate in, the Madoff Ponzi scheme. Thus, the Picower Entity Defendants are the alter egos of Picower and of each other.

THE MADOFF PONZI SCHEME AND DEFENDANTS' PARTICIPATION IN THE FRAUD

33. Shortly before his December 11, 2008 arrest, Madoff confessed that he had been conducting a Ponzi scheme through BLMIS for many years, and he estimated BLMIS' liabilities to be approximately $50 billion.

34. On March 10, 2009, the federal government filed an eleven-count information against Madoff in the criminal case styled *U.S. v. Madoff*, CV-No 09-CR-213 (S.D.N.Y), which is attached as "**Exhibit B**" hereto.

35. At a plea hearing on March 12, 2009 in Madoff pled guilty to the eleven-count criminal information and admitted under oath that he "operated a Ponzi scheme through. . . [BLMIS]." Madoff also admitted that "[a]s I engaged in my fraud, I knew what I was doing (was) wrong, indeed criminal." *See* **Exhibit "C"** hereto.

36. Madoff also admitted that, during the relevant time period, he never actually invested any of the funds he received from BLMIS customers, instead depositing the funds into a bank account. Madoff never actually purchased and sold securities in BLMIS customer accounts, instead using client funds simply to pay other, different, clients' purported returns and redemption of principal.

37. According to the Trustee, as of December 11 2008, BLMIS had 4,903 client accounts with a purported stated value of $64.8 billion as of November 30, 2008.

38. According to the Trustee, BLMIS made payments and other transfers to the Defendants totaling $7.2 billion more than Defendants deposited, including $6.7 billion from 1995 to 2008. A schedule of theses transfers, which are attached as Exhibit B to the Trustee's Complaint, are attached separately as **Exhibit "D"** hereto.

39. Picower, Barbara Picower, and each of the Picower Entity Defendants knowingly and actively participated in the Madoff/BLMIS scheme, and they at all relevant times had actual knowledge or recklessly and consciously avoided the fact that the holdings and profits reported in their BLMIS accounts were false and not a result of legitimate or actual purchases and sales of securities.

40. Defendants knew, recklessly and consciously avoided, or should have known that the annual returns in their BLMIS accounts were fabricated, as were the underlying securities transactions which purportedly generated these returns.

41. The Trustee's Complaint describes the Defendants' outright theft of cash through BLMIS, which cash Defendants knew could have only belonged to other innocent Madoff and BLMIS customers.

42. Picower and the other Defendants could not have been unaware of the fact that they were profiting from fraudulent transactions. Picower purported to follow a "buy and hold" strategy in the Defendants' BLMIS accounts, whereby they "bought" stock (typically large cap stock) at its annual low trading prices, and then purportedly sold the stock to generate profits.

43. The Defendants' "buy and hold strategy" purportedly generated extraordinary and implausibly high annual rates of return. For example, two of the BLMIS accounts controlled by Picower generated annual rates of return of over 100% for four consecutive years from 1996 through 1999. According to the Trustee: "Between 1996 and 2007 defendants 24 regular trading accounts enjoyed 14 instances of supposed annual returns of more than 100%. . . ." During this time period the annual rates of return for certain of Defendants' accounts ranged from 120% to over 550%. Other Defendant accounts had documented earnings of almost 1000%.

44. Defendants could not have believed that Madoff "beat the market" by such vast amounts on an annualized basis through legitimate "buy and hold" trading. The documentation and trading records available show that Picower and the other Defendants did not participate in the "options trading" strategy that comprised the core of Madoff's money management business. Madoff and BLMIS had no professed or actual expertise or ability to select appropriate large cap stocks for Picower and the other Defendant accounts. Madoff, with a small staff who had no particularized experience in "buy and hold" trading, never held himself out as a "stock picker."

45. On the contrary, Picower and the other Defendants knew [recklessly/consciously avoided] that the extra-ordinary returns being generated in their BLMIS accounts were far in

excess of what can be achieved by legitimate "buy and hold" trading, or by any other legitimate strategy.

46. Other trading in Defendants' accounts was obviously fabricated. For example, as stated in the Trustee's Complaint, in 2000 several of the Defendants' trading accounts reported negative annual rates of return from negative 74% to negative 779%.

47. Defendants knew or should have known that the account documents and statements that reflected fictitious trades and returns were patently false.

48. In fact, upon information and belief, Picower and the other Defendants, with the assistance of Picower's associate April C. Freilich ("Freilich"),[1] directed fictitious and backdated trades, with the consent of Madoff, BLMIS and their agents, to manufacture profits and losses in accordance with an overall fraudulent trading strategy developed by Picower.

The Decisions Incorporated Account

49. The several BLMIS accounts of Defendant Decisions Incorporated, which was controlled by Picower, provide concrete examples of the obviously fictitious profits Defendants received as a result of their participation in the Ponzi scheme.

50. These accounts were a primary source of Defendants' cash withdrawals from BLMIS during the relevant time period, yet the accounts reflected virtually no trading activity and very few purported securities positions.

51. Nevertheless, Picower and Freilich signed distribution requests and directed cash "withdrawals" from this account ranging from $50 million to $150 million five or more times per year from 1995 through 2007, for a total of $5,771,339,795.

[1] Freilich is an officer and/or director of Decisions Incorporated and a limited partner of Defendants Capital Growth Company, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, and JLN Partnership. Freilich is also a close personal friend and business associate of Picower's who carried out his directions in connection with Defendants' participation in the BLMIS scheme. Freilich was close enough to Picower to receive $10 million in his recently probated will.

52. Picower and Freilich directed the withdrawals from the Decisions Incorporated account even though the account maintained a large negative cash balance of more than $6 billion and there was not enough cash in the account to cover the withdrawals.

53. At the time of each withdrawal, Picower and the other Defendants, along with Madoff and BLMIS, knew the withdrawn funds could only be the property of other Madoff customers, including the Plaintiff and the class members.

Defendants and BLMIS Backdated Purported Transactions to Create Fictitious Profits

54. That Picower, the other Defendants, and Madoff and BLMIS actively conspired to steal the funds of the Plaintiff and the class members is also evidenced by the fact that many purported trades in the Defendants' accounts were back dated. Picower purportedly "sold" positions on a fabricated earlier date to generate phony profits.

55. For example, as stated in the Trustee's Complaint, on or about April 24, 2006, Decisions Incorporated opened a new account with BLMIS known as the "Decisions Incorporated 6" ("Decisions 6") account by a wire transfer on April 18, 2006 of $125 million.

56. Picower instructed BLMIS to backdate trades in this account to January 2006, which was before the Decisions 6 account was even opened.

57. As a result of the fabrication/backdating of trades, the purported net value of securities in the Decisions 6 account by the end of April 2006 had increased by almost $40 million, for a return of 30% in less than two weeks of "purported trading".

58. Picower's scheme to backdate trades in Decisions 6 was designed to generate phony paper profits in the account by picking stocks which had appreciated on a "hindsight basis," and represented part of a continuous pattern of false generation of profits which enabled Picower and the Defendants to pilfer other BLMIS customer accounts for actual cash based upon

phony booked profits.

59. As demonstrated in the Trustee's Complaint, BLMIS records indicate that Picower, Freilich and Madoff employees discussed and clearly understood that the trades in the various Defendants' accounts were being backdated for the purpose of generating phony profits.

60. For example, according to the Trustee's Complaint, on May 18, 2007, Freilich indicated that the Foundation needed "$20 mil in gains" for January and February and "want[ed] 18% for year[] 07 appreciation," but that she had to check the numbers "with Jeff." Upon information and belief, "Jeff" is Picower. Five days later on May 23, 2007, and presumably after consulting with Picower, Freilich told BLMIS that the numbers she provided earlier were wrong, and the Foundation "needs only $12.3 mil [in gains] for" January and February 2007.

61. Also, on or about December 22, 2005, Picower and/or Freilich faxed a letter to BLMIS that was signed by Picower, bearing an earlier date of December 1, 2005. This letter directed the sale of specific positions in four of Defendants' accounts. However, the actual underlying transactions could not have taken place in early December, 2005, as the positions sold remained in the Picower account through late December of 2005.

62. On or around December 29, 2005, Freilich, acting on Picower's behalf, faxed BLMIS a letter signed by Picower, that directed BLMIS to realize a gain of $50 million. Upon instruction from Picower and/or Freilich, BLMIS "sold" large amounts of Agilent Technologies and Intel Corporation stock in various Defendant accounts on a backdated basis. Freilich directed the sale of large amounts of these purported securities on or about December 29, 2005, requesting that the sales be booked to take place on an earlier date, *i.e.*, December 8th or 9th. These trades were backdated by Picower and BLMIS for the purpose of generating phony "paper" profits of approximately $46.3 million, making up most of Picower's requested $50

million gain.

63. Also according to the Trustee, Picower and BLMIS backdated other purported securities transactions during December 2005, including purported purchases on margin of Google, Diamond Offshore Drilling, Inc., and Burlington Resources, Inc. across several of Defendants' accounts, which resulted in a purported gain for Picower of almost $80 million. These purchases purportedly occurred between January 12 and 20, 2005, but they were entirely fictitious, as the transactions were first reflected 11 months later in Defendants' December 2005 BLMIS account statements.

64. Defendants and Madoff and BLMIS were aware of the false nature of these transactions and their purpose, which was to generate fictitious profits for Picower and allow him to withdraw cash which came from other BLMIS customer accounts, including those of the Plaintiff and the class members.

The Picower Foundation Account Reveals Fabricated Securities Transactions

65. The publicly available Form 990 Income Tax Returns for the Picower Foundation demonstrate that Picower and BLMIS were engaged in fraudulent and/ or anomalous trading for the purpose of generating false profits in the Picower Foundation account, enabling Picower to withdraw fictitious profits from this and the other Defendant accounts controlled by Picower. These cash withdrawals were effected by taking cash from other customer accounts of BLMIS.

66. For example, the Picower Foundation's 2007 income tax return reflects a holding of 328,830 shares of Oracle Corporation stock that was purportedly purchased on December 3, 2001. No such holdings are disclosed in the Picower Foundation's tax return filings for 2001 through 2005. In fact, the securities were never actually purchased according to Picower's own documentation, but simply fictitiously added to the account in the 2007 return. This had the

effect of increasing the Picower Foundation's portfolio value by $7.5 million.

67. The Picower Foundation's 2005 tax return reflects suspicious and inexplicably large portfolio gains in absolute and relevant terms based upon a small number of stocks. During 2005, the Picower Foundation did not sell any securities in its portfolio and made only four purchases. Nevertheless the portfolio purportedly grew significantly from the gains posted in less than six months in connection with the purchases of Amazon, Apple, Burlington, and Google, amounting to $141.3 million in the aggregate during this period. All four purchases were purportedly made on the same date, July 14, 2005. The unrealized annualized gain from these purchases was almost 100%, which is inordinately and unrealistically high in relation to the annual gain on the S&P 500 Index during this annual period, which was only 5%. These trades were likely backdated, consistent with the Defendants' and BLMIS's pattern of backdating trades to generate fictitious profits.

68. The Picower Foundation's 2004 tax return reflects Picower Foundation portfolio holdings in Eagle Materials Inc. of 12,853 common shares and 43,215 class B shares that were purportedly purchased November 28, 2001. But no such holdings are disclosed in the Picower Foundation's tax returns for 2001 through 2003. The mysterious appearance on the 2004 return had the effect of increasing the value of the Picower Foundation portfolio by almost $5 million.

69. The Picower Foundation's 2003 return reflects a holding in Cavco Industries, Inc. of 14,500 shares that were purportedly purchased November 28, 2001, which was the same date as the purported purchase of the Eagle Materials shares noted above. However, no such holding was disclosed in the 2001 or 2002 tax returns for the Foundation. This fictitious holding had the effect of increasing the value of the Picower portfolio.

70. The Picower Foundation's 2002 return reflects a holding in Carmax of 170,436

shares that were purportedly purchased on the same date, November 28, 2001, as were the undocumented Cavco and Eagle Materials purchases described above. But no such holding is disclosed in the 2001 or 2002 Picower Foundation returns. This phony transaction had the effect of increasing the value of the Picower portfolio by $3 million.

71. The Picower Foundation's 2000 return reflects incredibly large portfolio gains in absolute and relative terms, demonstrating backdated trading. During 2000, the Picower Foundation realized a gain on the purported sale of securities of $286.8 million on a book value of only $20.1 million, representing a staggering total return of 1,426.9%. The securities sold were purportedly held for a six year period on average. Thus, this return is equal to a compound annual average return of almost 56%, which vastly exceeds the annualized return for any other un-leveraged stock transaction by any other known market participant. This rate of return also is demonstrably false and contrasts sharply and unrealistically with the compound average annual return of the S&P 500 Index during this period of only approximately 15%.

72. The factual allegations set forth above demonstrate a consistent pattern of fraudulent activity, the result of which was that the Defendants' accounts generated tremendous apparent but false profits, which Defendants then withdrew from their BLMIS accounts with the consent of Madoff and BLMIS. In many instances, BLMIS, Picower and the Defendants simply manufactured positions in their respective accounts for the purpose of allowing Picower to "sell" the manufactured positions and withdraw cash based upon a phony sale.

73. As a result of the foregoing conduct, Defendants participated in and profited from the fraud on other BLMIS customers, and the Defendants converted the cash (there were no securities) of other BLMIS account holders to pay themselves these fictitious profits.

CLASS ACTION ALLEGATIONS

74. Plaintiff brings this action as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The definition of the Plaintiff class in this action is: all persons or entities who have maintained customer accounts with BLMIS who are not SIPA Payees and who have not received the net account value scheduled in their BLMIS accounts as of the day before the commencement of the SIPA Liquidation (the "Class"). The Class excluded the Defendants herein. Every class member has been barred by the Trustee from recovering in the SIPA Liquidation the amounts sought in this Complaint.

75. The Class meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

a. *Numerosity.* The Class consists of at least several thousand BLMIS account holders who are not SIPA Payees, as defined in paragraphs 3 and 74 above. The exact number of class members is currently unknown to the Plaintiff, and can only be ascertained through appropriate discovery. This number, which includes class members throughout the United States, is so numerous that joinder of all members of the Class is impracticable.

b. *Commonality.* There are questions of law and fact which are common to the representative party and each member of the Class including: (i) whether, and to what extent the Defendants participated in the Madoff Ponzi scheme and conspired with BLMIS and Madoff; (ii) whether Defendants converted the funds of other BLMIS account holders; (iii) the extent to which Defendants were unjustly enriched as a result of their participation in the Ponzi scheme; (iv) whether the Defendants violated the Florida Civil Remedies for Criminal

Practices Act Chapter 772, Florida Statutes, ("Florida RICO") by acting in concert with BLMIS to convert the cash of the members of the class; (v) whether Plaintiff and the class members have sustained damages as a result of Defendants' conduct, and the proper measure of such damages; (vi) whether Plaintiff and the class members are entitled to an award of punitive damages or other exemplary damages against Defendants.

c. *Typicality*. Plaintiff's claim is typical of each of those of the class members. Plaintiff maintained a BLMIS account, is not a SIPA Payee, and has suffered the same type of injury as did other members of the class.

d. *Adequacy*: Plaintiff will fairly and adequately represent and protect the interest of the Class and has no interest antagonistic to those of the other class members. Plaintiff has retained experienced counsel competent in litigation involving the claims at issue and in class litigation.

76. This class also meets the requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure. The common issues outlined herein predominate over any individual issues in this case. A class action is superior to all other available means for the fair and efficient adjudication of this controversy because: (1) it is economically impracticable for class members to prosecute individual actions against Defendants; (2) Plaintiff is aware of no other litigation concerning the non-SIPA Payees against Defendants; (3) it is desirable to concentrate these claims against Defendants in a single forum so as to avoid varying and disparate results; and (4) there is no difficulty likely to be encountered in the management of this case as a class action.

COUNT I
CIVIL CONSPIRACY

77. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth

herein.

78. Madoff has pled guilty to an eleven-count criminal information and admitted that he operated a fraudulent Ponzi scheme through BLMIS.

79. Defendants, on the one hand, agreed with Madoff and BLMIS, on the other hand, to unlawfully divert and convert the cash of other innocent BLMIS account holders, including Plaintiff and the class members, for the benefit of the Defendants and Madoff and BLMIS.

80. Defendants engaged in overt acts in furtherance of the conspiracy as set forth in above, which included: (a) participating in and directing the preparation of false documentation; (b) recording fictional profits in their respective BLMIS accounts; and (c) withdrawing such fictional profits knowing that they were the funds of other BLMIS account holders.

81. Defendants committed additional overt acts in pursuance of the conspiracy by concealing the true state of affairs from the IRS, securities regulators and other customers of BLMIS, by, *inter alia*, filing false statements in connection with their tax returns that purported to show trading in Defendants' accounts which in fact did not occur.

82. As a result of Defendants' conduct, Plaintiff and the Class have suffered financial injury and damages, which include, but are not limited to, lost investment income and returns on their bona fide cash investments at BLMIS, tax payments made in connection with reported but non-existent trading profits, and exposure for monetary losses in connection with the Trustee's clawback efforts.

WHEREFORE, Plaintiff requests judgment in her favor against Defendants for compensatory damages, prejudgment interest, punitive damages, and such other and further relief as is just and proper.

COUNT II
CONVERSION

83. Plaintiff re-asserts the allegations contained in paragraphs 1 through 76 above as if fully set forth herein.

84. Plaintiff and the class members were in possession of valuable property, including the cash in their BLMIS accounts.

85. Defendants, through improper means, have obtained the use of the property of the Plaintiff and the class members, and have wrongfully deprived the Plaintiff and the class members of the right to possess, and of the use of, their property for a permanent or indefinite term.

86. Plaintiff and the class members have suffered damages as a result of Defendants' conduct, including, but not limited to, lost investment income and returns on their bona fide cash investments at BLMIS, tax payments made in connection with reported but non-existent trading profits, and exposure for monetary losses in connection with the Trustee's clawback efforts.

87. Defendants had the specific intent to harm the Plaintiff and the class members.

WHEREFORE, Plaintiff requests judgment in their favor against Defendants for compensatory damages, prejudgment interest, punitive damages, and such other and further relief as is just and proper.

COUNT III
UNJUST ENRICHMENT

88. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth herein.

89. Defendants have benefited from their unlawful acts and conspiracy through the overpayment of proceeds from securities purportedly purchased and sold in their BLMIS

accounts.

90. Defendants improperly received funds from Plaintiff and the class members as a result of the deliberate misstatement of their BLMIS account holdings and the false profits generated in such accounts.

91. It would be inequitable for Defendants to be permitted to retain the benefit of their wrongful conduct.

92. The Plaintiff and the class members are entitled to the establishment of a constructive trust consisting of the ill gotten gains received by Defendants, to be disgorged or otherwise paid to the class members.

WHEREFORE, Plaintiff requests judgment in her favor and against each Defendant for disgorgement/restitution, punitive damages, and such other and further relief as is just and proper.

COUNT IV
CONSPIRACY TO VIOLATE THE FLORIDA CIVIL REMEDIES FOR CRIMINAL PRACTICES ACT (FLORIDA RICO)

93. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth herein.

Underlying BLMIS Enterprise

94. Plaintiff and the class members are "persons" within the meaning of § 772.104, Florida Statutes. Madoff, BLMIS and Defendants are "persons" with the meaning of § 772.103, Florida Statutes.

95. Under § 772.102(3), Florida Statutes, an "enterprise" is defined as "any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of the state, or any other legal entity or any unchartered union, association, or group of

individuals associated in fact although not a legal entity; and the term includes illicit as well as licit enterprises . . . ." BLMIS constituted such an enterprise.

96. Madoff, with criminal intent, operated the enterprise through a pattern of criminal activity though the enterprise as defined by § 772.103(1) and 772.103(2), Florida Statutes, and he has participated in the conduct of, or is otherwise in control of, and operated the enterprise by participating in and documenting phony, profitable transactions in Defendants' BLMIS accounts.

97. The enterprise has an ascertainable structure and hierarchy that set it apart from the mere commission of the predicate acts (specified below), and that form a pattern of racketeering activity in which Madoff actively engaged.

Predicate Act of Underlying RICO Violation

98. Section 772.102(a)22, Florida Statutes, specifies that "criminal activity" includes any act indictable under Chapter 817 of the Florida Criminal Code (relating to fraudulent practices, false pretenses, and fraud generally).

99. Section 772.1029(b), Florida Statutes, specifies that "criminal activity" includes any conduct subject to indictment or information listed in the federal RICO statute, 18 U.S.C. § 1961(1), which includes Title 18 section 1341 (relating to mail fraud) and section 1343 (relating to wire fraud).

100. Madoff has admitted to criminal activity demonstrating a systematic ongoing course of criminal conduct with the intent to defraud the BLMIS customers, including the Plaintiff and the class members, based on the following predicate acts: (a) a scheme to defraud and obtain property with the intent to obtain property by false or fraudulent pretenses, representations or promises as well as by unlawful misrepresentations in violation of § 817.034(4), Florida Statutes; (b) federal mail fraud; (c) federal wire fraud.

Pattern of Racketeering Activity

101. As set out above, Madoff has engaged in a "pattern of criminal activity" as defined under § 772.102(4), Florida Statutes, by committing at least two acts of criminal activity indictable as violations of Chapter 817, Florida Statues, and mail and wire fraud within the past five years.

102. Each predicate act was related and had as its purpose the criminal diversion of funds from customer accounts at BLMIS in connection with a conspiracy being conducted by BLMIS and Madoff.

103. This conduct did not arise out of single contract or transaction, but was a pervasive scheme that injured class members over many years. Each predicate act was related, had a similar purpose, involved the same or similar participants and method of commission, had similar results, and impacted the class member victims in a similar fashion.

104. The predicate acts specified above which Madoff committed, and which Defendants conspired to commit, were related to each other in furtherance of the scheme implemented by the enterprise. These acts were committed over a long period of time from at least 1995 through December 2008.

Defendants' Conspiracy to Commit RICO Violations

105. "Criminal activity" includes not only direct commissions of predicate acts, but also conspiracies and solicitations to commit predicate acts under § 772.102(1), Florida Statutes.

106. At all relevant times, Defendants agreed and conspired to participate, directly and indirectly, in the scheme described above through a pattern of racketeering activity in violation of § 772.103(4).

107. At all times the Defendants knew that BLMIS and Madoff were conspiring with

them with the objective of diverting and converting money from other BLMIS customer accounts for the benefit of Defendants.

108. The Defendants knew that BLMIS and Madoff were engaged in the misrepresentations and omissions and fraudulent conduct described in Exhibits B and C hereto, rendering Defendants liable for conspiracy to commit the criminal acts set forth therein.

109. Defendants conspired to commit violations of § 772.103, Florida Statutes, as alleged in paragraphs 49 through 73 above.

110. The Defendants committed and/or caused to be committed a series of overt acts in furtherance of the conspiracy alleged herein to effect the objectives of the scheme described above, including the acts alleged in paragraphs 54 through 73.

111. By directly instructing Madoff and BLMIS employees to book such phony transactions which generated phony profits, the Defendants controlled and enabled the fraud to convert the funds of other innocent BLMIS account holders.

112. Plaintiff and the class members, have been injured as a result of Defendants' Florida RICO violation, which injury includes the loss of investment profits and returns on their bona fide cash investment at BLMIS, tax payments made in connection with reported but non-existent trading profits, and exposure for monetary losses in connection with the Trustee's clawback efforts.

WHEREFORE, Plaintiff and the class members request entry of judgment in their favor and against Defendants jointly and severally for compensatory damages, as tripled pursuant to § 772.104(1), Florida Statutes, as well as the attorneys fees and court costs authorized under § 772.104(1), Florida Statutes, and such further relief as this court deems just and proper.

CLAIM FOR PUNITIVE DAMAGES

113. Defendants had actual knowledge of the wrongfulness of their conduct and the high probability of injury and damage to the Class. Defendants disregarded that knowledge intentionally and recklessly in pursuing their wrongful, deceitful, deceptive and illegal conduct.

114. As a direct and proximate result of Defendants' fraudulent, willful and reckless misconduct, the Plaintiff asserts a claim for punitive damages for each cause of action herein for which such damages are allowable under Florida law, in an amount to be determined by a jury.

CLAIM FOR RELIEF

Plaintiff seeks the following relief from this Court: (a) a judgment in the favor of plaintiffs in the class against Defendants on the claims specified in this Complaint; (b) an award of compensatory damages; (c) triple the amount of actual damages incurred for those claims which tripling of damages is authorized; (d) an equitable accounting and imposition of constructive trust on Defendants assets; (e) disgorgement of Defendants' ill gotten gains or restitution of the payments and property received by Defendants; (f) attorneys fees pursuant to § 772.104(1), Florida Statutes, (g) punitive damages for those claims where such damages are authorized; (h) prejudgment interest; (i) fees, court costs and expenses of this litigation; (j) all other relief that the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

DATED: this 16th day of February, 2010, by:

BEASLEY HAUSER KRAMER
LEONARD & GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Telephone: (561) 835-0900
Facsimile: (561) 835-0939
galardi@beasleylaw.net
Attorneys for Plaintiff and the Class

By: _____
James W. Beasley, Jr.
Florida Bar No. 145750
Joseph G. Galardi
Florida Bar No. 180572

-and-

Lesley Blackner, Esquire
Florida Bar No. 654043
BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, FL 33480
(561)659-5754
(561)659-3184 (fax)
lblackner@aol.com
Co-counsel for Plaintiff and the Class

Helen Davis Chaitman
New York Bar No. 1236678
BECKER & POLIAKOFF
45 Broadway 11th Floor
New York, NY 10006
(212) 599-3322
(212) 557-0295 (fax)
Co-counsel for Plaintiff and the Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 10-80252-CV-Ryskamp/Vitunac

ADELE FOX, individually and
on behalf of a class of similarly situated,

Plaintiffs,
v.

BARBARA PICOWER, individually, and as
Executor of the Estate of Jeffry M. Picower,
and as Trustee for the Picower Foundation
and for the Trust f/b/o Gabriel H. Picower;
CAPITAL GROWTH COMPANY;
DECISIONS, INC.;
FAVORITE FUNDS;
JA PRIMARY LIMITED PARTNERSHIP;
JA SPECIAL LIMITED PARTNERSHIP;
JAB PARTNERSHIP;
JEMW PARTNERSHIP;
JF PARTNERSHIP;
JFM INVESTMENT COMPANIES;
JLN PARTNERSHIP;
JMP LIMITED PARTNERSHIP;
JEFFRY M. PICOWER SPECIAL COMPANY;
JEFFRY M. PICOWER, P.C.;
THE PICOWER FOUNDATION;
THE PICOWER INSTITUTE OF MEDICAL RESEARCH;
THE TRUST F/B/O GABRIELLE H. PICOWER.
_____/

AMENDED COMPLAINT—
CLASS ACTION
(To Correct Identity of Executor)

Jury Trial Demanded

Plaintiff Adele Fox, through her undersigned attorneys, on her own behalf and on behalf of a similarly situated class of plaintiffs, hereby sues the Defendants. Upon knowledge, information and belief, and based upon investigation of counsel (including, *inter alia*, review of news accounts, account statements, publicly available documents, and court papers), Plaintiff alleges as follows:

BACKGROUND AND SUMMARY OF CLAIMS

1. This action arises from Defendants' participation in the now admitted massive Ponzi scheme that occurred under the direction of Bernard L. Madoff ("Madoff") and through Madoff's registered securities firm, Bernard L. Madoff Investment Securities Corporation LLC ("BLMIS"). Defendants were, as a group, the largest beneficiaries of the Ponzi scheme, converting and receiving billions of dollars from the accounts of innocent Madoff and BLMIS customers.

2. BLMIS is currently insolvent and is being liquidated by Irving H. Picard, Esq. (the "Trustee") as Trustee for the liquidation of the business of BLMIS, under the Securities Investor Protection Act, 15 U.S.C. § 78aaa, *et seq*. ("SIPA"), in the bankruptcy proceedings styled *In re: Bernard L. Madoff Investments Securities LLC*, Case No. 08-01789 (BRL), pending in the United States Bankruptcy Court, Southern District of New York (the "SIPA Liquidation").

3. The Trustee has commenced an adversary proceeding against the Picowers and their related entities named herein in the SIPA Liquidation (Adv. Pro. No. 09-1197) (the "Trustee's Complaint"). A copy of the Trustee's Complaint is attached as **Exhibit "A"**. The Trustee seeks damages only on behalf of BLMIS customers who have filed recognized claims in the SIPA Liquidation proceeding (the "SIPA Payees"). However, the Trustee does not have standing to bring claims on behalf of parties other than the SIPA Payees. Of the 4,903 SIPA claims, the Trustee has allowed only 2,568 such claims.

4. The Plaintiff and class members are non-SIPA Payees with independent claims against Defendants for, *inter alia*, conspiracy, unjust enrichment, conversion and violations of the Florida RICO statute that are separate and distinct from those asserted by the Trustee, and that have not been, and cannot be, asserted by the Trustee.

5. Jeffry M. Picower ("Picower") knew, and the other Defendants knew or should have known, that they were participating in and profiting from Madoff's fraudulent scheme because of the absurdly high rates of return that their accounts supposedly, but could not have legitimately, achieved. These rates of return sometimes exceeded 100% annually, and were even as high as 950% per year. (Picower shall hereinafter be included in references to "Defendants".)

6. Defendants knew that their rates of return were dramatically higher than those that BLMIS reported to its "ordinary investors." Defendants, and Picower specifically, were among a small group of Madoff investors with direct access to BLMIS's trading records. Defendants knew that their extra-ordinary returns were illegitimate and that BLMIS was running an illegitimate investment operation; Defendants could not have believed otherwise.

7. In fact, relevant documents and information show that Picower and the Defendants directed BLMIS to prepare account statements for the Defendants reflecting not actual trading results but the rates of return Picower "wanted to achieve". BLMIS complied with these directions, and the vast majority of the purported "profits" in the Defendants' accounts were not a result of the actual purchase and sale of securities.

8. The Defendants' account records reflect, and Defendants were aware of, or should have been of, the fact that Madoff and BLMIS booked in their accounts fictional profits from fictional trading. Upon information and belief, no purchases or sales of securities in the Defendants' BLMIS accounts ever actually occurred. Upon information and belief, no purchases or sales of securities in the class members' BLMIS accounts ever actually occurred.

9. Picower, the other Defendants, and their agents directly participated in the Madoff Ponzi scheme, and knew or should have known that the funds used to pay the Defendants' fictional profits could have only come from the accounts of other BLMIS customers. Picower

and Defendants converted the cash in other innocent BLMIS customer accounts for their own personal benefit with the acquiescence and assistance of Madoff and BLMIS.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d)(2)(A) because: (1) the matter in controversy between the class members and Defendants exceeds $5,000,000 exclusive of interest, attorneys' fees, and costs, and (2) many of the class members are citizens of a State other than the States of citizenship of the Defendants. The actions complained of herein are violations of Florida's RICO statute and took place in part in Palm Beach County, Florida. Personal jurisdiction also exists under Florida's long arm statute.

11. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 1391, because a substantial part of the events comprising Defendants' wrongful conduct giving rise to the claims alleged herein occurred in the Southern District of Florida. At the time of his death, Picower and his wife were residents of Palm Beach County, Florida, and his related-entity Defendants transact business in Palm Beach County, Florida. The main Defendants maintained their primary offices or residences in this district. Defendants have directly and indirectly made use of the means and instrumentalities of interstate commerce, or of the mails and wires, in connection with the transactions, acts, practices and courses of business alleged herein.

THE PARTIES

12. Plaintiff Adele Fox is a citizen and resident of Tamarac, Florida. Fox is an 86-year old retired New York City school secretary who had BLMIS accounts. Plaintiff brings this class action on behalf of herself and a putative class of persons similarly situated for damages and other relief arising from the Defendants' wrongful conduct as described herein.

13. Jeffry M. Picower ("Picower") was a resident of Palm Beach, Florida, and

Fairfield, Connecticut, prior to and at the time of his death on October 25, 2009. Picower was a highly sophisticated investor, accountant and attorney who participated in the Madoff Ponzi scheme for over 20 years, knowing that he was participating in a fraud. Picower had vast experience in the purchase and sale of businesses, including health care and technology companies. He had also been personally responsible for managing hundreds of millions, if not billions, of dollars of assets, and he had developed uncommon sophistication in trading securities and evaluating returns therefrom. Upon information and belief, Picower was closely associated with Madoff, both in business and socially, for the last 30 years. Picower held an individual BLMIS account in the name of "Jeffry M. Picower," with an account address of 1410 South Ocean Boulevard, Palm Beach, Florida. Picower was a trustee of the Picower Foundation, and Chairman of the Board of Defendant Decisions Incorporated.

14. Defendant Barbara Picower is the Executor of the Estate of Jeffry M. Picower, which is being probated in the State of New York.

15. Defendant Barbara Picower is a person residing at 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Barbara Picower is Picower's surviving spouse. According to the Trustee, Barbara Picower holds an individual account at BLMIS in the name "Barbara Picower," with the account address of 1410 South Ocean Boulevard, Palm Beach, Florida 33480, and Barbara Picower is trustee for Defendant Trust f/b/o Gabrielle H. Picower, an officer and/or director of Defendant Decisions Incorporated, and trustee and Executive Director of the Picower Foundation.

16. Defendant Decisions Incorporated is a corporation organized under the laws of Delaware with a principal place of business at 950 Third Avenue, New York, New York 10022 and an alternate mailing address on its BLMIS account listed as 22 Saw Mill River Road,

Hawthorne, New York, 10532. According to the Trustee, the Decisions Incorporated office in Hawthorne was merely a store-front office through which little or no business was conducted, and Decisions Incorporated is a general partner of Defendants Capital Growth Company, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, JMP Limited Partnership and Jeffry M. Picower Special Co.

17. Defendant Capital Growth Company purports to be a limited partnership with a mailing address for its BLMIS account listed at 22 Saw Mill River Road, Hawthorne, New York, 10532, care of Decisions Incorporated. According to the Trustee, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of Capital Growth Company, and Decisions Incorporated and Picower transact/transacted business through this entity.

18. Defendant JA Primary Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Defendant Decisions Incorporated and/or Picower serves/served as General Partner or Director of JA Primary Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this entity.

19. Defendant JA Special Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York, New York 10594. According to the Trustee, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JA Special Limited Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

20. According to the Trustee, Defendant JAB Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JAB Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

21. According to the Trustee, Defendant JEMW Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JEMW Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

22. According to the Trustee, Defendant JF Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JF Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

23. According to the Trustee, Defendant JFM Investment Company is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and JFM Investment Company is a Limited Partner of Capital Growth Company, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JFM Investment Company.

24. According to the Trustee, Defendant JLN Partnership is a limited partnership with

a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JLN Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

25. Defendant JMP Limited Partnership is a limited partnership organized under the laws of Delaware, with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Decisions Incorporated and/or Picower serve/served as General Partner or Director of JMP Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

26. According to the Trustee, Defendant Jeffry M. Picower Special Co. is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower Special Co.

27. According to the Trustee, Defendant Favorite Funds is an entity through which Picower transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Favorite Funds.

28. According to the Trustee, Defendant Jeffry M. Picower P.C. purports to be a limited partnership with a listed mailing address at 25 Virginia Lane, Thornwood, New York, New York 10594, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower P.C., and Decisions Incorporated, and/or Picower transact/transacted business through this defendant entity.

29. Defendant Picower Foundation is a trust organized for charitable purposes with Picower listed as donor, and Picower and Barbara Picower, among others, listed as Trustees during the relevant time period. Picower Foundation's addresses are reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 9 West 57th Street, Suite 3800, New York, New York 10019.

30. According to the Trustee, Defendant Picower Institute for Medical Research is a nonprofit entity organized under the laws of New York, with a principal place of business at 350 Community Drive, Manhasset, New York 11030.

31. According to the Trustee, Defendant Trust f/b/o Gabrielle H. Picower is a trust established for beneficiary Gabrielle H. Picower, who is the daughter of Picower and Barbara Picower, with Defendant Barbara Picower listed as trustee, and the trust's BLMIS account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

32. On information and belief, the Defendants listed in paragraphs 16 through 30 (collectively the "Picower Entity Defendants") were dominated, controlled and used as a mere instrumentality of Picower to advance his interests in, and to participate in, the Madoff Ponzi scheme. Thus, the Picower Entity Defendants are the alter egos of Picower and of each other.

THE MADOFF PONZI SCHEME AND DEFENDANTS' PARTICIPATION IN THE FRAUD

33. Shortly before his December 11, 2008 arrest, Madoff confessed that he had been conducting a Ponzi scheme through BLMIS for many years, and he estimated BLMIS' liabilities to be approximately $50 billion.

34. On March 10, 2009, the federal government filed an eleven-count information against Madoff in the criminal case styled *U.S. v. Madoff*, CV-No 09-CR-213 (S.D.N.Y), which is attached as "**Exhibit B**" hereto.

35. At a plea hearing on March 12, 2009 in Madoff pled guilty to the eleven-count criminal information and admitted under oath that he "operated a Ponzi scheme through. . . [BLMIS]." Madoff also admitted that "[a]s I engaged in my fraud, I knew what I was doing (was) wrong, indeed criminal." *See* **Exhibit "C"** hereto.

36. Madoff also admitted that, during the relevant time period, he never actually invested any of the funds he received from BLMIS customers, instead depositing the funds into a bank account. Madoff never actually purchased and sold securities in BLMIS customer accounts, instead using client funds simply to pay other, different, clients' purported returns and redemption of principal.

37. According to the Trustee, as of December 11 2008, BLMIS had 4,903 client accounts with a purported stated value of $64.8 billion as of November 30, 2008.

38. According to the Trustee, BLMIS made payments and other transfers to the Defendants totaling $7.2 billion more than Defendants deposited, including $6.7 billion from 1995 to 2008. A schedule of theses transfers, which are attached as Exhibit B to the Trustee's Complaint, are attached separately as **Exhibit "D"** hereto.

39. Picower, Barbara Picower, and each of the Picower Entity Defendants knowingly and actively participated in the Madoff/BLMIS scheme, and they at all relevant times had actual knowledge or recklessly and consciously avoided the fact that the holdings and profits reported in their BLMIS accounts were false and not a result of legitimate or actual purchases and sales of securities.

40. Defendants knew, recklessly and consciously avoided, or should have known that the annual returns in their BLMIS accounts were fabricated, as were the underlying securities transactions which purportedly generated these returns.

41. The Trustee's Complaint describes the Defendants' outright theft of cash through BLMIS, which cash Defendants knew could have only belonged to other innocent Madoff and BLMIS customers.

42. Picower and the other Defendants could not have been unaware of the fact that they were profiting from fraudulent transactions. Picower purported to follow a "buy and hold" strategy in the Defendants' BLMIS accounts, whereby they "bought" stock (typically large cap stock) at its annual low trading prices, and then purportedly sold the stock to generate profits.

43. The Defendants' "buy and hold strategy" purportedly generated extraordinary and implausibly high annual rates of return. For example, two of the BLMIS accounts controlled by Picower generated annual rates of return of over 100% for four consecutive years from 1996 through 1999. According to the Trustee: "Between 1996 and 2007 defendants 24 regular trading accounts enjoyed 14 instances of supposed annual returns of more than 100%. . . ." During this time period the annual rates of return for certain of Defendants' accounts ranged from 120% to over 550%. Other Defendant accounts had documented earnings of almost 1000%.

44. Defendants could not have believed that Madoff "beat the market" by such vast amounts on an annualized basis through legitimate "buy and hold" trading. The documentation and trading records available show that Picower and the other Defendants did not participate in the "options trading" strategy that comprised the core of Madoff's money management business. Madoff and BLMIS had no professed or actual expertise or ability to select appropriate large cap stocks for Picower and the other Defendant accounts. Madoff, with a small staff who had no particularized experience in "buy and hold" trading, never held himself out as a "stock picker."

45. On the contrary, Picower and the other Defendants knew [recklessly/consciously avoided] that the extra-ordinary returns being generated in their BLMIS accounts were far in

excess of what can be achieved by legitimate "buy and hold" trading, or by any other legitimate strategy.

46. Other trading in Defendants' accounts was obviously fabricated. For example, as stated in the Trustee's Complaint, in 2000 several of the Defendants' trading accounts reported negative annual rates of return from negative 74% to negative 779%.

47. Defendants knew or should have known that the account documents and statements that reflected fictitious trades and returns were patently false.

48. In fact, upon information and belief, Picower and the other Defendants, with the assistance of Picower's associate April C. Freilich ("Freilich"),[1] directed fictitious and backdated trades, with the consent of Madoff, BLMIS and their agents, to manufacture profits and losses in accordance with an overall fraudulent trading strategy developed by Picower.

The Decisions Incorporated Account

49. The several BLMIS accounts of Defendant Decisions Incorporated, which was controlled by Picower, provide concrete examples of the obviously fictitious profits Defendants received as a result of their participation in the Ponzi scheme.

50. These accounts were a primary source of Defendants' cash withdrawals from BLMIS during the relevant time period, yet the accounts reflected virtually no trading activity and very few purported securities positions.

51. Nevertheless, Picower and Freilich signed distribution requests and directed cash "withdrawals" from this account ranging from $50 million to $150 million five or more times per year from 1995 through 2007, for a total of $5,771,339,795.

[1] Freilich is an officer and/or director of Decisions Incorporated and a limited partner of Defendants Capital Growth Company, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, and JLN Partnership. Freilich is also a close personal friend and business associate of Picower's who carried out his directions in connection with Defendants' participation in the BLMIS scheme. Freilich was close enough to Picower to receive $10 million in his recently probated will.

52. Picower and Freilich directed the withdrawals from the Decisions Incorporated account even though the account maintained a large negative cash balance of more than $6 billion and there was not enough cash in the account to cover the withdrawals.

53. At the time of each withdrawal, Picower and the other Defendants, along with Madoff and BLMIS, knew the withdrawn funds could only be the property of other Madoff customers, including the Plaintiff and the class members.

Defendants and BLMIS Backdated Purported Transactions to Create Fictitious Profits

54. That Picower, the other Defendants, and Madoff and BLMIS actively conspired to steal the funds of the Plaintiff and the class members is also evidenced by the fact that many purported trades in the Defendants' accounts were back dated. Picower purportedly "sold" positions on a fabricated earlier date to generate phony profits.

55. For example, as stated in the Trustee's Complaint, on or about April 24, 2006, Decisions Incorporated opened a new account with BLMIS known as the "Decisions Incorporated 6" ("Decisions 6") account by a wire transfer on April 18, 2006 of $125 million.

56. Picower instructed BLMIS to backdate trades in this account to January 2006, which was before the Decisions 6 account was even opened.

57. As a result of the fabrication/backdating of trades, the purported net value of securities in the Decisions 6 account by the end of April 2006 had increased by almost $40 million, for a return of 30% in less than two weeks of "purported trading".

58. Picower's scheme to backdate trades in Decisions 6 was designed to generate phony paper profits in the account by picking stocks which had appreciated on a "hindsight basis," and represented part of a continuous pattern of false generation of profits which enabled Picower and the Defendants to pilfer other BLMIS customer accounts for actual cash based upon

phony booked profits.

59. As demonstrated in the Trustee's Complaint, BLMIS records indicate that Picower, Freilich and Madoff employees discussed and clearly understood that the trades in the various Defendants' accounts were being backdated for the purpose of generating phony profits.

60. For example, according to the Trustee's Complaint, on May 18, 2007, Freilich indicated that the Foundation needed "$20 mil in gains" for January and February and "want[ed] 18% for year[] 07 appreciation," but that she had to check the numbers "with Jeff." Upon information and belief, "Jeff" is Picower. Five days later on May 23, 2007, and presumably after consulting with Picower, Freilich told BLMIS that the numbers she provided earlier were wrong, and the Foundation "needs only $12.3 mil [in gains] for" January and February 2007.

61. Also, on or about December 22, 2005, Picower and/or Freilich faxed a letter to BLMIS that was signed by Picower, bearing an earlier date of December 1, 2005. This letter directed the sale of specific positions in four of Defendants' accounts. However, the actual underlying transactions could not have taken place in early December, 2005, as the positions sold remained in the Picower account through late December of 2005.

62. On or around December 29, 2005, Freilich, acting on Picower's behalf, faxed BLMIS a letter signed by Picower, that directed BLMIS to realize a gain of $50 million. Upon instruction from Picower and/or Freilich, BLMIS "sold" large amounts of Agilent Technologies and Intel Corporation stock in various Defendant accounts on a backdated basis. Freilich directed the sale of large amounts of these purported securities on or about December 29, 2005, requesting that the sales be booked to take place on an earlier date, *i.e.*, December 8th or 9th. These trades were backdated by Picower and BLMIS for the purpose of generating phony "paper" profits of approximately $46.3 million, making up most of Picower's requested $50

million gain.

63. Also according to the Trustee, Picower and BLMIS backdated other purported securities transactions during December 2005, including purported purchases on margin of Google, Diamond Offshore Drilling, Inc., and Burlington Resources, Inc. across several of Defendants' accounts, which resulted in a purported gain for Picower of almost $80 million. These purchases purportedly occurred between January 12 and 20, 2005, but they were entirely fictitious, as the transactions were first reflected 11 months later in Defendants' December 2005 BLMIS account statements.

64. Defendants and Madoff and BLMIS were aware of the false nature of these transactions and their purpose, which was to generate fictitious profits for Picower and allow him to withdraw cash which came from other BLMIS customer accounts, including those of the Plaintiff and the class members.

The Picower Foundation Account Reveals Fabricated Securities Transactions

65. The publicly available Form 990 Income Tax Returns for the Picower Foundation demonstrate that Picower and BLMIS were engaged in fraudulent and/ or anomalous trading for the purpose of generating false profits in the Picower Foundation account, enabling Picower to withdraw fictitious profits from this and the other Defendant accounts controlled by Picower. These cash withdrawals were effected by taking cash from other customer accounts of BLMIS.

66. For example, the Picower Foundation's 2007 income tax return reflects a holding of 328,830 shares of Oracle Corporation stock that was purportedly purchased on December 3, 2001. No such holdings are disclosed in the Picower Foundation's tax return filings for 2001 through 2005. In fact, the securities were never actually purchased according to Picower's own documentation, but simply fictitiously added to the account in the 2007 return. This had the

effect of increasing the Picower Foundation's portfolio value by $7.5 million.

67. The Picower Foundation's 2005 tax return reflects suspicious and inexplicably large portfolio gains in absolute and relevant terms based upon a small number of stocks. During 2005, the Picower Foundation did not sell any securities in its portfolio and made only four purchases. Nevertheless the portfolio purportedly grew significantly from the gains posted in less than six months in connection with the purchases of Amazon, Apple, Burlington, and Google, amounting to $141.3 million in the aggregate during this period. All four purchases were purportedly made on the same date, July 14, 2005. The unrealized annualized gain from these purchases was almost 100%, which is inordinately and unrealistically high in relation to the annual gain on the S&P 500 Index during this annual period, which was only 5%. These trades were likely backdated, consistent with the Defendants' and BLMIS's pattern of backdating trades to generate fictitious profits.

68. The Picower Foundation's 2004 tax return reflects Picower Foundation portfolio holdings in Eagle Materials Inc. of 12,853 common shares and 43,215 class B shares that were purportedly purchased November 28, 2001. But no such holdings are disclosed in the Picower Foundation's tax returns for 2001 through 2003. The mysterious appearance on the 2004 return had the effect of increasing the value of the Picower Foundation portfolio by almost $5 million.

69. The Picower Foundation's 2003 return reflects a holding in Cavco Industries, Inc. of 14,500 shares that were purportedly purchased November 28, 2001, which was the same date as the purported purchase of the Eagle Materials shares noted above. However, no such holding was disclosed in the 2001 or 2002 tax returns for the Foundation. This fictitious holding had the effect of increasing the value of the Picower portfolio.

70. The Picower Foundation's 2002 return reflects a holding in Carmax of 170,436

shares that were purportedly purchased on the same date, November 28, 2001, as were the undocumented Cavco and Eagle Materials purchases described above. But no such holding is disclosed in the 2001 or 2002 Picower Foundation returns. This phony transaction had the effect of increasing the value of the Picower portfolio by $3 million.

71. The Picower Foundation's 2000 return reflects incredibly large portfolio gains in absolute and relative terms, demonstrating backdated trading. During 2000, the Picower Foundation realized a gain on the purported sale of securities of $286.8 million on a book value of only $20.1 million, representing a staggering total return of 1,426.9%. The securities sold were purportedly held for a six year period on average. Thus, this return is equal to a compound annual average return of almost 56%, which vastly exceeds the annualized return for any other un-leveraged stock transaction by any other known market participant. This rate of return also is demonstrably false and contrasts sharply and unrealistically with the compound average annual return of the S&P 500 Index during this period of only approximately 15%.

72. The factual allegations set forth above demonstrate a consistent pattern of fraudulent activity, the result of which was that the Defendants' accounts generated tremendous apparent but false profits, which Defendants then withdrew from their BLMIS accounts with the consent of Madoff and BLMIS. In many instances, BLMIS, Picower and the Defendants simply manufactured positions in their respective accounts for the purpose of allowing Picower to "sell" the manufactured positions and withdraw cash based upon a phony sale.

73. As a result of the foregoing conduct, Defendants participated in and profited from the fraud on other BLMIS customers, and the Defendants converted the cash (there were no securities) of other BLMIS account holders to pay themselves these fictitious profits.

CLASS ACTION ALLEGATIONS

74. Plaintiff brings this action as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The definition of the Plaintiff class in this action is: all persons or entities who have maintained customer accounts with BLMIS who are not SIPA Payees and who have not received the net account value scheduled in their BLMIS accounts as of the day before the commencement of the SIPA Liquidation (the "Class"). The Class excluded the Defendants herein. Every class member has been barred by the Trustee from recovering in the SIPA Liquidation the amounts sought in this Complaint.

75. The Class meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

a. *Numerosity*. The Class consists of at least several thousand BLMIS account holders who are not SIPA Payees, as defined in paragraphs 3 and 74 above. The exact number of class members is currently unknown to the Plaintiff, and can only be ascertained through appropriate discovery. This number, which includes class members throughout the United States, is so numerous that joinder of all members of the Class is impracticable.

b. *Commonality*. There are questions of law and fact which are common to the representative party and each member of the Class including: (i) whether, and to what extent the Defendants participated in the Madoff Ponzi scheme and conspired with BLMIS and Madoff; (ii) whether Defendants converted the funds of other BLMIS account holders; (iii) the extent to which Defendants were unjustly enriched as a result of their participation in the Ponzi scheme; (iv) whether the Defendants violated the Florida Civil Remedies for Criminal

Practices Act Chapter 772, Florida Statutes, ("Florida RICO") by acting in concert with BLMIS to convert the cash of the members of the class; (v) whether Plaintiff and the class members have sustained damages as a result of Defendants' conduct, and the proper measure of such damages; (vi) whether Plaintiff and the class members are entitled to an award of punitive damages or other exemplary damages against Defendants.

c. *Typicality*. Plaintiff's claim is typical of each of those of the class members. Plaintiff maintained a BLMIS account, is not a SIPA Payee, and has suffered the same type of injury as did other members of the class.

d. *Adequacy*: Plaintiff will fairly and adequately represent and protect the interest of the Class and has no interest antagonistic to those of the other class members. Plaintiff has retained experienced counsel competent in litigation involving the claims at issue and in class litigation.

76. This class also meets the requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure. The common issues outlined herein predominate over any individual issues in this case. A class action is superior to all other available means for the fair and efficient adjudication of this controversy because: (1) it is economically impracticable for class members to prosecute individual actions against Defendants; (2) Plaintiff is aware of no other litigation concerning the non-SIPA Payees against Defendants; (3) it is desirable to concentrate these claims against Defendants in a single forum so as to avoid varying and disparate results; and (4) there is no difficulty likely to be encountered in the management of this case as a class action.

COUNT I
CIVIL CONSPIRACY

77. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth

herein.

78. Madoff has pled guilty to an eleven-count criminal information and admitted that he operated a fraudulent Ponzi scheme through BLMIS.

79. Defendants, on the one hand, agreed with Madoff and BLMIS, on the other hand, to unlawfully divert and convert the cash of other innocent BLMIS account holders, including Plaintiff and the class members, for the benefit of the Defendants and Madoff and BLMIS.

80. Defendants engaged in overt acts in furtherance of the conspiracy as set forth in above, which included: (a) participating in and directing the preparation of false documentation; (b) recording fictional profits in their respective BLMIS accounts; and (c) withdrawing such fictional profits knowing that they were the funds of other BLMIS account holders.

81. Defendants committed additional overt acts in pursuance of the conspiracy by concealing the true state of affairs from the IRS, securities regulators and other customers of BLMIS, by, *inter alia*, filing false statements in connection with their tax returns that purported to show trading in Defendants' accounts which in fact did not occur.

82. As a result of Defendants' conduct, Plaintiff and the Class have suffered financial injury and damages, which include, but are not limited to, lost investment income and returns on their bona fide cash investments at BLMIS, tax payments made in connection with reported but non-existent trading profits, and exposure for monetary losses in connection with the Trustee's clawback efforts.

WHEREFORE, Plaintiff requests judgment in her favor against Defendants for compensatory damages, prejudgment interest, punitive damages, and such other and further relief as is just and proper.

COUNT II
CONVERSION

83. Plaintiff re-asserts the allegations contained in paragraphs 1 through 76 above as if fully set forth herein.

84. Plaintiff and the class members were in possession of valuable property, including the cash in their BLMIS accounts.

85. Defendants, through improper means, have obtained the use of the property of the Plaintiff and the class members, and have wrongfully deprived the Plaintiff and the class members of the right to possess, and of the use of, their property for a permanent or indefinite term.

86. Plaintiff and the class members have suffered damages as a result of Defendants' conduct, including, but not limited to, lost investment income and returns on their bona fide cash investments at BLMIS, tax payments made in connection with reported but non-existent trading profits, and exposure for monetary losses in connection with the Trustee's clawback efforts.

87. Defendants had the specific intent to harm the Plaintiff and the class members.

WHEREFORE, Plaintiff requests judgment in their favor against Defendants for compensatory damages, prejudgment interest, punitive damages, and such other and further relief as is just and proper.

COUNT III
UNJUST ENRICHMENT

88. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth herein.

89. Defendants have benefited from their unlawful acts and conspiracy through the overpayment of proceeds from securities purportedly purchased and sold in their BLMIS

accounts.

90. Defendants improperly received funds from Plaintiff and the class members as a result of the deliberate misstatement of their BLMIS account holdings and the false profits generated in such accounts.

91. It would be inequitable for Defendants to be permitted to retain the benefit of their wrongful conduct.

92. The Plaintiff and the class members are entitled to the establishment of a constructive trust consisting of the ill gotten gains received by Defendants, to be disgorged or otherwise paid to the class members.

WHEREFORE, Plaintiff requests judgment in her favor and against each Defendant for disgorgement/restitution, punitive damages, and such other and further relief as is just and proper.

COUNT IV
CONSPIRACY TO VIOLATE THE FLORIDA CIVIL REMEDIES
FOR CRIMINAL PRACTICES ACT (FLORIDA RICO)

93. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth herein.

Underlying BLMIS Enterprise

94. Plaintiff and the class members are "persons" within the meaning of § 772.104, Florida Statutes. Madoff, BLMIS and Defendants are "persons" with the meaning of § 772.103, Florida Statutes.

95. Under § 772.102(3), Florida Statutes, an "enterprise" is defined as "any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of the state, or any other legal entity or any unchartered union, association, or group of

individuals associated in fact although not a legal entity; and the term includes illicit as well as licit enterprises . . . ." BLMIS constituted such an enterprise.

96. Madoff, with criminal intent, operated the enterprise through a pattern of criminal activity though the enterprise as defined by § 772.103(1) and 772.103(2), Florida Statutes, and he has participated in the conduct of, or is otherwise in control of, and operated the enterprise by participating in and documenting phony, profitable transactions in Defendants' BLMIS accounts.

97. The enterprise has an ascertainable structure and hierarchy that set it apart from the mere commission of the predicate acts (specified below), and that form a pattern of racketeering activity in which Madoff actively engaged.

Predicate Act of Underlying RICO Violation

98. Section 772.102(a)22, Florida Statutes, specifies that "criminal activity" includes any act indictable under Chapter 817 of the Florida Criminal Code (relating to fraudulent practices, false pretenses, and fraud generally).

99. Section 772.1029(b), Florida Statutes, specifies that "criminal activity" includes any conduct subject to indictment or information listed in the federal RICO statute, 18 U.S.C. § 1961(1), which includes Title 18 section 1341 (relating to mail fraud) and section 1343 (relating to wire fraud).

100. Madoff has admitted to criminal activity demonstrating a systematic ongoing course of criminal conduct with the intent to defraud the BLMIS customers, including the Plaintiff and the class members, based on the following predicate acts: (a) a scheme to defraud and obtain property with the intent to obtain property by false or fraudulent pretenses, representations or promises as well as by unlawful misrepresentations in violation of § 817.034(4), Florida Statutes; (b) federal mail fraud; (c) federal wire fraud.

Pattern of Racketeering Activity

101. As set out above, Madoff has engaged in a "pattern of criminal activity" as defined under § 772.102(4), Florida Statutes, by committing at least two acts of criminal activity indictable as violations of Chapter 817, Florida Statues, and mail and wire fraud within the past five years.

102. Each predicate act was related and had as its purpose the criminal diversion of funds from customer accounts at BLMIS in connection with a conspiracy being conducted by BLMIS and Madoff.

103. This conduct did not arise out of single contract or transaction, but was a pervasive scheme that injured class members over many years. Each predicate act was related, had a similar purpose, involved the same or similar participants and method of commission, had similar results, and impacted the class member victims in a similar fashion.

104. The predicate acts specified above which Madoff committed, and which Defendants conspired to commit, were related to each other in furtherance of the scheme implemented by the enterprise. These acts were committed over a long period of time from at least 1995 through December 2008.

Defendants' Conspiracy to Commit RICO Violations

105. "Criminal activity" includes not only direct commissions of predicate acts, but also conspiracies and solicitations to commit predicate acts under § 772.102(1), Florida Statutes.

106. At all relevant times, Defendants agreed and conspired to participate, directly and indirectly, in the scheme described above through a pattern of racketeering activity in violation of § 772.103(4).

107. At all times the Defendants knew that BLMIS and Madoff were conspiring with

them with the objective of diverting and converting money from other BLMIS customer accounts for the benefit of Defendants.

108. The Defendants knew that BLMIS and Madoff were engaged in the misrepresentations and omissions and fraudulent conduct described in Exhibits B and C hereto, rendering Defendants liable for conspiracy to commit the criminal acts set forth therein.

109. Defendants conspired to commit violations of § 772.103, Florida Statutes, as alleged in paragraphs 49 through 73 above.

110. The Defendants committed and/or caused to be committed a series of overt acts in furtherance of the conspiracy alleged herein to effect the objectives of the scheme described above, including the acts alleged in paragraphs 54 through 73.

111. By directly instructing Madoff and BLMIS employees to book such phony transactions which generated phony profits, the Defendants controlled and enabled the fraud to convert the funds of other innocent BLMIS account holders.

112. Plaintiff and the class members, have been injured as a result of Defendants' Florida RICO violation, which injury includes the loss of investment profits and returns on their bona fide cash investment at BLMIS, tax payments made in connection with reported but non-existent trading profits, and exposure for monetary losses in connection with the Trustee's clawback efforts.

WHEREFORE, Plaintiff and the class members request entry of judgment in their favor and against Defendants jointly and severally for compensatory damages, as tripled pursuant to § 772.104(1), Florida Statutes, as well as the attorneys fees and court costs authorized under § 772.104(1), Florida Statutes, and such further relief as this court deems just and proper.

CLAIM FOR PUNITIVE DAMAGES

113. Defendants had actual knowledge of the wrongfulness of their conduct and the high probability of injury and damage to the Class. Defendants disregarded that knowledge intentionally and recklessly in pursuing their wrongful, deceitful, deceptive and illegal conduct.

114. As a direct and proximate result of Defendants' fraudulent, willful and reckless misconduct, the Plaintiff asserts a claim for punitive damages for each cause of action herein for which such damages are allowable under Florida law, in an amount to be determined by a jury.

CLAIM FOR RELIEF

Plaintiff seeks the following relief from this Court: (a) a judgment in the favor of plaintiffs in the class against Defendants on the claims specified in this Complaint; (b) an award of compensatory damages; (c) triple the amount of actual damages incurred for those claims which tripling of damages is authorized; (d) an equitable accounting and imposition of constructive trust on Defendants assets; (e) disgorgement of Defendants' ill gotten gains or restitution of the payments and property received by Defendants; (f) attorneys fees pursuant to § 772.104(1), Florida Statutes, (g) punitive damages for those claims where such damages are authorized; (h) prejudgment interest; (i) fees, court costs and expenses of this litigation; (j) all other relief that the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

DATED: this 15th day of March, 2010, by:

BEASLEY HAUSER KRAMER
LEONARD & GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Telephone: (561) 835-0900
Facsimile: (561) 835-0939
galardi@beasleylaw.net
Attorneys for Plaintiff and the Class

By: s/ Joseph G. Galardi
James W. Beasley, Jr.
Florida Bar No. 145750
Joseph G. Galardi
Florida Bar No. 180572

-and-

Lesley Blackner, Esquire
Florida Bar No. 654043
BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, FL 33480
(561)659-5754
(561)659-3184 (fax)
lblackner@aol.com
Co-counsel for Plaintiff and the Class

Helen Davis Chaitman
New York Bar No. 1236678
BECKER & POLIAKOFF
45 Broadway 11th Floor
New York, NY 10006
(212) 599-3322
(212) 557-0295 (fax)
Co-counsel for Plaintiff and the Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Joseph G. Galardi
Joseph G. Galardi

SERVICE LIST

Via overnight deliver:
William D. Zabel, Esq.
Schulte Roth & Zabel, LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 756-2351
Facsimile: (212) 593.5955
william.zabel@srz.com
Attorney for All Defendants

EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. **10-80254-CIV-Hurley/Hopkins**

SUSANNE STONE MARSHALL, individually and on behalf of a class of similarly situated,

Plaintiffs,

v.

JEFFRY M. PICOWER ESTATE, through its Executor, William D. Zabel;
BARBARA PICOWER, individually and as Trustee for the Picower Foundation and for the Trust f/b/o Gabriel H. Picower;
CAPITAL GROWTH COMPANY;
DECISIONS, INC.;
FAVORITE FUNDS;
JA PRIMARY LIMITED PARTNERSHIP;
JA SPECIAL LIMITED PARTNERSHIP;
JAB PARTNERSHIP;
JEMW PARTNERSHIP;
JF PARTNERSHIP;
JFM INVESTMENT COMPANIES;
JLN PARTNERSHIP;
JMP LIMITED PARTNERSHIP;
JEFFRY M. PICOWER SPECIAL COMPANY;
JEFFRY M. PICOWER, P.C.;
THE PICOWER FOUNDATION;
THE PICOWER INSTITUTE OF MEDICAL RESEARCH;
THE TRUST F/B/O GABRIELLE H. PICOWER.
_____/

COMPLAINT—CLASS ACTION

Jury Trial Demanded

Plaintiff Susanne Stone Marshall, through her undersigned attorneys, on her own behalf and on behalf of a similarly situated class of plaintiffs, hereby sues the Defendants. Upon knowledge, information and belief, and based upon investigation of counsel (including, *inter alia*, review of news accounts, account statements, publicly available documents, and court papers), Plaintiff alleges as follows:

BACKGROUND AND SUMMARY OF CLAIMS

1. This action arises from Defendants' participation in the now admitted massive Ponzi scheme that occurred under the direction of Bernard L. Madoff ("Madoff") and through Madoff's registered securities firm, Bernard L. Madoff Investment Securities Corporation LLC ("BLMIS"). Defendants were, as a group, the largest beneficiaries of the Ponzi scheme, converting and receiving billions of dollars from the accounts of innocent Madoff and BLMIS customers.

2. BLMIS is currently insolvent and is being liquidated by Irving H. Picard, Esq. (the "Trustee") as Trustee for the liquidation of the business of BLMIS, under the Securities Investor Protection Act, 15 U.S.C. § 78aaa, *et seq.* ("SIPA"), in the bankruptcy proceedings styled *In re: Bernard L. Madoff Investments Securities LLC*, Case No. 08-01789 (BRL), pending in the United States Bankruptcy Court, Southern District of New York (the "SIPA Liquidation").

3. The Trustee has commenced an adversary proceeding against the Picowers and their related entities named herein in the SIPA Liquidation (Adv. Pro. No. 09-1197) (the "Trustee's Complaint"). A copy of the Trustee's Complaint is attached as **Exhibit "A"**. The Trustee seeks damages only on behalf of BLMIS customers who have filed recognized claims for recognized amounts in the SIPA Liquidation proceeding ("SIPA Payees"). The Trustee does not have standing to bring claims on behalf of parties other than SIPA Payees. Of the 4,903 SIPA claims, the Trustee has allowed only 2,568 such claims.

4. The Plaintiff and class members are BLMIS account holders who had their SIPA claims disallowed in whole or in part or who have not filed SIPA claims with the Trustee, all of whom have independent claims against Defendants for, *inter alia*, conspiracy, unjust enrichment, conversion and violations of the Florida RICO statute that are separate and distinct from those

asserted by the Trustee, and that have not been, and cannot be, asserted by the Trustee.

5. Jeffry M. Picower ("Picower") knew, and the other Defendants knew or should have known, that they were participating in and profiting from Madoff's fraudulent scheme because of the absurdly high rates of return that their accounts supposedly, but could not have legitimately, achieved. These rates of return sometimes exceeded 100% annually, and were even as high as 950% per year. (Picower shall hereinafter be included in references to "Defendants").

6. Defendants knew that their rates of return were dramatically higher than those that BLMIS reported to its "ordinary investors." Defendants, and Picower specifically, were among a small group of Madoff investors with direct access to BLMIS's trading records. Defendants knew that their extra-ordinary returns were illegitimate and that BLMIS was running an illegitimate investment operation; Defendants could not have believed otherwise.

7. In fact, relevant documents and information show that Picower and the Defendants directed BLMIS to prepare account statements for the Defendants reflecting not actual trading results but the rates of return Picower "wanted to achieve". BLMIS complied with these directions, and the vast majority of the purported "profits" in the Defendants' accounts were not a result of the actual purchase and sale of securities.

8. The Defendants' account records reflect, and Defendants were aware of, or should have been of, the fact that Madoff and BLMIS booked in their accounts fictional profits from fictional trading. Upon information and belief, no purchases or sales of securities in the Defendants' BLMIS accounts ever actually occurred. Upon information and belief, no purchases or sales of securities in the class members' BLMIS accounts ever actually occurred.

9. Picower, the other Defendants, and their agents directly participated in the Madoff Ponzi scheme, and knew or should have known that the funds used to pay the Defendants'

fictional profits could have only come from the accounts of other BLMIS customers. Picower and Defendants converted the cash in other innocent BLMIS customer accounts for their own personal benefit with the acquiescence and assistance of Madoff and BLMIS.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d)(2)(A) because: (1) the matter in controversy between the class members and Defendants exceeds $5,000,000 exclusive of interest, attorneys' fees, and costs, and (2) many of the class members are citizens of a State other than the States of citizenship of the Defendants. The actions complained of herein are violations of Florida's RICO statute and took place in part in Palm Beach County, Florida. Personal jurisdiction also exists under Florida's long arm statute.

11. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 1391, because a substantial part of the events comprising Defendants' wrongful conduct giving rise to the claims alleged herein occurred in the Southern District of Florida. At the time of his death, Picower and his wife were residents of Palm Beach County, Florida, and his related-entity Defendants transact business in Palm Beach County, Florida. The main Defendants maintained their primary offices or residences in this district. Defendants have directly and indirectly made use of the means and instrumentalities of interstate commerce, or of the mails and wires, in connection with the transactions, acts, practices and courses of business alleged herein.

THE PARTIES

12. Plaintiff Susanne Stone Marshall is a citizen and resident of St. Augustine, Florida. The Trustee limited Marshall's claim in the SIPA Liquidation to $30,000. However, this is not the full amount of her loss, and the balance on Marshall's November 30, 2008 BLMIS account statement was approximately $205,000. Plaintiff brings this class action on behalf of

herself and a putative class of persons similarly situated for damages and other relief arising from the Defendants' wrongful conduct as described herein.

13. Jeffry M. Picower ("Picower") was a resident of Palm Beach, Florida, and Fairfield, Connecticut, prior to and at the time of his death on October 25, 2009. Picower was a highly sophisticated investor, accountant and attorney who participated in the Madoff Ponzi scheme for over 20 years, knowing that he was participating in a fraud. Picower had vast experience in the purchase and sale of businesses, including health care and technology companies. He had also been personally responsible for managing hundreds of millions, if not billions, of dollars of assets, and he had developed uncommon sophistication in trading securities and evaluating returns therefrom. Upon information and belief, Picower was closely associated with Madoff, both in business and socially, for the last 30 years. Picower held an individual BLMIS account in the name of "Jeffry M. Picower," with an account address of 1410 South Ocean Boulevard, Palm Beach, Florida. Picower was a trustee of the Picower Foundation, and Chairman of the Board of Defendant Decisions Incorporated.

14. Upon information and belief, Defendant William D. Zabel is the Executor of the Estate of Jeffry M. Picower, which is being probated in New York Surrogate's Court.

15. Defendant Barbara Picower is a person residing at 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Barbara Picower is Picower's surviving spouse. According to the Trustee, Barbara Picower holds an individual account at BLMIS in the name "Barbara Picower," with the account address of 1410 South Ocean Boulevard, Palm Beach, Florida 33480, and Barbara Picower is trustee for Defendant Trust f/b/o Gabrielle H. Picower, an officer and/or director of Defendant Decisions Incorporated, and trustee and Executive Director of the Picower Foundation.

16. Defendant Decisions Incorporated is a corporation organized under the laws of Delaware with a principal place of business at 950 Third Avenue, New York, New York 10022 and an alternate mailing address on its BLMIS account listed as 22 Saw Mill River Road, Hawthorne, New York, 10532. According to the Trustee, the Decisions Incorporated office in Hawthorne was merely a store-front office through which little or no business was conducted, and Decisions Incorporated is a general partner of Defendants Capital Growth Company, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, JMP Limited Partnership and Jeffry M. Picower Special Co.

17. Defendant Capital Growth Company purports to be a limited partnership with a mailing address for its BLMIS account listed at 22 Saw Mill River Road, Hawthorne, New York, 10532, care of Decisions Incorporated. According to the Trustee, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of Capital Growth Company, and Decisions Incorporated and Picower transact/transacted business through this entity.

18. Defendant JA Primary Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Defendant Decisions Incorporated and/or Picower serves/served as General Partner or Director of JA Primary Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this entity.

19. Defendant JA Special Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York, New York 10594. According to the Trustee, Defendant Decisions Incorporated

and/or Picower serve/served as General Partner or Director of JA Special Limited Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

20. According to the Trustee, Defendant JAB Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JAB Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

21. According to the Trustee, Defendant JEMW Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JEMW Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

22. According to the Trustee, Defendant JF Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JF Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

23. According to the Trustee, Defendant JFM Investment Company is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and JFM Investment Company is a Limited Partner of Capital Growth Company,

and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JFM Investment Company.

24. According to the Trustee, Defendant JLN Partnership is a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JLN Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

25. Defendant JMP Limited Partnership is a limited partnership organized under the laws of Delaware, with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Decisions Incorporated and/or Picower serve/served as General Partner or Director of JMP Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

26. According to the Trustee, Defendant Jeffry M. Picower Special Co. is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower Special Co.

27. According to the Trustee, Defendant Favorite Funds is an entity through which Picower transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Favorite Funds.

28. According to the Trustee, Defendant Jeffry M. Picower P.C. purports to be a limited partnership with a listed mailing address at 25 Virginia Lane, Thornwood, New York,

New York 10594, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower P.C., and Decisions Incorporated, and/or Picower transact/transacted business through this defendant entity.

29. Defendant Picower Foundation is a trust organized for charitable purposes with Picower listed as donor, and Picower and Barbara Picower, among others, listed as Trustees during the relevant time period. Picower Foundation's addresses are reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 9 West 57th Street, Suite 3800, New York, New York 10019.

30. According to the Trustee, Defendant Picower Institute for Medical Research is a nonprofit entity organized under the laws of New York, with a principal place of business at 350 Community Drive, Manhasset, New York 11030.

31. According to the Trustee, Defendant Trust f/b/o Gabrielle H. Picower is a trust established for beneficiary Gabrielle H. Picower, who is the daughter of Picower and Barbara Picower, with Defendant Barbara Picower listed as trustee, and the trust's BLMIS account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

32. On information and belief, the Defendants listed in paragraphs 16 through 30 (collectively the "Picower Entity Defendants") were dominated, controlled and used as a mere instrumentality of Picower to advance his interests in, and to participate in, the Madoff Ponzi scheme. Thus, the Picower Entity Defendants are the alter egos of Picower and of each other.

THE MADOFF PONZI SCHEME AND DEFENDANTS' PARTICIPATION IN THE FRAUD

33. Shortly before his December 11, 2008 arrest, Madoff confessed that he had been conducting a Ponzi scheme through BLMIS for many years, and he estimated BLMIS' liabilities to be approximately $50 billion.

34. On March 10, 2009, the federal government filed an eleven-count information against Madoff in the criminal case styled *U.S. v. Madoff*, CV-No 09-CR-213 (S.D.N.Y), which is attached as "**Exhibit B**" hereto.

35. At a plea hearing on March 12, 2009 in Madoff pled guilty to the eleven-count criminal information and admitted under oath that he "operated a Ponzi scheme through. . . [BLMIS]." Madoff also admitted that "[a]s I engaged in my fraud, I knew what I was doing (was) wrong, indeed criminal." *See* **Exhibit "C"** hereto.

36. Madoff also admitted that, during the relevant time period, he never actually invested any of the funds he received from BLMIS customers, instead depositing the funds into a bank account. Madoff never actually purchased and sold securities in BLMIS customer accounts, instead using client funds simply to pay other, different, clients' purported returns and redemption of principal.

37. According to the Trustee, as of December 11, 2008, BLMIS had 4,903 accounts with a purported stated value of $64.8 billion as of November 30, 2008.

38. According to the Trustee, BLMIS made payments and other transfers to the Defendants totaling over $7.2 billion more than Defendants deposited, including $6.7 billion from 1995 to 2008. A schedule of theses transfers, which are attached as Exhibit B to the Trustee's Complaint, are attached separately as **Exhibit "D"** hereto.

39. Picower, Barbara Picower, and each of the Picower Entity Defendants knowingly and actively participated in the Madoff/BLMIS scheme, and they at all relevant times had actual knowledge or recklessly and consciously avoided the fact that the holdings and profits reported in their BLMIS accounts were false and not a result of legitimate or actual purchases and sales of securities.

40. Defendants knew, recklessly and consciously avoided, or should have known that the annual returns in their BLMIS accounts were fabricated, as were the underlying securities transactions which purportedly generated these returns.

41. The Trustee's Complaint describes the Defendants' outright theft of cash through BLMIS, which cash Defendants knew could have only belonged to other innocent Madoff and BLMIS customers.

42. Picower and the other Defendants could not have been unaware of the fact that they were profiting from fraudulent transactions. Picower purported to follow a "buy and hold" strategy in Defendants' BLMIS accounts, whereby they "bought" stock (typically large cap stock) at its annual low trading prices, and then purportedly sold the stock to generate profits.

43. The Defendants' "buy and hold strategy" purportedly generated extraordinary and implausibly high annual rates of return. For example, two of the BLMIS accounts controlled by Picower generated annual rates of return of over 100% for four consecutive years from 1996 through 1999. According to the Trustee: "Between 1996 and 2007 defendants 24 regular trading accounts enjoyed 14 instances of supposed annual returns of more than 100%. . . ." During this time period the annual rates of return for certain of Defendants' accounts ranged from 120% to over 550%. Other Defendant accounts had documented earnings of almost 1000%.

44. Defendants could not have believed that Madoff "beat the market" by such vast amounts on an annualized basis through legitimate "buy and hold" trading. The documentation and trading records available show that Picower and the other Defendants did not participate in the "options trading" strategy that comprised the core of Madoff's money management business. Madoff and BLMIS had no professed or actual expertise or ability to select appropriate large cap stocks for Picower and the other Defendant accounts. Madoff, with a small staff who had no

particularized experience in "buy and hold" trading, never held himself out as a "stock picker."

45. On the contrary, Picower and the other Defendants knew [recklessly/consciously avoided] that the extra-ordinary returns being generated in their BLMIS accounts were far in excess of what can be achieved by legitimate "buy and hold" trading, or by any other legitimate strategy.

46. Other trading in Defendants' accounts was obviously fabricated. For example, as stated in the Trustee's Complaint, in 2000 several of the Defendants' trading accounts reported negative annual rates of return from negative 74% to negative 779%.

47. Defendants knew or should have known that the account documents and statements that reflected fictitious trades and returns were patently false.

48. In fact, upon information and belief, Picower and the other Defendants, with the assistance of Picower's associate April C. Freilich ("Freilich"),[1] directed fictitious and backdated trades, with the consent of Madoff, BLMIS and their agents, to manufacture profits and losses in accordance with an overall fraudulent trading strategy developed by Picower.

The Decisions Incorporated Account

49. The several BLMIS accounts of Defendant Decisions Incorporated, which was controlled by Picower, provide concrete examples of the obviously fictitious profits Defendants received as a result of their participation in the Ponzi scheme.

50. These accounts were a primary source of Defendants' cash withdrawals from BLMIS during the relevant time period, yet the accounts reflected virtually no trading activity and very few purported securities positions.

[1] Freilich is an officer and/or director of Decisions Incorporated and a limited partner of Defendants Capital Growth Company, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, and JLN Partnership. Freilich is also a close personal friend and business associate of Picower's who carried out his directions in connection with Defendants' participation in the BLMIS scheme. Freilich was close enough to Picower to receive $10 million in his recently probated will.

51. Nevertheless, Picower and Freilich signed distribution requests and directed cash "withdrawals" from this account ranging from $50 million to $150 million five or more times per year from 1995 through 2007, for a total of $5,771,339,795.

52. Picower and Freilich directed the withdrawals from the Decisions Incorporated account even though the account maintained a large negative cash balance of more than $6 billion and there was not enough cash in the account to cover the withdrawals.

53. At the time of each withdrawal, Picower and the other Defendants, along with Madoff and BLMIS, knew the withdrawn funds could only be the property of other Madoff customers, including the Plaintiff and the class members.

Defendants and BLMIS Backdated Purported Transactions to Create Fictitious Profits

54. That Picower, the other Defendants, and Madoff and BLMIS actively conspired to steal the funds of the Plaintiff and the class members is also evidenced by the fact that many purported trades in the Defendants' accounts were back dated. Picower purportedly "sold" positions on a fabricated earlier date to generate phony profits.

55. For example, as stated in the Trustee's Complaint, on or about April 24, 2006, Decisions Incorporated opened a new account with BLMIS known as the "Decisions Incorporated 6" ("Decisions 6") account by a wire transfer on April 18, 2006 of $125 million.

56. Picower instructed BLMIS to backdate trades in this account to January 2006, which was before the Decisions 6 account was even opened.

57. As a result of the fabrication/backdating of trades, the purported net value of securities in the Decisions 6 account by the end of April 2006 had increased by almost $40 million, for a return of 30% in less than two weeks of "purported trading".

58. Picower's scheme to backdate trades in Decisions 6 was designed to generate

phony paper profits in the account by picking stocks which had appreciated on a "hindsight basis," and represented part of a continuous pattern of false generation of profits which enabled Picower and the Defendants to pilfer other BLMIS customer accounts for actual cash based upon phony booked profits.

59. As demonstrated in the Trustee's Complaint, BLMIS records indicate that Picower, Freilich and Madoff employees discussed and clearly understood that the trades in the various Defendants' accounts were being backdated for the purpose of generating phony profits.

60. For example, according to the Trustee's Complaint, on May 18, 2007, Freilich indicated that the Foundation needed "$20 mil in gains" for January and February and "want[ed] 18% for year[] 07 appreciation," but that she had to check the numbers "with Jeff." Upon information and belief, "Jeff" is Picower. Five days later on May 23, 2007, and presumably after consulting with Picower, Freilich told BLMIS that the numbers she provided earlier were wrong, and the Foundation "needs only $12.3 mil [in gains] for" January and February 2007.

61. Also, on or about December 22, 2005, Picower and/or Freilich faxed a letter to BLMIS that was signed by Picower, bearing an earlier date of December 1, 2005. This letter directed the sale of specific positions in four of Defendants' accounts. However, the actual underlying transactions could not have taken place in early December, 2005, as the positions sold remained in the Picower account through late December of 2005.

62. On or around December 29, 2005, Freilich, acting on Picower's behalf, faxed BLMIS a letter signed by Picower, that directed BLMIS to realize a gain of $50 million. Upon instruction from Picower and/or Freilich, BLMIS "sold" large amounts of Agilent Technologies and Intel Corporation stock in various Defendant accounts on a backdated basis. Freilich directed the sale of large amounts of these purported securities on or about December 29, 2005,

requesting that the sales be booked to take place on an earlier date, *i.e.*, December 8th or 9th. These trades were backdated by Picower and BLMIS for the purpose of generating phony "paper" profits of approximately $46.3 million, making up most of Picower's requested $50 million gain.

63. Also according to the Trustee, Picower and BLMIS backdated other purported securities transactions during December 2005, including purported purchases on margin of Google, Diamond Offshore Drilling, Inc., and Burlington Resources, Inc. across several of Defendants' accounts, which resulted in a purported gain for Picower of almost $80 million. These purchases purportedly occurred between January 12 and 20, 2005, but they were entirely fictitious, as the transactions were first reflected 11 months later in Defendants' December 2005 BLMIS account statements.

64. Defendants and Madoff and BLMIS were aware of the false nature of these transactions and their purpose, which was to generate fictitious profits for Picower and allow him to withdraw cash which came from other BLMIS customer accounts, including those of the Plaintiff and the class members.

The Picower Foundation Account Reveals Fabricated Securities Transactions

65. The publicly available Form 990 Income Tax Returns for the Picower Foundation demonstrate that Picower and BLMIS were engaged in fraudulent and/ or anomalous trading for the purpose of generating false profits in the Picower Foundation account, enabling Picower to withdraw fictitious profits from this and the other Defendant accounts controlled by Picower. These cash withdrawals were effected by taking cash from other customer accounts of BLMIS.

66. For example, the Picower Foundation's 2007 income tax return reflects a holding of 328,830 shares of Oracle Corporation stock that was purportedly purchased on December 3,

2001. No such holdings are disclosed in the Picower Foundation's tax return filings for 2001 through 2005. In fact, the securities were never actually purchased according to Picower's own documentation, but simply fictitiously added to the account in the 2007 return. This had the effect of increasing the Picower Foundation's portfolio value by $7.5 million.

67. The Picower Foundation's 2005 tax return reflects suspicious and inexplicably large portfolio gains in absolute and relevant terms based upon a small number of stocks. During 2005, the Picower Foundation did not sell any securities in its portfolio and made only four purchases. Nevertheless the portfolio purportedly grew significantly from the gains posted in less than six months in connection with the purchases of Amazon, Apple, Burlington, and Google, amounting to $141.3 million in the aggregate during this period. All four purchases were purportedly made on the same date, July 14, 2005. The unrealized annualized gain from these purchases was almost 100%, which is inordinately and unrealistically high in relation to the annual gain on the S&P 500 Index during this annual period, which was only 5%. These trades were likely backdated, consistent with the Defendants' and BLMIS's pattern of backdating trades to generate fictitious profits.

68. The Picower Foundation's 2004 tax return reflects Picower Foundation portfolio holdings in Eagle Materials Inc. of 12,853 common shares and 43,215 class B shares that were purportedly purchased November 28, 2001. But no such holdings are disclosed in the Picower Foundation's tax returns for 2001 through 2003. The mysterious appearance on the 2004 return had the effect of increasing the value of the Picower Foundation portfolio by almost $5 million.

69. The Picower Foundation's 2003 return reflects a holding in Cavco Industries, Inc. of 14,500 shares that were purportedly purchased November 28, 2001, which was the same date as the purported purchase of the Eagle Materials shares noted above. However, no such holding

was disclosed in the 2001 or 2002 tax returns for the Foundation. This fictitious holding had the effect of increasing the value of the Picower portfolio.

70. The Picower Foundation's 2002 return reflects a holding in Carmax of 170,436 shares that were purportedly purchased on the same date, November 28, 2001, as were the undocumented Cavco and Eagle Materials purchases described above. But no such holding is disclosed in the 2001 or 2002 Picower Foundation returns. This phony transaction had the effect of increasing the value of the Picower portfolio by $3 million.

71. The Picower Foundation's 2000 return reflects incredibly large portfolio gains in absolute and relative terms demonstrating backdated trading. During 2000, the Picower Foundation realized a gain on the purported sale of securities of $286.8 million on a book value of only $20.1 million, representing a staggering total return of 1,426.9%. The securities sold were purportedly held for a six year period on average. Thus, this return is equal to a compound annual average return of almost 56%, which vastly exceeds the annualized return for any other un-leveraged stock transaction by any other known market participant. This rate of return also is demonstrably false and contrasts sharply and unrealistically with the compound average annual return of the S&P 500 Index during this period of only approximately 15%.

72. The factual allegations set forth above demonstrate a consistent pattern of fraudulent activity, the result of which was that the Defedants' accounts generated tremendous apparent but false profits, which Defendants then withdrew from their BLMIS accounts with the consent of Madoff and BLMIS. In many instances, BLMIS, Picower and the Defendants simply manufactured positions in their respective accounts for the purpose of allowing Picower to "sell" the manufactured positions and withdraw cash based upon a phony sale.

73. As a result of the foregoing conduct, Defendants participated in and profited from

the fraud on other BLMIS customers, and the Defendants converted the cash (there were no securities) of other BLMIS account holders to pay themselves these fictitious profits.

CLASS ACTION ALLEGATIONS

74. Plaintiff brings this action as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The definition of the Plaintiff class in this action is: all SIPA Payees, but only with respect to claims, or portions thereof, not assigned to the Trustee. (the "Class"). The Class does not included Defendants herein.

75. The class meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

a. *Numerosity*. The Class consists of at least several thousand BLMIS account holders who are members of the Class as defined in paragraph 74 above. The exact number of class members is currently unknown to the Plaintiff, and can only be ascertained through appropriate discovery. This number is so numerous that joinder of all members of the Class is impracticable. The members of the Class reside throughout the United States.

b. *Commonality*. There are questions of law and fact which are common to the representative party and each member of the class including: (i) whether, and to what extent the Defendants participated in the Madoff Ponzi scheme and conspired with BLMIS and Madoff; (ii) whether Defendants converted the funds of other BLMIS account holders; (iii) the extent to which Defendants were unjustly enriched as a result of their participation in the Ponzi scheme; (iv) whether the Defendants violated the Florida Civil Remedies for Criminal Practices Act Chapter 772, Florida Statutes, ("Florida RICO") by acting in

concert with BLMIS to convert the cash of the members of the class; (v) whether Plaintiff and the class members have sustained damages as a result of Defendants' conduct, and the proper measure of such damages; (vi) whether Plaintiff and the class members are entitled to an award of punitive damages or other exemplary damages against Defendants.

c. *Typicality*. Plaintiff's claims are typical of each of those of the class members. Plaintiff maintained a BLMIS account, and is a SIPA Payee who has not assigned her claim, or a portion of her claim, to the Trustee, thereby having suffered the same type of injury as did other class members.

d. *Adequacy*: Plaintiff will fairly and adequately represent and protect the interest of the Class and has no interest antagonistic to those of the other class members. Plaintiff has retained experienced counsel competent in litigation involving the claims at issue and in class litigation.

76. This class also meets the requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure. The common issues outlined herein predominate over any individual issues in this case. A class action is superior to all other available means for the fair and efficient adjudication of this controversy because: (1) it is economically impracticable for class members to prosecute individual actions against Defendants; (2) Plaintiff is aware of no other litigation seeking to recover on the claims asserted herein against Defendants; (3) it is desirable to concentrate these claims against Defendants in a single forum so as to avoid varying and disparate results; and (4) there is no difficulty likely to be encountered in the management of this case as a class action.

COUNT I
CIVIL CONSPIRACY

77. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth herein.

78. Madoff has pled guilty to an eleven-count criminal information and admitted that he operated a fraudulent Ponzi scheme through BLMIS.

79. Defendants, on the one hand, agreed with Madoff and BLMIS, on the other hand, to unlawfully divert and convert the cash of other innocent BLMIS account holders, including Plaintiff and the class members, for the benefit of the Defendants and Madoff and BLMIS.

80. Defendants engaged in overt acts in furtherance of the conspiracy as set forth above, which included: (a) participating in and directing the preparation of false documentation; (b) recording fictional profits in their respective BLMIS accounts; and (c) withdrawing such fictional profits knowing that they were the funds of other BLMIS account holders.

81. Defendants committed additional overt acts in pursuance of the conspiracy by concealing the true state of affairs from the IRS, securities regulators and other customers of BLMIS, by, *inter alia*, filing false statements in connection with their tax returns that purported to show trading in Defendants' accounts which in fact did not occur.

82. As a result of Defendants' conduct, Plaintiff and the Class have suffered financial injury and damages, which include, but are not limited to, lost investment principal, income and returns on their bona fide cash investments at BLMIS, and tax payments made in connection with reported but non-existent trading profits.

WHEREFORE, Plaintiff requests judgment in her favor against Defendants for compensatory damages, prejudgment interest, punitive damages, and such other and further relief as is just and proper.

COUNT II
CONVERSION

83. Plaintiff re-asserts the allegations contained in paragraphs 1 through 76 above as if fully set forth herein.

84. Plaintiff and the class members were in possession of valuable property, including the cash in their BLMIS accounts.

85. Defendants, through improper means, have obtained the use of the property of the Plaintiff and the class members, and have wrongfully deprived the Plaintiff and the class members of the right to possess, and the use of, their property for a permanent or indefinite term.

86. Plaintiff and the class members have suffered damages as a result of Defendants' conduct, which include, but not limited to, lost investment principal, income and returns on their bona fide cash investments at BLMIS, and tax payments made in connection with reported but non-existent trading profits.

87. Defendants had the specific intent to harm the Plaintiff and the class members.

WHEREFORE, Plaintiff requests judgment in their favor against Defendants for compensatory damages, prejudgment interest, punitive damages, and such other and further relief as is just and proper.

COUNT III
UNJUST ENRICHMENT

88. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth herein.

89. Defendants have benefited from their unlawful acts and conspiracy through the overpayment of proceeds from securities purportedly purchased and sold in their BLMIS accounts.

90. Defendants improperly received funds from Plaintiff and the class members as a result of the deliberate misstatement of their BLMIS account holdings and the false profits generated in such accounts.

91. It would be inequitable for Defendants to be permitted to retain the benefit of their wrongful conduct.

92. The Plaintiff and the class members are entitled to the establishment of a constructive trust consisting of the ill gotten gains received by Defendants, to be disgorged or otherwise paid to the class members.

WHEREFORE, Plaintiff requests judgment in her favor and against each Defendant for disgorgement/restitution, punitive damages, and such other and further relief as is just and proper.

COUNT IV
CONSPIRACY TO VIOLATE THE FLORIDA CIVIL REMEDIES FOR CRIMINAL PRACTICES ACT (FLORIDA RICO)

93. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth herein.

Underlying BLMIS Enterprise

94. Plaintiff and the class members are "persons" within the meaning of § 772.104, Florida Statutes. Madoff, BLMIS and Defendants are “persons" with the meaning of § 772.103, Florida Statutes.

95. Under § 772.102(3), Florida Statutes, an "enterprise" is defined as "any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of the state, or any other legal entity or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and the term includes illicit as well as

licit enterprises . . . ." BLMIS constituted such an enterprise.

96. Madoff, with criminal intent, operated the enterprise through a pattern of criminal activity though the enterprise as defined by § 772.103(1) and 772.103(2), Florida Statutes, and he has participated in the conduct of, or is otherwise in control of, and operated the enterprise by participating in and documenting phony, profitable transactions in Defendants' BLMIS accounts.

97. The enterprise has an ascertainable structure and hierarchy that set it apart from the mere commission of the predicate acts (specified below), and that form a pattern of racketeering activity in which Madoff actively engaged.

Predicate Act of Underlying RICO Violation

98. Section 772.102(a)22, Florida Statutes, specifies that "criminal activity" includes any act indictable under Chapter 817 of the Florida Criminal Code (relating to fraudulent practices, false pretenses, and fraud generally).

99. Section 772.1029(b), Florida Statutes, specifies that "criminal activity" includes any conduct subject to indictment or information listed in the federal RICO statute, 18 U.S.C. § 1961(1), which includes Title 18 section 1341 (relating to mail fraud) and section 1343 (relating to wire fraud).

100. Madoff has admitted to criminal activity demonstrating a systematic ongoing course of criminal conduct with the intent to defraud the BLMIS customers, including the Plaintiff and the class members, based on the following predicate acts: (a) a scheme to defraud and obtain property with the intent to obtain property by false or fraudulent pretenses, representations or promises as well as by unlawful misrepresentations in violation of § 817.034(4), Florida Statutes; (b) federal mail fraud; (c) federal wire fraud.

Pattern of Racketeering Activity

101. As set out above, Madoff has engaged in a "pattern of criminal activity" as defined under § 772.102(4), Florida Statutes, by committing at least two acts of criminal activity indictable as violations of Chapter 817, Florida Statues, and mail and wire fraud within the past five years.

102. Each predicate act was related and had as its purpose the criminal diversion of funds from customer accounts at BLMIS in connection with a conspiracy being conducted by BLMIS and Madoff.

103. This conduct did not arise out of single contract or transaction, but was a pervasive scheme that injured class members over many years. Each predicate act was related, had a similar purpose, involved the same or similar participants and method of commission, had similar results, and impacted the class member victims in a similar fashion.

104. The predicate acts specified above which Madoff committed, and which Defendants conspired to commit, were related to each other in furtherance of the scheme implemented by the enterprise. These acts were committed over a long period of time from at least 1995 through December 2008.

Defendants' Conspiracy to Commit RICO Violations

105. "Criminal activity" includes not only direct commissions of predicate acts, but also conspiracies and solicitations to commit predicate acts under § 772.102(1), Florida Statutes.

106. At all relevant times, Defendants agreed and conspired to participate, directly and indirectly, in the scheme described above through a pattern of racketeering activity in violation of § 772.103(4).

107. At all times the Defendants knew that BLMIS and Madoff were conspiring with

them with the objective of diverting and converting money from other BLMIS customer accounts for the benefit of Defendants.

108. The Defendants knew that BLMIS and Madoff were engaged in the misrepresentations and omissions and fraudulent conduct described in Exhibits B and C hereto, rendering Defendants liable for conspiracy to commit the criminal acts set forth therein.

109. Defendants conspired to commit violations of § 772.103, Florida Statutes, as alleged in paragraphs 49 through 73 above.

110. The Defendants committed and/or caused to be committed a series of overt acts in furtherance of the conspiracy alleged herein to effect the objectives of the scheme described above, including the acts alleged in paragraphs 54 through 73 above.

111. By directly instructing Madoff and BLMIS employees to book such phony transactions which generated phony profits, among other things, the Defendants controlled and enabled the fraud to convert the funds of other innocent BLMIS account holders.

112. Plaintiff, and the class members, have been injured as a result of Defendants' Florida RICO violation, which injury includes the loss of investment principal, profits and returns on their bona fide cash investment at BLMIS, and tax payments made in connection with reported but non-existent trading profits.

WHEREFORE, Plaintiff and the class members request entry of judgment in their favor and against Defendants jointly and severally for compensatory damages, as tripled pursuant to § 772.104(1), Florida Statutes, as well as the attorneys fees and court costs authorized under § 772.104(1), Florida Statutes, and such further relief as this court deems just and proper.

CLAIM FOR PUNITIVE DAMAGES

113. Defendants had actual knowledge of the wrongfulness of their conduct and the high probability of injury and damage to the class. Defendants disregarded that knowledge intentionally and recklessly in pursuing their wrongful, deceitful, deceptive and illegal conduct.

114. As a direct and proximate result of Defendants' fraudulent, willful and reckless misconduct, the Plaintiff asserts a claim for punitive damages for each cause of action herein for which such damages are allowable under Florida law, in an amount to be determined by a jury.

CLAIM FOR RELIEF

Plaintiff seeks the following relief from this Court: (a) a judgment in the favor of plaintiffs in the class against Defendants on the claims specified in this Complaint; (b) an award of compensatory damages; (c) triple the amount of actual damages incurred for those claims which tripling of damages is authorized; (d) an equitable accounting and imposition of constructive trust on Defendants assets; (e) disgorgement of Defendants' ill gotten gains or restitution of the payments and property received by Defendants; (f) attorneys fees pursuant to § 772.104(1), Florida Statutes, (g) punitive damages for those claims where such damages are authorized; (h) prejudgment interest; (i) fees, court costs and expenses of this litigation; (j) all other relief that the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

DATED: this 17th day of February, 2010, by:

BEASLEY HAUSER KRAMER
LEONARD & GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Telephone: (561) 835-0900
Facsimile: (561) 835-0939
galardi@beasleylaw.net
Attorneys for Plaintiff and the Class

By: _____
James W. Beasley, Jr.
Florida Bar No. 145750
Joseph G. Galardi
Florida Bar No. 180572

-and-

Lesley Blackner, Esquire
Florida Bar No. 654043
BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, FL 33480
(561)659-5754
(561)659-3184 (fax)
lblackner@aol.com
Co-counsel for Plaintiff and the Class

Helen Davis Chaitman
New York Bar No. 1236678
BECKER & POLIAKOFF
45 Broadway 11th Floor
New York, NY 10006
(212) 599-3322
(212) 557-0295 (fax)
Co-counsel for Plaintiff and the Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 10-80254-CV-Ryskamp/Vitunac

SUSANNE STONE MARSHALL, individually and on behalf of a class of similarly situated,

Plaintiffs,

v.

BARBARA PICOWER, individually, and as Executor of the Estate of Jeffry M. Picower, and as Trustee for the Picower Foundation and for the Trust f/b/o Gabriel H. Picower; CAPITAL GROWTH COMPANY; DECISIONS, INC.; FAVORITE FUNDS; JA PRIMARY LIMITED PARTNERSHIP; JA SPECIAL LIMITED PARTNERSHIP; JAB PARTNERSHIP; JEMW PARTNERSHIP; JF PARTNERSHIP; JFM INVESTMENT COMPANIES; JLN PARTNERSHIP; JMP LIMITED PARTNERSHIP; JEFFRY M. PICOWER SPECIAL COMPANY; JEFFRY M. PICOWER, P.C.; THE PICOWER FOUNDATION; THE PICOWER INSTITUTE OF MEDICAL RESEARCH; THE TRUST F/B/O GABRIELLE H. PICOWER.
_____/

AMENDED COMPLAINT—
CLASS ACTION
(To Correct Identity of Executor)

Jury Trial Demanded

Plaintiff Susanne Stone Marshall, through her undersigned attorneys, on her own behalf and on behalf of a similarly situated class of plaintiffs, hereby sues the Defendants. Upon knowledge, information and belief, and based upon investigation of counsel (including, *inter alia*, review of news accounts, account statements, publicly available documents, and court papers), Plaintiff alleges as follows:

BACKGROUND AND SUMMARY OF CLAIMS

1. This action arises from Defendants' participation in the now admitted massive Ponzi scheme that occurred under the direction of Bernard L. Madoff ("Madoff") and through Madoff's registered securities firm, Bernard L. Madoff Investment Securities Corporation LLC ("BLMIS"). Defendants were, as a group, the largest beneficiaries of the Ponzi scheme, converting and receiving billions of dollars from the accounts of innocent Madoff and BLMIS customers.

2. BLMIS is currently insolvent and is being liquidated by Irving H. Picard, Esq. (the "Trustee") as Trustee for the liquidation of the business of BLMIS, under the Securities Investor Protection Act, 15 U.S.C. § 78aaa, *et seq*. ("SIPA"), in the bankruptcy proceedings styled *In re: Bernard L. Madoff Investments Securities LLC*, Case No. 08-01789 (BRL), pending in the United States Bankruptcy Court, Southern District of New York (the "SIPA Liquidation").

3. The Trustee has commenced an adversary proceeding against the Picowers and their related entities named herein in the SIPA Liquidation (Adv. Pro. No. 09-1197) (the "Trustee's Complaint"). A copy of the Trustee's Complaint is attached as **Exhibit "A"**. The Trustee seeks damages only on behalf of BLMIS customers who have filed recognized claims for recognized amounts in the SIPA Liquidation proceeding ("SIPA Payees"). The Trustee does not have standing to bring claims on behalf of parties other than SIPA Payees. Of the 4,903 SIPA claims, the Trustee has allowed only 2,568 such claims.

4. The Plaintiff and class members are BLMIS account holders who had their SIPA claims disallowed in whole or in part or who have not filed SIPA claims with the Trustee, all of whom have independent claims against Defendants for, *inter alia*, conspiracy, unjust enrichment, conversion and violations of the Florida RICO statute that are separate and distinct from those

asserted by the Trustee, and that have not been, and cannot be, asserted by the Trustee.

5. Jeffry M. Picower ("Picower") knew, and the other Defendants knew or should have known, that they were participating in and profiting from Madoff's fraudulent scheme because of the absurdly high rates of return that their accounts supposedly, but could not have legitimately, achieved. These rates of return sometimes exceeded 100% annually, and were even as high as 950% per year. (Picower shall hereinafter be included in references to "Defendants").

6. Defendants knew that their rates of return were dramatically higher than those that BLMIS reported to its "ordinary investors." Defendants, and Picower specifically, were among a small group of Madoff investors with direct access to BLMIS's trading records. Defendants knew that their extra-ordinary returns were illegitimate and that BLMIS was running an illegitimate investment operation; Defendants could not have believed otherwise.

7. In fact, relevant documents and information show that Picower and the Defendants directed BLMIS to prepare account statements for the Defendants reflecting not actual trading results but the rates of return Picower "wanted to achieve". BLMIS complied with these directions, and the vast majority of the purported "profits" in the Defendants' accounts were not a result of the actual purchase and sale of securities.

8. The Defendants' account records reflect, and Defendants were aware of, or should have been of, the fact that Madoff and BLMIS booked in their accounts fictional profits from fictional trading. Upon information and belief, no purchases or sales of securities in the Defendants' BLMIS accounts ever actually occurred. Upon information and belief, no purchases or sales of securities in the class members' BLMIS accounts ever actually occurred.

9. Picower, the other Defendants, and their agents directly participated in the Madoff Ponzi scheme, and knew or should have known that the funds used to pay the Defendants'

fictional profits could have only come from the accounts of other BLMIS customers. Picower and Defendants converted the cash in other innocent BLMIS customer accounts for their own personal benefit with the acquiescence and assistance of Madoff and BLMIS.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d)(2)(A) because: (1) the matter in controversy between the class members and Defendants exceeds $5,000,000 exclusive of interest, attorneys' fees, and costs, and (2) many of the class members are citizens of a State other than the States of citizenship of the Defendants. The actions complained of herein are violations of Florida's RICO statute and took place in part in Palm Beach County, Florida. Personal jurisdiction also exists under Florida's long arm statute.

11. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 1391, because a substantial part of the events comprising Defendants' wrongful conduct giving rise to the claims alleged herein occurred in the Southern District of Florida. At the time of his death, Picower and his wife were residents of Palm Beach County, Florida, and his related-entity Defendants transact business in Palm Beach County, Florida. The main Defendants maintained their primary offices or residences in this district. Defendants have directly and indirectly made use of the means and instrumentalities of interstate commerce, or of the mails and wires, in connection with the transactions, acts, practices and courses of business alleged herein.

THE PARTIES

12. Plaintiff Susanne Stone Marshall is a citizen and resident of St. Augustine, Florida. The Trustee limited Marshall's claim in the SIPA Liquidation to $30,000. However, this is not the full amount of her loss, and the balance on Marshall's November 30, 2008 BLMIS account statement was approximately $205,000. Plaintiff brings this class action on behalf of

herself and a putative class of persons similarly situated for damages and other relief arising from the Defendants' wrongful conduct as described herein.

13. Jeffry M. Picower ("Picower") was a resident of Palm Beach, Florida, and Fairfield, Connecticut, prior to and at the time of his death on October 25, 2009. Picower was a highly sophisticated investor, accountant and attorney who participated in the Madoff Ponzi scheme for over 20 years, knowing that he was participating in a fraud. Picower had vast experience in the purchase and sale of businesses, including health care and technology companies. He had also been personally responsible for managing hundreds of millions, if not billions, of dollars of assets, and he had developed uncommon sophistication in trading securities and evaluating returns therefrom. Upon information and belief, Picower was closely associated with Madoff, both in business and socially, for the last 30 years. Picower held an individual BLMIS account in the name of "Jeffry M. Picower," with an account address of 1410 South Ocean Boulevard, Palm Beach, Florida. Picower was a trustee of the Picower Foundation, and Chairman of the Board of Defendant Decisions Incorporated.

14. Defendant Barbara Picower is the Executor of the Estate of Jeffry M. Picower, which is being probated in the State of New York.

15. Defendant Barbara Picower is a person residing at 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Barbara Picower is Picower's surviving spouse. According to the Trustee, Barbara Picower holds an individual account at BLMIS in the name "Barbara Picower," with the account address of 1410 South Ocean Boulevard, Palm Beach, Florida 33480, and Barbara Picower is trustee for Defendant Trust f/b/o Gabrielle H. Picower, an officer and/or director of Defendant Decisions Incorporated, and trustee and Executive Director of the Picower Foundation.

16. Defendant Decisions Incorporated is a corporation organized under the laws of Delaware with a principal place of business at 950 Third Avenue, New York, New York 10022 and an alternate mailing address on its BLMIS account listed as 22 Saw Mill River Road, Hawthorne, New York, 10532. According to the Trustee, the Decisions Incorporated office in Hawthorne was merely a store-front office through which little or no business was conducted, and Decisions Incorporated is a general partner of Defendants Capital Growth Company, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, JMP Limited Partnership and Jeffry M. Picower Special Co.

17. Defendant Capital Growth Company purports to be a limited partnership with a mailing address for its BLMIS account listed at 22 Saw Mill River Road, Hawthorne, New York, 10532, care of Decisions Incorporated. According to the Trustee, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of Capital Growth Company, and Decisions Incorporated and Picower transact/transacted business through this entity.

18. Defendant JA Primary Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Defendant Decisions Incorporated and/or Picower serves/served as General Partner or Director of JA Primary Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this entity.

19. Defendant JA Special Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York, New York 10594. According to the Trustee, Defendant Decisions Incorporated

and/or Picower serve/served as General Partner or Director of JA Special Limited Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

20. According to the Trustee, Defendant JAB Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JAB Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

21. According to the Trustee, Defendant JEMW Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JEMW Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

22. According to the Trustee, Defendant JF Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JF Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

23. According to the Trustee, Defendant JFM Investment Company is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and JFM Investment Company is a Limited Partner of Capital Growth Company,

and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JFM Investment Company.

24. According to the Trustee, Defendant JLN Partnership is a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JLN Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

25. Defendant JMP Limited Partnership is a limited partnership organized under the laws of Delaware, with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Decisions Incorporated and/or Picower serve/served as General Partner or Director of JMP Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

26. According to the Trustee, Defendant Jeffry M. Picower Special Co. is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower Special Co.

27. According to the Trustee, Defendant Favorite Funds is an entity through which Picower transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Favorite Funds.

28. According to the Trustee, Defendant Jeffry M. Picower P.C. purports to be a limited partnership with a listed mailing address at 25 Virginia Lane, Thornwood, New York,

New York 10594, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower P.C., and Decisions Incorporated, and/or Picower transact/transacted business through this defendant entity.

29. Defendant Picower Foundation is a trust organized for charitable purposes with Picower listed as donor, and Picower and Barbara Picower, among others, listed as Trustees during the relevant time period. Picower Foundation's addresses are reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 9 West 57th Street, Suite 3800, New York, New York 10019.

30. According to the Trustee, Defendant Picower Institute for Medical Research is a nonprofit entity organized under the laws of New York, with a principal place of business at 350 Community Drive, Manhasset, New York 11030.

31. According to the Trustee, Defendant Trust f/b/o Gabrielle H. Picower is a trust established for beneficiary Gabrielle H. Picower, who is the daughter of Picower and Barbara Picower, with Defendant Barbara Picower listed as trustee, and the trust's BLMIS account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

32. On information and belief, the Defendants listed in paragraphs 16 through 30 (collectively the "Picower Entity Defendants") were dominated, controlled and used as a mere instrumentality of Picower to advance his interests in, and to participate in, the Madoff Ponzi scheme. Thus, the Picower Entity Defendants are the alter egos of Picower and of each other.

THE MADOFF PONZI SCHEME AND DEFENDANTS' PARTICIPATION IN THE FRAUD

33. Shortly before his December 11, 2008 arrest, Madoff confessed that he had been conducting a Ponzi scheme through BLMIS for many years, and he estimated BLMIS' liabilities to be approximately $50 billion.

34. On March 10, 2009, the federal government filed an eleven-count information against Madoff in the criminal case styled *U.S. v. Madoff*, CV-No 09-CR-213 (S.D.N.Y), which is attached as "**Exhibit B**" hereto.

35. At a plea hearing on March 12, 2009 in Madoff pled guilty to the eleven-count criminal information and admitted under oath that he "operated a Ponzi scheme through. . . [BLMIS]." Madoff also admitted that "[a]s I engaged in my fraud, I knew what I was doing (was) wrong, indeed criminal." *See* **Exhibit "C"** hereto.

36. Madoff also admitted that, during the relevant time period, he never actually invested any of the funds he received from BLMIS customers, instead depositing the funds into a bank account. Madoff never actually purchased and sold securities in BLMIS customer accounts, instead using client funds simply to pay other, different, clients' purported returns and redemption of principal.

37. According to the Trustee, as of December 11, 2008, BLMIS had 4,903 accounts with a purported stated value of $64.8 billion as of November 30, 2008.

38. According to the Trustee, BLMIS made payments and other transfers to the Defendants totaling over $7.2 billion more than Defendants deposited, including $6.7 billion from 1995 to 2008. A schedule of theses transfers, which are attached as Exhibit B to the Trustee's Complaint, are attached separately as **Exhibit "D"** hereto.

39. Picower, Barbara Picower, and each of the Picower Entity Defendants knowingly and actively participated in the Madoff/BLMIS scheme, and they at all relevant times had actual knowledge or recklessly and consciously avoided the fact that the holdings and profits reported in their BLMIS accounts were false and not a result of legitimate or actual purchases and sales of securities.

40. Defendants knew, recklessly and consciously avoided, or should have known that the annual returns in their BLMIS accounts were fabricated, as were the underlying securities transactions which purportedly generated these returns.

41. The Trustee's Complaint describes the Defendants' outright theft of cash through BLMIS, which cash Defendants knew could have only belonged to other innocent Madoff and BLMIS customers.

42. Picower and the other Defendants could not have been unaware of the fact that they were profiting from fraudulent transactions. Picower purported to follow a "buy and hold" strategy in Defendants' BLMIS accounts, whereby they "bought" stock (typically large cap stock) at its annual low trading prices, and then purportedly sold the stock to generate profits.

43. The Defendants' "buy and hold strategy" purportedly generated extraordinary and implausibly high annual rates of return. For example, two of the BLMIS accounts controlled by Picower generated annual rates of return of over 100% for four consecutive years from 1996 through 1999. According to the Trustee: "Between 1996 and 2007 defendants 24 regular trading accounts enjoyed 14 instances of supposed annual returns of more than 100%. . . ." During this time period the annual rates of return for certain of Defendants' accounts ranged from 120% to over 550%. Other Defendant accounts had documented earnings of almost 1000%.

44. Defendants could not have believed that Madoff "beat the market" by such vast amounts on an annualized basis through legitimate "buy and hold" trading. The documentation and trading records available show that Picower and the other Defendants did not participate in the "options trading" strategy that comprised the core of Madoff's money management business. Madoff and BLMIS had no professed or actual expertise or ability to select appropriate large cap stocks for Picower and the other Defendant accounts. Madoff, with a small staff who had no

particularized experience in “buy and hold” trading, never held himself out as a "stock picker."

45. On the contrary, Picower and the other Defendants knew [recklessly/consciously avoided] that the extra-ordinary returns being generated in their BLMIS accounts were far in excess of what can be achieved by legitimate “buy and hold” trading, or by any other legitimate strategy.

46. Other trading in Defendants' accounts was obviously fabricated. For example, as stated in the Trustee's Complaint, in 2000 several of the Defendants' trading accounts reported negative annual rates of return from negative 74% to negative 779%.

47. Defendants knew or should have known that the account documents and statements that reflected fictitious trades and returns were patently false.

48. In fact, upon information and belief, Picower and the other Defendants, with the assistance of Picower’s associate April C. Freilich ("Freilich"),[1] directed fictitious and backdated trades, with the consent of Madoff, BLMIS and their agents, to manufacture profits and losses in accordance with an overall fraudulent trading strategy developed by Picower.

The Decisions Incorporated Account

49. The several BLMIS accounts of Defendant Decisions Incorporated, which was controlled by Picower, provide concrete examples of the obviously fictitious profits Defendants received as a result of their participation in the Ponzi scheme.

50. These accounts were a primary source of Defendants’ cash withdrawals from BLMIS during the relevant time period, yet the accounts reflected virtually no trading activity and very few purported securities positions.

[1] Freilich is an officer and/or director of Decisions Incorporated and a limited partner of Defendants Capital Growth Company, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, and JLN Partnership. Freilich is also a close personal friend and business associate of Picower's who carried out his directions in connection with Defendants’ participation in the BLMIS scheme. Freilich was close enough to Picower to receive $10 million in his recently probated will.

51. Nevertheless, Picower and Freilich signed distribution requests and directed cash "withdrawals" from this account ranging from $50 million to $150 million five or more times per year from 1995 through 2007, for a total of $5,771,339,795.

52. Picower and Freilich directed the withdrawals from the Decisions Incorporated account even though the account maintained a large negative cash balance of more than $6 billion and there was not enough cash in the account to cover the withdrawals.

53. At the time of each withdrawal, Picower and the other Defendants, along with Madoff and BLMIS, knew the withdrawn funds could only be the property of other Madoff customers, including the Plaintiff and the class members.

Defendants and BLMIS Backdated Purported Transactions to Create Fictitious Profits

54. That Picower, the other Defendants, and Madoff and BLMIS actively conspired to steal the funds of the Plaintiff and the class members is also evidenced by the fact that many purported trades in the Defendants' accounts were back dated. Picower purportedly "sold" positions on a fabricated earlier date to generate phony profits.

55. For example, as stated in the Trustee's Complaint, on or about April 24, 2006, Decisions Incorporated opened a new account with BLMIS known as the "Decisions Incorporated 6" ("Decisions 6") account by a wire transfer on April 18, 2006 of $125 million.

56. Picower instructed BLMIS to backdate trades in this account to January 2006, which was before the Decisions 6 account was even opened.

57. As a result of the fabrication/backdating of trades, the purported net value of securities in the Decisions 6 account by the end of April 2006 had increased by almost $40 million, for a return of 30% in less than two weeks of "purported trading".

58. Picower's scheme to backdate trades in Decisions 6 was designed to generate

phony paper profits in the account by picking stocks which had appreciated on a "hindsight basis," and represented part of a continuous pattern of false generation of profits which enabled Picower and the Defendants to pilfer other BLMIS customer accounts for actual cash based upon phony booked profits.

59. As demonstrated in the Trustee's Complaint, BLMIS records indicate that Picower, Freilich and Madoff employees discussed and clearly understood that the trades in the various Defendants' accounts were being backdated for the purpose of generating phony profits.

60. For example, according to the Trustee's Complaint, on May 18, 2007, Freilich indicated that the Foundation needed "$20 mil in gains" for January and February and "want[ed] 18% for year[] 07 appreciation," but that she had to check the numbers "with Jeff." Upon information and belief, "Jeff" is Picower. Five days later on May 23, 2007, and presumably after consulting with Picower, Freilich told BLMIS that the numbers she provided earlier were wrong, and the Foundation "needs only $12.3 mil [in gains] for" January and February 2007.

61. Also, on or about December 22, 2005, Picower and/or Freilich faxed a letter to BLMIS that was signed by Picower, bearing an earlier date of December 1, 2005. This letter directed the sale of specific positions in four of Defendants' accounts. However, the actual underlying transactions could not have taken place in early December, 2005, as the positions sold remained in the Picower account through late December of 2005.

62. On or around December 29, 2005, Freilich, acting on Picower's behalf, faxed BLMIS a letter signed by Picower, that directed BLMIS to realize a gain of $50 million. Upon instruction from Picower and/or Freilich, BLMIS "sold" large amounts of Agilent Technologies and Intel Corporation stock in various Defendant accounts on a backdated basis. Freilich directed the sale of large amounts of these purported securities on or about December 29, 2005,

requesting that the sales be booked to take place on an earlier date, *i.e.*, December 8th or 9th. These trades were backdated by Picower and BLMIS for the purpose of generating phony "paper" profits of approximately $46.3 million, making up most of Picower's requested $50 million gain.

63. Also according to the Trustee, Picower and BLMIS backdated other purported securities transactions during December 2005, including purported purchases on margin of Google, Diamond Offshore Drilling, Inc., and Burlington Resources, Inc. across several of Defendants' accounts, which resulted in a purported gain for Picower of almost $80 million. These purchases purportedly occurred between January 12 and 20, 2005, but they were entirely fictitious, as the transactions were first reflected 11 months later in Defendants' December 2005 BLMIS account statements.

64. Defendants and Madoff and BLMIS were aware of the false nature of these transactions and their purpose, which was to generate fictitious profits for Picower and allow him to withdraw cash which came from other BLMIS customer accounts, including those of the Plaintiff and the class members.

The Picower Foundation Account Reveals Fabricated Securities Transactions

65. The publicly available Form 990 Income Tax Returns for the Picower Foundation demonstrate that Picower and BLMIS were engaged in fraudulent and/ or anomalous trading for the purpose of generating false profits in the Picower Foundation account, enabling Picower to withdraw fictitious profits from this and the other Defendant accounts controlled by Picower. These cash withdrawals were effected by taking cash from other customer accounts of BLMIS.

66. For example, the Picower Foundation's 2007 income tax return reflects a holding of 328,830 shares of Oracle Corporation stock that was purportedly purchased on December 3,

2001. No such holdings are disclosed in the Picower Foundation's tax return filings for 2001 through 2005. In fact, the securities were never actually purchased according to Picower's own documentation, but simply fictitiously added to the account in the 2007 return. This had the effect of increasing the Picower Foundation's portfolio value by $7.5 million.

67. The Picower Foundation's 2005 tax return reflects suspicious and inexplicably large portfolio gains in absolute and relevant terms based upon a small number of stocks. During 2005, the Picower Foundation did not sell any securities in its portfolio and made only four purchases. Nevertheless the portfolio purportedly grew significantly from the gains posted in less than six months in connection with the purchases of Amazon, Apple, Burlington, and Google, amounting to $141.3 million in the aggregate during this period. All four purchases were purportedly made on the same date, July 14, 2005. The unrealized annualized gain from these purchases was almost 100%, which is inordinately and unrealistically high in relation to the annual gain on the S&P 500 Index during this annual period, which was only 5%. These trades were likely backdated, consistent with the Defendants' and BLMIS's pattern of backdating trades to generate fictitious profits.

68. The Picower Foundation's 2004 tax return reflects Picower Foundation portfolio holdings in Eagle Materials Inc. of 12,853 common shares and 43,215 class B shares that were purportedly purchased November 28, 2001. But no such holdings are disclosed in the Picower Foundation's tax returns for 2001 through 2003. The mysterious appearance on the 2004 return had the effect of increasing the value of the Picower Foundation portfolio by almost $5 million.

69. The Picower Foundation's 2003 return reflects a holding in Cavco Industries, Inc. of 14,500 shares that were purportedly purchased November 28, 2001, which was the same date as the purported purchase of the Eagle Materials shares noted above. However, no such holding

was disclosed in the 2001 or 2002 tax returns for the Foundation. This fictitious holding had the effect of increasing the value of the Picower portfolio.

70. The Picower Foundation's 2002 return reflects a holding in Carmax of 170,436 shares that were purportedly purchased on the same date, November 28, 2001, as were the undocumented Cavco and Eagle Materials purchases described above. But no such holding is disclosed in the 2001 or 2002 Picower Foundation returns. This phony transaction had the effect of increasing the value of the Picower portfolio by $3 million.

71. The Picower Foundation's 2000 return reflects incredibly large portfolio gains in absolute and relative terms demonstrating backdated trading. During 2000, the Picower Foundation realized a gain on the purported sale of securities of $286.8 million on a book value of only $20.1 million, representing a staggering total return of 1,426.9%. The securities sold were purportedly held for a six year period on average. Thus, this return is equal to a compound annual average return of almost 56%, which vastly exceeds the annualized return for any other un-leveraged stock transaction by any other known market participant. This rate of return also is demonstrably false and contrasts sharply and unrealistically with the compound average annual return of the S&P 500 Index during this period of only approximately 15%.

72. The factual allegations set forth above demonstrate a consistent pattern of fraudulent activity, the result of which was that the Defedants' accounts generated tremendous apparent but false profits, which Defendants then withdrew from their BLMIS accounts with the consent of Madoff and BLMIS. In many instances, BLMIS, Picower and the Defendants simply manufactured positions in their respective accounts for the purpose of allowing Picower to "sell" the manufactured positions and withdraw cash based upon a phony sale.

73. As a result of the foregoing conduct, Defendants participated in and profited from

the fraud on other BLMIS customers, and the Defendants converted the cash (there were no securities) of other BLMIS account holders to pay themselves these fictitious profits.

CLASS ACTION ALLEGATIONS

74. Plaintiff brings this action as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The definition of the Plaintiff class in this action is: all SIPA Payees, but only with respect to claims, or portions thereof, not assigned to the Trustee. (the "Class"). The Class does not included Defendants herein.

75. The class meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

a. *Numerosity*. The Class consists of at least several thousand BLMIS account holders who are members of the Class as defined in paragraph 74 above. The exact number of class members is currently unknown to the Plaintiff, and can only be ascertained through appropriate discovery. This number is so numerous that joinder of all members of the Class is impracticable. The members of the Class reside throughout the United States.

b. *Commonality*. There are questions of law and fact which are common to the representative party and each member of the class including: (i) whether, and to what extent the Defendants participated in the Madoff Ponzi scheme and conspired with BLMIS and Madoff; (ii) whether Defendants converted the funds of other BLMIS account holders; (iii) the extent to which Defendants were unjustly enriched as a result of their participation in the Ponzi scheme; (iv) whether the Defendants violated the Florida Civil Remedies for Criminal Practices Act Chapter 772, Florida Statutes, ("Florida RICO") by acting in

concert with BLMIS to convert the cash of the members of the class; (v) whether Plaintiff and the class members have sustained damages as a result of Defendants' conduct, and the proper measure of such damages; (vi) whether Plaintiff and the class members are entitled to an award of punitive damages or other exemplary damages against Defendants.

c. *Typicality*. Plaintiff's claims are typical of each of those of the class members. Plaintiff maintained a BLMIS account, and is a SIPA Payee who has not assigned her claim, or a portion of her claim, to the Trustee, thereby having suffered the same type of injury as did other class members.

d. *Adequacy*: Plaintiff will fairly and adequately represent and protect the interest of the Class and has no interest antagonistic to those of the other class members. Plaintiff has retained experienced counsel competent in litigation involving the claims at issue and in class litigation.

76. This class also meets the requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure. The common issues outlined herein predominate over any individual issues in this case. A class action is superior to all other available means for the fair and efficient adjudication of this controversy because: (1) it is economically impracticable for class members to prosecute individual actions against Defendants; (2) Plaintiff is aware of no other litigation seeking to recover on the claims asserted herein against Defendants; (3) it is desirable to concentrate these claims against Defendants in a single forum so as to avoid varying and disparate results; and (4) there is no difficulty likely to be encountered in the management of this case as a class action.

COUNT I
CIVIL CONSPIRACY

77. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth herein.

78. Madoff has pled guilty to an eleven-count criminal information and admitted that he operated a fraudulent Ponzi scheme through BLMIS.

79. Defendants, on the one hand, agreed with Madoff and BLMIS, on the other hand, to unlawfully divert and convert the cash of other innocent BLMIS account holders, including Plaintiff and the class members, for the benefit of the Defendants and Madoff and BLMIS.

80. Defendants engaged in overt acts in furtherance of the conspiracy as set forth above, which included: (a) participating in and directing the preparation of false documentation; (b) recording fictional profits in their respective BLMIS accounts; and (c) withdrawing such fictional profits knowing that they were the funds of other BLMIS account holders.

81. Defendants committed additional overt acts in pursuance of the conspiracy by concealing the true state of affairs from the IRS, securities regulators and other customers of BLMIS, by, *inter alia*, filing false statements in connection with their tax returns that purported to show trading in Defendants' accounts which in fact did not occur.

82. As a result of Defendants' conduct, Plaintiff and the Class have suffered financial injury and damages, which include, but are not limited to, lost investment principal, income and returns on their bona fide cash investments at BLMIS, and tax payments made in connection with reported but non-existent trading profits.

WHEREFORE, Plaintiff requests judgment in her favor against Defendants for compensatory damages, prejudgment interest, punitive damages, and such other and further relief as is just and proper.

COUNT II
CONVERSION

83. Plaintiff re-asserts the allegations contained in paragraphs 1 through 76 above as if fully set forth herein.

84. Plaintiff and the class members were in possession of valuable property, including the cash in their BLMIS accounts.

85. Defendants, through improper means, have obtained the use of the property of the Plaintiff and the class members, and have wrongfully deprived the Plaintiff and the class members of the right to possess, and the use of, their property for a permanent or indefinite term.

86. Plaintiff and the class members have suffered damages as a result of Defendants' conduct, which include, but not limited to, lost investment principal, income and returns on their bona fide cash investments at BLMIS, and tax payments made in connection with reported but non-existent trading profits.

87. Defendants had the specific intent to harm the Plaintiff and the class members.

WHEREFORE, Plaintiff requests judgment in their favor against Defendants for compensatory damages, prejudgment interest, punitive damages, and such other and further relief as is just and proper.

COUNT III
UNJUST ENRICHMENT

88. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth herein.

89. Defendants have benefited from their unlawful acts and conspiracy through the overpayment of proceeds from securities purportedly purchased and sold in their BLMIS accounts.

90. Defendants improperly received funds from Plaintiff and the class members as a result of the deliberate misstatement of their BLMIS account holdings and the false profits generated in such accounts.

91. It would be inequitable for Defendants to be permitted to retain the benefit of their wrongful conduct.

92. The Plaintiff and the class members are entitled to the establishment of a constructive trust consisting of the ill gotten gains received by Defendants, to be disgorged or otherwise paid to the class members.

WHEREFORE, Plaintiff requests judgment in her favor and against each Defendant for disgorgement/restitution, punitive damages, and such other and further relief as is just and proper.

COUNT IV
CONSPIRACY TO VIOLATE THE FLORIDA CIVIL REMEDIES
FOR CRIMINAL PRACTICES ACT (FLORIDA RICO)

93. Plaintiff re-asserts the allegations in paragraphs 1 through 76 as if fully set forth herein.

Underlying BLMIS Enterprise

94. Plaintiff and the class members are "persons" within the meaning of § 772.104, Florida Statutes. Madoff, BLMIS and Defendants are “persons" with the meaning of § 772.103, Florida Statutes.

95. Under § 772.102(3), Florida Statutes, an "enterprise" is defined as "any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of the state, or any other legal entity or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and the term includes illicit as well as

licit enterprises . . . ." BLMIS constituted such an enterprise.

96. Madoff, with criminal intent, operated the enterprise through a pattern of criminal activity though the enterprise as defined by § 772.103(1) and 772.103(2), Florida Statutes, and he has participated in the conduct of, or is otherwise in control of, and operated the enterprise by participating in and documenting phony, profitable transactions in Defendants' BLMIS accounts.

97. The enterprise has an ascertainable structure and hierarchy that set it apart from the mere commission of the predicate acts (specified below), and that form a pattern of racketeering activity in which Madoff actively engaged.

Predicate Act of Underlying RICO Violation

98. Section 772.102(a)22, Florida Statutes, specifies that "criminal activity" includes any act indictable under Chapter 817 of the Florida Criminal Code (relating to fraudulent practices, false pretenses, and fraud generally).

99. Section 772.1029(b), Florida Statutes, specifies that "criminal activity" includes any conduct subject to indictment or information listed in the federal RICO statute, 18 U.S.C. § 1961(1), which includes Title 18 section 1341 (relating to mail fraud) and section 1343 (relating to wire fraud).

100. Madoff has admitted to criminal activity demonstrating a systematic ongoing course of criminal conduct with the intent to defraud the BLMIS customers, including the Plaintiff and the class members, based on the following predicate acts: (a) a scheme to defraud and obtain property with the intent to obtain property by false or fraudulent pretenses, representations or promises as well as by unlawful misrepresentations in violation of § 817.034(4), Florida Statutes; (b) federal mail fraud; (c) federal wire fraud.

Pattern of Racketeering Activity

101. As set out above, Madoff has engaged in a "pattern of criminal activity" as defined under § 772.102(4), Florida Statutes, by committing at least two acts of criminal activity indictable as violations of Chapter 817, Florida Statues, and mail and wire fraud within the past five years.

102. Each predicate act was related and had as its purpose the criminal diversion of funds from customer accounts at BLMIS in connection with a conspiracy being conducted by BLMIS and Madoff.

103. This conduct did not arise out of single contract or transaction, but was a pervasive scheme that injured class members over many years. Each predicate act was related, had a similar purpose, involved the same or similar participants and method of commission, had similar results, and impacted the class member victims in a similar fashion.

104. The predicate acts specified above which Madoff committed, and which Defendants conspired to commit, were related to each other in furtherance of the scheme implemented by the enterprise. These acts were committed over a long period of time from at least 1995 through December 2008.

Defendants' Conspiracy to Commit RICO Violations

105. "Criminal activity" includes not only direct commissions of predicate acts, but also conspiracies and solicitations to commit predicate acts under § 772.102(1), Florida Statutes.

106. At all relevant times, Defendants agreed and conspired to participate, directly and indirectly, in the scheme described above through a pattern of racketeering activity in violation of § 772.103(4).

107. At all times the Defendants knew that BLMIS and Madoff were conspiring with

them with the objective of diverting and converting money from other BLMIS customer accounts for the benefit of Defendants.

108. The Defendants knew that BLMIS and Madoff were engaged in the misrepresentations and omissions and fraudulent conduct described in Exhibits B and C hereto, rendering Defendants liable for conspiracy to commit the criminal acts set forth therein.

109. Defendants conspired to commit violations of § 772.103, Florida Statutes, as alleged in paragraphs 49 through 73 above.

110. The Defendants committed and/or caused to be committed a series of overt acts in furtherance of the conspiracy alleged herein to effect the objectives of the scheme described above, including the acts alleged in paragraphs 54 through 73 above.

111. By directly instructing Madoff and BLMIS employees to book such phony transactions which generated phony profits, among other things, the Defendants controlled and enabled the fraud to convert the funds of other innocent BLMIS account holders.

112. Plaintiff, and the class members, have been injured as a result of Defendants' Florida RICO violation, which injury includes the loss of investment principal, profits and returns on their bona fide cash investment at BLMIS, and tax payments made in connection with reported but non-existent trading profits.

WHEREFORE, Plaintiff and the class members request entry of judgment in their favor and against Defendants jointly and severally for compensatory damages, as tripled pursuant to § 772.104(1), Florida Statutes, as well as the attorneys fees and court costs authorized under § 772.104(1), Florida Statutes, and such further relief as this court deems just and proper.

CLAIM FOR PUNITIVE DAMAGES

113. Defendants had actual knowledge of the wrongfulness of their conduct and the high probability of injury and damage to the class. Defendants disregarded that knowledge intentionally and recklessly in pursuing their wrongful, deceitful, deceptive and illegal conduct.

114. As a direct and proximate result of Defendants' fraudulent, willful and reckless misconduct, the Plaintiff asserts a claim for punitive damages for each cause of action herein for which such damages are allowable under Florida law, in an amount to be determined by a jury.

CLAIM FOR RELIEF

Plaintiff seeks the following relief from this Court: (a) a judgment in the favor of plaintiffs in the class against Defendants on the claims specified in this Complaint; (b) an award of compensatory damages; (c) triple the amount of actual damages incurred for those claims which tripling of damages is authorized; (d) an equitable accounting and imposition of constructive trust on Defendants assets; (e) disgorgement of Defendants' ill gotten gains or restitution of the payments and property received by Defendants; (f) attorneys fees pursuant to § 772.104(1), Florida Statutes, (g) punitive damages for those claims where such damages are authorized; (h) prejudgment interest; (i) fees, court costs and expenses of this litigation; (j) all other relief that the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

DATED: this 15th day of March, 2010, by:

BEASLEY HAUSER KRAMER
LEONARD & GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Telephone: (561) 835-0900
Facsimile: (561) 835-0939
galardi@beasleylaw.net
Attorneys for Plaintiff and the Class

By: s/ Joseph G. Galardi
James W. Beasley, Jr.
Florida Bar No. 145750
Joseph G. Galardi
Florida Bar No. 180572

-and-

Lesley Blackner, Esquire
Florida Bar No. 654043
BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, FL 33480
(561)659-5754
(561)659-3184 (fax)
lblackner@aol.com
Co-counsel for Plaintiff and the Class

Helen Davis Chaitman
New York Bar No. 1236678
BECKER & POLIAKOFF
45 Broadway 11th Floor
New York, NY 10006
(212) 599-3322
(212) 557-0295 (fax)
Co-counsel for Plaintiff and the Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Joseph G. Galardi
Joseph G. Galardi

SERVICE LIST

Via overnight delivery:
William D. Zabel, Esq.
Schulte Roth & Zabel, LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 756-2351
Facsimile: (212) 593.5955
william.zabel@srz.com
Attorney for All Defendants

EXHIBIT G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No.:10-80252-CV-KLR

SUZANNE STONE MARSHALL, ADELE FOX, MARSHA PESHKIN, and RUSSELL OASIS, individually and on behalf of a class of similarly situated Plaintiffs,

vs.

CAPITAL GROWTH COMPANY;
DECISIONS, INCORPORATED.;
FAVORITE FUNDS;
JA PRIMARY LIMITED PARTNERSHIP;
JA SPECIAL LIMITED PARTNERSHIP;
JAB PARTNERSHIP;
JEMW PARTNERSHIP;
JF PARTNERSHIP;
JFM INVESTMENT COMPANIES;
JLN PARTNERSHIP;
JMP LIMITED PARTNERSHIP;
JEFFRY M. PICOWER SPECIAL COMPANY;
JEFFRY M. PICOWER, P.C.;
THE PICOWER FOUNDATION;
THE PICOWER INSTITUTE OF MEDICAL RESEARCH;
THE TRUST F/B/O GABRIELLE H. PICOWER;
BARBARA PICOWER, individually, and as Executor of the Estate of Jeffry M. Picower, and as Trustee for the Picower Foundation and for the Trust f/b/o Gabriel H. Picower.
_____/

SECOND AMENDED COMPLAINT CLASS ACTION

Jury Trial Demanded

Plaintiffs Suzanne Stone Marshall, Adele Fox, Marsha Peshkin, and Russell Oasis, through their undersigned attorneys, on their own behalf and on behalf of a similarly situated class of plaintiffs (collectively, "Plaintiffs"), hereby sue Defendants (the "Picower Parties") and allege the following based upon the investigation by Plaintiffs' counsel, including a review of documents filed in the bankruptcy proceeding concerning Bernard L.

Madoff Investment Securities, LLC ("BLMIS"); documents made available to the public in the proceedings brought by the Securities Exchange Commission ("SEC") involving Bernard L. Madoff ("Madoff"); documents made available to the public in the civil forfeiture action (the "Civil Forfeiture Action") brought by the United States of America (the "Government") against Jeffry M. Picower ("Picower"); and communications with Madoff.

NATURE OF ACTION

1. This is an action on behalf of all BLMIS investors who entrusted their money to BLMIS to be invested in the BLMIS Discretionary Trading Program, in the expectation that it would be invested honestly and that it would appreciate over time. The claims asserted against the Picower Parties arise out of Picower's criminal conspiracy with Madoff to perpetrate a massive investment fraud on the Plaintiffs in order to perpetuate a scheme whereby Picower and the Picower Parties were able to realize unprecedented returns on their money. Plaintiffs assert claims under the federal securities laws, Florida and federal Racketeer Influenced and Corrupt Organization ("RICO") statutes, and Florida common law.

JURISDICTION AND VENUE

2. The claims asserted herein arise under (i) §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b), 78t(a), and under Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5, (the "Section 20(a) Claim"); (ii) the Federal Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968 (the "Federal RICO Claim"); (iii) Florida Civil Remedies for Criminal Practices Act, Chapter 772 of the Fla. Stat. (the "State RICO Claim"); and (iv) Florida common law.

3. This Court has jurisdiction over the subject matter of this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), providing for jurisdiction when, as in

this case, "any member of a class of Plaintiffs is a citizen of a State different from any defendant" and the aggregated amount in controversy exceeds $5,000,000 exclusive of interest and costs. *See* 28 U.S.C. § 1332(d)(2) and (6).

4. Jurisdiction is also based on § 27 of the Exchange Act, 15 U.S.C. § 78aa, upon the Federal RICO Act, 18 U.S.C. § 1964, and upon principles of supplemental jurisdiction.

5. At all relevant times the principal place of business and/or the residence of the Picower Parties was Palm Beach, Florida, where Madoff also had a residence. Substantial acts, if not all of the acts, committed in furtherance of the control relationship and the Picower Parties' participation in the fraudulent scheme occurred in the State of Florida. Therefore, the Court has personal jurisdiction over the Picower Parties.

6. Venue is proper in this district pursuant to 28 U.S.C. §1391(b) because the Picower Parties reside or are headquartered in this district and the acts and transactions alleged occurred in substantial part in this district.

7. In connection with the wrongs alleged herein, the Picower Parties used the instrumentalities of interstate commerce, including the United States mails, interstate wire and telephone facilities, and the facilities of national securities markets.

THE PARTIES

8. Plaintiff Adele Fox ("Fox") is a resident of the State of Florida. Under the Second Circuit's "net equity" decision, Fox is a "net winner" because she withdrew more money than she deposited with BLMIS over the life of her participation in the BLMIS Discretionary Trading Program. Accordingly, Irving H. Picard, Esq., as trustee ("Trustee") for the substantively consolidated liquidation of Madoff's estate and of BLMIS, disallowed her SIPC claim in the BLMIS liquidation. Fox brings this class action on behalf of herself and a

putative class of persons similarly situated for damages and other relief arising from the Picower Parties' wrongful conduct described herein.

9. Plaintiff Suzanne Stone Marshall ("Marshall") is a resident of the State of Florida. Under the Second Circuit's "net equity" decision, Marshall is a "net loser" because she withdrew less money than she deposited with BLMIS over the life of her participation in the BLMIS Discretionary Trading Program. Marshall brings this class action on behalf of herself and a putative class of persons similarly situated for damages and other relief arising from the Picower Parties' wrongful conduct described herein.

10. Plaintiff Marsha Peshkin ("Peshkin") is a resident of the State of Florida. Under the Second Circuit's "net equity" decision, Peshkin is a "net loser" with respect to one of her accounts with BLMIS because she withdrew less money than she deposited with BLMIS over the life of her participation in the BLMIS Discretionary Trading Program. Peshkin brings this class action on behalf of herself and a putative class of persons similarly situated for damages and other relief arising from the Picower Parties' wrongful conduct described herein.

11. Plaintiff Russell Oasis ("Oasis") is a resident of the State of Florida. Oasis was an indirect customer of BLMIS through an account which, under the Second Circuit's "net equity" decision, is a "net winner" because it withdrew more money than it deposited with BLMIS over the life of its participation in the BLMIS Discretionary Trading Program. Accordingly, the Trustee sued him in the BLMIS liquidation. Oasis brings this class action on behalf of himself and a putative class of persons similarly situated for damages and other relief arising from the Picower Parties' wrongful conduct described herein.

12. Picower was a resident of Palm Beach, Florida, and Fairfield, Connecticut, prior to and at the time of his death on October 25, 2009. Picower held an individual BLMIS account

in the name of "Jeffry M. Picower," with an account address of 1410 South Ocean Boulevard, Palm Beach, Florida. Picower was Chairman of the Board of Defendant Decisions Incorporated ("Decisions Inc."). Picower transacted business through all of the Defendant entities (the "Picower Entity Defendants").

13. Defendant Barbara Picower is Picower's widow and the Executrix of his Estate, which is being probated in the State of New York. She resides at 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Barbara Picower held an individual account at BLMIS in her name. She is the trustee for Defendant Trust f/b/o Gabrielle H. Picower. She is an officer and/or director of Defendant Decisions Inc. and she is a trustee and the Executive Director of the Defendant Picower Foundation.

14. Defendant Decisions Inc. is a corporation organized under the laws of Delaware with a principal place of business at 950 Third Avenue, New York, New York 10022 and an alternate mailing address on its BLMIS account at 22 Saw Mill River Road, Hawthorne, New York, 10532. The Decisions Inc. office in Hawthorne was merely a store-front office through which little or no business was conducted. Decisions Inc. is a general partner of Defendants Capital Growth Company, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, JMP Limited Partnership and Jeffry M. Picower Special Co.

15. Defendant Capital Growth Company purports to be a limited partnership with a mailing address for its BLMIS account at 22 Saw Mill River Road, Hawthorne, New York, 10532, care of Decisions Inc. During his lifetime, Picower served as General Partner or Director of Capital Growth Company. Since Picower's death, Decisions Inc. has assumed those roles.

16. Defendant JA Primary Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. During his lifetime, Picower served as General Partner or Director of JA Primary Partnership. Since Picower's death, Decisions Inc. has assumed those roles.

17. Defendant JA Special Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York, New York 10594. During his lifetime, Picower served as General Partner or Director of JA Special Limited Partnership. Since his death, Decisions Inc. has assumed those roles.

18. Defendant JAB Partnership purports to be a limited partnership with a mailing address care of Decisions Inc. at 22 Saw Mill River Road, Hawthorne, New York, 10532. During his lifetime, Picower served as General Partner or Director of JAB Partnership. Since his death, Decisions Inc. has assumed those roles.

19. Defendant JEMW Partnership purports to be a limited partnership with a mailing address care of Decisions Inc. at 22 Saw Mill River Road, Hawthorne, New York, 10532. During his lifetime, Picower served as General Partner or Director of JEMW Partnership. Since his death, Decisions Inc. has assumed those roles.

20. Defendant JF Partnership purports to be a limited partnership with a mailing address care of Decisions Inc. at 22 Saw Mill River Road, Hawthorne, New York, 10532. During his lifetime, Picower served as General Partner or Director of JF Partnership. Since his death, Decisions Inc. has assumed those roles.

21. Defendant JFM Investment Company is an entity through which Picower and, after his death, Decisions Inc., have done business, with a listed mailing address care of

Decisions Inc. at 22 Saw Mill River Road, Hawthorne, New York, 10532. JFM Investment Company is a Limited Partner of Capital Growth Company. During his lifetime, Picower served as General Partner or Director of JFM Investment Company. Since his death, Decisions Inc. has assumed those roles.

22. Defendant JLN Partnership is a limited partnership with a mailing address care of Decisions Inc. at 22 Saw Mill River Road, Hawthorne, New York, 10532. During his lifetime, Picower served as General Partner or Director of JLN Partnership. Since his death, Decisions Inc. has assumed those roles

23. Defendant JMP Limited Partnership is a limited partnership organized under the laws of Delaware, with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. During his lifetime, Picower served as General Partner or Director of JMP Partnership. Since his death, Decisions Inc. has assumed those roles.

24. Defendant Jeffry M. Picower Special Co. is an entity with a mailing address care of Decisions Inc. at 22 Saw Mill River Road, Hawthorne, New York 10532. During his lifetime, Picower served as General Partner or Director of Jeffry M. Picower Special Co. Since his death, Decisions Inc. has assumed those roles.

25. Defendant Favorite Funds is an entity with a mailing address care of Decisions Inc. at 22 Saw Mill River Road, Hawthorne, New York, 10532. During his lifetime, Picower served as General Partner or Director of Favorite Funds. Since his death, Decisions Inc. has assumed those roles,

26. Defendant Jeffry M. Picower P.C. purports to be a limited partnership with a mailing address at 25 Virginia Lane, Thornwood, New York, New York 10594. During his

lifetime, Picower served as General Partner or Director of Jeffry M. Picower P.C. Since his death, Decisions Inc. has assumed those roles.

27. Defendant the Picower Foundation purports to be a trust organized for charitable purposes with Picower listed as donor and Picower and Barbara Picower, among others, listed as Trustees during the relevant time period. The Picower Foundation's addresses are reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 9 West 57th Street, Suite 3800, New York, New York 10019.

28. Defendants John Doe Trustees of the Picower Foundation were the Trustees of the Picower Foundation during the relevant time period.

29. Defendant Picower Institute for Medical Research is a nonprofit entity organized under the laws of New York, with a principal place of business at 350 Community Drive, Manhasset, New York 11030.

30. Defendant Trust f/b/o Gabrielle H. Picower is a trust established for beneficiary Gabrielle H. Picower, who is the daughter of Picower and Barbara Picower, with Defendant Barbara Picower listed as trustee, and the trust's BLMIS account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

31. The Picower Entity Defendants were dominated, controlled and used as a mere instrumentality of Picower to advance his interests in, and to control BLMIS and the fraudulent BLMIS Discretionary Trading Program. Thus, the Picower Entity Defendants are the alter egos of Picower and of each other, and are jointly and severally liable for wrongful conduct committed by one or more of them, as detailed herein.

ALLEGATIONS COMMON TO ALL CLAIMS

Madoff's Criminal Enterprise

32. BLMIS is a New York limited liability company that was founded in 1959 and wholly owned by Madoff. BLMIS operated from its principle place of business at 885 Third Avenue, New York, NY. Madoff was Founder, Chairman, Chief Executive Officer, and sole equity holder. BLMIS was registered with the SEC as a Securities Broker Dealer under § 15 of the Exchange Act. BLMIS purportedly engaged in three different operations: investment advisory services, market making services, and proprietary trading. In its market making and proprietary trading activities, BLMIS, at various times, employed approximately 188 people and conducted trades equal to 10% of the daily volume on the New York Stock Exchange. BLMIS' customers included major financial firms like Bear Stearns and Charles Schwab.

33. BLMIS' investment advisory business was operated by approximately 12 people and, according to Madoff, began operating fraudulently in the early 1990's.

34. Starting in 1992 and continuing until December 11, 2008, BLMIS entered into investment advisory agreements with customers pursuant to which the customers authorized BLMIS to buy and sell securities in BLMIS' sole discretion pursuant to the BLMIS Discretionary Trading Program. Madoff explained to customers that he had a proprietary trading strategy pursuant to which he would purchase a basket of Fortune 100 company stocks, hedge his positions through option contracts, hold the positions for a period of weeks, sell the stocks and put the money into Treasury Notes. He would repeat that process approximately six times per year. In fact, however, starting in 1992, BLMIS generally did not purchase the securities shown on the customers' trade confirmations and did not and allocate the securities to the accounts of the customers who participated in the BLMIS Discretionary Trading Program.

35. BLMIS required customers of the BLMIS Discretionary Trading Program to execute a power of attorney and sign documents giving BLMIS complete discretion to trade in

their accounts. Customers of the BLMIS Discretionary Trading Program had no power to instruct BLMIS as to how their funds should be invested.

36. From 1992 on, BLMIS provided customers of the BLMIS Discretionary Trading Program with a steady return of at least 10% per year, taxable as short term capital gains.

37. BLMIS falsely represented to all Class members that it purchased securities and options contracts for their accounts under the BLMIS Discretionary Trading Program. Customer "participation" therein involved the purchase and sale of securities, which were securities and investment contracts under the Exchange Act.

38. BLMIS purported to keep meticulous records of its customers' fictional trading transactions. The customers received written confirmations of every purchase and sale for their accounts and, each month, they received from BLMIS a detailed account statement showing the entire month's transactions and the month end securities positions in the account.

39. Madoff has admitted that from 1992 on, the trade confirmations and monthly statements sent to customers in the BLMIS Discretionary Trading Program were fabricated and that he had never purchased any securities for these customers that were allocated to their accounts. Except for certain isolated individual transactions, there is no record of BLMIS having purchased or sold any securities for the customers of the BLMIS Discretionary Trading Program.

40. BLMIS was assisted in perpetuating the fraudulent BLMIS Discretionary Trading Program by BLMIS' accounting firm, Friehlich and Horowitz, a three person accounting firm in Rockland County, New York, which prepared false BLMIS audited financial statements. These statements, which showed that BLMIS operated profitably, were provided to regulators and customers in the BLMIS Discretionary Trading Program.

Picower's Relationship With Madoff

41. Picower was a highly sophisticated investor, accountant, and attorney. He lived close to Madoff in Palm Beach and was closely associated with Madoff, both in business and socially, for over 30 years. Madoff served as a trustee for The Picower Institute of Medical Research.

42. Picower "invested" approximately $650 million of his personal funds, Barbara Picower's funds, and the funds of the various Picower Entities Defendants, with BLMIS during a period beginning in the 1980's. At times, Picower demanded returns of 700%-800% on his money entrusted to BLMIS and, for reasons that are presently unknown, Madoff acceded to those demands.

43. According to Madoff, the amount the Picower Parties withdrew from BLMIS, over a 20-year period, far exceeded $7.8 billion. Thus, the profit the Picower Parties realized on their BLMIS "investment" far exceeded $7.2 billion and Picower and the Picower Parties used those profits to invest in various businesses which, over decades, significantly appreciated in value. Thus, the total profits that the Picower Parties realized from their criminal conspiracy with Madoff exceeds $20 billion.

44. Picower directed Madoff, on numerous occasions, to document fictitious gains in the accounts of the Picower Parties and to deposit into those accounts cash purportedly representing the profits on those transactions. For example, on or about December 29, 2005, Picower's assistant April Friehlich, acting on behalf of the Picower Parties, faxed BLMIS a letter signed by Picower that directed BLMIS to "realize" a gain of $50 million in the Picower accounts. Upon direction from Picower and Friehlich, BLMIS falsified records so that it would appear that BLMIS sold large amounts of stock in Agilent Technologies and Intel Corporation in various Picower Parties' accounts on a back-dated basis. Friehlich

directed the fictitious sale of large amounts of these purported securities on or about December 29, 2005, requesting that the sales be "booked" to take place on an earlier date, *i.e.,* December 8 or 9. BLMIS back-dated the trades at Picower's direction and on Picower's behalf for the purpose of generating phony paper profits of approximately $46.3 million, which made up most of Picower's requested $50 million distribution.

45. Similarly, on or about April 24, 2006, Defendant Decisions Inc. opened a new account with BLMIS known as the "Decisions, Inc. 6" account with a wire transfer of $125 million. Picower and Friehlich directed Madoff to back-date trades in this account to January 2006, which was four months prior to the date the account was actually opened. BLMIS employees carried out the Picower Parties' instructions and fabricated and back-dated trades in the "Decisions, Inc. 6" account. This resulted in the net value of the account increasing by almost $40 million, or 30%, in less than two weeks after it opened. The Picower Parties also directed and orchestrated the preparation of false statements in May 2007, which reflected millions of dollars in securities transactions which reportedly took place in earlier in 2007, but which in fact did not take place at all.

46. According to Madoff, Picower knew that, in order to generate enormous paper profits in the Picower Parties' accounts, BLMIS would have to steal money from customers in the BLMIS Discretionary Trading Program. According to Madoff, Picower fully and knowingly participated in the fraud that BLMIS perpetrated on customers of the BLMIS Discretionary Trading Program and actively encouraged people to enter into investment advisory agreements with BLMIS.

47. In addition to demanding astronomical fictitious gains, Picower and Freilich demanded that BLMIS manufacture fictitious losses for the Picower Parties, including The

Picower Foundation, in order to reduce their state and federal tax liabilities. April C. Freilich routinely demanded that BLMIS generate retroactive fraudulent statements showing trading losses so that the taxes payable by the various Picower Entity Defendants, including The Picower Foundation, would be reduced.

48. At Picower's demand and Madoff's direction, BLMIS employees regularly fabricated and back-dated trades in Picower's accounts to generate phony losses. For reasons that are presently unknown, Madoff acceded to these demands and provided the fraudulent statements.

49. As Picower's demands for more and more money from Madoff increased, he encouraged Madoff to expand the customer base of the BLMIS Discretionary Trading Program so that funds belonging to new customers could be stolen and given to the Picower Parties.

50. According to Madoff, Picower knew that BLMIS would have to conceal the fact that money belonging to customers in the BLMIS Discretionary Trading Program had been stolen by Picower.

51. According to Madoff, Picower also knew that BLMIS would have to generate false account information for each of the customers in the BLMIS Discretionary Trading Program, just as Picower demanded that Madoff generate false trades in order to justify the astronomical returns and fictitious losses that Picower demanded.

52. Picower knew and intended that each phony recording of a fictitious profitable transaction in his accounts resulted directly in the recording of false transactions and false asset values in the accounts of customers whose funds were invested pursuant to the BLMIS Discretionary Trading Program because BLMIS concealed the theft of customers' money in order to enrich Picower and the Picower Parties.

53. As a result of Picower's control over Madoff, he caused BLMIS to send to all of the customers of the BLMIS Discretionary Trading Program false and misleading information (*i.e.*, fictitious trade and inflated account values), in order to induce customers to maintain their accounts with BLMIS and to continue to attract new customers for BLMIS' Discretionary Trading Program. If Plaintiffs had been provided with accurate information, they would have immediately closed their accounts.

54. As a result of Picower's control, he caused BLMIS to solicit new customers for the BLMIS Discretionary Trading Program, such as the Plaintiffs.

55. The fraudulent transactions directed by Picower also directly resulted in the falsification of BLMIS' financial statements provided to regulators. Each month, BLMIS prepared and filed a Financial and Operational Combined Uniform Single ("FOCUS") report with the Financial Industry Regulatory Authority, Inc. ("FINRA"), the self-regulatory organization that regulates broker-dealers. BLMIS' FOCUS reports materially misstated its financial condition by failing to account properly for Picower's phony trades and for the overstated value of other customers' accounts.

56. Picower's ability to direct the creation and dissemination of false and misleading trading documentation which he knew would be incorporated in financial disclosures made by BLMIS, a regulated broker and investment advisor, shows that Picower exercised direct and indirect control over the day-to-day operations of BLMIS and over the illegal trading activity of the BLMIS Discretionary Trading Program.

57. Picower's conduct constituted a violation of the securities laws.

58. In addition to Picower's conspiracy with Madoff for BLMIS to provide Picower with astronomical returns and fictitious losses, Picower directed BLMIS to make a margin "loan"

of approximately $6 billion to Defendant Decisions Inc. This $6 billion represented money stolen from customers of the BLMIS Discretionary Trading Program.

59. Borrowing in a brokerage account is regulated by margin rules established by the Federal Reserve System and by the New York Stock Exchange. These rules limit the amount that an account holder can borrow based upon the value of securities that can be used as collateral for the loan. The Decisions Inc. account reflected virtually no trading activity and virtually no securities positions or other collateral for loans.

60. Picower was able to direct BLMIS to violate the margin loan rules and "loan" almost $6 billion to the Decisions Inc. account without any collateral.

61. Picower knew at all times that this $6 billion "loan" was actually a theft of funds from the accounts of other BLMIS Discretionary Trading Program customers that was never recorded in those accounts and never repaid.

62. As further evidence of Picower's control over Madoff, in or about 1992, Madoff covered large loss positions incurred by Picower. Madoff had a hold harmless agreement with Picower which Picower refused to honor. Madoff could have enforced the agreement but, instead, he expanded the customer base for the BLMIS Discretionary Trading Program, stealing money from new customers to cove Picower's losses.

63. In addition to the aforementioned illustrations of control exercised by Picower over BLMIS, Plaintiffs believe, based upon their investigation to date, that additional factual information concerning Picower's control over BLMIS and participation in the fraudulent scheme will be provided by Madoff, whose deposition Plaintiffs will seek to take promptly upon the reopening of this action.

Madoff's Confession

64. On December 11, 2008, Madoff was arrested by federal agents and charged with criminal violation of the federal securities laws, including securities fraud, investment advisor fraud, and mail and wire fraud. On the same day, the SEC filed a complaint in the United States District Court for the Southern District of New York against Madoff and BLMIS, also alleging that Madoff and BLMIS had engaged in securities fraud.

65. On December 15, 2008, the district court appointed the Trustee under the Securities and Investor Protection Action ("SIPA").

66. On March 10, 2009, the Government filed an 11-count criminal information against Madoff in the case styled *United States v. Madoff,* 09-CR-213 (S.D.N.Y.).

67. According to the Information, by 2008, Madoff had 4,800 customer accounts in the BLMIS Discretionary Trading Program and, by November 30, 2008, BLMIS' customer monthly statements showed an aggregate of $64 billion under management. However, according to the Information, Madoff never traded a single security on behalf of any customer. He merely stole money from customers of the BLMIS Discretionary Trading Program for other purposes, such as funding the Picower Parties' astronomical returns.

68. On March 12, 2009, Madoff pled guilty to all 11 counts, including Count I for securities fraud under § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. In his plea allocution, Madoff stated that he began the investment advisory business in 1992 and never executed a single trade on behalf of any client. He admitted that he deposited all victim cash in an account at Chase Bank and used the funds to pay "returns" to earlier "investors."

CLASS ACTION ALLEGATIONS

85. Plaintiffs bring this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3). The definition of the Class in this action is: (1) all customers of BLMIS who entrusted securities or cash to BLMIS, either directly or indirectly, pursuant to the BLMIS Discretionary Trading Program between December 1, 1992, the approximate date that Picower first became a control person of BLMIS, and December 11, 2008, the date that Madoff confessed (the "Class Period"). The Class excludes the Picower Parties, BLMIS employees, and any of their affiliates or controlled entities, as well as all co-conspirators.

86. The Class meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

a. *Numerosity.* The members of the Class are so numerous that joinder of all members is impractical. Based on disclosures made by the Trustee, the Class has thousands of members. Class members may be identified from records maintained by BLMIS and the Trustee. The members of the Class may be notified of the pendency of this action by mail or otherwise using a form of notice similar to that customarily used in securities class actions.

b. *Commonality.* Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are: (i) whether § 20(a) of the Exchange Act was violated by the Picower Parties as alleged herein; (ii) whether the Federal RICO Statutes were violated by the Picower Parties as alleged herein; (iii) whether the Florida RICO Statute was violated by the Picower Parties as alleged herein; (iv) whether the Picower Parties violated Florida common law as alleged herein; (iv) whether members of the Class have sustained damages as a result of the foregoing violations and, if so, the proper measure of such damages.

c. *Typicality.* Plaintiffs' claims are typical of the claims of members of the Class because they originate from the same misconduct of the Picower Parties and all members of the Class were similarly affected by Picower's wrongful conduct in violation of federal and state law as alleged herein.

d. *Adequacy.* Plaintiffs will fairly and adequately represent and protect the interest of the members of the Class, are committed to the vigorous prosecution of this action, have retained counsel competent and experienced in class and securities litigation, and have no interests antagonistic to or in conflict with those of the Class. As such, Plaintiffs are adequate representatives of the Class.

87. This class action also meets the requirements of Federal Rule of Civil Procedure 23(b)(3). The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the Class. The common issues outlined herein predominate over any individual issues in the case. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable and because of the many questions of law and fact that are common to Plaintiffs' claims and those of the Class. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually address the wrongs done to them. There will be no difficulty in the management of this action as a class action.

88. Class treatment will permit a large number of similarly situated persons to prosecute their claims in a single forum simultaneously, efficiently, and, without

unnecessarily duplicating evidence, effort, and expense that numerous individual actions would engender.

STATUTE OF LIMITATIONS ALLEGATIONS

89. On or about February 16, 2010, Fox and Marshall filed class actions complaints against the Picower Parties in the United States District Court for the Southern District of Florida. *See Susanne Stone Marshall, Individually and On Behalf of a Class of Similarly Situated v. Barbara Picower, Individually, and as Executor of the Estate Of Jeffry M. Picower, et al.,* Case No.: 10-CV-80254 (S.D. Fla.) and *Adele Fox, Individually and On Behalf of a Class of Similarly Situated v. Barbara Picower, Individually, and as Executor of the Estate Of Jeffry M. Picower, et al.,* Case No.: 10-CV-80252 (S.D. Fla.) Fox commenced the putative class action on behalf of BLMIS customers who were deemed "net winners" by the Trustee and thus entitled to no compensation in BLMIS' SIPA liquidation. Marshall filed a similar lawsuit on behalf of "net losers" who will not receive full compensation of their lost principal and interest.

90. The predominant theme of the complaints was that the Picower Parties directly participated in the fraudulent scheme and actively conspired with Madoff and BLMIS to injure Marshall, Fox, and similarly situated customers of the BLMIS Discretionary Trading Program. The complaints asserted claims for civil conspiracy, conversion, unjust enrichment, and conspiracy to violate the Florida RICO statute.

91. On March 31, 2010, the Trustee filed complaints in the Bankruptcy Court for the Southern District of New York to enjoin the *Fox* and *Marshall* actions. He also sought a preliminary injunction pursuant to 11 .S.C. § 105(a).

92. On May 3, 2010, the bankruptcy court enjoined the actions on the theory that they violated the automatic stay and were, therefore, void *ab initio* (the "Automatic Stay Decision").

93. On December 17, 2010, the United States Attorney's Office for the Southern District of New York filed a complaint against the Picower Parties for forfeiture in the amount of $7,206,157,717 (the "Forfeited Funds"), representing the net amount (according to the Government) that the Picower Parties received from their BLMIS accounts. That same day, the Government and the Picower Parties signed a forfeiture settlement stipulation, whereby the Picower Parties agreed to irrevocably and unconditionally turn over to the Government all of the Forfeited Funds.

94. Also on December 17, 2010, the Picower Parties entered into a settlement agreement with the Trustee for $5 billion of the $7.2 billion forfeited. That settlement resolved the Trustee's adversary proceeding against the Picower Parties in which he alleged that the Defendants received at least $7.2 billion from BLMIS, net of their investments. As part of the settlement, the Trustee agreed to use his reasonable best efforts to obtain a permanent injunction that would enjoin any BLMIS customer or creditor from asserting any claim against the Picower Parties that is duplicative or derivative of any claim brought by the Trustee, or which could have been brought by the Trustee.

95. On January 13, 2011, the Bankruptcy Court for the Southern District of New York entered an order approving the settlement and granting a permanent injunction (the "Permanent Injunction Order").

96. Fox and Marshall timely appealed the Permanent Injunction Order to the District Court for the Southern District of New York (the "District Court").

97. On March 26, 2012, the District Court issued an order affirming the Automatic Stay Decision and the Permanent Injunction Order (the "First Appeal Order").

98. Fox and Marshall appealed the First Appeal Order. On January 13, 2014, the Court of Appeals for the Second Circuit affirmed the District Court's decision without prejudice to Fox and Marshall seeking leave to amend their complaints in this Court. Although the court concluded that the Fox and Marshall complaints fell within the scope of the permanent injunction because they lacked particularized facts illustrating the Defendants' participation in the fraud aimed at other BLMIS investors, the court explicitly acknowledged that "[t]here is conceivably some particularized conspiracy claim appellants could assert that would not be derivative of those asserted by the Trustee."

99. Any applicable statute of limitations with respect to Plaintiffs' claims has been tolled since no later than February 16, 2010, by the filing of the class action complaints. *See American Pipe and Construction Company v. Utah,* 414 U.S. 538, 552 (1974).

100. The claims asserted in this complaint are timely because they relate back to the filing of the class action complaints. *See* Fed. R. Civ. P. 15(c).

COUNT I

VIOLATIONS OF SECTION 20(a) OF THE EXCHANGE ACT

BLMIS' Primary Violation of § 10(b) of the Exchange Act and Rule 10b-5

101. Plaintiffs repeat the allegations heretofore stated.

102. BLMIS violated § 10(b) of the Exchange Act and Rule 10b-5. Madoff pled guilty to criminal securities fraud under § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. Madoff admitted that his fraud involved billions of dollars.

103. BLMIS carried out a plan, scheme, and course of conduct that was intended to and, did: (i) cause customers of BLMIS' Discretionary Trading Program to entrust to BLMIS securities and cash; and (ii) misappropriate the assets of BLMIS customers who entered into agreements for their funds to be invested pursuant to the BLMIS Discretionary Trading Program. In furtherance of this unlawful scheme, plan, and course of conduct, BLMIS and its agents, including Madoff, took the actions set forth herein. Plaintiffs and the other members of the Class suffered damages in the amount of $64.8 billion as a result of the undisclosed and unauthorized theft of their securities and cash, the misappropriation of the proceeds thereof, and the deprivation of any appreciation in their investments, in many instances, over decades.

104. BLMIS (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon customers who entrusted their money to BLMIS to be invested pursuant to the BLMIS Discretionary Trading Program. Thus, BLMIS violated § 10(b) of the Exchange Act and Rule 10b-5.

105. As part of and in furtherance of this conduct, BLMIS engaged in an ongoing scheme to misappropriate funds that constituted the property of customers of the BLMIS Discretionary Trading Program.

106. BLMIS directly and indirectly, by the use, means and instrumentalities of interstate commerce and of the mails, engaged and participated in a continuous course of conduct to misappropriate funds that constituted the property of BLMIS customers such as the Plaintiffs and the Class members.

107. BLMIS made untrue statements of material fact and/or omitted to state material facts necessary to make its statements not misleading and employed devices, schemes and artifices to defraud, and engaged in acts, practices, and a course of conduct in an effort to mislead and misappropriate the assets of customers of the BLMIS Discretionary Trading Program. Such misconduct included the making of, or the participation in the making of, untrue statements of material fact and omitting to state material facts necessary in order to make the statements made about the BLMIS Discretionary Trading Program, its financial performance and its business operations not misleading in light of the circumstances under which they were made. The misconduct included engaging in manipulative and deceptive transactions, practices and courses of business which operated as a fraud and deceit upon the customers of the BLMIS Discretionary Trading Program, including the surreptitious and unauthorized theft of customer assets and securities.

108. BLMIS had actual knowledge of the misrepresentations and omissions of material facts set forth herein. BLMIS' material misrepresentations and/or omissions were done knowingly for the purpose and effect of inducing customers to enter into and maintain their assets in the BLMIS Discretionary Trading Program. At all relevant times, BLMIS was aware of the dissemination of artificially inflated financial information to its customers which it knew was materially false and misleading.

109. At the time of the misrepresentations, omissions and manipulative and deceptive conduct, Plaintiffs and other members of the Class were ignorant of their falsity and believed them to be true, and they were ignorant of the manipulative and deceptive conduct complained of herein. If Plaintiffs and the other members of the Class had known the truth regarding BLMIS' materially false statements and deceptive and manipulative conduct, Plaintiffs and other

members of the Class would never have entered into agreements with BLMIS to have their funds invested through the BLMIS Discretionary Trading Program.

110. As a direct and proximate result of BLMIS' wrongful, manipulative, and deceptive conduct, including the dissemination of the materially false and misleading information set forth above, Plaintiffs and the other members of the Class suffered damages through the loss of their investment assets and the deprivation of any appreciation on their investment assets, in many instances, over decades. As a result of the manipulative and deceptive conduct set forth above, Plaintiffs and the Class members suffered damages of approximately $64.8 billion.

111. By virtue of the foregoing, BLMIS violated § 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

The Picower Parties are Control Persons under Section 20(a)

112. Each Picower Party is an entity or individual operating as part of a control group of BLMIS. The Picower Parties were commonly controlled by Picower and used by him as a mere instrumentality for his criminal conduct.

113. Pursuant to § 20(a), Picower is jointly and severally liable to the same extent as BLMIS itself for BLMIS' violations of § 10(b) of the Exchange Act and Rule 10b-5.

114. Picower acted collectively and in concert with the Picower Parties as a control group of BLMIS within the meaning of § 20(a) of the Exchange Act as alleged herein.

115. Picower had the power to directly or indirectly control, and did in fact control, the overall decision-making at BLMIS, solicitation of customers, the record keeping for the Picower Parties' accounts and other BLMIS Discretionary Trading Program customers, and the false recording of securities transactions and cash transfers in and from all customer accounts at

BLMIS for customers of the BLMIS Discretionary Trading Program, including those of the Class members.

116. Picower had the power to directly or indirectly control, and did in fact control, the flow of funds and securities in and out of the accounts of the BLMIS Discretionary Trading Program and Picower knew that the activity in these accounts was fraudulently mis-stated to customers.

117. Picower regularly communicated and agreed with Madoff and other BLMIS personnel to perpetuate the fraud. Picower had a close relationship with Madoff and BLMIS, and directly and indirectly ensured that Madoff and BLMIS concealed the scheme from other customers in the BLMIS Discretionary Trading Program. Picower directly or indirectly induced BLMIS' misleading statements to others so that he could continue to enrich the Picower Parties at the expense of the Plaintiffs and the Class they seek to represent. These misrepresentations induced customers to entrust their funds to BLMIS for investment in the BLMIS Discretionary Trading Program.

118. Picower induced Madoff to solicit additional customers for the BLMIS Discretionary Trading Program so that he could continue to enjoy astronomical returns.

119. Picower had intimate knowledge of and involvement in the operations, record keeping, and financial management of BLMIS. Picower directly or indirectly induced the material misrepresentations and omissions giving rise to the securities violations alleged herein.

120. Picower knew and intended that material misrepresentations and omissions would be communicated to other customers of the BLMIS Discretionary Trading Program, including Plaintiffs. Picower directly or indirectly induced BLMIS to conceal the fraud from BLMIS customers and from federal and state regulators. Picower and the rest of the Picower Parties

profited from the BLMIS scheme and materially benefitted from Picower's direct or indirect control of BLMIS' violations of § 10(b) and SEC Rule 10b-5.

121. Pursuant to § 20(a), because of Picower's control of BLMIS and Picower's domination and control of Picower Parties, the Picower Parties are jointly and severally liable as a control group to the same extent as BLMIS itself for Plaintiffs' damages, which are sought to be recovered from other assets of the Picower Parties, and not from the funds recovered by the Trustee through his fraudulent conveyance claims.

122. As a direct and proximate result of BLMIS' securities violations, Plaintiffs and other members of the Class have suffered damages for which the Picower Parties are liable.

COUNT 2

VIOLATIONS OF FEDERAL RICO (18 U.S.C. § 1962(d))

123. Plaintiffs repeat the allegations stated in paragraphs 1 through 100 above as if fully set forth herein.

124. In the alternative, Plaintiffs sue pursuant to § 1964(c) of the Federal RICO Act, 18 U.S.C. §§ 1961-1968, which confers a private right of action on any person injured in his business or property by reason of a violation of § 1962.

125. Madoff and BLMIS, with criminal intent and through a pattern of racketeering activity, operated a criminal enterprise, which functioned from the offices of BLMIS at 885 Third Avenue, New York, New York and which affected interstate commerce.

126. The enterprise had an ascertainable structure and hierarchy that set it apart from the mere commission of the predicate acts set forth herein, and that form a pattern of racketeering activity in which Madoff and BLMIS actively engaged.

127. Madoff controlled and operated the criminal enterprise in violation of 18 U.S.C. §1962(c) by inducing customers to retain his investment advisory services and agreeing to entrust their money to him for investment through the BLMIS Discretionary Trading Program, utilizing false and fraudulent materials, and disseminating fraudulent trade confirmations and account statements.

128. None of the predicate acts on which the Plaintiffs rely involves "any conduct that would have been actionable as fraud in the purchase or sale of securities" as prohibited by 18 U.S.C. § 1964(c).

129. Madoff conducted the affairs of a criminal enterprise through a pattern of racketeering that ran from approximately 1992 until December 11, 2008 in violation of 18 U.S.C. § 1962 for the unlawful purpose of intentionally defrauding the Plaintiffs and the Class they represent.

130. Madoff and BLMIS conducted the enterprise's affairs through a pattern of racketeering acts that consisted, among other things, of sending through the United States mail to thousands of customers of the BLMIS Discretionary Trading Program every month, between 1992 and December 11, 2008, periodic trade confirmations reflecting trades in their accounts that, in fact, did not occur, and monthly account statements that stated falsely that the customers' money was invested in various securities and that BLMIS has transacted various stock and bond transactions on their behalves.

131. The BLMIS trade confirmations and account statements were intended to cause, and did in fact cause, customers in the BLMIS Discretionary Trading Program to believe that their money was earning a positive return which caused them to give more money to BLMIS for investment pursuant to the BLMIS Discretionary Trading Program.

132. The RICO violation is the conduct of an enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), namely the use of the mails and wires in furtherance of a scheme to defraud or obtain property by means of false or fraudulent pretenses, representations, or promises, in violation of 18 U.S.C. §§ 1341 and 1343.

133. Each predicate act was related and had as its purpose the criminal diversion of funds from the accounts of customers of the BLMIS Discretionary Trading Program.

134. The conduct underlying the fraudulent scheme alleged in the complaint establishes a "pattern of racketeering activity" within 18 U.S.C. § 1961(5). This conduct does not consist of isolated incidents.

135. The Picower Parties knowingly and purposefully agreed and conspired with Madoff and BLMIS to violate 18 U.S.C. § 1962(c) by knowingly participating in Madoff's racketeering enterprise.

136. The Picower Parties knowingly and purposely conspired to violate 18 U.S.C. § 1962(c) by, among other things, (i) directing and orchestrating preparation of fictitious account statements to be distributed to customers of the BLMIS Discretionary Trading Program; (ii) encouraging Madoff to increase the customer base of the BLMIS Discretionary Trading Program in order to maintain the criminal enterprise; (iii) causing BLMIS to recognize certain fictitious gains and losses in the Picower Parties' accounts so that Picower and the rest of the Picower Parties could be enriched by the RICO scheme; (iv) causing BLMIS to steal money from customers in the BLMIS Discretionary Trading Program to generate enormous paper profits in the Picower Parties' accounts, thereby allowing Picower and the rest of the Picower Parties to enrich themselves by substantially more than $7.2 billion; and (v) causing BLMIS to falsify BLMIS' financial statements provided to regulators.

137. By directing Madoff and BLMIS employees to book various phony transactions that generated phony profits, the Picower Parties controlled and actively participated in the criminal conduct of Madoff and BLMIS in stealing the funds of customers of the BLMIS Discretionary Trading Program, including the funds of the Plaintiffs and the Class.

138. The Picower Parties' knowing participation in the fraudulent scheme was an integral part of the racketeering enterprise.

139. Plaintiffs and the Class are victims of Madoff's criminal enterprise. By virtue of the fraudulent scheme of Madoff and the Picower Parties in violation of 18 U.S.C. § 1962, the Plaintiffs and the Class have been caused damages of $64.8 billion.

COUNT 3

CONSPIRACY TO VIOLATE THE FLORIDA CIVIL REMEDIES FOR CRIMINAL PRACTICES ACT (FLORIDA RICO)

140. Plaintiffs repeat the allegations stated in paragraphs 1-100 and 124-139 above as if fully set forth herein.

141. This is an action for violations of the Florida Civil Remedies for Criminal Practices Act, Fla. Stat. § 772.101, *et seq.*, also known as the Florida RICO Act.

142. Florida Stat. § 772.104 provides that any person who has been injured by reason of the provisions of § 772.103 shall have a civil cause of action for threefold actual damages and also for reasonable attorneys' fees and court costs through the trial and appellate courts.

143. Section 772.103 provides that:

> [i]t is unlawful for any person:
>
> (1) Who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of criminal activity or through the collection of an unlawful debt to use or invest,

whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) Through a pattern of criminal activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) Employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt.

(4) To conspire or endeavor to violate any of the provisions of subsection (1), subsection (2), or subsection (3).

144. Under Fla. Stat. § 772.102(3), an "enterprise" is defined as "any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and the term includes illicit as well as licit enterprises. . . ."

145. The enterprise was comprised of an association in fact of Madoff, individually, and through the association with BLMIS, with the Picower Parties, and others, that engaged in a scheme to fraud customers of the BLMIS Discretionary Trading Program.

146. Madoff, with criminal intent, received proceeds from the operation of the criminal enterprise in violation of Fla. Stat. § 772.103(1).

147. Additionally, Madoff, with criminal intent, through the pattern of criminal activity of the enterprise, participated in the conduct of, was otherwise in control of, and operated the enterprise by inducing new customers to enroll in the BLMIS Discretionary Trading Program, utilizing false and fraudulent materials, disseminating fraudulent trade confirmations and account

statements to customers of the BLMIS Discretionary Trading Program, and submitting falsified BLMIS financial statements to regulators.

148. The enterprise had an ascertainable structure and hierarchy that set it apart from the mere commission of the predicate acts set forth herein, and that form a pattern of racketeering activity in which Madoff and BLMIS actively engaged.

149. Under Fla. Stat. § 772.102(1)(a)(22), "criminal activity" includes any act indictable under Chapter 817 of the Florida Criminal Code relating to fraudulent practices, false pretenses, and fraud generally.

150. "Criminal activity" also encompasses any conduct that is subject to indictment or information as a criminal offense and listed in 18 U.S.C. § 1961(1), which includes § § 1341 and 1343 of Title 18 relating to mail fraud and wire fraud, respectively. *See* Fla. Stat. § 772.102(1)(b).

151. As set forth in detail above, Madoff engaged in a systematic ongoing course of criminal conduct with the intent to defraud customers of the BLMIS Discretionary Trading Program, including Plaintiffs and the Class, based on the following predicate acts: (a) a scheme to defraud with the intent to obtain property by false or fraudulent pretenses, representations, or promises as well as by unlawful misrepresentations in violation of Fla. Stat. § 817.034(4); (b) federal mail fraud; and (c) federal wire fraud.

152. Under Fla. Stat. § 772.102(4), a "pattern of criminal activity" is defined as "engaging in at least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided that the last of such incidents occurred within 5 years after a prior incident of criminal activity."

153. Madoff and BLMIS engaged in a "pattern of criminal activity" that consisted, among other things, of sending through the United States mail to thousands of customers of the BLMIS Discretionary Trading Program every month, between 1992 and December 11, 2008, trade confirmations and monthly account statements that stated falsely that the customers' money was invested in various securities and that BLMIS had transacted various stock and bond transactions on their behalves.

154. Each predicate act alleged herein was related and had as its purpose the criminal diversion of funds from customers of the BLMIS Discretionary Trading Program in connection with the conspiracy conducted by BLMIS, Madoff, and the Picower Parties.

155. This conduct did not arise out of a single contract or transaction, but was a pervasive scheme that injured the Class over many years. Each predicate act was related, had a similar purpose, involved the same or similar participants and method of commission, had similar results, and impacted the Class in a similar fashion.

156. The predicate acts specified above which Madoff committed, and which the Picower Parties conspired with Madoff to commit, were related to each other in furtherance of the scheme implemented by the enterprise.

157. Under Fla. Stat. § 772.102(1), "criminal activity" also includes the conspiracy to commit the predicate acts under that section.

158. At all relevant times, the Picower Parties knew of, agreed and conspired to participate in the scheme set forth herein through a pattern of criminal activity in violation of Fla. Stat. §772.103(4).

159. The Picower Parties knowingly and purposefully agreed and conspired with Madoff and BLMIS to violate Fla. Stat. § 772.103 by knowingly participating in Madoff's criminal enterprise.

160. The Picower Parties committed and/or caused to be committed a series of overt acts in furtherance of the conspiracy alleged herein to effect the objective of the fraudulent scheme, including the acts alleged in paragraphs 42 through 62.

161. For instance, the Picower Parties knowingly and purposely conspired to violate Fla. Stat. § 772.103 by, among other things, (i) directing and orchestrating preparation of fictitious account statements to be distributed to customers of the BLMIS Discretionary Trading Program; (ii) encouraging Madoff to increase the customer base of the BLMIS Discretionary Trading Program in order for BLMIS to obtain additional funds that the Picower Parties could steal in furtherance of the criminal enterprise; (iii) causing BLMIS to recognize astronomical fictitious gains and losses in the Picower Parties' accounts; (iv) causing BLMIS to steal money from customers in the BLMIS Discretionary Trading Program to generate enormous paper profits in the Picower Parties' accounts; and (v) causing BLMIS to falsify BLMIS' financial statements provided to regulators.

162. By directing Madoff and BLMIS employees to book various phony transactions that generated phony profits, the Picower Parties controlled and enabled BLMIS to wrongfully convert the funds of customers of the BLMIS Discretionary Trading Program, including the funds belonging to the Plaintiffs and the Class.

163. The Picower Parties' knowing participation in the fraudulent scheme was an integral part of the criminal enterprise.

164. Plaintiffs and the Class are victims of Madoff's criminal enterprise. By virtue of the fraudulent scheme of Madoff and the Picower Parties in violation of Fla. Stat. § 772.103, the Plaintiffs and the Class have suffered damages in excess of $64.8 billion.

COUNT 4

AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

165. Plaintiffs repeat the allegations stated in paragraphs 1 through 100 above as if fully set forth herein.

166. Madoff and BLMIS owed a fiduciary duty to customers of the BLMIS Discretionary Trading Program, including Plaintiffs and the Class.

167. The Picower Parties knew that Madoff, as the sole owner of BLMIS and an investment advisor, owed a fiduciary duty to the customers of the BLMIS Discretionary Trading Program. Moreover, Picower undoubtedly had reviewed account agreements in which BLMIS agreed to invest customers' money pursuant to specific terms.

168. Madoff and BLMIS breached that fiduciary duty by, among other things, failing to use the funds that customers of the BLMIS Discretionary Trading Program entrusted to BLMIS for investment purposes and instead misappropriating the funds for the enrichment of Madoff and the Picower Parties.

169. The Picower Parties knowingly participated in the theft of the money belonging to the customers of the BLMIS Discretionary Trading Program.

170. Madoff was able to perpetrate this scheme by sending customers of the BLMIS Discretionary Trading Program, including the Plaintiffs and the Class, trade confirmations and monthly account statements that falsely stated that securities were being purchased and sold on their behalves.

171. The Picower Parties provided substantial assistance to Madoff in stealing the money belonging to the customers in the BLMIS Discretionary Trading Program.

172. For instance, Picower directly or indirectly caused BLMIS employees to book profitable fabricated securities transactions in accounts which he directly or indirectly owned that, in fact, never occurred.

173. Picower knew that by demanding and receiving astronomical returns on his and the other Picower Parties' money, Madoff and BLMIS were forced to steal the money belonging to the customers of the BLMIS Discretionary Trading Program. This theft was carried out through material misrepresentations to other BLMIS investors as to their account values and profits.

174. The misrepresentations that Picower knowingly and intentionally caused to be made were calculated to give the appearance that BLMIS was a legitimate and profitable business and that BLMIS customers were making steady profits in their accounts. The misrepresentations ensured that the fraudulent scheme would continue, and that Picower would continue to reap the benefits from the scheme.

175. The Picower Parties' participation was a proximate cause of the breach. For reasons presently unknown, Picower controlled Madoff and caused Madoff to accede to all of his demands for astronomical returns and for falsified losses.

176. The aforesaid conduct by the Picower Parties was purposeful. With knowledge that they were aiding and abetting BLMIS' and Madoff's breach of fiduciary duty, Picower caused BLMIS to send to all of the customers of the BLMIS Discretionary Trading Program false and misleading information in order to induce customers to maintain their accounts with BLMIS and to continue to attract new customers for BLMIS' Discretionary Trading Program.

177. Picower's aiding and abetting of this breach of fiduciary duty caused customers of the BLMIS Discretionary Trading Program to lose billions of dollars.

178. As a result of Picower's aiding and abetting Madoff's fraud, Plaintiffs have suffered damages of $64.8 billion.

COUNT 5

AIDING AND ABETTING FRAUD

179. Plaintiffs repeat the allegations stated in paragraphs 1 through 100 above as if fully set forth herein.

180. Madoff and BLMIS committed a massive fraud.

181. The Picower Parties had actual knowledge of the fraud that BLMIS perpetrated on customers of the BLMIS Discretionary Trading Program and fully and knowingly lent substantial assistance to Madoff and BLMIS in committing the fraud.

182. Picower knew that, in order to generate enormous paper profits in the Picower Parties' accounts, BLMIS would have to steal money from customers in the BLMIS Discretionary Trading Program.

183. Picower also knew that BLMIS would have to generate false account information for each of the customers in the BLMIS Discretionary Trading Program, just as Picower demanded that Madoff generate false trades in order to justify the astronomical returns and fictitious losses that Picower demanded.

185. Picower substantially assisted Madoff and BLMIS in committing the fraud by causing BLMIS employees to book profitable fabricated securities transactions in accounts which he directly or indirectly owned; causing additional material misrepresentations to other BLMIS investors as to their account values and profits; actively encouraging and causing

BLMIS to solicit new customers for the BLMIS Discretionary Trading Program, which Picower knew to be a fraudulent scheme; causing BLMIS to submit fraudulent financial statements to the regulators; directing recording of fictitious transactions in the Picower Parties' accounts; and directing BLMIS to violate rules pertaining to margin loans.

186. Picower's assistance was a proximate cause of the fraud because, for reasons presently unknown, Picower controlled Madoff and caused Madoff to accede to all of his demands for astronomical returns and for falsified losses.

187. Madoff's scheme has resulted in billions of dollars in losses to customers of the BLMIS Discretionary Trading Program, including the Plaintiffs and the Class.

188. As a result of Picower's aiding and abetting Madoff's fraud, Plaintiffs have suffered damages in excess of $64.8 billion.

189. Plaintiffs are entitled to punitive damages in an amount equal to ten times their actual damages.

COUNT 6

NON-NOMINATIVE TORT FOR INTENTIONAL AND UNPRIVILEGED INFLICTION OF TEMPORAL HARM

190. Plaintiffs repeat the allegations stated in paragraphs 1 through 100 above as if fully set forth herein.

191. By knowingly and intentionally participating in BLMIS' fraudulent scheme on the customers of the BLMIS Discretionary Trading Program, the Picower Parties caused customers of the BLMIS Discretionary Trading Program, including the Plaintiffs and the Class, to incur billions of dollars in losses.

192. The Picower Parties' conduct was undertaken without excuse or justification, was motivated by greed, and was intended to keep the fraudulent scheme from collapsing so that the Picower Parties could reap the benefits of the fraudulent scheme.

193. As a result of the Picower Parties' conduct, Plaintiffs and the Class have suffered damages in excess of $64.8 billion.

WHEREFORE, Plaintiffs demand judgment against the Picower Parties as follows:

(i) On Count One, awarding Plaintiffs and the Class compensatory damages against the Picower Parties jointly and severally in an amount to be determined at trial, together with interest, counsel fees, litigation expenses, and cost of suit;

(ii) On Count Two, awarding Plaintiffs and the Class compensatory damages against the Picower Parties jointly and severally, treble damages under RICO, plus attorneys' fees, litigation expenses, and cost of suit;

(iii) On Count Three, awarding Plaintiffs and the Class compensatory damages against the Picower Parties jointly and severally, treble damages pursuant to Fla. Stat. § 772.104(1), as well as attorneys' fees and costs authorized under Fla. Stat. § 772.104(1);

(iv) On Count Four, awarding Plaintiffs and the Class compensatory and punitive damages against the Picower Parties jointly and severally in an amount to be determined at trial, together with interest, counsel fees, litigation expenses, and cost of suit;

(v) On Count Five, awarding Plaintiffs and the Class compensatory and punitive damages against the Picower Parties jointly and severally in an amount to be determined at trial, together with interest, counsel fees, litigation expenses, and cost of suit;

(vi) On Count Six, awarding Plaintiffs and the Class compensatory and punitive damages against the Picower Parties jointly and severally in an amount to be determined at trial, together with interest, counsel fees, litigation expenses, and cost of suit;

(vii) Determining that this action is a proper class action;

(viii) Designating Plaintiffs as class representatives under Rule 23 of the Federal Rules of Civil Procedure and Plaintiffs' counsel as class counsel; and

(ix) Granting Plaintiffs such other and further relief as the Court deems appropriate.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

February 5, 2014

BECKER & POLIAKOFF, P.A.

/s/ Allen M. Levine
Florida Bar No. 315419
Becker and Poliakoff, P.A.
1 East Broward Blvd.
Suite 1800
Ft. Lauderdale, FL 33301
Telephone: (954) 987-7550
Facsimile: (954) 985-4176
ALevine@bplegal.com

and

BECKER & POLIAKOFF LLP

By: *s/s Helen Davis Chaitman*

45 Broadway
New York, New York 10006
Telephone: (212) 599-3322
Facsimile: (212) 557-0295

Email: hchaitman@bplegal.com
Email: jgorchkova@bplegal.com

Attorneys for Plaintiffs and the Class

ACTIVE: 5443125_1
DRAFT 2/5/14

EXHIBIT H

HERRICK, FEINSTEIN LLP
Two Park Avenue
Joshua J. Angel
Frederick E. Schmidt, Jr.
New York, New York 10016
Telephone: (212) 592-1400
Facsimile: (212) 592-1500
jangel@herrick.com
eschmidt@herrick.com

BEASLEY HAUSER KRAMER & GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Telephone: (561) 835-0900
Facsimile: (561) 835-0939

BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, Florida 33480
Telephone: (561) 659-5754
Facsimile: (561) 659-3184

Attorneys for A & G Goldman Partnership, individually and on behalf of a similarly situated class

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Adv. Pro. No. 08-1789 (BRL)
SECURITIES INVESTOR PROTECTION CORPORATION,	:	SIPA Liquidation
	:	(Substantively Consolidated)
Plaintiff-Applicant,	:	
v.	:	
BERNARD L. MADOFF INVESTMENT SECURITIES LLC,	:	
Defendant.	:	

MOTION OF PICOWER CLASS ACTION PLAINTIFFS FOR A DETERMINATION THAT THE COMMENCEMENT OF SECURITIES CLASS ACTION LAWSUITS AGAINST NON-DEBTOR PARTIES IS NOT PROHIBITED BY A PERMANENT INJUNCTION ISSUED BY THIS COURT OR VIOLATIVE OF THE AUTOMATIC STAY

A & G Goldman Partnership,[1] individually and on behalf of all other similarly situated (collectively, the "Picower Class Action Plaintiffs" or "Movants"), by and through their undersigned counsel, as and for their motion (the "Motion") for entry of an order determining that neither the injunction issued by this Court as part of its order, dated January 13, 2011, nor the automatic stay provisions (the "Automatic Stay") of section 362 of title 11 of the United States Code (the "Bankruptcy Code"), bar, prohibit, restrict or prevent Movants from commencing and prosecuting a securities law class action (the "Class Action") against certain non-debtor defendants (collectively, the "Picower Defendants") in the United States District Court for the Southern District of Florida (the "Florida District Court"), respectfully represent as follows:

PRELIMINARY STATEMENT

1. As more fully set forth below, Movants respectfully submit that neither the permanent injunction issued by this Court nor the Automatic Stay restricts the commencement and prosecution of the Class Actions in the Florida District Court because:

- The securities law claims asserted by the Movants against the Picower Defendants in the Class Actions are neither "duplicative" nor "derivative" of any claims the Trustee brought or could have brought against the Picower Defendants. Those claims, which belong to BLMIS's investors, are not of the type which could be asserted by the Trustee (as defined below). Moreover, as confirmed by recent decisions rendered by the District Court for the Southern District of New York, the Trustee does not have standing to assert claims against third parties on behalf of customers of BLMIS (as defined below).

- Movants do not seek any relief against the Debtors (as defined below) or property of the Debtors' estate in the Class Action.

2. Unless barred by order of this Court, Movants intend to file a class action

[1] A & G Goldman Partnership, like all other class members, is a "net winner" having (i) received the return of its principal investment with BLMIS, (ii) not received the full amount reflected in its last BLMIS account statement; and (iii) incurred significant economic damages separate and apart from the returns reflected in its last BLMIS account statement.

complaint (the "Class Action Complaint") substantially in the form annexed hereto as Exhibit "A" (without exhibits) in the Florida District Court.

BACKGROUND

The Madoff/BMIS Bankruptcy Court Cases

3. On December 11, 2008, the Securities and Exchange Commission ("SEC") filed a Securities Violation Complaint in the United States District Court for the Southern District of New York against the estate of Bernard L. Madoff ("Madoff") and Bernard L. Madoff Investment Securities LLC ("BLMIS", and together with Madoff, the "Debtors"). The SEC alleged, *inter alia*, that the Debtors engaged in fraud through investment advisor activities of BLMIS.

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

5. On December 15, 2008, the District Court entered an order pursuant to SIPA which, in pertinent part:

- appointed Irving H. Picard (the "Trustee") as trustee for the liquidation of the business of BLMIS, pursuant to section 78eee(b)(3) of SIPA;
- removed the case to this Court pursuant to section 78eee(b)(4) of SIPA; and
- authorized the Trustee to take immediate possession of the property of the Debtors, wherever located.

6. On April 13, 2009, an involuntary bankruptcy petition was filed against Madoff.

On June 9, 2009, this Court entered an order substantively consolidating the chapter 7 estate of Madoff into the BLMIS SIPA proceeding.

The Picower Settlement

7. On May 12, 2009, the Trustee filed a complaint (the "Picower Complaint") commencing an adversary proceeding against certain of the Picower Parties (as defined below), captioned *Picard v. Picower*, Adv. Pro. No. 09-1197 (BRL), in which he alleged that prior to the Filing Date, BLMIS made payments or other transfers (the "Transfers") totaling more than $6.7 billion to one or more of the Picower Parties. The Picower Complaint asserted claims under, *inter alia*, section 547 of the Bankruptcy Code for avoidance and recovery of alleged preferential transfers, sections 544 and 548 of the Bankruptcy Code for avoidance and recovery of alleged fraudulent conveyances and section 542 of the Bankruptcy Code for turnover of alleged assets of the Debtors' estates. The Trustee has since asserted that BLMIS transferred to the Picower Parties an amount of at least approximately $7.2 billion.

8. The Trustee thereafter entered into a settlement agreement (the "Picower Settlement Agreement") with what are referred to therein as the "Picower BLMIS Account Holders", "Adversary Proceeding Defendants," and the "Picower Releasees" (collectively referred to herein as the "Picower Parties"). The Trustee presented the Picower Settlement Agreement to the Court for approval by motion dated December 17, 2010 (the "Picower Settlement Motion"). The salient terms of the Picower Settlement Agreement are as follows:

- Barbara Picower, one of the Picower Parties, on behalf of herself and the other Picower Parties, agreed to forfeit to the United States Attorney's Office for the Southern District of New York (the "Government") the amount of $7,206,157,717, of which $5 billion was to be credited and paid over to the Trustee with the balance remaining with the Government.

- The Trustee provided a broad release to the Picower Parties "from any and all past, present or future claims or causes of action that are, have been, could have been or might in the future be asserted by the Trustee."

- The effectiveness of the Trustee Picower Release was conditioned on only two things: (i) receipt by the Trustee or the Government of the Bankruptcy Settlement Amount; and (ii) the entry of either a final order of this Court approving the Picower Settlement Agreement, or a final order of the District Court approving a forfeiture agreement between the Government and the Picower Parties.

9. On January 13, 2011, the Court entered an order (the "Picower Settlement Order") approving the Picower Settlement Agreement. A copy of the Picower Settlement Order is annexed hereto as Exhibit "B".

10. The Picower Settlement Order contained the following permanent injunction provision:

> ORDERED, that any BLMIS customer or creditor of the BLMIS estate who filed or could have filed a claim in the liquidation, anyone acting on their behalf or in concert or participation with them, or anyone whose claim in any way arises from or is related to BLMIS or the Madoff Ponzi scheme, is hereby permanently enjoined from asserting any claim against the Picower BLMIS Accounts or the Picower Releasees ***that is duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower Releasees.*** (emphasis added).

11. Upon information and belief, the Government Settlement Amount has been paid into escrow for the benefit of the Government, and although orders of this Court and the District Court have been entered, neither order has become final due to pending appeals.

12. As set forth hereafter, the claims contained in the Class Action Complaint are neither "duplicative or derivative of the claims brought by the Trustee" nor claims "which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower

Releasees."[2]

The Class Action Complaint

13. Upon approval of this Court, Movants will commence the Class Action by filing the Class Action Complaint in the Florida District Court.

14. The Class Action Complaint asserts claims (the "Class Action Claims") under section 20(a) of the Securities Exchange Act of 1934 (as amended, the "Exchange Act") against the Picower Defendants, based on, among other things, the Picower Defendants' control and influence over the decision making, record-keeping, securities transaction recording, and flow of funds and assets at BLMIS, which resulted in the Picower Defendants receiving billions of dollars of unearned profits from BLMIS.

ARGUMENT

THE FILING AND PROSECUTION OF THE CLASS ACTION COMPLAINT DOES NOT VIOLATE THE PERMANENT INJUNCTION ENTERED BY THIS COURT

15. The Class Action Claims are neither "duplicative" nor "derivative" of any claims made by the Trustee against the Picower Defendants. In fact, neither the Trustee nor the pre-petition Debtor could have asserted the Movants' securities law claims against the Picower Defendants. Thus, the Movants are not barred under the Picower Settlement Order from asserting their securities law claims against the Picower Defendants.

A. Neither BLMIS Nor the Trustee Could Assert the Class Action Claims on Their Own Behalf

16. The Class Action Claims cannot be asserted by the Trustee or BLMIS. The Class Action Claims are based on control person liability pursuant to section 20(a) of the Exchange Act. In order to assert a claim under Exchange Act section 20(a), a plaintiff must allege a

[2] Movants are aware that the Settlement Order and the permanent injunction therein are the subject of appeals to the District Court for the Southern District of New York. For the purposes of this Motion, Movants take no position on the issues raised in those appeals

primary violation of section 10(b) of the Exchange Act. See, e.g., STMicroelectronics v. Credit Suisse Group, 775 F. Supp. 2d 525, 535 (E.D.N.Y. 2011). A plaintiff asserting a claim under Exchange Act section 10(b) and Securities and Exchange Commission Rule 10b-5,[3] in turn, must be a "purchaser" or "seller" of securities in order to have standing. See Amorosa v. Ernst & Young LLP, 682 F. Supp. 2d 351, 367-69 (S.D.N.Y. 2010).

17. Here, the Class Action Complaint alleges that the Picower Defendants controlled BLMIS and that BLMIS committed violations of section 10(b) of the Exchange Act and Rule 10b-5. Neither BLMIS nor the Trustee (acting on behalf of BLMIS) would have standing to commence a § 20(a) action against the Picower Defendants because BLMIS was neither a "purchaser" nor "seller" of its own securities.

18. Furthermore, a primary violator, such as BLMIS, may not assert a § 20(a) claim against its alleged controller. See In re Maxim Integrated Products, Inc. Derivative Litigation, 574 F. Supp. 2d 1046, 1067 (N.D. Cal. 2008) (dismissing § 20(a) claim where plaintiffs sued derivatively on behalf of primary violator). Accordingly, even if BLMIS were a purchaser or seller of BLMIS securities, it still could not assert a § 20(a) claim because it was the primary violator of § 10(b) of the Exchange Act and Rule 10b-5.

19. The Trustee, therefore, could not assert a direct § 20(a) claim against the Picower Defendants, and the Movants' Class Action Claims are not subject to the injunction in the Picower Settlement Order.

B. The Trustee Does Not Have Standing to Assert the Class Action Claims on Behalf of BLMIS Investors

20. The Trustee does not have standing to commence and prosecute the Class Action

[3] Private rights of action for violations of section 10(b) of the Exchange Act are created by Securities and Exchange Commission Rule 10b-5 ("Rule 10b-5"). See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 126 S.Ct. 1503, 1509 (2006).

Claims on behalf of BLMIS's investors. Two recent District Court decisions have helped to define the limits of the Trustee's ability to assert claims on behalf of BLMIS creditors against third parties. Both decisions establish conclusively that the Trustee may not assert claims against third parties on behalf of BLMIS's investors.[4]

1. Picard v. HSBC

21. On July 15, 2009, the Trustee commenced an adversary proceeding (the "HSBC Action") against HSBC Bank PLC and certain of its affiliates (collectively, "HSBC"), seeking approximately $2 billion in preferential or fraudulent transfers, and an additional $6.6 billion in damages under common law theories such as unjust enrichment, aiding and abetting fraud, and aiding and abetting breach of fiduciary duty. The Trustee alleged that HSBC failed to adequately investigate BLMIS despite the existence of red flags and indicia of fraud. The United States District Court for the Southern District of New York (Judge Rakoff) withdrew the reference to address a threshold issue of federal non-bankruptcy law; to wit, whether the Trustee had standing to pursue common law claims against third parties on behalf of BLMIS's customers.

22. On July 28, 2011, Judge Rakoff rendered a decision dismissing the Trustee's customer claims against HSBC for lack of standing. See Picard v. HSBC Bank PLC, 454 B.R. 25 (S.D.N.Y. 2011) (copy attached as Exhibit "C"). The Court rejected the Trustee's arguments that he had standing, and held that "the Trustee does not have standing to bring his common law claims either on behalf of customers directly or as bailee of customer property, enforcer of SIPC's subrogation rights, or assignee of customer claims." 454 B.R. at 37.

2. Picard v. JPMorgan Chase & Co.

23. The Trustee also commenced two adversary proceedings against UBS AG and

[4] The decisions also note that BLMIS would be barred from asserting direct common law fraud claims under the doctrine of *in pari delicto*.

certain of its affiliates (collectively, "UBS," and the adversary proceeding against it, the "UBS Action") and JPMorgan Chase & Co. and certain of its affiliates (collectively, "JPM," and the adversary proceeding against it, the "JPM Action"). The causes of action asserted by the Trustee in the UBS and JPM Actions were substantially similar, and the reference of both actions to the Bankruptcy Court was withdrawn by the District Court (Judge McMahon) in order to address the issue of whether the Trustee had standing to pursue common law claims (including aiding and abetting fraud, breach of duty and conversion, and unjust enrichment) against third party banks such as UBS and JPM on behalf of BLMIS customers.

24. JPM moved to dismiss the common law claims asserted by the Trustee. UBS move to dismiss as well, joining JPM's arguments, and on November 1, 2011, the District Court (Judge McMahon) issued its decision dismissing the Trustee's common law claims for lack of standing in both the UBS and JPM Actions. See Picard v. JPMorgan Chase & Co., 2011 WL 5170434 (S.D.N.Y. Nov. 1, 2011) (copy attached as Exhibit "D").

25. In its decision the Court in the JPM Action ruled consistently with Judge Rakoff's reasoning in the HSBC decision and held, *inter alia*, that the Trustee's common law claims belonged to the creditors of BLMIS, not the Trustee and that the Trustee did not otherwise establish any other basis to confer him standing to bring the common law claims. 2011 WL 5170434 at *3-*5. Here, the Trustee likewise does not have standing to assert the Class Action Claims against the Picower Defendants on behalf of the BLMIS investors.

26. Because the Trustee could not assert the Class Action Claims against the Picower Defendants, either as a direct claim of the BLMIS estate or derivatively on behalf of BLMIS's investors, the Class Action Claims are neither duplicative of nor derivative of claims brought by the Trustee against the Picower Defendants. Accordingly, it is respectfully submitted that the

Class Action Claims are not permanently enjoined by the Picower Settlement Order.

THE AUTOMATIC STAY DOES NOT APPLY

27. Just as the Class Action is not barred by the permanent injunction in the Picower Settlement Order, it is also not subject to the Automatic Stay. The Class Action Claims do not fall within any of the categories of claims against the Debtors or property of their estates that are stayed by section 362 of the Bankruptcy Code. The Debtors are not named as parties, nor does the Class Action Complaint seek a judgment or other remedy or relief against the Debtors or their property, directly or indirectly. Importantly, the Class Actions do not seek any of the proceeds of the Trustee's settlement with the Picower Defendants. By its plain language, section 362(a)(1) of the Bankruptcy Code stays actions only against a debtor. Courts continually have held that the automatic stay is inapplicable to actions and proceedings against non-debtors. See Teachers Ins. & Annuity Ass'n v. Butler, 803 F.2d 61, 65 (2d Cir. 1986); In re United Health Care Org., 210 B.R. 228, 232 (S.D.N.Y. 1997); Ripely v. Mulroy, 80 B.R. 17, 19 (E.D.N.Y. 1987). See also Credit Alliance Corp. v. Williams, 851 F.2d 119, 121 (4th Cir. 1988) ("The plain language of § 362 ... provides only for the automatic stay of judicial proceedings and enforcement of judgments against the debtor or the property of the estate.") (citation and internal quotations omitted).

28. Here, the Class Action Complaint asserts claims against only the Picower Defendants and not the Debtor. Moreover, the Class Action Claims will not affect property of the Debtor's estate. Nor will Movants be usurping or interfering with causes of action belonging to the Trustee. As set forth above, the Trustee does not have standing to assert § 20(a) claims against the Picower Defendants. Moreover, the Trustee has already settled his claims against the Picower Defendants and the Movants do not seek to upset that settlement. Accordingly, the

Automatic Stay does not apply to the Class Action Claims.

CONCLUSION

For the reasons set forth above, the Movants respectfully request that the Court (a) enter an Order (i) determining that neither the permanent injunction contained in the Picower Settlement Order nor the Automatic Stay prohibits the Movants from commencing and fully prosecuting the Class Actions.

Dated: New York, New York
December 13, 2011

Respectfully submitted,

/s/Joshua J. Angel

HERRICK, FEINSTEIN LLP
Two Park Avenue
New York, New York 10016
Telephone: (212) 592-1400
Facsimile: (212) 592-1500
Joshua J. Angel
Frederick E. Schmidt, Jr.

BEASLEY HAUSER KRAMER & GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Telephone: (561) 835-0900
Facsimile: (561) 835-0939

- and -

BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, Florida 33480
Telephone: (561) 659-5754
Facsimile: (561) 659-3184

Attorneys for A & G Goldman Partnership, individually and on behalf of a similarly situated class

EXHIBIT A

DRAFT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No: _____

A & G GOLDMAN PARTNERSHIP, individually
and on behalf of a class of similarly situated Plaintiffs,

vs.

CAPITAL GROWTH COMPANY;
DECISIONS, INC.;
FAVORITE FUNDS;
JA PRIMARY LIMITED PARTNERSHIP;
JA SPECIAL LIMITED PARTNERSHIP;
JAB PARTNERSHIP;
JEMW PARTNERSHIP;
JF PARTNERSHIP;
JFM INVESTMENT COMPANIES;
JLN PARTNERSHIP;
JMP LIMITED PARTNERSHIP;
JEFFRY M. PICOWER SPECIAL COMPANY;
JEFFRY M. PICOWER, P.C.;
THE PICOWER FOUNDATION;
THE PICOWER INSTITUTE OF MEDICAL RESEARCH;
THE TRUST F/B/O GABRIELLE H. PICOWER;
BARBARA PICOWER, individually, and as
Executor of the Estate of Jeffry M. Picower,
and as Trustee for the Picower Foundation
and for the Trust f/b/o Gabriel H. Picower.
_____/

COMPLAINT-CLASS ACTION

Jury Trial Demanded

Plaintiff, A & G Goldman Partnership, through their undersigned attorneys, on its own behalf and on behalf of a similarly situated class of plaintiffs, hereby sues the Defendants and allege the following based upon the investigation by Plaintiffs' counsel, which includes: (1) review of filings made by the trustee (the “Trustee”) in the bankruptcy proceeding concerning Bernard L. Madoff Investment Securities, LLC ("BLMIS") including the documents filed in connection with the Bankruptcy Estate settlement with the Defendants in December 2010 and

DRAFT

later which contained new information as to Picower's control of BLMIS and the existence and extent of the Picower margin loan described therein; (2) review of the filings contained in the action commenced by the Securities and Exchange Commission against Bernard L. Madoff ("Madoff"); and (3) a review of documents and pleadings contained in the criminal proceeding brought against Madoff. This investigation has also included a review of publically available documents filed by or on behalf of the Defendants, including documents prepared by the Picower Foundation, as well as pleadings filed by the Trustee and by the Defendants in connection with various actions brought by the Trustee in the BLMIS bankruptcy. Plaintiffs believe that substantial additional evidentiary support exists to support the allegations set forth herein.

INTRODUCTION AND SUMMARY OF CLAIMS

1. Madoff is widely regarded as the crook of the century and the primary beneficiary of the largest Ponzi scheme in history, which he operated through BLMIS. In fact, however, Madoff was not the most substantial beneficiary of the Ponzi scheme. The Defendants were. The accounting performed by the Madoff bankruptcy Trustee reveals that the Defendants received at least $7.2 billion of BLMIS customers' cash. This figure is astounding not only in absolute terms, but also because it represents almost 40% of the approximately $18 billion of the total assets of all BLMIS customers.

2. While Madoff and a few employees operated the Ponzi scheme on a day to day basis, they did so under the direction and control of the Defendants who participated in the fraud for their own benefit by directing the creation of false books and records at BLMIS. The Defendants instructed Madoff and his employees to make false transactions and book entries to document allegedly profitable securities transactions in the Defendants' BLMIS accounts that in fact never occurred, but instead provided the Defendants with the returns that they "wanted to

DRAFT

achieve." BLMIS complied, which allowed the Defendants to steal billions of dollars of BLMIS customers' assets in the form of the fictitious profits based on the false trading documentation.

3. This securities class action lawsuit is filed on behalf of all BLMIS customers whose BLMIS account statements as of the date of the BLMIS bankruptcy reflected net account values in excess of the amount that such customers actually received from BLMIS to date and who have not received and are not eligible to receive any payment directly or indirectly from the Securities Investor Protector Corporation ("SIPC"). The Plaintiff and all class members are BLMIS customers who have not and will not receive any payments from SIPC or payments from the Madoff/BLMIS estate.

4. This action alleges only control person liability as against the Defendants under section 20(a) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The Defendants' control over the day to day financial records of BLMIS, along with the astounding amount of fictitious profits that the Defendants withdrew from BLMIS, establishes the Defendants' pervasive and fraudulent operational control of BLMIS. The Defendants exerted their control over BLMIS to steal securities and cash assets belonging to the class members.

JURISDICTION AND VENUE

5. The claims asserted herein arise under sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a), and under Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. §240.10b-5.

6. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1337, and under § 27 of the Exchange Act, 15 U.S.C. §78aa. At all relevant times the principal place of business of most of the Defendants was Palm Beach, Florida.

DRAFT

Substantial acts, if not all of the acts, committed in the furtherance of the control relationship occurred in the state of Florida.

7. Venue is proper in this district pursuant to § 27 of the Exchange Act ,15 U.S.C. §78aa, 28 U.S.C. §1391(b), because several of the Defendants reside or are headquartered in this judicial district, and the acts and transactions alleged herein occurred in substantial part in this judicial district.

8. In connection with the wrongs alleged herein, the Defendants used the instrumentalities of interstate commerce, including the United States mails, interstate wire and telephone facilities and the facilities of national securities markets.

THE PARTIES

9. Plaintiff A & G Goldman Partnership is a New York partnership with its principal place of business in the State of New York. Plaintiff brings this class action on behalf of itself and a putative class of persons similarly situated for damages and other relief arising from the Defendants' wrongful conduct described herein.

10. Jeffry M. Picower ("Picower") was a resident of Palm Beach, Florida, and Fairfield, Connecticut, prior to and at the time of his death on October 25, 2009. Picower was a highly sophisticated investor, accountant and attorney who participated in the Madoff Ponzi scheme for over 20 years, knowing that he was participating in a fraud. Picower had vast experience in the purchase and sale of businesses, including health care and technology companies. He had also been personally responsible for managing hundreds of millions, if not billions, of dollars of assets, and he had developed uncommon sophistication in trading securities and evaluating returns therefrom. Upon information and belief, Picower was closely associated with Madoff, both in business and socially, for the last 30 years. Picower held an individual

DRAFT

BLMIS account in the name of "Jeffry M. Picower," with an account address of 1410 South Ocean Boulevard, Palm Beach, Florida. Picower was a trustee of the Picower Foundation, and Chairman of the Board of Defendant Decisions Incorporated.

11. Defendant Barbara Picower is the Executor of the Estate of Jeffry M. Picower, which is being probated in the State of New York.

12. Defendant Barbara Picower is a person residing at 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Barbara Picower is Picower's surviving spouse. According to the Trustee, Barbara Picower holds an individual account at BLMIS in the name "Barbara Picower," with the account address of 1410 South Ocean Boulevard, Palm Beach, Florida 33480, and Barbara Picower is trustee for Defendant Trust f/b/o Gabrielle H. Picower, an officer and/or director of Defendant Decisions Incorporated, and trustee and Executive Director of the Picower Foundation.

13. Defendant Decisions Incorporated is a corporation organized under the laws of Delaware with a principal place of business at 950 Third Avenue, New York, New York 10022 and an alternate mailing address on its BLMIS account listed as 22 Saw Mill River Road, Hawthorne, New York, 10532. According to the Trustee, the Decisions Incorporated office in Hawthorne was merely a store-front office through which little or no business was conducted, and Decisions Incorporated is a general partner of Defendants Capital Growth Company, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, JMP Limited Partnership and Jeffry M. Picower Special Co.

14. Defendant Capital Growth Company purports to be a limited partnership with a mailing address for its BLMIS account listed at 22 Saw Mill River Road, Hawthorne, New York,

DRAFT

10532, care of Decisions Incorporated. According to the Trustee, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of Capital Growth Company, and Decisions Incorporated and Picower transact/transacted business through this entity.

15. Defendant JA Primary Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Defendant Decisions Incorporated and/or Picower serves/served as General Partner or Director of JA Primary Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this entity.

16. Defendant JA Special Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York, New York 10594. According to the Trustee, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JA Special Limited Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

17. According to the Trustee, Defendant JAB Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JAB Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

18. According to the Trustee, Defendant JEMW Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River

DRAFT

Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JEMW Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

19. According to the Trustee, Defendant JF Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JF Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

20. According to the Trustee, Defendant JFM Investment Company is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and JFM Investment Company is a Limited Partner of Capital Growth Company, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JFM Investment Company.

21. According to the Trustee, Defendant JLN Partnership is a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JLN Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

22. Defendant JMP Limited Partnership is a limited partnership organized under the laws of Delaware, with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Decisions Incorporated and/or Picower serve/served as

DRAFT

General Partner or Director of JMP Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

23. According to the Trustee, Defendant Jeffry M. Picower Special Co. is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower Special Co.

24. According to the Trustee, Defendant Favorite Funds is an entity through which Picower transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Favorite Funds.

25. According to the Trustee, Defendant Jeffry M. Picower P.C. purports to be a limited partnership with a listed mailing address at 25 Virginia Lane, Thornwood, New York, New York 10594, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower P.C., and Decisions Incorporated, and/or Picower transact/transacted business through this defendant entity.

26. Defendant Picower Foundation is a trust organized for charitable purposes with Picower listed as donor, and Picower and Barbara Picower, among others, listed as Trustees during the relevant time period. Picower Foundation's addresses are reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 9 West 57th Street, Suite 3800, New York, New York 10019.

DRAFT

27. According to the Trustee, Defendant Picower Institute for Medical Research is a nonprofit entity organized under the laws of New York, with a principal place of business at 350 Community Drive, Manhasset, New York 11030.

28. According to the Trustee, Defendant Trust f/b/o Gabrielle H. Picower is a trust established for beneficiary Gabrielle H. Picower, who is the daughter of Picower and Barbara Picower, with Defendant Barbara Picower listed as trustee, and the trust's BLMIS account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

29. On information and belief, the Defendants listed in paragraphs 13 through 28 (collectively the "Picower Entity Defendants") were dominated, controlled and used as a mere instrumentality of Picower to advance his interests in, and to participate in and control, the Madoff Ponzi scheme. Thus, the Picower Entity Defendants are the alter egos of Jeffry Picower and of each other.

THE MADOFF FRAUD AND PICOWER'S CONTROL

Madoff Admits to Committing Securities Fraud

30. BLMIS is a New York Limited Liability Corporation that was wholly owned by Madoff. BLMIS was founded in 1959. Madoff as Founder, Chairman, Chief Executive Officer, and sole shareholder ran BLMIS as his alter ego with several family members and a few employees. BLMIS was registered with the SEC as a Securities Broker Dealer under § 15 of the Exchange Act.

31. The portion of the BLMIS customer business at issue was operated pursuant to account documentation which afforded BLMIS a power of attorney and complete discretion over trading in the relevant BLMIS accounts. BLMIS described its trading strategy to customers falsely as involving a complicated option strategy which generated consistent returns.

DRAFT

32. The BLMIS program of comingled options and stock trading were securities and investment contracts under the Exchange Act and customer "participation" therein involved the purchase and sale of securities.

33. BLMIS customers received monthly statements showing the purchase and sales of securities in their accounts along with the profits purportedly realized from these securities transactions. But the transactions reported on these statements were a fabrication. The securities transactions described in the monthly statements either never occurred or rarely occurred, and the profits reported were entirely fictitious. Madoff admitted at his plea hearing that he had never purchased any of the securities in BLMIS customer accounts. Following an extensive and lengthy investigation, the Trustee for BLMIS has stated that, except for isolated individual transactions, there is no record of BLMIS having purchased or sold any securities in BLMIS customer accounts.

34. The money that customers paid to BLMIS in connection with their investment contracts with BLMIS was not used to purchase securities as described, but instead was used to make distributions to other investors, primarily to the Defendants.

35. On December 11, 2008, Madoff was arrested by federal agents and charged with criminal violation of the federal securities laws, including securities fraud, investment advisor fraud, and mail and wire fraud. On the same day, the SEC filed a complaint in the United States District Court for the Southern District of New York against Madoff and BLMIS, also alleging that Madoff and BLMIS engaged in securities fraud. *See* **Exhibit "A"** hereto.

36. On December 15, 2008, the SEC consented to a combination of its own action with an application of the Securities Investor Protection Corporation ("SIPC"). Thereafter, pursuant to 15 U.S.C. § 78eee(a)(4)(B) of the Securities and Investor Protection Action

DRAFT

("SIPA"), SIPC filed an application in the District Court alleging that BLMIS was not able to meet its obligations to its securities customers as they came due and that such customers needed the protections afforded by SIPA.

37. Also on December 15, 2008, the District Court appointed Irving H. Picard, Esq., as trustee ("Trustee") for the substantively consolidated liquidation of Madoff's estate and of BLMIS under SIPA.

38. On March 10, 2009, the federal government filed an eleven count criminal information against Madoff in the case styled *United States v. Madoff*, 09-CR-213 (S.D.N.Y.). *See* **Exhibit "B"** hereto.

39. On March 12, 2009, Madoff plead guilty to all eleven-counts of the criminal information, including Count I for securities fraud under § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. *See* **Exhibit "C"** hereto at 4-5; 35. As a result of the guilty plea, it is indisputable that Madoff and BLMIS, which he wholly owned and controlled, violated § 10(b) of the Exchange Act and Rule 10b-5.

Through Picower's Direct Participation and Control, the
Defendants Become the Primary Beneficiaries of the Madoff Fraud.

40. Each Defendant is an entity or individual operating as part of a control group of BLMIS. The Defendants are commonly controlled or were commonly controlled by Picower and his wife Barbara Picower.

41. The volume, pattern and practice of the Defendants' fraudulent withdrawals from BLMIS and their control over fraudulent documentation of underlying transactions at BLMIS establishes the Defendants' "control person" liability under the federal securities laws.

42. Picower, now deceased, was a sophisticated investor, accountant and lawyer. Picower, directly and through the Defendants, had a very close relationship with Madoff.

DRAFT

Picower knew Madoff for decades and was an investor in BLMIS since at least the 1980s. Madoff served as a Trustee for one of Picower's foundations, the Picower Institute for Medical Research.

43. Through the other Defendants and through his relationship with Madoff, Picower became privy to information about BLMIS and its operations not available to other customers.

44. In interviews with author Diana Henriquez, Madoff stated that Jeffry Picower knew of the existence of his scheme and that Jeffry Picower was taking fraudulent profits from the BLMIS customer accounts.

45. Picower was able to control BLMIS and use BLMIS as "a personal piggy bank" by withdrawing funds for various entities he controlled, even if there was no legitimate underlying profitable transaction warranting a distribution of such funds.

46. In fact, the Defendants benefited in a much more substantial way than Madoff and his family. The Trustee has alleged in an adversary action against the Defendants that the Defendants received at least $7.2 billion from BLMIS, net of their investments. *See* Trustee's Complaint, **Exhibit "D"** hereto and Trustee's Response to Mot. to Dismiss, **Exhibit "E"** hereto.

47. The Picower Defendants were far and away the primary beneficiaries of the Madoff fraud, having received almost 40% of the approximately $18 billion lost by BLMIS customers.

48. In order to realize and withdraw their false profits, Picower, through the Defendants and other agents, directed and effected false trading documentation at BLMIS with respect to the Defendants' BLMIS accounts.

49. The Defendants directed BLMIS to prepare fraudulent trading records and fraudulent trading results, which effected returns in their accounts based upon transactions which

DRAFT

in fact never took place. Picower directly and through the other Defendants initiated, directed, coordinated and cause to be effected false records and back dated records at BLMIS, which resulted in the appearance of trading profits in these accounts. Picower then withdrew these false profits from the Defendant accounts. This direction of trading activity and direction of preparation of false trading records over a multi-year period shows control of the specific fraudulent activity which constituted the underlying Ponzi scheme and the underlying violations of 10b-5 engaged in by BLMIS.

50. The false trading documentation maintained by BLMIS shows that the Defendants' accounts generated annual rates of return well in excess of any conceivable rates of return for the relevant trading strategy in these accounts. For example, two of the BLMIS accounts controlled by Picower generated annual rates of return of over 100% for four consecutive years from 1996 through 1999. According to the Trustee "between 1996 and 2007 defendants' 24 regular trading accounts enjoyed 14 instances of supposed annual returns of more than 100%. . . ." During this time period the annual rates of return for certain of defendants' accounts ranged from 120% to over 550%. In actuality, Picower directly and through the Picower defendants used his ability to control the BLMIS records maintained to cause the preparation of trading records which purported to show these trading profits, which in fact never occurred. By orchestrating the creation of these false trading records, Picower enabled himself to transfer proceeds from these purported transactions to his own account and then to third party bank accounts which he controlled. The funds he withdrew belonged to other BLMIS customers including the class members.

51. The pattern of transactions in the Defendants' accounts reveals their fraudulent nature. Picower and the other Defendants received fraudulent profits from the various Madoff

accounts from at least December 1995 through December 2008. Each quarter, Picower, directly and through the other Defendants and other agents, directed the withdrawal of large sums of money divided into odd numbers spread over many of the Defendant accounts. When added together, these withdrawals usually equaled large even numbered sums. For example, on January 2, 2003, Picower withdrew $1,378,852 from his JLM Partnership account, yet the total withdrawals across all the Defendant accounts for that single day amounted to $250 million.

An Illustration of Picower's Control:
The $6 Billion Decisions Incorporated Margin Loan

52. Several BLMIS accounts controlled by Picower and operated under the name of Decisions, Inc. provide concrete examples of Picower's control over BLMIS. Picower, directly and through the other Defendants, was able to withdraw "funds" from the Decisions, Inc. account in the form of a "loan" of approximately *$6 billion*, even though the account had no trading activity or cash or related assets to support such borrowing. The terms and amounts of the "loan" became known in connection with the December 2010 settlement between the Trustee and the Defendants.

53. Borrowing in a brokerage account is regulated by margin rules established by the Federal Reserve System and by the New York Stock Exchange. These rules limit the amount that an account holder can borrow from his or her securities account based upon the value of securities that can be used as collateral for the loan. Picower was able to borrow almost $6 billion in the Decisions, Inc. account (*i.e.*, steal it from other BLMIS account) without the requisite collateral.

54. The operations of the Decisions account establishes Picower's control of the cash flows at BLMIS and his unfettered ability to remove money from the BLMIS customer accounts for his own benefit and as he saw fit. The Decisions, Inc. accounts were the primary source of

the Picower Defendants' cash withdrawals from BLMIS. These accounts reflect virtually no trading activity and virtually no securities positions or other collateral for loans from this account.

55. Picower, directly and through the other Defendants, made distribution requests and directed cash withdrawals from this account ranging from $50 million to $150 million five or more times per year for a total of approximately $6 billion. These withdrawals were inconsistent with legitimate business activity and inconsistent with margin regulations that would permit such a loan only if the account maintains substantial collateral equal to approximately twice the amount of such loans. Picower's ability to make such irregular withdrawals without collateral and in a manner inconsistent with applicable regulations shows that he controlled cash flow and the cash distributions at BLMIS during the relevant time period. At all relevant times Picower and the Picower defendants knew that the withdrawals could only be the property of other BLMIS customers, including the plaintiff and other class members.

Further Illustration of the Picower defendants Control: Directing BLMIS to Backdate False Transactions to Create Fictitious Profits

56. The Defendants' control of BLIMS's operations was such that they were able to direct BLMIS employees to create and document false and non-existent securities transactions, which, in turn, were designed to generate fictitious profits for Picower to withdraw from the Defendants' BLMIS accounts.

57. The Defendants' ability to reconfigure for their own fraudulent purpose the actual trading records maintained by BLMIS, a highly regulated broker and investment advisor, shows that the Defendants exercised control over the day to day operations of BLMIS and specifically over the trading activity that constituted a violation of the securities laws.

DRAFT

58. By way of example, as stated in the Trustee's complaint, on or about April 24, 2006, Defendant Decisions, Inc. opened a new account with BLMIS known as the Decisions, Inc. 6 account. This account was opened with a wire transfer of $125 million. The Defendants instructed BLMIS to back date trades in this account to January 2006, which was four months prior to the time the account was actually opened. BLMIS employees carried out the Defendants' direct instructions and fabricated and back dated trades in the Decision 6 account. This resulted in the net value of the account increasing by almost $40 million, or 30%, in less than two weeks after it "actually opened." The Defendants' ability to affect back dated trades in the Decisions 6 account generated phony paper profits which had appreciated only on a hindsight basis and represented part of a continuous pattern of the Picower defendants directing the falsification of trading records at BLMIS, which allowed Picower to pilfer from other BLMIS accounts.

59. By way of further example, on or about December 29, 2005, Picower's assistant April Friehlich, acting on behalf of the Defendants, faxed BLMIS a letter signed by Picower that directed BLMIS to "realize" a gain of $50 million in the Picower accounts. Upon direction from Picower and Friehlich, BLMIS sold large amounts of stock in Agilent Technologies and Intel Corporation in various Defendant accounts on a back dated basis. Friehlich directed the sales of large amounts of these purported securities on or about December 29, 2005, requesting that the sales be booked to take place on an earlier date, *i.e.*, December 8 or 9. BLMIS backdated the trades at Picower's direction and on Picower's behalf for the purpose of generating phony paper profits of approximately $46.3 million, which made up most of Picower's requested $50 million distribution.

DRAFT

60. Picower, on behalf of the Defendants, directed and caused BLMIS to affect other back dated transactions generating phony profits. During December 2005, the Defendants purported to purchase the following securities on margin in their accounts: Google, Diamond Offshore Drilling, Inc., and Burlington Resources, Inc. This resulted in a purported gain of almost $80 million. These purchases purportedly occurred between January 12 and 20, 2005 but were fictitious, as the transactions actually occurred eleven months later in December 2005. Defendants caused BLMIS to create false book and record entries in order to create a phony $80 million profit on “transactions” that did not take place on the dates recorded on BLMIS's records.

61. The Defendants also directed and orchestrated the preparation of false statements in May 2007, which reflected millions of dollars in securities transactions which reportedly took place in earlier in 2007, but which in fact did not take place at all.

CLASS ACTION ALLEGATIONS

62. Plaintiffs bring this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3). The definition of the Plaintiff class in this action is: (1) all brokerage customers of BLMIS who at any time entrusted securities or cash to BLMIS and at such time granted to BLMIS or its employees or agents trading authority and discretion with respect to assets in such brokerage accounts for trading in the BLMIS stock/options trading program (the "BLMIS Discretionary Trading Program"); and (2) who have not received the full account value of their BLMIS account(s) as of the date of the BLMIS bankruptcy/SIPC liquidation; and (3) who have not received and are not eligible to receive any payments directly or indirectly from SIPC or from the BLMIS estate on behalf of SIPC (the “Class”). The Class excludes the Defendants named herein and members of the Madoff family.

DRAFT

63. The Class meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

a. *Numerosity.* The members of the class are so numerous that joinder of all members is impracticable. Based on disclosures made by the SIPA Trustee the Class has thousands of members. Class members may be identified from records maintained by BLMIS and the SIPA Trustee. The members of the class may be notified of the pendency of this action by mail or otherwise using a form of notice similar to that customarily used in securities class actions.

b. *Commonality.* Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are whether the Federal Securities Laws specifically §20(a) of the Exchange Act was violated by defendants as alleged herein, whether members of the class have sustained damages as a result thereof and if so what is the proper measure of such damages.

c. *Typicallity.* Plaintiff's claims are typical of the claims of members of the Class as all members of the Class were similarly affected by Defendants' wrongful conduct in violation of federal law as alleged herein.

d. *Adequacy.* Plaintiffs will fairly and adequately represent and protect the interest of the members of the Class. Plaintiff has retained competent and experienced counsel in class and securities litigation.

64. This class action also meets the requirements of Federal Rule of Civil Procedure 23(b)(3). The common issues outlined herein predominate over any individual issues in the case.

DRAFT

A class action is superior to all other available methods of the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the class to individually address the wrongs done to them. There will be no difficulty in the management of this action as a class action.

TOLLING THE STATUTE OF LIMITATIONS

65. Any applicable statute of limitations with respect to Plaintiff's claims has been tolled since no later than February 16, 2010, by the filing of the class action complaint against all of the Defendants named here in the action captioned *Adele Fox, Individually and On Behalf of a Class of Similarly Situated v. Barbara Picower, Individually, and as Executor of the Estate Of Jeffry M. Picower, et al.*, case no. 10-80252-CV-Ryskam/Vitunac (S.D. Fla.). *See American Pipe and Construction Company v. Utah*, 414 U.S. 538, 552 (1974); *In re World Comm Securities Litigation*, 496 F.3d 245 (2d Cir. 2007).

BLMIS'S VIOLATION OF §10(b) OF THE EXCHANGE ACT AND RULE 10b-5 PROMULGATED THEREUNDER

66. BLMIS is currently subject to a federal bankruptcy proceeding, enjoys the benefit of the bankruptcy automatic stay, and thus cannot be named as a defendant in this action. Based upon: (1) the complaints filed by the Justice Department against Madoff and his guilty plea, (2) the complaints filed by the SEC against Madoff and BLMIS, and (3) the factual allegations made by the Trustee against BLMIS in the many claims he has filed in the bankruptcy proceeding, it is beyond dispute that BLMIS engaged in the largest Ponzi scheme in U.S. history and committed a substantial violation of the § 10(b) of the Exchange Act and Rule 10b-5 during the Class Period.

DRAFT

67. BLMIS was a New York limited liability company wholly owned by Madoff. BLMIS operated from its principle place of business at 885 Third Avenue, New York, NY. Madoff was Founder, Chairman, Chief Executive Officer and the sole shareholder of BLMIS.

68. Madoff ran BLMIS together with several family members and a few employees subject to the controlling influence of the Picower Defendants. BLMIS was registered with the SEC as a securities broker dealer under section 15 of the Securities Exchange Act.

69. Class members purchased securities issued by BLMIS, which consisted of a discretionary trading account purportedly investing in stock and options and operated pursuant to a power of attorney (the "BLMIS Discretionary Trading Program"). Each class member received monthly statements purportedly reflecting the securities in their account, the trading activity during the month, and the profits earned over the relevant time period. The monthly statements for customer accounts depicted consistent profits on a monthly basis and rarely, if ever, showed loses.

70. In fact, the monthly statements and the purported trading and profits reflected therein were entirely fictitious. At his criminal plea hearing, Madoff admitted that neither he nor any BLMIS employee ever purchased any of the securities described in the monthly statements. The Trustee has investigated the substance activity in the accounts and, with the exception of isolated transactions for certain clients other than class members, there is no record of BLMIS having purchased or sold any securities..

71. Madoff has admitted, and it is a fact, that BLMIS and the BLMIS Discretionary Trading Program operated as a Ponzi scheme and Madoff and other BLMIS employees concealed this ongoing fraud in an effort to hinder and delay customers of BLMIS from discovering this fraud. The fraud involved overt material misrepresentations on monthly account

DRAFT

statements and confirmations representing transactions which did not take place as well as reporting false profits.

72. The Ponzi scheme also involved the direct theft of customer assets in the BLMIS Discretionary Trading Program by Madoff, his family, and by certain favored customer including the Picower Defendants.

73. Monies received from investors in connection with the BLMIS Discretionary Trading Program were not invested as described by BLMIS in confirmations and monthly statements, but instead were used to make distributions to selected other investors, primarily Madoff and the controlling Picower Defendants.

74. The money sent to BLMIS for investment in the BLMIS Discretionary Trading Program was in fact stolen by Madoff and the Picower Defendants.

75. In or about December 2008, the Ponzi scheme collapsed when customer redemptions in the BLMIS Discretionary Trading Program overwhelmed the amount of money which was being placed in new BLMIS accounts. As result of the Ponzi scheme, Madoff and his family defalcated at least $800 million of *bona fide* customer assets, and the Picower Defendants defalcated at least $7.2 billion. The BLMIS Ponzi scheme also involved the preparation and publication to investors and brokerage customers of false BLMIS audit reports prepared by Frielich and Horowitz as members of a three person accounting firm in Rockland County, New York. BLMIS provided the financial reports to regulators and investors in the BLMIS Discretionary Trading Program for the purpose of their reliance thereon. The accounting reports falsely reported that Madoff was effecting customer transactions and that BLMIS was profitable and generating customer profits in customer accounts.

DRAFT

76. At all times relevant hereto, the BLMIS's actual liabilities were billions of dollars greater than its assets. As a result, BLMIS and the BLMIS Discretionary Trading Program were rendered insolvent by the Ponzi scheme. Customer assets were effectively stolen by Madoff and the Picower Defendants in connection with this Ponzi scheme.

77. The BLMIS securities fraud involved the overt and continuing material misrepresentations with respect to the trading activity and profits in the BLMIS Discretionary Trading Program, the use of materially false accounting statements, and the theft of customer securities and cash in connection with the ongoing Ponzi scheme.

Violation of Section 10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder By Non-Defendant BLMIS as Predicate for Count I Herein

78. Plaintiff repeats and re-alleges each and every allegation contained above as if fully set forth herein.

79. During the Class Period, BLMIS carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: (i) misappropriate the assets of BLMIS customers who purchased securities issued by BLMIS in connection with the BLMIS Discretionary Trading Program, as alleged herein; and (ii) cause brokerage customers of BLMIS and investors in the BLMIS Discretionary Trading Program to entrust securities for safe-keeping with BLMIS during the Class Period. In furtherance of this unlawful scheme, plan, and course of conduct, BLMIS and its agents, including Madoff took the actions set forth herein. As a result, Plaintiff and the other members of the Class suffered damages in connection with the undisclosed and unauthorized theft of their securities, cash assets and the misappropriation of the proceeds thereof, as alleged above.

80. BLMIS (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of materials fact and/or omitted to state material facts necessary to make the

statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon brokerage customers who entrusted assets to BLMIS and who purchased securities issued by BLMIS in violation of Section 10(b) of the Exchange Act and Rule 10b-5.

81. As part and in furtherance of this conduct, BLMIS engaged in an ongoing scheme to misappropriate funds which constituted the proceeds of sales of customers' securities.

82. BLMIS directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to misappropriate funds which constituted the proceeds of sales of securities (or the securities themselves or cash) held by BLMIS as securities custodian and broker for Plaintiff and the Class members.

83. BLMIS made untrue statements of material fact and/or omitted to state material facts necessary to make their statements not misleading, and they employed devices, schemes and artifices to defraud, and engaged in acts, practices, and a course of conduct in an effort to mislead and misappropriate the assets of BLMIS brokerage customers and participants in the BLMIS Discretionary Trading Program. Such misconduct included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about BLMIS and the BLMIS Discretionary Trading Program, its financial performance and its business operations in the light of the circumstances under which they were made, not misleading, and which included engaging in manipulative and deceptive transactions, practices and courses of business which operated as a fraud and deceit upon the customers of BLMIS and participants in the BLMIS Discretionary

DRAFT

Trading Program during the Class Period, including the surreptitious and unauthorized theft of customer assets and securities.

84. BLMIS had actual knowledge of the misrepresentations and omissions of material facts set forth herein. BLMIS's material misrepresentations and/or omissions were done knowingly for the purpose and effect of inflating BLMIS' financial results and to enrich defendant and the Picower Defendants. At all relevant times, BLMIS was aware of the dissemination of artificially inflated financial information to the investing public which it knew was materially false and misleading.

85. As a result of the manipulative and deceptive conduct and the dissemination of the materially false and misleading information as set forth above, Plaintiffs and the Class members suffered injury.

86. At the time of the misrepresentations, omissions and manipulative and deceptive conduct, Plaintiff and other members of the Class were ignorant of their falsity and believed them to be true, and they were ignorant of the manipulative and deceptive conduct complained of herein. Had Plaintiffs and the other members of the Class known the truth regarding BLMIS's materially false statements and deceptive and manipulative conduct alleged above, which were not disclosed during the Class Period, Plaintiff and other members of the Class would not have entrusted their assets with BLMIS or purchased the BLMIS securities.

87. By virtue of the foregoing, BLMIS has violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

88. As a direct and proximate result of BLMIS's wrongful conduct, plaintiffs and the other members of the Class suffered damages in connection with the undisclosed and

DRAFT

unauthorized sale of their securities and the misappropriation of the proceeds thereof, as alleged above.

COUNT I

VIOLATIONS OF 20(a) OF THE EXCHANGE ACT AS AGAINST THE PICOWER DEFENDANTS

89. Plaintiff repeats and re-alleges each and every allegation contained above as it fully set forth herein.

90. The Defendants acted collectively as a control group of BLMIS within the meaning of § 20(a) of the Exchange Act as alleged herein.

91. The Defendants had the power to influence and control, and did in fact directly influence and control, the decision making at BLMIS, the record keeping at BLMIS, and the recording of securities transactions at BLMIS.

92. The Defendants had the power to influence and control, and did in fact directly influence and control, the flow of funds and assets in and out of BLMIS and the BLMIS Discretionary Trading Program, even when this flow of funds and assets did not correspond to actual trading activity; this resulted in the distribution of billions of dollars of false profits to the Defendant control group.

93. The Defendants had access to the books and records of BLMIS, and used these books and records as an instrumentality to divert and steal funds from other BLMIS Discretionary Trading accounts for the Defendants' benefit.

94. The Defendants, either directly or through Picower, had direct involvement in the day to day operations, record keeping, and financial management of BLMIS. The Defendants

DRAFT

had and employed the power to control and influence actual transactions giving rise to the securities violations alleged herein.

95. As set forth above and in the complaint filed by the Justice Department against Madoff, in the complaint filed by the SEC against Madoff and BLMIS, and in the numerous complaints filed by the Trustee, BLMIS violated § 10b of the Exchange Act and Rule 10b-5 by its acts and omissions and by engaging in a massive Ponzi scheme.

96. By virtue of their position as a control group, the Defendants are jointly and severally liable pursuant to § 20(a) of the Exchange Act.

97. As a direct and proximate result of the Defendants' wrongful conduct, Plaintiff and other members of the Class have suffered damages.

WHEREFORE, Plaintiffs pray for relief and judgment against the Defendants as follows:

A. Determining that this action is a proper class action;

B. designating Plaintiff as class representative under Rule 23 of the Federal Rules of Civil Procedure and Plaintiff's counsel as class counsel;

C. awarding compensatory damages in favor of Plaintiff and other class members against all the Defendants jointly and severally, for all damages sustained as a result of the Defendants wrong- doing in an amount to be proven at trial, including interest;

D. awarding Plaintiff and the Class the reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

E. such other and further relief as the Court may deem just and proper.

DATED: this ___ day of December, 2011, by:

DRAFT

BEASLEY HAUSER KRAMER
& GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Telephone: (561) 835-0900
Facsimile: (561) 835-0939
galardi@beasleylaw.net
By: *s/ Draft*
James W. Beasley, Jr.
Florida Bar No. 145750
Joseph G. Galardi
Florida Bar No. 180572

-and-

Lesley Blackner, Esquire
Florida Bar No. 654043
BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, FL 33480
(561)659-5754
(561)659-3184 (fax)
lblackner@aol.com
Co-counsel for Plaintiff and the Class

HERRICK, FEINSTEIN LLP
Two Park Avenue
Joshua J. Angel
Frederick E. Schmidt, Jr.
New York, New York 10016
Telephone: (212) 592-1400
Facsimile: (212) 592-1500
jangel@herrick.com
eschmidt@herrick.com

BEASLEY HAUSER KRAMER LEONARD & GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Telephone: (561) 835-0900
Facsimile: (561) 835-0939

BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, Florida 33480
Telephone: (561) 659-5754
Facsimile: (561) 659-3184

Attorneys for Pamela Goldman, individually and on behalf of a similarly situated class

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Adv. Pro. No. 08-1789 (BRL)
SECURITIES INVESTOR PROTECTION CORPORATION,	:	SIPA Liquidation
Plaintiff-Applicant,	:	(Substantively Consolidated)
v.	:	
BERNARD L. MADOFF INVESTMENT SECURITIES LLC,	:	
Defendant.	:	

MOTION OF PICOWER CLASS ACTION PLAINTIFFS FOR A DETERMINATION THAT THE COMMENCEMENT OF SECURITIES CLASS ACTION LAWSUITS AGAINST NON-DEBTOR PARTIES IS NOT PROHIBITED BY A PERMANENT INJUNCTION ISSUED BY THIS COURT OR VIOLATIVE OF THE AUTOMATIC STAY

Pamela Goldman,[1] individually and on behalf of all other similarly situated (collectively, the "Picower Class Action Plaintiffs" or "Movants"), by and through their undersigned counsel, as and for their motion (the "Motion") for entry of an order determining that neither the injunction issued by this Court as part of its order, dated January 13, 2011, nor the automatic stay provisions (the "Automatic Stay") of section 362 of title 11 of the United States Code (the "Bankruptcy Code"), bar, prohibit, restrict or prevent Movants from commencing and prosecuting a securities law class action (the "Class Action") against certain non-debtor defendants (collectively, the "Picower Defendants") in the United States District Court for the Southern District of Florida (the "Florida District Court"), respectfully represent as follows:

PRELIMINARY STATEMENT

1. As more fully set forth below, Movants respectfully submit that neither the permanent injunction issued by this Court nor the Automatic Stay restricts the commencement and prosecution of the Class Actions in the Florida District Court because:

- The securities law claims asserted by the Movants against the Picower Defendants in the Class Actions are neither "duplicative" nor "derivative" of any claims the Trustee brought or could have brought against the Picower Defendants. Those claims, which belong to BLMIS's investors, are not of the type which could be asserted by the Trustee (as defined below). Moreover, as confirmed by recent decisions rendered by the District Court for the Southern District of New York, the Trustee does not have standing to assert claims against third parties on behalf of customers of BLMIS (as defined below).

- Movants do not seek any relief against the Debtors (as defined below) or property of the Debtors' estate in the Class Action.

2. Unless barred by order of this Court, Movants intend to file a class action complaint (the "Class Action Complaint") substantially in the form annexed hereto as Exhibit "A" (without exhibits) in the Florida District Court.

[1] Pamela Goldman, like all other class members, is a "net loser" having not received the return of her full principal investment with BLMIS.

BACKGROUND

The Madoff/BMIS Bankruptcy Court Cases

3. On December 11, 2008, the Securities and Exchange Commission ("SEC") filed a Securities Violation Complaint in the United States District Court for the Southern District of New York against the estate of Bernard L. Madoff ("Madoff") and Bernard L. Madoff Investment Securities LLC ("BLMIS", and together with Madoff, the "Debtors"). The SEC alleged, *inter alia*, that the Debtors engaged in fraud through investment advisor activities of BLMIS.

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

5. On December 15, 2008, the District Court entered an order pursuant to SIPA which, in pertinent part:

- appointed Irving H. Picard (the "Trustee") as trustee for the liquidation of the business of BLMIS, pursuant to section 78eee(b)(3) of SIPA;
- removed the case to this Court pursuant to section 78eee(b)(4) of SIPA; and
- authorized the Trustee to take immediate possession of the property of the Debtors, wherever located.

6. On April 13, 2009, an involuntary bankruptcy petition was filed against Madoff. On June 9, 2009, this Court entered an order substantively consolidating the chapter 7 estate of Madoff into the BLMIS SIPA proceeding.

The Picower Settlement

7. On May 12, 2009, the Trustee filed a complaint (the "Picower Complaint") commencing an adversary proceeding against certain of the Picower Parties (as defined below), captioned *Picard v. Picower*, Adv. Pro. No. 09-1197 (BRL), in which he alleged that prior to the Filing Date, BLMIS made payments or other transfers (the "Transfers") totaling more than $6.7 billion to one or more of the Picower Parties. The Picower Complaint asserted claims under, *inter alia*, section 547 of the Bankruptcy Code for avoidance and recovery of alleged preferential transfers, sections 544 and 548 of the Bankruptcy Code for avoidance and recovery of alleged fraudulent conveyances and section 542 of the Bankruptcy Code for turnover of alleged assets of the Debtors' estates. The Trustee has since asserted that BLMIS transferred to the Picower Parties an amount of at least approximately $7.2 billion.

8. The Trustee thereafter entered into a settlement agreement (the "Picower Settlement Agreement") with what are referred to therein as the "Picower BLMIS Account Holders", "Adversary Proceeding Defendants," and the "Picower Releasees" (collectively referred to herein as the "Picower Parties"). The Trustee presented the Picower Settlement Agreement to the Court for approval by motion dated December 17, 2010 (the "Picower Settlement Motion"). The salient terms of the Picower Settlement Agreement are as follows:

- Barbara Picower, one of the Picower Parties, on behalf of herself and the other Picower Parties, agreed to forfeit to the United States Attorney's Office for the Southern District of New York (the "Government") the amount of $7,206,157,717, of which $5 billion was to be credited and paid over to the Trustee with the balance remaining with the Government.

- The Trustee provided a broad release to the Picower Parties "from any and all past, present or future claims or causes of action that are, have been, could have been or might in the future be asserted by the Trustee."

- The effectiveness of the Trustee Picower Release was conditioned on only two things: (i) receipt by the Trustee or the Government of the Bankruptcy Settlement Amount; and (ii) the entry of either a final order of

> this Court approving the Picower Settlement Agreement, or a final order of the District Court approving a forfeiture agreement between the Government and the Picower Parties.

9. On January 13, 2011, the Court entered an order (the "Picower Settlement Order") approving the Picower Settlement Agreement. A copy of the Picower Settlement Order is annexed hereto as Exhibit "B".

10. The Picower Settlement Order contained the following permanent injunction provision:

> ORDERED, that any BLMIS customer or creditor of the BLMIS estate who filed or could have filed a claim in the liquidation, anyone acting on their behalf or in concert or participation with them, or anyone whose claim in any way arises from or is related to BLMIS or the Madoff Ponzi scheme, is hereby permanently enjoined from asserting any claim against the Picower BLMIS Accounts or the Picower Releasees ***that is duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower Releasees.*** (emphasis added).

11. Upon information and belief, the Government Settlement Amount has been paid into escrow for the benefit of the Government, and although orders of this Court and the District Court have been entered, neither order has become final due to pending appeals.

12. As set forth hereafter, the claims contained in the Class Action Complaint are neither "duplicative or derivative of the claims brought by the Trustee" nor claims "which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower Releasees."[2]

[2] Movants are aware that the Settlement Order and the permanent injunction therein are the subject of appeals to the District Court for the Southern District of New York. For the purposes of this Motion, Movants take no position on the issues raised in those appeals.

The Class Action Complaint

13. Upon approval of this Court, Movants will commence the Class Action by filing the Class Action Complaint in the Florida District Court.

14. The Class Action Complaint asserts claims (the "Class Action Claims") under section 20(a) of the Securities Exchange Act of 1934 (as amended, the "Exchange Act") against the Picower Defendants, based on, among other things, the Picower Defendants' control and influence over the decision making, record-keeping, securities transaction recording, and flow of funds and assets at BLMIS, which resulted in the Picower Defendants receiving billions of dollars of unearned profits from BLMIS.

ARGUMENT

THE FILING AND PROSECUTION OF THE CLASS ACTION COMPLAINT DOES NOT VIOLATE THE PERMANENT INJUNCTION ENTERED BY THIS COURT

15. The Class Action Claims are neither "duplicative" nor "derivative" of any claims made by the Trustee against the Picower Defendants. In fact, neither the Trustee nor the pre-petition Debtor could have asserted the Movants' securities law claims against the Picower Defendants. Thus, the Movants are not barred under the Picower Settlement Order from asserting their securities law claims against the Picower Defendants.

A. Neither BLMIS Nor the Trustee Could Assert the Class Action Claims on Their Own Behalf

16. The Class Action Claims cannot be asserted by the Trustee or BLMIS. The Class Action Claims are based on control person liability pursuant to section 20(a) of the Exchange Act. In order to assert a claim under Exchange Act section 20(a), a plaintiff must allege a primary violation of section 10(b) of the Exchange Act. See, e.g., STMicroelectronics v. Credit Suisse Group, 775 F. Supp. 2d 525, 535 (E.D.N.Y. 2011). A plaintiff asserting a claim under

Exchange Act section 10(b) and Securities and Exchange Commission Rule 10b-5,[3] in turn, must be a "purchaser" or "seller" of securities in order to have standing. See Amorosa v. Ernst & Young LLP, 682 F. Supp. 2d 351, 367-69 (S.D.N.Y. 2010).

17. Here, the Class Action Complaint alleges that the Picower Defendants controlled BLMIS and that BLMIS committed violations of section 10(b) of the Exchange Act and Rule 10b-5. Neither BLMIS nor the Trustee (acting on behalf of BLMIS) would have standing to commence a § 20(a) action against the Picower Defendants because BLMIS was neither a "purchaser" nor "seller" of its own securities.

18. Furthermore, a primary violator, such as BLMIS, may not assert a § 20(a) claim against its alleged controller. See In re Maxim Integrated Products, Inc. Derivative Litigation, 574 F. Supp. 2d 1046, 1067 (N.D.Cal. 2008) (dismissing § 20(a) claim where plaintiffs sued derivatively on behalf of primary violator). Accordingly, even if BLMIS were a purchaser or seller of BLMIS securities, it still could not assert a § 20(a) claim because it was the primary violator of § 10(b) of the Exchange Act and Rule 10b-5.

19. The Trustee, therefore, could not assert a direct § 20(a) claim against the Picower Defendants and the Movants' Class Action Claims are not subject to the injunction in the Picower Settlement Order.

B. The Trustee Does Not Have Standing to Assert the Class Action Claims on Behalf of BLMIS Investors

20. The Trustee does not have standing to commence and prosecute the Class Action Claims on behalf of BLMIS's investors. Two recent District Court decisions have helped to define the limits of the Trustee's ability to assert claims on behalf of BLMIS creditors against

[3] Private rights of action for violations of section 10(b) of the Exchange Act are created by Securities and Exchange Commission Rule 10b-5 ("Rule 10b-5"). See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 126 S.Ct. 1503, 1509 (2006).

third parties. Both decisions establish conclusively that the Trustee may not assert claims against third parties on behalf of BLMIS's investors.[4]

1. Picard v. HSBC

21. On July 15, 2009, the Trustee commenced an adversary proceeding (the "HSBC Action") against HSBC Bank PLC and certain of its affiliates (collectively, "HSBC"), seeking approximately $2 billion in preferential or fraudulent transfers, and an additional $6.6 billion in damages under common law theories such as unjust enrichment, aiding and abetting fraud, and aiding and abetting breach of fiduciary duty. The Trustee alleged that HSBC failed to adequately investigate BLMIS despite the existence of red flags and indicia of fraud. The United States District Court for the Southern District of New York (Judge Rakoff) withdrew the reference to address a threshold issue of federal non-bankruptcy law; to wit, whether the Trustee had standing to pursue common law claims against third parties on behalf of BLMIS's customers.

22. On July 28, 2011, Judge Rakoff rendered a decision dismissing the Trustee's customer claims against HSBC for lack of standing. See Picard v. HSBC Bank PLC, 454 B.R. 25 (S.D.N.Y. 2011) (copy attached as Exhibit "C"). The Court rejected the Trustee's arguments that he had standing, and held that "the Trustee does not have standing to bring his common law claims either on behalf of customers directly or as bailee of customer property, enforcer of SIPC's subrogation rights, or assignee of customer claims." 454 B.R. at 37.

2. Picard v. JPMorgan Chase & Co.

23. The Trustee also commenced two adversary proceedings against UBS AG and certain of its affiliates (collectively, "UBS," and the adversary proceeding against it, the "UBS Action") and JPMorgan Chase & Co. and certain of its affiliates (collectively, "JPM," and the

[4] The decisions also note that BLMIS would be barred from asserting direct common law fraud claims under the doctrine of *in pari delicto*.

adversary proceeding against it, the "JPM Action"). The causes of action asserted by the Trustee in the UBS and JPM Actions were substantially similar, and the reference of both actions to the Bankruptcy Court was withdrawn by the District Court (Judge McMahon) in order to address the issue of whether the Trustee had standing to pursue common law claims (including aiding and abetting fraud, breach of duty and conversion, and unjust enrichment) against third party banks such as UBS and JPM on behalf of BLMIS customers.

24. JPM moved to dismiss the common law claims asserted by the Trustee. UBS move to dismiss as well, joining JPM's arguments, and on November 1, 2011, the District Court (Judge McMahon) issued its decision dismissing the Trustee's common law claims for lack of standing in both the UBS and JPM Actions. See Picard v. JPMorgan Chase & Co., 2011 WL 5170434 (S.D.N.Y. Nov. 1, 2011) (copy attached as Exhibit "D").

25. In its decision the Court in the JPM Action ruled consistently with Judge Rakoff's reasoning in the HSBC decision and held, *inter alia*, that the Trustee's common law claims belonged to the creditors of BLMIS, not the Trustee and that the Trustee did not otherwise establish any other basis to confer him standing to bring the common law claims. 2011 WL 5170434 at *3-*5. Here, the Trustee likewise does not have standing to assert the Class Action Claims against the Picower Defendants on behalf of the BLMIS investors.

26. Because the Trustee could not assert the Class Action Claims against the Picower Defendants, either as a direct claim of the BLMIS estate or derivatively on behalf of BLMIS's investors, the Class Action Claims are neither duplicative of nor derivative of claims brought by the Trustee against the Picower Defendants. Accordingly, it is respectfully submitted that the Class Action Claims are not permanently enjoined by the Picower Settlement Order.

THE AUTOMATIC STAY DOES NOT APPLY

27. Just as the Class Action is not barred by the permanent injunction in the Picower Settlement Order, it is also not subject to the Automatic Stay. The Class Action Claims do not fall within any of the categories of claims against the Debtors or property of their estates that are stayed by section 362 of the Bankruptcy Code. The Debtors are not named as parties, nor does the Class Action Complaint seek a judgment or other remedy or relief against the Debtors or their property, directly or indirectly. Importantly, the Class Actions do not seek any of the proceeds of the Trustee's settlement with the Picower Defendants. By its plain language, section 362(a)(1) of the Bankruptcy Code stays actions only against a debtor. Courts continually have held that the automatic stay is inapplicable to actions and proceedings against non-debtors. See Teachers Ins. & Annuity Ass'n v. Butler, 803 F.2d 61, 65 (2d Cir. 1986); In re United Health Care Org., 210 B.R. 228, 232 (S.D.N.Y. 1997); Ripely v. Mulroy, 80 B.R. 17, 19 (E.D.N.Y. 1987). See also Credit Alliance Corp. v. Williams, 851 F.2d 119, 121 (4th Cir. 1988) ("The plain language of § 362 ... provides only for the automatic stay of judicial proceedings and enforcement of judgments against the debtor or the property of the estate.") (citation and internal quotations omitted).

28. Here, the Class Action Complaint asserts claims against only the Picower Defendants and not the Debtor. Moreover, the Class Action Claims will not affect property of the Debtor's estate. Nor will Movants be usurping or interfering with causes of action belonging to the Trustee. As set forth above, the Trustee does not have standing to assert § 20(a) claims against the Picower Defendants. Moreover, the Trustee has already settled his claims against the Picower Defendants and the Movants do not seek to upset that settlement. Accordingly, the Automatic Stay does not apply to the Class Action Claims.

CONCLUSION

For the reasons set forth above, Movants respectfully request that the Court (a) enter an Order (i) determining that neither the permanent injunction contained in the Picower Settlement Order nor the Automatic Stay prohibits the Movants from commencing and fully prosecuting the Class Actions.

Dated: New York, New York
December 13 , 2011

Respectfully submitted,

/s/Joshua J. Angel

HERRICK, FEINSTEIN LLP
Two Park Avenue
New York, New York 10016
Telephone: (212) 592-1400
Facsimile: (212) 592-1500
Joshua J. Angel
Frederick E. Schmidt, Jr.

BEASLEY HAUSER KRAMER LEONARD & GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Telephone: (561) 835-0900
Facsimile: (561) 835-0939

- and -

BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, Florida 33480
Telephone: (561) 659-5754
Facsimile: (561) 659-3184

Attorneys for Pamela Goldman, individually and on behalf of a similarly situated class

EXHIBIT A

DRAFT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No: _____

Pamela Goldman, individually and on behalf of a class of similarly situated Plaintiffs,

vs.

CAPITAL GROWTH COMPANY;
DECISIONS, INC.;
FAVORITE FUNDS;
JA PRIMARY LIMITED PARTNERSHIP;
JA SPECIAL LIMITED PARTNERSHIP;
JAB PARTNERSHIP;
JEMW PARTNERSHIP;
JF PARTNERSHIP;
JFM INVESTMENT COMPANIES;
JLN PARTNERSHIP;
JMP LIMITED PARTNERSHIP;
JEFFRY M. PICOWER SPECIAL COMPANY;
JEFFRY M. PICOWER, P.C.;
THE PICOWER FOUNDATION;
THE PICOWER INSTITUTE OF MEDICAL RESEARCH;
THE TRUST F/B/O GABRIELLE H. PICOWER;
BARBARA PICOWER, individually, and as Executor of the Estate of Jeffry M. Picower, and as Trustee for the Picower Foundation and for the Trust f/b/o Gabriel H. Picower.
_____/

COMPLAINT-CLASS ACTION

Jury Trial Demanded

Plaintiff, Pamela Goldman, through their undersigned attorneys, on her own behalf and on behalf of a similarly situated class of plaintiffs, hereby sues the Defendants and alleges the following based upon the investigation by Plaintiffs' counsel, which includes: (1) review of filings made by the trustee (the “Trustee”) in the bankruptcy proceeding concerning Bernard L. Madoff Investment Securities, LLC ("BLMIS") including the documents filed in connection with the Bankruptcy Estate settlement with the Defendants in December 2010 and later which

DRAFT

contained new information as to Picower's control of BLMIS and the existence and extent of the Picower margin loan described therein; (2) review of the filings contained in the action commenced by the Securities and Exchange Commission against Bernard L. Madoff ("Madoff"); and (3) a review of documents and pleadings contained in the criminal proceeding brought against Madoff. This investigation has also included a review of publically available documents filed by or on behalf of the Defendants, including documents prepared by the Picower Foundation, as well as pleadings filed by the Trustee and by Defendants in connection with various actions brought by the Trustee in the BLMIS bankruptcy. Plaintiffs believe that substantial additional evidentiary support exists to support the allegations set forth herein.

INTRODUCTION AND SUMMARY OF CLAIMS

1. Madoff is widely regarded as the crook of the century and the primary beneficiary of the largest Ponzi scheme in history, which he operated through BLMIS. In fact, however, Madoff was not the most substantial beneficiary of the Ponzi scheme. The Defendants were. The accounting performed by the Madoff bankruptcy Trustee reveals that the Defendants received at least $7.2 billion of BLMIS customers' cash. This figure is astounding not only in absolute terms, but also because it represents almost 40% of the approximately $18 billion of the total assets of all BLMIS customers.

2. While Madoff and a few employees operated the Ponzi scheme on a day to day basis, they did so under the direction and control of the Defendants who participated in the fraud for their own benefit by directing the creation of false books and records at BLMIS. The Defendants instructed Madoff and his employees to make false transactions and book entries to document allegedly profitable securities transactions in the Defendants' BLMIS accounts that in fact never occurred, but instead provided the Defendants with the returns that they "wanted to

DRAFT

achieve." BLMIS complied, which allowed the Defendants to steal billions of dollars of BLMIS customers' assets in the form of the fictitious profits based on the false trading documentation.

3. All Brokerage customers at BLMIS who at any time entrusted securities or cash to BLMIS and at such time granted BLMIS or its employees or agents trading authority and discretion with respect to assets in such brokerage accounts for trading in the BLMIS stock/options trading program (the "BLMIS Discretionary Trading Program") and who have received or are eligible to receive payments directly or indirectly from SIPC or from the BLMIS estate on behalf of SIPC in respect of their BLMIS accounts.

4. This action alleges only control person liability as against the Defendants under section 20(a) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The Defendants' control over the day to day financial records of BLMIS, along with the astounding amount of fictitious profits that the Defendants withdrew from BLMIS, establishes the Defendants' pervasive and fraudulent operational control of BLMIS. The Defendants exerted their control over BLMIS to steal securities and cash assets belonging to the class members.

JURISDICTION AND VENUE

5. The claims asserted herein arise under sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a), and under Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. §240.10b-5.

6. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1337, and under § 27 of the Securities Exchange Act (the "Exchange Act"), 15 U.S.C. §78aa. At all relevant times the principal place of business of most of the Defendants was Palm Beach, Florida. Substantial acts, if not all of the acts, committed in the furtherance of the control relationship occurred in the state of Florida.

DRAFT

7. Venue is proper in this district pursuant to § 27 of the Exchange Act ,15 U.S.C. §78aa, 28 U.S.C. §1391(b), because several of the Defendants reside or are headquartered in this judicial district, and the acts and transactions alleged herein occurred in substantial part in this judicial district.

8. In connection with the wrongs alleged herein, the Defendants used the instrumentalities of interstate commerce, including the United States mails, interstate wire and telephone facilities and the facilities of national securities markets.

THE PARTIES

9. Plaintiff Pamela Goldman is a resident of the State of New York. Plaintiff brings this class action on behalf of herself and a putative class of persons similarly situated for damages and other relief arising from the Defendants' wrongful conduct described herein.

10. Jeffry M. Picower ("Picower") was a resident of Palm Beach, Florida, and Fairfield, Connecticut, prior to and at the time of his death on October 25, 2009. Picower was a highly sophisticated investor, accountant and attorney who participated in the Madoff Ponzi scheme for over 20 years, knowing that he was participating in a fraud. Picower had vast experience in the purchase and sale of businesses, including health care and technology companies. He had also been personally responsible for managing hundreds of millions, if not billions, of dollars of assets, and he had developed uncommon sophistication in trading securities and evaluating returns therefrom. Upon information and belief, Picower was closely associated with Madoff, both in business and socially, for the last 30 years. Picower held an individual BLMIS account in the name of "Jeffry M. Picower," with an account address of 1410 South Ocean Boulevard, Palm Beach, Florida. Picower was a trustee of the Picower Foundation, and Chairman of the Board of Defendant Decisions Incorporated.

DRAFT

11. Defendant Barbara Picower is the Executor of the Estate of Jeffry M. Picower, which is being probated in the State of New York.

12. Defendant Barbara Picower is a person residing at 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Barbara Picower is Picower's surviving spouse. According to the Trustee, Barbara Picower holds an individual account at BLMIS in the name "Barbara Picower," with the account address of 1410 South Ocean Boulevard, Palm Beach, Florida 33480, and Barbara Picower is trustee for Defendant Trust f/b/o Gabrielle H. Picower, an officer and/or director of Defendant Decisions Incorporated, and trustee and Executive Director of the Picower Foundation.

13. Defendant Decisions Incorporated is a corporation organized under the laws of Delaware with a principal place of business at 950 Third Avenue, New York, New York 10022 and an alternate mailing address on its BLMIS account listed as 22 Saw Mill River Road, Hawthorne, New York, 10532. According to the Trustee, the Decisions Incorporated office in Hawthorne was merely a store-front office through which little or no business was conducted, and Decisions Incorporated is a general partner of Defendants Capital Growth Company, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, JMP Limited Partnership and Jeffry M. Picower Special Co.

14. Defendant Capital Growth Company purports to be a limited partnership with a mailing address for its BLMIS account listed at 22 Saw Mill River Road, Hawthorne, New York, 10532, care of Decisions Incorporated. According to the Trustee, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of Capital Growth Company, and Decisions Incorporated and Picower transact/transacted business through this

DRAFT

entity.

15. Defendant JA Primary Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Defendant Decisions Incorporated and/or Picower serves/served as General Partner or Director of JA Primary Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this entity.

16. Defendant JA Special Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York, New York 10594. According to the Trustee, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JA Special Limited Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

17. According to the Trustee, Defendant JAB Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JAB Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

18. According to the Trustee, Defendant JEMW Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JEMW Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

DRAFT

19. According to the Trustee, Defendant JF Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JF Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

20. According to the Trustee, Defendant JFM Investment Company is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and JFM Investment Company is a Limited Partner of Capital Growth Company, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JFM Investment Company.

21. According to the Trustee, Defendant JLN Partnership is a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JLN Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

22. Defendant JMP Limited Partnership is a limited partnership organized under the laws of Delaware, with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. According to the Trustee, Decisions Incorporated and/or Picower serve/served as General Partner or Director of JMP Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

23. According to the Trustee, Defendant Jeffry M. Picower Special Co. is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a

DRAFT

mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower Special Co.

24. According to the Trustee, Defendant Favorite Funds is an entity through which Picower transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Favorite Funds.

25. According to the Trustee, Defendant Jeffry M. Picower P.C. purports to be a limited partnership with a listed mailing address at 25 Virginia Lane, Thornwood, New York, New York 10594, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower P.C., and Decisions Incorporated, and/or Picower transact/transacted business through this defendant entity.

26. Defendant Picower Foundation is a trust organized for charitable purposes with Picower listed as donor, and Picower and Barbara Picower, among others, listed as Trustees during the relevant time period. Picower Foundation's addresses are reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 9 West 57th Street, Suite 3800, New York, New York 10019.

27. According to the Trustee, Defendant Picower Institute for Medical Research is a nonprofit entity organized under the laws of New York, with a principal place of business at 350 Community Drive, Manhasset, New York 11030.

28. According to the Trustee, Defendant Trust f/b/o Gabrielle H. Picower is a trust established for beneficiary Gabrielle H. Picower, who is the daughter of Picower and Barbara

DRAFT

Picower, with Defendant Barbara Picower listed as trustee, and the trust's BLMIS account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

29. On information and belief, the Defendants listed in paragraphs 13 through 28 (collectively the "Picower Entity Defendants") were dominated, controlled and used as a mere instrumentality of Picower to advance his interests in, and to participate in and control, the Madoff Ponzi scheme. Thus, the Picower Entity Defendants are the alter egos of Jeffry Picower and of each other.

THE MADOFF FRAUD AND PICOWER'S CONTROL

Madoff Admits to Committing Securities Fraud

30. BLMIS is a New York Limited Liability Corporation that was wholly owned by Madoff. BLMIS was founded in 1959. Madoff as Founder, Chairman, Chief Executive Officer, and sole shareholder ran BLMIS as his alter ego with several family members and a few employees. BLMIS was registered with the SEC as a Securities Broker Dealer under § 15 of the Exchange Act.

31. The portion of the BLMIS customer business at issue was operated pursuant to account documentation which afforded BLMIS a power of attorney and complete discretion over trading in the relevant BLMIS accounts. BLMIS described its trading strategy to customers falsely as involving a complicated option strategy which generated consistent returns.

32. The BLMIS program of comingled options and stock trading were securities and investment contracts under the Exchange Act and customer "participation" therein involved the purchase and sale of securities.

33. BLMIS customers received monthly statements showing the purchase and sales of securities in their accounts along with the profits purportedly realized from these securities

transactions. But the transactions reported on these statements were a fabrication. The securities transactions described in the monthly statements either never occurred or rarely occurred, and the profits reported were entirely fictitious. Madoff admitted at his plea hearing that he had never purchased any of the securities in BLMIS customer accounts. Following an extensive and lengthy investigation, the Trustee for BLMIS has stated that, except for isolated individual transactions, there is no record of BLMIS having purchased or sold any securities in BLMIS customer accounts.

34. The money that customers paid to BLMIS in connection with their investment contracts with BLMIS was not used to purchase securities as described but instead was used to make distributions to other investors, primarily to the Defendants.

35. On December 11, 2008, Madoff was arrested by federal agents and charged with criminal violation of the federal securities laws, including securities fraud, investment advisor fraud, and mail and wire fraud. On the same day, the SEC filed a complaint in the United States District Court for the Southern District of New York against Madoff and BLMIS, also alleging that Madoff and BLMIS engaged in securities fraud. *See* **Exhibit "A"** hereto.

36. On December 15, 2008, the SEC consented to a combination of its own action with an application of the Securities Investor Protection Corporation ("SIPC"). Thereafter, pursuant to 15 U.S.C. § 78eee(a)(4)(B) of the Securities and Investor Protection Action ("SIPA"), SIPC filed an application in the District Court alleging that BLMIS was not able to meet its obligations to its securities customers as they came due and that such customers needed the protections afforded by SIPA.

DRAFT

37. Also on December 15, 2008, the District Court appointed Irving H. Picard, Esq., as trustee ("Trustee") for the substantively consolidated liquidation of Madoff's estate and of BLMIS under SIPA.

38. On March 10, 2009, the federal government filed an eleven count criminal information against Madoff in the case styled *United States v. Madoff*, 09-CR-213 (S.D.N.Y.). *See* **Exhibit "B"** hereto.

39. On March 12, 2009, Madoff plead guilty to all eleven-counts of the criminal information, including Count I for securities fraud under § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. *See* **Exhibit "C"** hereto at 4-5; 35. As a result of the guilty plea, it is indisputable that Madoff and BLMIS, which he wholly owned and controlled, violated § 10(b) of the Exchange Act and Rule 10b-5.

Through Picower's Direct Participation and Control, the
Defendants Become the Primary Beneficiaries of the Madoff Fraud.

40. Each Defendant is an entity or individual operating as part of a control group of BLMIS. The Defendants are commonly controlled or were commonly controlled by Picower and his wife Barbara Picower.

41. The volume, pattern and practice of the Defendants' fraudulent withdrawals from BLMIS and their control over fraudulent documentation of underlying transactions at BLMIS establishes the Defendants' "control person" liability under the federal securities laws.

42. Picower, now deceased, was a sophisticated investor, accountant and lawyer. Picower, directly and through the Defendants, had a very close relationship with Madoff. Picower knew Madoff for decades and was an investor in BLMIS since at least the 1980s. Madoff served as a Trustee for one of Picower's foundations, the Picower Institute for Medical Research.

DRAFT

43. Through the other Defendants and through his relationship with Madoff, Picower became privy to information about BLMIS and its operations not available to other customers.

44. In interviews with author Diana Henriquez, Madoff stated that Jeffry Picower knew of the existence of his scheme and that Jeffry Picower was taking fraudulent profits from the BLMIS customer accounts.

45. Picower was able to control BLMIS and use BLMIS as "a personal piggy bank" by withdrawing funds for various entities he controlled, even if there was no legitimate underlying profitable transaction warranting a distribution of such funds.

46. In fact, the Defendants benefited in a much more substantial way than Madoff and his family. The Trustee has alleged in an adversary action against the Defendants that the Defendants received at least $7.2 billion from BLMIS, net of their investments. *See* Trustee's Complaint, **Exhibit "D"** hereto and Trustee's Response to Mot. to Dismiss, **Exhibit "E"** hereto.

47. The Picower Defendants were far and away the primary beneficiaries of the Madoff fraud, having received almost 40% of the approximately $18 billion lost by BLMIS customers.

48. In order to realize and withdraw their false profits, Picower, through the Defendants and other agents, directed and effected false trading documentation at BLMIS with respect to the Defendants' BLMIS accounts.

49. The Defendants directed BLMIS to prepare fraudulent trading records and fraudulent trading results, which effected returns in their accounts based upon transactions which in fact never took place. Picower directly and through the other Defendants initiated, directed, coordinated and cause to be effected false records and back dated records at BLMIS, which resulted in the appearance of trading profits in these accounts. Picower then withdrew these false

DRAFT

profits from the Defendant accounts. This direction of trading activity and direction of preparation of false trading records over a multi-year period shows control of the specific fraudulent activity which constituted the underlying Ponzi scheme and the underlying violations of 10b-5 engaged in by BLMIS.

50. The false trading documentation maintained by BLMIS shows that the Defendants' accounts generated annual rates of return well in excess of any conceivable rates of return for the relevant trading strategy in these accounts. For example, two of the BLMIS accounts controlled by Picower generated annual rates of return of over 100% for four consecutive years from 1996 through 1999. According to the Trustee "between 1996 and 2007 defendants' 24 regular trading accounts enjoyed 14 instances of supposed annual returns of more than 100%. . . ." During this time period the annual rates of return for certain of defendants' accounts ranged from 120% to over 550%. In actuality, Picower directly and through the Picower defendants used his ability to control the BLMIS records maintained to cause the preparation of trading record which purported to show these trading profits, which in fact never occurred. By orchestrating the creation of these false trading records, Picower enabled himself to transfer proceeds from these purported transactions to his own account and then to third party bank accounts which he controlled. The funds he withdrew belonged to other BLMIS customers including the class members.

51. The pattern of transactions in the Defendants' accounts reveals their fraudulent nature. Picower and the other Defendants received fraudulent profits from the various Madoff accounts from at least December 1995 through December 2008. Each quarter, Picower, directly and through the other Defendants and other agents, directed the withdrawal of large sums of money divided into odd numbers spread over many of the Defendant accounts. When added

DRAFT

together, these withdrawals usually equaled large even numbered sums. For example, on January 2, 2003, Picower withdrew $1,378,852 from his JLM Partnership account, yet the total withdrawals across all the Defendant accounts for that single day amounted to $250 million.

An Illustration of Picower's Control:
The $6 Billion Decisions Incorporated Margin Loan

52. Several BLMIS accounts controlled by Picower and operated under the name of Decisions, Inc. provide concrete examples of Picower's control over BLMIS. Picower, directly and through the other Defendants, was able to withdraw "funds" from the Decisions, Inc. account in the form of a "loan" of approximately *$6 billion*, even though the account had no trading activity or cash or related assets to support such borrowing. The terms and amounts of the "loan" became known in connection with the December 2010 settlement between the Trustee and the Defendants.

53. Borrowing in a brokerage account is regulated by margin rules established by the Federal Reserve System and by the New York Stock Exchange. These rules limit the amount that an account holder can borrow from his or her securities account based upon the value of securities that can be used as collateral for the loan. Picower was able to borrow almost $6 billion in the Decisions, Inc. account (*i.e.*, steal it from other BLMIS account) without the requisite collateral.

54. The operations of the Decisions account establishes Picower's control of the cash flows at BLMIS and his unfettered ability to remove money from the BLMIS customer accounts for his own benefit and as he saw fit. The Decisions, Inc. accounts were the primary source of the Picower Defendants' cash withdrawals from BLMIS. These accounts reflect virtually no trading activity and virtually no securities positions or other collateral for loans from this account.

DRAFT

55. Picower, directly and through the other Defendants, made distribution requests and directed cash withdrawals from this account ranging from $50 million to $150 million five or more times per year for a total of approximately $6 billion. These withdrawals were inconsistent with legitimate business activity and inconsistent with margin regulations that would permit such a loan only if the account maintains substantial collateral equal to approximately twice the amount of such loans. Picower's ability to make such irregular withdrawals without collateral and in a manner inconsistent with applicable regulations shows that he controlled cash flow and the cash distributions at BLMIS during the relevant time period. At all relevant times Picower and the Picower defendants knew that the withdrawals could only be the property of other BLMIS customers, including the plaintiff and other class members.

Further Illustration of the Picower defendants Control: Directing BLMIS to Backdate False Transactions to Create Fictitious Profits

56. The Defendants' control of BLIMS's operations was such that they were able to direct BLMIS employees to create and document false and non-existent securities transactions, which, in turn, were designed to generate fictitious profits for Picower to withdraw from the Defendants' BLMIS accounts.

57. The Defendants' ability to reconfigure for their own fraudulent purpose the actual trading records maintained by BLMIS, a highly regulated broker and investment advisor, shows that the Defendants exercised control over the day to day operations of BLMIS and specifically over the trading activity that constituted a violation of the securities laws. By way of example, as stated in the Trustee's complaint, on or about April 24, 2006, Defendant Decisions, Inc. opened a new account with BLMIS known as the Decisions, Inc. 6 account. This account was opened with a wire transfer of $125 million.

DRAFT

58. The Defendants instructed BLMIS to back date trades in this account to January 2006, which was four months prior to the time the account was actually opened. BLMIS employees carried out the Defendants' direct instructions and fabricated and back dated trades in the Decision 6 account. This resulted in the net value of the account increasing by almost $40 million, or 30%, in less than two weeks after it "actually opened." The Defendants' ability to affect back dated trades in the Decisions 6 account generated phony paper profits which had appreciated only on a hindsight basis and represented part of a continuous pattern of the Picower defendants directing the falsification of trading records at BLMIS, which allowed Picower to pilfer from other BLMIS accounts.

59. By way of further example, on or about December 29, 2005, Picower's assistant April Friehlich, acting on behalf of the Defendants, faxed BLMIS a letter signed by Picower that directed BLMIS to "realize" a gain of $50 million in the Picower accounts. Upon direction from Picower and Friehlich, BLMIS "sold large amounts of stock in Agilent Technologies and Intel Corporation in various Defendants accounts on a back dated basis." Friehlich directed the sales of large amounts of these purported securities on or about December 29, 2005, requesting that the sales be booked to take place on an earlier date *i.e.* December 8 or 9. BLMIS backdated the trades at Picower's direction and on Picower's behalf for the purpose of generating phony paper profits of approximately $46.3 million, which made up most of Picower's requested $50 million distribution.

60. Picower, on behalf of the Defendants, directed and caused BLMIS to affect other back dated transactions generating phony profits. During December 2005, the Defendants purported to purchase the following securities on margin in their accounts: Google, Diamond Offshore Drilling, Inc., and Burlington Resources, Inc. This resulted in a purported gain of

almost $80 million. These purchases purportedly occurred between January 12 and 20, 2005 but were fictitious, as the transactions actually occurred eleven months later in December 2005. Defendants caused BLMIS to create false book and record entries in order to create a phony $80 million profit on “transactions” that did not take place on the dates recorded on BLMIS's records.

61. The Defendants also directed and orchestrated the preparation of false statements in May 2007, which reflected millions of dollars in securities transactions which reportedly took place in earlier in 2007, but which in fact did not take place at all.

CLASS ACTION ALLEGATIONS

62. Plaintiffs bring this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3). The definition of the Plaintiff class in this action is: (1) all brokerage customers of BLMIS who at any time entrusted securities or cash to BLMIS and at such time granted to BLMIS or its employees or agents trading authority and discretion with respect to assets in such brokerage accounts for trading in the BLMIS stock/options trading program (the "BLMIS Discretionary Trading Program"); and (2) who have not received the full account value of their BLMIS account(s) as of the date of the BLMIS bankruptcy/SIPC liquidation; and (3) who have not received sufficient payments directly or indirectly from SIPC or from the BLMIS estate on behalf of SIPC to cover the full amount of their losses (the “Class”). The Class excludes the Defendants named herein and members of the Madoff family.

63. The Class meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

All Brokerage customers at BLMIS who at any time entrusted securities or cash to BLMIS and at such time granted BLMIS or its employees or agents trading authority and discretion with respect to assets in such brokerage accounts for trading in the BLMIS

DRAFT

stock/options trading program (the "BLMIS Discretionary Trading Program") and who have received or are eligible to receive payments directly or indirectly from SIPC or from the BLMIS estate on behalf of SIPC in respect of their BLMIS accounts.

a. *Numerosity.* The members of the class are so numerous that joinder of all members is impracticable. Based on disclosures made by the SIPA Trustee the Class has thousands of members. Class members may be identified from records maintained by BLMIS and the SIPA Trustee. The members of the class may be notified of the pendency of this action by mail or otherwise using a form of notice similar to that customarily used in securities class actions.

b. *Commonality.* Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are whether the Federal Securities Laws specifically §20(a) of the Exchange Act was violated by defendants as alleged herein, whether members of the class have sustained damages as a result thereof and if so what is the proper measure of such damages.

c. *Typicallity.* Plaintiff's claims are typical of the claims of members of the Class as all members of the Class were similarly affected by Defendants' wrongful conduct in violation of federal law as alleged herein.

d. *Adequacy.* Plaintiffs will fairly and adequately represent and protect the interest of the members of the Class. Plaintiff has retained competent and experienced counsel in class and securities litigation.

DRAFT

64. This class action also meets the requirements of Federal Rule of Civil Procedure 23(b)(3). The common issues outlined herein predominate over any individual issues in the case. A class action is superior to all other available methods of the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the class to individually address the wrongs done to them. There will be no difficulty in the management of this action as a class action.

TOLLING THE STATUTE OF LIMITATIONS

65. Any applicable statute of limitations with respect to Plaintiff's claims has been tolled since no later than February 16, 2010, by the filing of the class action complaint against all of the Defendants named here in the action captioned *Susanne Stone Marshall, Individually and On Behalf of a Class of Similarly Situated v. Barbara Picower, Individually, and as Executor of the Estate Of Jeffry M. Picower, et al.*, case no. 10-80252-CV-Ryskam/Vitunac (S.D. Fla.). *See American Pipe and Construction Company v. Utah*, 414 U.S. 538, 552 (1974); *In re World Comm Securities Litigation*, 496 F.3d 245 (2d Cir. 2007).

VIOLATION OF §10(b) OF THE EXCHANGE ACT AND RULE 10b-5 PROMULGATED THEREUNDER

66. BLMIS is currently subject to a federal bankruptcy proceeding, enjoys the benefit of the bankruptcy automatic stay, and thus cannot be named as a defendant in this action. Based upon: (1) the complaints filed by the Justice Department against Madoff and his guilty plea, (2) the complaints filed by the SEC against Madoff and BLMIS, and (3) the factual allegations made by the Trustee against BLMIS in the many claims he has filed in the bankruptcy proceeding, it is

DRAFT

beyond dispute that BLMIS engaged in the largest Ponzi scheme in U.S. history and committed a substantial violation of the § 10(b) of the Exchange Act and Rule 10b-5 during the Class Period.

67. BLMIS was a New York limited liability company wholly owned by Madoff. BLMIS operated from its principle place of business at 885 Third Avenue, New York, NY. Madoff was Founder, Chairman, Chief Executive Officer and the sole shareholder of BLMIS.

68. Madoff ran BLMIS together with several family members and a few employees subject to the controlling influence of the Defendants. BLMIS was registered with the SEC as a securities broker dealer under section 15 of the Securities Exchange Act.

69. Class members purchased securities issued by BLMIS, which consisted of a discretionary trading account purportedly investing in stock and options and operated pursuant to a power of attorney (the "BLMIS Discretionary Trading Program"). Each class member received monthly statements purportedly reflecting the securities in their account, the trading activity during the month, and the profits earned over the relevant time period. The monthly statements for customer accounts depicted consistent profits on a monthly basis and rarely if ever showed loses.

70. In fact, the monthly statements and the purported trading and profits reflected therein were entirely fictitious. At his criminal plea hearing, Madoff admitted that neither he nor any BLMIS employee ever purchased any of the securities described in the monthly statements. The Trustee has investigated the substance activity in the accounts and, with the exception of isolated transactions for certain clients other than class members, there is no record of BLMIS having purchased or sold any securities.

71. Madoff has admitted, and it is a fact, that BLMIS and the BLMIS Discretionary Trading Program operated as a Ponzi scheme and Madoff and other BLMIS employees

concealed this ongoing fraud in an effort to hinder and delay customers of BLMIS from discovering this fraud. The fraud involved overt material misrepresentations on monthly account statements and confirmations representing transactions which did not take place as well as reporting false profits.

72. The Ponzi scheme also involved the direct theft of customer assets in the BLMIS Discretionary Trading Program by Madoff, his family, and by certain favored customer including the Picower Defendants.

73. Monies received from investors in connection with the BLMIS Discretionary Trading Program were not invested as described by BLMIS in confirmations and monthly statements but instead were used to make distributions to selected other investors, primarily Madoff and the controlling Picower Defendants.

74. The money sent to BLMIS for investment in the BLMIS Discretionary Trading Program was in fact stolen, by Madoff and the Picower Defendants.

75. In or about December 2008, the Ponzi scheme collapsed when customer redemptions in the BLMIS Discretionary Trading Program overwhelmed the amount of money which was being placed in new BLMIS accounts. As result of the Ponzi scheme, Madoff and his family defalcated at least $800 million of *bona fide* customer assets, and the Picower Defendants defalcated at least $7.2 billion. The BLMIS Ponzi scheme also involved the preparation and publication to investors and brokerage customers of false BLMIS audit reports prepared by Frielich and Horowitz as members of a three person accounting firm in Rockland County, New York. BLMIS provided the financial reports to regulators and investors in the BLMIS Discretionary Trading Program for the purpose of their reliance thereon. The accounting reports

falsely reported that Madoff was effecting customer transactions and that BLMIS was profitable and was generating customer profits in customer accounts.

76. At all times relevant hereto, the BLMIS's actual liabilities were billions of dollars greater than its assets. As a result, BLMIS and the BLMIS Discretionary Trading Program were rendered insolvent by the Ponzi scheme. Customer assets were effectively stolen by Madoff and the Picower Defendants in connection with this Ponzi scheme.

77. The BLMIS securities fraud involved the overt and continuing material misrepresentations with respect to the trading activity and profits in the BLMIS Discretionary Trading Program, the use of materially false accounting statements, and the theft of customer securities and cash in connection with the ongoing Ponzi scheme.

Violation of Section 10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder By Non-Defendant BLMIS as Predicate for Count I Herein

78. Plaintiff repeats and re-alleges each and every allegation contained above as if fully set forth herein.

79. During the Class Period, BLMIS carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: (i) misappropriate the assets of BLMIS customers who purchased securities issued by BLMIS in connection with the BLMIS Discretionary Trading Program, as alleged herein and (ii) cause brokerage customers of BLMIS and investors in the BLMIS Discretionary Trading Program to entrust securities for safe-keeping with BLMIS during the Class Period. In furtherance of this unlawful scheme, plan, and course of conduct, BLMIS and its agents, including Madoff, took the actions set forth herein. As a result, Plaintiff and the other members of the Class suffered damages in connection with the

undisclosed and unauthorized theft of their securities, cash assets and the misappropriation of the proceeds thereof, as alleged above.

80. BLMIS (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of materials fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon brokerage customers who entrusted assets to BLMIS and who purchased securities issued by BLMIS in violation of Section 10(b) of the Exchange Act and Rule 10b-5.

81. As part and in furtherance of this conduct, BLMIS engaged in an ongoing scheme to misappropriate funds which constituted the proceeds of sales of customers' securities.

82. BLMIS directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to misappropriate funds which constituted the proceeds of sales of securities (or the securities themselves or cash) held by BLMIS as securities custodian and broker for Plaintiff and the Class members.

83. BLMIS made untrue statements of material fact and/or omitted to state material facts necessary to make their statements not misleading and they employed devices, schemes and artifices to defraud, and engaged in acts, practices, and a course of conduct in an effort to mislead and misappropriate the assets of BLMIS brokerage customers and participants in the BLMIS Discretionary Trading Program. Such misconduct included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about BLMIS and the BLMIS Discretionary Trading Program, its financial performance and its business operations in the light

of the circumstances under which they were made, not misleading, and which included engaging in manipulative and deceptive transactions, practices and courses of business which operated as a fraud and deceit upon the customers of BLMIS and participants in the BLMIS Discretionary Trading Program during the Class Period, including the surreptitious and unauthorized theft of customer assets and securities.

84. BLMIS had actual knowledge of the misrepresentations and omissions of material facts set forth herein. BLMIS's material misrepresentations and/or omissions were done knowingly for the purpose and effect of inflating BLMIS' financial results and to enrich defendant and the Picower Defendants. At all relevant times, BLMIS was aware of the dissemination of artificially inflated financial information to the investing public which it knew was materially false and misleading.

85. As a result of the manipulative and deceptive conduct and the dissemination of the materially false and misleading information as set forth above, Plaintiffs and the Class members suffered injury.

86. At the time of the misrepresentations, omissions and manipulative and deceptive conduct, Plaintiff and other members of the Class were ignorant of their falsity and believed them to be true, and they were ignorant of the manipulative and deceptive conduct complained of herein. Had Plaintiffs and the other members of the Class known the truth regarding BLMIS's materially false statements and deceptive and manipulative conduct alleged above, which were not disclosed during the Class Period, Plaintiff and other members of the Class would not have entrusted their assets with BLMIS or purchased the BLMIS securities.

87. By virtue of the foregoing, BLMIS has violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

DRAFT

88. As a direct and proximate result of BLMIS's wrongful conduct, plaintiffs and the other members of the Class suffered damages in connection with the undisclosed and unauthorized sale of their securities and the misappropriation of the proceeds thereof, as alleged above.

COUNT I

VIOLATIONS OF 20(a) OF THE EXCHANGE ACT AS AGAINST THE PICOWER DEFENDANTS

89. Plaintiff repeats and re-alleges each and every allegation contained above as it fully set forth herein.

90. The Defendants acted collectively as a control group of BLMIS within the meaning of § 20(a) of the Exchange Act as alleged herein.

91. The Defendants had the power to influence and control and did in fact directly influence and control the decision making at BLMIS, the record keeping at BLMIS, and the recording of securities transactions at BLMIS.

92. The Defendants had the power to influence and control, and did in fact directly influence and control the flow of funds and assets in and out of BLMIS and the BLMIS Discretionary Trading Program, even when this flow of funds and assets did not correspond to actual trading activity; this resulted in the distribution of billions of dollars of false profits to the Defendant control group.

93. The Defendants had access to the books and records of BLMIS, and used these books and records as an instrumentality to divert and steal funds from other BLMIS Discretionary Trading accounts for the Defendants' benefit.

94. The Defendants, either directly or through Picower, had direct involvement in the day to day operations, record keeping and financial management of BLMIS. The Defendants

DRAFT

had and employed the power to control and influence actual transactions giving rise to the securities violations alleged herein.

95. As set forth above and in the complaint filed by the Justice Department against Madoff, in the complaint filed by the SEC against Madoff and BLMIS, and in the numerous complaints filed by the Trustee, BLMIS violated § 10b of the Exchange Act and Rule 10b-5 by its acts and omissions and by engaging in a massive Ponzi scheme.

96. By virtue of their position as a control group, the Defendants are jointly and severally liable pursuant to § 20(a) of the Exchange Act.

97. As a direct and proximate result of the Defendants' wrongful conduct, Plaintiff and other members of the Class have suffered damages.

WHEREFORE, Plaintiffs pray for relief and judgment against the Defendants as follows:

A. Determining that this action is a proper class action;

B. designating Plaintiff as class representative under Rule 23 of the Federal Rules of Civil Procedure and Plaintiff's counsel as class counsel;

C. awarding compensatory damages in favor of Plaintiff and other class members against all the Defendants jointly and severally, for all damages sustained as a result of the defendants wrong-doing in an amount to be proven at trial, including interest;

D. awarding Plaintiff and the Class the reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

E. such other and further relief as the Court may deem just and proper.

DATED: this ___ day of December, 2011, by:

DRAFT

BEASLEY HAUSER KRAMER
& GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Telephone: (561) 835-0900
Facsimile: (561) 835-0939
galardi@beasleylaw.net
By: s/ Draft
James W. Beasley, Jr.
Florida Bar No. 145750
Joseph G. Galardi
Florida Bar No. 180572

-and-

Lesley Blackner, Esquire
Florida Bar No. 654043
BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, FL 33480
(561)659-5754
(561)659-3184 (fax)
lblackner@aol.com
Co-counsel for Plaintiff and the Class

EXHIBIT I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In Re: Bernard L. Madoff Investment Securities, LLC

A & G GOLDMAN PARTNERSHIP and PAMELA GOLDMAN,

Appellants,

v. 12 Civ. 6109 (RJS)

IRVING H. PICARD,

Bankruptcy Appeal

Appellee.

----------x

New York, N.Y.
September 24, 2013
2:10 p.m.

Before:

HON. RICHARD J. SULLIVAN

District Judge

APPEARANCES

RICHARD LEE STONE
Attorney for Appellants

HERRICK FEINSTEIN LLP
Attorneys for Appellants
BY: FREDERICK E. SCHMIDT, JR.
JOSHUA J. ANGEL

BAKER & HOSTETLER LLP
Attorneys for Appellee
BY: DAVID J. SHEEHAN
FERVE E. OZTURK

(Case called)

THE COURT: Appearances for the appellants?

MR. STONE: Richard Stone on behalf of the appellants.

THE COURT: Mr. Stone, you are not on the docket sheet, right? I only have Mr. Schmidt, I think, on the docket sheet.

MR. SCHMIDT: Frederick Schmidt of Herrick Feinstein, for the appellants. Our co-counsel is Mr. Stone. He was on the brief. He should be on --

THE COURT: You have to file a notice of appearance. Did you file a notice of appearance?

MR. STONE: I'm a member of the Southern District bar.

THE COURT: You have to file a notice in this case. Let's do that. All right. Mr. Schmidt, Mr. Stone, and?

MR. ANGEL: Joshua Angel.

THE COURT: Mr. Angel, I don't see you on the docket sheet, either.

MR. ANGEL: I'm with Herrick Feinstein.

THE COURT: Still, individual lawyers have to make appearances, not just firms. Let's do that. Good afternoon.

And for the appellee?

MR. SHEEHAN: David Sheehan, your Honor, of Baker Hostetler, for the trustee. Ferve Ozturk is with me today.

THE COURT: I don't see Ms. Ozturk on the docket sheet, either. Let's file a notice of appearance for you as

well.

We are here in connection with the appeal of Judge Lifland's decision. I, like you, have been waiting to see what the circuit is going to do on what seems to be a somewhat related case involving Judge Koeltl. I don't know when they are going to do that. They argued it about ten months ago, I think. I was expecting it at any point. Especially since another case came out involving this bankruptcy around June I guess it was, the JPMorgan decision, I assumed this would follow right on the heels, but it hasn't. We all have to move on with our lives, so that's why scheduled this.

What I thought I would do is hear from the appellants first. Are you the only one arguing, Mr. Stone?

MR. STONE: Yes, your Honor.

THE COURT: I will allow you to reserve a little bit of your time to respond to what the appellees have to say, since it is your appeal.

MR. STONE: Thank you, your Honor. Good afternoon, Richard Stone for appellant Goldman plaintiffs and the putative class.

Appellants position on this appeal is that the Second Circuit decision in Fox may strengthen appellants' position on this appeal but cannot negatively impact appellants' position, and thus that this appeal should be decided now. Moreover, because the Second Circuit and the Eleventh Circuit, where the

Goldman case is to be filed, have clearly ruled that federal securities claims of estate creditors which arise out of the same fraud as claims asserted by the estate as against common defendants may only be asserted by purchasers of those securities and the decision below should be reversed.

THE COURT: It is clear that the trustee can't bring securities claims. I will hear from Mr. Sheehan, but I think he would probably concede that point. The issue is whether these security claims are just fraudulent conveyance claims in securities claims' clothing.

It wasn't a securities cause of action in the Fox case. That was a case in which Judge Koeltl said these are state statutory and common law causes of action, state RICO, conspiracy, unjust enrichment I think, and conversion, and although each is a separate, stand-alone cause of action that perhaps wouldn't be available to the trustee, in reality these were derivative of and duplicative of the fraudulent conveyance action. That is certainly what Judge Koeltl found.

You don't think if the circuit affirmed and said, yes, that is exactly what this is, that wouldn't have a pretty much conclusive effect in this case?

MR. STONE: No, your Honor, I think it would have no effect whatsoever.

THE COURT: Why?

MR. STONE: The claims are completely distinct.

THE COURT: Yes, they are completely distinct. What is the magic of a federal securities claim that makes it different from a state RICO claim.

MR. STONE: A federal securities claim can only be asserted by a purchaser of the security under Blue Chip Stamps. Our class is the purchaser of the security. BLMIS, the estate, is the issuer of the security. It is a separate claim because we are the only people that can assert it. The damages we claim under the 20(a) claim are distinct from fraudulent conveyance claims. The damages in a securities case would not be the amount of money that --

THE COURT: Do you think the trustee could have asserted a state RICO claim against itself or against its co-conspirators?

MR. STONE: I think he would have been barred by in pari delicto, your Honor.

THE COURT: Right. I guess I'm not sure what the difference in that is. In either case the trustee is not in a position to bring the claim. I think there is no question about that.

MR. STONE: Correct.

THE COURT: Judge Koeltl nonetheless found that even though the trustee couldn't bring the claim, the claim, at least as pled, or in this case potentially pled, is identical to the fraudulent conveyance claim that was in fact brought by

the trustee. I guess I don't see what the magic of federal securities law is.

MR. STONE: Judge Koeltl didn't bar the claims under in pari delicto. He felt that they weren't barred by in pari delicto. He also found that St. Paul extended those claims which the Second Circuit held opposite in the HSBC v. JPMorgan case that was just decided.

THE COURT: The JPMorgan case does reference Judge Koeltl's case and seems to recognize that Judge Koeltl got it right. Do you know the footnote I'm referring to?

MR. STONE: Yes, I do, your Honor.

THE COURT: Deal with that. I think I'm reading tea leaves a little bit. I don't know what the Second Circuit is going to do any more than you do. But there is a hint of what they are doing. That case had just been argued around the time that -- well, no, this case was argued in November. JPMorgan was argued when, after that?

MR. SHEEHAN: Just before Thanksgiving, your Honor.

THE COURT: In any event, certainly the two are aware of each other, and there is a reference in JPMorgan to Judge Koeltl's decision in Fox.

MR. STONE: Your Honor, we think that footnote stands only for the proposition that if in fact the claims are duplicative and derivative, then there are state claims and nothing more than that. We don't think it is a finding on

that. We are obviously waiting for the Second Circuit's review of that analysis in a decision that hasn't been issued yet.

Your Honor, if I could get back to 20(a). First of all, no court has ever in the history of securities litigation, as far as we know, enjoined a federal securities claim even when the estate brings common law claims. Negligence, malpractice against its auditors, against its insurance company, overlapping facts, no court has ever enjoined a federal securities claim in that context.

I myself and I'm sure this court has had the experience of having contemporaneous litigation of estate claims against an auditor defendant and class action against an auditor defendant. We just finished the Adelphia case, where there are three such instances. No court has ever enjoined those claims even though they arise from the same fact pattern and assert similar type fraudulent actions, because securities class actions are distinct from estate claims. They can only be brought by purchasers of securities. They seek different damages.

In this context the damages we seek exceeds 7.2 billion by a substantial amount. The damages in our case are the amount we overpaid for the securities. Here apparently there were no underlying securities ever bought, so that can be as much as $18.5 billion, your Honor, substantially in excess of the amount Picower actually stole from the estate, because

other transactions took place while they were in control of that entity for which they are responsible which depleted the assets of Madoff. We have a different claim extending to different dollars and different activities, not the receipt of moneys: The failure to supervise a broker-dealer over whom they have a federal legal duty, a fiduciary-like duty, to oversee.

THE COURT: I think the securities claims are going to be dead on arrival and if you ever live to go pitch this claim in a federal court. That's not the inquiry today. But I do think there is an inquiry as to whether or not the claims you are proposing are derivative. I'm curious as to what that term means and what authority would be guiding me to decide whether or not the claims that you are seeking to assert are derivative of the fraudulent conveyance claims that have been made and then settled.

MR. STONE: Your Honor, we think "derivative" means they are assertible by the estate.

THE COURT: What is your basis for saying that?

MR. STONE: That is what our understanding of a derivative action is, a claim that is brought by shareholders that is on behalf of the estate that the estate itself could assert but did not.

THE COURT: There is a derivative cause of action which is sort of made by shareholders in the shoes of the

corporation where you have faithless directors or whatever. There is also derivative as derived from, which is just plain English and not loaded with Rule 23.1 baggage. You're suggesting that "derivative" means basically a derivative claim brought by shareholders?

MR. STONE: No. It means a claim which the corporation could have brought, had standing to bring, but was brought by shareholders in its stead. Under Delaware law, the example you are using is one example of that, yes.

THE COURT: The phrase that is used by Judge Koeltl and that is in the settlement agreement is "derivative of and duplicative of," I believe.

MR. STONE: That is the language from Judge Lifland's injunction.

THE COURT: Right. What am I to make of "duplicative"? Should I be looking at whether a claim is duplicative? If so, what is the standard for deciding whether something is duplicative?

MR. STONE: Honestly, your Honor, we are not entirely clear on what the court meant by that. We questioned that at the time. But I don't see how we can find that a federal securities claim seeking to remedy a federal right where an entity has a fiduciary duty directly to shareholders to oversee the proper issuance and maintenance of information concerning the issuance of securities is duplicative of the claim that

that entity stole money.

We are seeking moneys well beyond the $7.2 billion that Mr. Picower and his entities took. There were other people that were able to take money because there were phony books and records. There were other people that were able to get fraudulent conveyances because the records were false and directed by the Picower defendants.

THE COURT: I understand that. You are not really alleging that the Picower defendants were directing trades or directing communication between the Madoff folks and shareholders, right?

MR. STONE: We are alleging that they directed, forged the preparation of documents which they knew would be delivered to shareholders, yes.

THE COURT: It is difficult for me to see what you are alleging beyond that the documents that supported the fraudulent conveyance were false.

MR. STONE: Your Honor, those weren't the only documents that were false. The account statements that were received on a monthly basis by all the members of the class were false. The FOCUS reports and broker-dealer reports filed by BLMIS were false. The accounting records prepared by BLMIS and made public were false, all because phony trades were booked at the direction of the Picower defendants.

THE COURT: Phony trades were booked at the direction

of the Picower defendants, where are you alleging that, that they directed trades?

MR. STONE: We have a draft complaint. I'll get the draft complaint, if I can, your Honor.

THE COURT: Sure.

MR. STONE: Page 12, your Honor, paragraph 39. This is the Pamela Goldman draft complaint.

THE COURT: Just read it.

MR. STONE: "The defendants," that's the Picower defendants, "directed BLMIS to prepare fraudulent trading records and fraudulent trading results which affected returns in their accounts based upon transactions which never took place. Picower, directly and through the other defendants, initiated, directed, coordinated, and caused to be effected false records and backdated records of BLMIS which resulted in the appearance of trading profits in these accounts," meaning customer accounts. Picower then withdrew these false profits from the defendants' accounts. The direction of trading activity and the direction and preparation of false trading records over a multiyear period shows control of the specific fraudulent activity which constituted the underlying Ponzi scheme and the underlying violations of 10b-5 engaged in by BLMIS."

THE COURT: What you just read to me doesn't really tell me what are the documents you are talking about.

MR. STONE: We are talking about the actual trading records maintained by the broker-dealer BLMIS, the account statements received by the consumers of BLMIS.

THE COURT: Picower directed what account statements got sent to the account holders?

MR. STONE: No. Federal law dictates the form of those. He dictated what information was contained on that, which was false.

THE COURT: Dictated how? What you are saying now sounds like conclusory statements. You are suggesting that he told the Madoff defendants what to put in their statements to the account holders?

MR. STONE: That's exactly correct, your Honor. There are email documents, substantial documents, some of which we have gotten since we filed this draft complaint, which is not a final complaint, which showed that Picower directed through email false trades be recorded on the bank records of Madoff which showed substantial profits that were not occurring.

That money, the money that resulted from those false transactions, was wired to Mr. Picower, which constituted the fraudulent conveyance action. The bank records themselves were thereby false and the monthly statements that customers received were thereby false because those booked transactions never existed, to the tune of billions of dollars.

THE COURT: I don't have the emails. It seems to me

that Picower is a customer of Madoff and, like other customers of Madoff, was either a net winner or a net loser. It's a net winner. But it is not clear to me what emails you are referring to that show that Picower was basically directing what communications were to be made to other account holders.

MR. STONE: Your Honor, it is our intention, when we have the ability to do so, to file an amended complaint including all of that. This was a draft complaint filed more than a year ago. Information has come out. Those emails are now public.

THE COURT: One of the other things that Judge Koeltl addresses is the effect of the Metromedia case, which he talks about standing for the proposition that truly unusual circumstances might warrant a different result than in a garden variety case. I'm not sure what the limiting principle is for that. Look, Metromedia is controlling precedent. You can discuss what it means and what truly unusual circumstances would be necessary in order to justify a step like that taken by the bankruptcy court.

MR. STONE: We don't think there are any truly unusual circumstances here, your Honor. In fact, our continuing of the litigation against the Picower defendants will have no impact on the estate, because they finally settled with them. What Metromedia is talking about is activities which would prevent a reorganization of a debtor. None of those exist here.

THE COURT: They will speak for themselves I suppose. At least it could have a chilling effect on future settlements and future bankruptcies, would you agree with that?

MR. STONE: No, your Honor. We are five years into this litigation. I believe that the statute of limitations for most of the estate actions has run. They brought cases against most of the defendants they are going to sue.

THE COURT: Future bankruptcy is what you have. You have somebody like Picower, a party that is prepared to settle but on the condition that they get sort of peace. That's what the trustee negotiates and that's what the bankruptcy court approves. $7.2 billion ultimately is nothing to sneeze at, it seems to me. Sounds like real money.

MR. STONE: Your Honor, under Metromedia and under subsequent authorities that I think we have briefed quite thoroughly in the case, Manville being the other one, the size and magnitude of the settlement alone cannot be those circumstances that warrant a barring of third party state claims.

Three circuit courts have found that section 524 of the Bankruptcy Code doesn't permit it at all. It may be there is a small exception in the Second Circuit in connection with asbestosis litigation or drug litigation where there is a channeling injunction and other people get money, but it has never been used in this context to justify simply a large

settlement, which is the only justification that the trustee offers.

Moreover, I would say that Judge Koeltl effectively found that the state law claims were estate assets, so Manville really didn't have a major role in that decision. Once he found that there were state assets, he did have subject matter jurisdiction. It's only if they aren't estate assets.

THE COURT: It is an alternative holding, I think.

MR. STONE: I agree, your Honor.

THE COURT: If I were to agree with you but then accept his alternate holding, that would still be the end, right?

MR. STONE: Your Honor, in that event I suggest we wait for the Second Circuit because I think they will address that quite thoroughly.

THE COURT: You just told me not to.

MR. STONE: Of course. I guess I'm entitled to change my mind. I think it would be extremely significant for the Court to rule that simply the existence of an estate claim arising out of common facts against a common defendant, even though a very large claim, can serve as a basis for enjoining independent federal securities claim.

It's never happened. To the contrary, the contemporaneous litigation of estate claims and class action claims, including control person claims in Metzger v. Feingold,

which is 367 F.App'x 202. That is our case. There was a fraudulent conveyance, there was money transferred, the directors were sued by the entity, by the estate, and as control persons of the entity in a class action. That's Eleventh Circuit authority where our case will be pending.

THE COURT: I'm in the Second Circuit.

MR. STONE: Yes.

THE COURT: I take my marching orders from them even. If I don't think they are right, I have to take my marching orders from them.

MR. STONE: I understand.

THE COURT: Why don't we hear from Mr. Sheehan, and then I'll give you a chance to respond to him.

MR. STONE: Thank you very much, your Honor.

THE COURT: Thanks.

MR. SHEEHAN: Thank you, your Honor. First of all, I think I'd like to focus on your Honor's question. The question was whether or not there is a meaningful distinction to justify a different result. I think our answer is a resounding no. I know your Honor is not surprised to hear me say that. Let me explain why I think so.

One thing that is interesting here is that no one disputes the fact that the injunction itself against duplicative or derivative causes of action is appropriate. In other words, Judge Lifland and Judge Koeltl's decisions

emphasize the fact that in an orderly administration of the bankruptcy estate it is entirely appropriate, when something is a duplicative or derivative action, to enjoin it. So the question here today is isn't duplicative or derivative.

THE COURT: How do I define those terms?

MR. SHEEHAN: I think Judge Koeltl's decision, while not binding on your Honor, is very instructive in terms of the exercise one has to go through to make that decision. When we start comparing the two alleged causes of action, what we find here is this.

One of the same things that are in play in both the Fox decision before Judge Koeltl and the Goldman decision before your Honor is the fact that they are both emanating out of the same transactions, the fraudulent conveyance transactions. Even the description that counsel just offered to you about emails going back and forth between Mr. Picower and BLMIS emanate out of the fraudulent transfers. He was directing, as we allege, that certain transactions take place.

These were not publicized to anyone. There is no such allegation. They were publicized only between the BLMIS and Mr. Picower. Therefore, everything here, everything here, is built on the fulcrum of a fraudulent conveyance. There is no other way to look at it. There is no allegation that anything transpired.

Mr. Picower had nothing to do with these people. He

was a customer just like they were customers. Everything they are alleging here is the same as in the earlier lawsuit in this sense. Judge Koeltl and Judge Lifland both found in the earlier case, when there was a tort claim, it could have been brought by any other customer. The same is true here. What does that tell us? It's a generalized claim.

THE COURT: This suit couldn't be brought by any other creditor.

MR. SHEEHAN: Any other customer.

THE COURT: But not any other creditor.

MR. SHEEHAN: I apologize. I misspoke. I meant customer.

THE COURT: I'm not sure you said that. I'm saying that. Is that a difference that is meaningful? Where is a case where any other creditor could bring a claim that is general?

MR. SHEEHAN: Right.

THE COURT: In this case it is not any other creditor, it is only customers. There are certainly a class of creditors who are not customers, right?

MR. SHEEHAN: That's correct. As a matter of fact, interestingly enough, I think that reinforces the fact of why you have to have here the statutorily mandated SIPA scheme, the ability to shut down duplicative and derivative causes of action by customers who are trying to hijack the system, which

is exactly what is going on here.

They don't like the outcome. They didn't like the net equity decision. What they want to do is create a cause of action that suggests to your Honor that it somehow is independent. Independent based on what?

THE COURT: I'm trying to figure out how as a rule of general application I in this case and the next case will be able to discern what is derivative and what is not, what is independent. If the Picower folks were actually communicating or dictating to Madoff what he should put in correspondence with other customers, would that be enough?

MR. SHEEHAN: I don't think so, not in this situation.

THE COURT: Why not?

MR. SHEEHAN: Because, first of all, with all due respect, and I use this term advisedly, this is a concocted cause of action.

THE COURT: That may be. I've got a hypothetical, a different one, not this one, a hypothetical in which there is a person who is dictating to Madoff and to his lieutenants what should be included in communications with customers. Assuming that scenario, that fact pattern, wouldn't the customers have a cause of action against that individual?

MR. SHEEHAN: I don't know. There is no privity there. There is no interaction between the two of them. They are simply customers. He is a customer who has better access

to Mr. Madoff, that's all that is. Whether that constitutes a cause of action is a wholly different kettle of fish.

I understand what your Honor is saying. My adversary just said it, too. We are not here on a motion to dismiss.

THE COURT: Are you saying there needs to be privity for a securities fraud?

MR. SHEEHAN: No. What I'm saying is there has to be some added starter. It can't simply be that he's talking to Mr. Madoff and somehow that starts a cause of action by the entire creditor body against that individual. Many, many people talked to Mr. Madoff every day about their accounts. Many of them talked to him in the way that Mr. Picower did. He was not alone. That does not mean that there were causes of action against all those individuals.

Your Honor, we have to focus on what he did do, what were his acts. His acts were to take money out from that to the detriment of everyone else. It's a fraudulent conveyance. That's what they are actually complaining of. If you want to slice through whether you call it a tort, a securities action --

THE COURT: That is not what he is complaining of. He is saying the damages go beyond that. The difference is this. The fraudulent conveyance is challenging and moving on the gains that Picower received.

MR. SHEEHAN: Correct.

THE COURT: A securities fraud action, it seems to me, is moving on the losses resulting from securities transactions that were based on false information.

MR. SHEEHAN: I ask this question rhetorically. If he had gotten nothing, would there be a cause of action? I submit to you there wouldn't. The only reason there is a cause of action is because he got money. If he had gotten nothing out of that, where does the liability lie?

THE COURT: Wait. On federal securities law there has to be a loss, you have to show that you have been harmed, but you don't have to show that the person who harmed you gained. I think we have to stay focused on a federal securities action or any securities action in which the claim is that they overstated or falsely stated the bona fides of a particular transaction and based on that false information, I traded. If that's the case, then the damage is the loss amount, right? It's the inflation caused by the false statements as measured by the drop in the stock price when there is disclosure.

MR. SHEEHAN: There is no stock price. There is no stock.

THE COURT: Fraudulent conveyance is --

MR. SHEEHAN: If I can create a cause of action nominally out of thin air and all of a sudden I can proceed with that, I think the court, the bankruptcy court, should be entitled to stop that, stop that before it gets out of the

starting gate. Otherwise, we are going to have multiple litigations all over the place depending on the imagination of a lawyer who suggests that somehow this is an independent cause of action. I think you have to look at the cause of action. You can't just ignore it.

THE COURT: You are insisting that the cause of action is for the $7.2 million or the money that was fraudulently conveyed to Picower.

MR. SHEEHAN: No, that's not what I am saying.

THE COURT: Oh.

MR. SHEEHAN: What I am saying is their cause of action is predicated on the same conduct of Mr. Picower. That is a fraudulent conveyance, and the appropriate way to deal with that fraudulent conveyance is in the confines of the bankruptcy cause of action, not to come up with causes of action that don't exist and suggest your Honor will allow us to pursue those when they don't. It's the same.

For example, to go back, Judge Koeltl says it a locality better than I do. I wish I could just read his opinion; I'd do a lot better here. What he says is nominally you can call it anything. To quote the Bard, a rose by any other name smells as sweet.

The same thing is true here. Nominally you can call it a tort, you can call it a securities action, you can call it everything else, but essentially the same factual statements

are being alleged to constitute their cause of action as the factual statements alleged by the trustee. Therefore, it is derivative.

THE COURT: That's what I'm groping for. You're saying that any cause of action that alleges or relies upon the same allegedly fraudulent statements is derivative?

MR. SHEEHAN: Without more. Without more.

THE COURT: No.

MR. SHEEHAN: What I mean by that is let's assume that Mr. Picower had reached out to these individuals. There is no such obligation, but let's say he had reached out to a group of customers and said look, this guy Bernie, he's the sure thing, he's done a terrific job for me, you ought to give him a lot of dough. I don't think I'd be standing here, your Honor, suggesting to you that this is the same cause of action as a fraudulent conveyance. He is actively engaged in conduct that he should be responsible for. There is no such allegation. There is no proof. There is nothing of that.

What they have here is Mr. Picower taking money out as a fraudulent conveyance and they are saying, wait a minute, holy cow, that constitutes that he is in some kind of control here and as a result we should have a cause of action, when in fact all that is is rhetoric. Rhetoric shouldn't be enough to sustain or go around the ability of the bankruptcy court to control what's going on here.

THE COURT: Rhetoric, I don't know. I have a proposed complaint and now a representation that there will be even a better complaint that they could write that has more facts and less rhetoric presumably.

MR. SHEEHAN: Your Honor, with the complaint or even with the enhanced complaint, I don't see that there is any basis here to suggest that what they are arguing is different than what was in front of Judge Koeltl or is in front of your Honor here today. They are exactly the same.

I don't want to keep repeating myself, your Honor. Let me go to a different tack. I suggest to your Honor that the Third Circuit has already forecast where they are going -- Second Circuit I should say. Your Honor doesn't have to wait too much longer because of the footnote your Honor referred to, maybe I could read a portion of it.

It says, your Honor, referring now to Judge Koeltl's decision, "The customer claims were 'duplicative and derivative of the trustee's fraudulent transfer claim.' ID 479. Accordingly, the court found the claims to be 'general' in the sense, articulating St. Paul, in that they arose from a single set of actions that harmed BLMIS and all BLMIS customers in the same way," which is what I said at the outset.

There is nothing here that these individuals are alleging that is any different than any other customers could so allege. That being the case, they are indeed generalized

claims, they are in fact duplicative of what the trustee has brought, and they should be enjoined.

THE COURT: The Metromedia point, Johns-Manville.

MR. SHEEHAN: Again, I refer to Judge Koeltl's opinion, which articulates it a lot better than I can. We do have an extraordinary result here. It is not every day you walk into a courtroom with a $5 billion settlement and an additional $2.2 billion going to the Department of Justice as part of the settlement. That is an extraordinary event in the context of the case.

More importantly, something your Honor pointed out and so did Judge Koeltl, what this does is it arms a bankruptcy trustee with the ability to negotiate and work settlements with other people, not just other bankruptcies, as your Honor alluded to, but also within this case itself.

Our ability to offer that kind of relief in the context of a settlement enhances the trustee's ability to bring in the assets to the estate, to create the customer fund that we have created, now over $9 billion, and be able then to satisfy all customer claims hopefully at the end of the day. That is not going to happen unless we are fully armed with all the tools in our kit to be able to do that.

THE COURT: I'm not sure. In this case you are saying to allow them to go forward with their claims in federal court in Florida is going to somehow scuttle the settlement?

MR. SHEEHAN: No, it is not going to scuttle the settlement. What I am saying is it would disarm the trustee in future settlements if what were to happen is this injunction is tossed out. We go to our next settlement and they say if you offer us this release, there would be a complete disclosure here, but that is not what is going to happen, look what happened in the Picower case.

We need to have that ability in future cases to offer not only the ability to get relief in terms of their claims being released and what-have-you, getting releases, but also the ability to ensure that when they have paid in all of the money, as happened in Picower, paid all of it, all the money that they took out, at the end of the day that gives them repose.

We are limiting this, your Honor. Let's not confuse estate assets here. We are not talking about estate assets. What we are talking about here is duplicate and derivative claims. If these individuals had independent causes of action, we wouldn't be here today.

THE COURT: Judge Koeltl's decision seemed to suggest that even if they are not independent claims, even if they are not derivative claims, Metromedia and the unusual circumstances would still justify a settlement. Do you agree with that?

MR. SHEEHAN: I agree with that, absolutely.

THE COURT: You're saying that a trustee would have

the authority, the bankruptcy court would have the authority, to approve settling a creditor's claims that the trustee couldn't have brought on their own because it's a whopping big bankruptcy?

MR. SHEEHAN: No, of course not. If I said that, I misspoke. It has to be in the context of a trustee's bringing a claim such as we did here, the traditional bankruptcy claims, fraudulent conveyance claims, etc. That's what I'm speaking of, your Honor. And enhancing the customer fund. Only then, when we are doing that, coupled with that appropriate cause of action and the group result or great result, then you package together with it the injunctive relief. You want to fully arm the trustee to be able to do that.

THE COURT: Again, it seems to me that Judge Koeltl was leaving open an alternative basis for approving the injunction and for denying the causes of action.

MR. SHEEHAN: I'm not saying that they are co-dependent, your Honor. I believe that they are independent. But I believe that rationale behind them flows very nicely in the sense of independently it is a terrific outcome and therefore it should enhance the trustee's ability to get the right result, which includes an injunction in this particular instance. I agree with Judge Koeltl that it has an independent basis in Metromedia and that's why they decided the case that way.

I am also saying that in this situation here I think it is appropriate even without Metromedia in order to have the trustee achieve the outcome that was necessary, because we are limiting it. The injunction is this, duplicate and derivative. It doesn't mean if they had something else, they couldn't see. It's not like a ban on all causes of action ever against Mr. Picower. It's very limited. If it's duplicate and derivative of a fraudulent conveyance claim, it is enjoined. That's the only reason we are here.

THE COURT: Again, it turns on the definition of "derivative." What Mr. Stone said was that "derivative" means that it could be brought by the trustee. You would concede that the trustee can't bring a securities fraud claim, right?

MR. SHEEHAN: I disagree with that statement. It is derivative of the trustee's cause of action. If it is derivative of trustee's cause of action, they can't bring it. And there is no question that their transaction derives exactly out of the trustee's cause of action here.

THE COURT: You are using the term "derived" to mean it is based on the same facts?

MR. SHEEHAN: The same conduct of Mr. Picower. It is based on the same conduct. Your Honor, does anyone in this courtroom doubt that Mr. Picower didn't engage in these fraudulent conveyances, that he would be subjected to this lawsuit by them?

THE COURT: I don't know.

MR. SHEEHAN: I think it is pretty obvious: No fraudulent conveyance by Mr. Picower, no lawsuit. It's as simple as that.

THE COURT: I assume there would be no lawsuit if Mr. Picower or his estate or the other defendants who would be named in a securities class action had no money left. Then there would be no suit. But if there is any thought that there was any money left, then I'm not so sure.

MR. SHEEHAN: It is still based on what he did, his conduct. As Judge Koeltl said, look at what he did, don't look at all the hurrah about what the cause of action might be named. What did he do? What was the conduct? That is pivotal here.

THE COURT: That requires me to look, then, very carefully at the complaint, right? They are saying that the conduct was false statements in connection with the purchase or sale of securities --

MR. SHEEHAN: You don't get there. I'm sorry.

THE COURT: Let me finish.

MR. SHEEHAN: Yes, your Honor. I apologize.

THE COURT: -- that the fraud took place at the time the plaintiffs in the securities action purchased the security going forward with their accounts with Madoff, that that is where the damage took place. It is not about what money went

to Picower, it is about what money went from the pockets of the plaintiffs into Madoff's and others'. That is different conduct, right? Your conduct is about the outflow of money. That's the conduct focused on by the trustee in the fraudulent conveyance action, right?

MR. SHEEHAN: Yes.

THE COURT: Outflow of money. It seems to me Mr. Stone is saying, no, no, we are focused on different conduct, we are focused on conduct that induced the purchase or sale of the securities in the first place, which is temporal. If you a time limit, it would be in a different spot, right?

MR. SHEEHAN: Can I read his complaint, your Honor, what he read to you before?

THE COURT: Sure.

MR. SHEEHAN: This is paragraph 49, page 12. "The defendants directed BLMIS to prepare fraudulent trading records and fraudulent trading results which affected returns of their accounts," that is, the defendants', Picower's, "based upon transactions which in fact never took place. Picower, directly and through the other defendants, initiated, directed, coordinated, and caused to be effected false records and backdated records at BLMIS," those are all the fraudulent conveyances, "which resulted in the appearance of trade profits in these accounts. Picower then withdrew those false profits from the defendants' accounts." That is exactly what they are

talking about.

THE COURT: I think it talks about the two steps. One is creating false records and false documents. The other, the next step, is then withdrawing funds from the account. Right?

MR. SHEEHAN: Maybe I'm not making myself clear.

THE COURT: Look, I think they will have a very tough time proving the elements for a securities fraud. But if they could establish that the fraud was completed with respect to the plaintiffs at the time of the false communications, not the conveyance --

MR. SHEEHAN: There isn't a whisper that these plaintiffs ever heard of Mr. Picower until we sued them. There is no representation by Mr. Picower to them, none, zero, none alleged.

THE COURT: I get it. I agree. I don't think they are alleging that. They are alleging that the communications that were made which induced purchase or sale were directed by Mr. Picower. The fact that the victims didn't know who is directing is not an offense of a securities fraud.

MR. SHEEHAN: There is no allegation that he directed BLMIS's representations.

THE COURT: I thought that's what Mr. Stone said the emails were going to show.

MR. SHEEHAN: There is nothing in the complaint and there is no evidence of that. There is no whisper of it.

THE COURT: But if he amends his proposed complaint and includes emails to show that Picower was telling Madoff exactly what to communicate to his customers so they wouldn't get wise, that would be still derivative?

MR. SHEEHAN: No. I think you are getting a lot closer to where these guys want to be, but it doesn't exist, which gets back to my point that it is all fine and dandy to suggest we are not here on a motion to dismiss. But if what they say is, OK, I can make this all up -- which they have done, it is concocted -- and now they fired off, we can't shut that down, they concoct something and we are not going to a motion to dismiss, based on what they said, it doesn't look derivative to me, then we are going to have dozens of these lawsuits all emanating out of what they say are the facts when those facts don't exist, they made them up.

THE COURT: I don't know if there will be dozens, and I think the federal courts can handle those. These can easily be consolidated into one action before one judge, transferred to me. I would look at a motion to dismiss. You seem to have no confidence that the federal courts can handle these things.

MR. SHEEHAN: No, I have much more confidence in the federal courts than that. My confidence is that they stop and they stop it early, they don't waste a lot of time to do duplicative litigation with a trustee involved all over the country with people coming up with causes of action based

upon -- your Honor, take a look at --

THE COURT: Before you say that, it seems to me that the case law is pretty clear that at this stage I and the bankruptcy court are not supposed to be looking at whether or not the complaint can withstand a 12(b)(6) motion.

MR. SHEEHAN: I am not suggesting that is true. What I am saying is this. Let me finish with this, your Honor.

THE COURT: OK.

MR. SHEEHAN: Take a look at Judge Lifland's opinion. Take a look at the chart that he attached to this case.

THE COURT: I have looked at all that.

MR. SHEEHAN: They took our complaint, put a caption on it, and filed it. That's what they did, there is no other way to describe that, tacking on to it a few added starters about securities laws. But that's what they did. They took the conduct that we alleged in our complaint and they have tried to make it into a federal securities cause of action. Lifland saw it for what it was, deja-vu all over again, and he tossed it. The same thing should happen here.

Thank you, your Honor.

THE COURT: Thank you.

Mr. Stone. You get the last word. I guess I get the last word. Maybe the circuit gets the last word. I did actually have one question. I don't know that it matters. There seems to be a dispute as to whether or not Ms. Goldman

actually got paid or recovered from the trustee on her claims. They are suggesting she did and you are suggesting she didn't, right?

MR. SHEEHAN: She did.

THE COURT: You are saying she didn't, right?

MR. STONE: Your Honor, I am not in possession of information as to that. The bankruptcy counsel are aware of that. Maybe they can address that.

THE COURT: Does it matter, in your view?

MR. STONE: No, I don't think it matters at all.

THE COURT: Do you think it matters?

MR. SHEEHAN: Absolutely.

THE COURT: Why does it matter?

MR. SHEEHAN: It's in Enron. They didn't like the outcome here. They don't like the net equity decision and concocted this cause of action to run around it. Judge Lifland saw that and called it for what it was.

THE COURT: I guess I'm not sure why that would turn on whether or not she got paid or didn't. The other plaintiff, the corporate entity, didn't make any money. They didn't get paid by the trustee. Ms. Goldman apparently did. Does the fact that one got paid and one didn't get paid make a difference in terms of the analysis?

MR. SHEEHAN: No, it is just a fact. But the fact that they are both customers and were dealt with within the

four corners of that liquidation proceeding does have an impact because what they were trying to do is run around that. They don't like the outcome, they don't like the net equity decision. They wanted the last statement, they didn't get it. Now they are trying to do it this way.

THE COURT: I get that. I was just wondering whether it is there is a legal distinction to be made because one got paid and one didn't. I don't think there is.

Go ahead, Mr. Stone.

MR. STONE: We are not trying to run around a net equity position. That relates solely to priorities in bankruptcy. There have been many claims outside of bankruptcy on behalf of people who are direct and indirect creditors of the estate where they have recovered money against feeder funds and the like. Outside of bankruptcy, people are allowed to bring claims even if they arise out of the similar fact pattern.

Ochs v. Lipson, your Honor, a 20(a) case. The court says, "The 20(a) claim is not derivative in nature, it is a direct shareholder suit. While the underlying facts in the shareholder action may be similar to those involved in the trustee's mismanagement of the suit, the two lawsuits raise separate and discrete causes of action for breaches of different duties."

That is the issue, your Honor. We are saying they

participated in the fraudulent misrepresentations made by BLMIS and in addition had a federally established duty as control persons to make sure that didn't happen.

They want to attack our complaint which hasn't been filed yet. They want to attack our complaint which doesn't have data and information which has come out in the last 18 months since we were stayed by the bankruptcy court in a decision that contained no authority.

There is no authority for staying a federal securities class action. It happens routinely. My practice involves many of these cases. We have never encountered a court which has entered a stay, your Honor.

THE COURT: What happens that is routine?

MR. STONE: Class actions against common defendants who are sued by the estate, auditors being a classic example, are litigated simultaneously. Adelphia. The Adelphia trustee in bankruptcy sued the auditors. The Adelphia trustee sued the law firm that issued the opinion in the '33 Act registration. So did we as class action attorneys. We settled, they settled.

What the trustee wants is the right to usurp those federal class actions and settle all of them under the guise of Metromedia without adhering to federal law. He wants to wipe out '34 Act class actions when there is bankruptcy. That's not the law, your Honor. That's not the law.

THE COURT: I'm not sure what the law is at this

point. I'm waiting to learn what the law is. Certainly Judge Koeltl didn't see it your way, right?

MR. STONE: I don't think Judge Koeltl was addressing a 20(a) claim.

THE COURT: He clearly wasn't addressing a 20(a) claim. But I'm not sure what the magic of a 20(a) claim is that means that it is a different analysis that when it is a state RICO claim.

MR. STONE: It is a different analysis because it relates to different direct duties owed by the defendant. Their argument was those state law causes of action aren't raising duties that were breached by the Picowers. We are alleging they are.

THE COURT: There are different elements to a state RICO claim, but it is not clear to me why the result would be any different. Judge Koeltl's analysis didn't turn on the elements of the claim; it turned on the facts of the cases and the facts of the pleading, right? That was all about really a fraudulent conveyance. Call it what you want, but it is a fraudulent convince. That's what Judge Koeltl says.

MR. STONE: In our case it is not, your Honor. There was a fraudulent conveyance. That is a fact. Money was taken. But in addition and separate and distinct from that, the Picowers engaged in directing false bookkeeping, false recordkeeping, and false reporting, which allowed the Ponzi

scheme to continue indefinitely, and they had a separate duty as control persons to make sure that didn't happen.

THE COURT: They engaged in false bookkeeping of their own?

MR. STONE: Directing false bookkeeping, your Honor.

THE COURT: Again, that is not really in your complaint other than stated conclusorily. You are asserting there is no information that you have that would show that?

MR. STONE: Right. We are comfortable having the district court judge in the Southern District of Florida, where the case would have been initiated had we not been stayed, address that. Defendants who are not in the courtroom today, the trustee is not the defendant in that case, will have the right to do that. The trustee won't be bothered by that case. That will be between us and the Picower defendants and their counsel.

THE COURT: I understand that. As I said, it seems to me that there are going to be a lot of problems with the securities cause of action. But that is not really the purpose here today.

Here they bleed into one another a little bit. Trying to figure out what "derivative" means and how it applies sort of feels like assessing the merits of the pleading for a securities claim under 12(b)(6). Feels like it. But they are distinct analyses.

Anything else you want to say?

MR. STONE: I have nothing further. Thank you very much, your Honor.

THE COURT: Anything you want to say, Mr. Sheehan? I told him I'd give him the last word, but we finished a little early.

MR. SHEEHAN: No, that's quite all right. I'm comfortable. Judge Koeltl said it a lot better than I ever could. Thank you.

THE COURT: Judge Koeltl said what he said. It is a thoughtful, well written opinion. I think there are things that one could disagree with. As you say, he is not binding on me, he is not binding authority on me. The circuit would be. The circuit certainly has suggested in the footnote that what Judge Koeltl did was OK, though they haven't found and it is a different panel, so I'm not sure I am in a position to say that. There was one overlapping member of the two panels, I think.

MR. SHEEHAN: There is one other case, it is not binding because it was not published, the Lautenberg opinion. We cited that. I don't want to continue this argument much further. I just commend it to your Honor. There were statements in there by Senator Lautenberg's foundation that there had been misrepresentations made to them by Peter Madoff, directly to them. They were enjoined by the Lautenberg Second

Circuit opinion because it was derivative of the cause of action that we were bringing against the Madoff family, including Mr. Madoff at that time.

MR. STONE: Your Honor, may I address that? This is a preliminary injunction, not a final injunction barring class action. That was entered, as typically a bankruptcy judge will, during the pendency of a bankruptcy to prevent interference with the administration of the case, not a permanent injunction barring an independent claim forever, which has never been done in the case of a securities claim.

THE COURT: I understand the distinctions to be made. I think the reasoning is worth looking at, but it is not on all fours here.

MR. SHEEHAN: No, your Honor.

MR. STONE: That's correct, your Honor.

THE COURT: I am going to reserve. I would like to rule on this to get it off my docket because it has been sitting around a long time. I have to report to Congress. I had thought it was worth waiting for the circuit. Maybe I'm wrong. If and when we hear from the circuit, I'm sure I will know it as soon as you do. If anybody wants to, you can give me notice indicating that the circuit has ruled, and then I will let you know what it means.

Thank you. Make sure everybody remembers to docket their appearances. I thank the court reporter, as always, for

his time and talents. If anyone needs a copy of this transcript, you can take it up with him after this proceeding or on the website. If you can get to him quickly, fine. Otherwise, I have another matter starting in a couple of minutes.

Thanks very much. Well argued, well briefed. It's always a pleasure to have smart lawyers who are responsive and thoughtful. Thanks for that.

(Adjourned)

EXHIBIT J

CLOSED,WM

U.S. District Court
Southern District of Florida (West Palm Beach)
CIVIL DOCKET FOR CASE #: 9:14-cv-80012-KAM

Goldman et al v. Capital Growth Company et al
Assigned to: Judge Kenneth A. Marra
Cause: 28:2201 Declaratory Judgment

Date Filed: 01/06/2014
Date Terminated: 09/25/2014
Jury Demand: None
Nature of Suit: 850 Securities/Commodities
Jurisdiction: Federal Question

Plaintiff

Pamela Goldman

represented by **Lesley Guy Blackner**
Blackner Stone & Associates
340 Royal Poinciana Way
St 317-377
Palm Beach, FL 33480
561-659-5754
Fax: 561-659-3184
Email: LBlackner@aol.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Joseph George Galardi
Beasley Hauser Kramer & Galardi PA
505 S Flagler Drive
Suite 1500
West Palm Beach, FL 33401
561-835-0900
Fax: 835-0939
Email: Galardi@beasleylaw.net
ATTORNEY TO BE NOTICED

Plaintiff

A & G Goldman Partnership

represented by **Lesley Guy Blackner**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Joseph George Galardi
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Capital Growth Company

represented by **Jennifer Opheim**
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
212-756-2000
Email: jennifer.opheim@srz.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
212-756-2000
Email: michael.kwon@srz.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
Holland & Knight
701 Brickell Avenue
Suite 3000
Miami, FL 33131
305-374-8500
Email: brian.toth@hklaw.com
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
Holland & Knight
701 Brickell Avenue
Suite 3000
Miami, FL 33131
305-789-7678
Fax: 305-679-6335
Email: sbohrer@hklaw.com
ATTORNEY TO BE NOTICED

Defendant

Decisions, Inc.

represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY

PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Favorite Funds represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JA Primary Limited Partnership represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer

(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JA Special Limited Partnership represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JAB Partnership represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JEMW Partnership represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JF Partnership represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JFM Investment Companies represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JLN Partnership represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JMP Limited Partnership represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Jeffry M. Picower Special Company represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Jeffry M. Picower, P.C. represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

The Picower Foundation represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth

(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

John Doe Trustees of the Picower Foundation

represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

The Picower Institute of Medical Research

represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

The Trust f/b/o Gabrielle H. Picower

represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Barbara Picower
individually, and as Executor of the Estate of Jeffry M. Picower, and as Trustee for the Picower Foundation and for the Trust f/b/o Gabriel H. Picower

represented by **Jennifer Opheim**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael Kwon
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Brian W. Toth
(See above for address)
ATTORNEY TO BE NOTICED

Sanford Lewis Bohrer
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/06/2014	1	COMPLAINT *for Declaratory Judgment* against All Defendants. Filing fees $ 400.00 receipt number 113C-6366685, filed by A & G Goldman Partnership, Pamela Goldman. (Attachments: # 1 Civil Cover Sheet, # 2 Exhibit A - Complaint-Class Action, # 3 Exhibit B - Memorandum and Order 9-30-13, # 4 Exhibit C - Report and Recommendation)(Galardi, Joseph) (Entered: 01/06/2014)
01/06/2014	2	Judge Assignment to Judge Kenneth A. Marra (yha) (Entered: 01/06/2014)
01/08/2014	3	Order Requiring Counsel to Confer and File Joint Scheduling Report. Signed by Judge Kenneth A. Marra on 1/7/2014. (ir) (Entered: 01/08/2014)
01/28/2014	4	

		NOTICE of Filing Proposed Summons(es) by A & G Goldman Partnership, Pamela Goldman (Attachments: # 1 Summon(s) All Defendants)(Galardi, Joseph) (Entered: 01/28/2014)
01/28/2014	5	Plaintiff's MOTION for Summary Judgment *and Incorporated Statement of Material Facts and Memorandum of Law* by A & G Goldman Partnership, Pamela Goldman. Responses due by 2/14/2014 (Attachments: # 1 Exhibit A - January 13, 2014 Opinion)(Galardi, Joseph) (Entered: 01/28/2014)
01/29/2014	6	Summons Issued as to All Defendants. (yha) (Entered: 01/29/2014)
02/21/2014	7	Notice of Pendency of Other Action by A & G Goldman Partnership, Pamela Goldman (Galardi, Joseph) (Entered: 02/21/2014)
03/11/2014	8	SUMMONS (Affidavit) Returned Executed on 1 Complaint, with a 21 day response/answer filing deadline by A & G Goldman Partnership, Pamela Goldman. Barbara Picower served on 2/21/2014, answer due 3/14/2014; The Picower Foundation served on 2/21/2014, answer due 3/14/2014; The Trust f/b/o Gabrielle H. Picower served on 2/21/2014, answer due 3/14/2014. (Attachments: # 1 Affidavit in Support of Return of Service)(Galardi, Joseph) (Entered: 03/11/2014)
03/14/2014	9	Defendant's MOTION to Dismiss 1 Complaint, *for Insufficient Process*, Defendant's MOTION to Stay re 1 Complaint, by Capital Growth Company, Favorite Funds, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JFM Investment Companies, JLN Partnership, JMP Limited Partnership, Jeffry M. Picower Special Company, Jeffry M. Picower, P.C., Barbara Picower, The Picower Foundation, The Picower Institute of Medical Research, The Trust f/b/o Gabrielle H. Picower. Attorney Brian W. Toth added to party Capital Growth Company(pty:dft), Attorney Brian W. Toth added to party Favorite Funds (pty:dft), Attorney Brian W. Toth added to party JA Primary Limited Partnership(pty:dft), Attorney Brian W. Toth added to party JA Special Limited Partnership(pty:dft), Attorney Brian W. Toth added to party JAB Partnership (pty:dft), Attorney Brian W. Toth added to party JEMW Partnership(pty:dft), Attorney Brian W. Toth added to party JF Partnership(pty:dft), Attorney Brian W. Toth added to party JFM Investment Companies(pty:dft), Attorney Brian W. Toth added to party JLN Partnership(pty:dft), Attorney Brian W. Toth added to party JMP Limited Partnership(pty:dft), Attorney Brian W. Toth added to party Jeffry M. Picower Special Company(pty:dft), Attorney Brian W. Toth added to party Jeffry M. Picower, P.C.(pty:dft), Attorney Brian W. Toth added to party Barbara Picower(pty:dft), Attorney Brian W. Toth added to party The Picower Foundation(pty:dft), Attorney Brian W. Toth added to party The Picower Institute of Medical Research(pty:dft), Attorney Brian W. Toth added to party The Trust f/b/o Gabrielle H. Picower(pty:dft). Responses due by 3/31/2014 (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Affidavit Barbara Picower, # 9 Affidavit Raquel Gorostiza)(Toth, Brian) (Entered: 03/14/2014)
03/18/2014	10	NOTICE by JFM Investment Companies, JA Special Limited Partnership, The Picower Institute of Medical Research, The Picower Foundation, JMP Limited Partnership, JA Primary Limited Partnership, Capital Growth Company, JEMW

		Partnership, JLN Partnership, Jeffry M. Picower Special Company, Jeffry M. Picower, P.C., Barbara Picower, JAB Partnership, Decisions, Inc., JF Partnership, The Trust f/b/o Gabrielle H. Picower, Favorite Funds re 9 Defendant's MOTION to Dismiss 1 Complaint, *for Insufficient Process*Defendant's MOTION to Stay re 1 Complaint, . Attorney Sanford Lewis Bohrer added to party Capital Growth Company(pty:dft), Attorney Sanford Lewis Bohrer added to party Decisions, Inc.(pty:dft), Attorney Sanford Lewis Bohrer added to party Favorite Funds(pty:dft), Attorney Sanford Lewis Bohrer added to party JA Primary Limited Partnership(pty:dft), Attorney Sanford Lewis Bohrer added to party JA Special Limited Partnership(pty:dft), Attorney Sanford Lewis Bohrer added to party JAB Partnership(pty:dft), Attorney Sanford Lewis Bohrer added to party JEMW Partnership(pty:dft), Attorney Sanford Lewis Bohrer added to party JF Partnership(pty:dft), Attorney Sanford Lewis Bohrer added to party JFM Investment Companies(pty:dft), Attorney Sanford Lewis Bohrer added to party JLN Partnership(pty:dft), Attorney Sanford Lewis Bohrer added to party JMP Limited Partnership(pty:dft), Attorney Sanford Lewis Bohrer added to party Jeffry M. Picower Special Company(pty:dft), Attorney Sanford Lewis Bohrer added to party Jeffry M. Picower, P.C.(pty:dft), Attorney Sanford Lewis Bohrer added to party Barbara Picower(pty:dft), Attorney Sanford Lewis Bohrer added to party The Picower Foundation(pty:dft), Attorney Sanford Lewis Bohrer added to party The Picower Institute of Medical Research (pty:dft), Attorney Sanford Lewis Bohrer added to party The Trust f/b/o Gabrielle H. Picower(pty:dft). (Attachments: # 1 Exhibit A)(Bohrer, Sanford) (Entered: 03/18/2014)
03/28/2014	11	RESPONSE in Opposition re 9 Defendant's MOTION to Dismiss 1 Complaint, *for Insufficient Process*Defendant's MOTION to Stay re 1 Complaint, filed by A & G Goldman Partnership, Pamela Goldman. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E, # 6 Exhibit Exhibit F, # 7 Exhibit Exhibit G, # 8 Exhibit Exhibit H, # 9 Exhibit Exhibit I, # 10 Exhibit Exhibit J, # 11 Exhibit Exhibit K, # 12 Exhibit Exhibit L, # 13 Exhibit Exhibit M)(Galardi, Joseph) (Entered: 03/28/2014)
04/07/2014	12	REPLY to Response to Motion re 9 Defendant's MOTION to Dismiss 1 Complaint, *for Insufficient Process*Defendant's MOTION to Stay re 1 Complaint, filed by Capital Growth Company, Decisions, Inc., Favorite Funds, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JFM Investment Companies, JLN Partnership, JMP Limited Partnership, Jeffry M. Picower Special Company, Jeffry M. Picower, P.C., John Doe Trustees of the Picower Foundation, Barbara Picower, The Picower Foundation, The Picower Institute of Medical Research, The Trust f/b/o Gabrielle H. Picower. Attorney Brian W. Toth added to party Decisions, Inc.(pty:dft), Attorney Brian W. Toth added to party John Doe Trustees of the Picower Foundation(pty:dft). (Toth, Brian) (Entered: 04/07/2014)
06/26/2014	13	NOTICE by JFM Investment Companies, JA Special Limited Partnership, John Doe Trustees of the Picower Foundation, The Picower Institute of Medical Research, The Picower Foundation, JMP Limited Partnership, JA Primary

		Limited Partnership, Capital Growth Company, JEMW Partnership, JLN Partnership, Jeffry M. Picower Special Company, Jeffry M. Picower, P.C., Barbara Picower, JAB Partnership, Decisions, Inc., The Trust f/b/o Gabrielle H. Picower, JF Partnership, Favorite Funds *of Memorandum Decision Granting BLMIS Trustee's Motion for an Injunction and Denying Motion for a Stay and Cross-Motion to Dismiss* (Attachments: # 1 Exhibit A)(Toth, Brian) (Entered: 06/26/2014)
07/03/2014	14	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Michael Kwon. Filing Fee $ 75.00. Receipt # 82354. (pt) (Entered: 07/07/2014)
07/03/2014	15	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Jennifer M. Opheim. Filing Fee $ 75.00. Receipt # 82354. (pt) (Entered: 07/07/2014)
07/10/2014	16	NOTICE by JFM Investment Companies, JA Special Limited Partnership, John Doe Trustees of the Picower Foundation, The Picower Institute of Medical Research, The Picower Foundation, JMP Limited Partnership, JA Primary Limited Partnership, Capital Growth Company, JEMW Partnership, JLN Partnership, Jeffry M. Picower Special Company, Jeffry M. Picower, P.C., Barbara Picower, JAB Partnership, Decisions, Inc., The Trust f/b/o Gabrielle H. Picower, JF Partnership, Favorite Funds *of Order in Picard v. Marshall et al. Enjoining Plaintiffs from Prosecuting this Action* (Attachments: # 1 Exhibit A) (Toth, Brian) (Entered: 07/10/2014)
07/23/2014	17	ENDORSED ORDER granting Michael Kwon 14 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing ; granting Jennifer M. Opheim 15 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing. Signed by Judge Kenneth A. Marra on 7/23/2014. (ir) (Entered: 07/23/2014)
09/24/2014	18	Agreed MOTION to close case *and Joint Stipulation* by A & G Goldman Partnership, Pamela Goldman. (Attachments: # 1 Exhibit Proposed Order) (Galardi, Joseph) (Entered: 09/24/2014)
09/25/2014	19	ORDER granting 18 Motion to Close Case. This case is ADMINISTRATIVELY CLOSED. Signed by Judge Kenneth A. Marra on 9/24/2014. (ir) (Entered: 09/25/2014)
09/25/2014		Civil Case Terminated. (ir) **NOTICE: If there are sealed documents in this case, they may be unsealed after 1 year or as directed by Court Order, unless they have been designated to be permanently sealed. See Local Rule 5.4 and Administrative Order 2014-69.** (Entered: 09/25/2014)

PACER Service Center
Transaction Receipt

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

PAMELA GOLDMAN and A & G
GOLDMAN PARTNERSHIP,

Plaintiffs,

vs.

CAPITAL GROWTH COMPANY;
DECISIONS, INC.;
FAVORITE FUNDS;
JA PRIMARY LIMITED PARTNERSHIP;
JA SPECIAL LIMITED PARTNERSHIP;
JAB PARTNERSHIP;
JEMW PARTNERSHIP;
JF PARTNERSHIP;
JFM INVESTMENT COMPANIES;
JLN PARTNERSHIP;
JMP LIMITED PARTNERSHIP;
JEFFRY M. PICOWER SPECIAL COMPANY;
JEFFRY M. PICOWER, P.C.;
THE PICOWER FOUNDATION; JOHN DOE TRUSTEES
OF THE PICOWER FOUNDATION;
THE PICOWER INSTITUTE OF MEDICAL RESEARCH;
THE TRUST F/B/O GABRIELLE H. PICOWER;
BARBARA PICOWER, individually, and as
Executor of the Estate of Jeffry M. Picower,
and as Trustee for the Picower Foundation
and for the Trust f/b/o Gabriel H. Picower.
_____/

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs Pamela Goldman and A & G Goldman Partnership, by and through their undersigned counsel, sue for a declaration that neither the injunction issued by the United States Bankruptcy Court for the Southern District of New York as part of its order, dated January 13, 2011, nor the automatic stay provisions (the "Automatic Stay") of Section 362 of Title 11 of the United States Code (the "Bankruptcy Code"), bar, prohibit, restrict or prevent the Plaintiffs from filing and prosecuting a proposed securities law class action (the "Class Action") against certain

non-debtor defendants (collectively, the "Picower Defendants") in the United States District Court for the Southern District of Florida:

1. The draft Class Action Complaint (attached as **Exhibit A** hereto) is intended to be consistent with the *Memorandum and Order* [Doc. 37] of September 30, 2013 issued by the Honorable Richard J. Sullivan, United States District Judge, in *A&G Goldman Partnership and Pamela Goldman v. Irving H. Picard*, No. 1:12-cv-06109-RJS (S.D.N.Y. September 30, 2013), which is attached as **Exhibit B**.

2. This Court has exclusive jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1337, and under § 27 of the Exchange Act, 15 U.S.C. §78aa. Under 28 U.S.C. § 2201(a), this Court may "declare the rights and other legal relations of any interested person" relating to this action.

3. *In personam* jurisdiction exists over all defendants as substantial acts, if not all of the acts, committed in the furtherance of the control relationship alleged in the underlying complaint occurred in the state of Florida.

4. Venue in this district is proper pursuant to § 27 of the Exchange Act, 15 U.S.C. §78aa, and 28 U.S.C. §1391(b), because the acts and transactions alleged in the underlying complaint occurred in substantial part in this judicial district.

The Madoff/BLMIS Bankruptcy Court Cases

5. On December 11, 2008, the Securities and Exchange Commission ("SEC") filed a Securities Violation Complaint in the United States District Court for the Southern District of New York against the estate of Bernard L. Madoff ("Madoff') and Bernard L. Madoff Investment Securities LLC ("BLMIS", and together with Madoff, the "Debtors"). The SEC alleged, *inter alia*, that the Debtors engaged in fraud through investment advisor activities of BLMIS.

6. On December 15, 2008, the District Court entered an order pursuant to Section 78eee(a)(4)(A) of the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.* ("SIPA") which, in pertinent part, appointed Irving H. Picard (the "Trustee") as trustee for the liquidation of the business of BLMIS, pursuant to Section 78eee(b)(3) of SIPA.

The Picower Settlement

7. On May 12, 2009, the Trustee filed a complaint (the "Picower Complaint") commencing an adversary proceeding against certain of the Picower Defendants, captioned *Picard v. Picower*, Adv. Pro. No. 09-1197 (BRL), in which the Trustee alleged that prior to the Filing Date, BLMIS made payments or other transfers totaling more than $6.7 billion to one or more of the Picower Defendants, an allegation that was subsequently increased to approximately $7.2 billion. The Picower Complaint asserted claims under the Bankruptcy Code for avoidance and recovery of alleged preferential transfers, and avoidance and recovery of alleged fraudulent conveyances.

8. The Trustee thereafter entered into a settlement agreement (the "Picower Settlement Agreement").

9. On January 13, 2011, the Bankruptcy Court entered an order (the "Picower Settlement Order") approving the Picower Settlement Agreement.

10. The Picower Settlement Order contained the following permanent injunction provision:

> ORDERED, that any BLMIS customer or creditor of the BLMIS estate who filed or could have filed a claim in the liquidation, anyone acting on their behalf or in concert or participation with them, or anyone whose claim in any way arises from or is related to BLMIS or the Madoff Ponzi scheme, is hereby permanently enjoined from asserting any claim against the Picower BLMIS Accounts or the Picower Releasees that is *duplicative or derivative of the claims brought by the*

Trustee, or which *could have been brought by the Trustee* against the Picower BLMIS Accounts or the Picower Releasees. (emphasis added).

Judge Sullivan's Memorandum and Order of September 30, 2013

11. On December 13, 2011, the Plaintiffs filed a motion in the BLMIS Bankruptcy, Case No. 08-1789-brl, for leave to file two draft class action complaints under Section 20(a) of the Securities Exchange Act of 1934 (as amended, the "Exchange Act") against the Picower Defendants, based on the Picower Defendants' control over BLMIS.

12. The Bankruptcy Court denied leave to file the proposed complaints on June 20, 2012.

13. On appeal to the United States District Court, the Honorable Richard J. Sullivan considered whether the claims under Section 20(a) of the Exchange Act set forth in the draft complaints were barred by the Picower Settlement Order and the Automatic Stay. Judge Sullivan held that, by their very nature, claims against Picower under Section 20(a) could not be owned or asserted by the Trustee, barred by the Picower Settlement Order, or prohibited under the Automatic Stay. *See* **Exh. B.**

14. Nevertheless, Judge Sullivan held that the two draft class action complaints before him were barred, because the claims asserted were not Section 20(a) claims but fraudulent transfer claims.

The Class Action Complaint

15. In compliance with Judge Sullivan's opinion, the Plaintiffs have prepared a draft Class Action complaint, which is attached as **Exhibit A** hereto (the "Class Action Complaint").

16. The Class Action Complaint states a Section 20(a) claim. Plaintiffs have alleged that Picower and his affiliates were in fact control persons who directly or indirectly controlled BLMIS and directly or indirectly induced BLMIS's securities fraud. The damages sought are

only securities based damages to be obtained from assets currently held by Defendants, not assets recovered by the Trustee from Defendants in the fraudulent conveyance settlement.

17. The sole issue in controversy for the purposes of this Complaint is whether the draft Class Action Complaint (**Exh. A**) is "duplicative" or "derivative" of the Trustee's fraudulent conveyance claims. As Judge Sullivan acknowledged in his September 30, 2013 Order, whether or not the Class Action Complaint properly states a claim under federal securities law is not now before the Court.

18. Because a Section 20(a) claim is sufficiently and clearly stated in Exhibit A, the Class Action claims are neither "duplicative" nor "derivative" of any claims made by or assertable by the Trustee against the Picower Defendants. As shown in Judge Sullivan's decision, neither the Trustee nor the pre-petition Debtor could have asserted the Plaintiffs' valid securities law claims against the Picower Defendants. Thus, Plaintiffs are not barred under the Picower Settlement Order from pursuing the Class Action claims.

19. In order to be liable under Section 20(a), the Picower Defendants must have directly or indirectly controlled BLMIS. As alleged in **Exhibit A**, the Picower Defendants had the practical ability to control BLMIS in order to operate and conceal the Ponzi scheme.

Defendants' Position

20. Defendants have taken the position that the Plaintiffs' claims in the prior draft class action complaints against the Picower Defendants under Section 20(a) are barred by the Picower Settlement Order, and Defendants are expected to take the same position as to the attached Class Action Complaint.

Declaratory Relief is Warranted

21. Accordingly, a controversy exists between the Plaintiffs and Defendants that should be judicially resolved pursuant to the United States Declaratory Judgment Act, 28 U.S.C. § 2201.

22. This Adversary Complaint seeks no relief other than a judicial determination that the claims in the draft Class Action Complaint are not duplicative or derivative of any claims that were made or that could be made by the Trustee against the Picower Defendants.

Section 20(a) claims differ materially from fraudulent transfer claims

23. The Class Action Complaint does not plead "fraudulent transfer" claims, disguised or otherwise.

24. Fraudulent transfer and Section 20(a) control person claims are premised on different legal theories, have distinct elements, and seek different damages. They are therefore distinct in both "name and substance." *See Sher v. SAF Financial, Inc.*, 2010 WL 4034272, at *14 (D. Md. Oct. 14, 2010) (legal malpractice claims were not redundant of fraudulent transfer claims); *In re Friedman's Inc.*, 394 B.R. 623, 628–29 (S.D. Ga. 2008) (same).

25. The Eleventh Circuit has expressly held that, under similar circumstances, a Section 20(a) claim is a direct action which does not belong to a bankruptcy trustee and which may be asserted by securities holders against defendants. *See Medkser v. Feingold*, 307 Fed. App'x 262, 265 (11th Cir. 2008). In *Medkser*, a group of investors brought Section 20(a) claims against the principals of a bankrupt hedge fund, accusing them of, *inter alia*, controlling the hedge fund and violating securities laws by funneling the investors' funds into the defendants' own offshore accounts. The defendants argued that the investors' control person claims had to be raised as part of the bankruptcy estate. The trial court incorrectly found that the claims were

derivative, and granted judgment on the pleadings in favor of defendants. *See Report and Recommendation*, *Medsker v. Feingold*, No. 04-81025, D.E. 119 (S.D. Fla. Jan. 24, 2008), *adopted by district judge*, D.E. 124 (S.D Fla. Feb. 12, 2008) (attached as **Exhibit C** hereto). The Eleventh Circuit vacated the judgment, and held that:

> The claims involve direct injuries sustained by these plaintiffs based their own reliance on fraudulent statements and misrepresentations made to them. The fact that some other investors may also have been similarly injured does not transform these direct claims into derivative ones. **The corporate entity could not bring suit to recover the investment that these plaintiffs made relying on the fraudulent actions of the defendants; thus, these claims may be maintained in this direct action.**

Medkser v. Feingold, 307 Fed. App'x at 265 (emphasis supplied). The Eleventh Circuit's holding in *Medkser* definitively establishes that a Section 20(a) claim is not "duplicative" or "derivative" of any claims that belong to a bankruptcy estate.

26. There are numerous fundamental differences between the claims asserted in the Class Action Complaint and the Trustee's fraudulent conveyance action. Under New York's implementation of the Uniform Fraudulent Conveyance Act and the United States Bankruptcy Code, a fraudulent transfer is one in which the debtor transfers property for less than reasonably equivalent value at a time when the debtor is insolvent (or is left insolvent by the transfer), or one in which the debtor transfers the property to hinder, delay, or defraud creditors. *See* N.Y. DCD § 270 *et seq.*; 11 U.S.C. § 548. No intent or wrongdoing by the recipient is required for a fraudulent transfer claim because the "fraud" can be constructive – *any* transfer made for less than reasonably equivalent value may be set aside. N.Y. DCD § 273 ("Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent"); 11 U.S.C. § 548(a)(1)(b). The statute of limitations for a fraudulent transfer claim begins running from the date of the transfer

of the funds from the debtor to the recipient. *See* N.Y. Civ. Prac. L. & R. § 213(8) (limitations period for fraud is the greater of six years from accrual of the cause of action or two years after the claimant discovered or reasonably could have discovered the fraud). A fraudulent transfer action only seeks to set aside the conveyance; it does not seek damages against the transferee.

27. In contrast, the intent of Section 20(a) is to prevent defendants from escaping liability for securities fraud by using intermediaries to carry out actions that would be prohibited under the Securities Exchange Act if performed directly. *See* H.R. Rep. No. 73-1383, at 26 (1934). The statute of limitations for Section 20(a) is based upon the underlying securities violation itself, not the date that the debtor improperly transferred funds to a recipient. *See In re Heritage*, 289 F. Supp. 2d 1132, 1147-48 (C.D. Cal. 2003). Moreover, unlike the recipient of a fraudulent conveyance, a Section 20(a) control person is jointly and severally liable with the primary violator for all damages caused by the underlying securities fraud, which is the actual loss sustained by the plaintiff. *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 154-55 (1972).

28. Here Plaintiffs allege that Defendants directed and controlled the publication of false and misleading account documents to BLMIS investors, causing them to believe that BLMIS was profitable and that they were making profits in their BLMIS accounts. These misrepresentations and omissions caused BLMIS investors to overpay for BLMIS securities.

29. Judge Sullivan noted that the only relevant inquiry at this stage is whether a putative Section 20(a) claim is "duplicative" or "derivative" of the Trustee's fraudulent conveyance claims, not whether the Section 20(a) claim would survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). As a matter of law, the legal theory, elements, required proof, and damages stemming from a Section 20(a) securities law claim are completely different from a

fraudulent conveyance claim. The Class Action Complaint alleges a Section 20(a) claim, not a fraudulent conveyance claim.

Picower was a control person of BLMIS

A. Legal Standard

30. A defendant must "control" the primary violator in order to be liable under Section 20(a). Control requires "the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws ... [and having] the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability." *See Brown v. Enstar Group, Inc.*, 84 F.3d 393, 396 (11th Cir. 1996). Control may be established by showing that the defendant possessed, directly or indirectly, "'the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise.'" *Laperriere v. Vesta Ins. Group, Inc.*, 526 F. 3d 715, 722-23 (11th Cir. 2008) (quoting 17 C.F.R. § 240.12b-2, emphasis supplied). There can be more than one control person. *See, e.g., In re PSS World Medical Inc.*, 250 F. Supp. 2d 1335, 1351 (M.D. Fla. 2002) (plaintiffs successfully alleged control person claims against multiple executive officers and directors; those defendants "both individually and [as] part of the group making up the [primary violator's] control structure — were directly responsible for the allegedly fraudulent statements at issue").

31. In the Eleventh Circuit, there is no requirement that a Section 20(a) control person defendant "culpably participate" in the underlying securities violation. *See Brown v. Enstar Group, Inc.*, 84 F.3d at 396 n.5. However, while culpable participation is unnecessary for Plaintiffs to prevail on their Class Action claims, the allegations in the Class Action Complaint in any case show that the Picower Defendants were direct participants in the fraud and the material

misrepresentations made to BLMIS investors. The Class Action Complaint also alleges (1) Picower's knowledge of BLMIS's fraud and (2) the disproportionate profits that Picower obtained ($7.2 billion). *See generally Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 407 (S.D.N.Y. 2010) (plaintiffs pleaded scienter of fund managers who "benefited in a concrete and personal way" from perpetuating BLMIS's fraud and who "knew facts or had access to information" suggesting that BLMIS's public statements were not accurate).

B. The Picower Defendants were control persons

32. Whether a defendant such as Picower "controlled" BLMIS depends "on the particular factual circumstances of each case."[1] *Laperriere v. Vesta Ins. Group, Inc.*, 526 F. 3d at 723. The issue of "control" requires close examination of the relationships of the various alleged "controlling persons" to the person or entity which is alleged to have violated the Securities Exchange Act. *In re Bausch & Lomb, Inc.*, 941 F. Supp. 1352, 1368 (W.D.N.Y. 1996) (issue of control status could not be resolved on motion to dismiss).

33. District courts have allowed control person claims against defendants who participated in fraudulent activity, even though they were not officers, directors, or shareholders of the controlled company. For instance, in *In re Global Crossing, Ltd.*, 322 F. Supp. 2d 319 (S.D.N.Y. 2004), the district court approved a Section 20(a) claim against a "Professional Standards Group" ("PSG") within Arthur Andersen. The PSG allegedly "gave advice on complex questions for [the primary violator's] audit teams," "was consulted by Andersen's [primary violator] audit team," "was actually aware of the fraudulent accounting schemes," "was responsible for ensuring that they were applied consistently," and "actively 'quashed' the dissent

[1] Allegations of control are not subject to the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *See In re Hamilton Bankcorp., Inc.*, 194 F. Supp. 2d 1353, 1360 (S.D. Fla. 2002) ("allegations that individuals, because of their management and/or director positions, could control a company's general affairs . . . are sufficient to state a cause of action for controlling person liability").

of a junior auditor who questioned their propriety in the context of related frauds perpetrated at another company." *Id.* at 351. These allegations were sufficient to show "actual control and culpable participation by the Andersen PSG." *Id.* (denying motion to dismiss); *see also In re Sunbeam*, 89 F. Supp. 2d 1326, 1346 (S.D. Fla. 1999) (approving Rule 10b-5 and Section 20(a) claims against Arthur Andersen based, in part, on the firm's allegedly reckless behavior in permitting primary violator to misrepresent audited financial statements).

34. A court must consider "the total effect of the various indicia of control in combination." *In re Leslie Fay Companies, Inc.*, 918 F. Supp. 749, 762-63 (S.D.N.Y. 1996). A person who has the power to make strategic decisions relating to the underlying securities fraud is generally in control. *See, e.g., In re Pfizer Inc.*, 584 F. Supp. 2d 621, 641 (S.D.N.Y. 2008) (control persons "had access to internal Company documents, reports and other information, including adverse nonpublic information regarding Pfizer's business, operations, products and future prospects"). Even a person who is not an executive officer at the time of the alleged misconduct may be held liable as a control person, if it is sufficiently alleged that the person "had the power to at least indirectly control corporate policy." *Fuechtman v. Mastec, Inc.*, 390 F. Supp. 2d 1264, 1268 (S.D. Fla. 2005).

35. The Picower Defendants' control is squarely alleged in the Class Action Complaint. For example, (1) Picower was aware of the misrepresentations and omissions BLMIS made to its investors under the control of Picower in order to conceal and thereby perpetuate the Ponzi scheme; (2) Picower materially and knowingly benefited from the Ponzi scheme; (3) the Picower Defendants and their agents communicated directly with BLMIS employees with regard to booking phony trades in their accounts, concealing those trades from other BLMIS customers, and misrepresenting the cash and securities positions in BLMIS

customer accounts; and (4) Picower and BLMIS agreed that Picower would receive large cash distributions based on phony profitable stock trades, and that BLMIS would make misrepresentations to the Plaintiffs (and all other BLMIS customers) necessary for Picower to obtain those distributions and maintain the secrecy of the fraud.

36. Picower obtained approximately $7.2 billion (approximately 40% of the net cash placed with BLMIS) from a scheme which he knew was fraudulent. The benefit obtained by a defendant from a fraudulent misrepresentation is evidence of control. *See In re SemGroup Energy Partners, L.P.*, 729 F. Supp. 2d 1276, 1303-1304 (N.D. Okla. 2010). *SemGroup* involved a securities class action in connection with two public offerings; the complaint alleged Section 20(a) claims against persons who did not own or manage the primary violator. *Id.* at 1303. However, the defendants owned minority interests in the primary violator's parent, approved the drop down of assets in connection with one of the offerings, and "reaped [millions of dollars in] distributions." *Id.* The district court held that "[t]hese facts, taken as a whole, create a sufficient inference of indirect control." *Id.* (denying 12(b)(6) motion to dismiss).

37. Picower routinely communicated directly with BLMIS employees with regard to booking phony trades in his account and concealing those trades from other BLMIS customers by misrepresenting their account values. Communications between the primary violator and the control person relating to the primary violation show control. *See In re Tronox, Inc.*, 769 F. Supp. 2d 202, 212 (S.D.N.Y. 2011) (quarterly meetings between primary violator and control person relating to misrepresentations in a public offering supported the inference that the control person "ensured" that the primary violator acted as intended by the control person).

38. Picower and BLMIS agreed that Picower would receive certain cash distributions based upon phony transactions. Picower's fraudulent gain of $7 billion necessarily meant a loss

of that same amount in the accounts of other investors. BLMIS and Picower agreed to make the misrepresentations to BLMIS investors necessary for Picower to obtain those distributions and to conceal them. Picower's ability to cause BLMIS to routinely make misrepresentations to others is proof of control.

The Class Action is not derivative of the Trustee's claims

39. As set forth above and in more detail in the Class Action Complaint, the Picower Defendants controlled BLMIS under Section 20(a), and are jointly and severally liable with BLMIS for securities fraud.

40. The damages sought are exclusive of the $7.2 billion forfeited as a fraudulent conveyance to the Trustee. The damages sought equal the total amount overpaid by BLMIS investors for the BLMIS securities together with interest thereon. This amount, exclusive of the $7.2 billion, exceeds $10 billion.

41. The Picower Defendants did not and cannot immunize themselves from securities fraud liability merely by returning a portion of what they stole to the BLMIS estate. Plaintiffs' Section 20(a) claims do not belong to the Trustee, and are not derivative of the Trustee's claims. *See Medkser v. Feingold*, 307 Fed. App'x 262, 265 (11th Cir. 2008). Consequently, Plaintiffs' Section 20(a) claims are not subject to the injunction in the Picower Settlement Order or the Automatic Stay.

WHEREFORE, Plaintiffs respectfully request that the Court enter a Final Declaratory Judgment determining that neither the permanent injunction contained in the Picower Settlement Order nor the Automatic Stay prohibits the Plaintiffs from commencing and fully prosecuting the Class Action Complaint in the Southern District of Florida.

Dated: January 6, 2014

Respectfully submitted,

/s/ Joseph G. Galardi
James W. Beasley, Jr.
beasley@beasleylaw.net
Florida Bar No. 145750
Joseph G. Galardi
galardi@beasleylaw.net
Florida Bar No. 180572
BEASLEY HAUSER KRAMER
& GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Tel: (561) 835-0900
Fax: (561) 835-0939

and

/s/ Lesley Blackner
Lesley Blackner, Esq.
lblackner@aol.com
Florida Bar No. 654043
BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, Florida 33480
Tel: (561) 659-5754
Fax: (561) 659-3184

Attorneys for Pamela Goldman and A & G Goldman Partnership

EXHIBIT L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No: _____

PAMELA GOLDMAN and
A & G GOLDMAN PARTNERSHIP, individually
and on behalf of a class of similarly situated Plaintiffs,

vs.

CAPITAL GROWTH COMPANY;
DECISIONS, INC.;
FAVORITE FUNDS;
JA PRIMARY LIMITED PARTNERSHIP;
JA SPECIAL LIMITED PARTNERSHIP;
JAB PARTNERSHIP;
JEMW PARTNERSHIP;
JF PARTNERSHIP;
JFM INVESTMENT COMPANIES;
JLN PARTNERSHIP;
JMP LIMITED PARTNERSHIP;
JEFFRY M. PICOWER SPECIAL COMPANY;
JEFFRY M. PICOWER, P.C.;
THE PICOWER FOUNDATION; JOHN DOE TRUSTEES
OF THE PICOWER FOUNDATION;
THE PICOWER INSTITUTE OF MEDICAL RESEARCH;
THE TRUST F/B/O GABRIELLE H. PICOWER;
BARBARA PICOWER, individually, and as
Executor of the Estate of Jeffry M. Picower,
and as Trustee for the Picower Foundation
and for the Trust f/b/o Gabriel H. Picower.
_____/

COMPLAINT-CLASS ACTION

Jury Trial Demanded

Plaintiffs, Pamela Goldman and A&G Goldman Partnership, through their undersigned attorneys, on their own behalf and on behalf of a similarly situated class of plaintiffs (collectively, "Plaintiffs"), hereby sue Defendants and allege the following based upon the investigation by Plaintiffs' counsel, including a review of documents in the bankruptcy proceeding concerning Bernard L. Madoff Investment Securities, LLC ("BLMIS"); documents in the Securities Exchange Commission ("SEC") and criminal proceedings against Bernard L.

EXHIBIT A

Madoff ("Madoff"); and documents in the United States of America's (the "Government") civil forfeiture action (the "Civil Forfeiture Action") against Jeffry M. Picower ("Picower").

INTRODUCTION AND SUMMARY OF CLAIMS

1. For decades, Madoff and BLMIS engaged in one of the largest Ponzi schemes in history. BLMIS was a broker-dealer ostensibly engaged in the business of buying and selling securities and custodying customer securities and cash balances. In the course of the scheme, BLMIS sent monthly statements to its nearly 7,000 customers reflecting phony investments and phony profits. Each such statement was a material misrepresentation since each misrepresented to customers, including Plaintiffs, that securities had been purchased and cash proceeds credited when there were no such purchases or cash credited.

2. Madoff and BLMIS, however, did not act alone. Picower knew that BLMIS was operating a fraud, and directly or indirectly controlled BLMIS for his own benefit. Picower directly or indirectly caused BLMIS employees to book profitable fabricated securities transactions in accounts which he directly or indirectly owned that in fact never occurred. Picower knew that these false transactions (1) directly resulted in additional material misrepresentations to other BLMIS investors as to their account values and profits, and (2) required defalcation of funds from other BLMIS investors to pay Picower and his affiliates.

3. Picower's control of BLMIS, combined with Picower's knowledge that other BLMIS customers would be defrauded as a result of the transactions that he directed, amounted to Picower making direct misrepresentations to those customers. Picower's control of BLMIS was to the detriment of Plaintiffs, who were materially and intentionally deceived as to the true state of BLMIS's financial condition and the condition and value of Plaintiffs' accounts, as a

result of, and in reliance upon, false financial information created directly or indirectly by Picower.

4. The Ponzi scheme could only succeed if investors did not know it existed. The misrepresentations that Picower knowingly and intentionally caused to be made were calculated to give the appearance that BLMIS was a legitimate and profitable business, and that BLMIS customers were making steady profits in their accounts. The misrepresentations ensured that the Ponzi scheme would continue, and that Picower would continue to reap the benefits from the scheme. In short, Picower, through his direct or indirect control of BLMIS, was able to fraudulently induce Plaintiffs to invest and/or remain invested in BLMIS by the creation and dissemination of materially false information concerning Plaintiffs' accounts.

5. In or about December 2008, the BLMIS Ponzi scheme collapsed when customer redemptions in the BLMIS Discretionary Trading Program overwhelmed the amount of money which was being placed in new BLMIS accounts. When the scheme collapsed, the recorded assets in the account statements of the *bona fide* investors totaled approximately $65 billion. However, there were virtually no funds available at BLMIS. There were no securities, because all of the ostensible purchases of securities that had occurred during the life of the Ponzi scheme were fictitious.

6. The net amount of investor cash that was defalcated in the Ponzi scheme was approximately $18 billion. Of that amount, approximately 40%, or $7.2 billion, went into and remained in the pockets of Picower and his affiliates. Approximately $800 million was stolen by Madoff and his affiliates and used for their own personal benefit. Given Picower's knowledge of BLMIS's underlying fraud, the fact that Picower reaped most of the benefits of the Ponzi scheme is evidence that he was able to directly and indirectly exert control over BLMIS.

7. On December 11, 2008, Madoff was arrested by federal agents and charged with criminal violation of the federal securities laws, including securities fraud, investment advisor fraud, and mail and wire fraud. On the same day, the SEC filed a complaint in the United States District Court for the Southern District of New York against Madoff and BLMIS, also alleging that Madoff and BLMIS had engaged in securities fraud.

8. On December 15, 2008, the District Court appointed Irving H. Picard, Esq., as trustee ("Trustee") for the substantively consolidated liquidation of Madoff's estate and of BLMIS under the Securities and Investor Protection Action ("SIPA"). On March 10, 2009, the federal government filed an eleven count criminal information against Madoff in the case styled *United States v. Madoff*, 09-CR-213 (S.D.N.Y.). Two days later, Madoff plead guilty to all eleven counts, including Count I for securities fraud under § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

9. Picower and Madoff were the masterminds of this fraudulent scheme. They were partners in crime. Madoff was convicted of securities fraud; Picower avoided a similar fate by his death shortly after the collapse of the scheme.

10. On May 12, 2009, the Trustee brought fraudulent conveyance claims against Picower and Defendant Barbara Picower, both individually and as representatives of various Picower BLMIS accounts ("Conveyance Defendants"). The Trustee settled with the Conveyance Defendants on December 17, 2010, and recovered the entire net amount that the Conveyance Defendants had withdrawn from BLMIS. The Trustee's claims were based entirely on the fraudulent transfer of funds from BLMIS to the Conveyance Defendants. The Trustee did not, and could not, assert claims against Conveyance Defendants for securities violations which caused damages to BLMIS investors.

11. There is no basis in law or fact to contend that by agreeing to return to the Trustee the amount of the fraudulent transfers that they received, that Conveyance Defendants immunized themselves from damage claims of securities fraud by defrauded investors.

12. This action only alleges control person liability against Defendants under Section 20(a). As alleged in more detail herein, Picower controlled BLMIS for his own benefit to perpetuate the Ponzi scheme through misrepresentations he caused to be made to BLMIS investors and regulators. Picower also caused and controlled the concealment of the BLMIS Ponzi Scheme, thereby causing damages to purchasers and prospective purchasers of BLMIS securities.

13. Unlike the Trustee's fraudulent conveyance claims, which did not require (and were resolved without) a finding that Picower and his affiliates had the ability to directly or indirectly control BLMIS, Plaintiffs allege here that Picower was a control person of BLMIS. Moreover, Plaintiffs are seeking damages for their actual losses due to the underlying securities fraud, which are distinct from the repayment of funds to the Trustee that Picower caused to be improperly withdrawn from BLMIS.

14. For the reasons set forth above and in further detail herein, Picower directly or indirectly controlled BLMIS, and directly or indirectly induced and caused the acts and omissions constituting BLMIS's securities law violations. Picower did not act in good faith. Defendants are responsible and liable for the actions and omissions of BLMIS. Defendants are jointly and severally liable with BLMIS for the securities-based damages suffered by purchasers of BLMIS securities under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t ("Section 20(a)"), which provides that:

> Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable

jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constitution the violation or cause of action.

JURISDICTION AND VENUE

15. The claims asserted herein arise under Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a), and under Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. §240.10b-5.

16. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1337, and under § 27 of the Exchange Act, 15 U.S.C. §78aa. At all relevant times the principal place of business of the Defendants was Palm Beach, Florida. Substantial acts, if not all of the acts, committed in the furtherance of the control relationship occurred in the state of Florida.

17. Venue is proper in this district pursuant to § 27 of the Exchange Act, 15 U.S.C. §78aa, 28 U.S.C. §1391(b), because the Defendants reside or are headquartered in this judicial district, and the acts and transactions alleged herein occurred in substantial part in this judicial district.

18. In connection with the wrongs alleged herein, Defendants used the instrumentalities of interstate commerce, including the United States mails, interstate wire and telephone facilities, and the facilities of national securities markets.

THE PARTIES

19. Plaintiff Pamela Goldman is a resident of the State of New York. Plaintiff brings this class action on behalf of herself and a putative class of persons similarly situated for damages and other relief arising from the Defendants' wrongful conduct described herein.

20. Plaintiff A & G Goldman Partnership is a New York partnership with its principal place of business in the State of New York. Plaintiff brings this class action on behalf of itself and a putative class of persons similarly situated for damages and other relief arising from the Defendants' wrongful conduct described herein.

21. Picower was a resident of Palm Beach, Florida, and Fairfield, Connecticut, prior to and at the time of his death on October 25, 2009. Picower held an individual BLMIS account in the name of "Jeffry M. Picower," with an account address of 1410 South Ocean Boulevard, Palm Beach, Florida. Picower was Chairman of the Board of Defendant Decisions Incorporated.

22. Defendant Barbara Picower is the Executor of the Estate of Jeffry M. Picower, which is being probated in the State of New York.

23. Defendant Barbara Picower is a person residing at 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Barbara Picower is Picower's surviving spouse. Barbara Picower holds an individual account at BLMIS in the name "Barbara Picower," with the account address of 1410 South Ocean Boulevard, Palm Beach, Florida 33480, and Barbara Picower is trustee for Defendant Trust f/b/o Gabrielle H. Picower, an officer and/or director of Defendant Decisions Incorporated, and trustee and Executive Director of the Picower Foundation.

24. Defendant Decisions Incorporated is a corporation organized under the laws of Delaware with a principal place of business at 950 Third Avenue, New York, New York 10022 and an alternate mailing address on its BLMIS account listed as 22 Saw Mill River Road, Hawthorne, New York, 10532. The Decisions Incorporated office in Hawthorne was merely a store-front office through which little or no business was conducted, and Decisions Incorporated is a general partner of Defendants Capital Growth Company, JA Primary Limited Partnership,

JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, JMP Limited Partnership and Jeffry M. Picower Special Co.

25. Defendant Capital Growth Company purports to be a limited partnership with a mailing address for its BLMIS account listed at 22 Saw Mill River Road, Hawthorne, New York, 10532, care of Decisions Incorporated. Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of Capital Growth Company, and Decisions Incorporated and Picower transact/transacted business through this entity.

26. Defendant JA Primary Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. Defendant Decisions Incorporated and/or Picower serves/served as General Partner or Director of JA Primary Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this entity.

27. Defendant JA Special Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York, New York 10594. Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JA Special Limited Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

28. Defendant JAB Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JAB Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

29. Defendant JEMW Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JEMW Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

30. Defendant JF Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JF Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

31. Defendant JFM Investment Company is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and JFM Investment Company is a Limited Partner of Capital Growth Company, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JFM Investment Company.

32. Defendant JLN Partnership is a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JLN Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

33. Defendant JMP Limited Partnership is a limited partnership organized under the laws of Delaware, with a principal place of business at 25 Virginia Lane, Thornwood, New York

10594. Decisions Incorporated and/or Picower serve/served as General Partner or Director of JMP Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

34. Defendant Jeffry M. Picower Special Co. is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower Special Co.

35. Defendant Favorite Funds is an entity through which Picower transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Favorite Funds.

36. Defendant Jeffry M. Picower P.C. purports to be a limited partnership with a listed mailing address at 25 Virginia Lane, Thornwood, New York, New York 10594, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower P.C., and Decisions Incorporated, and/or Picower transact/transacted business through this defendant entity.

37. Defendant Picower Foundation is a trust organized for charitable purposes with Picower listed as donor, and Picower and Barbara Picower, among others, listed as Trustees during the relevant time period. Picower Foundation's addresses are reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 9 West 57th Street, Suite 3800, New York, New York 10019.

38. Defendants John Doe Trustees of the Picower Foundation were the Trustees of the Picower Foundation during the statute of limitations period.

39. Defendant Picower Institute for Medical Research is a nonprofit entity organized under the laws of New York, with a principal place of business at 350 Community Drive, Manhasset, New York 11030.

40. Defendant Trust f/b/o Gabrielle H. Picower is a trust established for beneficiary Gabrielle H. Picower, who is the daughter of Picower and Barbara Picower, with Defendant Barbara Picower listed as trustee, and the trust's BLMIS account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

41. On information and belief, the Picower Entity Defendants were dominated, controlled and used as a mere instrumentality of Picower to advance his interests in, and to control BLMIS and the Madoff Ponzi scheme. Thus, the Picower Entity Defendants are the alter egos of Jeffry Picower and of each other, and are jointly and severally liable for wrongful conduct committed by one or more of them, as detailed herein.

PRIMARY SECURITIES LAW VIOLATION

BLMIS Committed Securities Fraud

42. BLMIS is a New York Limited Liability Company that was wholly owned by Madoff. BLMIS was founded in 1959, and operated from its principle place of business at 885 Third Avenue, New York, NY. Madoff was Founder, Chairman, Chief Executive Officer, and sole shareholder. BLMIS was registered with the SEC as a Securities Broker Dealer under Section 15 of the Exchange Act.

43. BLMIS typically obtained account documentation from its customers which gave BLMIS a power of attorney and complete discretion over trading in the relevant BLMIS

accounts. BLMIS falsely described its trading strategy to customers as involving a complicated option strategy which generated consistent returns. BLMIS in fact operated a Ponzi scheme.

44. BLMIS falsely represented to all class members that it maintained a program of commingled options and stock trading which were securities and investment contracts under the Exchange Act (the "BLMIS Discretionary Trading Program"). Customer "participation" therein involved the purchase and sale of securities.

45. BLMIS falsely represented to class members that they had purchased securities through BLMIS. Each class member received monthly statements purportedly reflecting the securities in their account, the trading activity during the month, and the profits earned over the relevant time period. The monthly statements for customer accounts depicted consistent profits on a monthly basis and rarely, if ever, showed loses.

46. The transactions reported on these statements were a fabrication. The securities transactions described in the monthly statements never occurred, and the profits and securities positions reported were entirely fictitious. Madoff admitted at his plea hearing that he had never purchased any of the securities in BLMIS customer accounts. Except for isolated individual transactions, there is no record of BLMIS having purchased or sold any securities in BLMIS customer accounts.

47. The BLMIS Ponzi scheme also involved the preparation and publication of false BLMIS audit reports prepared by Friehlich and Horowitz, a three person accounting firm in Rockland County, New York. BLMIS provided these financial reports to regulators and investors in the BLMIS Discretionary Trading Program for the purpose of their reliance thereon. The accounting reports falsely reported that Madoff was effecting customer transactions and that BLMIS was profitable and was generating profits in customer accounts.

48. It is beyond dispute that BLMIS engaged in the largest Ponzi scheme in U.S. history. The net amount of *bona fide* net customer assets invested in the BLMIS scheme was approximately $18 billion. BLMIS violated Section 10(b) of the Exchange Act and Rule 10b-5. Madoff pleaded guilty to criminal securities fraud under Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. During the Ponzi scheme, Madoff and his family defalcated at least $800 million of *bona fide* customer assets.

49. BLMIS is currently subject to a federal bankruptcy proceeding, and thus cannot be named as a defendant in this action.

BLMIS Violated Section 10(b) of the Exchange Act and Rule 10b-5

50. BLMIS carried out a plan, scheme and course of conduct which was intended to and, did: (i) cause brokerage customers of BLMIS and investors in the BLMIS Discretionary Trading Program to entrust securities and cash for safe-keeping with BLMIS; and (ii) misappropriate the assets of BLMIS customers who purchased securities sold by or issued by BLMIS in connection with the BLMIS Discretionary Trading Program, as alleged herein. In furtherance of this unlawful scheme, plan, and course of conduct, BLMIS and its agents, including Madoff, took the actions set forth herein. As a result, Plaintiffs and the other members of the Class suffered damages in connection with the undisclosed and unauthorized theft of their securities, cash assets and the misappropriation of the proceeds thereof, as alleged above.

51. BLMIS (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of materials fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon brokerage customers who entrusted assets to BLMIS and

who purchased securities issued by BLMIS in violation of Section 10(b) of the Exchange Act and Rule 10b-5.

52. As part of and in furtherance of this conduct, BLMIS engaged in an ongoing scheme to misappropriate funds which constituted the proceeds of sales of customers' securities.

53. BLMIS directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to misappropriate funds which constituted the proceeds of sales of securities (or the securities themselves or cash) held by BLMIS as securities custodian and broker for Plaintiffs and the Class members.

54. BLMIS made untrue statements of material fact and/or omitted to state material facts necessary to make its statements not misleading, and employed devices, schemes and artifices to defraud, and engaged in acts, practices, and a course of conduct in an effort to mislead and misappropriate the assets of BLMIS brokerage customers and participants in the BLMIS Discretionary Trading Program. Such misconduct included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about BLMIS and the BLMIS Discretionary Trading Program, its financial performance and its business operations in the light of the circumstances under which they were made, not misleading, and which included engaging in manipulative and deceptive transactions, practices and courses of business which operated as a fraud and deceit upon the customers of BLMIS and participants in the BLMIS Discretionary Trading Program, including the surreptitious and unauthorized theft of customer assets and securities.

55. BLMIS had actual knowledge of the misrepresentations and omissions of material facts set forth herein. BLMIS's material misrepresentations and/or omissions were done knowingly for the purpose and effect of inflating BLMIS's financial results. At all relevant times, BLMIS was aware of the dissemination of artificially inflated financial information to the investing public which it knew was materially false and misleading.

56. At the time of the misrepresentations, omissions and manipulative and deceptive conduct, Plaintiffs and other members of the Class were ignorant of their falsity and believed them to be true, and they were ignorant of the manipulative and deceptive conduct complained of herein. If Plaintiffs and the other members of the Class had known the truth regarding BLMIS's materially false statements and deceptive and manipulative conduct alleged above, which were not disclosed, Plaintiffs and other members of the Class would not have entrusted their assets to BLMIS or purchased what they were led to believe were BLMIS securities.

57. As a direct and proximate result of BLMIS's wrongful, manipulative, and deceptive conduct, including the dissemination of the materially false and misleading information set forth above, Plaintiffs and the other members of the Class suffered damages by overpaying for the BLMIS securities As a result of the manipulative and deceptive conduct and, Plaintiffs and the Class members suffered damages.

58. By virtue of the foregoing, BLMIS violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

DEFENDANTS ARE CONTROL PERSONS UNDER SECTION 20(a)

This Action Is Distinct From the Trustee's Fraudulent Conveyance Actions

59. Each Defendant is an entity or individual operating as part of a control group of BLMIS. Defendants are commonly controlled or were commonly controlled by Jeffry M. Picower.

60. The Trustee has alleged in his adversary action against Defendants that the Defendants received at least $7.2 billion from BLMIS, net of their investments. Those funds have now been recovered by the Trustee and the Government, and Plaintiffs do not seek the recovery of any fraudulently transferred funds in this action. Instead, Plaintiffs seek damages against Defendants resulting from their reliance upon misrepresentations made by BLMIS and fraud committed by BLMIS, under the direct or indirect control of Picower.

61. The Trustee's fraudulent conveyance action did not require allegations that Picower exercised control over BLMIS. The allegations set forth in more detail herein describe Picower's direct and indirect control over BLMIS's securities violations.

62. Pursuant to Section 20(a), Defendants are jointly and severally liable to the same extent as BLMIS itself for Plaintiffs' damages, which are sought to be recovered from other assets of Defendants, and not the funds recovered by the Trustee through his fraudulent conveyance claims.

Picower controlled BLMIS, and knowingly induced BLMIS's securities fraud

63. Picower was a highly sophisticated investor, accountant, and attorney. Picower was closely associated with Madoff, both in business and socially, for decades, and lived close to Madoff in Palm Beach. Madoff served as a trustee for the Picower Institute for Medical Research. Picower "invested" with BLMIS since at least the 1980s.

64. Through his close relationship with Madoff, Picower was aware of the BLMIS fraud. In interviews with author Diana Henriquez, Madoff admitted that Picower knew of the existence of the BLMIS scheme and actively participated in it for over 20 years, knowing that he was participating in a fraud. Picower became a control person of BLMIS for his own benefit at least by December 1, 1995, when he started to directly or indirectly induce and cause BLMIS to make misrepresentations to other customers.

65. Picower caused BLMIS to book phony transactions with phony profits in his accounts. From time to time, Picower withdrew these phony profits from his BLMIS account. These withdrawals were actually funded with cash from other BLMIS customers. Picower knew that BLMIS did not, and could not, truthfully report to customers the unauthorized transfer of customer assets to Picower and maintain the Ponzi scheme. Picower knew and intended that each phony recording of a fictitious profitable transaction in his accounts resulted directly in the recording of false transactions and false asset values in the accounts of other BLMIS customers because these customer accounts did not reflect the resulting cash transfer from their accounts to Picower.

66. As a result of Picower's control, the account records of other BLMIS customers falsely overstated the assets therein and their investment performance. BLMIS customers consequently unknowingly overpaid for BLMIS securities.

67. As a result of Picower's control, he caused BLMIS to present Plaintiffs with false and misleading information (i.e., inflated account values), in order to induce those investors to remain invested in BLMIS and to continue to attract new investments in BLMIS. If Plaintiffs had been provided with accurate information, they would have attempted to protect the value of their investments, and the Ponzi scheme would have collapsed.

68. Picower's direction of fraudulent misrepresentations with respect to his own accounts, coupled with his knowledge and intent that BLMIS would necessarily create corresponding false entries in other BLMIS customer accounts, made Picower jointly and severally liable for BLMIS's misrepresentations. Picower's direction of false trading activity and the preparation of false trading records over a multi-year period show control of the specific fraudulent activity which constituted the underlying Ponzi scheme and the underlying violations

of Section 10(b) and Rule 10b-5 engaged in by BLMIS. Picower's wrongful conduct is exactly the evil that Section 20(a) was enacted to remedy.

69. BLMIS employees regularly carried out Picower's fraudulent trading instructions by fabricating and back dating trades in Picower's accounts to generate phony paper profits. By way of example, on or about December 29, 2005, Picower's assistant April Friehlich, acting on behalf of the Defendants, faxed BLMIS a letter signed by Picower that directed BLMIS to "realize" a gain of $50 million in the Picower accounts. Upon direction from Picower and Friehlich, BLMIS falsified records so that it would appear that BLMIS sold large amounts of stock in Agilent Technologies and Intel Corporation in various Defendant accounts on a back dated basis. Friehlich directed the fictitious sale of large amounts of these purported securities on or about December 29, 2005, requesting that the sales be "booked" to take place on an earlier date, *i.e.*, December 8 or 9. BLMIS backdated the trades at Picower's direction and on Picower's behalf for the purpose of generating phony paper profits of approximately $46.3 million, which made up most of Picower's requested $50 million distribution. Picower knew that in order to maintain the Ponzi scheme, Picower's phony $46.3 million paper profit necessitated the creation of corresponding phony account records in other BLMIS customer accounts.

70. Similarly, on or about April 24, 2006, Defendant Decisions Incorporated opened a new account with BLMIS known as the "Decisions, Inc. 6" account. This account was opened with a wire transfer of $125 million. Defendants instructed BLMIS to back date trades in this account to January 2006, which was four months prior to the date the account was actually opened. BLMIS employees carried out Defendants' direct instructions and fabricated and back dated trades in the "Decisions, Inc. 6" account. This resulted in the net value of the account increasing by almost $40 million, or 30%, in less than two weeks after it opened. Defendants

also directed and orchestrated the preparation of false statements in May 2007, which reflected millions of dollars in securities transactions which reportedly took place in earlier in 2007, but which in fact did not take place at all.

71. The fraudulent transactions directed by Picower also directly resulted in the falsification of BLMIS's financial statements provided to regulators. Each month, BLMIS prepared and filed a Financial and Operational Combined Uniform Single ("FOCUS") report with the Financial Industry Regulatory Authority, Inc. ("FINRA"), the self-regulatory organization that regulates broker-dealers. BLMIS's FOCUS reports materially misstated its financial condition by failing to account properly for Picower's phony trades and for the overstated value of other customers' accounts. Picower's ability to direct the creation and dissemination of false and misleading trading documentation which he knew would be incorporated in financial disclosures made by BLMIS, a highly regulated broker and investment advisor, shows that Picower exercised direct and indirect control over the day-to-day operations of BLMIS and specifically over the trading activity that constituted a violation of the securities laws.

72. Picower's control of BLMIS was not limited to the false documentation and concealment of phony trades and the direction of misreporting in customer accounts. Picower directly or indirectly exerted control over the benefits of the BLMIS Ponzi scheme and the cash assets held in customer accounts by BLMIS.

73. For example, Picower directed BLMIS to make a margin "loan" of approximately *$6 billion* to Defendant Decisions Incorporated, even though the account had no trading activity or cash or securities to support such borrowing.

74. Borrowing in a brokerage account is regulated by margin rules established by the Federal Reserve System and by the New York Stock Exchange. These rules limit the amount that an account holder can borrow from his or her securities account based upon the value of securities that can be used as collateral for the loan. The Decisions Incorporated account reflects virtually no trading activity and virtually no securities positions or other collateral for loans from this account. Picower was able to direct BLMIS to violate the margin rules and "loan" almost $6 billion in the Decisions Incorporated account without any collateral.

75. Picower knew at all times that this $6 billion credit was actually a transfer from the accounts of other BLMIS customers that was never recorded in those accounts.

76. Along with the other evidence outlined herein, Picower's control over the benefits derived from BLMIS's fraudulent misrepresentations to other investors (which eventually amounted to $7.2 billion, constituting approximately 40% of the net cash from the Ponzi scheme and more than seven times what Madoff stole) is overwhelming evidence that Picower controlled BLMIS within the meaning of Section 20(a).

77. The volume, pattern and practice of Picower's control over the fraudulent documentation of underlying transactions at BLMIS, including the direction of false reporting of customer assets and returns in monthly statements to Plaintiffs, as well as Picower's direct or indirect control over the benefits of the Ponzi scheme, establishes Picower's "control person" liability under Section 20(a), for which Defendants are liable.

CLASS ACTION ALLEGATIONS

78. Plaintiffs bring this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3). The definition of the Plaintiff Class in this action is: (1) all brokerage customers of BLMIS who entrusted securities or cash to BLMIS between December 1,

1995, the approximate date that Picower first became a control person of BLMIS, and December 15, 2008, the date that BLMIS entered into SIPA liquidation ("Class Period"), and who at such time granted to BLMIS or its employees or agents trading authority or discretion with respect to assets in such brokerage accounts for trading in the BLMIS Discretionary Trading Program; and (2) who have not received the full reported account value of their BLMIS account(s) as of the date of the BLMIS bankruptcy/SIPC liquidation (the "Class"). The Class excludes the Defendants named herein, members of the Madoff family, BLMIS employees, and any of their affiliates or controlled entities.

79. The Class meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

a. *Numerosity.* The members of the Class are so numerous that joinder of all members is impracticable. Based on disclosures made by the SIPA Trustee the Class has thousands of members. Class members may be identified from records maintained by BLMIS and the SIPA Trustee. The members of the Class may be notified of the pendency of this action by mail or otherwise using a form of notice similar to that customarily used in securities class actions.

b. *Commonality.* Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are whether the Federal Securities Laws (specifically §20(a) of the Exchange Act) were violated by Picower as alleged herein, whether members of the Class have sustained damages as a result thereof, and if so, the proper measure of such damages.

c. *Typicality.* Plaintiffs' claims are typical of the claims of members of the Class as all members of the Class were similarly affected by Picower's wrongful conduct in violation of federal law as alleged herein.

d. *Adequacy.* Plaintiffs will fairly and adequately represent and protect the interest of the members of the Class. Plaintiffs have retained competent and experienced counsel in class and securities litigation.

80. This class action also meets the requirements of Federal Rule of Civil Procedure 23(b)(3). The common issues outlined herein predominate over any individual issues in the case. A class action is superior to all other available methods of the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually address the wrongs done to them. There will be no difficulty in the management of this action as a class action.

81. The allegations herein are based on the damage inflicted directly upon the Class members through the fraudulent and deceptive reporting directed or perpetrated by Defendants with the intention that the Class members would rely upon those representations to their detriment. The Class members did in fact rely upon these misrepresentations and/or omissions of material fact.

TOLLING THE STATUTE OF LIMITATIONS

82. Any applicable statute of limitations with respect to Plaintiffs' claims has been tolled since no later than February 16, 2010, by the filing of the class action complaint against all of the Defendants named here in the action captioned *Susanne Stone Marshall, Individually and*

On Behalf of a Class of Similarly Situated v. Barbara Picower, Individually, and as Executor of the Estate Of Jeffry M. Picower, et al., case no. 10-80252-CV-Ryskamp/Vitunac (S.D. Fla.). *See American Pipe and Construction Company v. Utah*, 414 U.S. 538, 552 (1974); *In re World Comm Securities Litigation*, 496 F.3d 245 (2d Cir. 2007).

COUNT I

VIOLATIONS OF SECTION 20(a) OF THE EXCHANGE ACT AS AGAINST THE PICOWER DEFENDANTS

83. Plaintiffs repeat and re-allege each and every allegation contained above as if fully set forth herein.

84. BLMIS violated Section 10(b) of the Exchange Act and Rule 10b-5 by its acts and omissions and by engaging in a massive Ponzi scheme.

85. At all relevant times, Defendants were dominated, controlled and used as a mere instrumentality of Jeffry M. Picower.

86. Pursuant to Section 20(a), Picower is jointly and severally liable to the same extent as BLMIS itself for BLMIS's violations of Section 10(b) of the Exchange Act and Rule 10b-5.

87. Defendants acted collectively and in concert as a control group of BLMIS within the meaning of Section 20(a) of the Exchange Act as alleged herein.

88. Picower had the power to directly or indirectly control, and did in fact control, the overall decision-making at BLMIS, the record keeping for their account and other customers' accounts at BLMIS, and the false recording of securities transactions and cash transfers in and from all customer accounts at BLMIS, including those of the Class members.

89. Picower had the power to directly or indirectly control, and did in fact control, the flow of funds and securities in and out of BLMIS and customer accounts at BLMIS, even when

this flow of funds and assets did not correspond to actual trading activity, resulting in the overstatement of the value of the Class members' customer accounts at BLMIS.

90. Picower actively communicated and agreed with Madoff and other BLMIS personnel to perpetuate the fraud. Picower had a close relationship with Madoff and BLMIS, and directly or indirectly ensured that Madoff and BLMIS concealed the scheme from other BLMIS customers. Picower directly or indirectly induced BLMIS's misleading statements to others. These misrepresentations induced BLMIS customers to pay BLMIS for non-existent securities.

91. Picower had intimate knowledge and involvement in the operations, record keeping, and financial management of BLMIS. Picower directly or indirectly induced the material misrepresentations and omissions giving rise to the securities violations alleged herein.

92. Picower knew and intended that material misrepresentations and omissions would be communicated to other investors, including Plaintiffs. Picower directly or indirectly induced BLMIS to conceal the fraud from BLMIS customers and regulators. Picower and Defendants also profited from the BLMIS scheme, and did in fact materially benefit from Picower's direct or indirect control of BLMIS's violations of Section 10(b) and SEC Rule 10b-5.

93. Pursuant to Section 20(a), Picower's control of BLMIS, and Picower's domination and control of Defendants, Defendants are jointly and severally liable as a control group to the same extent as BLMIS itself for Plaintiffs' damages, which are sought to be recovered from other assets of Defendants, and not the funds recovered by the Trustee through his fraudulent conveyance claims.

94. As a direct and proximate result of BLMIS's securities violations, Plaintiffs and other members of the Class have suffered damages.

WHEREFORE, Plaintiffs pray for relief and judgment against the Defendants as follows:

A. Determining that this action is a proper class action;

B. designating Plaintiffs as class representatives under Rule 23 of the Federal Rules of Civil Procedure and Plaintiffs' counsel as class counsel;

C. awarding compensatory damages in favor of Plaintiffs and other Class members against all of the Defendants jointly and severally, for all securities based damages sustained as a result of Defendants' wrongdoing in an amount to be proven at trial, including interest;

D. awarding Plaintiffs and the Class the reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

E. such other and further relief as the Court may deem just and proper.

DATED: this ___ day of _____, 2014, by:

By: DRAFT

James W. Beasley, Jr.
beasley@beasleylaw.net
Florida Bar No. 145750
Joseph G. Galardi
galardi@beasleylaw.net
Florida Bar No. 180572
BEASLEY HAUSER KRAMER
& GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Tel: (561) 835-0900
Fax: (561) 835-0939

and

DRAFT

Lesley Blackner, Esq.
lblackner@aol.com
Florida Bar No. 654043
BLACKNER, STONE & ASSOCIATES

123 Australian Avenue
Palm Beach, FL 33480
Tel: (561) 659-5754
Fax: (561) 659-3184

Co-counsel for Plaintiffs and the Class

EXHIBIT M

STAYED,WM

U.S. District Court
Southern District of Florida (West Palm Beach)
CIVIL DOCKET FOR CASE #: 9:14-cv-81125-KAM

Goldman et al v. Capital Growth Company et al
Assigned to: Judge Kenneth A. Marra
Cause: 15:0078 Securities Exchange Act

Date Filed: 08/28/2014
Jury Demand: Plaintiff
Nature of Suit: 850 Securities/Commodities
Jurisdiction: Federal Question

Plaintiff

Pamela Goldman

represented by **James Wallace Beasley , Jr.**
Beasley Hauser Kramer Leonard & Galardi PA
505 S Flagler Drive
Suite 1500
West Palm Beach, FL 33401
561-835-0900
Fax: 835-0939
Email: stringer@beasleylaw.net
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lesley Guy Blackner
Blackner Stone & Associates
340 Royal Poinciana Way
St 317-377
Palm Beach, FL 33480
561-659-5754
Fax: 561-659-3184
Email: LBlackner@aol.com
ATTORNEY TO BE NOTICED

Joseph George Galardi
Beasley Hauser Kramer & Galardi PA
505 S Flagler Drive
Suite 1500
West Palm Beach, FL 33401
561-835-0900
Fax: 835-0939
Email: Galardi@beasleylaw.net
ATTORNEY TO BE NOTICED

Plaintiff

represented by

A & G Goldman Partnership
individually and on behalf of a class of similarly situated Plaintiffs

James Wallace Beasley , Jr.
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lesley Guy Blackner
(See above for address)
ATTORNEY TO BE NOTICED

Joseph George Galardi
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant
Capital Growth Company

Defendant
Decisions, Inc.

Defendant
Favorite Funds

Defendant
JA Primary Limited Partnership

Defendant
JA Special Limited Partnership

Defendant
JAB Partnership

Defendant
JEMW Partnership

Defendant
JF Partnership

Defendant
JFM Investment Companies

Defendant
JLN Partnership

Defendant
JMP Limited Partnership

Defendant

Jeffry M. Picower Special Company

Defendant

Jeffry M. Picower, P.C.

Defendant

The Picower Foundation

Defendant

John Doe Trustees of the Picower Foundation

Defendant

The Picower Institute of Medical Research

Defendant

The Trust f/b/o Gabrielle H. Picower

Defendant

Barbara Picower
individually, and as Executor of the Estate of Jeffrey M. Picower, and as Trustee for the Picower Foundation and for the Trust f/b/o Gabriel H. Picower

Date Filed	#	Docket Text
08/28/2014	1	COMPLAINT against All Defendants. Filing fees $ 400.00 receipt number 113C-7028466, filed by A & G Goldman Partnership, Pamela Goldman. (Attachments: # 1 Civil Cover Sheet Civil Cover Sheet)(Galardi, Joseph) (Entered: 08/28/2014)
08/28/2014	2	Judge Assignment to Judge Kenneth A. Marra (bb) (Entered: 08/28/2014)
09/03/2014	3	Order Requiring Counsel to confer and file Joint Scheduling Report. Signed by Judge Kenneth A. Marra on 9/3/2014. (ir) (Entered: 09/03/2014)
09/24/2014	4	Agreed MOTION to Stay *and Joint Stipulation* by A & G Goldman Partnership, Pamela Goldman. Responses due by 10/14/2014 (Attachments: # 1 Exhibit Proposed Order)(Galardi, Joseph) (Entered: 09/24/2014)
09/25/2014	5	Clerks Notice to Filer re 4 Agreed MOTION to Stay *and Joint Stipulation.* **Attorney Did Not Associate Themselves**; ERROR - Filing attorney neglected to associate themselves to the case. The Clerk has added the attorney to the case. It is not necessary to refile this document future filings must comply with the CM/ECF Administrative Procedures and Local Rules by filing a Notice of Attorney Appearance and linking themselves to the case. (asl) (Entered: 09/25/2014)

09/29/2014	6	ORDER granting 4 Motion to Stay. Signed by Judge Kenneth A. Marra on 9/29/2014. (ir) (Entered: 09/29/2014)

PACER Service Center
Transaction Receipt
11/17/2014 10:04:23

EXHIBIT N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No: _____

PAMELA GOLDMAN and
A & G GOLDMAN PARTNERSHIP, individually
and on behalf of a class of similarly situated Plaintiffs,

vs.

CAPITAL GROWTH COMPANY;
DECISIONS, INC.;
FAVORITE FUNDS;
JA PRIMARY LIMITED PARTNERSHIP;
JA SPECIAL LIMITED PARTNERSHIP;
JAB PARTNERSHIP;
JEMW PARTNERSHIP;
JF PARTNERSHIP;
JFM INVESTMENT COMPANIES;
JLN PARTNERSHIP;
JMP LIMITED PARTNERSHIP;
JEFFRY M. PICOWER SPECIAL COMPANY;
JEFFRY M. PICOWER, P.C.;
THE PICOWER FOUNDATION; JOHN DOE TRUSTEES
OF THE PICOWER FOUNDATION;
THE PICOWER INSTITUTE OF MEDICAL RESEARCH;
THE TRUST F/B/O GABRIELLE H. PICOWER;
BARBARA PICOWER, individually, and as
Executor of the Estate of Jeffry M. Picower,
and as Trustee for the Picower Foundation
and for the Trust f/b/o Gabriel H. Picower.
_____/

COMPLAINT-CLASS ACTION

Jury Trial Demanded

Plaintiffs, Pamela Goldman and A&G Goldman Partnership, through their undersigned attorneys, on their own behalf and on behalf of a similarly situated class of plaintiffs (collectively, "Plaintiffs"), hereby sue Defendants and allege the following based upon the investigation of Plaintiffs' counsel, including a review of documents in the bankruptcy proceeding concerning Bernard L. Madoff Investment Securities, LLC ("BLMIS"); documents in the Securities Exchange Commission ("SEC") and criminal proceedings against Bernard L.

Madoff ("Madoff") and other BLMIS employees, including without limitation the sworn testimony of Enrica Cotellessa-Pitz, Frank DiPascali, Jr., and Annette Bongiorno in the criminal action, United States v. Bonventre, et al., 10-cr-228(LTS) (S.D.N.Y.); and documents in the United States of America's (the "Government") civil forfeiture action (the "Civil Forfeiture Action") against Jeffry M. Picower.

INTRODUCTION AND SUMMARY OF CLAIMS

1. This is an action against Jeffry Picower and his affiliated Defendants ("Picower") for control person liability under Section 20(a) of the 1934 Exchange Act, 15 U.S.C § 78t(a). This claim arises out of Picower's decades of knowing direction and active funding and concealment of the notorious Madoff/BLMIS Ponzi scheme. Picower's role included involvement in the creation and dissemination of material misrepresentations and omissions made to BLMIS customers. The damages sought through this action are separate from, and are not predicated on, Picower's fraudulent withdrawals from the Ponzi scheme.

2. BLMIS was a broker-dealer owned by Madoff and ostensibly engaged in the business of buying and selling securities in customer accounts. BLMIS sent monthly statements to its nearly 7,000 customers reflecting phony investments, phony securities transactions, and phony profits. Each such statement contained material misrepresentations and omissions that were sent to BLMIS customers, including Plaintiffs. Each statement falsely reflected that securities had been purchased and cash proceeds credited to customer accounts when there were no such purchases or cash credited.

3. Madoff's fraudulent scheme also involved the continuous misrepresentation of BLMIS' overall solvency and securities trading activity. BLMIS' fraudulent documentation of its trading activity and its own financial condition was critical to the perpetuation of the scheme.

4. Since BLMIS did not make any actual securities transactions in BLMIS accounts, when BLMIS customers withdrew the profits or the principal reflected in their statements, they were paid with the cash that had been invested by other BLMIS customers. In or about December 2008, the Ponzi scheme collapsed when customer redemptions overwhelmed the amount of money invested in BLMIS. Madoff has been convicted for violations of the federal securities laws. But Madoff did not act alone.

5. Before his death, Picower was a highly sophisticated investor, accountant, and attorney. Picower was closely associated with Madoff, both in business and socially, for decades, and Picower lived close to Madoff in Palm Beach, Florida. Madoff served as a trustee for the Picower Institute for Medical Research. Picower "invested" with BLMIS since at least the 1980s. Through his close relationship with Madoff, Picower had uncommon access to BLMIS' books and records, directed the affairs of BLMIS, and became Madoff's de facto partner.

6. Section 20(a) of the Exchange Act provides that:

> Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constitution the violation or cause of action. (Emphasis added.)

Consistent with the remedial purpose of Section 20(a), the SEC defines "control" broadly as:

> The possession, direct or indirect, of the power to direct or cause the directions of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

17 C.F.R. § 230.405 (2012) (emphasis added).

7. Picower is liable under Section 20(a) because Picower knew that BLMIS was operating a fraud, and because Picower caused the dissemination of material misrepresentations and documents containing material omissions relied on by BLMIS customers that are the basis of BLMIS' securities law violations.

8. Picower had both the motive and opportunity to control BLMIS. He stole at least $7.2 million (40%) of the total $18 billion in cash invested in BLMIS. This in and of itself is indicia of Picower's control over the BLMIS enterprise. But Picower did far more, exerting control over the Ponzi scheme in ways that had nothing to do with transactions in his own BLMIS accounts or his theft of cash from BLMIS.

9. The Ponzi scheme could only succeed if investors did not know it was a fraud, and concealment of the scheme required continuous misrepresentations as to BLMIS' solvency and securities trading activity. Picower directed BLMIS on strategic decisions regarding the dissemination of such misrepresentations and omissions and participated directly in the scheme and its concealment.

10. For example, Picower made approximately $200 million in sham "loans" to BLMIS in order to prop up the Ponzi scheme and enable BLMIS to pay off redeeming investors. But for the Picower "loans," BLIMS and the Ponzi scheme would have collapsed long ago. The "loans" also resulted in direct misrepresentations to BLMIS customers about BLMIS' solvency and financial condition.

11. Picower also acted as a "counterparty" to phony options trading transactions on BLMIS' books that were critical to the "split-strike" options trading strategy that Madoff and BLMIS purported to engage in on a day to day basis, and which Madoff touted to investors as his primary investment strategy.

12. In short, Picower directly and indirectly controlled the viability of the Ponzi scheme. Picower caused and directed material misrepresentations and omissions relating to BLMIS' general trading activity, balance sheet, assets, capital, and solvency, all of which gave investors and regulators the false appearance that BLMIS was engaged in profitable and legitimate trading and investment activity, and all of which induced Plaintiffs and the class members to invest or remain invested in BLMIS.

13. The net amount of customer cash lost in the Ponzi scheme was approximately $18 billion. Picower is responsible for all $18 billion of the losses suffered by BLMIS customers: not because he stole $7.2 billion of the $18 billion lost, but because he controlled BLMIS and directed the fraud in numerous ways.

14. On December 17, 2010, the BLMIS bankruptcy Trustee settled his fraudulent conveyance claims against Picower, and the Trustee recovered the entire $7.2 billion net amount Picower withdrew from BLMIS. There is no basis in law or fact to contend that Picower and his affiliates immunized themselves from securities fraud damages claims by defrauded investors by agreeing to return the fraudulent transfers to the Trustee. BLMIS investors lost $11 billion that is separate and apart from any amount fraudulently transferred from BLMIS to Picower. This action seeks recovery of this distinct loss.

15. Picower's wrongful conduct is exactly the evil that Section 20(a) was enacted to remedy.

JURISDICTION AND VENUE

16. The claims asserted herein arise under Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a), and under Rule 10b-5 promulgated thereunder by the SEC, 17 C.F.R. §240.10b-5.

17. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331,1337, and under § 27 of the Exchange Act, 15 U.S.C. §78aa. At all relevant times the principal place of Defendants' business was Palm Beach, Florida. Substantial acts, if not all of the acts, committed in the furtherance of the control relationship occurred in the state of Florida.

18. Venue is proper in this district pursuant to § 27 of the Exchange Act, 15 U.S.C. §78aa, 28 U.S.C. §1391(b), because Defendants reside or are headquartered in this judicial district, and the acts and transactions alleged herein occurred in substantial part in this judicial district.

19. In connection with the wrongs alleged herein, Defendants used the instrumentalities of interstate commerce, including the United States mails, interstate wire and telephone facilities, and the facilities of national securities markets.

THE PARTIES

20. Plaintiff Pamela Goldman is a resident of the State of New York. Plaintiff brings this class action on behalf of herself and a putative class of persons similarly situated for damages and other relief arising from the Defendants' wrongful conduct described herein.

21. Plaintiff A & G Goldman Partnership is a New York partnership with its principal place of business in the State of New York. Plaintiff brings this class action on behalf of itself and a putative class of persons similarly situated for damages and other relief arising from the Defendants' wrongful conduct described herein.

22. Picower was a resident of Palm Beach, Florida, and Fairfield, Connecticut, prior to and at the time of his death on October 25, 2009. Picower held an individual BLMIS account

in the name of "Jeffry M. Picower," with an account address of 1410 South Ocean Boulevard, Palm Beach, Florida. Picower was Chairman of the Board of Defendant Decisions Incorporated.

23. Defendant Barbara Picower is the Executor of the Estate of Jeffry M. Picower, which is being probated in the State of New York.

24. Defendant Barbara Picower is a person residing at 1410 South Ocean Boulevard, Palm Beach, Florida 33480. Barbara Picower is Picower's surviving spouse. Barbara Picower holds an individual account at BLMIS in the name "Barbara Picower," with the account address of 1410 South Ocean Boulevard, Palm Beach, Florida 33480, and Barbara Picower is trustee for Defendant Trust f/b/o Gabrielle H. Picower, an officer and/or director of Defendant Decisions Incorporated, and trustee and Executive Director of the Picower Foundation.

25. Defendant Decisions Incorporated is a corporation organized under the laws of Delaware with a principal place of business at 950 Third Avenue, New York, New York 10022 and an alternate mailing address on its BLMIS account listed as 22 Saw Mill River Road, Hawthorne, New York, 10532. The Decisions Incorporated office in Hawthorne was merely a store-front office through which little or no business was conducted, and Decisions Incorporated is a general partner of Defendants Capital Growth Company, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JLN Partnership, JMP Limited Partnership and Jeffry M. Picower Special Co.

26. Defendant Capital Growth Company purports to be a limited partnership with a mailing address for its BLMIS account listed at 22 Saw Mill River Road, Hawthorne, New York, 10532, care of Decisions Incorporated. Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of Capital Growth Company, and Decisions Incorporated and Picower transact/transacted business through this entity.

27. Defendant JA Primary Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. Defendant Decisions Incorporated and/or Picower serves/served as General Partner or Director of JA Primary Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this entity.

28. Defendant JA Special Limited Partnership is a limited partnership organized under the laws of Delaware with a principal place of business at 25 Virginia Lane, Thornwood, New York, New York 10594. Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JA Special Limited Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

29. Defendant JAB Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532. Upon information and belief, Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JAB Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

30. Defendant JEMW Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or Director of JEMW Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

31. Defendant JF Partnership purports to be a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Defendant Decisions Incorporated and/or Picower serve/served as General Partner or

Director of JF Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

32. Defendant JFM Investment Company is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and JFM Investment Company is a Limited Partner of Capital Growth Company, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JFM Investment Company.

33. Defendant JLN Partnership is a limited partnership with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of JLN Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

34. Defendant JMP Limited Partnership is a limited partnership organized under the laws of Delaware, with a principal place of business at 25 Virginia Lane, Thornwood, New York 10594. Decisions Incorporated and/or Picower serve/served as General Partner or Director of JMP Partnership, and Decisions Incorporated, and/or Picower transact/transacted business through this Defendant entity.

35. Defendant Jeffry M. Picower Special Co. is an entity through which Decisions Incorporated, and/or Picower transact/transacted business, with a mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532; and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower Special Co.

36. Defendant Favorite Funds is an entity through which Picower transacted business, with a listed mailing address care of Decisions Incorporated at 22 Saw Mill River Road, Hawthorne, New York, 10532, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Favorite Funds.

37. Defendant Jeffry M. Picower P.C. purports to be a limited partnership with a listed mailing address at 25 Virginia Lane, Thornwood, New York, New York 10594, and Decisions Incorporated and/or Picower serve/served as General Partner or Director of Jeffry M. Picower P.C., and Decisions Incorporated, and/or Picower transact/transacted business through this defendant entity.

38. Defendant Picower Foundation is a trust organized for charitable purposes with Picower listed as donor, and Picower and Barbara Picower, among others, listed as Trustees during the relevant time period. Picower Foundation's addresses are reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480 and 9 West 57th Street, Suite 3800, New York, New York 10019.

39. Defendants John Doe Trustees of the Picower Foundation were the Trustees of the Picower Foundation during the statute of limitations period.

40. Defendant Picower Institute for Medical Research is a nonprofit entity organized under the laws of New York, with a principal place of business at 350 Community Drive, Manhasset, New York 11030.

41. Defendant Trust f/b/o Gabrielle H. Picower is a trust established for beneficiary Gabrielle H. Picower, who is the daughter of Picower and Barbara Picower, with Defendant Barbara Picower listed as trustee, and the trust's BLMIS account address reported as 1410 South Ocean Boulevard, Palm Beach, Florida 33480.

42. On information and belief, the Picower Entity Defendants were dominated, controlled and used as a mere instrumentality of Picower to advance his interests in, and to control BLMIS and the Madoff Ponzi scheme. Thus, the Picower Entity Defendants are the alter egos of Jeffry Picower and of each other, and are jointly and severally liable for wrongful conduct committed by one or more of them, as detailed herein.

BLMIS' PRIMARY SECURITIES LAW VIOLATION

BLMIS Committed Securities Fraud

43. For decades, Madoff and BLMIS engaged in the largest Ponzi scheme in history. BLMIS was a broker-dealer ostensibly engaged in the business of buying and selling securities and acting as the custodian of customer securities and cash balances. In the course of the scheme, BLMIS sent monthly statements to its nearly 7,000 customers reflecting phony investments and phony profits. Each such statement was a material misrepresentation since each misrepresented to customers, including Plaintiffs, that securities had been purchased and cash proceeds credited when there were no such purchases or cash credited.

44. Madoff's fraudulent scheme also involved the continuous misrepresentation of BLMIS' solvency and securities trading activity. It was essential to the scheme that BLMIS appear to be a solvent, profitable brokerage firm. Indeed, throughout the class period BLMIS was actually insolvent and repeatedly needed large undisclosed "loans" to pay off investors who redeemed their BLMIS interests. BLMIS also needed parties who would assist it in fabricating purported trading activity at BLMIS. BLMIS did not engage in such trading, but it needed well-constructed, authentic looking, but fraudulent trading records to hide this fact from investors and regulators. BLMIS' fraudulent documentation of its trading activity and its own financial condition was an essential part of its overall fraudulent scheme.

45. BLMIS is a New York Limited Liability Company that was wholly owned by Madoff. BLMIS was founded in 1959, and operated from its principle place of business at 885 Third Avenue, New York, NY. Madoff was Founder, Chairman, Chief Executive Officer, and sole shareholder. BLMIS was registered with the SEC as a Securities Broker Dealer under Section 15 of the Exchange Act.

46. BLMIS typically obtained account documentation from its customers which gave BLMIS a power of attorney and complete discretion over trading in the relevant BLMIS accounts. BLMIS falsely described its trading strategy to customers as involving a complicated option strategy ("split-strike') which generated consistent returns. BLMIS in fact operated a Ponzi scheme.

47. BLMIS falsely represented to all class members that it maintained a multi-billion dollar program of commingled options and stock trading which were securities and investment contracts under the Exchange Act (the "BLMIS Discretionary Trading Program"). Customer "participation" therein involved the purchase and sale of securities.

48. BLMIS falsely represented to class members that they had purchased securities and options through BLMIS. Each class member received monthly statements purportedly reflecting securities in their account, trading activity during the month, and profits earned over the relevant time period. BLMIS also published for customers and regulators monthly and annual financial reports. The monthly statements for customer accounts depicted consistent profits on a monthly basis and rarely, if ever, showed loses. The BLMIS financials reported a profitable firm that was solvent.

49. The transactions reported on these monthly statements were a fabrication. The securities transactions described in the monthly statements never occurred, and the profits and

securities positions reported were entirely fictitious. Madoff admitted at his plea hearing that he had never purchased any of the securities in BLMIS customer accounts. Except for isolated individual transactions, there is no record of BLMIS having purchased or sold any securities in BLMIS customer accounts, or any proprietary accounts.

50. On December 11, 2008, Madoff was arrested by federal agents and charged with criminal violation of the federal securities laws, including securities fraud, investment advisor fraud, and mail and wire fraud. On the same day, the SEC filed a complaint in the United States District Court for the Southern District of New York against Madoff and BLMIS, also alleging that Madoff and BLMIS had engaged in securities fraud.

51. On December 15, 2008, the District Court appointed Irving H. Picard, Esq., as trustee ("Trustee") for the substantively consolidated liquidation of Madoff's estate and of BLMIS under the Securities and Investor Protection Action ("SIPA"). On March 10, 2009, the federal government filed an eleven count criminal information against Madoff in the case styled United States v. Madoff, 09-CR-213 (S.D.N.Y.). Two days later, Madoff plead guilty to all eleven counts, including Count I for securities fraud under § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

52. It is beyond dispute that BLMIS engaged in the largest Ponzi scheme in U.S. history. The net amount of bona fide net customer assets invested in the BLMIS scheme was approximately $18 billion. BLMIS violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. Madoff pleaded guilty to criminal securities fraud under Section 10(b) of the Exchange Act and Rule 10b-5. During the Ponzi scheme, Madoff and his family defalcated at least $800 million of bona fide customer assets.

53. BLMIS is currently subject to a federal bankruptcy proceeding, and thus cannot be named as a defendant in this action.

BLMIS Violated Section 10(b) of the Exchange Act and Rule 10b-5

54. BLMIS carried out a plan, scheme and course of conduct which was intended to and, did: (i) cause brokerage customers of BLMIS and investors in the BLMIS Discretionary Trading Program to entrust securities and cash for safe-keeping with BLMIS; and (ii) misappropriate the assets of BLMIS customers who purchased securities sold by or issued by BLMIS in connection with the BLMIS Discretionary Trading Program, as alleged herein. In furtherance of this unlawful scheme, plan, and course of conduct, BLMIS and its agents, including Madoff, took the actions set forth herein. As a result, Plaintiffs and the other members of the Class suffered damages in connection with the undisclosed and unauthorized theft of their securities and cash assets, and the misappropriation of the proceeds thereof, as alleged herein.

55. BLMIS (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of materials fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon brokerage customers who entrusted assets to BLMIS and who purchased securities issued by BLMIS in violation of Section 10(b) of the Exchange Act and Rule 10b-5.

56. As part of and in furtherance of this conduct, BLMIS engaged in an ongoing scheme to misappropriate funds which constituted the proceeds of sales of customers' securities.

57. BLMIS directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to misappropriate funds which constituted the proceeds of sales of securities (or the securities

themselves or cash) held by BLMIS as securities custodian and broker for Plaintiffs and the Class members.

58. BLMIS made untrue statements of material fact and/or omitted to state material facts necessary to make its statements not misleading, and employed devices, schemes and artifices to defraud, and engaged in acts, practices, and a course of conduct in an effort to mislead and misappropriate the assets of BLMIS brokerage customers and participants in the BLMIS Discretionary Trading Program. Such misconduct included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about BLMIS and the BLMIS Discretionary Trading Program, its financial performance and its business operations in the light of the circumstances under which they were made, not misleading, and which included engaging in manipulative and deceptive transactions, practices and courses of business which operated as a fraud and deceit upon the customers of BLMIS and participants in the BLMIS Discretionary Trading Program, including the surreptitious and unauthorized theft of customer assets and securities.

59. BLMIS had actual knowledge of the misrepresentations and omissions of material facts set forth herein. BLMIS' material misrepresentations and/or omissions were done knowingly for the purpose and effect of inflating BLMIS' financial results. At all relevant times, BLMIS was aware of the dissemination of artificially inflated financial information to the investing public which it knew was materially false and misleading.

60. At the time of the misrepresentations, omissions and manipulative and deceptive conduct, Plaintiffs and other members of the Class were ignorant of their falsity and believed them to be true, and they were ignorant of the manipulative and deceptive conduct complained of

herein. If Plaintiffs and the other members of the Class had known the truth regarding BLMIS' materially false statements and deceptive and manipulative conduct alleged above, which were not disclosed, Plaintiffs and other members of the Class would not have entrusted their assets to BLMIS or purchased what they were led to believe were BLMIS securities.

61. As a direct and proximate result of BLMIS' wrongful, manipulative, and deceptive conduct, including the dissemination of the materially false and misleading information set forth above, Plaintiffs and the other members of the Class suffered damages by overpaying for the BLMIS securities. Plaintiffs and the Class members suffered damages as a result of this manipulative and deceptive conduct.

62. By virtue of the foregoing, BLMIS violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

DEFENDANTS ARE CONTROL PERSONS UNDER SECTION 20(a)

Picower controlled BLMIS and directed its fraud

63. Picower was a highly sophisticated investor, accountant, and attorney. Picower was closely associated with Madoff, both in business and socially, for decades, and Picower lived close to Madoff in Palm Beach. Madoff served as a trustee for the Picower Institute for Medical Research. Picower "invested" with BLMIS since at least the 1980s.

64. Through his close relationship with Madoff, Picower was heavily involved in the BLMIS fraud and became Madoff's de facto partner. Picower also used his extensive connections in Palm Beach and his stature on Wall Street to recruit and refer clients to the BLMIS scheme, despite his knowledge that it was a fraud.

65. Picower had invested in BLMIS since the 1980s, and he became a control person of BLMIS for his own benefit at least by December 1, 1995, when he started to directly or indirectly cause BLMIS to make misrepresentations to other customers, and to direct and

participate in the fraudulent acts described herein. Madoff has stated that Picower was "complicit" in the scheme.

66. Picower secretly financed the Ponzi scheme and directly participated in BLMIS' fraudulent transactions that allowed the Ponzi scheme to go undetected by regulators and the class members, and he caused the dissemination of highly material misstatements and omissions in BLMIS' financials for extended periods of time.

Picower Controlled BLMIS and Caused the Dissemination of Material Misrepresentations and Omissions Through Fraudulent "Lending" Transactions

67. In order to prop up the Ponzi scheme, Picower engaged in a series of "lending" transactions amounting to more than $200 million. But for these "loans," BLMIS would have been unable to pay off redeeming investors and the Ponzi scheme would have collapsed. The loans gave Picower control over BLMIS as his potential to either refuse to make the illicit "loans" or to call them would have resulted in the end of the Ponzi scheme.

68. Specifically, in 1992, one of BLMIS' large feeder funds, Avellino & Bienes ("Avellino"), failed and was under SEC investigation. BLMIS needed cash to pay back Avellino investors and deflect suspicion away from the Ponzi scheme. After conferring with Madoff, Picower sent $76 million dollars' worth of securities from a non-BLMIS account to BLMIS, without consideration.

69. The Picower securities were held in a BLMIS general account, and they were then pledged as security to obtain a bank loan (or multiple loans) to repay the Avellino clients who had invested in BLMIS. BLMIS falsely represented to a lending bank that BLMIS owned the Picower securities. The securities that Picower "loaned" to BLMIS perpetuated the fraud and allowed BLMIS to continue to bringing new victims into the Ponzi scheme.

70. Picower also made a $125 million "loan" to BLMIS in April 2006 (without consideration) in order to keep BLMIS afloat when it was short on cash to pay its redeeming customers. Picower was quickly repaid on his "loan" when BLMIS wired him $125 million in September 2006. Like the earlier 1993 "loan," this loan was necessary to perpetuate the Ponzi scheme by concealing BLMIS' inability to pay its redeeming customers their fictitious gains.

71. Although Picower was a sophisticated businessman and investor, he never entered into formal loan documents for his $200 million in "loans" to BLMIS. This lack of documentation allowed Picower to hide the loans and their fraudulent purpose.

72. It was essential to both Picower and to BLMIS that the Picower "loans" were secret because they were improper and inconsistent with applicable laws, rules, and regulations of the SEC and the Financial Institution Regulatory Authority (FINRA). Loans to brokers like BLMIS must be approved by FINRA following a comprehensive review of the purpose of the loan and the lender. Also, a bona fide lender must sign a detailed subordination agreement, agreeing that the loan is subordinate to certain other liabilities to creditors of the brokerage firm. Knowing that "bailing out a Ponzi scheme" would not be an acceptable purpose for a subordinated loan, Picower hid the loans from FINRA and participated in BLMIS' fraudulent representation of the Picower loans as BLMIS capital that could be pledged as security for a bank loan or used as a cash asset to pay back redeeming BLMIS investors.

73. Through the BLMIS bailouts, Picower had the power to coerce BLMIS to do what he wanted, as he could have pulled the loans or refused them at any time, causing BLMIS to fail. Picower's role as a provider of significant hidden financing to prolong the Ponzi scheme gave him control over BLMIS, because his refusal to participate in such hidden loan transactions would have been the demise of BLMIS.

74. Through these secret and illegal "loans" to BLMIS, Picower directly caused the dissemination of material misrepresentations and omissions to prospective and existing BLMIS customers about the legitimacy and solvency of BLMIS, which BLMIS customers relied upon in investing with, or staying invested with, BLMIS. Moreover, the Picower "loans" were not properly reflected in BLMIS' financial statements, which financial statements were rendered materially false by Picower's actions. In fact, the Picower "loans" rendered BLMIS insolvent because they created a $200 million liability without any corresponding asset.

75. These misrepresentations and omissions were not related to transactions in Picower's BLMIS trading accounts and were not incident to the fraudulent withdrawal of funds from Picower's BLMIS accounts. The loans were not the withdrawal of capital at all, but were hidden infusions designed to deceive investors into believing that BLMIS was solvent.

Picower Controlled BLMIS and Caused the Dissemination of Material Misrepresentations and Omissions as a Party to Fraudulent Options Trading

76. A critical aspect of the Ponzi scheme was the creation of the appearance of legitimate trading records to induce prospective and existing BLMIS customers to invest and stay invested with BLMIS. To that end, Madoff represented that he engaged in high volume "split strike" options trading activity. Madoff purported to invest BLMIS customers' money in the largest S&P 100 stocks and buy and sell options against those stocks to minimize losses.

77. However, BLMIS did not actually engage in any real stock or options transactions. Therefore, fabrication of the trading records was essential to the Ponzi scheme, as was the cooperation of partners in the fraud who would agree to act as a "counterparty" to the phony options contracts with BLMIS.

78. Madoff was continually concerned that those who BLMIS identified as counterparties to the phony options transactions, such as institutional broker-dealers throughout

the world, would become subject to heightened scrutiny from regulators and from large institutions that did business with BLMIS. Madoff believed BLMIS needed to frequently name new counterparties for its fake option trades to continue tricking regulators, and the public and prospective and existing customers, into believing BLMIS was actually engaged in large scale options trading necessary to implement BLMIS' purported split-strike options strategy.

79. BLMIS and Picower agreed that Picower, who was a billionaire, would be listed on BLMIS' fabricated books and records as a counterparty for a large volume of options trading. Picower knew that there was no such options trading, but agreed to participate in this falsification of BLMIS trading records to deceive auditors, regulators, and BLMIS customers and potential investors and to preserve the Ponzi scheme. Picower expressly agreed not to disclose the counterparty fraud and that he would warn Madoff if he was questioned by regulators or anyone else about the options transactions.

80. By agreeing to act as a party to fraudulent options transactions, Picower knowingly controlled the falsification of the books of BLMIS and participated in the preparation and dissemination of false information and material omissions about the legitimacy of the split-strike options strategy used to induce BLMIS customers to invest. This also made Picower an essential element of the Ponzi scheme.

81. These misrepresentations and omissions were not related to cash withdrawals from Picower's BLMIS accounts and are, therefore, not incident to the fraudulent withdrawal of funds from Picower's BLMIS accounts.

Picower Controlled BLMIS Through Direct Contact With BLMIS Employees

82. Picower also had extensive direct contact with BLMIS employees and had the power to direct their actions.

83. Picower caused BLMIS to book phony transactions with phony profits in his own BLMIS accounts. From time to time, Picower withdrew these phony profits from his BLMIS accounts. These withdrawals were actually funded with cash from other BLMIS customers.

84. Picower knew and intended that each phony recording of a fictitious profitable transaction in his accounts resulted directly in the recording of false transactions and false asset values in the accounts of other BLMIS customers, because these customer accounts did not reflect the resulting cash transfer from their accounts to Picower.

85. BLMIS employees regularly carried out Picower's fraudulent trading instructions by fabricating and back dating trades in Picower's accounts to generate phony paper profits. By way of example, on or about December 29, 2005, Picower's assistant April Friehlich, acting on behalf of the Defendants, faxed BLMIS a letter signed by Picower that directed BLMIS to "realize" a gain of $50 million in the Picower accounts. Upon direction from Picower and Friehlich, BLMIS falsified records so that it would appear that BLMIS sold large amounts of stock in Agilent Technologies and Intel Corporation in various Defendant accounts on a back dated basis. Friehlich directed the fictitious sale of large amounts of these purported securities on or about December 29, 2005, requesting that the sales be "booked" to take place on an earlier date, i.e., December 8 or 9.

86. BLMIS backdated the trades at Picower's direction and on Picower's behalf for the purpose of generating phony paper profits of approximately $46.3 million, which made up most of Picower's requested $50 million distribution. Picower knew that in order to maintain and hide the Ponzi scheme, Picower's phony $46.3 million paper profit necessitated the creation of corresponding phony account records in other BLMIS customer accounts.

87. Similarly, on or about April 24, 2006, Defendant Decisions Incorporated opened a new account with BLMIS known as the "Decisions, Inc. 6" account. This account was opened with a wire transfer of $125 million. Defendants instructed BLMIS to back date trades in this account to January 2006, which was four months prior to the date the account was actually opened. BLMIS employees carried out Defendants' direct instructions and fabricated and back dated trades in the "Decisions, Inc. 6" account. This resulted in the net value of the account increasing by almost $40 million, or 30%, in less than two weeks after it opened. Defendants also directed and orchestrated the preparation of false statements in May 2007, which reflected millions of dollars in securities transactions which reportedly took place in earlier in 2007, but which in fact did not take place at all.

88. Picower also directed BLMIS to make a margin "loan" of approximately $6 billion to Defendant Decisions Incorporated, even though the account had no trading activity or cash or securities to support such borrowing.

89. Borrowing in a brokerage account is regulated by margin rules established by the Federal Reserve System and by the New York Stock Exchange. These rules limit the amount that an account holder can borrow from his or her securities account based upon the value of securities that can be used as collateral for the loan. The Decisions Incorporated account reflects virtually no trading activity and virtually no securities positions or other collateral for loans from this account. Picower was able to direct BLMIS to violate the margin rules and "loan" almost $6 billion in the Decisions Incorporated account without any collateral.

90. Picower knew at all times that this $6 billion credit was actually a transfer from the accounts of other BLMIS customers that was never recorded in those accounts.

Picower's Participation in the Ponzi Scheme Caused the Dissemination of Material Misrepresentations and Omissions.

91. The fraudulent transactions directed and participated in by Picower as well his fraudulent lending activity and participation as a phony options counterparty all directly resulted in the falsification of BLMIS' financial statements provided to regulators and relied upon by BLMIS customers.

92. Each month, BLMIS prepared and filed a Financial and Operational Combined Uniform Single ("FOCUS") report with FINRA, which is the self-regulatory organization that regulates broker-dealers.

93. BLMIS' FOCUS reports materially misstated its financial condition by failing to account properly for Picower's phony lending and phony trades and the overstated value of other customers' accounts, and by overstating BLMIS' capital and trading profits.

94. Picower's ability to direct the creation and dissemination of false and misleading trading and financial documentation which he knew would be incorporated in financial disclosures made by BLMIS, establishes that Picower exercised direct and indirect control over the day-to-day operations of BLMIS and specifically over the activity that constituted a violation of the securities laws.

95. As a result of Picower's control, the account records of other BLMIS customers falsely overstated the assets therein and their investment performance and the BLMIS financials vastly overstated BLMIS' capital and fraudulently reported trading activity which never took place. BLMIS customers consequently unknowingly overpaid for BLMIS securities.

96. As a result of Picower's control, he caused BLMIS to present Plaintiffs with false and misleading information (i.e., inflated account values and inflated capital values for BLMIS), in order to induce those investors to remain invested in BLMIS and to continue to attract new

investments in BLMIS. If Plaintiffs had been provided with accurate information, they would have attempted to protect the value of their investments, and the Ponzi scheme would have collapsed. Picower's direction of fraud with respect to his own accounts, and the financial and trading records of BLMIS, coupled with his knowledge and intent that BLMIS would necessarily create corresponding false entries in other BLMIS customer accounts, show control of the specific fraudulent activity which constituted the underlying Ponzi scheme and the underlying violations of Section 10(b) and Rule 10b-5 engaged in by BLMIS.

This Action Is Distinct From the Trustee's Fraudulent Conveyance Actions

97. Picower was able to withdraw at least $7.2 billion from BLMIS, constituting approximately 40% of the net $18 million in cash from the Ponzi scheme.

98. The Trustee has alleged in his adversary action against Defendants that the Defendants received at least $7.2 billion from BLMIS, net of their investments. Those funds have now been recovered by the Trustee and the Government through a settlement. Plaintiffs do not seek the recovery of any fraudulently transferred funds in this action.

99. Instead, Plaintiffs seek damages against Defendants resulting from Plaintiffs' reliance upon misrepresentations made by BLMIS and fraud committed by BLMIS under the direct or indirect control of Picower. BLMIS customers lost at least $11 billion in excess of the $7.2 billion transferred to Picower. Picower is responsible for the entire $11 billion loss as a control person who participated in and caused the dissemination of material misrepresentations and omissions and directed the fraudulent scheme.

100. The Trustee's fraudulent conveyance action did not involve allegations that Picower exercised control over BLMIS.

101. Pursuant to Section 20(a) of the Exchange Act, Defendants are jointly and severally liable to the same extent as BLMIS itself for Plaintiffs' damages, which are sought to

be recovered from other assets of Defendants, and not the funds recovered by the Trustee through his fraudulent conveyance claims.

CLASS ACTION ALLEGATIONS

102. Picower, as a control person, is liable for the $11 billion of customer assets lost by BLMIS above and beyond the amounts actually paid to Picower as fraudulent conveyances. His control and participation in the fraud allowed Madoff and others to defalcate or lose $11 billion of additional customer assets.

103. Plaintiffs bring this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3). The definition of the Plaintiff Class in this action is: (1) all brokerage customers of BLMIS who entrusted securities or cash to BLMIS between December 1, 1995, the approximate date that Picower first became a control person of BLMIS, and December 15, 2008, the date that BLMIS entered into SIPA liquidation ("Class Period"), and who at such time granted to BLMIS or its employees or agents trading authority or discretion with respect to assets in such brokerage accounts for trading in the BLMIS Discretionary Trading Program; and (2) who have not received the full reported account value of their BLMIS account(s) as of the date of the BLMIS bankruptcy/SIPC liquidation (the "Class"). The Class excludes the Defendants named herein, members of the Madoff family, BLMIS employees, and any of their affiliates or controlled entities.

104. The Class meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

a. Numerosity. The members of the Class are so numerous that joinder of all members is impracticable. Based on disclosures made by the SIPA Trustee the Class has thousands of members. Class members may be identified from records

maintained by BLMIS and the SIPA Trustee. The members of the Class may be notified of the pendency of this action by mail or otherwise using a form of notice similar to that customarily used in securities class actions.

b. Commonality. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are whether the Federal Securities Laws (specifically §20(a) of the Exchange Act) were violated by Picower as alleged herein, whether members of the Class have sustained damages as a result thereof, and if so, the proper measure of such damages.

c. Typicality. Plaintiffs' claims are typical of the claims of members of the Class as all members of the Class were similarly affected by Picower's wrongful conduct in violation of federal law as alleged herein.

d. Adequacy. Plaintiffs will fairly and adequately represent and protect the interest of the members of the Class. Plaintiffs have retained competent and experienced counsel in class and securities litigation.

105. This class action also meets the requirements of Federal Rule of Civil Procedure 23(b)(3). The common issues outlined herein predominate over any individual issues in the case. A class action is superior to all other available methods of the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually address the

wrongs done to them. There will be no difficulty in the management of this action as a class action.

106. The allegations herein are based on the damage inflicted directly upon the Class members through the fraudulent and deceptive practices of, and materially false reporting directed or controlled by Defendants with the intention that the Class members would be deceived by such practices and/or reporting and rely upon such reporting to their detriment. The Class members did in fact rely upon these misrepresentations and/or omissions of material fact, and were defrauded.

TOLLING THE STATUTE OF LIMITATIONS

107. Any applicable statute of limitations with respect to Plaintiffs' claims has been tolled since no later than February 16, 2010, by the filing of the class action complaint against all of the Defendants named here in the action captioned Susanne Stone Marshall, Individually and On Behalf of a Class of Similarly Situated v. Barbara Picower, Individually, and as Executor of the Estate Of Jeffry M. Picower, et al., case no. 10-80252-CV-Ryskamp/Vitunac (S.D. Fla.). See American Pipe and Construction Company v. Utah, 414 U.S. 538, 552 (1974); In re World Comm Securities Litigation, 496 F.3d 245 (2d Cir. 2007).

COUNT I

VIOLATIONS OF SECTION 20(a) OF THE EXCHANGE ACT AS AGAINST THE PICOWER DEFENDANTS

108. Plaintiffs repeat and re-allege each and every allegation contained above as if fully set forth herein.

109. BLMIS violated Section 10(b) of the Exchange Act and Rule 10b-5 by its acts and omissions and by engaging in a massive Ponzi scheme.

110. Picower and Madoff were the masterminds of the fraudulent Ponzi scheme and each actively participated in the fraud.

111. Picower actively controlled and prolonged the Ponzi scheme with full knowledge of its fraudulent purpose. Picower's actions had the effect of falsifying BLMIS' trading records and financial reporting and giving BLMIS the false appearance of being a solvent, profitable brokerage entity.

112. Picower had motive to hide BLMIS' insolvency and continue the BLMIS fraud in order to prevent his role in the fraud from being detected.

113. Pursuant to Section 20(a), Picower is jointly and severally liable to the same extent as BLMIS itself for BLMIS' violations of Section 10(b) of the Exchange Act and Rule 10b-5.

114. Defendants acted collectively and in concert as a control group of BLMIS within the meaning of Section 20(a) of the Exchange Act as alleged herein. Each Defendant is an entity or individual operating as part of a control group of BLMIS. Defendants are commonly controlled or were commonly controlled by Jeffry M. Picower. At all relevant times, Defendants were dominated, controlled and used as a mere instrumentality of Jeffry M. Picower.

115. Picower had the power to directly or indirectly control, and did in fact control, the overall decision-making at BLMIS, including the record keeping for his accounts and other customers' accounts at BLMIS, the reporting of the financial condition and capital of BLMIS, the recording of securities transactions and cash transfers in and from all customer accounts at BLMIS, including those of the Class members, and the recording of securities and options trading activity by BLMIS itself.

116. Picower had the power to directly or indirectly control, and did in fact control, the flow of funds and securities in and out of BLMIS and customer accounts at BLMIS, even when this flow of funds and securities did not correspond to actual trading activity, resulting in the overstatement of the value of the Class members' accounts at BLMIS and the capital of BLMIS.

117. Picower actively communicated and agreed with Madoff and other BLMIS personnel to perpetuate and hide the fraud. Picower had a close relationship with Madoff and BLMIS, and directly ensured that Madoff and BLMIS concealed the scheme from other BLMIS customers and regulators. Picower directly or indirectly induced and participated in BLMIS' misleading statements to others. These misrepresentations induced BLMIS customers to pay BLMIS for non-existent securities.

118. Picower had intimate knowledge of and involvement in the operations, record keeping, and financial management of BLMIS. Picower directly or indirectly induced the material misrepresentations, fraudulent schemes and omissions giving rise to the securities violations alleged herein.

119. Picower knew and intended that the material misrepresentations and omissions described herein would be communicated to other investors, including Plaintiffs and knew that they would be defrauded by BLMIS' fraudulent schemes. Picower directly or indirectly induced BLMIS to conceal the fraud from BLMIS customers and regulators. Picower and Defendants also profited from the BLMIS scheme, and did in fact materially benefit from Picower's direct or indirect control of BLMIS.

120. The damages sought herein are distinct from the monies paid by Defendants pursuant to fraudulent conveyance actions pressed by the Madoff Estate and U.S. Government. Here Plaintiffs seek only damages resulting from Defendants control of the BLMIS fraud which

resulted in their overpaying for BLMIS securities. The Picower Defendants are jointly and severally liable for the $18 billion out of pocket loss resulting from the BLMIS fraud, plus interest. Thus the fraudulent conveyance damages they have paid have not compensated Plaintiffs for their securities damages.

121. The volume, pattern and practice of Picower's control over BLMIS as set forth above, including Picower's secret unauthorized funding of the scheme, his agreement to act as a fraudulent trading counterparty to throw off regulators, his direction of false reporting of BLMIS' capital and financial condition and customer assets and returns in monthly statements provided to Plaintiffs, and his direct or indirect control over the benefits of the Ponzi scheme, establishes that Picower was a "control person" with liability under Section 20(a).

122. Picower directed and was involved in the creation and dissemination of actionable misrepresentations and omissions to prospective and existing BLMIS customers, which representations and omissions were not incident to the Picower's fraudulent withdraws from Picower's BLMIS accounts.

123. The damages sought in this action are completely separate from, and are not predicated on, the transfer of funds from BLMIS to Picower.

124. Pursuant to Section 20(a), Picower's control of BLMIS, and Picower's domination and control of Defendants, makes them jointly and severally liable to the same extent as BLMIS itself for Plaintiffs' damages, which are sought to be recovered from other assets of Defendants, and not the funds recovered by the Trustee through his fraudulent conveyance claims.

125. As a direct and proximate result of BLMIS' securities violations, Plaintiffs and other members of the Class have suffered damages.

WHEREFORE, Plaintiffs pray for relief and judgment against the Defendants as follows:

A. Determining that this action is a proper class action;

B. designating Plaintiffs as class representatives under Rule 23 of the Federal Rules of Civil Procedure and Plaintiffs' counsel as class counsel;

C. awarding compensatory damages in favor of Plaintiffs and other Class members against all of the Defendants jointly and severally, for all securities based damages sustained as a result of Defendants' wrongdoing in an amount to be proven at trial, including interest;

D. awarding Plaintiffs and the Class the reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

E. such other and further relief as the Court may deem just and proper.

DATED: this 28 day of August, 2014, by:

By: /s/ James W. Beasley, Jr.

James W. Beasley, Jr.
beasley@beasleylaw.net
Florida Bar No. 145750
Joseph G. Galardi
galardi@beasleylaw.net
Florida Bar No. 180572
BEASLEY KRAMER & GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Tel: (561) 835-0900
Fax: (561) 835-0939

and

Lesley Blackner, Esq.
lblackner@aol.com
Florida Bar No. 654043
BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, FL 33480

Tel: (561) 659-5754
Fax: (561) 659-3184

Co-counsel for Plaintiffs and the Class

EXHIBIT O

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 14-81125-CIV-MARRA

PAMELA GOLDMAN and
A & G GOLDMAN PARTNERSHIP, individually
and on behalf of a class of similarly situated Plaintiffs,

vs.

CAPITAL GROWTH COMPANY, et al.;

Defendants.
_____/

JOINT STIPULATION AND
AGREED MOTION FOR STAY

Plaintiffs Pamela Goldman and A & G Goldman Partnership and Defendants[1] (collectively, the "Parties"), by and through their undersigned counsel, hereby stipulate and jointly move for the entry of an order staying this action, and in support state as follows:

1. Plaintiffs, individually and on behalf of a putative class of similarly situated putative plaintiffs, filed their Complaint [D.E. 1] ("Complaint") in this action on August 28, 2014 (the "Action").

2. Defendants hereby agree to waive service of summons of the Complaint in the Action pursuant to Federal Rule of Civil Procedure 4(d), and, notwithstanding any provision in

[1] "Defendants" collectively refers to Defendants Capital Growth Company, Decisions, Inc., Favorite Funds, JA Primary Limited Partnership, JA Special Limited Partnership, JAB Partnership, JEMW Partnership, JF Partnership, JFM Investment Companies, JLN Partnership, JMP Limited Partnership, Jeffry M. Picower Special Company, Jeffry M. Picower, P.C., The Picower Foundation, The Picower Institute of Medical Research, The Trust f/b/o Gabrielle H. Picower, Barbara Picower, individually, and as Executor of the Estate of Jeffry M. Picower, and as Trustee for the Picower Foundation and for the Trust f/b/o Gabrielle H. Picower.

this Motion, Plaintiffs shall be permitted to file documents necessary and sufficient to evidence and effect such service on Defendants under Rule 4.

3. The Parties agree and jointly request the entry of a stay of the Action pending final resolution of any challenge to the Complaint brought by Irving H. Picard (as Trustee for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC) (the "Trustee") and/or the Defendants in the Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

4. The Parties agree and jointly request that an order granting the stay provide that the stay shall terminate if a challenge to the Complaint by the Defendants and/or the Trustee is not filed in the Bankruptcy Court on or before November 17, 2014. The Parties agree that Plaintiffs' response to any such challenge shall be filed on or before December 15, 2014; and any reply to that response shall be filed on or before January 12, 2014.

5. The Parties agree that other than as set forth above, the Parties reserve all rights and defenses they may otherwise have with respect to this Action, and entry into this stipulation shall not impair or otherwise affect or result in a waiver of any such rights and defenses or estop them from asserting such rights, and the Parties request that the order granting this Motion provide as such.

WHEREFORE, the Parties respectfully request that the Court grant this Motion and enter an order in the form of the proposed order attached hereto.

Dated: September 24, 2014.

Respectfully, submitted by:

/s/ James W. Beasley, Jr.
James W. Beasley, Jr.
beasley@beasleylaw.net
Florida Bar No. 145750
Joseph G. Galardi
galardi@beasleylaw.net
Florida Bar No. 180572
BEASLEY KRAMER
& GALARDI, P.A.
505 South Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
Tel: (561) 835-0900
Fax: (561) 835-0939

-and-

Lesley Blackner, Esq.
lblackner@aol.com
Florida Bar No. 654043
BLACKNER, STONE & ASSOCIATES
123 Australian Avenue
Palm Beach, Florida 33480
Tel: (561) 659-5754
Fax: (561) 659-3184
Attorneys for Plaintiffs

/s/ Sanford L. Bohrer
Sanford L. Bohrer
Florida Bar No. 160643
sbohrer@hklaw.com
Brian W. Toth
Florida Bar No. 57708
brian.toth@hklaw.com
HOLLAND & KNIGHT LLP
701 Brickell Avenue, Suite 3300
Miami, Florida 33131
Telephone: (305) 374-8500
Fax: (305) 789-7799

Of counsel:

SCHULTE ROTH & ZABEL LLP
William D. Zabel
Marcy Ressler Harris
Michael Kwon (admitted pro hac vice)
Jennifer M. Opheim (admitted pro hac vice)
919 Third Avenue
New York, New York 10022
(212) 756-2000

Attorneys for Defendants

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that on this **24th** day of September, 2014, this document was electronically filed with the Clerk of this Court by using the CM/ECF system, which will serve a copy on all counsel of record.

/s/ Joseph G. Galardi
Joseph G. Galardi

EXHIBIT P

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 14-81125-CIV-MARRA

PAMELA GOLDMAN and
A & G GOLDMAN PARTNERSHIP, individually
and on behalf of a class of similarly situated Plaintiffs,

vs.

CAPITAL GROWTH COMPANY, et al.;

Defendants.
_____/

ORDER ON JOINT STIPULATION AND
AGREED MOTION FOR STAY

This matter came before the Court on the Joint Stipulation and Agreed Motion for Stay ("Motion") filed by Plaintiffs and Defendants (collectively, the "Parties") (DE 4). Plaintiffs, individually and on behalf of a putative class of similarly situated putative plaintiffs, filed their Complaint [D.E. 1] ("Complaint") in this action on August 28, 2014 (the "Action").

Having considered the Motion (DE 4), and being otherwise fully advised in the premises, the Motion is hereby **GRANTED** as follows:

1. Plaintiffs shall be permitted to file documents necessary and sufficient to evidence and effect service on Defendants under Federal Rule of Civil Procedure 4.

2. This Action is otherwise **STAYED** pending final resolution of any challenge to the Complaint brought by Irving H. Picard (as Trustee for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC) (the "Trustee") and/or the Defendants in the Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

3. The stay shall terminate if a challenge to the Complaint by the Defendants and/or the Trustee is not filed in the Bankruptcy Court on or before November 17, 2014.

4. Other than as set forth above, the Parties have reserved all rights and defenses they may otherwise have with respect to this Action. The Parties' entry into the Joint Stipulation and Agreed Motion shall not impair or otherwise affect or result in a waiver of any such rights and defenses, or estop them from asserting such rights.

DONE AND ORDERED, in Chambers, at West Palm Beach, Florida this 29th day of September, 2014.

KENNETH A. MARRA
United States District Judge

cc: All Counsel of Record

EXHIBIT F

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201

Attorneys for Irving H. Picard, Trustee
for the Substantively Consolidated SIPA Liquidation
of Bernard L. Madoff Investment Securities LLC
and the Estate of Bernard L. Madoff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (SMB) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. A & G GOLDMAN PARTNERSHIP and PAMELA GOLDMAN, Defendants.	Adv. Pro. No. _____ (SMB) **AFFIDAVIT OF VINEET SEHGAL IN SUPPORT OF APPLICATION FOR ENFORCEMENT OF THE PERMANENT INJUNCTION AND AUTOMATIC STAY**

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

VINEET SEHGAL, being duly sworn, deposes and says:

1. I am a Managing Director of AlixPartners LLP, consultant to, and claims agent for, Plaintiff Irving H. Picard (the "Trustee"), trustee for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.* ("SIPA"), and the estate of Bernard L. Madoff ("Madoff"), individually.

2. I make this affidavit to transmit to this Court true and correct copies of documents and provide information in connection with the Application for Enforcement of the Permanent Injunction and Automatic Stay.

3. Through SIPC advances and an interim distribution from the fund of customer property, Pamela Goldman's allowed claims (Claim Nos. 005535 and 005183) have been fully satisfied.

4. True and correct copies of the following documents are attached:[1]

Exhibit A: Customer Claim No. 005535, received March 4, 2009 (Pamela Goldman)

Exhibit B: Notice of Determination of Claim No. 005535, issued July 2, 2010 (Pamela Goldman)

Exhibit C: Customer Claim No. 005183, received March 4, 2009 (Pamela Goldman)

Exhibit D: Notice of Determination of Claim No. 005183, issued October 29, 2009 (Pamela Goldman)

[1] Certain information in the below-described claim forms has been redacted from the copies annexed hereto to protect potentially confidential information in accordance with the Court's Protective Order entered on June 6, 2011, as amended on September 17, 2013. (Adv. Pro. No. 08-01789, ECF Nos. 4137, 5474.) Further, exhibits to this affidavit reflecting filed claims do not include the supporting material originally filed with the claims.

Exhibit E: Customer Claim No. 015036, received July 2, 2009 (A&G Goldman)

Exhibit F: Notice of Determination of Claim No. 015036, issued August 28, 2009 (A&G Goldman)

Exhibit G: Objection to Trustee's Determination of Claim filed by A&G Goldman, Adv. Pro. No. 08-1789 (Bankr. S.D.N.Y.), filed September 30, 2009 (ECF No. 492)

Vineet Sehgal

Sworn and subscribed to before me this 13TH day of November, 2014

Notary Public

SHARYN P. DOYLE
Notary Public, State of New York
No. 01DO5051953
Qualified in New York County
Commission Expires Nov. 13, 2017

EXHIBIT A

CUSTOMER CLAIM

Bernard L. Madoff Investment Securities LLC
Case No 08-01789-BRL
U.S. Bankruptcy Court for the Southern District of New York
Claim Number: 005535

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

In Liquidation

RECEIVED
MAR 0 4 2009

DECEMBER 11, 2008

(Please print or type)

Name of Customer: Pamela B. Goldman
Mailing Address: [redacted]
City: [redacted] **State:** [redacted] **Zip:** [redacted]
Account No.: 1-G0233
Taxpayer I.D. Number (Social Security No.): [redacted]

NOTE: BEFORE COMPLETING THIS CLAIM FORM, BE SURE TO READ CAREFULLY THE ACCOMPANYING INSTRUCTION SHEET. A SEPARATE CLAIM FORM SHOULD BE FILED FOR EACH ACCOUNT AND, TO RECEIVE THE FULL PROTECTION AFFORDED UNDER SIPA, ALL CUSTOMER CLAIMS MUST BE RECEIVED BY THE TRUSTEE ON OR BEFORE March 4, 2009. CLAIMS RECEIVED AFTER THAT DATE, BUT ON OR BEFORE July 2, 2009, WILL BE SUBJECT TO DELAYED PROCESSING AND TO BEING SATISFIED ON TERMS LESS FAVORABLE TO THE CLAIMANT. PLEASE SEND YOUR CLAIM FORM BY CERTIFIED MAIL - RETURN RECEIPT REQUESTED.

****

1. Claim for money balances as of **December 11, 2008**:

   a. The Broker owes me a Credit (Cr.) Balance of $ 2,615.00

   b. I owe the Broker a Debit (Dr.) Balance of $ 0

   c. If you wish to repay the Debit Balance, please insert the amount you wish to repay and attach a check payable to "Irving H. Picard, Esq., Trustee for Bernard L. Madoff Investment Securities LLC." If you wish to make a payment, **it must be enclosed** with this claim form. $ N/A

   d. If balance is zero, insert "None." N/A

502180406 1

HF 4611387

2. Claim for securities as of **December 11, 2008:**

PLEASE DO NOT CLAIM ANY SECURITIES YOU HAVE IN YOUR POSSESSION.

		YES	NO
a.	The Broker owes me securities	x	
b.	I owe the Broker securities	x	
c.	If yes to either, please list below:		

Date of Transaction (trade date)	Name of Security	Number of Shares or Face Amount of Bonds: The Broker Owes Me (Long)	Number of Shares or Face Amount of Bonds: I Owe the Broker (Short)
See Attached	See Attached Madoff Summary and Statement of Security Positions	See Attached	
11/19/08	U.S. Treasury Bill Due 3/26/09	250,000	
11/19/08	S&P 100 Index December 430 Call		72
11/19/08	S&P 100 Index December 420 Put	72	

Proper documentation can speed the review, allowance and satisfaction of your claim and shorten the time required to deliver your securities and cash to you. Please enclose, if possible, copies of your last account statement and purchase or sale confirmations and checks which relate to the securities or cash you claim, and any other documentation, such as correspondence, which you believe will be of assistance in processing your claim. In particular, you should provide all documentation (such as cancelled checks, receipts from the Debtor, proof of wire transfers, etc.) of your deposits of cash or securities with the Debtor from as far back as you have documentation. You should also provide all documentation or information regarding any withdrawals you have ever made or payments received from the Debtor.

Please explain any differences between the securities or cash claimed and the cash balance and securities positions on your last account statement. If, at any time, you complained in writing about the handling of your account to any person or entity or regulatory authority, and the complaint relates to the cash and/or securities that you are now seeking, please be sure to provide with your claim copies of the complaint and all related correspondence, as well as copies of any replies that you received.

PLEASE CHECK THE APPROPRIATE ANSWER FOR ITEMS 3 THROUGH 9.

NOTE: IF "YES" IS MARKED ON ANY ITEM, PROVIDE A DETAILED EXPLANATION ON A SIGNED ATTACHMENT. IF SUFFICIENT DETAILS ARE NOT PROVIDED, THIS CLAIM FORM WILL BE RETURNED FOR YOUR COMPLETION.

		YES	NO
3.	Has there been any change in your account since December 11, 2008? If so, please explain.		x
4.	Are you or were you a director, officer, partner, shareholder, lender to or capital contributor of the broker?		x
5.	Are or were you a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the broker?		x
6.	Are you related to, or do you have any business venture with, any of the persons specified in "4" above, or any employee or other person associated in any way with the broker? If so, give name(s)		x
7.	Is this claim being filed by or on behalf of a broker or dealer or a bank? If so, provide documentation with respect to each public customer on whose behalf you are claiming.		x
8.	Have you ever given any discretionary authority to any person to execute securities transactions with or through the broker on your behalf? Give names, addresses and phone numbers.		x
9.	Have you or any member of your family ever filed a claim under the Securities Investor Protection Act of 1970? If so, give name of that broker.		x

Please list the full name and address of anyone assisting you in the preparation of this claim form: John Oleske - Herrick, Feinstein LLP
2 Park Avenue, New York, NY 10016

If you cannot compute the amount of your claim, you may file an estimated claim. In that case, please indicate your claim is an estimated claim.

IT IS A VIOLATION OF FEDERAL LAW TO FILE A FRAUDULENT CLAIM. CONVICTION CAN RESULT IN A FINE OF NOT MORE THAN $50,000 OR IMPRISONMENT FOR NOT MORE THAN FIVE YEARS OR BOTH.

THE FOREGOING CLAIM IS TRUE AND ACCURATE TO THE BEST OF MY INFORMATION AND BELIEF.

Date 2/27/09 Signature _____

Date _____ Signature _____

(If ownership of the account is shared, all must sign above. Give each owner's name, address, phone number, and extent of ownership on a signed separate sheet. If other than a personal account, *e.g.*, corporate, trustee, custodian, etc., also state your capacity and authority. Please supply the trust agreement or other proof of authority.)

This customer claim form must be completed and mailed promptly, together with supporting documentation, etc. to:

Irving H. Picard, Esq.,
Trustee for Bernard L. Madoff Investment Securities LLC
Claims Processing Center
2100 McKinney Ave., Suite 800
Dallas, TX 75201

EXHIBIT B

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

In Liquidation

DECEMBER 11, 2008[1]

NOTICE OF TRUSTEE'S DETERMINATION OF CLAIM

July 2, 2010

PAMELA B. GOLDMAN
[redacted]

Dear PAMELA B. GOLDMAN:

PLEASE READ THIS NOTICE CAREFULLY.

The liquidation of the business of BERNARD L. MADOFF INVESTMENT SECURITIES LLC ("BLMIS") is being conducted by Irving H. Picard, Trustee under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq. ("SIPA"), pursuant to an order entered on December 15, 2008 by the United States District Court for the Southern District of New York.

The Trustee has made the following determination regarding your claim on BLMIS Account No. 1G0233 designated as Claim Number 5535:

Your claim for a credit balance of $2,615.00 and for securities is **DENIED**. No securities were ever purchased for your account.

Your claim is **ALLOWED** for $523,500.00, which was the balance in your BLMIS Account on the Filing Date based on the amount of money you deposited with BLMIS for the purchase of securities, less subsequent withdrawals, as outlined in Table 1, plus the preferential $100,000.00 as discussed below.

As reflected in Table 1, certain of the transfers into or out of your account have been adjusted. As part of the Trustee's analysis of accounts, the Trustee has assessed accounts based on a money in/money out analysis (i.e., has the investor deposited more or less than he or she withdrew

1 Section 78*lll*(7)(B) of SIPA states that the filing date is "the date on which an application for a protective decree is filed under 78eee(a)(3)," except where the debtor is the subject of a proceeding pending before a United States court "in which a receiver, trustee, or liquidator for such debtor has been appointed and such proceeding was commenced before the date on which such application was filed, the term 'filing date' means the date on which such proceeding was commenced." Section 78*lll*(7)(B). Thus, even though the Application for a protective decree was filed on December 15, 2008, the Filing Date in this action is on December 11, 2008.

3000941781

from BLMIS). This analysis allows the Trustee to determine which part of an account's balance is originally invested principal and which part is fictitious gains that were fabricated by BLMIS. A customer's allowed claim is based on the amount of principal in the customer's account.

Whenever a customer requested a transfer from one account to another, the Trustee analyzed whether the transferor account had principal in the account at the time of the transfer. The available principal in the account was transferred to and credited in the transferee account. Thus, the reason that the adjusted amount of transferred deposits or withdrawals in Table 1 is less than the purported transfer amount is that the transferor account did not have sufficient principal available to effectuate the full transfer. The difference between the purported transfer amount and the adjusted transfer amount is the amount of fictitious gain that was transferred to or from your account. Under the money in/money out analysis, the Trustee does not give credit for fictitious gains in setting your allowed claim.

- Table 1 -

DEPOSITS

DATE	TRANSACTION DESCRIPTION	AMOUNT	ADJUSTED AMOUNT
4/14/1997	TRANS FROM 1G004510	$211,435.45	$90,000.00
10/6/1998	CHECK	$100,000.00	$100,000.00
3/28/2002	CHECK	$300,000.00	$300,000.00
2/20/2003	CHECK	$300,000.00	$300,000.00
1/5/2004	CHECK	$500,000.00	$500,000.00
2/7/2005	CHECK	$300,000.00	$300,000.00
12/15/2005	CHECK	$400,000.00	$400,000.00
2/12/2007	TRANS FROM 1B010530	$1,189,157.63	$163,500.00
Total Deposits:		$3,300,593.08	$2,153,500.00

WITHDRAWALS

DATE	TRANSACTION DESCRIPTION	AMOUNT	ADJUSTED AMOUNT
10/12/2001	CHECK	($30,000.00)	($30,000.00)
12/15/2004	CHECK	($300,000.00)	($300,000.00)
4/13/2005	CHECK	($500,000.00)	($500,000.00)
10/28/2005	CHECK WIRE	($500,000.00)	($500,000.00)
1/30/2008	CHECK	($100,000.00)	($100,000.00)
6/5/2008	CHECK	($100,000.00)	($100,000.00)
9/22/2008	CHECK	($200,000.00)	($200,000.00)
Total Withdrawals:		($1,730,000.00)	($1,730,000.00)
Total deposits less withdrawals:		$1,570,593.08	$423,500.00

As discussed with my legal counsel, Courtni Thorpe, on June 30, 2010, the last withdrawal from your BLMIS Account was made within 90 days of the Filing Date and is therefore a preferential transfer which is recoverable by the Trustee under 11 U.S.C. §§547(b) and 550(a). You agreed with Courtni Thorpe that to facilitate the prompt partial satisfaction of your allowed claim, the Trustee was authorized to deduct the preferential payment of $100,000.00 from his initial payment to you.

Accordingly, your **ALLOWED CLAIM** of $523,000.00 will be satisfied in the following manner:

The enclosed **PARTIAL RELEASE AND ASSIGNMENT** must be executed, notarized and returned in the envelope provided herewith. Upon receipt of the executed and notarized **PARTIAL RELEASE AND ASSIGNMENT**, the Trustee will make a partial satisfaction of your **ALLOWED CLAIM** by sending you a check in the amount of $400,000.00 - the $500,000.00 advanced by the Securities Investor Protection Corporation pursuant to section 78fff-3(a)(1) of SIPA, less the repayment of the preferential $100,000.00. In addition, you will be entitled to receive an additional distribution based upon your **ALLOWED CLAIM** from the fund of customer property, if any.

The manner of this allowance and partial satisfaction of your **ALLOWED CLAIM** shall be in final settlement of any preference action the Trustee may have otherwise brought against you.

It is the Trustee's intent, pursuant to SIPA, to submit a Motion for an order of the Bankruptcy Court to allocate assets he has collected and will collect between the fund of customer property and the general estate and to distribute customer property *pro rata* among allowed claimants, such as you. In a decision in this case, Rosenman Family, LLC v. Picard, 401 B.R. 629, 634 (Bankr. S.D.N.Y. 2009), the Bankruptcy Court stated:

> The customer estate is a fund consisting of customer property and is limited exclusively to satisfying customer claims. In re Adler Coleman Clearing Corp. (Adler Coleman II), 216 B.R. 719, 722 (Bankr. S.D.N.Y. 1998) ("A SIPA trustee, distributes 'customer property' exclusively among the debtor's customers...."); see also 15 U.S.C. § 78*lll*(4). Accordingly, Customers, as defined by SIPA § 78*lll*(2), enjoy a preferred status and are afforded special protections under SIPA. See New Times Securities, 463 F.3d at 127; Adler Coleman, 195 B.R. at 269."

Id. at 634.

It is not known at this time when the Trustee will be filing such allocation and distribution motion.

On March 1, 2010, the United States Bankruptcy Court for the Southern District of New York (Lifland, J.) issued a decision which affirmed the Trustee's Net Investment Method for determining customer claims. The final resolution of this issue is expected to be determined on appeal.

Should a final and unappealable court order determine that the Trustee is incorrect in his interpretation of "net equity" and its corresponding application to the determination of customer claims, the Trustee will be bound by that order and will apply it retroactively to all previously determined customer claims in accordance with the Court's order. Nothing in this Notice of Trustee's Determination of Claim shall be construed as a waiver of any rights or claims held by you in having your customer claim re-determined in accordance with any such Court order.

PLEASE TAKE NOTICE: If you disagree with this determination and desire a hearing before Bankruptcy Judge Burton R. Lifland, you **MUST** file your written opposition, setting forth the grounds for your disagreement, referencing Bankruptcy Case No. 08-1789 (BRL) and attaching copies of any documents in support of your position, with the United States Bankruptcy Court **and** the Trustee within **THIRTY DAYS** after July 2, 2010, the date on which the Trustee mailed this notice.

PLEASE TAKE FURTHER NOTICE: If you do not properly and timely file a written opposition, the Trustee's determination with respect to your claim will be deemed confirmed by the Court and binding on you.

PLEASE TAKE FURTHER NOTICE: If you properly and timely file a written opposition, a hearing date for this controversy will be obtained by the Trustee and you will be notified of that hearing date. Your failure to appear personally or through counsel at such hearing will result in the Trustee's determination with respect to your claim being confirmed by the Court and binding on you.

PLEASE TAKE FURTHER NOTICE: You must mail your opposition, if any, in accordance with the above procedure, to each of the following addresses:

Clerk of the United States Bankruptcy Court for
the Southern District of New York
One Bowling Green
New York, New York 10004

and

Irving H. Picard, Trustee
c/o Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10011

Irving H. Picard

Trustee for the Liquidation of the Business of
Bernard L. Madoff Investment Securities LLC

cc: John Oleske, Esq.
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016

300910059
300894178.1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789-BRL SIPA Liquidation

PARTIAL ASSIGNMENT AND RELEASE

KNOW ALL MEN BY THESE PRESENTS, that Pamela B. Goldman, with an address of [redacted] (hereinafter referred to as the "Assignor"), in consideration of the payment of $400,000.00 to satisfy in part her claims for customer protection (the "Customer Claim", having been designated Claim #5535) filed in the liquidation proceeding of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §78aaa et seq. ("SIPA") (see §§78fff-2(b), 78fff-2(d), and §78fff-3(a)(1) of SIPA), does for herself hereby assign, transfer and set over to Irving H. Picard as SIPA Trustee (the "SIPA Trustee") for the liquidation of BLMIS (see §78fff-2(b) of SIPA), and the Securities Investor Protection Corporation ("SIPC"), as subrogee to the extent of its cash advances to the SIPA Trustee for the satisfaction of the aforementioned Customer Claim (see §78fff-3(a)(1) of SIPA), any and all rights, including causes of action or claims, that Assignor now may have against BLMIS and/or any third party arising out of or relating to any fraudulent or illegal activity with respect to Assignor's BLMIS account (Account No. 1G0233, the "BLMIS Account"), which gave rise to the allowed Customer Claim for securities filed by Assignor against BLMIS. Such

assignment is only to the extent that Assignor has received satisfaction of the Customer Claim as set forth above.

Further, Assignor has not previously compromised or assigned any claim, cause of action or other right against BLMIS, its principals or agents or any third party arising out of or related to any fraudulent or illegal activity giving rise to the Customer Claim.

Upon reasonable request of the SIPA Trustee or SIPC, Assignor agrees to cooperate with the SIPA Trustee or SIPC in connection with any efforts of either to recover from the principals or agents of BLMIS or anyone else for amounts advanced by SIPC or paid by the SIPA Trustee to satisfy in part Assignor's Customer Claim in this SIPA liquidation proceeding. Such efforts to recover by the SIPA Trustee or SIPC, either to demand or pursue or to prosecute or settle any collection effort, action or proceeding therefore, shall be at the sole cost of the SIPA Trustee or SIPC.

Effective immediately and without further action, contingent only upon Assignor's receipt from the SIPA Trustee or his agent of a check in the amount of $400,000.00 as set forth in the SIPA Trustee's Notice of Determination of the Customer Claim dated July 2, 2010, (the "Trustee's Determination"), and upon receipt by the SIPA Trustee of this executed and notarized Partial Assignment and Release, the Assignor does for herself and for her executors, administrators, heirs and assigns hereby remise, release and forever discharge the SIPA Trustee and SIPC, as subrogee to the extent of its cash advances for the satisfaction of the Customer Claim, and, as the case may be, their officers, directors, professionals, employees, agents, successors and assigns, of and from any and all claims arising out of or relating to the Assignor's BLMIS Account, the Customer Claim filed with the SIPA Trustee as protected by the provisions of SIPA, and any and all circumstances giving rise to said Customer Claim which the Assignor

now has, or hereafter may have, for or by any reason, cause, matter or thing whatsoever from the beginning of the world to the date of the execution of this Partial Assignment and Release, only to the extent that the SIPA Trustee and/or SIPC has paid monies to the Assignor to satisfy Assignor's Customer Claim.

Assignor acknowledges that, as discussed with Courtni Thorpe, legal counsel for the Trustee, on June 30, 2010, the last withdrawal from Assignor's BLMIS Account was made within 90 days of the Filing Date and is therefore a preferential transfer which is recoverable by the Trustee under 11 U.S.C. §§547(b) and 550(a). Assignor agrees that to facilitate the prompt partial satisfaction of the Customer Claim, the Trustee is authorized to deduct the preferential payment of $100,000.00 from the initial payment to Assignor.

Upon receipt of this Partial Assignment and Release, Trustee will make a partial satisfaction of the Customer Claim by sending Assignor a check in the amount of $400,000.00 - the $500,000.00 advanced by the Securities Investor Protection Corporation pursuant to section 78fff-3(a)(1) of SIPA, less the repayment of the preferential $100,000.00. In addition, Assignor will be entitled to receive an additional distribution based upon Assignor's Allowed Claim from the fund of customer property, if any.

Should a final and unappealable Court order determine that the Trustee is incorrect in his interpretation of "net equity" and its corresponding application to the determination of customer claims, the Trustee will be bound by that order and will apply it retroactively to all previously determined customer claims in accordance with the Court's order. Nothing in this Partial Assignment and Release shall be construed as a waiver of any rights or claims held by Assignor in having its customer claim re-determined in accordance with any such Court order. The payment of the undisputed amount of the Assignor's Customer Claim (up to the limits of SIPA

protection) will be without prejudice to the Trustee's and the Assignor's rights, claims, and defenses with respect to the disputed portion(s) of the Assignor's Customer Claim.

Assignor acknowledges the sufficiency of the consideration to be received in accordance with the SIPA Trustee's Determination and under this Partial Assignment and Release. Assignor further acknowledges that the consideration to be received is in final settlement of any preference action the Trustee may have otherwise brought against Assignor.

IN WITNESS WHEREOF, the undersigned has on this day set forth below duly executed this Partial Assignment of Assignor's Customer Claim and Release, intending to be legally bound hereby.

By:_____
Pamela B. Goldman

Sworn and subscribed before me this
_____ day of _____, 2010.

_____
Notary Public

EXHIBIT C

Bernard L. Madoff Investment Securities LLC
Case No 08-01789-BRL
U.S. Bankruptcy Court for the Southern District of New York
Claim Number: 005183

CUSTOMER CLAIM

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

In Liquidation

DECEMBER 11, 2008

RECEIVED
MAR 04 2009

(Please print or type)

Name of Customer: Pamela B. Goldman
Mailing Address: [redacted]
City: [redacted] **State:** [redacted] **Zip:** [redacted]
Account No.: 1-G0094
Taxpayer I.D. Number (Social Security No.): [redacted]

NOTE: BEFORE COMPLETING THIS CLAIM FORM, BE SURE TO READ CAREFULLY THE ACCOMPANYING INSTRUCTION SHEET. A SEPARATE CLAIM FORM SHOULD BE FILED FOR EACH ACCOUNT AND, TO RECEIVE THE FULL PROTECTION AFFORDED UNDER SIPA, ALL CUSTOMER CLAIMS MUST BE RECEIVED BY THE TRUSTEE ON OR BEFORE March 4, 2009. CLAIMS RECEIVED AFTER THAT DATE, BUT ON OR BEFORE July 2, 2009, WILL BE SUBJECT TO DELAYED PROCESSING AND TO BEING SATISFIED ON TERMS LESS FAVORABLE TO THE CLAIMANT. PLEASE SEND YOUR CLAIM FORM BY CERTIFIED MAIL - RETURN RECEIPT REQUESTED.

****

1. Claim for money balances as of **December 11, 2008**:

   a. The Broker owes me a Credit (Cr.) Balance of $ 26,800

   b. I owe the Broker a Debit (Dr.) Balance of $ 0

   c. If you wish to repay the Debit Balance, please insert the amount you wish to repay and attach a check payable to "Irving H. Picard, Esq., Trustee for Bernard L. Madoff Investment Securities LLC." If you wish to make a payment, **it must be enclosed** with this claim form. $ 0

   d. If balance is zero, insert "None." N/A

2. Claim for securities as of **December 11, 2008**:

PLEASE DO NOT CLAIM ANY SECURITIES YOU HAVE IN YOUR POSSESSION.

		YES	NO
a.	The Broker owes me securities	x	
b.	I owe the Broker securities		x

c. If yes to either, please list below:

Date of Transaction (trade date)	Name of Security	Number of Shares or Face Amount of Bonds: The Broker Owes Me (Long)	I Owe the Broker (Short)
9/17/08	U.S. Treasury Bill Due 2/12/09	$275,000	

Proper documentation can speed the review, allowance and satisfaction of your claim and shorten the time required to deliver your securities and cash to you. Please enclose, if possible, copies of your last account statement and purchase or sale confirmations and checks which relate to the securities or cash you claim, and any other documentation, such as correspondence, which you believe will be of assistance in processing your claim. In particular, you should provide all documentation (such as cancelled checks, receipts from the Debtor, proof of wire transfers, etc.) of your deposits of cash or securities with the Debtor from as far back as you have documentation. You should also provide all documentation or information regarding any withdrawals you have ever made or payments received from the Debtor.

Please explain any differences between the securities or cash claimed and the cash balance and securities positions on your last account statement. If, at any time, you complained in writing about the handling of your account to any person or entity or regulatory authority, and the complaint relates to the cash and/or securities that you are now seeking, please be sure to provide with your claim copies of the complaint and all related correspondence, as well as copies of any replies that you received.

PLEASE CHECK THE APPROPRIATE ANSWER FOR ITEMS 3 THROUGH 9.

NOTE: IF "YES" IS MARKED ON ANY ITEM, PROVIDE A DETAILED EXPLANATION ON A SIGNED ATTACHMENT. IF SUFFICIENT DETAILS ARE NOT PROVIDED, THIS CLAIM FORM WILL BE RETURNED FOR YOUR COMPLETION.

		YES	NO
3.	Has there been any change in your account since December 11, 2008? If so, please explain.		x
4.	Are you or were you a director, officer, partner, shareholder, lender to or capital contributor of the broker?		x
5.	Are or were you a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the broker?		x
6.	Are you related to, or do you have any business venture with, any of the persons specified in "4" above, or any employee or other person associated in any way with the broker? If so, give name(s)		x
7.	Is this claim being filed by or on behalf of a broker or dealer or a bank? If so, provide documentation with respect to each public customer on whose behalf you are claiming.		x
8.	Have you ever given any discretionary authority to any person to execute securities transactions with or through the broker on your behalf? Give names, addresses and phone numbers.		x
9.	Have you or any member of your family ever filed a claim under the Securities Investor Protection Act of 1970? if so, give name of that broker.		x

Please list the full name and address of anyone assisting you in the preparation of this claim form: John Oleske - Herrick, Feinstein LLP
2 Park Avenue, New York, NY 10016

If you cannot compute the amount of your claim, you may file an estimated claim. In that case, please indicate your claim is an estimated claim.

IT IS A VIOLATION OF FEDERAL LAW TO FILE A FRAUDULENT CLAIM. CONVICTION CAN RESULT IN A FINE OF NOT MORE THAN $50,000 OR IMPRISONMENT FOR NOT MORE THAN FIVE YEARS OR BOTH.

THE FOREGOING CLAIM IS TRUE AND ACCURATE TO THE BEST OF MY INFORMATION AND BELIEF.

Date 2/27/09 Signature _____

Date _____ Signature _____

(If ownership of the account is shared, all must sign above. Give each owner's name, address, phone number, and extent of ownership on a signed separate sheet. If other than a personal account, *e.g.*, corporate, trustee, custodian, etc., also state your capacity and authority. Please supply the trust agreement or other proof of authority.)

This customer claim form must be completed and mailed promptly, together with supporting documentation, etc. to:

Irving H. Picard, Esq.,
Trustee for Bernard L. Madoff Investment Securities LLC
Claims Processing Center
2100 McKinney Ave., Suite 800
Dallas, TX 75201

EXHIBIT D

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

In Liquidation

DECEMBER 11, 2008[1]

NOTICE OF TRUSTEE'S DETERMINATION OF CLAIM

October 29, 2009

Pamela B. Goldman (IRA)
[redacted]

Dear Pamela B. Goldman (IRA):

PLEASE READ THIS NOTICE CAREFULLY.

The liquidation of the business of BERNARD L. MADOFF INVESTMENT SECURITIES LLC ("BLMIS") is being conducted by Irving H. Picard, Trustee under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq. ("SIPA"), pursuant to an order entered on December 15, 2008 by the United States District Court for the Southern District of New York.

The Trustee has made the following determination regarding your claim on BLMIS Account No. 1G0094 designated as Claim Number 005183:

Your claim for a credit balance of $26,800 and for securities is **DENIED**. No securities were ever purchased for your account.

Your claim is **ALLOWED** for $59,753.38, which was the balance in your BLMIS Account on the Filing Date based on the amount of money you deposited with BLMIS for the purchase of securities, less subsequent withdrawals, as outlined in Table 1.

1 Section 78*lll*(7)(B) of SIPA states that the filing date is "the date on which an application for a protective decree is filed under 78eee(a)(3)," except where the debtor is the subject of a proceeding pending before a United States court "in which a receiver, trustee, or liquidator for such debtor has been appointed and such proceeding was commenced before the date on which such application was filed, the term 'filing date' means the date on which such proceeding was commenced." Section 78*lll*(7)(B). Thus, even though the Application for a protective decree was filed on December 15, 2008, the Filing Date in this action is on December 11, 2008.

- Table 1 -		
DEPOSITS		
DATE	**TRANSACTION DESCRIPTION**	**AMOUNT**
3/5/1993	ROLLOVER CHECK	$34,126.22
3/30/1993	ROLLOVER CHECK	$63.82
4/14/1993	ROLLOVER CHECK	$2,000.00
7/27/1993	CHECK	$35.25
7/27/1993	CHECK	$32.47
7/27/1993	CHECK	$32.47
8/26/1993	CHECK	$36.30
10/4/1993	CHECK	$926.85
4/8/1994	1993 IRA CONTRIBUTION	$2,000.00
4/5/1995	1994 CONTRIBUTION	$2,000.00
4/9/1996	1995 CONTRIBUTION	$2,000.00
4/11/1997	1996 IRA CONTRIBUTION	$2,000.00
4/13/1998	CHECK	$2,000.00
6/12/1998	CANCEL CHECK 4/13/98	($2,000.00)
6/12/1998	1997 CONTRIBUTION A/O 4/13	$2,000.00
4/15/1999	1998 CONTRIBUTION	$2,000.00
4/14/2000	CHECK	$2,000.00
3/28/2002	2002 CONTRIBUTION	$3,000.00
3/28/2002	2001 CONTRIBUTION	$2,000.00
4/15/2004	CHECK	$3,500.00
Total Deposits:		$59,753.38
WITHDRAWALS		
Total Withdrawals:		$0.00
Total deposits less withdrawals:		$59,753.38

Your **ALLOWED CLAIM** of $59,753.38 will be satisfied in the following manner:

The enclosed **ASSIGNMENT AND RELEASE** must be executed, notarized and returned in the envelope provided herewith. You also should provide the name of the custodian for your IRA. Upon receipt of the executed and notarized **ASSIGNMENT AND RELEASE**, and designation of your IRA custodian the Trustee will fully satisfy your **ALLOWED CLAIM** by sending you a check in the amount of $59,753.38, with the funds being advanced by Securities Investor Protection Corporation pursuant to section 78fff-3(a)(1) of SIPA.

Should a final and unappealable court order determine that the Trustee is incorrect in his interpretation of "net equity" and its corresponding application to the determination of customer claims, the Trustee will be bound by that order and will apply it retroactively to all previously determined customer claims in accordance with the Court's order. Nothing in this Notice of Trustee's Determination of Claim shall be construed as a waiver of any rights or

claims held by you in having your customer claim re-determined in accordance with any such Court order.

PLEASE TAKE NOTICE: If you disagree with this determination and desire a hearing before Bankruptcy Judge Burton R. Lifland, you **MUST** file your written opposition, setting forth the grounds for your disagreement, referencing Bankruptcy Case No. 08-1789 (BRL) and attaching copies of any documents in support of your position, with the United States Bankruptcy Court **and** the Trustee within **THIRTY DAYS** after October 29, 2009, the date on which the Trustee mailed this notice.

PLEASE TAKE FURTHER NOTICE: If you do not properly and timely file a written opposition, the Trustee's determination with respect to your claim will be deemed confirmed by the Court and binding on you.

PLEASE TAKE FURTHER NOTICE: If you properly and timely file a written opposition, a hearing date for this controversy will be obtained by the Trustee and you will be notified of that hearing date. Your failure to appear personally or through counsel at such hearing will result in the Trustee's determination with respect to your claim being confirmed by the Court and binding on you.

PLEASE TAKE FURTHER NOTICE: You must mail your opposition, if any, in accordance with the above procedure, to each of the following addresses:

Clerk of the United States Bankruptcy Court for
the Southern District of New York
One Bowling Green
New York, New York 10004

and

Irving H. Picard, Trustee
c/o Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111

Irving H. Picard
Trustee for the Liquidation of the Business of
Bernard L. Madoff Investment Securities LLC

cc: NTC & Co. fbo Pamela Goldman
P.O. Box 173859
Denver, CO 80217

John Oleske
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789-BRL SIPA Liquidation

ASSIGNMENT AND RELEASE

KNOW ALL MEN BY THESE PRESENTS, that Pamela B. Goldman (IRA), located at [redacted] (hereinafter referred to as the "Assignor") in consideration of the payment of $59,753.38 to satisfy her claim for customer protection (the "Customer Claim", having been designated Claim #005183) filed in the liquidation proceeding of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §78aaa et seq. ("SIPA") (see §§78fff-2(b), 78fff-2(d), and §78fff-3(a)(1) of SIPA), does for herself hereby assign, transfer and set over to Irving H. Picard as SIPA Trustee (the "SIPA Trustee") for the liquidation of BLMIS (see §78fff-2(b) of SIPA), and the Securities Investor Protection Corporation ("SIPC"), as subrogee to the extent of its cash advances to the SIPA Trustee for the satisfaction of the aforementioned Customer Claim (see §78fff-3(a)(1) of SIPA), any and all rights, including causes of action or claims, that Assignor now may have against BLMIS and/or any third party arising out of or relating to any fraudulent or illegal activity with respect to Assignor's BLMIS account (Account No. 1G0094, the "BLMIS Account"), which gave rise to the allowed Customer Claim for securities filed by Assignor against BLMIS. Such

assignment is only to the extent that Assignor has received satisfaction of the Customer Claim as set forth above.

Further, Assignor has not previously compromised or assigned any claim, cause of action or other right against BLMIS, its principals or agents or any third party arising out of or related to any fraudulent or illegal activity giving rise to the Customer Claim.

Upon reasonable request of the SIPA Trustee or SIPC, Assignor agrees to cooperate with the SIPA Trustee or SIPC in connection with any efforts of either to recover from the principals or agents of BLMIS or anyone else for amounts advanced by SIPC or paid by the SIPA Trustee to satisfy Assignor's Customer Claim in this SIPA liquidation proceeding. Such efforts to recover by the SIPA Trustee or SIPC, either to demand or pursue or to prosecute or settle any collection effort, action or proceeding therefore, shall be at the sole cost of the SIPA Trustee or SIPC.

Effective immediately and without further action, contingent only upon Assignor's receipt from the SIPA Trustee or his agent of a check in the amount of $59,753.38 as set forth in the SIPA Trustee's Notice of Determination of the Customer Claim dated October 29, 2009, (the "Trustee's Determination"), and upon receipt by the SIPA Trustee of this executed and notarized Assignment and Release, the Assignor does for herself, and for her executors, administrators, heirs and assigns hereby remise, release and forever discharge the SIPA Trustee and SIPC, as subrogee to the extent of its cash advances for the satisfaction of the Customer Claim, and, as the case may be, their officers, directors, professionals, employees, agents, successors and assigns, of and from any and all claims arising out of or relating to the Assignor's BLMIS Account, the Customer Claim filed with the SIPA Trustee as protected by the provisions of SIPA, and any and all circumstances giving rise to said Customer Claim which the Assignor now has, or hereafter

may have, for or by any reason, cause, matter or thing whatsoever from the beginning of the world to the date of the execution of this Assignment and Release, only to the extent that the SIPA Trustee and/or SIPC has paid monies to the Assignor to satisfy Assignor's Customer Claim.

Should a final and unappealable Court order determine that the Trustee is incorrect in his interpretation of "net equity" and its corresponding application to the determination of customer claims, the Trustee will be bound by that order and will apply it retroactively to all previously determined customer claims in accordance with the Court's order. Nothing in this Assignment and Release shall be construed as a waiver of any rights or claims held by Assignor in having her customer claim re-determined in accordance with any such Court order. The payment of the undisputed amount of the Assignor's Customer Claim (up to the limits of SIPA protection) will be without prejudice to the Trustee's and the Assignor's rights, claims, and defenses with respect to the disputed portion(s) of the Assignor's Customer Claim.

Assignor acknowledges the sufficiency of the consideration to be received in accordance with the SIPA Trustee's Determination and under this Assignment and Release.

IN WITNESS WHEREOF, the undersigned has on this day set forth below duly executed this Assignment of Assignor's Customer Claim and Release, intending to be legally bound hereby.

By:_____
Pamela B. Goldman

Sworn and subscribed before me this
_____ day of _____, 2009.

_____
Notary Public

EXHIBIT E

Bernard L. Madoff Investment Securities LLC
Case No 08-01789-BRL
U.S Bankruptcy Court for the Southern District of New York
Claim Number: 015036

Date Received

CUSTOMER CLAIM

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

In Liquidation

DECEMBER 11, 2008

RECEIVED
JUL 02 2009
By

(Please print or type)

Name of Customer: A & G Goldman Partnership
Mailing Address: c/o G. Goldman, [redacted]
City: [redacted] **State:** [redacted] **Zip:** [redacted]
Account No.: 1-G0304
Taxpayer I.D. Number (Social Security No.): [redacted]

NOTE: **BEFORE COMPLETING THIS CLAIM FORM, BE SURE TO READ CAREFULLY THE ACCOMPANYING INSTRUCTION SHEET. A SEPARATE CLAIM FORM SHOULD BE FILED FOR EACH ACCOUNT AND, TO RECEIVE THE FULL PROTECTION AFFORDED UNDER SIPA, ALL CUSTOMER CLAIMS MUST BE RECEIVED BY THE TRUSTEE ON OR BEFORE March 4, 2009. CLAIMS RECEIVED AFTER THAT DATE, BUT ON OR BEFORE July 2, 2009, WILL BE SUBJECT TO DELAYED PROCESSING AND TO BEING SATISFIED ON TERMS LESS FAVORABLE TO THE CLAIMANT. PLEASE SEND YOUR CLAIM FORM BY CERTIFIED MAIL - RETURN RECEIPT REQUESTED.**

****

1. Claim for money balances as of **December 11, 2008**:

   a. The Broker owes me a Credit (Cr.) Balance of $ 20,480

   b. I owe the Broker a Debit (Dr.) Balance of $ 0

   c. If you wish to repay the Debit Balance, please insert the amount you wish to repay and attach a check payable to "Irving H. Picard, Esq., Trustee for Bernard L. Madoff Investment Securities LLC." If you wish to make a payment, **it must be enclosed** with this claim form. $ 0

   d. If balance is zero, insert "None." None

2. Claim for securities as of **December 11, 2008**:

PLEASE DO NOT CLAIM ANY SECURITIES YOU HAVE IN YOUR POSSESSION.

		YES	NO
a.	The Broker owes me securities	X	
b.	I owe the Broker securities	X	
c.	If yes to either, please list below:		

Date of Transaction (trade date)	Name of Security	Number of Shares or Face Amount of Bonds: The Broker Owes Me (Long)	Number of Shares or Face Amount of Bonds: I Owe the Broker (Short)
See Attached	See Attached		

Proper documentation can speed the review, allowance and satisfaction of your claim and shorten the time required to deliver your securities and cash to you. Please enclose, if possible, copies of your last account statement and purchase or sale confirmations and checks which relate to the securities or cash you claim, and any other documentation, such as correspondence, which you believe will be of assistance in processing your claim. In particular, you should provide all documentation (such as cancelled checks, receipts from the Debtor, proof of wire transfers, etc.) of your deposits of cash or securities with the Debtor from as far back as you have documentation. You should also provide all documentation or information regarding any withdrawals you have ever made or payments received from the Debtor.

Please explain any differences between the securities or cash claimed and the cash balance and securities positions on your last account statement. If, at any time, you complained in writing about the handling of your account to any person or entity or regulatory authority, and the complaint relates to the cash and/or securities that you are now seeking, please be sure to provide with your claim copies of the complaint and all related correspondence, as well as copies of any replies that you received.

PLEASE CHECK THE APPROPRIATE ANSWER FOR ITEMS 3 THROUGH 9.

NOTE: IF "YES" IS MARKED ON ANY ITEM, PROVIDE A DETAILED EXPLANATION ON A SIGNED ATTACHMENT. IF SUFFICIENT DETAILS ARE NOT PROVIDED, THIS CLAIM FORM WILL BE RETURNED FOR YOUR COMPLETION.

		YES	NO
3.	Has there been any change in your account since December 11, 2008? If so, please explain.		X
4.	Are you or were you a director, officer, partner, shareholder, lender to or capital contributor of the broker?		X
5.	Are or were you a person who, directly or indirectly and through agreement or otherwise, exercised or had the power to exercise a controlling influence over the management or policies of the broker?		X
6.	Are you related to, or do you have any business venture with, any of the persons specified in "4" above, or any employee or other person associated in any way with the broker? If so, give name(s)		X
7.	Is this claim being filed by or on behalf of a broker or dealer or a bank? If so, provide documentation with respect to each public customer on whose behalf you are claiming.		X
8.	Have you ever given any discretionary authority to any person to execute securities transactions with or through the broker on your behalf? Give names, addresses and phone numbers.		X
9.	Have you or any member of your family ever filed a claim under the Securities Investor Protection Act of 1970? if so, give name of that broker.		X

Please list the full name and address of anyone assisting you in the preparation of this claim form: John Oleske, Herrick, Feinstein LLP, 2 Park Avenue, New York, NY 10016 (212) 592-5981

If you cannot compute the amount of your claim, you may file an estimated claim. In that case, please indicate your claim is an estimated claim.

IT IS A VIOLATION OF FEDERAL LAW TO FILE A FRAUDULENT CLAIM. CONVICTION CAN RESULT IN A FINE OF NOT MORE THAN $50,000 OR IMPRISONMENT FOR NOT MORE THAN FIVE YEARS OR BOTH.

THE FOREGOING CLAIM IS TRUE AND ACCURATE TO THE BEST OF MY INFORMATION AND BELIEF.

Date 6/30/09 Signature [signature]

Date 6/30/09 Signature [signature]

(If ownership of the account is shared, all must sign above. Give each owner's name, address, phone number, and extent of ownership on a signed separate sheet. If other than a personal account, *e.g.*, corporate, trustee, custodian, etc., also state your capacity and authority. Please supply the trust agreement or other proof of authority.)

This customer claim form must be completed and mailed promptly, together with supporting documentation, etc. to:

Irving H. Picard, Esq.,
Trustee for Bernard L. Madoff Investment Securities LLC
Claims Processing Center
2100 McKinney Ave., Suite 800
Dallas, TX 75201

EXHIBIT F

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

In Liquidation

DECEMBER 11, 2008[1]

NOTICE OF TRUSTEE'S DETERMINATION OF CLAIM

August 28, 2009

A&G Goldman Partnership
c/o G. Goldman
[redacted]

Dear Mr. Goldman:

PLEASE READ THIS NOTICE CAREFULLY.

The liquidation of the business of BERNARD L. MADOFF INVESTMENT SECURITIES LLC ("BLMIS") is being conducted by Irving H. Picard, Trustee under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq. ("SIPA"), pursuant to an order entered on December 15, 2008 by the United States District Court for the Southern District of New York.

The Trustee has made the following determination regarding your claim on BLMIS Account No. 1G0304 designated as Claim Number 015036:

Your claim for a credit balance of $1,618,432.86 and for securities is **DENIED**. No securities were ever purchased for your account.

Further, based on the Trustee's analysis, the amount of money you withdrew from your account at BLMIS (total of $22,100,000.00), as more fully set forth in Table 1 annexed hereto and made a part hereof, is greater than the amount that was deposited with BLMIS for the purchase of securities

---

1 Section 78*lll*(7)(B) of SIPA states that the filing date is "the date on which an application for a protective decree is filed under 78eee(a)(3)," except where the debtor is the subject of a proceeding pending before a United States court "in which a receiver, trustee, or liquidator for such debtor has been appointed and such proceeding was commenced before the date on which such application was filed, the term 'filing date' means the date on which such proceeding was commenced." Section 78*lll*(7)(B). Thus, even though the Application for a protective decree was filed on December 15, 2008, the Filing Date in this action is on December 11, 2008.

(total of $18,750,000.00). As noted, no securities were ever purchased by BLMIS for your account. Any and all profits reported to you by BLMIS on account statements were fictitious.

Since there were no profits to use either to purchase securities or to pay you any money beyond the amount that was deposited into your BLMIS account, the amount of money you received in excess of the deposits in your account ($3,350,000.00) was taken from other customers and given to you. Accordingly, because you have withdrawn more than was deposited into your account, you do not have a positive "net equity" in your account and you are not entitled to an allowed claim in the BLMIS liquidation proceeding. Therefore, your claim is **DENIED** in its entirety.

- Table 1 -

DEPOSITS

DATE	TRANSACTION DESCRIPTION	AMOUNT
10/2/1998	CHECK WIRE	$4,750,000.00
10/2/1998	CHECK WIRE	$4,000,000.00
9/28/1999	CHECK WIRE	$1,000,000.00
9/28/1999	CHECK WIRE	$1,000,000.00
12/26/2001	CHECK WIRE	$1,500,000.00
2/19/2002	CHECK WIRE	$3,500,000.00
7/13/2006	CHECK	$1,000,000.00
9/8/2006	CHECK	$1,000,000.00
3/8/2007	CHECK WIRE	$1,000,000.00
Total Deposits:		$18,750,000.00

WITHDRAWALS

DATE	TRANSACTION DESCRIPTION	AMOUNT
5/12/1999	CHECK	($200,000.00)
12/6/1999	CHECK WIRE	($2,000,000.00)
12/30/1999	TRANS TO 1G024130	($650,000.00)
2/18/2000	CHECK WIRE	($500,000.00)
3/31/2000	CHECK WIRE	($500,000.00)
4/20/2000	CHECK WIRE	($1,000,000.00)
5/19/2000	CHECK WIRE	($500,000.00)
7/5/2000	CHECK WIRE	($1,000,000.00)
8/18/2000	CHECK	($500,000.00)
9/13/2000	CHECK WIRE	($500,000.00)
12/1/2000	CHECK WIRE	($500,000.00)
1/31/2001	CHECK WIRE	($500,000.00)
3/2/2001	CHECK WIRE	($750,000.00)
3/26/2001	CHECK WIRE	($500,000.00)
5/1/2001	CHECK WIRE	($500,000.00)
6/5/2001	CHECK WIRE	($500,000.00)
7/2/2001	CHECK WIRE	($500,000.00)
7/20/2001	CHECK WIRE	($500,000.00)

8/8/2001	CHECK WIRE	($500,000.00)
9/11/2001	CHECK WIRE	($500,000.00)
9/25/2001	CHECK WIRE	($500,000.00)
10/25/2001	CHECK WIRE	($500,000.00)
11/9/2001	CHECK	($300,000.00)
1/29/2002	CHECK WIRE	($500,000.00)
3/22/2002	CHECK WIRE	($500,000.00)
5/28/2002	CHECK WIRE	($500,000.00)
7/2/2002	CHECK WIRE	($500,000.00)
8/8/2002	CHECK WIRE	($500,000.00)
9/4/2002	CHECK WIRE	($750,000.00)
2/21/2003	CHECK WIRE	($500,000.00)
3/27/2003	CHECK WIRE	($1,000,000.00)
4/16/2003	CHECK WIRE	($500,000.00)
6/5/2003	CHECK WIRE	($500,000.00)
3/23/2004	CHECK	($150,000.00)
1/30/2008	CHECK	($250,000.00)
4/3/2008	CHECK	($250,000.00)
4/16/2008	CHECK WIRE	($800,000.00)
8/25/2008	CHECK WIRE	($500,000.00)
10/3/2008	CHECK WIRE	($500,000.00)
Total Withdrawals:		($22,100,000.00)
Total deposits less withdrawals:		($3,350,000.00)

As reflected in Table 1, certain of the transfers into or out of your account have been adjusted. As part of the Trustee's analysis of accounts, the Trustee has assessed accounts based on a money in/money out analysis (i.e., has the investor deposited more or less than he or she withdrew from BLMIS). This analysis allows the Trustee to determine which part of an account's balance is originally invested principal and which part is fictitious gains that were fabricated by BLMIS. A customer's allowed claim is based on the amount of principal in the customer's account.

When ever a customer requested a transfer from one account to another, the Trustee analyzed whether the transferor account had principal in the account at the time of the transfer. The available principal in the account was transferred to and credited in the transferee account. Thus, the reason that the adjusted amount of transferred deposits in Table 1 is less than the purported transfer amount is that the transferor account did not have sufficient principal available to effectuate the full transfer. The difference between the purported transfer amount and the adjusted transfer amount is the amount of fictitious gain that was transferred to or from your account. Under the money in/money out analysis, the Trustee does not give credit for fictitious gains in settling your allowed claim.

Should a final and unappealable court order determine that the Trustee is incorrect in his interpretation of "net equity" and its corresponding application to the determination of customer claims, the Trustee will be bound by that order and will apply it retroactively to all previously determined customer claims in accordance with the Court's order. Nothing in this Notice of

Trustee's Determination of Claim shall be construed as a waiver of any rights or claims held by you in having your customer claim re-determined in accordance with any such Court order.

Nothing in this Notice of Trustee's Determination of Claim shall be construed as a waiver of any rights or claims held by the Trustee against you.

PLEASE TAKE NOTICE: If you disagree with this determination and desire a hearing before Bankruptcy Judge Burton R. Lifland, you **MUST** file your written opposition, setting forth the grounds for your disagreement, referencing Bankruptcy Case No. 08-1789 (BRL) and attaching copies of any documents in support of your position, with the United States Bankruptcy Court **and** the Trustee within **THIRTY DAYS** after August 28, 2009, the date on which the Trustee mailed this notice.

PLEASE TAKE FURTHER NOTICE: If you do not properly and timely file a written opposition, the Trustee's determination with respect to your claim will be deemed confirmed by the Court and binding on you.

PLEASE TAKE FURTHER NOTICE: If you properly and timely file a written opposition, a hearing date for this controversy will be obtained by the Trustee and you will be notified of that hearing date. Your failure to appear personally or through counsel at such hearing will result in the Trustee's determination with respect to your claim being confirmed by the Court and binding on you.

PLEASE TAKE FURTHER NOTICE: You must mail your opposition, if any, in accordance with the above procedure, to each of the following addresses:

Clerk of the United States Bankruptcy Court for
the Southern District of New York
One Bowling Green
New York, New York 10004

and

Irving H. Picard, Trustee
c/o Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10011

Irving H. Picard

Trustee for the Liquidation of the Business of
Bernard L. Madoff Investment Securities LLC

cc: John Oleske
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016

EXHIBIT G

John Oleske, Esq.
Herrick, Feinstein LLP
2 Park Avenue
New York, New York 10016
Tel: (212) 592-1400
Email: joleske@herrick.com
Attorneys for Claimant A&G Goldman Partnership

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-0179 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF Debtor,	

CLAIMANT'S OBJECTION TO TRUSTEE'S DETERMINATION OF CLAIM

Claimant A & G Goldman Partnership, by its attorneys Herrick, Feinstein LLP, hereby submits its objection to the Trustee's denial of its customer Claim Number 015036. The basis for Claimant's objection is the Trustee's faulty construction of the term Net Equity, which should properly be based on each claimant's balance as shown on their November 30, 2008

account statement provided by BLMIS.

In support of its objection Claimant submits herewith its November 30, 2008 account statement, which shows a closing balance of $1,618,432.86. Based on that closing balance, Claimant is entitled to an allowed claim in the BLMIS liquidation proceeding.

Dated: New York, New York
September 28, 2009

HERRICK, FEINSTEIN LLP

By:_____
John Oleske
2 Park Avenue
New York, New York 10016
Telephone: 212-592-1400
joleske@herrick.com
Attorneys for Claimant
A&G Goldman Partnership

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC
New York □ London

885 Third Avenue
New York, NY 10022
(212) 230-2424
800 334-1343
Fax (212) 838-4061

Affiliated with
Madoff Securities International Limited
12 Berkeley Street
Mayfair, London W1J 8DT
Tel 020 7493 6222

A & G GOLDMAN PARTNERSHIP

C/O G GOLDMAN
9 RYE ROAD
RYE NY 10580

PERIOD ENDING: 11/30/08 | PAGE: 1
YOUR ACCOUNT NUMBER: 1-G0304-3-0 | YOUR TAX PAYER IDENTIFICATION NUMBER: ******5682

DATE	BOUGHT RECEIVED OR LONG	SOLD DELIVERED OR SHORT	TNN	DESCRIPTION	PRICE OR SYMBOL	AMOUNT DEBITED TO YOUR ACCOUNT	AMOUNT CREDITED TO YOUR ACCOUNT
				BALANCE FORWARD		138,401.24	
11/12	884		3613	WAL-MART STORES INC	55.830	49,388.72	
11/12	578		4115	INTERNATIONAL BUSINESS MACHS	87.270	50,465.06	
11/12	2,142		7939	EXXON MOBIL CORP	72.880	156,193.96	
11/12	2,346		8441	INTEL CORP	14.510	34,133.46	
11/12	1,122		12767	JOHNSON & JOHNSON	59.580	66,892.76	
11/12	1,530		17092	J P MORGAN CHASE & CO	38.530	59,011.90	
11/12	816		21418	COCA COLA CO	44.660	36,474.56	
11/12	476		25744	MCDONALDS CORP	55.370	26,375.12	
11/12	884		30070	MERCK & CO	28.550	25,273.20	
11/12	3,230		34396	MICROSOFT CORP	21.810	70,575.30	
11/12	1,632		38722	ORACLE CORPORATION	17.300	28,298.60	
11/12	646		51700	PEPSICO INC	56.410	36,465.86	
11/12	374		52202	APPLE INC	100.780	37,705.72	
11/12	2,754		56026	PFIZER INC	16.940	46,762.76	
11/12	646		56528	ABBOTT LABORATORIES	54.610	35,303.06	
11/12	1,224		60352	PROCTER & GAMBLE CO	64.080	78,481.92	
11/12	442		60854	AMGEN INC	59.160	26,155.72	
11/12	850		64678	PHILLIP MORRIS INTERNATIONAL	43.600	37,094.00	
11/12	2,040		65180	BANK OF AMERICA	21.590	44,124.60	
11/12	680		69004	QUALCOMM INC	33.770	22,990.60	
11/12	2,210		69506	CITI GROUP INC	12.510	27,735.10	
11/12	510		73350	SCHLUMBERGER LTD	49.480	25,254.80	
11/12	1,224		73832	COMCAST CORP CL A	16.510	20,256.24	
				CONTINUED ON PAGE 2			

PLEASE RETAIN THIS STATEMENT FOR INCOME TAX PURPOSES

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC
New York □ London

885 Third Avenue
New York, NY 10022
(212) 230-2424
800 334-1343
Fax (212) 838-4061

Affiliated with
Madoff Securities International Limited
12 Berkeley Street
Mayfair, London W1J 8DT
Tel 020 74936222

A & G GOLDMAN PARTNERSHIP

C/O G GOLDMAN
9 RYE ROAD
RYE NY 10580

PERIOD ENDING 11/30/08 | PAGE 2

YOUR ACCOUNT NUMBER 1-G0304-3-0 | YOUR TAX PAYER IDENTIFICATION NUMBER *****5682

DATE	BOUGHT RECEIVED OR LONG	SOLD DELIVERED OR SHORT	TRN	DESCRIPTION	PRICE PER SHARE	AMOUNT DEBITED TO YOUR ACCOUNT	AMOUNT CREDITED TO YOUR ACCOUNT
11/12	2,414		77656	AT&T INC	27	65,274.00	
11/12	612		78158	CONOCOPHILIPS	52.510	32,160.12	
11/12	408		81982	UNITED PARCEL SVC INC CLASS B	52.040	21,248.32	
11/12	2,482		82484	CISCO SYSTEMS INC	16.730	41,622.86	
11/12	714		86308	U S BANCORP	29.530	21,112.42	
11/12	850		86810	CHEVRON CORP	73.430	62,449.50	
11/12	408		90634	UNITED TECHNOLOGIES CORP	53.160	21,705.28	
11/12	4,318		91136	GENERAL ELECTRIC CO	19.630	84,934.34	
11/12	1,156		94960	VERIZON COMMUNICATIONS	30.410	35,199.96	
11/12	102		95462	GOOGL [illegible]	337.400	34,418.80	
11/12	1,428		99286	WELLS FARGO & CO NEW	29.800	42,611.40	
11/12	1,020		99788	HEWLETT PACKARD CO	34.900	35,638.00	
11/12		1,550,000	21898	U S TREASURY BILL DUE 2/12/2009	99.936		1,549,008.00
11/12				110 1 2/12/2009			
11/12				FIDELITY SPARTAN U.S TREASURY MONEY MARKET	DIV		9.67
11/12				DIV 11/12/08			
11/12		16,188	16997	FIDELITY SPARTAN U S TREASURY MONEY MARKET	1		16,188.00
11/12	18,540		26366	FIDELITY SPARTAN U.S TREASURY MONEY MARKET	1	18,540.00	
11/19				FIDELITY SPARTAN U S TREASURY MONEY MARKET DIV 11/19/08	DIV		2.26
				CONTINUED ON PAGE 3			

PLEASE RETAIN THIS STATEMENT FOR INCOME TAX PURPOSES

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC
New York □ London

885 Third Avenue
New York, NY 10022
(212) 230-2424
800 334-1343
Fax (212) 838-4061

Affiliated with
Madoff Securities International Limited
12 Berkeley Street
Mayfair, London W1J 8DT
Tel 020 7493 6222

A & G GOLDMAN PARTNERSHIP

C/O G GOLDMAN
9 RYE ROAD
RYE NY 10580

PERIOD ENDING 11/30/08 | PAGE 3
YOUR ACCOUNT NUMBER 1-G0304-3-0 | YOUR TAX PAYER IDENTIFICATION NUMBER *****5682

DATE	BOUGHT RECEIVED OR LONG	SOLD DELIVERED OR SHORT	CTRN	DESCRIPTION	PRICE OR SYMBOL	AMOUNT DEBITED TO YOUR ACCOUNT	AMOUNT CREDITED TO YOUR ACCOUNT
11/19		18,540	51740	FIDELITY SPARTAN U.S.TREASURY MONEY MARKET	1		18,540.00
11/19	100,000		56337	U.S.TREASURY BILL DUE 03/26/2009	99.926	99,926.00	
11/19	20,480		60779	FIDELITY SPARTAN U.S.TREASURY MONEY MARKET	1	20,480.00	
11/19	22,000		63668	FIDELITY SPARTAN U S TREASURY MONEY MARKET	1	22,000.00	
11/19		22,000	63668	FIDELITY SPARTAN U.S.TREASURY MONEY MARKET	1		22,000.00
				NEW BALANCE		233,397.31	
				SECURITY POSITIONS	MKT PRICE		
	2,414			AT&T INC	28.560		
	646			ABBOTT LABORATORIES	52.390		
	442			AMGEN INC	55.540		
	374			APPLE INC	92.670		
	2,040			BANK OF AMERICA	16.250		
	850			CHEVRON CORP	79.010		
	2,482			CISCO SYSTEMS INC	16.540		
	2,210			CITI GROUP INC	8.290		
	816			COCA COLA CO	46.870		
	1,224			COMCAST CORP CL A	17.340		
				CONTINUED ON PAGE 4			

PLEASE RETAIN THIS STATEMENT FOR INCOME TAX PURPOSES

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC
New York □ London

885 Third Avenue
New York, NY 10022
(212) 230-2424
800 334-1343
Fax (212) 838-4061

Affiliated with
Madoff Securities International Limited
12 Berkeley Street
Mayfair, London W1J 8DT
Tel 020 7493 6222

A & G GOLDMAN PARTNERSHIP

C/O G GOLDMAN
9 RYE ROAD
RYE NY 10580

PERIOD ENDING 11/30/08 | PAGE 4 | YOUR ACCOUNT NUMBER 1-G0304-3-0 | YOUR TAX PAYER IDENTIFICATION NUMBER *****5682

DATE	BOUGHT RECEIVED OR LONG	SOLD DELIVERED OR SHORT	TRN	DESCRIPTION	PRICE OR SYMBOL	AMOUNT DEBITED TO YOUR ACCOUNT	AMOUNT CREDITED TO YOUR ACCOUNT
	612			CONOCOPHILIPS	52.520		
	2,142			EXXON MOBIL CORP	80.150		
	4,318			GENERAL ELECTRIC CO	17.170		
	102			GOOGLE	292.960		
	1,020			HEWLETT PACKARD CO	35.280		
	2,346			INTEL CORP	13.800		
	578			INTERNATIONAL BUSINESS MACHS	81.600		
	1,530			J P MORGAN CHASE & CO	31.660		
	1,122			JOHNSON & JOHNSON	58.580		
	476			MCDONALDS CORP	58.750		
	884			MERCK & CO INC	26.720		
	3,230			MICROSOFT CORP	20.220		
	1,632			ORACLE CORPORATION	16.090		
	646			PEPSICO INC	56.700		
	2,754			PFIZER INC	16.430		
	850			PHILLIP MORRIS INTERNATIONAL	42.160		
	1,224			PROCTER & GAMBLE CO	64.350		
	680			QUALCOMM INC	33.570		
	510			SCHLUMBERGER LTD	50.740		
	20,480			FIDELITY SPARTAN U S TREASURY MONEY MARKET	1		
	714			U S BANCORP	26.980		
	408			UNITED PARCEL SVC INC CLASS B	57.600		
	100,000			U S TREASURY BILL DUE 03/26/2009	99.971		
				3/26/2009			
				CONTINUED ON PAGE 5			

PLEASE RETAIN THIS STATEMENT FOR INCOME TAX PURPOSES

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC
New York □ London

885 Third Avenue
New York, NY 10022
(212) 230-2424
800 334-1343
Fax (212) 838-4061

Affiliated with
Madoff Securities International Limited
12 Berkeley Street
Mayfair, London W1J 8DT
Tel 020 7493 6522

A & G GOLDMAN PARTNERSHIP

C/O G GOLDMAN
9 RYE ROAD
RYE NY 10580

Account Number: 1-G0304-3-0
Statement Period: 11/30/08
Page: 5
Your Tax Payer Identification Number: ******5682

DATE	DESCRIPTION	PRICE PER SHARE/ UNIT	AMOUNT CREDITED TO YOUR ACCOUNT	AMOUNT DEBITED TO YOUR ACCOUNT
	UNITED TECHNOLOGIES CORP	48.530		
408	VERIZON COMMUNICATIONS	32.650		
1,156	WAL-MART STORES INC	55.880		
1,884	WELLS FARGO & CO NEW	28.890		
1,428				
	MARKET VALUE OF SECURITIES			
	LONG / SHORT			
	78187232-86			

PLEASE RETAIN THIS STATEMENT FOR INCOME TAX PURPOSES

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC
New York □ London

885 Third Avenue
New York, NY 10022
(212) 230-2424
800 334-1343
Fax (212) 838-4061

Affiliated with
Madoff Securities International Limited
12 Berkeley Street
Mayfair, London W1J 8DT
Tel 020 7493 8822

A E G GOLDMAN PARTNERSHIP

C/O G GOLDMAN
9 RYE ROAD
RYE NY 10580

YOUR ACCOUNT NUMBER: 1-60304-3-0
MONTH ENDING: 11/30/08
PAGE: 6
YOUR TAXPAYER IDENTIFICATION NUMBER: *****5682

DATE	BOUGHT / SOLD / INTEREST / DESCRIPTION	PRICE PER SHARE	AMOUNT DEBITED TO YOUR ACCOUNT	AMOUNT CREDITED TO YOUR ACCOUNT
	YEAR-TO-DATE SUMMARY			
	DIVIDENDS			18,766.38
	GROSS PROCEEDS FROM SALES			17,753,969.87

PLEASE RETAIN THIS STATEMENT FOR INCOME TAX PURPOSES

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC
New York □ London

885 Third Avenue
New York, NY 10022
(212) 230-2424
800 334-1343
Fax (212) 838-4061

Affiliated with
Madoff Securities International Limited
12 Berkeley Street
Mayfair, London W1J 8DT
Tel 020 7493 6222

A & G GOLDMAN PARTNERSHIP

C/O G GOLDMAN
9 RYE ROAD
RYE NY 10580

PERIOD ENDING: 11/30/08
PAGE: 1
YOUR ACCOUNT NUMBER: 1-G0304-4-0
YOUR TAX PAYER IDENTIFICATION NUMBER: *****5682

DATE	BOUGHT RECEIVED OR LONG	SOLD DELIVERED OR SHORT	TRX	DESCRIPTION	PRICE OR SYMBOL	AMOUNT DEBITED TO YOUR ACCOUNT	AMOUNT CREDITED TO YOUR ACCOUNT
				BALANCE FORWARD			138,402.00
11/12		34	43048	S & P 100 INDEX NOVEMBER 460 CALL	15.800		53,686.00
11/12	34		47374	S & P 100 INDEX NOVEMBER 450 PUT	17.800	60,554.00	
11/19		34	33478	S & P 100 INDEX DECEMBER 430 CALL	26		88,366.00
11/19	34		37803	S & P 100 INDEX DECEMBER 420 PUT	30	102,034.00	
11/19	34		42128	S & P 100 INDEX NOVEMBER 460 CALL	3	10,234.00	
11/19		34	46453	S & P 100 INDEX NOVEMBER 450 PUT	37		125,766.00
				NEW BALANCE			233,398.00
				SECURITY POSITIONS	MKT PRICE		
		34		S & P 100 INDEX DECEMBER 430 CALL	23.300		
	34			S & P 100 INDEX DECEMBER 420 PUT	16.500		
				MARKET VALUE OF SECURITIES			
				LONG 56,100.00 SHORT 79,220.00-			

PLEASE RETAIN THIS STATEMENT FOR INCOME TAX PURPOSES