1
2 **UNITED STATES COURT OF APPEALS**
3
4 **FOR THE SECOND CIRCUIT**
5
6 August Term, 2010
7
8
9 (Argued: March 3, 2011 Decided: August 16, 2011)
10
11 Docket Nos. 10-2378-bk(L); 10-2676-bk(con); 10-2677-bk(con);
12 10-2679-bk(con); 10-2684-bk(con); 10-2685-bk(con); 10-2687-
13 bk(con); 10-2691-bk(con); 10-2693-bk(con); 10-2694-bk(con);
14 10-2718-bk(con); 10-2737-bk(con); 10-3188-bk(con); 10-3579-
15 bk(con); 10-3675-bk(con)
16
17 -x
18
19 IN RE: BERNARD L. MADOFF INVESTMENT
20 SECURITIES LLC,
21 Debtor.*
22 -x
23
24 Before: JACOBS, Chief Judge, LEVAL and RAGGI,
25 Circuit Judges.
26
27 Former investors with Bernard L. Madoff appeal from an
28 order entered by the United States Bankruptcy Court for the
29 Southern District of New York (Lifland, J.) in the
30 liquidation proceedings of Bernard L. Madoff Investment
31 Securities LLC under the Securities Investor Protection Act.
32 The Trustee, Irving H. Picard, concluded that the investors'
33 "net equity," which determines how customer property will be

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* Consolidated docket number 10-2737-bk was dismissed with prejudice by stipulation of the parties on December 10, 2010. Fed. R. App. P. 42(b).

1 distributed in the wake of Madoff's fraud, should be
2 calculated based on the Net Investment Method. The
3 bankruptcy court affirmed the decision of the Trustee and
4 certified its decision for immediate appeal to this Court.
5 28 U.S.C. § 158(d)(2). This Court accepted the direct
6 appeal from the bankruptcy court, and for the following
7 reasons, we hold that the Trustee's determination as to how
8 to calculate "net equity" under the Securities Investor
9 Protection Act is legally sound in light of the
10 circumstances of this case and the relevant statutory
11 language. Accordingly, we affirm the order of the
12 bankruptcy court.

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39 DENNIS JACOBS, Chief Judge:
40
41 In the aftermath of a colossal Ponzi scheme conducted
42 by Bernard Madoff over a period of years, Irving H. Picard
43 has been appointed, pursuant to the Securities Investor

1 Protection Act, 15 U.S.C. § 78aaa et seq. ("SIPA"), as
2 Trustee for the liquidation of Bernard L. Madoff Investment
3 Securities LLC, id. § 78eee(b)(3). Pursuant to SIPA, Mr.
4 Picard has the general powers of a bankruptcy trustee, as
5 well as additional duties, specified by the Act, related to
6 recovering and distributing customer property. Id. § 78fff-
7 1. Essentially, Mr. Picard has been charged with sorting
8 out decades of fraud. The question presented by this appeal
9 is whether the method Mr. Picard selected for carrying out
10 his responsibilities under SIPA is legally sound under the
11 language of the statute. We hold that it is. Accordingly,
12 we affirm the order of the United States Bankruptcy Court
13 for the Southern District of New York (Lifland, J.).

14 **BACKGROUND**

15 The facts surrounding Bernard Madoff's multibillion
16 dollar Ponzi scheme are widely known and were recounted in
17 detail by the bankruptcy court. In re Bernard L. Madoff
18 Inv. Sec. LLC, 424 B.R. 122, 125-32 (Bankr. S.D.N.Y. 2010);
19 see also, e.g., In re Beacon Assocs. Litig., 745 F. Supp. 2d
20 386, 393-94 (S.D.N.Y. 2010); Anwar v. Fairfield Greenwich
21 Ltd., 728 F. Supp. 2d 372, 387, 389-90 (S.D.N.Y. 2010); In
22 re Tremont Sec. Law, State Law & Ins. Litig., 703 F. Supp.
23 2d 363, 367-68 (S.D.N.Y. 2010). For our purposes, a few

1 facts suffice. When customers invested with Bernard L.
2 Madoff Investment Securities LLC ("BLMIS"), they
3 relinquished all investment authority to Madoff. Madoff
4 collected funds from investors, claiming to invest those
5 funds pursuant to what he styled as a "split-strike
6 conversion strategy" for producing consistently high rates
7 of return on investments.[2] J.A. Vol. II at 292. The split-
8 strike conversion strategy supposedly involved buying a
9 basket of stocks listed on the Standard & Poor's 100 Index
10 and hedging through the use of options. However, Madoff
11 never invested those customer funds. Instead, Madoff
12 generated fictitious paper account statements and trading
13 records in order to conceal the fact that he engaged in no
14 trading activity whatsoever. Even though a customer's
15 monthly account statement listed securities transactions
16 purportedly executed during the reporting period and
17 purported individual holdings in various Standard & Poor's
18 100 Index stocks as of the end of the reporting period, the

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[2] A select group of Madoff's family members, close friends, and employees held "non-split strike" accounts. Madoff provided these customers with invented account statements that reflected even greater investor success than the unwavering returns purportedly earned for his split-strike customers. In re Bernard L. Madoff, 424 B.R. at 130-31. The non-split strike customers are not parties to this appeal.

1 statement did not reflect any actual trading or holdings of
2 securities by Madoff on behalf of the customer. "In fact,
3 the Trustee's investigation revealed many occurrences where
4 purported trades were outside the exchange's price range for
5 the trade date." In re Bernard L. Madoff, 424 B.R. at 130.
6 Other now revealed irregularities make it clear that "Madoff
7 never executed his split-strike investment and hedging
8 strategies, and could not possibly have done so." Id. To
9 point out just two examples, "an unrealistic number of
10 option trades would have been necessary to implement the . .
11 . [s]trategy" and "one of the money market funds in which
12 customer resources were allegedly invested through BLMIS . .
13 . has acknowledged that it did not even offer investment
14 opportunities in any such money market fund from 2005
15 forward." Id.
16 As is true of all Ponzi schemes, see Cunningham v.
17 Brown, 265 U.S. 1, 7 (1924) (describing the "remarkable
18 criminal financial career of Charles Ponzi"), Madoff used
19 the investments of new and existing customers to fund
20 withdrawals of principal and supposed profit made by other
21 customers. Madoff did not actually execute trades with
22 investor funds, so these funds were never exposed to the
23 uncertainties or fluctuations of the securities market.

1 Fictional customer statements were generated based on after-
2 the-fact stock "trades" using already-published trading data
3 to pick advantageous historical prices. J.A. Vol. I at 365-
4 66, 371, 512; J.A. Vol. II at 291, 293. The customer
5 statements documented an astonishing pattern of continuously
6 profitable trades, approximating the profits Madoff had
7 promised his customers, but reflected trades that had never
8 occurred. Although Madoff's scheme was engineered so that
9 customers always appeared to earn positive annual returns,
10 the dreamt-up rates of return Madoff assigned to different
11 customers' accounts varied significantly and arbitrarily.
12 In re Bernard L. Madoff, 424 B.R. at 130. Thus, the
13 customer statements reflected unvarying investor success;
14 but the only accurate entries reflected the customers' cash
15 deposits and withdrawals. J.A. Vol. I at 513.
16 Madoff's scheme collapsed when the flow of new
17 investments could no longer support the payments required on
18 earlier invested funds. See Eberhard v. Marcu, 530 F.3d
19 122, 132 n.7 (2d Cir. 2008) (describing typical Ponzi scheme
20 "where earlier investors are paid from the investments of
21 more recent investors . . . until the scheme ceases to
22 attract new investors and the pyramid collapses"). The
23 final customer statements issued by BLMIS falsely recorded

1 nearly $64.8 billion of net investments and related
2 fictitious gains. J.A. Vol. I at 505. It is not contended
3 on this appeal that any victim knew or should have known
4 that the investments and customer statements were
5 fictitious. It is unquestioned that the great majority of
6 investors relied on their customer statements for purposes
7 of financial planning and tax reporting, to their terrible
8 detriment.
9 When Madoff's fraud came to light, the Securities and
10 Exchange Commission filed a civil complaint in the United
11 States District Court for the Southern District of New York,
12 alleging that Madoff and BLMIS were operating a Ponzi
13 scheme.[3] The Securities Investor Protection Corporation
14 ("SIPC"), a nonprofit corporation consisting of registered
15 broker-dealers and members of national securities exchanges
16 that supports a fund used to advance money to a SIPA
17 trustee, then stepped in.[4] 15 U.S.C. § 78ccc; Sec. & Exch.
18 Comm'n v. Packer, Wilbur & Co., 498 F.2d 978, 980 (2d Cir.
19 1974). SIPC filed an application in the civil action
20 seeking a decree that the customers of BLMIS are in need of

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[3] Madoff was arrested and charged with securities fraud; he pleaded guilty to an eleven-count criminal indictment and was sentenced to 150 years' imprisonment.

[4] By virtue of its registration with the SEC as a broker-dealer, BLMIS is a member of SIPC.

1 the protections afforded by SIPA. 15 U.S.C.
2 § 78eee(a)(3)(A). The district court granted SIPC's
3 application; the protective order appointed Mr. Picard as
4 Trustee for the liquidation of the business of BLMIS and the
5 SIPA liquidation proceeding was removed to the bankruptcy
6 court. Id. § 78eee(b)(3)-(4); see also Sec. Investor Prot.
7 Corp. v. BDO Seidman, LLP, 222 F.3d 63, 67 (2d Cir. 2000).
8 SIPA establishes procedures for liquidating failed
9 broker-dealers and provides their customers with special
10 protections. In a SIPA liquidation, a fund of "customer
11 property," separate from the general estate of the failed
12 broker-dealer, is established for priority distribution
13 exclusively among customers. The customer property fund
14 consists of cash and securities received or held by the
15 broker-dealer on behalf of customers, except securities
16 registered in the name of individual customers. 15 U.S.C.
17 § 78lll(4). Each customer shares ratably in this fund of
18 assets to the extent of the customer's "net equity." Id.
19 § 78fff-2(c)(1)(B). Under SIPA:

20 The term "net equity" means the dollar amount of
21 the account or accounts of a customer, to be
22 determined by--
23
24 (A) calculating the sum which would have been
25 owed by the debtor to such customer if
26 the debtor had liquidated, by sale or purchase
27 on the filing date, all securities positions

> of such customer . . . ; minus
>
> (B) any indebtedness of such customer to the debtor on the filing date . . . .

Id. § 78lll(11).

In many liquidations, however, the assets in the customer property fund are insufficient to satisfy every customer's "net equity" claim. In such a case, SIPC advances money to the SIPA trustee to satisfy promptly each customer's valid "net equity" claim. For securities accounts, the maximum advance is $500,000 per customer. Id. § 78fff-3(a). For customers with claims for cash, the maximum advance is substantially less. Id. § 78fff-3(a)(1), (d). Under SIPA, all claims must be filed with the trustee, id. § 78fff-2(a)(2), who is charged with determining customer claims in writing. A customer's objection must be filed with the bankruptcy court.

In satisfying customer claims in this case, Mr. Picard, as the SIPA Trustee, determined that the claimants are customers with claims for securities within the meaning of SIPA. The Trustee further concluded that each customer's "net equity" should be calculated by the "Net Investment Method," crediting the amount of cash deposited by the customer into his or her BLMIS account, less any amounts withdrawn from it. J.A. at 274. The use of the Net

1 Investment Method limits the class of customers who have
2 allowable claims against the customer property fund to those
3 customers who deposited more cash into their investment
4 accounts than they withdrew, because only those customers
5 have positive "net equity" under that method. Some
6 customers objected to the Trustee's method of calculating
7 "net equity" and argued that they were entitled to recover
8 the market value of the securities reflected on their last
9 BLMIS customer statements (the "Last Statement Method").
10 After the filing of a number of objections, the Trustee
11 moved the bankruptcy court for an order affirming his use of
12 the Net Investment Method of calculating "net equity." Both
13 SIPC and the SEC submitted briefs supporting the Trustee's
14 motion.[5]

15 After a hearing, the bankruptcy court upheld the
16 Trustee's use of the Net Investment Method on the ground
17 that the last customer statements could not "be relied upon
18 to determine [n]et [e]quity" because customers' account
19 statements were "entirely fictitious" and did "not reflect

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[5] The SEC further argued that the Net Investment Method should be applied using inflation-adjusted dollars. The Trustee argued that the issue whether the Net Investment Method should be adjusted to account for inflation or interest was beyond the scope of the briefing and took no position on it.

1 actual securities positions that could be
2 liquidated . . . ." In re Bernard L. Madoff, 424 B.R. at
3 135. The bankruptcy court reasoned that the definition of
4 "net equity" under SIPA "must be read in tandem with SIPA
5 section 78fff-2(b), which requires the Trustee to discharge
6 [n]et [e]quity claims only 'insofar as such obligations are
7 [1] ascertainable from the books and records of the debtor
8 or [2] are otherwise established to the satisfaction of the
9 trustee.'" Id. (quoting 15 U.S.C. § 78fff-2(b)(2)). The
10 bankruptcy court emphasized that the "BLMIS books and
11 records expose a Ponzi scheme where no securities were ever
12 ordered, paid for or acquired[,]" and concluded the Trustee
13 could not "discharge claims upon the false premise that
14 customers' securities positions are what the account
15 statements purport them to be." Id. The Net Investment
16 Method, unlike the Last Statement Method, allowed Mr. Picard
17 to (in the bankruptcy court's phrase)"unwind[], rather than
18 legitimiz[e], the fraudulent scheme." Id. at 136. The
19 bankruptcy court reserved decision on the issue of whether
20 the Net Investment Method should be adjusted to account for
21 inflation or interest. Id. at 125 n.8. The bankruptcy
22 court certified an immediate appeal to this Court, over
23 which this Court accepted jurisdiction, pursuant to 28
24 U.S.C. § 158(d)(2)(A).

1 **DISCUSSION**

2 We review the legal conclusions of the bankruptcy
3 court, including its interpretation of SIPA, de novo.
4 Turner v. Davis, Gillenwater & Lynch (In re Inv. Bankers,
5 Inc.), 4 F.3d 1556, 1560 (10th Cir. 1993). In conducting
6 our independent review, we consider that the views of the
7 Securities & Exchange Commission ("SEC") and SIPC are
8 "entitled to respect, but only to the extent that [they
9 have] the power to persuade." Chao v. Russell P. Le Frois
10 Builder, Inc., 291 F.3d 219, 228 (2d Cir. 2002) (internal
11 quotation marks and alterations omitted); see also In re New
12 Times Sec. Servs., Inc., 371 F.3d 68, 76 (2d Cir. 2004)
13 ("New Times I") (observing "that the drafters of SIPA
14 clearly envisioned roles for both the SEC and SIPC in
15 administering the statute").
16 The positions of the parties on appeal are as follows.
17 Mr. Picard asserts that the objecting BLMIS claimants are
18 customers with claims for securities under SIPA and that the
19 plain language of SIPA dictates that their "net equity" be
20 calculated based on the Net Investment Method. The SEC, as
21 amicus curiae, supports the Trustee's view that, here, the
22 Net Investment Method is required by the language of SIPA.
23 The SIPC--deemed to be a party in interest as to all matters

1 arising in a SIPA proceeding--urges this Court to affirm the
2 order of the bankruptcy court, which holds that on the
3 present facts the Net Investment Method (and not the Last
4 Statement Method) correctly measures "net equity." The
5 objecting BLMIS claimants contend that the Last Statement
6 Method is mandated by the language of SIPA; that they had a
7 legitimate expectation that their customer statements were
8 accurate; that SIPA is designed to protect this legitimate
9 expectation; and that the Net Investment Method undermines
10 the purpose of the statute.

11 First, accepting that the objecting BLMIS claimants are
12 "customers" under SIPA, they are customers with claims for
13 securities. Second, while the objecting BLMIS claimants and
14 the Trustee argue the plain language of SIPA supports their
15 (irreconcilable) positions, we conclude that the statutory
16 language does not prescribe a single means of calculating
17 "net equity" that applies in the myriad circumstances that
18 may arise in a SIPA liquidation.[6] <u>See</u> <u>Sec. & Exch. Comm'n</u>
19 <u>v. Aberdeen Sec. Co.</u>, 480 F.2d 1121, 1123 (3d Cir. 1973)
20 ("The intent of Congress to protect customers of financially

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[6] The two competing methods of calculating "net equity" proposed by the parties to this litigation are the only two methods at issue here. We do not hold that they are the only possible approaches to calculation of "net equity" under SIPA.

1 distressed security dealers is clear, but the specifics of
2 precise resolution of individual situations are clouded by
3 the provisions of a statute which range far from the clarity
4 of blue sky one might expect in this area of the law.");
5 McKenny v. McGraw (In re Bell & Beckwith), 104 B.R. 842, 848
6 (Bankr. N.D. Ohio 1989) (rejecting "plain meaning" arguments
7 as to meaning of "allocation" under SIPA as "not
8 persuasive"). Differing fact patterns will inevitably call
9 for differing approaches to ascertaining the fairest method
10 for approximating "net equity," as defined by SIPA. See 15
11 U.S.C. § 78fff-2(b)(2).
12 Mr. Picard's selection of the Net Investment Method was
13 more consistent with the statutory definition of "net
14 equity" than any other method advocated by the parties or
15 perceived by this Court. There was therefore no error.[7]
16 SIPA serves dual purposes: to protect investors, and to
17 protect the securities market as a whole. See Sec. Inv.
18 Prot. Corp. v. Barbour, 421 U.S. 412, 415 (1975). Treatment
19 of the BLMIS claimants as customers with claims for
20 securities and calculating "net equity" based on the Net

[7] We express no view on whether the Net Investment Method should be adjusted to account for inflation or interest, an issue on which the bankruptcy court has not yet ruled and which is not before us on this interlocutory appeal.

1 Investment Method effectuates these purposes. As the
2 bankruptcy court observed, "[a]ny dollar paid to reimburse a
3 fictitious profit is a dollar no longer available to pay
4 claims for money actually invested. If the Last Statement
5 Method were adopted," those claimants who have withdrawn
6 funds from their BLMIS accounts that exceed their initial
7 investments "would receive more favorable treatment by
8 profiting from the principal investments of [those claimants
9 who have withdrawn less money than they deposited], yielding
10 an inequitable result." In re Bernard L. Madoff, 424 B.R.
11 at 141. The statutory definition of "net equity" does not
12 require the Trustee to aggravate the injuries caused by
13 Madoff's fraud. Use of the Last Statement Method in this
14 case would have the absurd effect of treating fictitious and
15 arbitrarily assigned paper profits as real and would give
16 legal effect to Madoff's machinations.

17 **I**

18 The threshold issues are whether the BLMIS claimants
19 are "customers" within the meaning of SIPA and, if so,
20 whether they are customers with claims for securities or
21 customers with claims for cash. If the objecting BLMIS
22 claimants are not "customers," 15 U.S.C. § 78lll(2)(A), they
23 are not entitled to the protection of SIPA at all, see Sec.

1 Inv. Prot. Corp. v. Pepperdine Univ. (In re Brentwood Sec.,
2 Inc.), 925 F.2d 325, 327 (9th Cir. 1991). Under SIPA,
3 "[t]he term 'customer' includes . . . any person who has
4 deposited cash with the debtor for the purpose of purchasing
5 securities." 15 U.S.C. § 78lll(2)(B)(i); see also Tew v.
6 Res. Mgmt. (In re ESM Gov't Sec., Inc.), 812 F.2d 1374, 1376
7 (11th Cir. 1987) (observing "that it is the act of
8 entrusting the cash to the debtor for the purpose of
9 effecting securities transactions that triggers the customer
10 status provisions" (emphasis omitted)). It also includes:

11 . . . [a person] who has a claim on account of
12 securities received, acquired, or held by the
13 debtor in the ordinary course of business as a
14 broker or dealer from or for the securities
15 accounts of such person for safekeeping, with a
16 view to sale, to cover consummated sales, pursuant
17 to purchases, as collateral, security, or for
18 purposes of effecting transfer.
19
20 15 U.S.C. § 78lll(2)(A). We conclude that the BLMIS
21 claimants are customers with claims for securities within
22 the meaning of SIPA.

23 While SIPA does not--and cannot--protect an investor
24 against all losses, it "does . . . protect claimants who
25 attempt to invest through their brokerage firm but are
26 defrauded by dishonest brokers." Ahammed v. Sec. Inv. Prot.
27 Corp. (In re Primeline Sec. Corp.), 295 F.3d 1100, 1107
28 (10th Cir. 2002). SIPA provides this protection by ensuring

1 that claimants who deposited cash with a broker "for the
2 purpose of purchasing securities," 15 U.S.C. §
3 78lll(2)(B)(i), are treated as customers with claims for
4 securities. This is so because the "critical aspect of the
5 'customer' definition is the entrustment of cash or
6 securities to the broker-dealer *for the purposes of trading*
7 *securities*." Appleton v. First Nat'l Bank of Ohio, 62 F.3d
8 791, 801 (6th Cir. 1995) (emphasis added).
9 The legislative history supports the view that the
10 BLMIS claimants are customers with claims for securities.
11 "Throughout the [House Report on SIPA,] 'investors' is used
12 synonymously with 'customers,'" and it is clear that an
13 individual who had documentation of his status as a "trading
14 customer . . . was to be protected." Sec. & Exch. Comm'n v.
15 F.O. Baroff Co., 497 F.2d 280, 283 (2d Cir. 1974). Indeed,
16 treating the BLMIS claimants as customers with claims for
17 securities protects their "legitimate expectations" as
18 investors in the securities market. S. Rep. No. 95-763, at
19 2 (1978), reprinted in 1978 U.S.C.C.A.N. 764, 765.
20 Similarly, SIPA's implementing regulations bolster the
21 shared view of the Trustee, SIPC, and the SEC that a
22 claimant who has "written confirmation" that securities have
23 been purchased or sold on his or her behalf should be

1 treated as a customer with a claim for securities. 17
2 C.F.R. §§ 300.501(b)(1), 300.502(a)(1). The regulation does
3 not, however, mandate that this "written confirmation" form
4 the basis for calculating a customer's "net equity."

5 **II**

6 The BLMIS claimants object that the only way their
7 "legitimate expectations" can be protected is by calculating
8 "net equity" by reference to their last customer statements.
9 We conclude, however, that while the BLMIS customer
10 statements confirm that the BLMIS claimants are properly
11 treated as customers with claims for securities, the last
12 customer statements are not useful for ascertaining "net
13 equity." We "begin[] where all such inquiries must begin:
14 with the language of the statute itself." United States v.
15 Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989). Two
16 provisions interact. SIPA provides that a customer's "net
17 equity" is determined by:

18 (A) calculating the sum which *would have been owed*
19 by the debtor to such customer *if the debtor had*
20 *liquidated*, by sale or purchase on the filing date
21 [of the protective order]--
22
23 (i) *all securities positions* of such customer
24 . . . minus
25
26 (B) any indebtedness of such customer to the
27 debtor on the filing date . . . .
28
29 15 U.S.C. § 78lll(11) (emphasis added). At the same time,

1 SIPA provides that the Trustee should make payments to
2 customers based on "net equity" insofar as the amount owed
3 to the customer is "ascertainable from the *books and records*
4 of the debtor or [is] otherwise established to the
5 *satisfaction of the trustee.*" Id. § 78fff-2(b) (emphasis
6 added).
7 The objecting BLMIS claimants contend that their
8 "securities positions" should be determined by reference to
9 the "liquidat[ion]" value, id. § 78lll(11)(A), of the
10 securities listed on their last customer statements. The
11 Trustee argues that the customer statements do not reflect
12 "securities positions" that could be "liquidated" because
13 the account statements were wholly the invention of Madoff
14 and do not reflect actual securities positions; that any
15 pay-out of "net equity" therefore also requires a review of
16 the "books and records" of BLMIS; and that "the books and
17 records of the debtor reveal that the last statements are a
18 fiction." Br. of Appellee Picard at 28.
19 We agree with Mr. Picard that a SIPA trustee's
20 obligation to reimburse customers based on "net equity" must
21 be considered together with SIPA's requirement that the
22 Trustee discharge "obligations of the debtor to a customer
23 relating to, or net equity claims based upon . . .

securities . . . 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. § 78fff-2(b)(2); see also Sec. Investor Prot. Corp. v. Lehman Bros. Inc., 433 B.R. 127, 133 (Bankr. S.D.N.Y. 2010) ("Under SIPA, the Trustee is required to determine a 'customer' claim based on the 'net equity' of the customer as shown on the books and records of the debtor." (footnote omitted)). This accords with our usual practice of examining the "overall structure and operation" of a statute. Puello v. Bureau of Citizenship & Immigration Servs., 511 F.3d 324, 329 (2d Cir. 2007). "The meaning of a particular section in a statute can be understood in context with and by reference to the whole statutory scheme, by appreciating how sections relate to one another." Auburn Hous. Auth. v. Martinez, 277 F.3d 138, 144 (2d Cir. 2002). "In other words, the preferred meaning of a statutory provision is one that is consonant with the rest of the statute." Id.

When the terms of the statute are read together, the statute directs that a SIPA trustee should determine a customer's entitlement to recover "net equity" based both on the statutory definition of that term and by reference to the books and records of the debtor. While the language of

1 the statute clearly requires a SIPA trustee to distribute
2 customer property based on "net equity," the statute does
3 not define "net equity" by reference to a customer's last
4 account statement. Nor does it say specifically how "net
5 equity" should be calculated if a dishonest broker failed to
6 place a customer's funds into the security market,
7 notwithstanding that the customer "deposited cash with the
8 debtor for the purpose of purchasing securities," id. §
9 78lll(2)(B)(i).

10 Here, the profits recorded over time on the customer
11 statements were after-the-fact constructs that were based on
12 stock movements that had already taken place, were rigged to
13 reflect a steady and upward trajectory in good times and
14 bad, and were arbitrarily and unequally distributed among
15 customers. These facts provide powerful reasons for the
16 Trustee's rejection of the Last Statement Method for
17 calculating "net equity." In addition, if the Trustee had
18 permitted the objecting claimants to recover based on their
19 final account statements, this would have "affect[ed] the
20 limited amount available for distribution from the customer
21 property fund." In re Bernard L. Madoff, 424 B.R. at 133.
22 The inequitable consequence of such a scheme would be that
23 those who had already withdrawn cash deriving from imaginary

1 profits in excess of their initial investment would derive
2 additional benefit at the expense of those customers who had
3 not withdrawn funds before the fraud was exposed. Because
4 of these facts, the Net Investment Method better measures
5 "net equity," as statutorily defined, than does the Last
6 Statement Method.[8] As the bankruptcy court reasoned, "[t]he
7 Net Investment Method is appropriate because it relies
8 solely on unmanipulated withdrawals and deposits and refuses
9 to permit Madoff to arbitrarily decide who wins and who
10 loses." In re Bernard L. Madoff, 424 B.R. at 140.

11 In holding that it was proper for Mr. Picard to reject
12 the Last Statement Method, we expressly do not hold that
13 such a method of calculating "net equity" is inherently
14 impermissible. To the contrary, a customer's last account

[8] Because we find that, in this case, the Net Investment Method advocated by Mr. Picard is superior to the Last Statement Method as a matter of law, we have no need to consider whether a SIPA trustee may exercise discretion in selecting a method to calculate "net equity." Fraud is endlessly resourceful and the unraveling of weaved-up sins may sometimes require the grant of a measure of latitude to a SIPA trustee. It therefore appears to us that that in many circumstances a SIPA trustee may, and should, exercise some discretion in determining what method, or combination of methods, will best measure "net equity." We have no reason to doubt that a reviewing court could and should accord a degree of deference to such an exercise of discretion so long as the method chosen by the trustee allocates "net equity" among the competing claimants in a manner that is not clearly inferior to other methods under consideration.

1 statement will likely be the most appropriate means of
2 calculating "net equity" in more conventional cases. We
3 would expect that resort to the Net Investment Method would
4 be rare because this method wipes out all events of a
5 customer's investment history except for cash deposits and
6 withdrawals. The extraordinary facts of this case make the
7 Net Investment Method appropriate, whereas in many
8 instances, it would not be. The Last Statement Method, for
9 example, may be appropriate when securities were actually
10 purchased by the debtor, but then converted by the debtor.
11 Indeed, the Last Statement Method may be especially
12 appropriate where--unlike with the BLMIS accounts at issue
13 in this appeal--customers authorize or direct purchases of
14 specific stocks. See generally Miller v. DeQuine (In re
15 Stratton Oakmont, Inc.), No. 01-CV-2812 RCC, 01-CV-2313 RCC,
16 2003 WL 22698876 (S.D.N.Y. Nov. 14, 2003).
17 Ascertaining the proper measure of "net equity" in a
18 given case is for the ultimate purpose of issuing payments
19 to customers; so, the ability to deduce payment amounts (to
20 the satisfaction of the trustee) will bear upon the method
21 selected for calculating "net equity." In this case, the
22 Net Investment Method allows the Trustee to make payments
23 based on withdrawals and deposits, which can be confirmed by
24 the debtor's books and records, and results in a

1 distribution of customer property that is proper under SIPA.

2 **III**

3 Under the circumstances of this case, the limitation on
4 the objecting customers' recovery imposed by the Net
5 Investment Method is consistent with the purpose and design
6 of SIPA. "The principal purpose of SIPA is to protect
7 investors against financial losses arising from the
8 insolvency of their brokers." In re New Times Sec. Servs.,
9 Inc., 463 F.3d 125, 127 (2d Cir. 2006) ("New Times II")
10 (internal quotation marks omitted). SIPA is also intended
11 to "protect capital markets by instilling confidence in
12 securities traders." Sec. Investor Prot. Corp. v. Morgan,
13 Kennedy & Co., 533 F.2d 1314, 1317 (2d Cir. 1976). "SIPA's
14 main purpose [i]s . . . not to prevent fraud or conversion,
15 but to reverse los[s]es resulting from brokers' insolvency."
16 In re Stratton Oakmont, 2003 WL 22698876, at *5; see also
17 Appleton, 62 F.3d at 801; In re Brentwood Sec., 925 F.2d at
18 326.

19 The BLMIS claimants characterize the overall statutory
20 scheme as an insurance guarantee of the securities positions
21 set out in their account statements. They maintain that
22 SIPA should operate to make them whole from the losses they
23 incurred as a result of Madoff's dishonesty. We disagree.

1 While this Court has referred to SIPC as providing a "form
2 of public insurance," Packer, Wilbur & Co., 498 F.2d at 985,
3 it is clear that the obligations imposed on an insurance
4 provider under state law do *not* apply to this
5 congressionally-created "nonprofit membership corporation."
6 Barbour, 421 U.S. at 413; see also, e.g., Rosenbluth
7 Trading, Inc. v. United States, 736 F.2d 43, 46 (2d Cir.
8 1984) (observing that although Social Security is often
9 referred to as insurance, "[m]anifestly, social security is
10 not traditional insurance, and consequently principles
11 applicable to [insurance policies] . . . need not be
12 imported uncritically into lawsuits involving social
13 security"). Moreover, a registered broker-dealer may obtain
14 insurance under New York law and, in the event of a SIPA
15 liquidation, New York law governs the relative ability of
16 implicated parties to obtain the benefit of insurance
17 coverage. See generally Am. Bank & Trust Co. v. Davis
18 (Matter of F.O. Baroff Co.), 555 F.2d 38, 41-42 (2d Cir.
19 1977) (stating claimant in SIPA liquidation may share in
20 insurance held by bankrupt debtor).

21 It is not at all clear that SIPA protects against all
22 forms of fraud committed by brokers. See In re Investors
23 Ctr., Inc., 129 B.R. 339, 353 (Bankr. E.D.N.Y. 1991)
24 ("Repeatedly this Court has been forced to tell claimants

1 that the fund created for the protection of customers of
2 honest, but insolvent, brokers gives them no protection when
3 the insolvent broker has been guilty of dishonesty, breach
4 of contract or fraud."); H.R. Rep. No. 91-1613, at 1 (1970),
5 reprinted in 1970 U.S.C.C.A.N. 5254, 5255 (stating "[t]he
6 primary purpose of [SIPA] . . . is to provide protection for
7 investors if the broker-dealer with whom they are doing
8 business encounters financial troubles"). But it is clear
9 that the statute is not designed to insure investors against
10 *all* losses. See, e.g., Packer, Wilbur & Co., 498 F.2d at
11 983 ("SIPA was not designed to provide full protection to
12 all victims of a brokerage collapse."); Sec. Investor Prot.
13 Corp. v. Associated Underwriters, Inc., 423 F. Supp. 168,
14 171 (D. Utah 1975) (SIPA does not "guarantee that customers
15 will recover their investments which may have diminished as
16 a result of, among other things, market fluctuations or
17 broker-dealer fraud"). But, no party has contested the
18 availability of advances under SIPA to cushion the impact of
19 Madoff's fraud.

20 In any event, SIPA is intended to expedite the return
21 of *customer property*, and SIPC provides advances on customer
22 property. Customer property, in turn, is a term defined by
23 the statute as "cash and securities . . . at any time

1 received, acquired, or held by or for the account of a
2 debtor from or for the securities accounts of a customer,
3 and the proceeds of any such property transferred by the
4 debtor, including property unlawfully converted." 15 U.S.C.
5 § 78lll(4). Here, notwithstanding the BLMIS customer
6 statements, there were no securities purchased and there
7 were no proceeds from the money entrusted to Madoff for the
8 purpose of making investments. Moreover, customers share
9 "ratably" in customer property on the basis of their "net
10 equity," id. § 78fff-2(c)(1)(B); so if customers receive
11 SIPC advances based on property that is a fiction, those
12 advances will necessarily diminish the amount of customer
13 property available to other investors, including those who
14 have not recouped even their initial investment. Because
15 the main purpose of determining "net equity" is to achieve a
16 fair allocation of the available resources among the
17 customers, the Trustee properly rejected the Last Statement
18 Method as it would have undermined this objective.

19 **IV**

20 The objecting claimants maintain that a pair of
21 decisions of this Court--New Times I and New Times II--
22 dictate that the Last Statement Method be used to calculate
23 "net equity." We conclude that, to the contrary, our

1 precedent is consistent with the Trustee's decision to
2 utilize the Net Investment Method under the circumstances of
3 this case. And, use of the Last Statement Method in this
4 case would have been an impermissible means of calculating
5 "net equity."
6 Like the BLMIS litigation, the New Times cases arose
7 out of a Ponzi scheme. After the New Times scheme was
8 exposed, a SIPA trustee was appointed and a liquidation
9 proceeding commenced. New Times I, 371 F.3d at 71. The
10 SIPA trustee divided the claimants into two groups. One
11 group of claimants had been misled to believe that they were
12 investing "in mutual funds that in reality existed." Id. at
13 74. "[T]he information that these claimants received on
14 their account statements mirrored what would have happened
15 had the given transaction been executed." Id. (internal
16 quotation marks omitted). The New Times SIPA trustee
17 treated these claimants as customers with claims for
18 securities and reimbursed them based on their account
19 statements. The second group of claimants were
20 "fraudulently induced" to buy "shares in bogus mutual funds"
21 that did not exist. Id. at 71. The New Times trustee
22 treated these claimants as customers with claims for cash;
23 they objected; and the district court sustained their
24 objections, holding that they had claims for securities and

1 that their "net equity" should be determined by reference to
2 their customer statements. Id. The New Times Trustee and
3 SIPC appealed.[9]
4 This Court ruled [i] that the New Times claimants who
5 believed they had invested in mutual funds that did not, in
6 fact, exist, should be treated as customers with claims for
7 securities, but [ii] that their "net equity" could not be
8 calculated by reference to the "fictitious securities
9 positions reflected in the Claimants' account statements."
10 Id. at 75. The New Times I Court was persuaded by the joint
11 view of the SEC and SIPC that "basing customer recoveries on
12 fictitious amounts in the firm's books and records would
13 allow customers to recover arbitrary amounts that
14 necessarily have no relation to reality . . . [and would]
15 leave[] the SIPC fund unacceptably exposed." Id. at 88
16 (internal quotation marks omitted). Calculations based on
17 made-up values of fictional securities would be "unworkable"
18 and would create "potential absurdities." Id. Accordingly,
19 it was held that "each Claimant's net equity should be
20 calculated by reference to the amount of money the Claimants
21 originally invested with the Debtors (*not* including any

[9] The New Times claimants who were originally treated as customers with claims for securities and compensated based on their customer statements were never before this Court.

1 fictitious interest or dividend reinvestments)." Id. at 71.
2 In New Times II, this Court concluded that investors in
3 New Times Securities Services who, prior to the SIPA
4 proceeding, "were induced to liquidate their accounts . . .
5 and make a loan of the imaginary funds to the brokerage
6 house and to [the principal]" were not customers within the
7 meaning of SIPA. New Times II, 463 F.3d at 126, 129. They
8 could only legitimately have expected to be treated as
9 lenders unprotected by SIPA. Id. at 130.
10 Taken together, New Times I and New Times II militate
11 in favor of limiting recovery by BLMIS claimants to their
12 Net Investment. True, the objecting BLMIS claimants are
13 unlike the appellants in New Times I because their customer
14 statements reflected investments in real stocks listed on
15 the Standard & Poor's 100 Index. However, the objecting
16 BLMIS claimants are similarly situated to the New Times
17 appellants in a crucial respect: assessing "net equity"
18 based on their customer statements would require the Trustee
19 to establish each claimant's "net equity" based on a fiction
20 created by the perpetrator of the fraud. Commenting on the
21 New Times I decision, the New Times II Court stated:

22 The court declined to base the recovery on the
23 rosy account statements telling customers how well
24 the imaginary securities were doing, because
25 treating the fictitious paper profits as within
26 the ambit of the customers' "legitimate

1 expectations" would lead to the absurdity of
2 "duped" investors reaping windfalls as a result of
3 fraudulent promises made on fake securities.
4
5 Id. at 130 (quoting New Times I, 371 F.3d at 87-88).

6 Madoff constructed account statements retrospectively,
7 designating stocks based on advantageous historical price
8 information and arbitrarily distributing profits among his
9 customers.[10] It would therefore have been legal error for
10 the Trustee to "discharge claims upon the false premise that
11 customers' securities positions are what the account
12 statements purport them to be." In re Bernard L. Madoff,
13 424 B.R. at 135. The Trustee properly declined to calculate
14 "net equity" by reference to impossible transactions.
15 Indeed, if the Trustee had done otherwise, the whim of the
16 defrauder would have controlled the process that is supposed
17 to unwind the fraud.

18 In any event, SIPA covers potentially a multitude of
19 situations; no one size fits all. See Exch. Nat'l Bank of
20 Chicago v. Wyatt, 517 F.2d 453, 459 n.12 (2d Cir. 1975)
21 (stating SIPA "liquidation procedures have been carefully
22 designed to allow flexibility"). The fact that the trustee
23 appointed to oversee the liquidation underlying the New
24 Times cases calculated "net equity" in one manner is not

[10] Some purported trades were settled outside the Stock Exchange's price range for the trade dates.

1 determinative as to the proper method of ascertaining "net
2 equity" in this case.[11] The New Times trustee calculated
3 "net equity" based on customer statements for those
4 claimants whose account statements "mirrored what would have
5 happened had the given transaction[s] been executed." New
6 Times I, 371 F.3d at 74 (internal quotation marks omitted).
7 Here, however, the BLMIS customer statements reflect
8 impossible transactions and the Trustee is not obligated to
9 step into the shoes of the defrauder or treat the customer
10 statements as reflections of reality.

11 **CONCLUSION**

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[11] A SIPA liquidation is a hybrid proceeding. See 15 U.S.C. § 78fff-1(a) ("A trustee shall be vested with the same powers and title with respect to the debtor and the property of the debtor, including the same rights to avoid preferences, as a trustee in a case under Title 11."); id. § 78fff(b) ("To the extent consistent with the provisions of this chapter, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under [the Bankruptcy Code]."); see also In re Housecraft Indus. USA, Inc., 310 F.3d 64, 71 (2d Cir. 2002) (stating bankruptcy trustee may avoid fraudulent transactions). As the bankruptcy court ruled, "SIPA and the [Bankruptcy] Code intersect to . . . grant a SIPA trustee the power to avoid fraudulent transfers for the benefit of customers." In re Bernard L. Madoff, 424 B.R. at 136. The objecting BLMIS claimants point out that no avoidance power has been invoked in this case. True, however--in the context of *this* Ponzi scheme--the Net Investment Method is nonetheless more harmonious with provisions of the Bankruptcy Code that allow a trustee to avoid transfers made with the intent to defraud, see 11 U.S.C. § 548(a)(1)(A), and "avoid[s] placing some claims unfairly ahead of others," In re Adler, Coleman Clearing Corp., 263 B.R. 406, 463 (Bankr. S.D.N.Y. 2001).

1 For the reasons set forth above, we affirm the order of
2 the United States Bankruptcy Court for the Southern District
3 of New York (Lifland, J.) and hold that use of the Net
4 Investment Method for calculating the "net equity" of the
5 BLMIS customers was proper.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: August 16, 2011
Docket #: 10-2378 bk
Short Title: Securities Investor Protection v. Bernard L. Madoff Investment S

DC Docket #: 08-ap-1789
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DC Court: SDNY (NEW YORK CITY)
DC Judge: Lifland

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

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DC Court: SDNY (NEW YORK CITY)
DC Judge: Lifland

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

____

and in favor of

____

for insertion in the mandate.

Docketing Fee _____________________

Costs of printing appendix (necessary copies ______________) _____________________

Costs of printing brief (necessary copies ______________ ____) _____________________

Costs of printing reply brief (necessary copies ______________) _____________________

(VERIFICATION HERE)

____
Signature

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
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DC Judge: Lifland

NOTICE OF DECISION

The court has issued a decision in the above-entitled case. It is available on the Court's website http://www.ca2.uscourts.gov.

Judgment was entered on 08/16/2011; and a mandate will later issue in accordance with FRAP 41.

If pursuant to FRAP Rule 39 (c) you are required to file an itemized and verified bill of costs you must do so, with proof of service, within 14 days after entry of judgment. The form, with instructions, is also available on Court's website.

Inquiries regarding this case may be directed to . 212-857-8560