

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

<p>SECURITIES INVESTOR PROTECTION CORPORATION,</p> <p>Plaintiff-Applicant,</p> <p>v.</p> <p>BERNARD L. MADOFF INVESTMENT SECURITIES LLC,</p> <p>Defendants.</p>	<p>Adv. Pro. No. 08-1789 (BRL)</p> <p>SIPA LIQUIDATION</p> <p>(Substantively Consolidated)</p>
<p>In re BERNARD L. MADOFF INVESTMENT SECURITIES LLC,</p> <p>Debtor.</p>	
<p>IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,</p> <p>Plaintiff,</p> <p>v.</p> <p>HSBC Bank PLC, <i>et al.</i></p> <p>Defendants.</p>	<p>Adv. Pro. No. 09-1364 (BRL)</p> <p>11-CV-06677 (JSR)</p>

**DECLARATION OF OREN J. WARSHAVSKY, PURSUANT TO 28 U.S.C. § 1746,
IN SUPPORT OF TRUSTEE’S MEMORANDUM OF LAW IN OPPOSITION
TO ALPHA PRIME FUND LIMITED AND SENATOR FUND SPC’S
MOTION TO WITHDRAW THE REFERENCE**

Pursuant to 28 U.S.C. § 1746, OREN J. WARSHAVSKY hereby declares as follows:

I am a partner at the firm of Baker & Hostetler LLP, counsel for Plaintiff Irving H. Picard (the “Trustee”) for the substantively consolidated liquidation proceeding 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. As an attorney of record, I am fully familiar with this case and the facts set forth herein. I respectfully submit this Declaration to place before this

Court true and correct copies of certain documents relevant to the Trustee's memorandum of law in opposition to Alpha Prime Fund Limited and Senator Fund SPC's Motion to Withdraw the Reference and supporting Memorandum of Law filed in *Picard v. HSBC Bank PLC, et al.*, Adv. Pro. No. 09-1364 (Bankr. S.D.N.Y.) (BRL), No. 11-CV-06677 (S.D.N.Y.) (JSR) (ECF No. 1).

1. Attached hereto as Exhibit 1 is a true and correct copy of the complaint filed by the Trustee against Alpha Prime Fund Limited and Senator Fund SPC, Adv. Pro. No. 09-1364 (Bankr. S.D.N.Y.) (BRL).

2. Attached hereto as Exhibit 2 are true and correct redacted copies of the customer claims (without exhibits) submitted by Alpha Prime Fund Limited and Senator Fund SPC.

3. Attached hereto as Exhibit 3 is a true and correct copy of the Transcript of Oral Argument, *Picard v. Avellino, et al*, No. 11 Civ. 03882 (S.D.N.Y., Oct. 18, 2011) (JSR).

4. Attached hereto as Exhibit 4 is a true and correct copy of the Transcript of Oral Argument, *Michigan State Hous. Dev. Auth. v. Lehman Brothers, et al.*, No. 11-CV-3392 (S.D.N.Y. Sept. 14, 2011) (JGK).

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 7, 2011.

/s/ Oren J. Warshavsky
Oren J. Warshavsky

EXHIBIT 1

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.
In re: BERNARD L. MADOFF, Debtor.
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff,

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

SIPA Liquidation

(Substantively Consolidated)

AMENDED COMPLAINT

Adv. Pro. No. 09-1364 (BRL)

v.

HSBC BANK PLC; HSBC HOLDINGS PLC;
HSBC SECURITIES SERVICES
(LUXEMBOURG) S.A.; HSBC INSTITUTIONAL
TRUST SERVICES (IRELAND) LIMITED;
HSBC SECURITIES SERVICES (IRELAND)
LIMITED; HSBC INSTITUTIONAL TRUST
SERVICES (BERMUDA) LIMITED; HSBC
BANK USA, N.A.; HSBC SECURITIES
SERVICES (BERMUDA) LIMITED; HSBC
BANK (CAYMAN) LIMITED; HSBC PRIVATE
BANKING HOLDINGS (SUISSE) S.A.; HSBC
PRIVATE BANK (SUISSE) S.A.; HSBC FUND
SERVICES (LUXEMBOURG) S.A.; HSBC
BANK BERMUDA LIMITED; HERALD FUND
SPC; HERALD (LUX) SICAV; PRIMEO FUND;
ALPHA PRIME FUND LIMITED; SENATOR
FUND SPC; HERMES INTERNATIONAL FUND
LIMITED; LAGOON INVESTMENT LIMITED;
THEMA FUND LTD.; THEMA WISE
INVESTMENTS LTD.; THEMA
INTERNATIONAL FUND PLC; GEO
CURRENCIES LTD. S.A.; HERALD ASSET
MANAGEMENT LIMITED; 20:20 MEDICI AG;
UNICREDIT BANK AUSTRIA AG; BA
WORLDWIDE FUND MANAGEMENT
LIMITED; EUROVALEUR, INC.; PIONEER
ALTERNATIVE INVESTMENT
MANAGEMENT LIMITED; ALPHA PRIME
ASSET MANAGEMENT LTD.; REGULUS
ASSET MANAGEMENT LIMITED; CARRUBA
ASSET MANAGEMENT LIMITED;
GENEVALOR, BENBASSAT ET CIE; HERMES
ASSET MANAGEMENT LIMITED; THEMA
ASSET MANAGEMENT (BERMUDA) LTD.;
THEMA ASSET MANAGEMENT LTD.; EQUUS
ASSET MANAGEMENT LTD.; EQUUS ASSET
MANAGEMENT PARTNERS, L.P.; AURELIA
FUND MANAGEMENT LIMITED; URSULA
RADEL-LESZCZYNSKI; SONJA KOHN;
ERWIN KOHN; MARIO BENBASSAT;
ALBERTO BENBASSAT; STEPHANE
BENBASSAT; DAVID T. SMITH; ROBERTO
NESPOLO; LAURENT MATHYSEN-GERST;
OLIVIER ADOR; PASCAL CATTANEO;
VLADIMIR STEPCZYNSKI; JEAN-MARC

WENGER; LAGOON INVESTMENT TRUST;
UNICREDIT S.p.A.; INTER ASSET
MANAGEMENT, INC.; GTM MANAGEMENT
SERVICES CORP. N.V.; T+M TRUSTEESHIP &
MANAGEMENT SERVICES S.A.; AURELIA
ASSET MANAGEMENT PARTNERS; CAPE
INVESTMENT ADVISORS LIMITED; AND
TEREO TRUST COMPANY LIMITED,

Defendants.

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TABLE OF ABBREVIATIONS

A. Benbassat	Alberto Benbassat: Partner in Genevalor and Equus Partners; Son of M. Benbassat; director and primary manager of feeder funds affiliated with Genevalor, including Hermes, Thema Fund, Thema International, and Geo Currencies, as well as certain of those funds' investment managers and other service providers.
Ador	Olivier Ador: Partner in Aurelia Partners; managed, administered, and marketed Hermes and Lagoon Trust.
Alpha Prime	Alpha Prime Fund Limited: (Bermuda) Investment fund created by Bank Austria and Sonja Kohn to facilitate direct investment in BLMIS.
Alpha Prime Management	Alpha Prime Asset Management Ltd.: (Bermuda) Investment manager to Alpha Prime.
Aurelia	Aurelia Fund Management Limited: (Bermuda) Part owner of Hermes Management, to which it provided administrative support services.
Aurelia Partners	Aurelia Asset Management Partners: (Bermuda) The partnership that owned Aurelia, which provided administrative support services to Hermes.
BA Worldwide	BA Worldwide Fund Management Ltd.: (British Virgin Islands) Offshore subsidiary of Bank Austria that served as investment adviser to Primeo, Alpha Prime, and Thema International before being voluntarily liquidated on or about February 22, 2008.
Bank Austria	UniCredit Bank Austria AG: (Austria) Financial institution that helped create and control Madoff Feeder Funds Primeo, Alpha Prime, and Senator.
Bank Medici	20:20 Medici AG: (Austria) Entity owned by Kohn and Bank Austria that acted as investment manager to Herald, Herald (Lux), and Thema International, and which created, controlled, and marketed Madoff Feeder Funds, including Herald, Herald (Lux), and Primeo.
Benbassat Funds	Benbassat Funds: Madoff Feeder Funds created and/or controlled by the Benbassat Family: Hermes, and its subsidiary, Lagoon, Geo Currencies, Thema Fund, and its subsidiary, Thema Wise, and Thema International.

Beneficial Owners	Beneficial Owners: Includes Bank Austria, UniCredit, Tereo Trust, Eurovaleur, Genevalor, Equus, Equus Partners, Cape Investment, Inter Asset, GTM Management, T+M, Aurelia, Aurelia Partners, Kohn, E. Kohn, M. Benbassat, A. Benbassat, S. Benbassat, Nespolo, D. Smith, Velay, Mathysen-Gerst, Ador, Cattaneo, Stepczynski, and Wenger.
Cape Investment	Cape Investment Advisors Limited: (Bermuda) Entity holding an ownership interest in Thema Management Bermuda, investment manager to Thema Fund.
Carruba	Carruba Asset Management Limited: (Bermuda) Investment adviser to Senator, a Madoff Feeder Fund.
Cattaneo	Pascal Cattaneo: Partner in Aurelia Partners, managed and marketed Hermes and Lagoon, two Madoff Feeder Funds, and was a director and vice-president of Aurelia and general partner of Aurelia Partners.
Defender	Defender Limited: (British Virgin Islands) Madoff Feeder Fund.
D. Smith	David T. Smith: General partner of Genevalor and Equus Partners; managed, administered, and marketed Madoff Feeder Funds created by the Benbassat family with Genevalor, including Hermes, Thema International, and Thema Fund; director of Thema Fund, Hermes, Lagoon, Lagoon Trust, Thema International, Hermes Management, Thema Management Bermuda; President and a director of Cape Investment; and former employee of HSBC Bank Bermuda.
E. Kohn	Erwin Kohn: Owner of Herald Management and husband of Sonja Kohn.
Equus	Equus Asset Management Ltd.: (Bermuda) Entity owned substantially by the Benbassat family; provided administrative services to Thema Management Bermuda; part owner of Hermes Management and Thema Management Bermuda.
Equus Partners	Equus Asset Management Partners, L.P.: (Bermuda) Entity principally formed by the Benbassat family; provided administrative support services to Hermes Management; holds an ownership interest in Equus.

Eurovaleur	Eurovaleur, Inc.: (USA) Company owned by Sonja Kohn that served as investment sub-adviser to Primeo, and which holds an ownership interest in Thema Management BVI.
Feeder Fund Defendants	Feeder Fund Defendants: Primeo, Herald, Herald (Lux), Alpha Prime, Senator, Hermes, Lagoon, Thema Fund, Thema Wise, Thema International, Geo Currencies, and Lagoon Trust.
Genevalor	Genevalor, Benbassat et Cie: (Switzerland) Partnership created and controlled by the Benbassat Family and that created and controlled many Madoff Feeder Funds, including Hermes, Thema International, Thema Fund, and Geo Currencies.
Geo Currencies	Geo Currencies Ltd. S.A.: (Panama) Madoff Feeder Fund created by the Benbassat Family.
GTM Management	GTM Management Services Corp. N.V.: (Curacao) Part owner of Hermes Management, which managed Madoff Feeder Funds.
Harley	Harley International (Cayman) Limited: A Madoff Feeder Fund that was the reference fund for the structured products created by the HSBC Defendants.
Herald	Herald Fund SPC: (Cayman Islands) Madoff Feeder Fund created by Kohn and Bank Medici.
Herald (Lux)	Herald (Lux) SICAV: (Luxembourg) Madoff Feeder Fund created by Kohn and Bank Medici.
Herald Management	Herald Asset Management Limited: (Cayman Islands) Investment manager to Herald, a Madoff Feeder Fund owned by Erwin Kohn.
Hermes	Hermes International Fund Limited: (British Virgin Islands) Madoff Feeder Fund created by the Benbassat Family.
Hermes Management	Hermes Asset Management Limited: (Bermuda) Company co-founded by the Benbassat Family that served as investment manager to Hermes and Lagoon Trust.
HITSB	HSBC Institutional Trust Services (Bermuda) Limited: Custodian for Madoff Feeder Funds Alpha Prime, Hermes, and Thema Fund.

HITSI	HSBC Institutional Trust Services (Ireland) Ltd.: (Ireland) Custodian to Madoff Feeder Funds Defender, Optimal, Landmark and Thema International.
HSBC Administrator Defendants	HSBC Administrator Defendants: HSSI, HSBC Bank Bermuda, HSBC (Cayman), HSSB, HSSL, and HSBC Fund Services, which served as administrators and sub-administrators.
HSBC Bank	HSBC Bank plc: (England/Wales) Banking institution that served as payee bank for the Madoff feeder funds named herein.
HSBC Bank Bermuda	HSBC Bank Bermuda Limited: (Bermuda) Custodian to the Kingate Funds, which facilitated direct investment in BLMIS; former administrator and custodian to Madoff Feeder Funds Alpha Prime, Square One, Hermes, and Thema Fund.
HSBC Bank USA	HSBC Bank USA, N.A.: (USA) Entity which created derivative investment products based upon returns generated by Madoff Feeder Funds
HSBC (Cayman)	HSBC Bank (Cayman) Limited: (Cayman Islands) Banking institution that served as administrator of Primeo.
HSBC Custodian Defendants	HSBC Custodian Defendants: HITSI, HSSL, HITSB, and HSBC Bank Bermuda, which served as custodians and sub-custodians of Madoff Feeder Funds.
HSBC Defendants or HSBC	HSBC Defendants: HSBC Holdings, HSBC Bank, HSBC Bank USA, HITSB, HITSI, HSBC Private Bank Holdings (Suisse), HSBC Private Bank (Suisse), HSSB, HSSI, HSSL, HSBC (Cayman), HSBC Bank Bermuda, and HSBC Fund Services.
HSBC Fund Services	HSBC Fund Services (Luxembourg) S.A.: (Luxembourg) Sub-administrator and sub-registrar of Madoff Feeder Fund Hermes.
HSBC Holdings	HSBC Holdings plc: (England/Wales) Parent company of HSBC Group and all the HSBC entities named herein.
HSBC Private Bank (Suisse)	HSBC Private Bank (Suisse) S.A.: (Switzerland) Entity which marketed Madoff Feeder Funds to investors.
HSBC Private Banking Holdings (Suisse)	HSBC Private Banking Holdings (Suisse) SA: (Switzerland) Entity which owned HSBC Private Bank (Suisse) and marketed Madoff Feeder Funds to investors.

HSSB	HSBC Securities Services (Bermuda) Limited: (Bermuda) Administrator to Madoff Feeder Funds Alpha Prime, Hermes, and Thema Fund.
HSSI	HSBC Securities Services (Ireland) Limited: (Ireland) Administrator for Madoff Feeder Funds Defender, Optimal, Landmark, and Thema International.
HSSL	HSBC Securities Services (Luxembourg) S.A.: (Luxembourg) Administrator to Madoff Feeder Funds Lagoon, Thema Wise, Herald, Herald (Lux), and Senator; sub-administrator to Madoff feeder funds Thema Fund, Alpha Prime, Hermes, and Primeo; custodian to Lagoon, Herald, Herald (Lux), Primeo, and Senator; and sub-custodian to Alpha Prime, Hermes, and Thema Fund.
Individual Defendants	Individual Defendants: Kohn, E. Kohn, Radel-Leszczyński, M. Benbassat, A. Benbassat, S. Benbassat, Nespolo, D. Smith, Velay, Mathysen-Gerst, Ador, Cattaneo, Stepczynski, and Wenger.
Inter Asset	Inter Asset Management, Inc.: (British Virgin Islands) Part owner of Hermes Management.
Kingate Euro	Kingate Euro Fund, Ltd.: (Bermuda) Madoff feeder fund.
Kingate Funds	Kingate Funds: Kingate Euro and Kingate Global.
Kingate Global	Kingate Global Fund Ltd.: (Bermuda) Madoff feeder fund.
Kohn	Sonja Kohn: Marketed Madoff Feeder Funds to new investors; held a majority interest in Bank Medici; director of Alpha Prime. Wife of Erwin Kohn, owner of Herald Management.
Lagoon	Lagoon Investment Limited: (British Virgin Islands) Nominal holder of accounts at BLMIS's IA Business created by the Benbassat family, which held investments of Hermes and Lagoon Trust.
Lagoon Trust	Lagoon Investment Trust: (British Virgin Islands) Entity created by Aurelia—associates of the Benbassat family—for purpose of investing in BLMIS through Lagoon.
Madoff Feeder Funds	Madoff Feeder Funds: Investment funds with the principal or primary purpose of investing funds with BLMIS's IA Business.

Madoff Structured Products	Madoff Structured Products: Derivative investment vehicles which offered investors an opportunity to earn the returns of BLMIS and/or a Madoff feeder fund. HSBC Defendants which swapped an interest in Rye XL, Greenwich, Harley, Thema International, and Senator.
Management Defendants	Management Defendants: Bank Medici, Bank Austria, Genevalor, Herald Management, BA Worldwide, Pioneer, Eurovaleur, Alpha Prime Management, Regulus, Carruba, Hermes Management, Thema Management BVI, Thema Management Bermuda, Equus, Equus Partners, and Aurelia.
Mathysen-Gerst	Laurent Mathysen-Gerst: General partner in Aurelia Partners; president of Aurelia; founder and director of Hermes and Lagoon; director of Hermes and Lagoon.
M. Benbassat	Mario Benbassat: Founding partner of Genevalor who created Madoff feeder funds Hermes, Thema Fund, Thema International, and Geo Currencies.
Medici Funds	Medici Funds: Primeo, Alpha Prime, Herald, Herald (Lux), and Senator
Nespolo	Roberto Nespolo: General partner of Genevalor and Equus Partners; director of Thema Fund, Thema Management BVI, and Equus; managed Madoff feeder funds Hermes, Thema International, and Thema Fund.
Pioneer	Pioneer Alternative Investment Management Limited: (Ireland) Investment adviser to Madoff feeder fund Primeo.
Primeo	Primeo Fund: (Cayman Islands) Kohn, Bank Medici, and Bank Austria investment fund that invested directly in BLMIS and indirectly in BLMIS through Herald and Alpha Prime. Currently in liquidation.
Radel-Leszczyński	Ursula Radel-Leszczyński: President of BA Worldwide; director of Madoff Feeder Funds Primeo and Alpha Prime; co-founder of Madoff Feeder Funds Alpha Prime and Senator; manager of Madoff Feeder Funds Primeo, Alpha Prime, and Senator.
Regulus	Regulus Asset Management Limited: (Bermuda) Investment adviser to Madoff Feeder Fund Senator.

Rye XL	Rye Select Broad Market XL Fund, L.P.: Madoff Feeder Fund which served as a reference fund for structured financial products created by the HSBC Defendants.
S. Benbassat	Stephane Benbassat: Partner in Genevalor and Equus Partners; son of Mario Benbassat, brother of Alberto Benbassat; managed and directed Madoff Feeder Funds Hermes, Thema Fund, Thema International, and Geo Currencies.
Senator	Senator Fund SPC: (Cayman Islands) Madoff Feeder Fund created by Radel-Leszczynski and Bank Austria and/or BA Worldwide.
Sentry	Greenwich Sentry, L.P.: One of the largest Madoff Feeder Funds, created and controlled by the Fairfield Greenwich Group.
Square One	Square One Fund Limited: (British Virgin Islands) Madoff Feeder Fund that is not named as a party herein.
SSC Strategy	Split-strike conversion strategy: The purported investment strategy of BLMIS's IA Business.
Stepczynski	Vladimir Stepczynski: General partner in Aurelia Partners and manager of Hermes and Lagoon.
T+M	T+M Trusteeship & Management Services S.A.: (Switzerland) Part owner of Thema Management BVI.
Tereo Trust	Tereo Trust Company Limited: (Bermuda) Owner of Alpha Prime Management, Regulus, and Carruba.
Thema Fund	Thema Fund Ltd.: (British Virgin Islands) Investment fund created by the Benbassat family that invested in the IA Business through its wholly-owned subsidiary, Thema Wise.
Thema International	Thema International Fund plc: (Ireland) Madoff Feeder Fund created by the Benbassat family.
Thema Management Bermuda	Thema Asset Management (Bermuda) Ltd.: (Bermuda) Investment manager of Madoff Feeder Fund, Thema Fund.
Thema Management BVI	Thema Asset Management Ltd.: (British Virgin Islands) Investment manager of Madoff Feeder Fund, Thema International.

Thema Wise	Thema Wise Investments Ltd.: (British Virgin Islands) Nominal holder of an account of BLMIS's IA Business created by the Benbassat family, which held investments of Thema Fund.
UniCredit	UniCredit S.p.A.: (Italy) Parent company of Bank Austria and Pioneer.
Wenger	Jean-Marc Wenger: General partner of Aurelia Partners who managed Madoff Feeder Funds Hermes and Lagoon.

Irving H. Picard (the “Trustee”), as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC (“BLMIS”) and substantively consolidated estate of Bernard L. Madoff (“Madoff”), under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* (“SIPA”),¹ by and through his undersigned counsel, for his Complaint against the above-named defendants (the “Defendants”), states as follows:

NATURE OF THE ACTION

1. Madoff did not act alone in perpetrating the largest financial fraud in history. For more than a decade, HSBC Holdings plc, HSBC Bank plc, and their affiliates (collectively, the “HSBC Defendants” or “HSBC”) enabled Madoff’s Ponzi scheme by encouraging investment into an international network of feeder funds, including several named as defendants herein (the “Feeder Fund Defendants”). Ultimately, the HSBC Defendants directed over \$8.9 billion into BLMIS’s fraudulent investment advisory business (the “IA Business”). A September 2008 report commissioned by the HSBC Defendants estimated that at least 33% of all moneys turned over to Madoff were funneled by and through the HSBC Defendants. The HSBC Defendants aided, enabled, and sustained the massive Ponzi scheme masterminded by Madoff in order to reap an extraordinary financial windfall. The HSBC Defendants are liable for the damage they caused, in an amount to be proven at trial, which, upon information and belief, will be no less than \$6.6 billion. The Trustee also seeks to recover nearly \$2 billion in fraudulent transfers from BLMIS and more than \$400 million in fees received by the other Defendants in this action.

2. For years, Madoff attracted investors through a mix of staggering results and quiet gamesmanship; his legendary secrecy did not decrease his popularity among the investors intoxicated by his unparalleled performance. Madoff expanded the fortunes of prominent New

¹ Subsequent references to SIPA shall omit “15 U.S.C.”

Yorkers whose confidence he had gained. His reputation spread to other areas, such as Palm Beach, Florida, and Hollywood, California. But his reputation was, as the world now knows, based on a lie: Madoff was no whiz-kid, he was a criminal using the investments of new customers to satisfy withdrawals by earlier investors. As his pool of investors threatened to run dry, Madoff was on the verge of exhausting the sources from which he had drawn money for his Ponzi scheme. His attention turned to potential investors abroad.

3. Foreign investors were, in many ways, ideal targets for Madoff. An ocean away, these investors were a vast resource of fuel for the Ponzi scheme. The Defendants named herein came to Madoff's rescue by introducing him to European—and American—investors, many of whom thought they were investing in diverse and thoroughly vetted European funds when, in fact, they were simply depositing their money into the greatest fraud in history.

4. The Defendants engineered a labyrinth of hedge funds, management companies, and service providers that, to unsuspecting outsiders, seemed to compose a formidable system of checks and balances. Yet the purpose of this complex architecture was just the opposite: it provided different modes for directing money to Madoff while avoiding scrutiny and maximizing fees. At the core of this architecture was a remarkably small group of individuals and the bank on which they all relied to help project an air of credibility and respectability, HSBC.

5. Beginning in the 1980s, Sonja Kohn ("Kohn") became one of Madoff's top ambassadors, introducing him to a wide array of potential investors. In the early 1990s, Kohn introduced Madoff to the Benbassat Family, commencing in earnest the foreign feeder fund business that ultimately would fuel and sustain Madoff's Ponzi scheme. Beginning in 1992, the Benbassat Family, along with other Defendants, set up a variety of feeder funds, including defendants Hermes International Fund Limited ("Hermes") and its subsidiary, Lagoon

Investment Limited (“Lagoon”), Lagoon Investment Trust (“Lagoon Trust”), Geo Currencies Ltd. S.A. (“Geo Currencies”), Thema Fund Ltd. (“Thema Fund”) and its subsidiary, Thema Wise Investments Ltd. (“Thema Wise”), and Thema International Fund plc (“Thema International”) (collectively, the “Benbassat Funds”). The Benbassat Funds funneled more than \$1.9 billion into BLMIS.

6. Kohn brokered introductions between Madoff and Carlo Grosso and Federico Ceretti, who created the Kingate Global Fund, Ltd. (“Kingate Global”) and Kingate Euro Fund, Ltd. (“Kingate Euro”) (collectively, the “Kingate Funds,” both of which are defendants in another action brought by the Trustee). The Kingate Funds funneled more than \$1.7 billion into BLMIS.

7. In the early 1990s, Kohn moved back to Austria and, along with defendant UniCredit Bank Austria AG (“Bank Austria”), set up a series of funds, associated with defendant 20:20 Medici AG (“Bank Medici”). These included Primeo Fund (“Primeo”), Alpha Prime Fund Limited (“Alpha Prime”), Herald Fund SPC (“Herald”), Herald (Lux) SICAV (“Herald (Lux)”), and Senator Fund SPC (“Senator”) (collectively, the “Medici Funds”). The Medici Funds directed more than \$2.8 billion to BLMIS.

8. The Feeder Fund Defendants and their managers were able to rely primarily on one financial institution—HSBC—to act as their marketer, custodian, and administrator. All of these funds bore HSBC’s imprimatur, as did other feeder funds not named herein, including Defender Limited (which deposited over \$530 million with BLMIS), and funds associated with Optimal Multiadvisors Ltd. (which deposited more than \$1.7 billion with BLMIS). The HSBC imprimatur was the perfect endorsement to convince foreign (and, ultimately, other American) investors to pour money into BLMIS. To unknowing investors, the Feeder Fund Defendants

appeared to be sound, legitimate investment vehicles because the documents describing those investments were emblazoned with HSBC's brand.

9. The HSBC brand was backed not by reasonable due diligence, but by the explanation—to which several Feeder Fund Defendants subscribed—that BLMIS's performance in the market was the result of "magic." One Feeder Fund Defendant official explained that the feeder fund with which he was associated had "confirmed" that BLMIS's returns were, in fact, the product of a "magic formula" because others in the industry had tried to replicate Madoff's returns, but were unable to do so.

10. The Feeder Fund Defendants believed that Madoff had graced them with the opportunity to invest in BLMIS and to receive returns generated by the magic formula. Even when the HSBC Defendants were granted permission to perform due diligence on BLMIS, certain Feeder Fund Defendants feared that an intrusive due diligence process by HSBC would jeopardize the Feeder Fund Defendants' relationships with Madoff. The Feeder Fund Defendants warned HSBC that it had to exhibit appropriate reverence toward Madoff and BLMIS staff during the due diligence process. Probing the magic formula too deeply might evoke Madoff's wrath and spell the end of the Feeder Fund Defendants' access to BLMIS. HSBC acquiesced.

11. The Defendants were well aware of the indicia of fraud surrounding BLMIS. In yearly due diligence reports, certain of the HSBC Defendants identified numerous badges of fraud, including: Madoff's secrecy, his insistency on retaining custody of all its assets under management, his seemingly supernatural trading performance, BLMIS's untraditional fee structure, and the lack of a qualified auditor.

12. Despite being armed with knowledge of the serious risks of fraud that Madoff posed, the HSBC Defendants delegated many of their most critical roles and responsibilities to BLMIS. For example, certain HSBC Defendants purported to serve as custodian of the assets of the Medici Funds, the Benbassat Funds, and the Kingate Funds, as well as others, but without any public disclosure to investors, they surrendered all custodial duties to BLMIS. By doing so, the HSBC Defendants helped Madoff create a system devoid of checks and balances—a system ripe for fraud. Remarkably, when conducting due diligence on other Madoff Feeder Funds, HSBC explicitly noted that BLMIS’s role as custodian of assets created a serious risk of theft.

13. Madoff’s scheme could not have been accomplished or perpetuated unless the HSBC Defendants agreed to look the other way and to pretend that they were ensuring the existence of assets and trades when, in fact, they did no such thing. Instead, the HSBC Defendants merely delegated their responsibilities to BLMIS. The fees they received for their various roles were nothing more than kickbacks paid for looking the other way while legitimizing BLMIS through their name and brand, making it attractive to investors.

14. The HSBC Defendants twice retained KPMG to perform due diligence on BLMIS; KPMG twice reported serious fraud risks and deficiencies, many already known to the HSBC Defendants. Knowing that BLMIS was likely a fraud, the HSBC Defendants nevertheless continued to enable Madoff’s fraud for their own gain. No longer satisfied with being a mere marketing tool, the HSBC Defendants developed derivative structured financial products that poured even more money into BLMIS’s IA Business, providing Madoff with the substantial assistance he needed to keep the Ponzi scheme going.

15. The remaining defendants named herein are the management companies and service providers of the Medici Funds and the Benbassat Funds, as well as their directors. Given

that Madoff did all of the “managing,” these other defendants truly provided no services at all. Their overlapping ownership, and their receipt of fees for doing nothing, demonstrate that they were merely profit vehicles for Kohn, the Benbassats, and their associates.

16. These Defendants are financial institutions, hedge funds, investment advisers, managers, and/or promoters whose financial sophistication gave them unparalleled insight into Madoff’s fraud long before his confession and arrest in December 2008. Each possessed a strong financial incentive to participate in, perpetuate, and stay silent about Madoff’s fraudulent scheme. The Defendants received management, administrative, performance, advisory, distribution, custodial, and/or other fees for driving new investors into BLMIS’s IA Business. Every cent of the fees they collected is either stolen Customer Property,² as defined by statute, which must be returned to the Trustee for distribution, or represents the unjust enrichment of the Defendants, and must also be returned to the Trustee for the benefit of the victims of Madoff’s fraud.

17. These Defendants recklessly disregarded the numerous indicia of fraud that surrounded BLMIS. Because of their institutional avarice, what was already a terrible crime was transformed into one of the largest thefts in history.

18. The Defendants’ financial incentives led them to turn a blind eye to numerous indicia of illegitimate trading activity and fraud, including:

(a) Madoff refused to meet with HSBC despite the billions of dollars HSBC helped funnel into BLMIS’s IA Business;

² SIPA § 78lll(4) defines “Customer Property” as “cash and securities . . . at any time received, acquired, or held by or for the account of a debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted.”

(b) BLMIS purported to trade equities and options in volumes so implausibly high that they often exceeded the *entire daily reported volume* of such options and equities traded on the world's exchanges;

(c) BLMIS account statements sometimes showed securities trades executed outside of the daily price range;

(d) BLMIS served as custodian of its customers' funds, *i.e.*, there was no independent third-party that could verify either that BLMIS's assets existed or that customer funds were maintained in segregated accounts;

(e) BLMIS was too good of a deal; Madoff walked away from hundreds of millions of dollars by not charging industry standard management and performance fees.

BLMIS also purported to execute trades in a manner that would have required the IA Business to front at least hundreds of millions of dollars to its customers, yet Madoff never charged the Defendants for this remarkable accommodation;

(f) BLMIS, which had domestic and international operations with tens of billions of dollars under management, was audited by an unknown and unsophisticated auditor;

(g) BLMIS was insulated from performance volatility even in the most volatile markets. Madoff seemed to possess a near-perfect ability to time purchases and sales of stocks and options, so that BLMIS always managed to enter and exit the markets at the precise right time on the precise right day to maximize returns and avoid losses;

(h) BLMIS refused to allow its customers real-time access to their accounts, instead transmitting paper trade confirmations days after trades were purportedly made—a significant departure from industry practice, and an inexplicable practice at a firm that publicly proclaimed its early adoption of cutting-edge technologies;

(i) BLMIS's billions of dollars in purported trades never caused observable price displacement or liquidity disruptions in the market;

(j) Madoff refused to identify any of BLMIS's options trading counterparties to any of the Defendants and their customers who, collectively, risked billions of dollars in exposure to such counterparties;

(k) BLMIS's reported trading activity frequently deviated from the purported investment strategy of the IA Business;

(l) From the end of 2005 until Madoff's arrest, BLMIS's account statements showed transactions with the "Fidelity Spartan U.S. Treasury Money Market Fund" even though that fund had changed its name in August 2005; and

(m) BLMIS's trade confirmations did not comport with industry standards and often used improper or incorrect terminology to describe trades.

19. The Defendants observed all these red flags of fraud and others, but ignored them. In a 2001 due diligence report, HSBC noted that the investment community was "baffled" by Madoff and doubted that the split-strike conversion strategy (the "SSC Strategy") that he purported to employ could generate the returns he claimed. Upon information and belief, the Defendants suspected that Madoff might be illegally front-running the market using information he gleaned from his market-making operations or the "potentially greater risk" that Madoff was not, in fact, implementing the SSC Strategy. However, driven by the steady returns BLMIS purported to produce, and the profits it generated, the HSBC Defendants looked the other way.

20. Instead of reacting to these red flags with any modicum of suspicion, skepticism, or candor, the Defendants reacted with sarcasm. In February 2006, two [REDACTED] officials, [REDACTED], [REDACTED], wrote:

[REDACTED]

[REDACTED] “It’s the magic of Madoff.”

[REDACTED]

[REDACTED]

[REDACTED]

21. Ultimately, as custodians and administrators, the HSBC Defendants oversaw the infusion of no less than \$8.9 billion into BLMIS’s IA Business through a network of feeder funds. The HSBC Defendants funneled even more money into BLMIS in connection with derivative structured financial products that they issued and sold to their customers.

22. For their efforts, the Defendants received billions of dollars to which they are not entitled. Many of these Defendants received tens, if not hundreds, of millions of dollars by selling, marketing, lending to, and investing in financial instruments designed to substantially assist Madoff by pumping money into BLMIS and prolonging the Ponzi scheme.

23. Through this Complaint, the Trustee seeks the return of Customer Property belonging to the BLMIS estate, including redemptions, fees, compensation, and assets, as well as compensatory and punitive damages caused by the Defendants’ misconduct, and the disgorgement of all amounts by which the Defendants were unjustly enriched at the expense of BLMIS’s customers.

JURISDICTION AND VENUE

24. The Trustee brings this adversary proceeding pursuant to his statutory authority under SIPA §§ 78fff(b) and 78fff-2(c)(3), sections 105(a), 502(d), 510(c), 544, 547, 548, 550,

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.*) (“DCL”), New York Civil Practice Law and Rules (“N.Y. C.P.L.R.”), and other applicable law, for the avoidance and recovery of preferences and fraudulent conveyances, unjust enrichment, money had and received, contribution, aiding and abetting breaches of fiduciary duty, aiding and abetting fraud, disallowance and/or equitable subordination of customer claims, and damages in connection with property BLMIS transferred, directly or indirectly, to or for the benefit of the Defendants, or other activities of the Defendants in connection with BLMIS investment. Among other things, the Trustee seeks to set aside and recover all avoidable transfers, collect damages caused by the Defendants, preserve the Customer Property for the benefit of BLMIS’s defrauded customers, and recover from the Defendants all Customer Property, in whatever form it may exist now or in the future.

25. This is an adversary proceeding brought in this Court, where the main underlying SIPA case, No. 08-01789 (BRL) (the “SIPA Proceeding”), is pending. The SIPA case originally was 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”), on December 11, 2008 (the “Filing Date”), and thereafter was removed to this Court. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and SIPA §§ 78eee(b)(2)(A) and (b)(4).

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

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

BACKGROUND

28. 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 commencing the District Court Proceeding against Madoff and BLMIS. The District Court Proceeding remains pending. The SEC complaint alleges that Madoff and BLMIS engaged in fraud through the investment advisory activities of BLMIS.

29. 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 (the “Receiver”).

30. On December 15, 2008, pursuant to SIPA § 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. On that same date, pursuant to SIPA § 78eee(a)(4)(A), the SEC consented to a combination of its own action with SIPC’s application.

31. 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 SIPA § 78eee(b)(3);

(b) appointed Baker & Hostetler LLP as counsel to the Trustee pursuant to SIPA § 78eee(b)(3);

(c) removed the case to this Bankruptcy Court pursuant to SIPA § 78eee(b)(4); and

(d) removed the Receiver for BLMIS.

32. 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.

33. 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 eleven-count criminal information filed against him by the United States Attorney's 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]." Additionally, Madoff asserted "[a]s I engaged in my fraud, I knew what I was doing [was] wrong, indeed criminal."

34. Another former BLMIS employee, Frank DiPascali, also subsequently pleaded guilty to participating and conspiring to perpetuate the Ponzi scheme at a Plea Hearing on August 11, 2009, in the case entitled *United States v. DiPascali*, Case No. 09-CR-764 (RJS). Among other things, DiPascali admitted that the fictitious scheme had begun at BLMIS at least as early as the 1980s. See Plea Allocution of Frank DiPascali at 46, *United States v. DiPascali*, No. 09-CR-764 (RJS) (S.D.N.Y. Aug. 11, 2009) (Docket No. 11).

THE PONZI SCHEME

35. BLMIS was founded in 1959 by Madoff and, for most of its existence, operated from its principal place of business at 885 Third Avenue, New York, New York. Madoff, as founder, chairman, chief executive officer, and sole owner, operated BLMIS together with several of his friends and family members. BLMIS was registered with the SEC as a securities broker-dealer under Section 15(b) of the Securities Exchange Act of 1934 (the "1934 Act"),

15 U.S.C. § 78o(b). By virtue of that registration, BLMIS is a member of SIPC. BLMIS had three business units: the IA Business, market-making, and proprietary trading.

36. Outwardly, Madoff ascribed the consistent success of the IA Business to the SSC Strategy. Pursuant to that strategy, Madoff purported to invest BLMIS customers' funds in a basket of common stocks within the S&P 100 Index—a collection of the 100 largest publicly traded companies. Madoff claimed that this basket of stocks would mimic the movement of the S&P 100 Index. He also asserted that he would carefully time purchases and sales to maximize value and, correspondingly, BLMIS customers' funds would, intermittently, be out of the market. While out of the market, those funds were purportedly invested in United States Treasury bills or in funds holding Treasury bills. The second part of the SSC Strategy was the hedge of Madoff's stock purchases with S&P 100 Index option contracts. Those option contracts functioned as a "collar" limiting both the potential gains and the potential losses on the baskets of stocks. Madoff purported to use proceeds from the sale of S&P 100 Index call options to finance the cost of purchasing S&P 100 Index put options. Madoff also told IA Business customers, including the Defendants named herein, that he would enter and exit the market between eight and twelve times each year.

37. BLMIS's IA Business customers received fabricated monthly or quarterly statements showing that securities were held in, or had been traded through, their accounts. However, the securities purchases and sales shown in those account statements never occurred, and the reported profits were entirely fictitious. At the Plea Hearing, Madoff admitted that he never purchased any of the securities he claimed to have purchased for the IA Business's customer accounts. In fact, there is no record of BLMIS having cleared a *single* purchase or sale

of securities in connection with the SSC Strategy on any trading platform on which BLMIS reasonably could have traded securities. Madoff's SSC Strategy was entirely fictitious.

38. At times prior to his arrest, Madoff told customers and regulators that he purchased and sold the put and call options over-the-counter rather than through an exchange. Yet, like the underlying securities, the Trustee has yet to uncover any evidence that Madoff ever purchased or sold *any* of the options described in customer statements. Additionally, the Options Clearing Corporation, which clears all option contracts based upon the stocks of S&P 100 companies, has no record of the IA Business having bought or sold *any* exchange-listed options on behalf of any IA Business customers.

39. For all periods relevant hereto, the IA Business was operated as a Ponzi scheme. The money received from investors was not invested in stocks and options. Rather BLMIS used its IA Business customers' deposits to pay other customers' redemptions and to make other transfers, which are, of course, avoidable by the Trustee.

40. The falsified monthly account statements reported that the accounts of IA Business customers had made substantial gains, but, in reality, because it was a Ponzi scheme, BLMIS did not have the funds to pay investors on account of their new investments. BLMIS was able to survive for as long as it did only because it used the stolen principal invested by some customers to pay other customers. Indeed, entities like the Feeder Fund Defendants and the HSBC Defendants, by introducing billions in capital, assisted Madoff and BLMIS in extending the life of the Ponzi scheme.

41. At all times relevant hereto, the liabilities of BLMIS were greater than its assets. 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.

42. Madoff's scheme continued until December 2008, when the requests for redemptions overwhelmed the flow of new investments and caused the inevitable collapse of the Ponzi scheme.

43. This and similar complaints are being brought to recapture moneys paid to, or for the benefit of, BLMIS's customers, including moneys that were subsequently transferred by BLMIS's investors to other entities, so that these recovered funds can be placed in the Customer Property fund and be distributed *pro rata* in accordance with SIPA § 78fff-2(c)(1).

THE TRUSTEE'S POWERS AND STANDING

44. As the Trustee appointed under SIPA, the Trustee has the job of recovering and paying out Customer Property to BLMIS's customers, assessing claims, and liquidating any other assets of the firm for the benefit of the estate and its creditors. The Trustee is in the process of marshalling BLMIS's assets, and the liquidation of BLMIS's 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 and others who received avoidable transfers 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 SIPA § 78fff-2(c)(1).

45. To this end, the Trustee is bringing this action against the Defendants to recover no less than \$2.3 billion in avoidable transfers received from BLMIS by the Defendants and/or persons or entities on their behalf, for the six year period ending on the filing date.

46. The Trustee is also seeking to recover subsequent transfers and other moneys received by the Defendants in their roles as investment managers, investment advisers, administrators, custodians, and providers of back-office support to the funds, and further subsequent transfers of other moneys received by the beneficial owners of these entities, all of whom facilitated the growth of the Ponzi scheme. These subsequent transfers and moneys arose, *inter alia*, from: withdrawals; management, performance advisory, and administrative fees; fees from the marketing and sale of structured products; and other distributions. The Trustee is seeking from Defendants an amount to be proven at trial, which, upon information and belief, will be no less than \$400 million.

47. The Trustee brings this action against the Defendants to, among other things, recover all Customer Property received, directly or indirectly, from BLMIS.

48. Pursuant to SIPA § 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 SIPA § 78fff-1(b). Chapters 1, 3, 5, and subchapters I and II of chapter 7 of the Bankruptcy Code are applicable to this case.

49. In addition to the powers of a bankruptcy trustee, the Trustee has broader powers granted by SIPA.

50. The Trustee has standing to bring these claims pursuant to SIPA § 78fff-1 and the Bankruptcy Code, including sections 323(b) and 704(a)(1), because, among other reasons:

- (a) Defendants received Customer Property;
- (b) BLMIS incurred losses as a result of the claims set forth herein;
- (c) BLMIS's customers were injured as a result of the conduct detailed herein;

(d) SIPC cannot, by statute, advance funds to the Trustee to fully reimburse all customers for all of their losses;

(e) the Trustee will not be able to satisfy fully all claims;

(f) the Trustee, as bailee of Customer Property, can sue on behalf of the customer-bailors;

(g) as of this date, the Trustee has received multiple, express assignments of certain claims of the applicable accountholders, which they could have asserted. 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;

(h) SIPC is the subrogee of claims paid, and to be paid, to customers of BLMIS who have filed claims in the liquidation proceeding. SIPC has expressly conferred upon the Trustee enforcement of its rights of subrogation with respect to payments it has made and is making to customers of BLMIS from SIPC funds; and

(i) the Trustee has the power and authority to avoid and recover transfers pursuant to sections 544, 547, 548, 550, and 551 of the Bankruptcy Code and SIPA § 78fff-2(c)(3).

THE DEFENDANTS

Sonja Kohn and The Benbassat Family

51. Sonja Kohn (“Kohn”) is responsible for facilitating all of the Feeder Fund Defendants’ investments with BLMIS, and was instrumental in marketing those funds to investors across Europe and around the world. She also served various functions with respect to a number of the Medici Funds, including managing their relationships with BLMIS, and regularly traveled to New York City to meet with Madoff. Upon information and belief, not only

did Kohn introduce all of the Feeder Fund Defendants to Madoff, she also ushered other funds, such as Harley International (Cayman) Ltd. (“Harley”) and the Kingate Funds to Madoff.

52. Kohn and/or members of her family are majority shareholders of defendant Bank Medici, which provided “services” to a number of the Feeder Fund Defendants, and the direct or beneficial “owners” of a variety of companies that generated fees from Madoff Feeder Funds. In these roles, upon information and belief, Kohn received fees and/or distributions to which she is not entitled and/or which are composed, in part, of Customer Property. In addition, upon information and belief, Kohn also received and benefited from payments directly from BLMIS and its sister company in London, Madoff Securities International Ltd. Upon information and belief, Kohn received fees and/or distributions to which she was not entitled and/or which are composed, in part, of Customer Property.

53. Mario Benbassat (“M. Benbassat”), a friend of Kohn, helped create the Benbassat Funds and directed those funds’ investments into the IA Business. Upon information and belief, M. Benbassat was a director of a number of, and controlled, the Benbassat Funds, and regularly traveled to New York City to meet with Madoff. Also upon information and belief, M. Benbassat received fees and/or distributions to which he was not entitled and/or which are composed, in part, of Customer Property.

54. Alberto Benbassat (“A. Benbassat”), M. Benbassat’s son, helped manage and served as a director of the Benbassat Funds. He also managed the Benbassat Funds’ relationship with Madoff and regularly traveled to New York City to meet with Madoff. Upon information and belief, A. Benbassat received fees and/or distributions to which he was not entitled and/or which are composed, in part, of Customer Property.

55. Stephane Benbassat (“S. Benbassat”), M. Benbassat’s son and A. Benbassat’s brother, also helped manage and served as a director of a number of the Benbassat Funds. He also managed the Benbassat Funds’ relationship with Madoff, and regularly traveled to New York City to meet with Madoff. Upon information and belief, S. Benbassat received fees and/or distributions to which he was not entitled and/or which are composed, in part, of Customer Property.

56. As detailed further herein, A. Benbassat, M. Benbassat, and S. Benbassat (collectively, the “Benbassat Family”) created a variety of entities that purported to provide services to the Benbassat Funds. Likewise, Kohn and defendant UniCredit Bank Austria AG set up a variety of entities that claim to have provided services to the Medici Funds. Upon information and belief, as further detailed herein, all of these entities were established principally for the purpose of investing in BLMIS and further extracting fees from investors placed in the Feeder Fund Defendants.

The Funds and Related Investment Vehicles

57. Primeo Fund (“Primeo”) is an investment fund organized under the laws of the Cayman Islands with a registered address at the offices of Zolfo Cooper (Cayman) Ltd., P.O. Box 1102, Cayman Financial Center, Bermuda House, Cayman Islands. Primeo invested, directly and indirectly, with BLMIS. Upon information and belief, defendants Kohn, Bank Medici, and UniCredit Bank Austria AG created and controlled Primeo. Primeo is currently in liquidation in the Cayman Islands. Primeo received approximately \$145 million in avoidable direct and/or indirect transfers from BLMIS.

58. Herald Fund SPC (“Herald”) is an investment fund organized under the laws of the Cayman Islands. Its registered agent is M&C Corporate Services Limited, P.O. Box 309 GT, Ugland House, South Church Street, George Town, Grand Cayman, Cayman Islands. Herald

invested directly with BLMIS. Upon information and belief, defendants Bank Medici and Kohn created and controlled Herald for the purpose of investing assets with BLMIS. Herald received approximately \$578 million in avoidable direct and/or indirect transfers from BLMIS.

59. Herald (Lux) SICAV (“Herald (Lux)”) is an investment fund organized under the laws of the Grand Duchy of Luxembourg, with a registered office at 6, place de Nancy, L-2212 Luxembourg. Upon information and belief, since its inception, Herald (Lux) was qualified as an Undertaking for Collective Investment in Transferable Securities (“UCITS”) fund within the meaning of the UCITS regulations in Luxembourg. Herald (Lux) invested directly with BLMIS. Upon information and belief, defendants Kohn and Bank Medici created and controlled Herald (Lux) for the purpose of investing assets with BLMIS. Herald (Lux) is currently in liquidation in Luxembourg. Herald (Lux) received the benefit of approximately \$134,000 in direct and/or indirect avoidable transfers from BLMIS.

60. Alpha Prime Fund Limited (“Alpha Prime”) is an investment fund organized under the laws of Bermuda, with a registered address at Bank of Bermuda Building, 6 Front Street, Hamilton HM 11, Bermuda. Alpha Prime invested directly with BLMIS. Upon information and belief, defendant UniCredit Bank Austria AG, and Ursula Radel-Leszczyński, with the help of Kohn, created and controlled Alpha Prime for the purpose of investing assets with BLMIS. Alpha Prime received approximately \$86 million in avoidable direct and/or indirect transfers from BLMIS.

61. Senator Fund SPC (“Senator”) is an investment fund organized under the laws of the Cayman Islands. Its registered agent is DMS Corporate Services Ltd., P.O. Box 1344, DMS House, 20 Genesis Close, Grand Cayman KY1-1108, Cayman Islands. Senator invested directly with BLMIS. Upon information and belief, defendant UniCredit Bank Austria AG and its

subsidiary, BA Worldwide Fund Management Limited, as well as Ursula Radel-Leszczynski—whom Kohn introduced to Madoff—created and controlled Senator for the purpose of investing assets with BLMIS. Senator received approximately \$95 million in avoidable direct and/or indirect transfers from BLMIS.

62. Hermes International Fund Limited (“Hermes”) is an investment fund organized under the laws of Bermuda and later redomiciled under the laws of the British Virgin Islands. Its registered agent is Codan Trust Company (B.V.I.) Ltd., Romasco Place, Wickhams Cay 1, P.O. Box 3140, Road Town, Tortola, British Virgin Islands. Hermes was invested with BLMIS through its wholly-owned subsidiary, Lagoon Investment Limited, in whose name accounts were held at BLMIS. Upon information and belief, Hermes was created and run by the Benbassat Family and related individuals and entities, identified below. Hermes received approximately \$250 million in avoidable direct and/or indirect transfers from BLMIS.

63. Lagoon Investment Limited (“Lagoon”) is a company organized under the laws of the British Virgin Islands on or about January 7, 1992. Its registered agent is Codan Trust Company (B.V.I.) Ltd., Romasco Place, Wickhams Cay 1, P.O. Box 3140, Road Town, Tortola, British Virgin Islands. Lagoon is a wholly-owned subsidiary of Hermes that, upon information and belief, was created by the Benbassat Family and related entities and individuals, identified below, for the purpose of investing assets with BLMIS. Lagoon was the nominal holder of five BLMIS accounts (account numbers 1FN021, 1FN066, 1FN096, 1FR015, and 1FR016) and received approximately \$250 million in direct and/or indirect avoidable transfers from BLMIS.

64. Thema Fund Ltd. (“Thema Fund”) is an investment fund organized under the laws of the British Virgin Islands. Its registered agent is Codan Trust Company (B.V.I.) Ltd., Romasco Place, Wickhams Cay 1, P.O. Box 3140, Road Town, Tortola, British Virgin Islands.

Thema Fund invested with BLMIS through its wholly-owned subsidiary, Thema Wise Investments Ltd., in whose name an account was held at BLMIS. Upon information and belief, Thema Fund was created and controlled by the Benbassat Family and their related entities for the purpose of investing a substantial portion of its assets with BLMIS. Thema Fund received approximately \$132 million in direct and/or indirect avoidable transfers from BLMIS.

65. Thema Wise Investments Ltd. (“Thema Wise”) is a company organized under the laws of the British Virgin Islands. Its registered agent is Codan Trust Company (B.V.I.) Ltd., Romasco Place, Wickhams Cay 1, P.O. Box 3140, Road Town, Tortola, British Virgin Islands. Thema Wise is a wholly-owned subsidiary of Thema Fund that, upon information and belief, was created and controlled by the Benbassat Family and their related entities for the purpose of investing assets of Thema Fund with BLMIS. Thema Wise was the holder of BLMIS account number IFR093, and received approximately \$132 million in direct and/or indirect avoidable transfers from BLMIS.

66. Thema International Fund plc (“Thema International”) is an investment fund organized under the laws of Ireland. Its registered agent is William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2, Ireland. Upon information and belief, since at least December 31, 2006, Thema International has been authorized to operate as a UCITS fund within the meaning of the UCITS regulations in Ireland. Upon information and belief, the Benbassat Family and their related entities created and controlled Thema International for the purpose of investing assets with BLMIS. Thema International received approximately \$692 million in direct and/or indirect avoidable transfers from BLMIS.

67. Geo Currencies Ltd. S.A. (“Geo Currencies”) is an investment fund organized under the laws of Panama. Its registered agent is B. Arias & Asociados, Banco General Tower,

15th Floor, Aquilino de la Guardia Street, Marbella, Panamá 5, Republic of Panama. Geo Currencies received the benefit of approximately \$416,000 in avoidable direct and/or indirect transfers from BLMIS.

68. Lagoon Investment Trust (“Lagoon Trust”) was created pursuant to a trust deed between defendants Lagoon and Hermes Asset Management Limited, and is a professional fund recognized in the British Virgin Islands. Its registered agent is Codan Trust Company (B.V.I.) Ltd., Romasco Place, Wickhams Cay 1, P.O. Box 3140, Road Town, Tortola, British Virgin Islands. Upon information and belief, defendant Aurelia Fund Management Limited, along with the Benbassat Family and their related entities, created and controlled Lagoon Trust for the purpose of investing with BLMIS. Upon information and belief, Lagoon Trust received approximately \$250 million in direct and/or indirect avoidable transfers from BLMIS.

69. Collectively, Primeo, Herald, Herald (Lux), Alpha Prime, Senator, Hermes, Lagoon, Thema Fund, Thema Wise, Thema International, Geo Currencies, and Lagoon Trust are referred to herein as the “Feeder Fund Defendants.”

The Management Defendants

Management Defendants Primarily Associated With Medici Funds

70. 20:20 Medici AG (“Bank Medici”) is a company organized under the laws of Austria, with a registered address at Hegelgasse 17/17, 1010 Vienna, Austria. Defendant UniCredit Bank Austria AG founded Bank Medici in 1994. Later that year, Kohn purchased a majority interest in Bank Medici. In 2003, Bank Medici was granted a banking license and was renamed Bank Medici AG. Upon information and belief, Bank Medici’s banking license was revoked on or about May 28, 2009. On or about June 19, 2009, it changed its name to 20:20 Medici AG and, upon information and belief, continues to operate without a banking license. Also upon information and belief, Bank Medici helped create and control two of the Feeder Fund

Defendants, Herald and Herald (Lux), and helped create and market Primeo. In addition, at various times, Bank Medici acted as the investment manager to Herald, Thema International, and Herald (Lux), and marketed Herald and Herald (Lux) to investors across the globe. Upon information and belief, Bank Medici received at least \$15 million in fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

71. UniCredit Bank Austria AG (“Bank Austria”) is a company organized under the laws of Austria, with a registered address at Schottengasse 6-8, 1010 Vienna, Austria. Upon information and belief, during a portion of the relevant period, Bank Austria maintained a branch office at 150 E. 42nd Street, New York, New York. Bank Austria is a subsidiary of defendant UniCredit S.p.A. Upon information and belief, Bank Austria helped create, control, and/or market Primeo, Alpha Prime, and Senator. Upon information and belief, Bank Austria received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

72. BA Worldwide Fund Management Ltd. (“BA Worldwide”) was a company organized under the laws of the British Virgin Islands with a registered address at Craigmuir Chambers, P.O. Box 71, Road Town, Tortola, British Virgin Islands. BA Worldwide was a subsidiary of defendant Bank Austria and was voluntarily liquidated on or about February 22, 2008. At various times, BA Worldwide served as the investment adviser to Primeo, Alpha Prime, and Thema International. Upon information and belief, BA Worldwide received at least \$68 million in fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

73. UniCredit S.p.A. (“UniCredit”) is a company organized under the laws of Italy, with a registered address at Via Alessandro Specchi, 16, 00186, Rome, Italy, and a general

management headquarter office at Piazza Cordusio, 20123, Milan, Italy. Upon information and belief, UniCredit has a branch office at 150 E. 42nd Street, New York, New York. UniCredit is the parent company of defendants Bank Austria and Pioneer and, at various times, upon information and belief, helped control the activities of Primeo. Upon information and belief, UniCredit received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

74. Herald Asset Management Limited (“Herald Management”) is a company organized under the laws of the Cayman Islands with a last known registered address at Whitehall House, 238 North Church Street, P.O. Box 31362, Seven Mile Beach, George Town, Grand Cayman, Cayman Islands. Upon information and belief, Herald Management is wholly-owned by Kohn’s husband, defendant Erwin Kohn, via a trust. Herald Management served as investment manager to Herald. Upon information and belief, Herald Management received at least \$99 million in fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

75. Eurovaleur, Inc. (“Eurovaleur”) is a company organized under the laws of the State of New York with multiple last known addresses at 230 Park Avenue, Room 539, New York, New York 10169, and 767 5th Avenue, 5th Floor, Room 507, New York, New York 10022. Eurovaleur is wholly-owned by Kohn and members of her family. Upon information and belief, Eurovaleur served as the investment sub-adviser to Primeo and received 20% of the fees that BA Worldwide received in connection with Primeo. Upon information and belief, Eurovaleur holds an ownership interest in defendant Thema Asset Management Limited. Upon information and belief, Eurovaleur received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

76. Pioneer Alternative Investment Management Limited (“Pioneer”) is a company organized under the laws of Ireland with a registered address at 1, George’s Quay Plaza, George’s Quay, Dublin 2, Ireland. Pioneer is a wholly-owned subsidiary of Pioneer Global Asset Management S.p.A., a subsidiary of UniCredit. Pioneer served as an investment adviser to Primeo. Upon information and belief, Pioneer received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

77. Alpha Prime Asset Management Ltd. (“Alpha Prime Management”) is a company organized under the laws of Bermuda with a registered address at 83 Front Street, Hamilton HM 12, Bermuda. Alpha Prime Management served as the investment manager to Alpha Prime. Upon information and belief, Alpha Prime Management received fees and/or distributions of at least \$16 million to which it is not entitled and/or which are composed, in part, of Customer Property.

78. Regulus Asset Management Limited (“Regulus”) is a company organized under the laws of Bermuda with a registered address at 83 Front Street, Hamilton HM 12, Bermuda. Regulus served as an investment manager to Senator. Upon information and belief, Regulus received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

79. Carruba Asset Management Limited (“Carruba”) is a company organized under the laws of Bermuda with a registered address at 83 Front Street, Hamilton HM 12, Bermuda. Carruba served as investment adviser to Senator. Upon information and belief, in connection with that role, Carruba received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

80. Tereo Trust Company Limited (“Tereo Trust”) is a company organized under the laws of Bermuda with a principal place of business at Swiss Fund Services, 83 Front Street, Hamilton HM 12, Bermuda. Tereo Trust wholly owns Alpha Prime Management, Regulus, and Carruba. Upon information and belief, Tereo Trust received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

Management Defendants Associated with the Benbassat Funds

81. Genevalor, Benbassat et Cie (“Genevalor”) is a partnership formed under the laws of Switzerland with a registered address at rue 6 Place Camoletti, CH 1207, Geneva, Switzerland. Upon information and belief, defendant M. Benbassat co-founded Genevalor. The following are partners in Genevalor: A. Benbassat, S. Benbassat, Nespolo, D. Smith, M. Benbassat, and Union Bancaire Privée. Upon information and belief, Genevalor helped control and create Hermes, Lagoon, Thema International, Thema Fund, Thema Wise, and Geo Currencies. Genevalor, at various times, served as the distributor and sub-distributor of Thema International. Upon information and belief, Genevalor received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

82. Hermes Asset Management Limited (“Hermes Management”) is a company organized under the laws of Bermuda with a registered address at Ecosse Ltd., Bermudiana Arcade, 3rd Floor, 27 Queen Street, Hamilton HM 11, Bermuda. Upon information and belief, Hermes Management is owned and controlled, in part, by the Benbassat Family and/or Genevalor. Hermes Management served as the investment manager of Hermes and Lagoon Trust. Upon information and belief, in connection with those roles, Hermes Management received at least \$79 million in fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

83. Thema Asset Management (Bermuda) Ltd. (“Thema Management Bermuda”) is a company organized under the laws of Bermuda with a registered address at Ecosse Ltd., Bermudiana Arcade, 3rd Floor, 27 Queen Street, Hamilton HM 11, Bermuda. Upon information and belief, members of the Benbassat Family are co-owners and directors of Thema Management Bermuda. Thema Management Bermuda served as the investment manager of Thema Fund. Upon information and belief, Thema Management Bermuda received approximately \$10 million in fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

84. Thema Asset Management Limited (“Thema Management BVI”) is a company organized under the laws of the British Virgin Islands with best known registered addresses at Codan Trust Company (B.V.I) Ltd., Romasco Place, P.O. Box 3140, Road Town, Tortola, British Virgin Islands, and at Harneys Corporate Services, Ltd., Craigmuir Chambers, P.O. Box 71, Road Town, Tortola VG1110, British Virgin Islands. Upon information and belief, members of the Benbassat Family formed and are the directors of Thema Management BVI and, along with Kohn’s company, Eurovaleur, are owners of the company. Thema Management BVI served as the investment manager and global distributor for Thema International. Upon information and belief, Thema Management BVI received at least \$105 million in fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

85. Equus Asset Management Limited (“Equus”) is a company organized under the laws of Bermuda with a registered address at Warner Building, 85 Reid Street, Hamilton HM 12, Bermuda. Equus is owned, in substantial part, by entities owned by members of the Benbassat Family and other partners in Genevalor. Upon information and belief, principals of Equus co-founded and were active in controlling Hermes, Thema Fund, Thema International, and Geo

Currencies. Equus provided administrative support to Thema Management Bermuda in its capacity as investment manager of Thema Fund. In addition, Equus holds ownership interests in Hermes Management and Thema Management Bermuda. Upon information and belief, Equus received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

86. Equus Asset Management Partners, L.P. (“Equus Partners”) is a partnership formed under the laws of Bermuda with a registered office at Warner Building, 85 Reid Street, Hamilton HM 12, Bermuda. Defendants A. Benbassat, S. Benbassat, M. Benbassat, Nespolo, and D. Smith hold, or have held, partnership interests in Equus Partners. Equus Partners is an owner of defendant Equus and, ultimately, holds interests in Hermes Management and Thema Management Bermuda by virtue of its ownership interest in Equus. Equus Partners also provided administrative support to Hermes Management, in its capacity as investment manager of Hermes and Lagoon Trust. Upon information and belief, Equus Partners received fees and/or other distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

87. Aurelia Fund Management Limited (“Aurelia”) is a company organized under the laws of Bermuda with a registered address at Conyers, Dill & Pearman, Clarendon House, 2 Church Street, Hamilton HM 11, Bermuda. Upon information and belief, Aurelia has wound up, or is in the process of winding up, its operations in Bermuda and no longer is a going concern. Upon information and belief, Aurelia holds an ownership interest in Hermes Management, and principals of Aurelia co-founded and were active in controlling Hermes and Lagoon Trust. Aurelia provided administrative support to Hermes Management, the investment manager of Hermes and Lagoon Trust. Aurelia was also the investment adviser of Lagoon Trust. Upon

information and belief, Aurelia received fees and/or other distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

88. Bank Medici, Bank Austria, Genevalor, Herald Management, BA Worldwide, Pioneer, Eurovaleur, Alpha Prime Management, Regulus, Carruba, Hermes Management, Thema Management BVI, Thema Management Bermuda, Equus, Equus Partners, and Aurelia are referred to collectively herein as the “Management Defendants.”

Beneficial Owners

89. Inter Asset Management Inc. (“Inter Asset”) is a company organized under the laws of the British Virgin Islands. Its registered agent is Citco B.V.I. Limited, Citco Building, P.O. Box 662, Wickhams Cay, Road Town, Tortola, British Virgin Islands. Upon information and belief, Inter Asset has an ownership interest in Hermes Management, and received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

90. T+M Trusteeship & Management Services S.A. (“T+M”) is a company organized under the laws of Switzerland with a registered address at rue de Prince 9-11, 1204 Geneva, Switzerland. Upon information and belief, T+M has an ownership interest in Thema Management BVI, and received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

91. GTM Management Services Corp. N.V. (“GTM Management”) is a company organized under the laws of Curaçao with a registered address at c/o Holland Intertrust (Antilles) N.V., De Ruyterkade 58A, Curaçao, Netherlands Antilles. Upon information and belief, GTM Management has an ownership interest in Hermes Management, and received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

92. Aurelia Asset Management Partners (“Aurelia Partners”) was a partnership organized under the laws of Bermuda with a registered address at Chevron International Limited, Chevron House, 11 Church Street, Hamilton HM 11, Bermuda. The partnership was dissolved on October 12, 2009. Upon information and belief, partnership interests in Aurelia Partners were held by defendants Laurent Mathysen-Gerst, Olivier Ador, Pascal Cattaneo, Vladimir Stepczynski, and Jean-Marc Wenger. Aurelia Partners was the owner of Aurelia. Upon information and belief, Aurelia Partners received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

93. Cape Investment Advisors Limited (“Cape Investment”) is a company organized under the laws of Bermuda with a registered address at Warner Building, 85 Reid Street, Hamilton, HM 12, Bermuda. Cape Investment holds an ownership interest in Thema Management Bermuda. Upon information and belief, Cape Investment received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

94. Bank Austria, UniCredit, Tereo Trust, Eurovaleur, Genevalor, Equus, Equus Partners, Cape Investment, Inter Asset, GTM Management, T+M, Aurelia, and Aurelia Partners, as well as the Individual Defendants named herein, are referred to collectively herein as the “Beneficial Owners.”

The HSBC Defendants

95. HSBC Holdings plc (“HSBC Holdings”) is a public limited corporation, incorporated under the laws of England and Wales, with a principal place of business at 8 Canada Square, London E14 5HQ, United Kingdom. HSBC Holdings is the parent company of what is known as the HSBC Group, including all of the HSBC entities named as Defendants herein. Upon information and belief, HSBC Holdings received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

96. HSBC Bank plc (“HSBC Bank”) is a banking institution incorporated under the laws of England and Wales with a principal place of business at 8 Canada Square, London E14 5HQ, United Kingdom. HSBC Bank was the payee bank for all of the Feeder Fund Defendants. Upon information and belief, all moneys that were deposited with BLMIS by the Feeder Fund Defendants went through HSBC Bank. Upon information and belief, all moneys which were withdrawn from BLMIS by the Madoff Feeder Fund Defendants went through HSBC Bank. Upon information and belief, HSBC Bank received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

97. HSBC Bank USA, N.A. (“HSBC Bank USA”) is a national bank chartered by the Office of the Comptroller of the Currency with a principal executive office at 452 Fifth Avenue, New York, New York 10018 and also with a corporate headquarters at 1800 Tysons Boulevard, Suite 50, McLean, VA. HSBC Bank USA operates over 50 branches in Manhattan alone. HSBC Bank USA created structured financial products and entered into transactions involving those structured products, which ultimately served to increase the amount of money invested with BLMIS’s IA Business. Upon information and belief, HSBC Bank USA received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

98. HSBC Securities Services (Bermuda) Limited (“HSSB”), is incorporated under the laws of Bermuda with a principal place of business at 6 Front Street, Hamilton HM 11, Bermuda. Upon information and belief, HSSB served as administrator to Thema Fund, Hermes, and Alpha Prime, and directed and facilitated the transfer of millions of dollars into and out of BLMIS’s IA Business. Upon information and belief, HSSB received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

99. HSBC Institutional Trust Services (Bermuda) Limited (“HITSB”) is a corporation organized and existing under the laws of Bermuda with a principal place of business at 6 Front Street, Hamilton HM 11, Bermuda. HITSB served as the custodian for Alpha Prime, Hermes, and Thema Fund. Upon information and belief, HITSB received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

100. HSBC Bank Bermuda Limited (“HSBC Bank Bermuda”), formerly known as The Bank of Bermuda Limited, is a banking institution with a principal place of business at 6 Front Street, Hamilton HM 11, Bermuda. HSBC Bank Bermuda formerly served as the administrator and custodian of Alpha Prime, Thema Fund, Hermes, and Square One Fund Limited (“Square One”), which is a defendant in a separate action being brought by the Trustee. HSBC Bank Bermuda also served as custodian for the Kingate Funds, both of which are defendants in a separate action being brought by the Trustee. Upon information and belief, HSBC Bank Bermuda entered into at least one sub-custodian agreement with BLMIS. Upon information and belief, HSBC Bank Bermuda received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

101. HSBC Securities Services (Luxembourg) S.A. (“HSSL”), formerly known as Bank of Bermuda (Luxembourg) S.A., is a limited liability company incorporated as a société anonyme under the laws of the Grand Duchy of Luxembourg, and maintains its principal place of business at 16, boulevard d’Avranches, L-1160 Luxembourg. HSSL served as administrator to Lagoon, Herald, Herald (Lux), and Senator, and, upon information and belief, served as the sub-administrator to Thema Fund, Alpha Prime, Hermes, and Primeo. HSSL also served as custodian to Lagoon, Herald, Herald (Lux), Primeo, and Senator, and served as sub-custodian to Alpha Prime, Hermes, and Thema Fund. Also, upon information and belief, HSSL engaged

BLMIS to act as its sub-custodian to those Madoff Feeder Funds for which the bank served as custodian or sub-custodian. Upon information and belief, HSSL received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

102. HSBC Bank (Cayman) Limited (“HSBC (Cayman)”), which merged into Bank of Bermuda (Cayman) Limited, is a banking institution incorporated and existing under the laws of the Cayman Islands with a principal place of business at HSBC House, 68 West Bay Road, Grand Cayman, KY1-1102, Cayman Islands. HSBC (Cayman) served as the administrator of Primeo. Upon information and belief, HSBC (Cayman) received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

103. HSBC Private Banking Holdings (Suisse) S.A. (“HSBC Private Banking Holdings (Suisse)”) is a majority-owned subsidiary of HSBC Bank existing under the laws of Switzerland, with a principal place of business at Quai du Général Guisan, 2, P.O. Box 3580, CH-1211, Geneva 3, Switzerland. Upon information and belief, HSBC Private Banking Holdings (Suisse)—and/or entities under its control—marketed and directed investor moneys to the Madoff Feeder Funds, including the Feeder Fund Defendants. Upon information and belief, HSBC Private Banking Holdings (Suisse) received fees and/or distributions to which it is not entitled and/or which are composed, in part, of Customer Property.

104. HSBC Private Bank (Suisse) S.A. (“HSBC Private Bank (Suisse)”) is a public company incorporated and existing under the laws of Switzerland, with a principal place of business at Quai du Général Guisan, 2, P.O. Box 3580, CH-1211 Geneva 3, Switzerland. It is a subsidiary of HSBC Private Banking Holdings (Suisse). Upon information and belief, HSBC Private Banking Holdings (Suisse)—and/or entities under its control—marketed Madoff Feeder Funds, including the Feeder Fund Defendants to investors. Upon information and belief, HSBC

Private Bank (Suisse) received fees and/or distributions to which it was not entitled and/or which are composed, in part, of Customer Property.

105. HSBC Institutional Trust Services (Ireland) Ltd. (“HITSI”) is a limited liability company incorporated under the laws of Ireland with a principal place of business at One Grand Canal Square, Grand Canal Harbour, Dublin 2, Ireland. HITSI served as custodian to Thema International, and other Madoff Feeder Funds, including Defender, Landmark, and Optimal. Upon information and belief, HITSI appointed BLMIS to act as its sub-custodian for those Madoff Feeder Funds for which it served as custodian. Upon information and belief, HITSI received fees and/or distributions to which it was not entitled and/or which are composed, in part, of Customer Property.

106. HSBC Securities Services (Ireland) Ltd. (“HSSI”) is a limited liability company incorporated under the laws of Ireland with a registered office at One Grand Canal Square, Grand Canal Harbour, Dublin 2, Ireland. HSSI served as administrator to Thema International, Defender, Landmark, and Optimal. Upon information and belief, HSSI received fees and/or distributions to which it was not entitled and/or which are composed, in part, of Customer Property.

107. HSBC Fund Services (Luxembourg) S.A. (“HSBC Fund Services”), formerly known as Management International (Luxembourg) S.A., is a wholly-owned subsidiary of HSBC Holdings incorporated under the laws of the Grand Duchy of Luxembourg, and has a registered address at 16, boulevard d’Avranches, L-1160 Luxembourg. HSBC Fund Services acted as sub-administrator and sub-registrar for Hermes. Upon information and belief, HSBC Fund Services received fees and/or distributions to which it was not entitled and/or which are composed, in part, of Customer Property.

108. HSBC Holdings, HSBC Bank, HSBC Bank USA, HITSB, HITSI, HSBC Private Banking Holdings (Suisse), HSBC Private Bank (Suisse), HSSB, HSSI, HSSL, HSBC (Cayman), HSBC Fund Services, and HSBC Bank Bermuda are referred to collectively herein as the “HSBC Defendants.”

109. In addition to the fees and/or distributions described above, the HSBC Defendants are liable to the Trustee for damages caused by actions that enabled, prolonged, and worsened the Ponzi scheme, in amounts to be determined at trial but, in any event, no less than the subscriptions which the HSBC Defendants facilitated into BLMIS and/or the Feeder Fund Defendants.

Other Individuals

110. Erwin Kohn (“E. Kohn”) is the husband of Kohn, and owns Herald Management through a trust vehicle.

111. Ursula Radel-Leszczynski (“Radel-Leszczynski”) served as a director of Primeo and Alpha Prime. Radel-Leszczynski also was the President of BA Worldwide from 2000 until at least 2007 and, upon information and belief, was subsequently employed by Pioneer or one of its affiliates. Also upon information and belief, Radel-Leszczynski co-founded Alpha Prime and Senator; was actively involved in the management of Primeo, Alpha Prime, and Senator; and managed Madoff’s relationship with Primeo, Alpha Prime, and Senator. Upon information and belief, Radel-Leszczynski received fees and/or distributions to which she was not entitled and/or which are composed, in part, of Customer Property.

112. Roberto Nespolo (“Nespolo”) is a general partner of Genevalor and, upon information and belief, managed, administered, and marketed Hermes, Thema International, and Thema Fund for many years. Nespolo also served as a director of Thema Fund, Thema Management Bermuda, and Equus, and is a general partner of Equus Partners. Upon information

and belief, Nespolo received fees and/or distributions to which he was not entitled and/or which are composed, in part, of Customer Property.

113. David T. Smith (“D. Smith”) is a general partner of Genevalor and, upon information and belief, managed, administered, and marketed Hermes, Thema International, and Thema Fund for many years. D. Smith served as a director of Thema Fund, Hermes (and its subsidiary, Lagoon), Thema International, Hermes Management, and Thema Management Bermuda; was the President and a director of Equus; was the President and a Director of Cape Investment; and was a general partner of Equus Partners. Upon information and belief, D. Smith received fees and/or distributions to which he was not entitled and/or which are composed, in part, of Customer Property.

114. Laurent Mathysen-Gerst (“Mathysen-Gerst”), upon information and belief, co-founded and managed, administered, and marketed Hermes and Lagoon Trust. Mathysen-Gerst also served as a director of Hermes (and its subsidiary, Lagoon); was an authorized signatory for Hermes; served on Hermes’s investment committee (which decided with which managers the fund invested); was a director and the President of Aurelia; and was a general partner of Aurelia Partners. Upon information and belief, Mathysen-Gerst received fees and/or distributions to which he was not entitled and/or which are composed, in part, of Customer Property.

115. Olivier Ador (“Ador”), upon information and belief, co-founded, managed, administered, and marketed Hermes and Lagoon Trust. Ador also was a general partner of Aurelia Partners. Upon information and belief, in connection with those roles, Ador received fees and/or distributions to which he was not entitled and/or which are composed, in part, of Customer Property.

116. Pascal Cattaneo (“Cattaneo”), upon information and belief, co-founded and managed, administered, and marketed Hermes and Lagoon Trust. Cattaneo served as a director and Vice-President of Aurelia, and was a general partner of Aurelia Partners. Upon information and belief, Cattaneo received fees and/or distributions to which he was not entitled and/or which are composed, in part, of Customer Property.

117. Vladimir Stepczynski (“Stepczynski”), upon information and belief, co-founded, managed, administered, and marketed Hermes and Lagoon Trust. Stepczynski served as a director of Aurelia; was an authorized signatory for Hermes; served on Hermes’s investment committee (which decided with which managers the fund invested); and was a general partner of Aurelia Partners. Upon information and belief, Stepczynski received fees and/or distributions to which he was not entitled and/or which are composed, in part, of Customer Property.

118. Jean-Marc Wenger (“Wenger”), upon information and belief, co-founded, managed, administered, and marketed Hermes and Lagoon Trust. Wenger served as a director of Aurelia, and was a general partner of Aurelia Partners. Upon information and belief, Wenger received fees and/or distributions to which he was not entitled and/or which are composed, in part, of Customer Property.

119. Kohn, E. Kohn, Radel-Leszczynski, M. Benbassat, A. Benbassat, S. Benbassat, Nespolo, D. Smith, Mathysen-Gerst, Ador, Cattaneo, Stepczynski, and Wenger are referred to collectively herein as the “Individual Defendants.”

PERSONAL JURISDICTION

Individual Defendants

120. This Court has personal jurisdiction over all of the Individual Defendants pursuant to N.Y. C.P.L.R. 301 and 302 and Bankruptcy Rule 7004. All of the Individual Defendants have maintained minimum contacts with New York in connection with the claims

alleged herein. All of the Individual Defendants provided substantial assistance to Madoff in perpetrating a massive fraud and, thereby, committed tortious acts, both within and outside of New York, causing injury within New York. In addition, all of the Individual Defendants and/or their agents have traveled to New York to meet with Madoff, undertaken significant commercial activities in New York, and derived significant revenue from New York.

121. Kohn, Radel-Leszczyński, M. Benbassat, A. Benbassat, S. Benbassat, and Mathysen-Gerst regularly communicated with persons in New York regarding BLMIS.

122. A. Benbassat, D. Smith, and Radel-Leszczyński entered into agreements with BLMIS on behalf of Thema Wise, Thema International, Lagoon, and/or Alpha Prime, and delivered the agreements, or caused the agreements to be delivered, to BLMIS's headquarters in New York.

123. Upon information and belief, all of the Individual Defendants routinely assisted in transferring investor funds to BLMIS for the express purpose of investing with BLMIS.

124. Upon information and belief, Radel-Leszczyński and Ador have filed customer claims in this action seeking to recover assets allegedly lost through BLMIS, and thus have submitted to this Court's jurisdiction.

Feeder Fund Defendants

125. This Court has personal jurisdiction over the Feeder Fund Defendants pursuant to N.Y. C.P.L.R. 301 and 302 and Bankruptcy Rule 7004. All of the Feeder Fund Defendants have maintained minimum contacts with New York in connection with the claims alleged herein. The Feeder Fund Defendants all invested, directly or indirectly, with BLMIS, which operated its principal place of business in New York, New York. Additionally, BLMIS maintained accounts for the benefit of the Feeder Fund Defendants in New York, New York. The Feeder Fund Defendants and/or their agents sent, and/or directed others to send, funds to BLMIS, and

received funds from BLMIS. The Feeder Fund Defendants used New York banks when redeeming funds distributed to them by BLMIS and when investing additional funds with BLMIS. All of the Feeder Fund Defendants and/or their agents routinely directed the transfer of their investors' funds to, and received moneys and receipts from, BLMIS's account at JPMorgan Chase, Account #xxxxxxxxxxxx'703 (the "703 Account"), in New York, New York to conduct trading activities.

126. Alpha Prime, Herald, Herald (Lux), Geo Currencies, Hermes, Lagoon, Primeo, Senator, Thema Fund, Thema Wise, and Thema International, and/or their agents, executed and/or caused to be executed a variety of agreements relating to BLMIS accounts they maintained and/or that were maintained on their behalf. Specifically, the Feeder Fund Defendants executed, or caused to be executed, Customer Agreements, Option Agreements, and Trading Authorizations Limited to Purchases and Sales of Securities and Options, and delivered those agreements to BLMIS at BLMIS's headquarters in New York, New York. By their terms, those agreements were to be performed by BLMIS in New York through activities that were to take place in New York.

127. Further, certain Feeder Fund Defendants—specifically, Alpha Prime, Geo Currencies, Herald, Herald (Lux), Lagoon, Senator, Thema International, and Thema Wise—filed SIPA claims seeking to recover funds that they allegedly lost on their investments in BLMIS, and thus have submitted to this Court's jurisdiction.

Management Defendants

128. This Court has personal jurisdiction over all of the Management Defendants pursuant to N.Y. C.P.L.R. 301 and 302 and Bankruptcy Rule 7004. All of the Management Defendants maintained minimum contacts with New York in connection with the claims alleged herein. In addition, all of the Management Defendants routinely directed the transfer of investor

funds to, and the receipt of investor funds from, BLMIS in New York; derived significant revenue from the purported sales and purchases of securities in New York; and committed tortious acts, both within and outside of New York, causing injury within New York. The Management Defendants reasonably should have expected those acts to have consequences in New York, and derived substantial revenue from interstate or international commerce.

129. Upon information and belief, the Management Defendants and/or their agents communicated regularly with persons in New York regarding BLMIS, and their agents communicated with BLMIS on multiple occasions in connection with the allegations herein.

130. Upon information and belief, certain Management Defendants delivered to BLMIS's headquarters in New York account opening documents, including agreements, relating to BLMIS accounts maintained for the Feeder Fund Defendants.

131. Upon information and belief, the Management Defendants all received BLMIS account statements and trade confirmations, and derived substantial revenue based on the purported trading activities of BLMIS.

Beneficial Owners of Management Defendants

132. This Court has personal jurisdiction over all of the Beneficial Owners pursuant to N.Y. C.P.L.R. 301 and 302 and Bankruptcy Rule 7004. All the Beneficial Owners have maintained minimum contacts with New York in connection with the claims alleged herein. At all relevant times, all of the Beneficial Owners have derived significant revenue from New York and committed tortious acts, both within and outside of New York, causing injury within New York.

133. Upon information and belief, during at least a portion of the relevant period, Bank Austria, Eurovaleur, and UniCredit maintained offices in New York, New York, and regularly transacted business in New York.

134. Upon information and belief, all of the Beneficial Owners have assisted in directing the transfer of funds into, and the receipt of funds from, the 703 Account for the explicit purpose of investing with BLMIS, and they and/or their agents regularly transacted business in New York.

135. Upon information and belief, all of the Individual Defendants who are Beneficial Owners, and/or their agents, traveled to New York, New York to meet with Madoff in the offices of BLMIS, and transacted business in New York. These Defendants have purposefully availed themselves of the laws of the State of New York by undertaking significant commercial activities in New York and by receiving Customer Property to their benefit.

HSBC Defendants

136. This Court has personal jurisdiction over all of the HSBC Defendants pursuant to N.Y. C.P.L.R. 301 and 302 and Bankruptcy Rule 7004. All of the HSBC Defendants have maintained minimum contacts with New York in connection with the claims alleged herein.

137. Acting in their capacity as fund administrators and sub-administrators, HSSI, HSBC Bank Bermuda, HSBC (Cayman), HSSB, HSSL, and HSBC Fund Services (collectively, the “HSBC Administrator Defendants”) transmitted instructions to BLMIS, and received from BLMIS trade confirmations, account statements, and other information. The HSBC Administrator Defendants communicated with BLMIS in connection with their “duties” as fund administrators and were compensated for such communications. The HSBC Administrator Defendants transmitted the false information provided by BLMIS to customers located around the world, including within the United States. The HSBC Administrator Defendants have availed themselves of the laws of the State of New York by undertaking substantial commercial activities in New York and by receiving Customer Property to their benefit.

138. Acting in their capacity as fund custodians and sub-custodians, HITSI, HSSL, HITSB, and HSBC Bank Bermuda (collectively, the “HSBC Custodian Defendants”) directed and facilitated the transfer of hundreds of millions of dollars to and from BLMIS in New York for the purported purchase and sale of securities in New York. Through these activities, the HSBC Custodian Defendants purposely availed themselves of the laws of the State of New York by undertaking substantial commercial activities in New York and by receiving Customer Property to their benefit. The HSBC Custodian Defendants committed tortious acts both within and outside of New York, causing injury in New York, and reasonably should have expected those acts to have consequences in New York and elsewhere in the United States.

139. Each HSBC Custodian Defendant that entered into a sub-custodian agreement with BLMIS engaged BLMIS as its agent to act as the sub-custodian of fund assets. BLMIS, acting as an agent on behalf of the HSBC Custodian Defendants, committed multiple torts in the State of New York causing substantial injury to persons in the State of New York and elsewhere in the United States.

140. Acting in their capacity as payee banks, certain HSBC Defendants, including HSBC Bank, received and facilitated the transfer of stolen Customer Property out of BLMIS in New York or for the benefit of the Feeder Fund Defendants, and facilitated the transfer of funds from certain Feeder Fund Defendants to BLMIS in New York.

141. Further, certain of the HSBC Defendants, including HSBC Bank and HSBC Bank USA, increased the flow of funds into Madoff’s Ponzi scheme by creating and marketing structured financial products. Those products facilitated the investment of hundreds of millions of dollars into the Madoff Feeder Funds. The inflow of funds from those structured products

helped to perpetuate Madoff's Ponzi scheme, thus deepening the insolvency of BLMIS and perpetuating Madoff's fraud.

142. HSBC Bank USA is domiciled in the United States, and maintains offices and regularly transacts business in the State of New York.

143. The HSBC Defendants have purposefully availed themselves of the laws of the State of New York by undertaking significant commercial activities in New York, and by receiving Customer Property to their benefit. The HSBC Defendants derived significant revenue from New York. The HSBC Defendants have committed tortious acts both within and outside of New York, causing injury in New York, and the HSBC Defendants expected or should have reasonably expected those acts to have consequences in New York.

**RED FLAGS STRONGLY SUGGESTED
THAT BLMIS'S IA BUSINESS WAS A FRAUD**

144. For years, the Defendants invested—and encouraged others to invest—through BLMIS's IA Business notwithstanding explicit awareness of myriad red flags indicating that Madoff was engaged in a massive fraud. Despite observing and even internally reporting many signs that, at the very least, Madoff was not investing the way he purported to, the Defendants abandoned all candor and skepticism in order to profit from the supernaturally consistent returns of BLMIS's IA Business. The red flags were shocking not only for what they demonstrated about Madoff's investment strategy, but also for what they demonstrated about the depth of the Defendants' awareness of the fraud.

Madoff's Secrecy

145. Although Madoff touted the simplicity of his investment strategy, he refused to provide even the most basic details about how he implemented that strategy. Madoff's secrecy was a red flag. As HSBC noted in a 2001 report regarding Greenwich Sentry, L.P. ("Sentry"):

“transparency issues prevent us from conducting a proper due diligence.” Yet HSBC had no problem encouraging its customers to invest in a wide array of identical Madoff funds and products. This concern repeatedly was identified by the Defendants, who ultimately ignored Madoff’s inexplicable secrecy and the implication that there was something to hide.

146. The HSBC Defendants, Management Defendants, and Feeder Fund Defendants all acquiesced to Madoff’s demands and kept Madoff’s name out of offering documents relating to the Feeder Fund Defendants. In addition, to assist in maintaining Madoff’s secrecy, the Feeder Fund Defendants were established in domiciles that permitted them to omit mention of both Madoff and BLMIS in offering materials.

147. The Defendants acknowledged that they were concealing Madoff’s identity and role in managing the Madoff Feeder Funds. In August 2005, [REDACTED] of [REDACTED] told [REDACTED]

[REDACTED] of [REDACTED], [REDACTED]
[REDACTED]

148. Similarly, Bank Medici employees were instructed never to mention Madoff when discussing the funds with unsophisticated investors.

Madoff’s Purported Trade Volumes Were Too High to Be Believed

149. Although for many years Madoff was not willing to disclose BLMIS’s assets under management, the Defendants knew that the IA Business was too big to plausibly execute the SSC Strategy: with *at least* billions under management, there were not enough shares of stock to enable Madoff’s supposedly seamless entry into and exit out of the market. Madoff purported to purchase baskets of stocks and options which were then allocated to each customer account. When BLMIS registered as an investment adviser in August 2006, it disclosed (inaccurately) that it had \$11.7 billion in assets under management at the end of July 2006.

Despite the inaccuracy of this disclosure, the Defendants should have recognized that a fund of

that size would entail trading immense percentages of some of the most highly-traded stocks in the world. At times, BLMIS's purported trades in stocks on behalf of its IA customers approached or exceeded the entire volume of trades in those stocks on the composite tape, which includes all listed and unlisted market volumes.

150. For example, on November 26, 2007, BLMIS purportedly traded 8,608 shares of Abbott Laboratories (ABT) in Senator's account, an amount which, when extrapolated to the entire IA Business, would have exceeded the daily volume of that stock traded on the composite index by 407%.

151. In fact, across all of the accounts of the funds for which the HSBC Administrator Defendants served as administrator, there were 484 purported trades in stocks which, when extrapolated across the entire IA Business, would have exceeded the entire volume of trades in those stocks on the composite tape, and an additional 445 which, if similarly extrapolated, would have represented more than 50% of the volume traded in those stocks on the composite tape. Across all of the accounts of the funds for which HSBC served as custodian there were 454 purported transactions where BLMIS's trades represented more than 50% of the purportedly traded stock's volume on the composite tape and an additional 484 where BLMIS's trades exceeded the entire volume of the purportedly traded stock on the composite tape.

152. Aside from the implausibility of effecting trades comprising more than half of the daily trading volume in a particular stock, the Defendants should have—at the very least—been concerned with the fact that these massive trades never caused *any market displacement whatsoever*.

153. Despite the large volumes that Madoff purported to trade, BLMIS's IA Business never caused the slightest ripple in the market. Madoff purported to fully exit and re-enter the

market eight to twelve times every year, each time in just a few days, trading billions of dollars worth of stocks without causing any price displacement or other market effect. As the world now knows, this displacement was never observed because the trading did not occur. Based on the lack of observable market reaction, the Defendants knew or should have known that Madoff's trades were not happening as he claimed.

154. At the very least, these observations should have caused the Defendants to inquire further about Madoff's purported trading activity. Despite these signs that BLMIS was not trading in the manner represented to its customers, the Defendants buried their heads in the sand, and the Management Defendants and HSBC Defendants continued to receive fees for their "efforts."

There Were Not Enough Options to Implement Madoff's Purported Strategy

155. The Defendants were on notice of the impossibility of executing the number of options contracts required by the SSC Strategy. It should have been obvious that there was insufficient open interest in the listed options contracts required to hedge the billions of dollars under management at BLMIS's IA Business. Additionally, it would be, practically speaking, impossible to find OTC counterparties to supply the required option liquidity.

156. While, at times, Madoff claimed to purchase options over-the-counter, at other times he claimed to purchase the option contracts on the Chicago Board Options Exchange ("CBOE"). Either method was, on its face, impossible on numerous occasions, the option volume reported to BLMIS's customers exceeded the total volume of comparable options contracts traded on the CBOE by many hundreds and even thousands of times. The volume of the purported options trading in the Feeder Fund Defendants' accounts alone warranted further investigation by sophisticated financial entities such as the Defendants. However, the Defendants ignored this red flag and continued to market the funds.

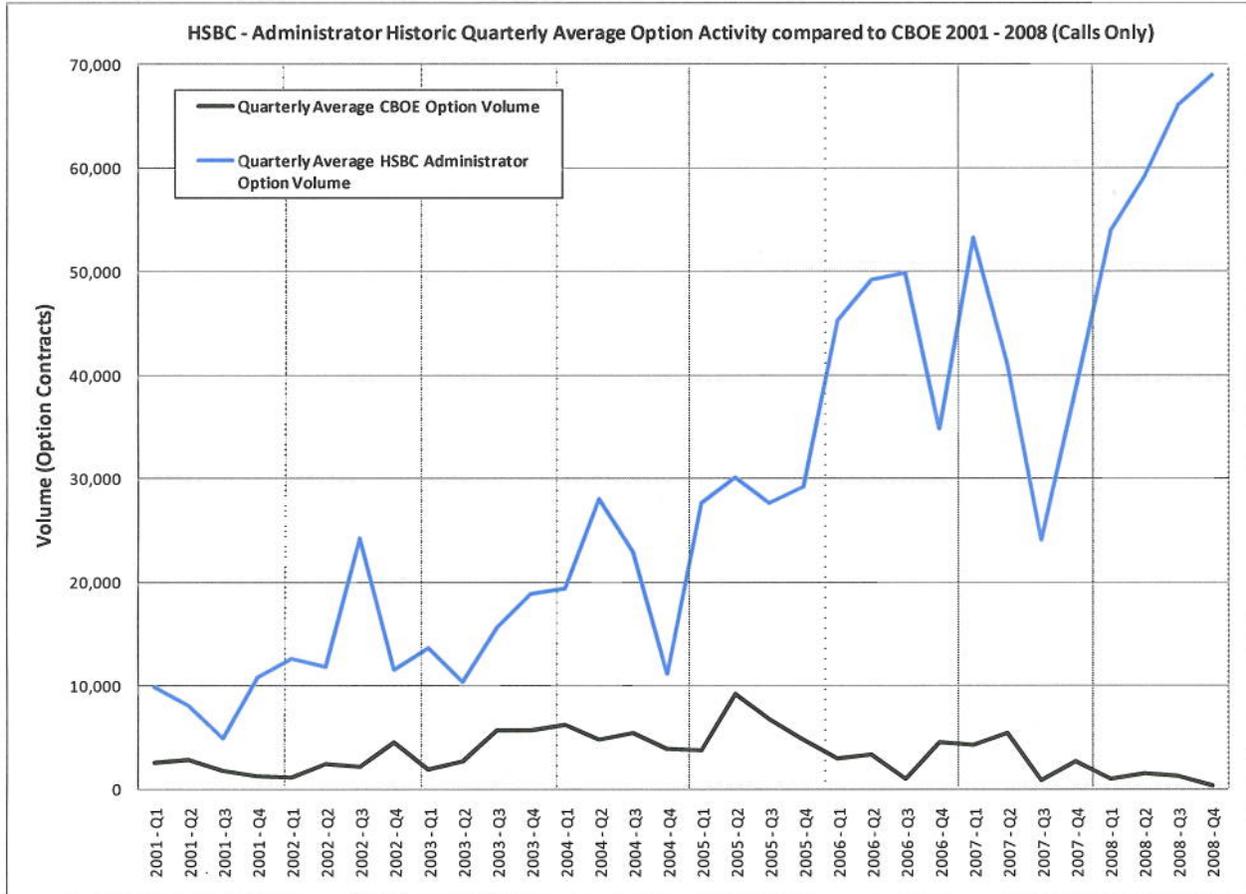
157. In addition, there were days on which Madoff purportedly executed options trades, but publicly available records show no options that had the same purchase date, strike price, and expiration date as those Madoff purportedly traded on the CBOE on those days. The Defendants also ignored this red flag.

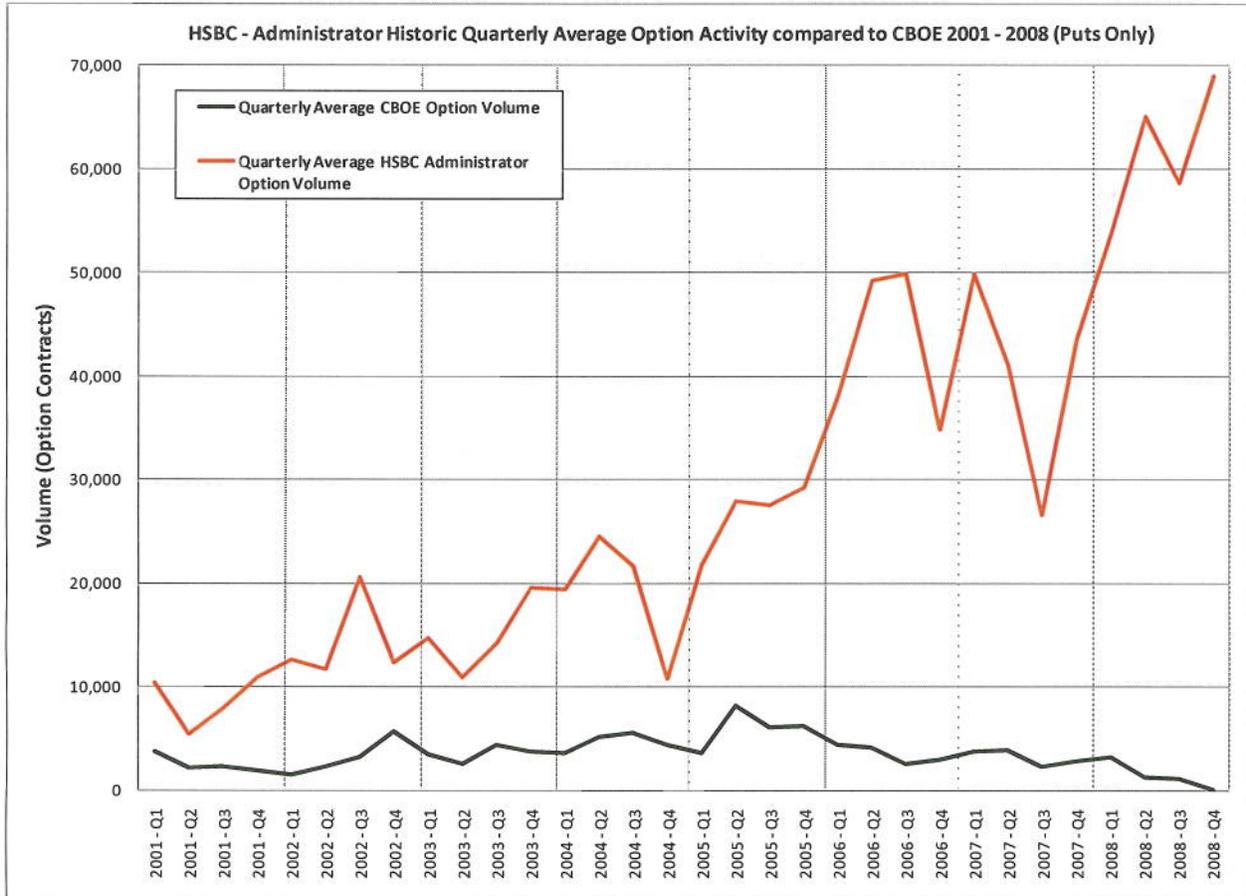
158. The purported options trading in each of the Funds' accounts was far beyond worldwide reported volume. As set forth in the following table, the volume of options contracts which BLMIS reported to the Defendants and the Madoff Feeder Funds exceeded the total volume of contracts for options with the same purchase date, strike price, and expiration date traded on the CBOE:

	Total Transactions Over Volume	Total Transactions	Percentage of Transactions Over Volume
Alpha Prime/Alpha Prime Management	153	440	34.77%
Aurelia/Equus Partners	381	844	45.14%
BA Worldwide	561	837	67.03%
Bank Medici	236	399	59.15%
Defender	72	102	70.59%
Eurovaleur	272	714	38.10%
Genevalor	613	860	71.28%
Geo Currencies	55	631	8.72%
Herald/Herald Management	223	399	55.89%
Herald (Lux)	31	57	54.39%
Hermes Management/Hermes/Lagoon/HSBC Fund Services	381	844	45.14%
HITSB	141	161	87.58%
HSBC Administrator	780	871	89.55%
HSBC Bank Bermuda	784	861	91.06%
HSBC (Cayman)	275	724	37.98%
HSBC Custodian	813	875	92.91%
HSSB	392	844	46.45%
HSSI/HITSI	727	839	86.65%
HSSL	562	859	65.42%
Kingate Euro	422	843	50.06%
Kingate Global	740	838	88.31%
Landmark	43	80	53.75%

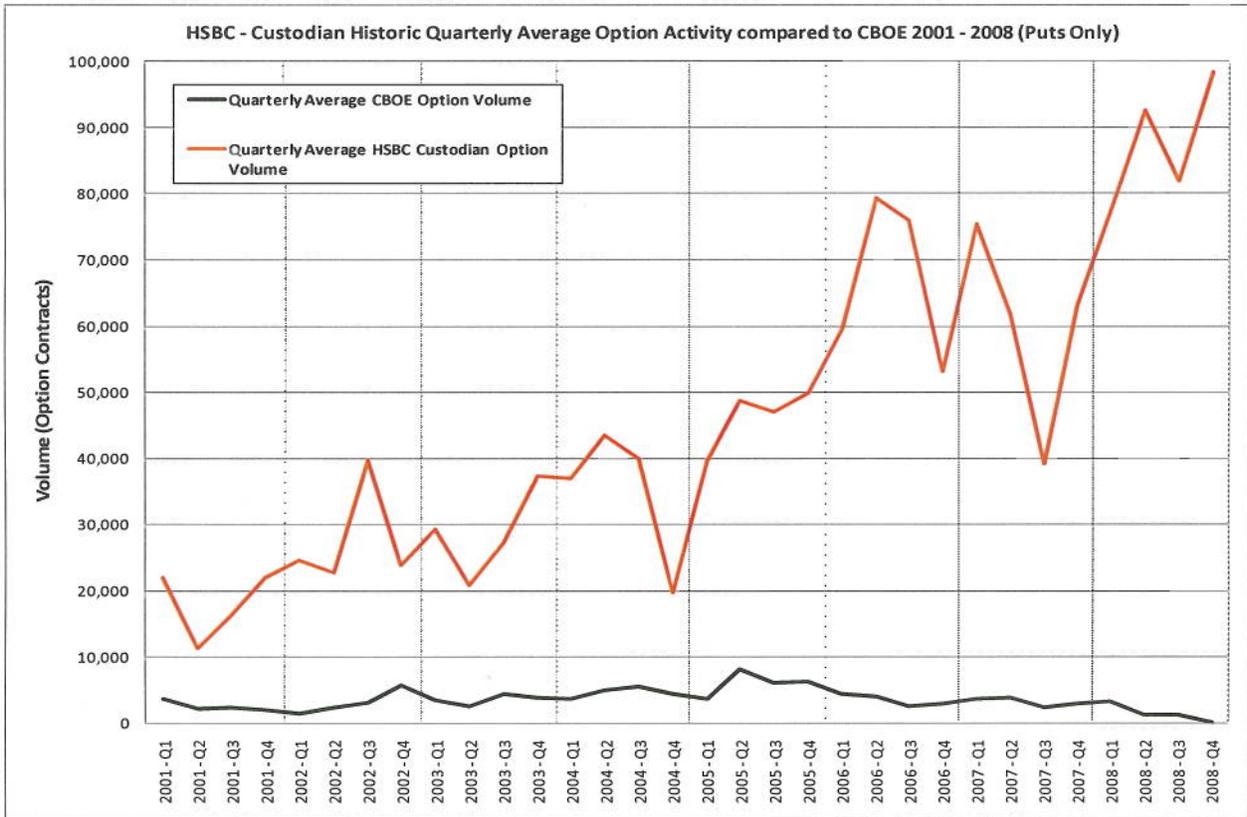
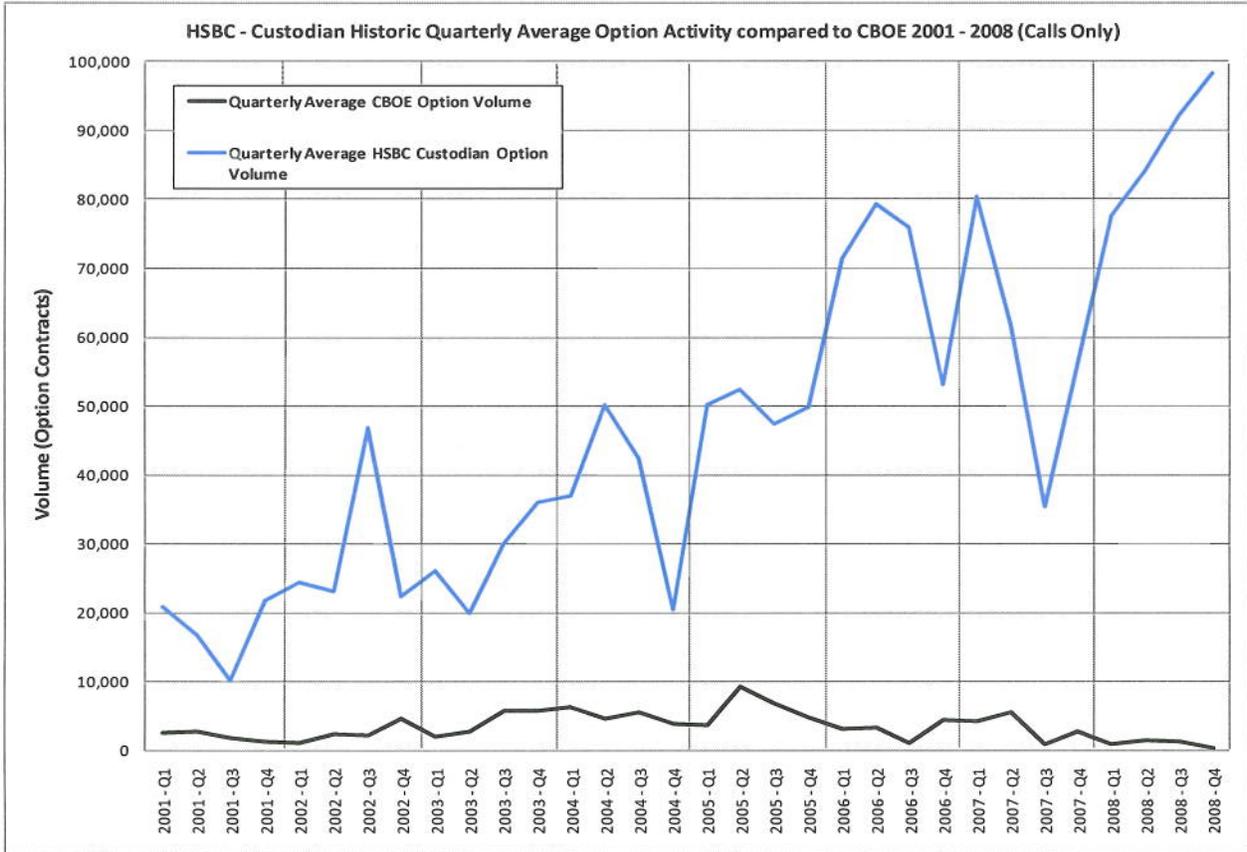
	Total Transactions Over Volume	Total Transactions	Percentage of Transactions Over Volume
Optimal	654	837	78.14%
Pioneer	3	10	30.00%
Primeo Fund	275	724	37.98%
Senator/Regulus/Carruba	52	138	37.68%
Square One	64	822	7.79%
Thema International	502	825	60.85%
Thema Management BVI	366	674	54.30%
Thema Wise/Thema Fund/Thema Management Bermuda/Equus	126	553	22.78%

159. Similarly, as described in the following graphs, from 2001 to 2008, BLMIS purported to trade—on behalf of accounts serviced by the HSBC Administrator Defendants—volumes that regularly were many hundreds of times greater than the total number of put and call options for options executed on the CBOE with the same purchase date, strike price, and expiration date:





160. Similarly, as set forth in the following graphs, from 2001 to 2008, BLMIS purported to trade—on behalf of accounts serviced by the HSBC Custodian Defendants—volumes that regularly were many thousands of times greater than the total number of put and call options executed on the CBOE with the same purchase date, strike price, and expiration date options:



Many Trades Appeared to Have Been Executed Outside the Daily Price Range

161. Many of the trades described in the Defendants' account statements appeared to have been executed outside the daily price range. The Management Defendants and HSBC Defendants, as administrators, sub-administrators, custodians, and/or sub-custodians of the Feeder Fund Defendants, should have reviewed trade confirmations on a regular basis in connection with these duties. Yet these Defendants simply ignored that these trade confirmations often reflected average trade values that were outside the daily price range for such securities.

162. For example, Lagoon's account statement for January 2001 reported the purchase of 33,120 shares of Pfizer Inc. (PFE) with a settlement date of January 8, 2001. BLMIS's records indicate that these shares were purchased on January 3, 2001 at a price of \$40.56. However, the price range for Pfizer Inc. stock on January 3, 2001 ranged only between \$46.44 and \$42.50. Upon information and belief, the Defendants reviewed these trade confirmations and took no action in response to this anomaly. There are a total of 142 unique instances where Lagoon's account bought or sold securities outside of the daily price range.

163. As set forth in the following table, BLMIS regularly purported to execute equities transactions on behalf of the Feeder Fund Defendants' and Madoff Feeder Funds' accounts that were outside the transacted security's daily price range:

	Equities Total Trades Out of Range
Alpha Prime/Alpha Prime Management	26
Aurelia/Equus Partners	277
BA Worldwide	304
Bank Medici	22
Defender	0
Eurovaleur	141
Genevalor	568

	Equities Total Trades Out of Range
Geo Currencies	52
Herald/Herald Management	22
Herald (Lux)	0
Hermes Management/Hermes/Lagoon/HSBC Fund Services	277
HITSB	3
HSBC Administrator	1,116
HSBC Bank Bermuda	815
HSBC (Cayman)	141
HSBC Custodian	1,396
HSSB	278
HSSI/HITSI	417
HSSL	566
Kingate Euro	140
Kingate Global	140
Landmark	0
Optimal	278
Pioneer	0
Primeo Fund	141
Senator/Regulus/Carruba	0
Square One	134
Thema International	139
Thema Management BVI	139
Thema Wise/Thema Fund/Thema Management Bermuda/Equus	100

164. Any one of these facially impossible trades should have, at the very least, put these Defendants on notice that Madoff was not doing what he purported to do. In fact, across all of the HSBC Administrator Defendants' accounts, there were 1,116 equity transactions executed at a price above the daily high or below the daily low for the purportedly traded security.

165. Across all of the accounts for which the HSBC Defendants served as custodian, there were 1,396 equity transactions executed at a price above the daily high or below the daily low for the purportedly traded security.

Madoff Insisted on Acting as His Own Custodian

166. The HSBC Custodian Defendants were responsible for insuring that Madoff had the customer funds he purported to have. Their independence was critical to the integrity and trustworthiness of the customer statements. Of course, had there been a reliable custodian, it would have been obvious that Madoff did not have the assets he purported to have. Therefore, Madoff insisted that he act as his own custodian. Always willing to play the lapdog, HSBC delegated to BLMIS the safekeeping of the assets of a number of Madoff Feeder Funds, including, but not limited to, Thema International, Thema Fund and its subsidiary, Thema Wise, Primeo, Hermes and its subsidiary, Lagoon, Alpha Prime, Herald, Herald (Lux), Kingate Euro, Kingate Global, Square One, Senator, Defender, and Landmark.

167. HSBC's delegation of its custodial duties violated industry practices requiring that assets be held by an independent custodian. Without an independent custodian, there could be no independent verification of assets. Madoff was able to conceal his trading—or the lack thereof—because BLMIS acted as prime broker, custodian, and portfolio manager. The Defendants should have recognized Madoff's insistence on keeping custody of the assets he managed for what it was—a hallmark of fraud.

168. This was pointed out in stark terms by KPMG, the company that HSBC Defendants retained to review fraud risks at Madoff. KPMG wrote that allowing BLMIS to act as custodian for its own funds created the potential that the trades were “a sham in order to divert client cash.”

169. HSBC itself recognized this as a serious problem. In its own due diligence reviews, HSBC repeatedly pointed to BLMIS's role as a sub-custodian as a fraud risk. For example, HSBC identified as a risk the lack of “independent custody and verification of trading

activity away from the investment manager (unlike a standard hedge fund that has a prime broker).” HSBC identified this risk every year from at least 2003 through 2008, yet did nothing.

170. Further, upon information and belief, the Defendants never publicly disclosed that BLMIS acted as sub-custodian of investor assets. Instead, the HSBC Custodian Defendants allowed their names to be used by the Feeder Fund Defendants to indicate—inaccurately—that HSBC exercised control over and care of investor assets. Despite having no control over the assets and providing no supervision over BLMIS, the HSBC Custodian Defendants collected fees for these “services.”

171. Armed with knowledge of this red flag and its implications, the Defendants nonetheless handed unsupervised responsibility over the safekeeping of the assets to BLMIS and Madoff. By giving BLMIS unchecked control over all of the assets, the HSBC Custodian Defendants played an indispensable role in allowing Madoff’s scheme to grow and function for as long as it did.

Negative Cash Balances

172. At times, Madoff appeared to execute the SSC Strategy in a manner which, had it been true, would have left his accountholders with a negative cash balance. This could occur for one of three principal reasons: (i) Madoff did not liquidate a sufficient number of Treasury bills to generate enough cash to purchase a basket of equities; (ii) the account satisfied a redemption request while in the market (BLMIS typically did not purport to sell anything to provide a withdrawal, but simply withdrew money, creating a negative cash event); or (iii) the purported purchase of put options occurred *before* the sale of corresponding call options, the sale of which was supposed to finance those put options according to the SSC Strategy.

173. In fact, on 832 separate occasions, the Feeder Fund Defendants’ BLMIS accounts went into a negative cash position. This was clear based upon a cursory review of the relevant

customer statements. For example, on January 11, 2006, Madoff purported to purchase a basket of equities on behalf of Primeo's BLMIS account but had not liquidated a sufficient number of Treasuries to finance the purchase, resulting in a negative cash balance in Primeo's account in the amount of \$78,289,845. Essentially, that meant that Madoff provided Primeo with a \$78 million interest-free loan. Similarly, over a fourteen-day period in November 2005, Primeo had an average negative balance of \$39,786,011. On 129 separate occasions, for a total of 573 days, Primeo's cash balances with Madoff had a negative value, yet Primeo was charged no interest, nor did Primeo have a margin agreement with BLMIS. No legitimate institution could advance this amount of money without a margin account, for Primeo's benefit, and none would have failed to charge interest during these periods. Madoff did not do so. Madoff's failure to require a margin account and/or charge interest was an alarming red flag. Primeo never questioned it.

174. Madoff never charged the Feeder Fund Defendants any interest for what appeared to be the extension of huge lines of credit to finance the SSC Strategy for their benefit. That the Defendants failed to inquire into or acknowledge this unorthodox practice speaks volumes of their disregard for principles of independent, meaningful, and reasonable due diligence. The Defendants should have been suspicious of Madoff's willingness to advance them hundreds of millions of dollars in interest-free loans.

175. As set forth in the following table, the Defendants' BLMIS accounts had negative cash balances for thousands of days, yet BLMIS never charged them interest for these extensions of credit:

	Number of Days with Negative Cash Balances	Number of Instances of Negative Balances
Alpha Prime/Alpha Prime Management	112	34
Aurelia/Equus Partners	1,085	327

	Number of Days with Negative Cash Balances	Number of Instances of Negative Balances
BA Worldwide	1,045	264
Bank Medici	93	34
Defender	3	3
Eurovaleur	661	150
Genevalor	1,978	617
Geo Currencies	289	108
Herald/Herald Management	64	24
Herald (Lux)	2	2
Hermes Management/Hermes/Lagoon/HSBC Fund Services	1,085	327
HITSB	57	15
HSBC Administrator	3,508	1,053
HSBC Bank Bermuda	2,349	740
HSBC (Cayman)	662	151
HSBC Custodian	4,232	1,308
HSSB	1,104	333
HSSI/HITSI	1,106	373
HSSL	2,101	591
Kingate Euro	375	128
Kingate Global	349	127
Landmark	10	4
Optimal	651	233
Pioneer	1	1
Primeo Fund	662	151
Senator/Regulus/Carruba	14	4
Square One	312	93
Thema International	442	133
Thema Management BVI	415	125
Thema Wise/Thema Fund/Thema Management Bermuda/Equus	162	49

176. Upon information and belief, the Defendants did not ever question where Madoff obtained the money he loaned to them. As one of the world's largest lenders, the HSBC Defendants had to recognize the absurdity that Madoff was—literally—lending HSBC's clients hundreds of millions of dollars for no charge whatsoever. But for the numerous incentives to

look the other way, the Defendants would have known that Madoff was not executing the trades described on customer statements.

Inadequacy of Madoff's Auditors

177. The Defendants knew that BLMIS relied on Friehling & Horowitz—an unknown, three-person accounting firm based in a strip mall in Rockland County, New York—to audit a multi-billion dollar investment fund. The Defendants were on notice that BLMIS's auditors did not have the competence, resources, technological capabilities, or expertise to perform the domestic and international auditing functions associated with BLMIS and its billions under management. That BLMIS, with billions of dollars under management, relied on an auditor like Friehling & Horowitz should have raised a warning sign with the Defendants. The Defendants, instead, acted as if nothing were out of the ordinary and continued to expand their relationships with BLMIS.

178. The absurdity of this situation was not lost on the Defendants; HSBC Private Bank identified as a concern “Madoff’s lack of [a] realistically independent auditor—Friehling & Horowitz is a very small firm with Madoff as its only major client.” Despite being explicitly aware of this red flag, the Defendants did nothing.

Madoff's Returns Did Not Mirror Market Conditions

179. BLMIS's IA Business appeared to be immune from any market instability, enjoying consistent rates of return at all times. For example, through the burst of the dotcom bubble in 2000, September 11th, and the market downturn in 2008, the SSC Strategy produced consistent and positive returns. Even during the last 14 months of BLMIS's existence, the IA Business generated positive returns while the S&P 100 fell nearly 40%. Overall, from January 2000 through November 2008, the Madoff Feeder Funds experienced no more than five months

of negative returns, while the S&P 100 experienced 53 months of negative returns over the same period.

180. Despite these logic-defying returns, the Defendants failed to conduct even a cursory review of how Madoff's SSC Strategy could achieve these results, and ignored clear evidence that Madoff could not possibly be generating the purported returns using the SSC Strategy. Genevalor employees tried to replicate Madoff's performance by using monthly account statements from BLMIS to reconstruct the SSC Strategy and BLMIS's returns, but were unable to do so. Yet Genevalor did not take any steps to inquire further, or to have any of its funds—Hermes, Thema Fund, or Thema International—cease investing in, or withdraw its investments from, BLMIS. The Defendants turned a blind eye to the fact that a strategy purportedly tied to the S&P 100 produced results that bore virtually no correlation to that index.

Madoff Was Able to Execute Trades at the Perfect Time, Every Time

181. Madoff appeared to have a near-perfect ability to buy low and sell high not only from day to day, but *within* each trading day. The Defendants were on notice that this was, practically speaking, impossible. Pricing reflected on trade confirmations and account statements demonstrated the implausibility of Madoff's trades, which almost always occurred at precisely the right time of the day. With remarkable consistency, when Madoff was purchasing shares, the reported average purchase price was in the lower half of the daily range, and when selling shares, the sale price was in the upper half of the daily range.

182. Madoff's routine ability to get the best price was, itself, a red flag. But Madoff further represented to investors that he was time-slicing (that is, entering the market at specific intervals over the course of a trading day). This meant that the reported trade prices were an *average*, and therefore should have gravitated toward the daily midpoint. Instead, they gravitated toward Madoff's optimal (and fictional) price point—a statistical impossibility that

should have spurred the Defendants to undertake the independent, reasonable, and meaningful due diligence they eschewed.

183. In fact, each of the Feeder Funds consistently received trade confirmations which showed purported executions of favorable price points within the day. This was impossible given Madoff's purported time slicing execution process, which should have led to execution at or near the midpoint of the daily trading range. A summary of these staggering results across all the Feeder Fund Defendants is set forth in the following table:

	Total Below Midpoint	Total Buys	Percentage Below Midpoint	Total Above Midpoint	Total Sells	Percentage Above Midpoint
Alpha Prime/Alpha Prime Management	2,709	3,269	82.87%	2,127	2,851	74.61%
Aurelia/Equus Partners	10,832	14,171	76.44%	8,852	12,673	69.85%
BA Worldwide	10,911	13,858	78.73%	9,029	12,431	72.63%
Bank Medici	3,755	4,650	80.75%	2,754	3,837	71.77%
Defender	654	845	77.40%	454	661	68.68%
Eurovaleur	4,360	5,645	77.24%	3,628	5,124	70.80%
Genevalor	22,734	29,391	77.35%	18,493	26,194	70.60%
Geo Currencies	3,462	4,454	77.73%	2,699	3,858	69.96%
Herald/Herald Management	2,526	3,060	82.55%	1,992	2,671	74.58%
Herald (Lux)	267	395	67.59%	133	210	63.33%
Hermes Management/Hermes/Lagoon/HSBC Fund Services	10,832	14,171	76.44%	8,852	12,673	69.85%
HITSB	3,848	4,780	80.50%	2,884	4,277	67.43%
HSBC Administrator	44,967	57,806	77.79%	36,351	51,071	71.18%
HSBC Bank Bermuda	27,006	34,928	77.32%	22,764	31,819	71.54%
HSBC (Cayman)	4,490	5,795	77.48%	3,628	5,124	70.80%
HSBC Custodian	55,105	70,921	77.70%	44,740	63,004	71.01%
HSSB	12,756	16,561	77.02%	10,231	14,735	69.43%
HSSI/HITSI	16,212	21,011	77.16%	13,069	18,493	70.67%
HSSL	25,040	31,967	78.33%	20,135	28,188	71.43%
Kingate Euro	5,049	6,534	77.27%	4,165	5,962	69.86%
Kingate Global	5,089	6,581	77.33%	4,129	5,833	70.79%
Landmark	429	595	72.10%	304	458	66.38%
Optimal	10,149	13,130	77.30%	8,252	11,654	70.81%
Pioneer	130	150	86.67%			
Primeo Fund	4,490	5,795	77.48%	3,628	5,124	70.80%
Senator/Regulus/Carruba	756	952	79.41%	520	716	72.63%
Square One	4,885	6,317	77.33%	4,069	5,730	71.01%
Thema International	4,980	6,441	77.32%	4,059	5,720	70.96%

	Total Below Midpoint	Total Buys	Percentage Below Midpoint	Total Above Midpoint	Total Sells	Percentage Above Midpoint
Thema Management BVI	4,018	5,246	76.59%	3,430	4,764	72.00%
Thema Wise/Thema Fund/Thema Management Bermuda/Equus	3,460	4,325	80.00%	2,883	3,943	73.12%

184. Across all of the accounts for which the HSBC Defendants served as administrator, BLMIS purported to purchase equities on 57,806 occasions; 44,967 of these were in the lower half of the daily price range. On behalf of these accounts BLMIS purported to sell equities on 51,071 occasions; 36,351 of these occurred in the upper half of the daily price range. In other words, Madoff was buying low 77.79% of the time and selling high 71.18% of the time.

185. Across all of the accounts for which the HSBC Defendants served as custodian, BLMIS purported to purchase equities on 70,921 occasions; 55,105 of these were in the lower half of the daily price range. On behalf of these accounts BLMIS purported to sell equities on 63,004 occasions; 44,740 of these occurred in the upper half of the daily price range. In other words, Madoff was buying low 77.70% of the time and selling high 71.01% of the time. Common sense dictates that such a success rate is impossible, especially since Madoff represented that he was time slicing. Yet, the HSBC Defendants did nothing.

186. Instead, HSBC routinely identified—and then ignored—red flags concerning Madoff’s supernatural trading ability. As early as 2001, HSBC recognized the improbability of Madoff being able to generate such consistent, positive returns with such a simplistic strategy:

Bernie Madoff’s 12 year track record trading a split strike conversion strategy on the S&P 100, is quite simply astounding. His annualized return of 15%, (net of a 20% performance fee), at a risk of 3%, yields a sharpe ratio of 3.3. Over this period the fund has endured only 4 down months, (the maximum of which was down 0.5%), and has now gone almost 6 years without a drawdown.

With this track record, seemingly derived from such a simple investment strategy, certain members of the investment community are baffled, as to how such a return stream has been earned.

(emphasis in original).

187. In January 2003, HSBC again admitted that “[i]t is unclear how [Madoff’s] strategy has generated a track record with almost no down months.” Upon information and belief, HSBC did nothing to inquire further, and did not cease investing in BLMIS or advising its clients to invest with the Feeder Fund Defendants.

Madoff Did Not Provide Real-Time Access to IA Business Accounts

188. Despite Madoff’s reputation as an early adopter of advanced trading technology, BLMIS did not provide real-time access to IA Business accounts and sent only paper trade confirmations to its customers. By the mid-2000s, electronic access and immediate investment performance information were industry standard, and routinely required by funds of funds which engaged in real-time hedging. BLMIS, however, transmitted paper copies of trade confirmations to the Defendants and/or their affiliates or representatives three to four days *after* trades purportedly occurred. Upon information and belief, the HSBC Defendants sought to receive trade confirmations electronically, yet, Madoff refused to do so. His nonsensical explanation was a fear that these service providers would steal his “strategy.” Like the other red flags, this was ignored by the Defendants.

Madoff’s Account Statements Purported to Transact With Non-Existent Funds

189. The SSC Strategy purported to invest IA Business customers’ funds in U.S. Treasury bills or mutual funds holding Treasury bills. One such fund was, until 2005, called the “Spartan U.S. Treasury Money Market Fund.” However, on August 15, 2005, that fund changed its name to Fidelity U.S. Treasury Money Market Fund. Despite that, Madoff’s account statements continued to indicate that customers’ funds had been invested in Fidelity Spartan U.S.

Treasury Money Market Fund, which no longer existed at the time. The Defendants' failure to investigate this error speaks to the short shrift they gave their responsibilities as administrators, custodians, managers, and advisers.

Madoff Never Identified His Options Counterparties

190. Madoff never identified the parties on the other side of the thousands of hedging options transactions he purported to effect each month. This should have been an intolerable practice to the Defendants, who bore the risk if those counterparties defaulted on the options agreement.

191. The SSC Strategy purportedly involved the purchase of a basket of between 35 and 50 S&P 100 equities together with a collar of S&P 100 Index put and call options on those stocks to limit the up-side potential and down-side risks. BLMIS purportedly executed agreements with third parties on behalf of account holders pursuant to the "Master Agreement for OTC Options."

192. At times, Madoff claimed simply to execute over-the-counter options trades with a network of unidentified counterparties, claiming that their identities were proprietary. At other times, he claimed simply that the counterparties were large, European financial institutions. And at still other times, Medici employees were told that Madoff's counterparties were American pension funds. The Defendants had excellent reasons to care about the identity of Madoff's purported counterparties as, in those options contracts, they understood that it was the Feeder Fund Defendants—not BLMIS—that bore the risk. Thus, the Defendants could be regularly exposed to hundreds of millions of dollars in potential risk. Had the purported counterparties been unable to meet their obligations, not only would there have been no collar, but the account would have been left exposed to the market without the protections that were so central to the SSC Strategy and they would not have been able to collect on the value of the options contracts.

193. Despite this potential exposure, the Feeder Fund Defendants, the Management Defendants, and the HSBC Defendants, acting as the Funds' administrator and/or custodian, all failed to perform any reasonable, meaningful, or independent inquiry into the counterparties' ability to perform under the contracts. Given the hundreds of millions of dollars at risk had those purported option counterparties been unable to deliver cash as required by the puts and calls, the Defendants' lack of inquiry or skepticism evinces a disregard for the reasonable, meaningful, and independent due diligence demanded. Upon information and belief, the Defendants did not review, comment on, modify, negotiate, or reject any form of draft or final counterparty agreement or OTC transaction confirmation. Despite bearing the risk of the counterparties' failure to perform, the Defendants had no knowledge of the counterparties' identities. The Defendants chose to blindly accept Madoff's nonsensical explanations in order to continue to collect their fees. Additionally, these Defendants should have recognized that under the 1934 Act, Rule 10b-10, states that upon written request, the identity of the counterparty must be disclosed; BLMIS's refusal to provide this information was, in fact, unlawful.

Madoff's Options Transactions Were Frequently Inconsistent With SSC Strategy

194. The Defendants' account statements frequently showed short-term, one-sided, speculative options trades that did not hedge any existing equity investment. These trades were inconsistent with the SSC Strategy and should have sounded alarms because they created precisely the market exposure that the SSC Strategy purported to avoid and were inconsistent with the offering memoranda, prospectuses, and marketing materials of the Feeder Fund Defendants which promised strict compliance with the SSC Strategy and no speculations in options. This was a glaring red flag to sophisticated financial entities such as the Defendants. The Defendants' customer accounts revealed regular deviations from the much vaunted SSC Strategy, yet the Defendants raised no objections.

195. For example, on August 14, 2002, on behalf of Thema International, BLMIS purported to purchase 13,938 S&P 100 call option contracts with a strike price of 450 at \$5.30 per option contract, which was the exact opposite of how the typical SSC Strategy opened. These options did not correspond to the purchase or sale of any equities in Thema International's BLMIS equities trading account, and was therefore a high-risk, stand alone position, far exceeding the implied risk of the SSC Strategy. This position was closed on August 19, 2002 with the purported sale of these options at \$18.44 per option, resulting in a gain of \$18,305,532. Obviously, Madoff deviated from the SSC Strategy to smooth out his returns—he deviated when he needed to meet his goal and other trading activity failed to do so. There were a total of 44 such speculative option transactions on Thema International's BLMIS account, creating a total net gain of \$51,569,327.75.

196. As set forth in the following table, BLMIS purported to engage in hundreds of these speculative options transactions, virtually all of which were profitable, generating purported gains of hundreds of millions of dollars:

	Total Speculative Option Trades	Net Gain or Loss
Alpha Prime/Alpha Prime Management	12	\$4,191,723
Aurelia/Equus Partners	120	\$27,083,399
BA Worldwide	94	\$60,966,609
Bank Medici	16	\$38,411,760
Defender	4	\$4,659,731
Eurovaleur	58	\$20,009,432
Genevalor	220	\$83,376,629
Geo Currencies	42	\$1,395,283
Herald/Herald Management	8	\$23,000,802
Herald (Lux)	4	\$1,419,670
Hermes Management/Hermes/Lagoon/HSBC Fund Services	120	\$27,083,399
HITSB	22	\$15,301,450
HSBC Administrator	387	\$231,240,773
HSBC Bank Bermuda	275	\$191,256,924
HSBC (Cayman)	58	\$20,009,432

	Total Speculative Option Trades	Net Gain or Loss
HSBC Custodian	513	\$400,554,344
HSSB	130	\$33,410,936
HSSI/HITSI	148	\$148,987,012
HSSL	220	\$81,188,258
Kingate Euro	50	\$32,920,758
Kingate Global	76	\$136,392,813
Landmark	4	\$1,195,313
Optimal	96	\$91,562,641
Pioneer	0	–
Primeo Fund	58	\$20,009,432
Senator/Regulus/Carruba	4	\$2,154,612
Square One	21	\$1,212,781
Thema International	44	\$51,569,328
Thema Management BVI	40	\$37,578,040
Thema Wise/Thema Fund/Thema Management Bermuda/Equus	14	\$3,328,620

197. Across all of the accounts for which the HSBC Defendants served as administrator, there were 387 such speculative options transactions, creating a total net gain of \$231,240,773. In reviewing the account statements of the funds for which they served as administrator, the HSBC Administrator Defendants should have raised questions about these speculative option transactions as they left the funds dangerously exposed to downside risk and were inconsistent with the SSC Strategy. But, because these speculative events almost always created gains, smoothed out the returns, and ultimately generated fees, the HSBC Administrator Defendants chose to ignore these readily apparent red flags.

198. Across all of the accounts for which the HSBC Defendants served as custodian, there was a total of 513 speculative options transactions, creating a total net gain of \$400,554,344. In reviewing the account statements of the funds for which they served as custodian, the HSBC Custodian Defendants should have raised questions about these speculative option transactions as they left the funds dangerously exposed to downside risk and were inconsistent with the SSC Strategy.

199. Additionally, Madoff engaged in options transactions that were often unbalanced in that changes to Madoff's basket of equities did not result in corresponding changes to the hedging options. Such "unbalanced hedges" were also inconsistent with the SSC Strategy and should have caused Defendants to inquire about deviations from that strategy.

200. One such unbalanced hedge is evident on the January and February 2004 BLMIS account statements of Kingate Global, Kingate Euro, Primeo, Thema International, Lagoon, Thema Wise, Square One, and Optimal. On January 8, 2004, Madoff purported to purchase two baskets of S&P 100 stocks, each of which included shares of Texas Instruments Inc. (TXN). However, according to the account statements, the shares of Texas Instruments were not sold between February 20 and 25, 2004, as were the other equities contained in the baskets, but rather on January 22, 2004. Despite this early sale of the Texas Instruments shares, the corresponding option hedges did not change. Madoff's failure to rebalance the hedge on these baskets was a deviation from the SSC Strategy that should have put Defendants on inquiry notice as to the purpose of the inconsistency.

201. As set forth in the following table, the Defendants and Madoff Feeder Funds' BLMIS account statements indicate that Madoff regularly did not make changes to the corresponding hedges when he purportedly sold one equity before the rest of the basket:

	Sells Without Hedge Adjustment
Alpha Prime/Alpha Prime Management	22
Aurelia/Equus Partners	34
BA Worldwide	73
Bank Medici	9
Defender	0
Eurovaleur	22
Genevalor	116
Geo Currencies	38
Herald/Herald Management	6

	Sells Without Hedge Adjustment
Herald (Lux)	0
Hermes Management/Hermes/Lagoon/HSBC Fund Services	34
HITSB	8
HSBC Administrator	202
HSBC Bank Bermuda	151
HSBC (Cayman)	22
HSBC Custodian	266
HSSB	39
HSSI/HITSI	80
HSSL	99
Kingate Euro	31
Kingate Global	33
Landmark	0
Optimal	48
Pioneer	0
Primeo Fund	22
Senator/Regulus/Carruba	3
Square One	24
Thema International	32
Thema Management BVI	29
Thema Wise/Thema Fund/Thema Management Bermuda/Equus	12

202. Across all of the accounts for which HSBC was administrator, Madoff did not rebalance the hedge on 202 occasions. By leaving the hedge unbalanced, Madoff deviated from his stated SSC Strategy, but HSBC did not question Madoff about these inconsistencies.

203. Across all of the accounts for which HSBC was custodian, Madoff did not rebalance the hedge on 266 occasions. By leaving the hedge unbalanced, Madoff deviated from his stated SSC Strategy, but HSBC did not question Madoff about these inconsistencies.

BLMIS's Paper Trade Confirmations Were Archaic and Replete with Inconsistencies

204. The Defendants and/or their affiliates and representatives received trade confirmations from BLMIS containing numerous inconsistencies that should have raised a red flag that Madoff was not implementing the SSC Strategy as he purported to do. However, the

Defendants ignored these troubling trade confirmations and instead continued to market the Feeder Fund Defendants to their customers.

205. For example, the trade confirmations did not reflect either the reporting or payment of the “Section 31” fees required by NASD and FINRA rules. This should have raised a red flag with the HSBC Defendants.

206. BLMIS’s trade confirmations erroneously characterized options as “trade origins,” rather than transactions, on checklists that appeared on the trade confirmations. The trade confirmations did not indicate the origin of those options trades. BLMIS’s trade confirmations accurately characterized other transactions, such as purchases of stocks, as “transactions” and accurately indicated the origins of those other transactions. The inaccurate reporting of options transactions on BLMIS’s trade confirmations should have raised a red flag with the Defendants that there were irregularities with BLMIS’s options trading; however, the Defendants failed to make any inquiries into this anomaly.

207. The trade confirmations also frequently indicated that BLMIS had effected the same trades as both principal and agent. Upon information and belief, the Defendants saw, but did not question, this paradox. At times, the front of the BLMIS trade confirmations coded purported trades as “principal transactions” while the backs of the trade confirmations stated, “[w]e have acted in the capacity of Agent for your transaction.” Upon information and belief, the Feeder Fund Defendants and HSBC Defendants were aware of this conflicting language, yet failed to make any inquiries to resolve these inconsistencies.

208. Finally, BLMIS’s option trade confirmations often contradicted Madoff’s claim that, from time to time, he purchased options in the over-the-counter market. All of the options trade confirmations contained Committee on Uniform Security Identification Procedures

(“CUSIP”) identification numbers, which indicated that the options Madoff utilized were S&P 100 Index options that were traded on the CBOE. Because the BLMIS options trade confirmations contained a CUSIP numbers tied to the CBOE, the Defendants should have recognized that BLMIS’s purported options trades were not purchased on the over-the-counter market, as Madoff represented.

Madoff Walked Away From Hundreds of Millions of Dollars by Employing a Bizarre Fee Structure

209. In addition to providing interest-free loans on billions of dollars, Madoff imposed an unusual fee structure that, when compared to the fees charged by most investment funds, including those charged by the Defendants here, meant that Madoff walked away from hundreds of millions, if not billions, of dollars in fees. Instead of charging a 1% - 2% management fee and a 10% - 20% performance fee typical of investment funds, Madoff charged only \$0.04 per share on stock transactions, and \$1.00 per option contract.

210. HSBC’s Private Bank Due Diligence Team, the Feeder Fund Defendants, the Management Defendants, and other investment professionals all were aware that the largesse of this fee structure was an aberration.

211. In a September 2005 email to [REDACTED], [REDACTED], a [REDACTED], and a [REDACTED], [REDACTED] acknowledged that Madoff’s fee structure, under which [REDACTED] paid no management fees [REDACTED] was unusual. [REDACTED] justified the fee structure—as well as Madoff’s insistence to allowing Madoff Feeder Funds to engage independent custodians—by explaining that Madoff was attempting to protect his “magic formula”:

[REDACTED]

212. ██████'s explanation of Madoff's fee structure and resistance to independent custodians was specious. Madoff's fee structure effectively abandoned between \$255 million and \$682 million each year in fees that the Defendants should have expected to pay. Madoff's explanation, that he was "perfectly happy to just earn commissions" should never have passed serious muster, and was another red flag. The Defendants own fees were a powerful incentive to overlook Madoff's absurdly generous fee structure.

213. HSBC Private Bank highlighted Madoff's fee structure as a red flag on at least nine occasions in reports issued between 2001 and 2008. In 2007, for example, HSBC Private Bank noted, "[t]he lack of transparency involving fees paid to Madoff was disturbing." HSBC Private Bank later reached the same conclusion as other investment professionals, stating, "Things do not add up in terms of Bernie's compensation structure." The Defendants ignored these warnings, and continued to funnel money into BLMIS through the Feeder Fund Defendants.

214. The Feeder Fund Defendants were happy to accept Madoff's minimal commission policy, because the fees went directly into the pockets of those funds' managers and service providers. As HSBC Private Bank noted, "[t]he 20% performance fee goes to Fairfield Sentry." The more money the Feeder Fund Defendants were making, the more money the HSBC Administrator Defendants, the HSBC Custodian Defendants, and the Management Defendants—and, ultimately, the Beneficial Owners—were taking in fees. These Defendants continued to procure billions of dollars to fuel the Madoff Ponzi scheme so that they could continue to reap their enormous fees.

Many Financial Professionals Publicly Questioned Madoff's Legitimacy

215. The Defendants ignored not only the red flags obvious from their relationship with BLMIS's IA Business, but also the warnings of many industry professionals. In May 2001,

two industry analysts published articles specifically questioning the legitimacy of BLMIS's operations and its investment performance. A *MAR/Hedge* newsletter, entitled "Madoff tops charts; skeptics ask how," reported on industry experts' bewilderment regarding Sentry's consistent returns and how such returns could be achieved so consistently and for so long. The article also observed that "others who use or have used the strategy . . . are known to have had nowhere near the same degree of success."

216. On May 7, 2001, *Barron's* published an article entitled "Don't Ask, Don't Tell: Bernie Madoff is so secretive, he even asks investors to keep mum." In that article, *Barron's* reported widespread Wall Street skepticism about BLMIS's IA Business, and noted the lack of transparency regarding the SSC Strategy as a result of Madoff's unwillingness to answer questions.

217. Both articles suggested that BLMIS had between \$6 billion and \$7 billion in assets under management. The articles noted that some industry experts speculated that Madoff used information gleaned from his market-making business, such as the bid-ask spreads, to front-run the IA Business's trades and to subsidize and smooth the IA Business's returns.

218. By the time these articles were published, the Defendants had already invested with BLMIS. The Defendants, however, performed no meaningful, independent, or reasonable inquiry or due diligence in response to assertions questioning Madoff's legitimacy or raising the possibility of fraud. Upon information and belief, the Defendants did not speak to the principals or anyone at Sentry regarding the contents of the articles and the serious red flags raised therein. The Defendants instead chose to deliberately ignore these serious indicia of fraud.

219. Upon information and belief, the *Barron's* article was circulated among the Defendants, yet, upon information and belief, none who saw the article attempted to follow up on

any of the issues it raised. Upon information and belief, Defendants' only response to these articles was to invent their own "answers"—without any independent inquiry—to the troubling questions the articles raised, including whether Madoff was front-running, how Madoff was able to purportedly trade such volumes without noticeably affecting the market, the overall lack of transparency, and why Madoff did not charge industry standard management and performance fees.

220. In fact, HSBC appended the *MAR/Hedge* articles to various due diligence reports and often quoted from that article. Upon information and belief, all the Defendants were aware of the *Barron's* and *MAR/Hedge* articles and simply chose to ignore the red flags raised therein.

***BLMIS Account Statements and Confirmations
Often Reflected Settlement Anomalies in Options Transactions***

221. The Defendants also ignored that a high percentage of options transactions in their BLMIS accounts settled in a time range outside of industry norms. It is common industry practice for options trades to settle on the business day following execution. However, BLMIS's trade confirmations regularly showed options transactions that purportedly settled as much as three days after execution. This allowed Madoff ample time to fabricate trades days after they purportedly took place. The Defendants should have been concerned that Madoff's very late settlement policies were enabling fraud. The frequency with which this occurred was staggering. For example, Herald (Lux)'s BLMIS account statements and trade confirmations indicate that out of 57 options transactions purportedly entered into on behalf of Herald (Lux)'s BLMIS account, only six settled on the business day following execution, meaning that 89.47% of all of the purported options activity in Herald (Lux)'s account did not comply with standard trading practices.

222. As set forth in the following table, BLMIS purported to enter into thousands of options transactions on behalf of the Defendants' and the Madoff Feeder Funds' accounts that did not settle on the business day following the execution of the trade:

	Options- Trades not Settling T+1	Options - Percentage not Settling T+1
Alpha Prime/Alpha Prime Management	233	51.89%
Aurelia/Equus Partners	479	25.36%
BA Worldwide	468	24.43%
Bank Medici	434	69.89%
Defender	98	94.23%
Eurovaleur	118	16.05%
Genevalor	1,203	29.93%
Geo Currencies	231	35.76%
Herald/Herald Management	233	57.11%
Herald (Lux)	51	89.47%
Hermes Management/Hermes/Lagoon/HSBC Fund Services	479	25.36%
HITSB	626	96.31%
HSBC Administrator	2,511	31.60%
HSBC Bank Bermuda	941	18.58%
HSBC (Cayman)	130	17.40%
HSBC Custodian	3,072	30.42%
HSSB	785	35.57%
HSSI/HITSI	975	31.95%
HSSL	1,497	35.17%
Kingate Euro	239	27.47%
Kingate Global	316	24.71%
Landmark	76	92.68%
Optimal	543	27.90%
Pioneer	12	100.00%
Primeo Fund	130	17.40%
Senator/Regulus/Carruba	136	95.77%
Square One	237	28.18%
Thema International	258	28.04%
Thema Management BVI	108	14.14%
Thema Wise/Thema Fund/Thema Management Bermuda/Equus	235	41.67%

223. The Administrator and Custodian accounts did not settle on T + 1 close to one-third of the time.

224. Settlement anomalies in such high percentages were clear red flags that should have prompted sophisticated financial entities such as the Defendants to conduct further investigations, request verifications of the trades, and demand more transparency into BLMIS's operations.

Madoff Purported to Execute Trades That Settled on Days When the Market Was Closed

225. Many of the Defendants' BLMIS account statements and trade confirmations reflected trades for which the settlement date and/or the trade date occurred on a weekend. Because the markets are closed on weekends, trade dates are unlikely to fall on weekends, and settlement dates require banks to be open.

226. For example, the account statements for Lagoon, Optimal, Primeo, Square One, Geo Currencies, Kingate Global, Kingate Euro, and Thema International for January 2000 all reported the execution of S&P 100 Index put options and S&P 100 Index call options with a trade date of January 7, 2000 (a Friday) and a settlement date of January 8, 2000 (a Saturday), which was impossible. The relevant Defendants reviewed this trade confirmation and took no action in response to this anomaly. Rather, this too was ignored by the Defendants, more than suggests they knew it was a Ponzi scheme.

THE DEFENDANTS' RELATIONSHIP WITH MADOFF

**Kohn and the Benbassats Established
a Complex Network Connecting Foreign Investors and Madoff**

227. Together, the Management Defendants, Individual Defendants, and HSBC Defendants built the infrastructure that would lead to an explosion of European and other foreign investment into BLMIS's IA Business beginning in the 1990s. These Defendants worked

together to create, manage, and administer the Feeder Fund Defendants, and to solicit investors for these funds. Their efforts perpetuated and deepened the Ponzi scheme and, as the Feeder Fund Defendants grew, enabled the Management Defendants, the Individual Defendants, and the HSBC Defendants to collect even greater fees for services they purported to provide.

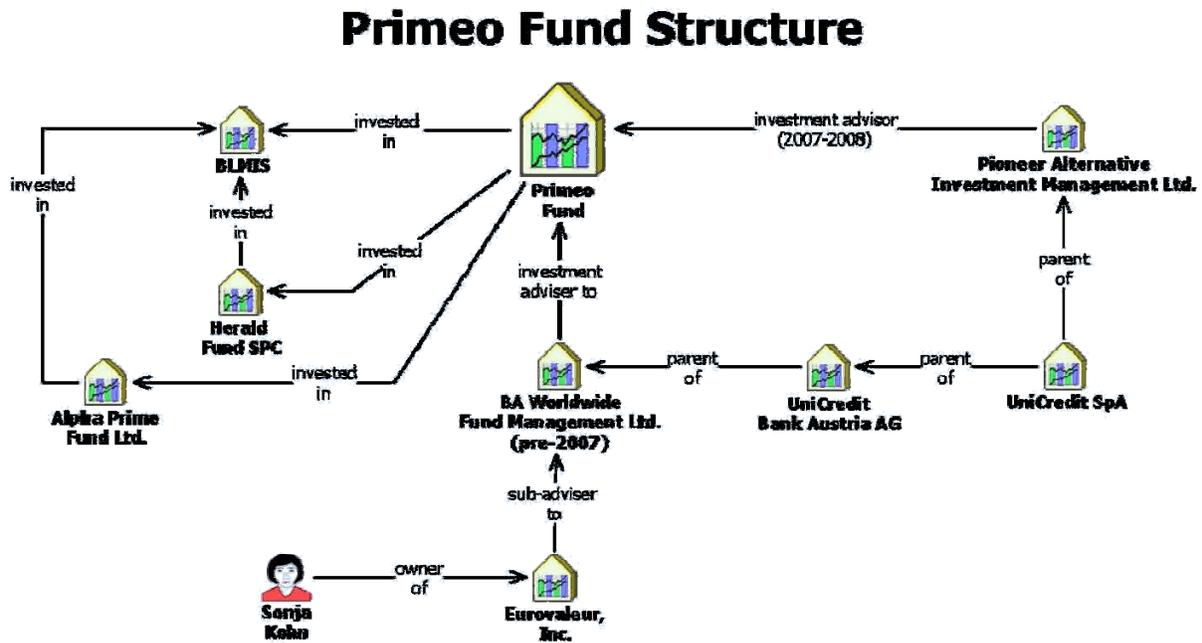
228. Kohn portrayed herself as an investment banker with connections to wealthy investors throughout Europe, including, among others, the members of the Benbassat Family, Federico Ceretti, and Carlo Grosso. These individuals were the hub of the foreign network that Madoff used to solicit new investors. Altogether, the funds with which Kohn, the Benbassats, Ceretti, and Grosso were involved funneled billions of dollars into BLMIS's IA Business. Kohn used the entities that she controlled, including Bank Medici, and entities with which she was affiliated, such as Bank Austria, coupled with the imprimatur of HSBC, to cultivate an aura of legitimacy for the Feeder Fund Defendants that she helped create.

229. Kohn benefited from the increased investment into BLMIS's IA Business. As the size of those feeder funds grew, so too did the fees she received. Moneys flowed to Kohn through Bank Medici and the other entities composing the investment network that funneled money to BLMIS.

230. In November 1993, after a meeting of Madoff, Kohn, and Bank Austria officials, Kohn and Bank Austria were given an opportunity to open an account with BLMIS, and together formed Primeo. Primeo opened its first account with BLMIS (account number 1FN060) on or about December 30, 1993. Shortly thereafter, Kohn, Bank Medici, and Bank Austria began to solicit investors for Primeo for the purpose of investing in BLMIS's IA Business.

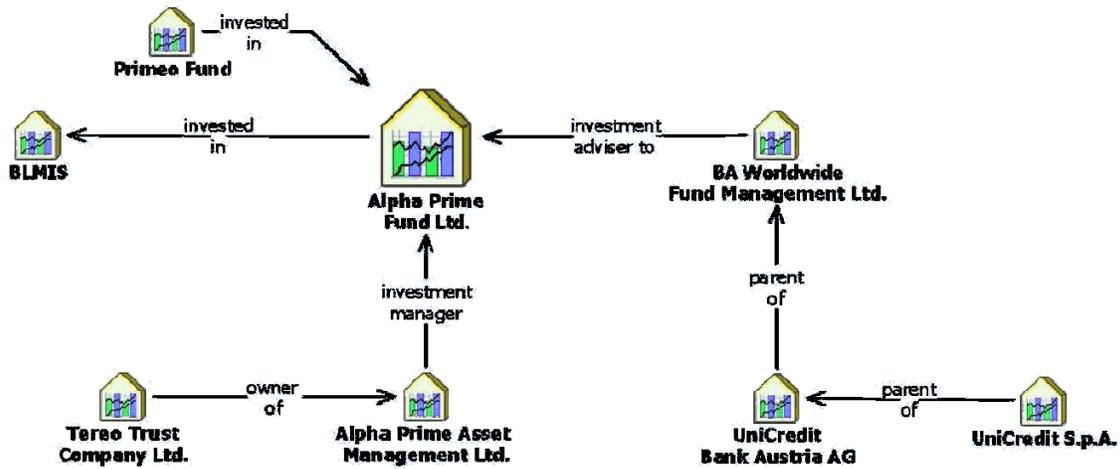
231. After successfully soliciting investors for Primeo, Kohn and Bank Austria expanded Primeo's base of investors in 1996 by publicly offering a new class of Primeo shares,

known as the “Primeo Select Fund.” Upon information and belief, Primeo Select Fund invested one hundred percent of its assets in BLMIS. Later that year, Primeo Select Fund opened a second account with BLMIS (account number 1FN092). The following chart depicts the structure of Primeo:



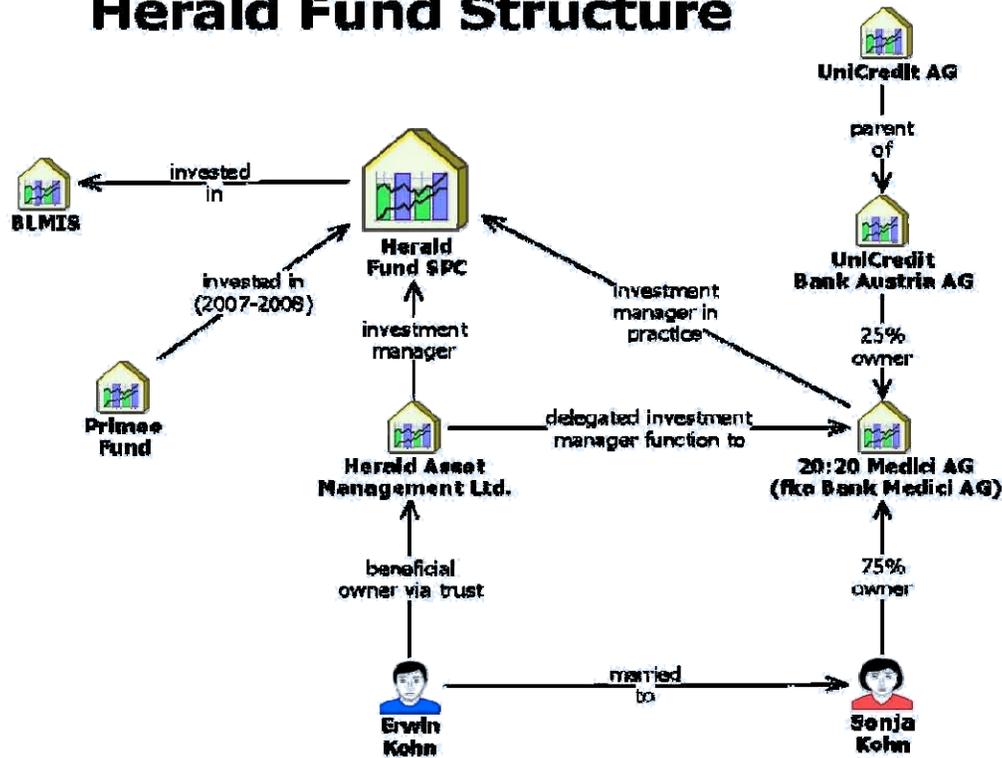
232. In March 2003, two European investment bankers whom Kohn had introduced to Madoff, including Radel-Leszczynski, founded Alpha Prime, another fund that invested in BLMIS. On or about June 13, 2003, Alpha Prime opened BLMIS account number 1FR097. The following chart depicts the structure of Alpha Prime:

Alpha Prime Fund Ltd. Structure

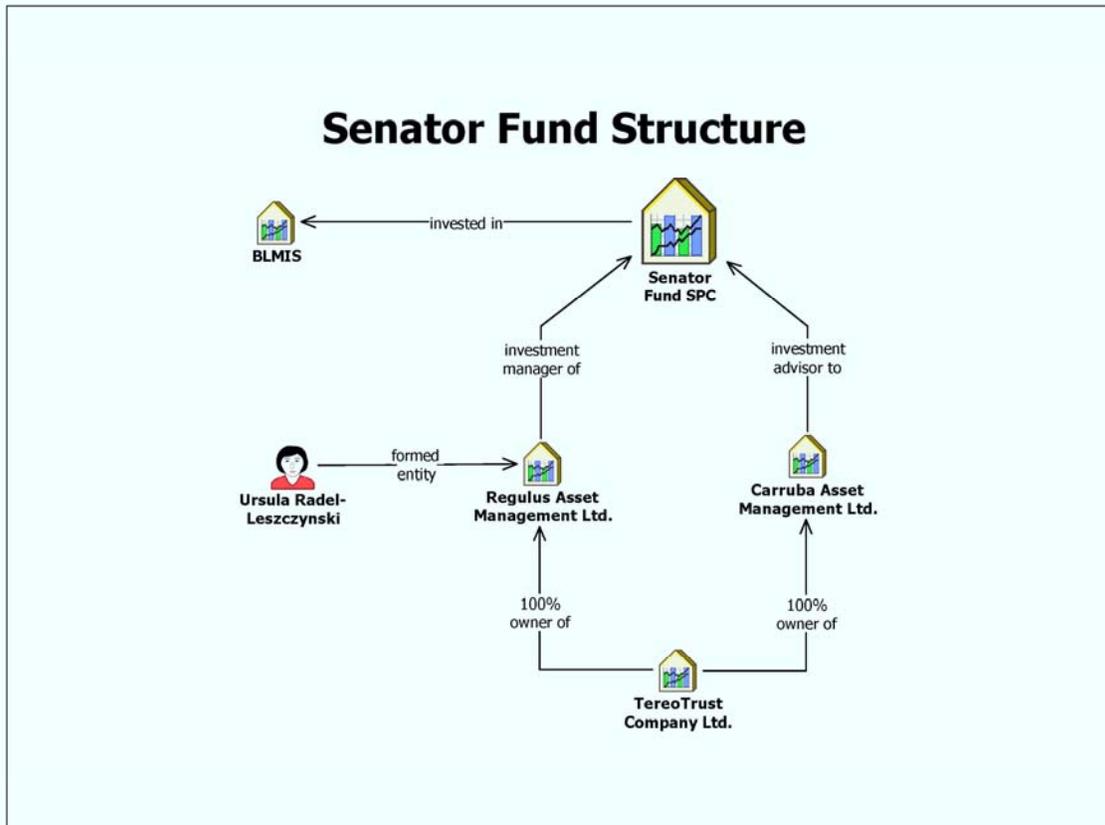


233. In March 2004, Kohn and Bank Medici created Herald Fund for the purpose of investing its assets into BLMIS. In 2004, Herald Fund opened BLMIS account number 1FR109. Herald Fund, by itself, fed over \$1.5 billion into the Ponzi scheme. The following chart depicts the structure of Herald Fund:

Herald Fund Structure

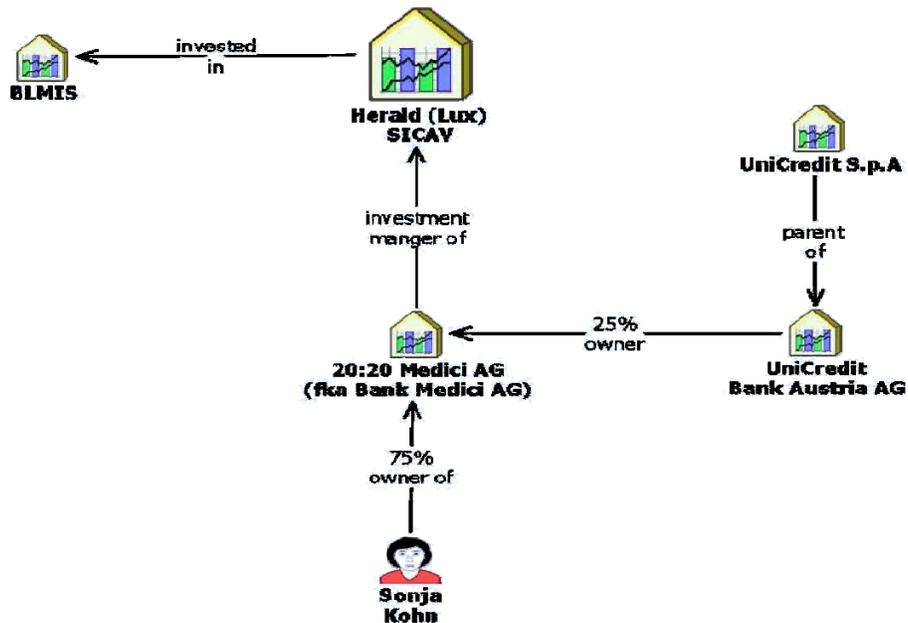


234. In or around September 2006, Radel-Leszczynski and, upon information and belief, Bank Austria, created Senator which thereafter opened BLMIS account number 1FR128. Upon information and belief, Senator was one hundred percent invested in BLMIS. The following chart depicts the structure of Senator:



235. Even as the Ponzi scheme neared its demise, Kohn and Bank Medici continued to create new funds in order to provide new sources of investment to Madoff. Bank Medici created Herald (Lux) in March 2008, which, on or about March 17, 2008, opened BLMIS account number 1FR135. Upon information and belief, Herald (Lux) was one hundred percent invested in BLMIS. The following chart depicts the structure of Herald (Lux):

Herald (Lux) Structure



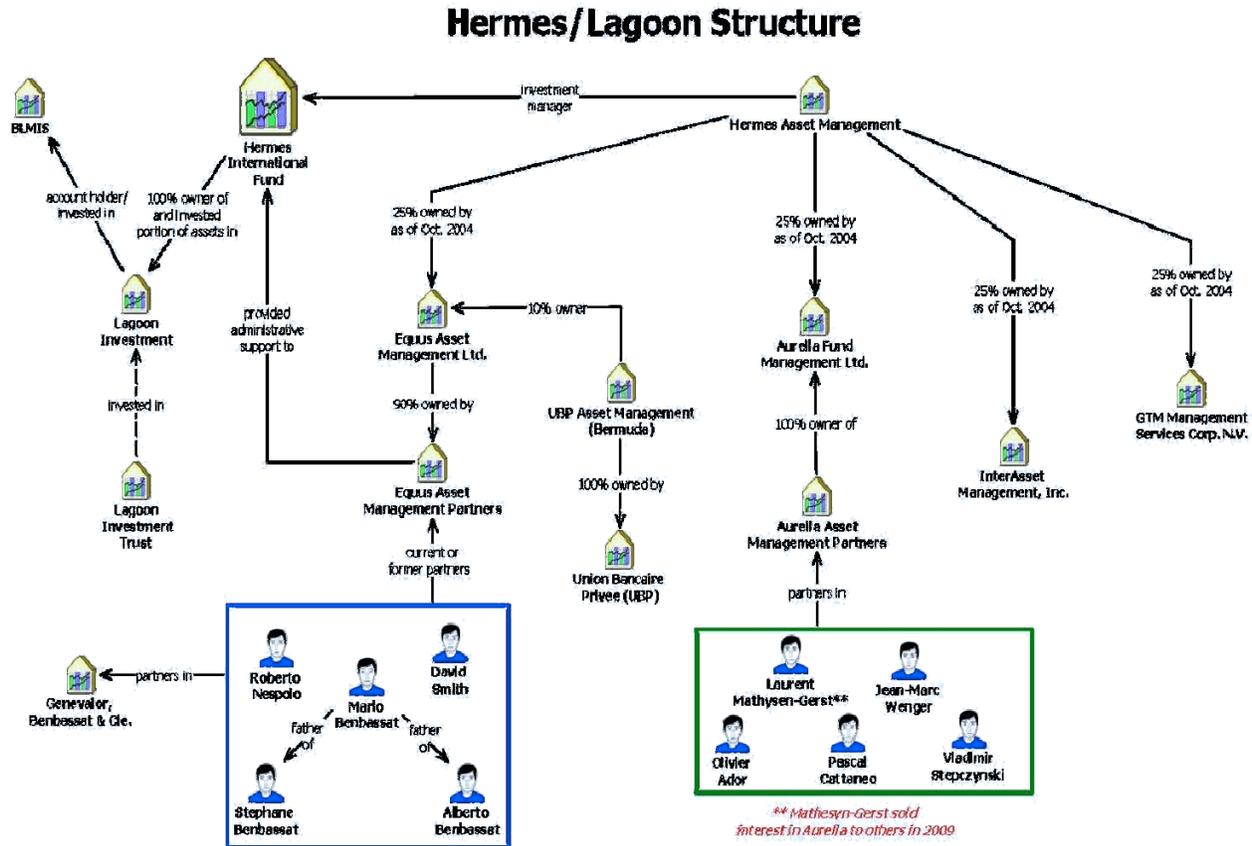
236. In total, the Feeder Fund Defendants that Kohn helped funnel over \$2.8 billion into the Ponzi scheme. Upon information and belief, for their role in soliciting investors and providing administrative services to the Feeder Fund Defendants, Kohn and Bank Austria received significant fees.

The Benbassats Solicited Madoff Investors

237. After Kohn introduced the members of the Benbassat Family to Madoff, the Benbassats, who had access to their own network of potential European investors, created several investment vehicles that funneled money into the Ponzi scheme. The Benbassats and related parties marketed these investment opportunities, hoping to profit from management, administrative, and other fees generated by steering money into BLMIS's IA Business.

238. In May 1992, the Benbassat Family's investment firm, Genevalor, co-founded Hermes. Hermes, through Lagoon, opened BLMIS account number 1FN021 and then opened

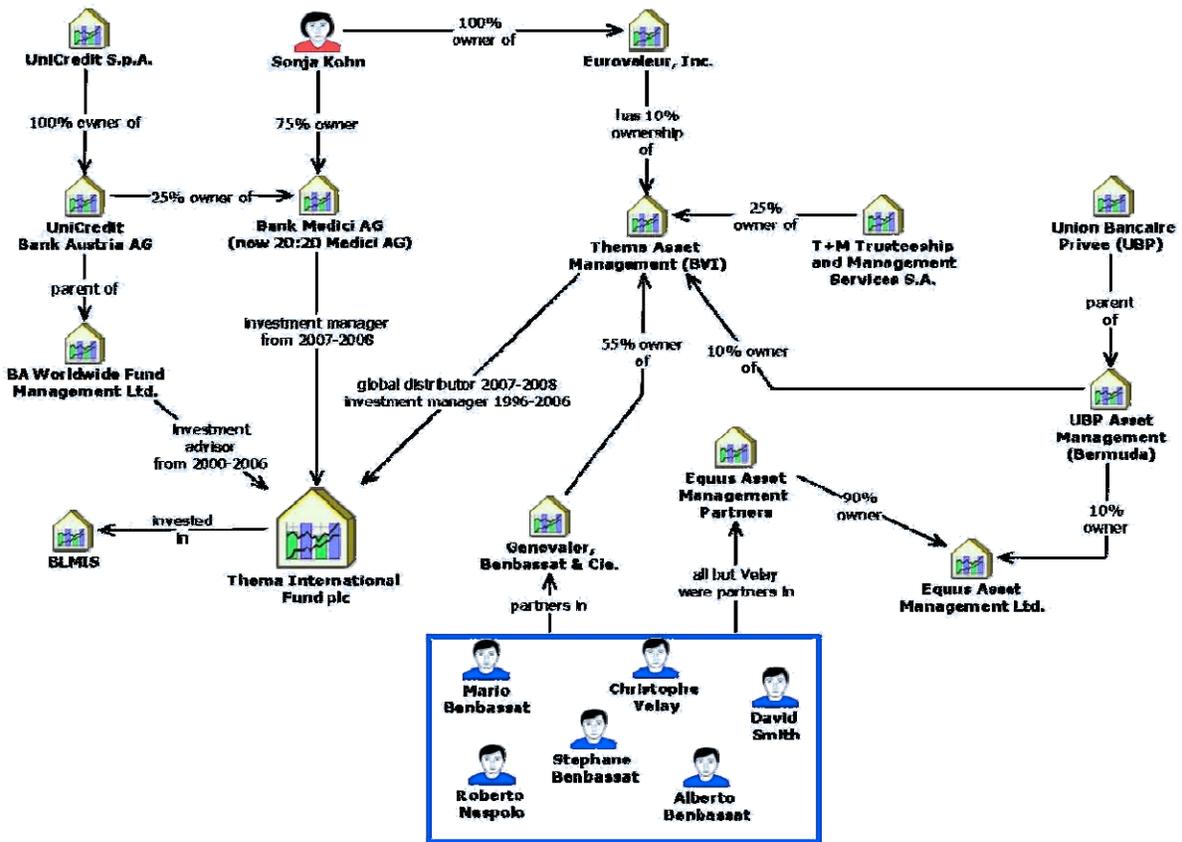
four other accounts with BLMIS between 1994 and 1997 (account numbers 1FN066, 1FN096, 1FR015, and 1FR016). The following chart depicts the structure of Hermes:



239. Upon information and belief, in May 1984, Genevalor created Geo Currencies, another fund that invested its assets into BLMIS. On or about June 8, 1995, Geo Currencies opened account number 1FN079 with BLMIS.

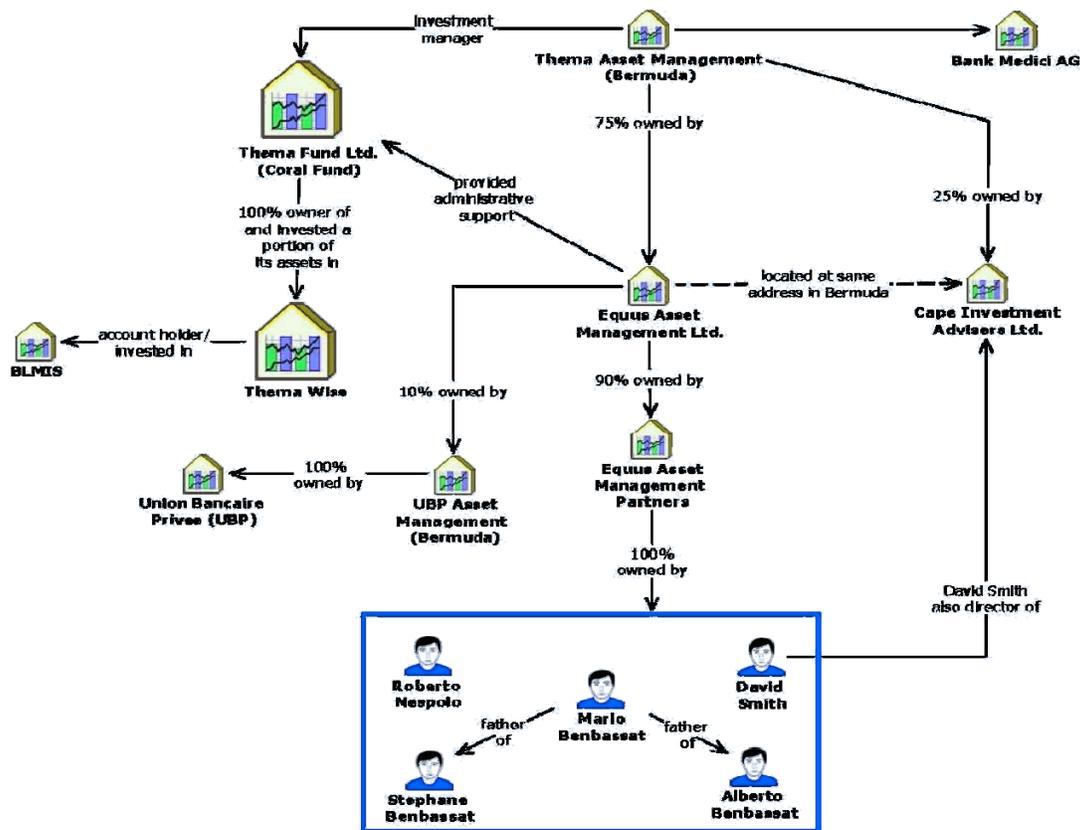
240. In December 2002, Genevalor created Thema International for the purpose of investing its assets into BLMIS. On July 1, 1996, Thema International opened account number 1FN095 with BLMIS. The following chart depicts the structure of Thema International:

Thema International Structure



241. In February 2003, Genevalor created Thema Fund, which also invested in Madoff. On or about February 3, 2003, Thema Fund, through Thema Wise, opened account number 1FR093 with BLMIS. The following chart depicts the structure of Thema Fund:

Thema Fund/ Thema Wise Structure



242. In total, the Benbassat Funds funneled over \$1.9 billion—approximately ten percent of the principal invested in BLMIS’s IA Business—into the Ponzi scheme. The Benbassat Family and related parties collected millions of dollars for the variety of roles that they purported to undertake in connection with the operation of these funds. In fact, they did little other than simply turn money over to Madoff.

HSBC Helped Funnel Foreign Investors into the Feeder Fund Defendants

243. All of the Feeder Fund Defendants relied on HSBC to act as their custodian, administrator, manager, and promoter. The goodwill attached to HSBC’s name provided an air of legitimacy to the Feeder Fund Defendants. HSBC’s name appeared in offering materials and, upon information and belief, also on the account statements sent out for the Feeder Fund Defendants. As further detailed herein, HSBC’s imprimatur played a key role in the expansion

of the Ponzi scheme, convincing investors in the Madoff Feeder Funds that these funds were a safe place to invest their money.

244. In their various roles as administrators, custodians, and investment managers of the Feeder Fund Defendants, the HSBC Defendants received over \$25 million in fees.

The Defendants Created Structured Products to Facilitate Additional Investment in the IA Business

245. Beginning in approximately 2006, the HSBC Defendants created structured financial products (the “Madoff Structured Products”), which directed hundreds of millions of dollars into Madoff’s Ponzi scheme through the Feeder Fund Defendants. Because of the leverage employed, the Madoff Structured Products offered investors the opportunity to earn a multiple of the returns generated by a Madoff Feeder Fund without the upfront capital necessary for a direct investment of that size.

246. The Madoff Structured Products created a “win-win-win” situation, as all participants exploited Madoff’s “success” for their own gains. The HSBC Defendants, who internally stated that these transactions involved “close to nil risk,” earned significant structuring and financing fees in connection with the Madoff Structured Products. The Feeder Fund Defendants earned significant management and performance fees because their assets under management increased as the HSBC Defendants invested in the Feeder Fund Defendants to hedge their exposure under the Madoff Structured Products. Investors, using borrowed funds, received multiples of the returns generated by the reference asset.

247. There were two main types of Madoff Structured Products: total return swaps (“swaps”) and structured notes (“notes”). A swap is a bilateral financial transaction created to “swap” the cash flows of an asset or basket of assets for cash flows of another asset. Swaps enable investors to achieve multiples of the returns from a reference asset—here, a Madoff

Feeder Fund—without having to own the asset. In exchange for paying the leveraged return on the reference fund at maturity, the financing institution—here, HSBC—collected significant structuring and financing fees on the leveraged amount. A structured note is a financial transaction in which a financial institution issues a note to an investor in exchange for a future payment based on the performance of an underlying reference fund, or index. Like swaps, notes typically employ leverage to provide investors with the possibility of multiples of the returns from the reference asset.

248. Typically, in both swaps and notes, the financing institution that has promised a leveraged return on the performance of a reference funds will hedge its risk by investing both its own money and the cash collateral provided by the swap counterparty or note purchaser directly in the reference fund. A note or swap investor makes a synthetic investment in a reference fund, because it is entitled at maturity to the leveraged returns generated by the reference fund, but it is the financing institution that is the actual owner of the reference fund shares.

249. In connection with the marketing and sale of the Madoff Structured Products, the HSBC Defendants were once again confronted by serious red flags that BLMIS's IA Business—and the Madoff Feeder Funds which served as reference funds to the Madoff Structured Products—were not what they purported to be. For example, HSBC admitted its inability to confirm trade data by comparison to an independent data set.

Calculations on investment guidelines for the underlying funds for these transactions such as risk measures, position and sector concentration percentages are being calculated by Madoff and sent to Product Control [at HSBC]. This process, which differs from the normal process . . . is due to lack of transparency of detailed fund information.

250. Similarly, HSBC Bank conceded that a swap done in 2007 needed to be hedged “entirely (no delta exposure) . . . [because] we do not currently monitor Madoff Strategy trades with sufficient granularity to meet restrictions outlined in the risk mandate”

251. In 2008, members of HSBC’s Structured Products Group visited Fix Asset Management (“FIX”) to conduct a due diligence review of Harley and FIX. Harley was a Madoff Feeder Fund and was the reference fund of the structured product transaction under review. HSBC concluded that it was “very familiar” with Madoff’s operations and SSC Strategy and was “comfortable with the strategy’s risk”, so it could “proceed with the transaction.” This recommendation came despite the fact that, on multiple occasions, HSBC’s own due diligence had raised significant concerns about investing in BLMIS through other channels. Upon information and belief, HSBC turned a blind eye to red flags of possible fraud at BLMIS, and moved forward with the creation of Madoff Structured Products.

252. HSBC was aware of ongoing and significant concerns regarding Madoff, yet continued to solicit investors for the Madoff Structured Products. In 2005, D. Smith, an officer of a Madoff Feeder Fund that served as a reference fund for one of the total return swaps discouraged HSBC from intruding upon BLMIS through due diligence, and warned that doing so would risk angering Madoff and could endanger the Madoff Feeder Funds’ ability to invest in BLMIS.

253. Upon information and belief, that Madoff Feeder Fund did not perform adequate due diligence upon BLMIS and invested in BLMIS, despite being aware of many significant red flags. In an email to HSBC, D. Smith acknowledged that Madoff was not a registered investment adviser, that Madoff declined to work with custodians, and that experts in the industry had repeatedly tried, but were unable to replicate BLMIS’s strategy and returns.

Although the Madoff Feeder Fund advised HSBC of these red flags, HSBC continued to solicit funds for the Madoff Structured Products.

The HSBC Swaps

254. Between June 2006 and September 2007, HSBC Bank USA and HSBC Bank entered into seven financing swaps for which the reference funds were Feeder Fund Defendants. The Madoff Structured Products caused hundreds of millions to be invested with the Feeder Funds, and, ultimately, into the IA Business, thereby prolonging Madoff's Ponzi scheme and deepening the insolvency of BLMIS.

255. The seven Madoff Structured Products used the following Madoff Feeder Funds as reference assets: (i) Rye Select Broad Market Fund, L.P. ("Broad Market"); (ii) Greenwich Sentry; (iii) Harley; (iv) Thema International; (v) Senator; and (vi) Rye Select Broad Market Portfolio Limited ("Broad Market Portfolio").

The Rye XL Fund Swap

256. In September 2006, HSBC Bank USA entered into a swap with Rye Select Broad Market XL Fund, L.P. ("Rye XL") with shares of Rye Select Broad Market Fund, a Madoff Feeder Fund, serving as the reference fund (the "Rye XL Fund Swap"). As part of the Rye XL Fund Swap, Rye XL received a notional exposure to Broad Market of \$140 million. Upon information and belief, HSBC funded this exposure by charging Rye XL a fee of LIBOR plus 90 basis points.

257. Initially, the Rye XL Fund Swap had a maximum notional exposure of \$300 million, however, due to increased interest in Broad Market, the size of the swap was increased to \$350 million in October 2006, and then to \$450 million in January 2007. Upon maturity, the Rye XL Swap contemplated a payout to Rye XL of up to 3.5 times the leveraged performance of Broad Market.

258. Upon information and belief, HSBC Bank USA redeemed \$50 million from Broad Market in the fall of 2007, and an additional \$13.5 million in the summer of 2008, at a time when it knew or deliberately avoided knowing of Madoff's fraud.

The Wickford Fund Swap

259. In March 2007, HSBC Bank USA entered into a swap transaction with Wickford Fund L.P. ("Wickford"), which provided levered exposure to the returns generated by Sentry (the "Wickford Fund Swap").

260. Wickford received a notional exposure to Sentry of \$10 million in the swap transaction. HSBC Bank USA funded this exposure by charging Wickford a financing fee of LIBOR plus 110 basis points.

261. Upon maturity, the Wickford Fund Swap contemplated a payout to Wickford of up to 3.5 times the leveraged performance of Sentry. Upon information and belief, HSBC Bank USA redeemed \$13 million from Sentry on August 29, 2008, at a time when it knew or deliberately avoiding knowing of Madoff's fraud.

The Santa Clara II Fund Options Swap

262. In June 2007, HSBC Bank entered into a swap transaction with Santa Clara II Fund ("Santa Clara") that provided Santa Clara with levered exposure to the returns generated by Harley (the, "Santa Clara Options Swap"). Santa Clara received a maximum notional exposure to Harley of \$300 million in the swap transaction. Upon maturity, the Santa Clara Options Swap contemplated a payout to Santa Clara of up to 4.5 times the leveraged performance of Harley. HSBC Bank funded this exposure by charging Santa Clara a financing fee of LIBOR plus 110 basis points.

263. Upon information and belief, HSBC Bank made redemptions from Harley and received transfers at a time when it knew or deliberately avoided knowing of Madoff's fraud.

The BNP Paribas Accreting Strike Call Option Transaction

264. In September 2007, HSBC Bank USA entered into an accreting strike call option transaction, which had the same economics as a total return swap, with BNP Paribas that provided BNP Paribas with levered exposure to the returns generated by Harley. As part of the BNP Paribas transaction, BNP Paribas received a notional exposure to Harley of \$70 million. Upon information and belief, HSBC Bank USA funded this exposure by charging BNP Paribas a financing fee.

265. Upon information and belief, HSBC Bank USA made redemptions and received transfers from Harley at a time when it knew or deliberately avoided knowing of Madoff's fraud.

The Gaspee Offshore Swap

266. Also in July 2007, HSBC Bank entered into a swap transaction with Gaspee Offshore Fund Ltd. ("Gaspee"), which provided levered exposure to Thema International Fund (the "Gaspee Offshore Swap"). As part of the Gaspee Offshore Swap, Gaspee received a notional exposure to Thema International of \$12.8 million. HSBC Bank funded this exposure by charging Gaspee a financing fee of LIBOR plus 110 basis points. In 2008, when Thema International was redeemed in full, Senator replaced Thema International as the reference fund.

267. Upon maturity, the Gaspee Offshore Swap contemplated a payout to Gaspee of up to 3.5 times the leveraged performance of Senator.

268. Upon information and belief, HSBC Bank made redemptions and received transfers from Thema International and Senator at a time when it knew or deliberately avoided knowing of Madoff's fraud.

The Rye Select Broad Market XL Portfolio Limited Swap

269. HSBC Bank entered into a swap transaction in August 2007, with Rye Select Broad Market XL Portfolio Limited ("Rye XL Portfolio"), in which Class D shares of Broad

Market Portfolio served as the reference fund (the “Rye XL Portfolio Swap”). As part of the Rye XL Portfolio Swap, Rye XL Portfolio received a notional exposure to Broad Market Portfolio of \$56 million. Upon maturity, the Rye XL Portfolio Swap agreement contemplated a payout to Rye XL Portfolio of up to 3.5 times the leveraged performance of Broad Market Portfolio.

270. HSBC Bank funded this exposure by charging Rye XL Portfolio a fee of LIBOR plus 90 basis points.

271. Upon information and belief, HSBC Bank redeemed \$15.9 million from Rye XL Portfolio during the fourth quarter of 2008, a time when it knew or deliberately avoided knowing of Madoff’s fraud.

The Wailea Swap

272. In September 2007, HSBC Bank USA entered into two swap agreements with Wailea Partners L.P. (“Wailea Partners”) and Wailea Offshore Fund Ltd. (“Wailea Offshore Fund”). In both swap transactions, Senator served as the reference fund (respectfully, the “Wailea Offshore Swap” and the “Wailea Partners Swap”). As part of the Wailea Partners Swap, Wailea Partners received a notional exposure of \$31 million to Senator. As part of the Wailea Offshore Swap, Wailea Offshore Fund received a notional exposure of \$14 million to Senator. Upon maturity, both these swap agreements contemplated a payout to Wailea Partners and Wailea Offshore Fund of up to 3.5 times the leveraged performance of Senator.

273. HSBC Bank USA funded this exposure by charging Wailea Partners and Wailea Offshore Fund a financing fee of LIBOR plus 110 basis points.

274. Upon information and belief, HSBC Bank USA made redemptions from and received transfers from Senator at a time when it knew or deliberately avoided knowing of Madoff’s fraud.

The Leveraged Note Programs

275. By 2006, a number of different financial institutions' leveraged investment vehicles had emerged that, like the Madoff Structured Products, increased investments in the BLMIS IA Business. Between 2005 and 2008, [REDACTED], [REDACTED], Capital Bank–GRAWE Gruppo AG (“Capital Bank”), and [REDACTED] had all created leveraged note programs that offered note purchasers multiples on the returns of an underlying Madoff Feeder Fund to which the note program was linked. [REDACTED] created leveraged notes programs linked to the returns of [REDACTED]; [REDACTED] created leveraged notes programs linked to the returns of [REDACTED] and funds managed by [REDACTED]; and Capital Bank created leveraged notes programs linked to the returns of Herald.

276. The leveraged note purchasers received multiples of the returns of an underlying fund, without actually owning the asset. Most of these leveraged note programs had notional values in excess of [REDACTED] and required initial investments of [REDACTED]. These notes created an additional access point through which investors could gain exposure to Madoff Feeder Funds that they otherwise could not invest in due to capacity limitations or minimum investment requirements.

277. The HSBC Defendants and Management Defendants benefited from leveraged note programs that were linked to the performance of Feeder Fund Defendants. As investments in the Feeder Fund Defendants increased, through investment in the leveraged note programs, the fees the HSBC Defendants and Management Defendants received also increased.

The STAIRS Note Programs

278. The HSBC Defendants also sought to create leveraged products through which individual high-net worth investors could invest in hedge funds, including gaining exposure to certain Madoff Feeder Funds. Under these leveraged products, which HSBC Bank USA called

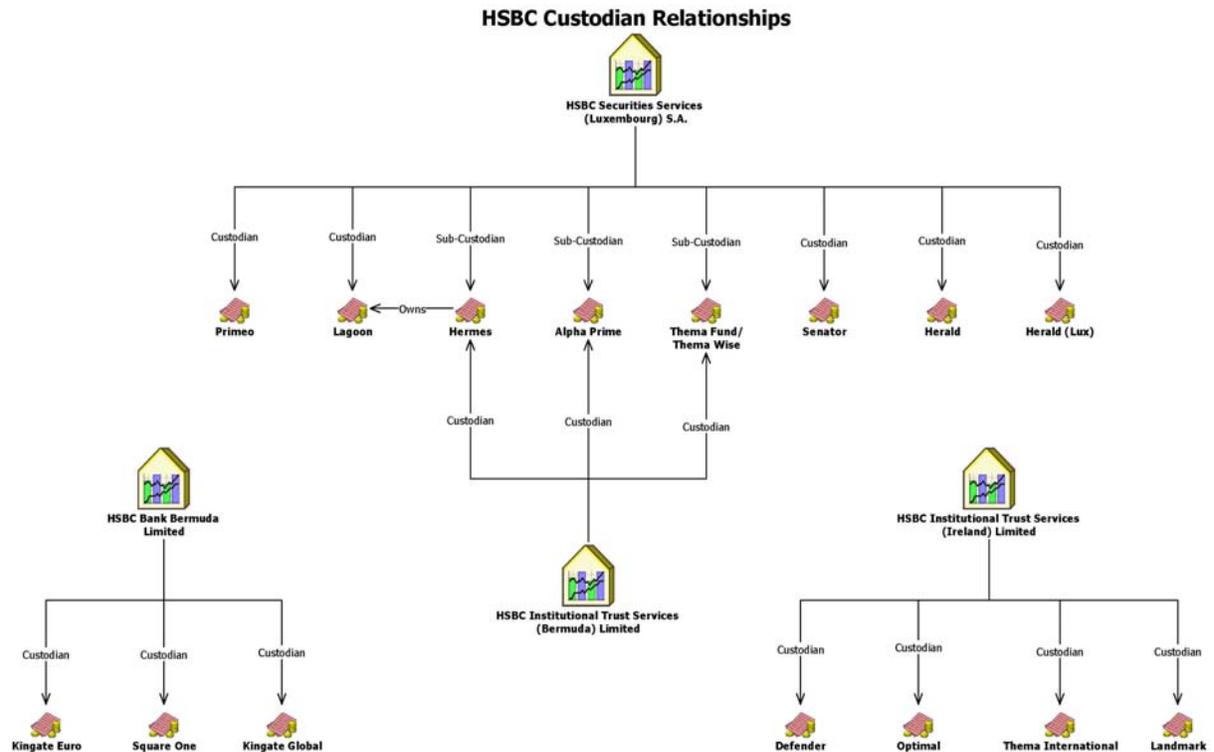
“leveraged hedge fund basket-linked STAIRS Notes” (the “STAIRS Notes”), individual investors would receive multiples of the returns generated by a basket of hedge funds selected by HSBC Bank USA. The STAIRS Notes products would have provided yet another avenue by which investors could access BLMIS and by which Madoff could tap into a new source of funds.

279. For example, as of January 9, 2007, HSBC Bank USA was attempting to create a seven-year STAIRS Notes program, with a notional exposure of \$40 million to a reference portfolio comprising two hedge funds—Permal FX Financial and Futures, and Broad Market, a feeder fund that was wholly invested in BLMIS. An investor participating in this STAIRS Note program would have received returns of up to three times that of the referenced fund, less the fees collected by HSBC Bank USA.

280. The HSBC Defendants also would have benefited from the STAIRS Note programs. For example, in connection with the program described above, HSBC Bank USA would have received net revenues of at least \$588,492 in fees during each of the seven years of the STAIRS Note program.

The Defendants Enabled Madoff to Act as His Own Custodian

281. The HSBC Custodian Defendants entered into custodian agreements with the Feeder Fund Defendants (and with a number of other fund families that directed Customer Property to Madoff such as the Kingate funds, Defender, Landmark, and Optimal). The following chart depicts these relationships, and additional illustrative details are provided in Exhibit F:



In connection with these agreements, the HSBC Custodian Defendants committed to undertaking significant responsibilities, including maintaining segregated accounts; overseeing the administration of the payment and redemption of funds; and otherwise transferring, exchanging, or delivering securities as directed by the Madoff Feeder Funds.

282. The HSBC Custodian Defendants did not discharge these responsibilities. Instead, they delegated these responsibilities to Madoff either informally or by entering into formal sub-custody agreements with BLMIS. Even after delegating these duties, the HSBC Custodian Defendants continued to collect fees and, in total, collected millions in fees for these services.

283. The HSBC Custodian Defendants' delegation of their duties as custodian of the Feeder Fund Defendants meant that there was no independent oversight over BLMIS's activities, which was critical to sustaining the Ponzi scheme. Obviously, BLMIS did not perform the duties HSBC delegated, and the HSBC Custodian Defendants did not even pretend to supervise BLMIS

to ensure that BLMIS performed these duties. Although, as the custodians of the Feeder Fund Defendants, they were obligated to do so. The HSBC Custodian Defendants never even questioned why BLMIS was willing to perform these duties without compensation, and did not question the fact that BLMIS insisted on keeping custody of the assets.

284. The HSBC Custodian Defendants also failed to notify investors that they had delegated their custodial duties to BLMIS. Instead, they continued to allow investors to believe that HSBC was acting as custodian. Although the HSBC Custodian Defendants had relinquished their custodial duties, the “HSBC” name continued to be emblazoned upon the Feeder Fund Defendants’ documents and gave the appearance that the HSBC Custodian Defendants approved of the manner in which BLMIS segregated and monitored its customers’ investments.

285. At least two of the funds for which the HSBC Defendants acted as custodians—Herald (Lux) and Thema International—were governed by UCITS. This means that the funds were created under the Undertakings for Collective Investments in Transferable Securities, a set of directives and laws issued by the European Union. UCITS funds are also governed by the relevant national law.

286. Herald (Lux) was incorporated in Luxembourg as a UCITS compliant *Société d'Investissement À Capital Variable* (“SICAV”) fund, and thus was open to investments from the public at large, rather than being limited to investments from sophisticated investors. Thema International was authorized in 2006 by the Irish Financial Regulator to operate as a UCITS compliant fund in Ireland.

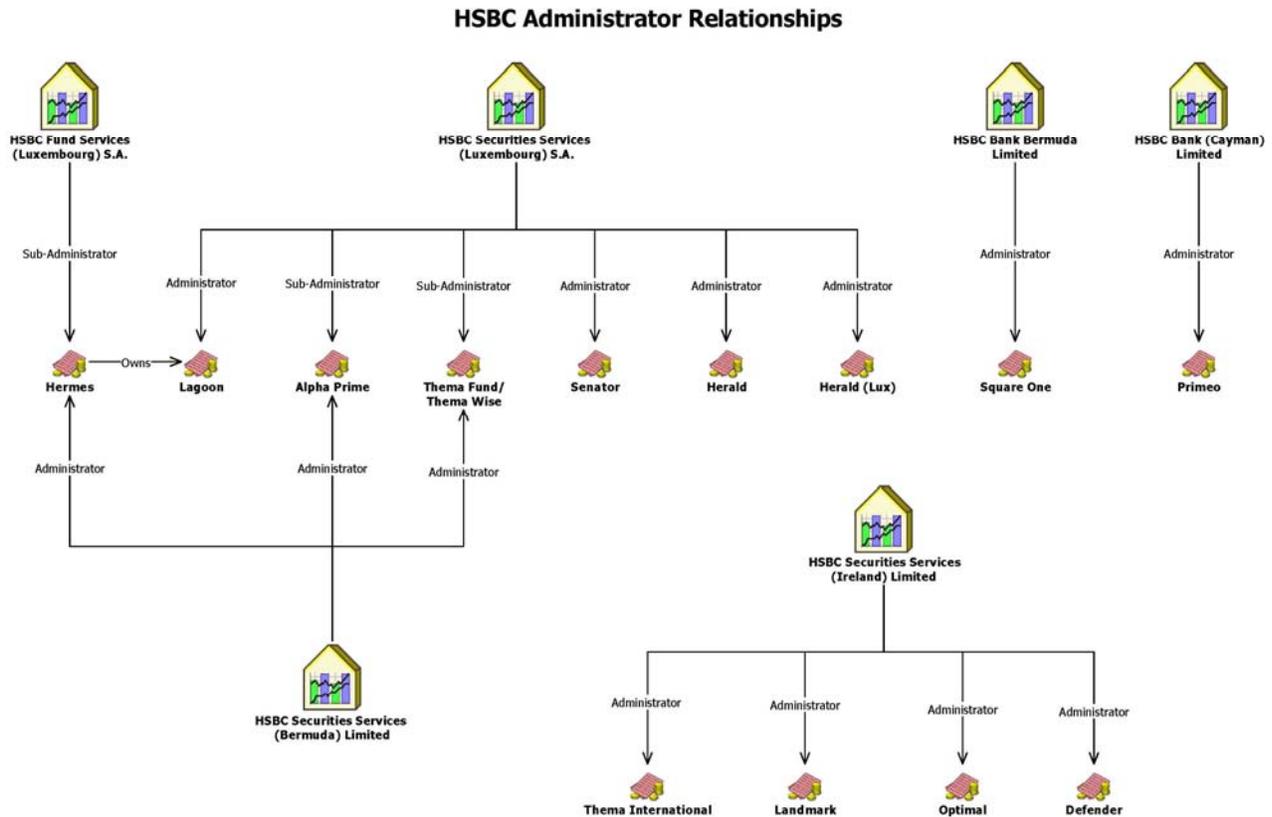
287. HSSL acted as the custodian of Herald (Lux), and HITSI acted as custodian to Thema International.

288. UCITS regulations require custodians of fund assets to ensure that the sale, issue, repurchase, and cancellation of securities are carried out in accordance with the law and with the company's articles of incorporation. UCITS regulations also prohibit companies from acting as both investment adviser and custodian, and UCITS regulations require custodians of fund assets to act solely in the interest of the fund's investors.

289. HSSL and HITSI failed to carry out their duties in compliance with UCITS regulations. HSSL and HITSI did not ensure that BLMIS's investment activities were carried out in accordance with the law. HSSL and HITSI violated UCITS regulations when they entered into sub-custody agreements with BLMIS, the entity that acted as an investment adviser to Herald (Lux) and Thema International. HSSL and HITSI also failed to act solely in the interest of the funds' investors. Indeed, despite being confronted with all of the badges of BLMIS's fraud, the HSBC Custodian Defendants yielded to BLMIS, surrendering billions of dollars to its custody and enabling Madoff's scheme to continue and expand.

HSBC As Administrator of the Feeder Fund Defendants

290. The HSBC Administrator Defendants served as administrators, registrars, and service agents pursuant to agreements with the Feeder Fund Defendants. The following chart depicts the relationships between the HSBC Administrator Defendants and the Feeder Fund Defendants, and additional illustrative details are provided in Exhibit F:



The HSBC Administrator Defendants were responsible for the day-to-day administration of the funds, which entailed, among other things, issuing and redeeming fund shares, and maintaining the books and records of those funds.

291. The HSBC Administrator Defendants failed to discharge their responsibility of valuing over-the-counter options contracts. To value over-the-counter options contracts, the HSBC Administrator Defendants needed to obtain at least weekly quotations from options trading counterparties, which was never done. Because Madoff would not reveal the identities of purported counterparties, even if the HSBC Administrator Defendants had attempted to verify the value, volume, or existence of any over-the-counter transactions purportedly made by BLMIS, they would not have been able to do so. The HSBC Administrator Defendants' failure to identify the counterparties, despite the obligation to do so, enabled the continuation of the Ponzi scheme.

HSBC Marketed Madoff to its Private Banking Clients

292. On top of the fact that HSBC served as administrators and custodians to the Feeder Fund Defendants, HSBC Private Banking, HSBC Private Bank Suisse, HSBC Bank USA, and their related affiliates (“HSBC Private Bank”) marketed the Feeder Fund Defendants to their clients. Even though HSBC issued overwhelmingly negative due diligence reports noting the many red flags associated with BLMIS, HSBC Private Bank still persuaded wealthy clients to invest in BLMIS, through the Feeder Fund Defendants. These efforts provided additional assets that perpetuated and worsened the Ponzi scheme.

293. Upon information and belief, HSBC Private Bank’s high net-worth clients had relationships of trust and confidence with HSBC Private Bank. These clients trusted HSBC Private Bank and relied on HSBC’s reputation when deciding among investment strategies. Upon information and belief, but for the recommendations of HSBC Private Bank, these individuals would not have invested with BLMIS through the Feeder Fund Defendants.

294. Upon information and belief, HSBC Private Bank began marketing Sentry to its high net-worth clients as early as 1999. This occurred even though HSBC Private Bank failed to conduct any meaningful due diligence on Sentry, and the fund was not a part of the HSBC Private Bank platform. Upon information and belief, HSBC violated internal policies by marketing and recommending a fund not on its official platform. On at least nine separate occasions between 2001 and 2009, HSBC Bank USA conducted due diligence on Sentry for the purpose of including the fund on its official platform.

295. In July 2001, the HSBC Private Bank due diligence team met with Fairfield Greenwich (“Fairfield”) officers. At this meeting, Stephen Kinne, a high-ranking member of HSBC Bank USA’s due diligence team, inquired about the many obvious red flags, including Madoff’s choice to forego lucrative fees, the identities of the counterparties to Madoff’s over-

the-counter options transactions, and the percentage of securities that Madoff held at the Depository Trust Corporation. Upon information and belief, none of the Fairfield representatives provided adequate responses to HSBC Bank USA's questions.

296. On August 7, 2001, HSBC Bank USA issued a due diligence report on Sentry ("2001 Report"). The 2001 Report stated that the due diligence team had been unable to meet with Madoff and that, therefore, the team formed its "opinions" solely on the basis of meetings with Fairfield representatives and a MAR/Hedge article on Madoff. The 2001 Report noted that, without meeting Madoff, there was no way for HSBC to assess Madoff's trading system, risk controls, or compliance procedures. As a result, HSBC Bank USA stated that it was "very difficult" to understand how Madoff was able to make money in such a consistent fashion. The 2001 Report also noted multiple red flags associated with Madoff, including his taking custody of securities and refusal to accept fees at the fund level.

297. In January of 2003, HSBC Bank USA issued another due diligence report on Sentry, which noted many of the same concerns addressed in the 2001 Report. According to Research Committee Minutes, David Mullane, a member of the due diligence team, warned, "I would not invest in [Sentry] nor would I want investors to invest."

298. Also in 2003, HSBC Bank USA issued a due diligence report for Ascot Fund, another Madoff Feeder Fund. The report noted similarities between the investment strategies employed by Ascot Fund and Sentry. HSBC Bank USA gave Ascot Fund a 1 rating, the worst possible score.

299. In 2004, HSBC Bank USA issued yet another report regarding Sentry. In addition to noting the previously-mentioned red flags, HSBC Bank USA noted the concern that Madoff's track record was "[t]oo good to be true."

300. HSBC Bank USA's comprehensive knowledge of these many red flags did not prevent HSBC Private Bank from simultaneously encouraging high-net worth investors to invest in Madoff Feeder Funds, including the Feeder Fund Defendants. In 2004, an HSBC Private Bank adviser in Geneva represented to at least one investor that Kingate Global was part of HSBC's diversified funds and that HSBC was, itself, invested in Kingate Global. Two years later, HSBC Private Bank forwarded marketing materials to the same investor recommending Kingate Global and Sentry for investment. In 2008, when the investor inquired further about Kingate Global, HSBC Private Bank informed the investor that HSBC had completely divested from Kingate due to "problems" with the fund.

301. In November of 2004, HSBC Private Bank in Geneva recommended Kingate Global to another investor, touting its 10% to 12% returns. HSBC Private Bank informed the investor that HSBC had sent its own inspectors to confirm that those funds were operating properly, and that they tracked the performance of all hedge funds its clients were invested in, including Kingate.

302. HSBC Private Bank informed another investor in 2004 that HSBC Private Bank did not sell every available fund, but only those that passed HSBC Private Bank's due diligence requirements. At each meeting, the HSBC Private Bank adviser confirmed that HSBC performed due diligence on all recommended funds. Upon information and belief, these recommendations led these investors to invest in Kingate Global and Sentry.

303. In early 2005, based on the recommendations of an HSBC Private Bank adviser in Zurich, one investor placed \$300,000 in Sentry. At the time, HSBC Private Bank did not inform the investor of its significant concerns regarding Sentry, any other Madoff Feeder Funds, or

BLMIS's IA Business. In 2007 the investor was finally informed by his adviser to "get out" because HSBC had conceded that it did not understand the investment strategy.

304. HSBC Private Bank in New York recommended Sentry to another investor in 2005, assuring him that HSBC was in contact with the fund, was confident in the fund, and was performing due diligence. In September 2005, HSBC provided an "Investment View and Proposal" listing Sentry as one of the proposed funds. HSBC Private Bank never warned the investor about its concerns regarding Sentry, other Madoff Feeder Funds, or BLMIS. After Madoff's arrest, however, the same HSBC Private Bank adviser stated that he, in fact, disliked Sentry.

***HSBC Bank Engaged KPMG
to Assess Fraud and Operational Risk at BLMIS and then Ignores its Findings***

305. The red flags signaling Madoff's fraud were apparent to the Defendants in September 2005, when HSBC Bank engaged KPMG to review BLMIS for fraud and related operational risk. KPMG's review focused on fraud risks in BLMIS's methods of recording and reporting client funds held by BLMIS, HSBC's ability to detect suspected fraud or misconduct in client funds for which HSBC served as primary custodian. These funds included Thema International, Thema Fund, Hermes, Primeo, Herald, Alpha Prime, and Square One.

306. KPMG's findings were encapsulated in a February 16, 2006 report, titled "Review of fraud risk and related operational risks at Bernard L. Madoff Investment Securities LLC" (the "2006 Report"). In the 2006 Report, KPMG identified a laundry list of fraud and related operational risks related to BLMIS's operations including:

- falsification of client mandates;
- embezzlement of client funds;
- use of fabricated client instructions to disguise poor proprietary positions;

- failure to segregate client funds from BLMIS funds;
- diversion of client funds for Madoff's personal gain;
- inaccurate allocation of reinvested funds from Fidelity across individual accounts;
- manipulation of option prices to maximize commissions;
- use of BLMIS claim funds to settle options exercised against HSBC;
- practice of exercising options without informing the client that the option was set to expire;
- use of client funds to make opportunistic trades that deviated from the SSC Strategy;
- diversion of cash resulting from the sale of equities and Treasury bills;
- systematic over-valuing of positions and the failure to report positions to HSBC in order to manipulate control relationships;
- stocks were not held in client names;
- inflation of call values to disguise misappropriation or poor positions;
- unauthorized trading in client accounts;
- trades executions made by unauthorized BLMIS staff members;
- sham trades to divert client cash;
- front-running order flow in the market-making business;
- false reporting of trades without execution to collect commissions; and
- falsification of trade confirmations.

307. KPMG was particularly concerned that it could not identify the owners of individual HSBC client assets, and that controls in place at BLMIS might not prevent fraud or errors in client accounts.

308. Despite the litany of fraud and operational risks identified by KPMG, the HSBC Defendants continued their relationship with Madoff, delegated custodial duties to BLMIS, and took no steps to implement KPMG's recommendations.

KPMG Engaged Again and Uncovers HSBC's Failure to Heed Earlier Warnings

309. After ignoring KPMG's dire warnings in 2006, the HSBC Defendants asked KPMG to conduct another review of BLMIS in March 2008. The terms and scope of the review were identical to the 2006 review, except that KPMG was also asked to assess the risk of placing HSBC investments with BLMIS. The relevant HSBC custodial clients were identified as Primeo, Lagoon (Hermes), Alpha Prime, Herald, Herald (Lux), Senator, Thema Wise (Thema Fund), Thema International, Defender, Landmark, and Kingate Global.

310. KPMG's conclusions were contained in a September 8, 2008, report entitled "Review of fraud risk and related operational risks at Bernard L. Madoff Investment Securities LLC" (the "2008 Report"). KPMG wrote that, according to Madoff, HSBC's client investments represented an astonishing 33% of BLMIS's assets under management.

311. In the 2008 Report, KPMG identified three additional fraud concerns at BLMIS, not previously identified in the 2006 Report:

- Client cash is diverted—signatures falsified on *client* instruction in an attempt to legitimize an unauthorized transaction (*i.e.*, redemption).
- Madoff LLC claim funds have been used to settle options exercised against HSBC.
- Stocks are intentionally not allocated a fair price from the bulk trade.

312. Yet again, the HSBC Defendants ignored KPMG's warnings and recommendations. The HSBC Defendants, instead, perverted the 2008 Report and used it as a marketing tool to encourage additional investment in the IA Business. Upon information and belief, in mid-2008, HSBC was asked to explain Madoff's investment strategy to Andreas



THE TRANSFERS

Initial Transfers from BLMIS to the Feeder Fund Defendants

317. According to BLMIS’s records, the Feeder Fund Defendants maintained and/or placed assets into multiple accounts with BLMIS (numbers 1FR097, 1FN079, 1FR109, 1FR135, 1FN021, 1FN066, 1FN096, 1FR015, 1FR016, 1FN060, 1FN092, 1FR128, 1FR093, and 1FN095), as set forth on Exhibit A (collectively, the “Account(s)”).

318. Prior to the Filing Date, BLMIS transferred approximately \$2.2 billion to, or for the benefit of, the Feeder Fund Defendants in the form of withdrawals from the Accounts (the “Transfers”), as is set forth in Exhibits A and B, under circumstances which should have put the Feeder Fund Defendants on notice that the Transfers were fraudulent. Of this amount, approximately \$83.8 million constituted non-existent profits supposedly earned in the Accounts (“Fictitious Profits”), and approximately \$2.1 billion constituted the return of principal. See Exhibit A, columns 8 and 9, and Exhibit B, columns 14 and 15. The Fictitious Profits received by the Feeder Fund Defendants were other people’s money.

319. The accountholder Defendants listed on Exhibit A were initial transferees of the avoidable transfers set forth above. In addition, because a number of the Feeder Fund Defendants routinely disregarded corporate formalities and freely transferred funds among themselves, upon information and belief, several Defendants that were not BLMIS accountholders—namely, defendants Hermes, Thema Fund, and Lagoon Trust—also, or in the alternative, received direct transfers from accounts held by defendants Lagoon and Thema Wise. Upon further information and belief, some or all of the Defendants may have received direct

transfers from BLMIS accounts not held in their names, but held in other accountholder Defendants' names, and therefore are initial transferees of those avoidable transfers.

320. The Transfers are avoidable and recoverable under sections 544, 547, 548, 550(a), and 551 of the Bankruptcy Code, applicable provisions of SIPA, particularly 78fff-2(c)(3), and applicable provisions of N.Y. C.P.L.R. 203(g) and 213(8) and DCL sections 273 – 279.

321. During the two years prior to the Filing Date, BLMIS made transfers to the Feeder Fund Defendants totaling at least \$1.6 billion, of which approximately \$1.5 billion constituted a return of principal (the “Two Year Principal Transfers”), and \$82.2 million represented fictitious profits from the Ponzi scheme (the “Two Year Fictitious Profit Transfers,” and, together with the Two Year Principal Transfers, the “Two Year Transfers”). See Exhibit A, columns 4 and 5.

322. Defendant Primeo (account numbers 1FN060 and 1FN092) received two year transfers totaling approximately \$16.2 million, of which \$16.19 million constituted a return of principal (the “Two Year Principal Transfers”), and \$27,942 represented fictitious profits from the Ponzi scheme (the “Two Year Fictitious Profit Transfers,” and, together with the Two Year Principal Transfers, the “Two Year Primeo Transfers”). See Exhibit B, columns 10 and 11.

323. Defendant Alpha Prime (account number 1FR097) received two year transfers totaling approximately \$78.2 million, of which the entire amount constituted a return of principal (the “Two Year Alpha Prime Transfers”). See Exhibit B, columns 10 and 11.

324. Defendant Herald (account number 1FR109) received two year transfers totaling approximately \$563.5 million, of which the entire amount constituted a return of principal (the “Two Year Herald Transfers”). See Exhibit B, columns 10 and 11.

325. Defendant Senator (account number 1FR128) received two year transfers totaling approximately \$95.4 million, of which the entire amount constituted a return of principal (the “Two Year Senator Transfers”). See Exhibit B, columns 10 and 11.

326. Defendant Herald (Lux) (account number 1FR135) received the benefit of two year transfers totaling approximately \$134,000, of which the entire amount constituted a return of principal (the “Two Year Herald (Lux) Transfers”). See Exhibit B, columns 10 and 11.

327. Defendants Hermes, Lagoon, and/or Lagoon Trust (account numbers 1FN021, 1FN066, 1FN096, 1FR015, and 1FR016) received two year transfers totaling approximately \$166.8 million, of which approximately \$84.6 million constituted a return of principal (the “Two Year Hermes/Lagoon Principal Transfers”), and \$82.2 million represented fictitious profits from the Ponzi scheme (the “Two Year Hermes/Lagoon Fictitious Profit Transfers,” and, together with the Two Year Hermes/Lagoon Principal Transfers, the “Two Year Hermes/Lagoon Transfers”). See Exhibit B, columns 10 and 11.

328. Defendants Thema Fund and/or Thema Wise (account number 1FR093) received two year transfers totaling approximately \$117.6 million, of which the entire amount constituted a return of principal (the “Two Year Thema Fund/Thema Wise Transfers”). See Exhibit B, columns 10 and 11.

329. Defendant Thema International (account number 1FN095) received two year transfers totaling approximately \$565.7 million, of which the entire amount constituted a return of principal (the “Two Year Thema International Transfers”). See Exhibit B, columns 10 and 11.

330. Defendant Geo Currencies (account number 1FN079) received the benefit of two year transfers totaling approximately \$130,000, of which the entire amount constituted a return of principal (the “Two Year Geo Currencies Transfers”). See Exhibit B, columns 10 and 11.

331. The Two Year Transfers are avoidable and recoverable under sections 548, 550(a), and 551 of the Bankruptcy Code and applicable provisions of SIPA, particularly section 78fff-2(c)(3) and applicable provisions of DCL sections 273 – 279.

332. During the six years prior to the Filing Date, BLMIS made transfers to the Feeder Fund Defendants totaling approximately \$2 billion, of which approximately \$1.9 billion constituted a return of principal (the “Six Year Principal Transfers”), and approximately \$82.2 million represented fictitious profits from the Ponzi scheme (the “Six Year Fictitious Profit Transfers,” and, together with the Six Year Principal Transfers, the “Six Year Transfers”). See Exhibit A, columns 6 and 7.

333. Defendant Primeo (account numbers 1FN060 and 1FN092) received six year transfers totaling approximately \$145 million, of which approximately \$144.9 million constituted a return of principal (the “Six Year Primeo Principal Transfers”), and \$27,942 represented fictitious profits from the Ponzi scheme (the “Six Year Primeo Fictitious Profit Transfers,” and, together with the Six Year Primeo Principal Transfers, the “Six Year Primeo Transfers”). See Exhibit B, columns 12 and 13.

334. Defendant Alpha Prime (account number 1FR097) received six year transfers totaling approximately \$85.8 million, of which the entire amount constituted a return of principal (the “Six Year Alpha Prime Transfers”). See Exhibit B, columns 12 and 13.

335. Defendant Herald (account number 1FR109) received six year transfers totaling approximately \$578 million, of which the entire amount constituted a return of principal (the “Six Year Herald Transfers”). See Exhibit B, columns 12 and 13.

336. Defendant Senator (account number 1FR128) received six year transfers totaling approximately \$95.4 million, of which the entire amount constituted a return of principal (the “Six Year Senator Transfers”). See Exhibit B, columns 12 and 13.

337. Defendant Herald (Lux) (account number 1FR135) received the benefit of six year transfers totaling approximately \$134,000, of which the entire amount constituted a return of principal (the “Six Year Herald (Lux) Transfers”). See Exhibit B, columns 12 and 13.

338. Defendants Hermes, Lagoon, and/or Lagoon Trust (account numbers 1FN021, 1FN066, 1FN096, 1FR015, and 1FR016) received six year transfers totaling approximately \$249.6 million, of which approximately \$167.4 million constituted a return of principal (the “Six Year Hermes/Lagoon Principal Transfers”), and approximately \$82.2 million represented fictitious profits from the Ponzi scheme (the “Six Year Hermes/Lagoon Fictitious Profit Transfers,” and together with the Six Year Principal Transfers, the “Six Year Hermes/Lagoon Transfers”). See Exhibit B, columns 12 and 13.

339. Defendants Thema Fund and/or Thema Wise (account number 1FR093) received six year transfers totaling approximately \$132 million, of which the entire amount constituted a return of principal (the “Six Year Thema Fund/Thema Wise Transfers”). See Exhibit B, columns 12 and 13.

340. Defendant Thema International (account number 1FN095) received six year transfers totaling approximately \$692.3 million, of which the entire amount constituted a return of principal (the “Six Year Thema International Transfers”). See Exhibit B, columns 12 and 13.

341. Defendant Geo Currencies (account number 1FN079) received the benefit of six year transfers totaling approximately \$417,000, of which the entire amount constituted a return of principal (the “Six Year Geo Currencies Transfers”). See Exhibit B, columns 12 and 13.

342. The Six Year Transfers are avoidable and recoverable under sections 544, 550(a), and 551 of the Bankruptcy Code, applicable provisions of SIPA, particularly 78fff-2(c)(3), and applicable provisions of DCL sections 273 – 279.

343. During the 90 days prior to the Filing Date, BLMIS made payments or other transfers totaling approximately \$1.3 billion to the Feeder Fund Defendants. Of that amount, approximately \$1.2 billion constituted preference payments (the “Preference Period Transfers”). See Exhibit A, column 3.

344. Defendant Alpha Prime (account number 1FR097) received 90 day transfers totaling approximately \$49 million, of which the entire amount constituted preference payments (the “Alpha Prime Preference Period Transfers”). See Exhibit B, column 9.

345. Defendant Herald (account number 1FR109) received 90 day transfers totaling approximately \$537.5 million, of which the entire amount constituted preference payments (the “Herald Preference Period Transfers”). See Exhibit B, column 9.

346. Defendant Senator (account number 1FR128) received 90 day transfers totaling approximately \$95.2 million, of which the entire amount constituted preference payments (the “Senator Preference Period Transfers”). See Exhibit B, column 9.

347. Defendants Hermes, Lagoon, and/or Lagoon Trust (account numbers 1FN021, 1FN066, 1FN096, 1FR015, and 1FR016) received 90 day transfers totaling approximately \$135.1 million, of which approximately \$52.9 million constituted preference payments (the “Hermes/Lagoon Preference Period Transfers”). See Exhibit B, column 9.

348. Defendants Thema Fund and/or Thema Wise (account number 1FR093) received 90 day transfers totaling approximately \$104 million, of which the entire amount constituted

preference payments (the “Thema Fund/Thema Wise Preference Period Transfers”). See Exhibit B, column 9.

349. Defendant Thema International (account number 1FN095) received 90 day transfers totaling approximately \$355.5 million, of which the entire amount constituted preference payments (the “Thema International Preference Period Transfers”). See Exhibit B, column 9.

350. Defendant Geo Currencies (account number 1FN079) received 90 day transfers totaling approximately \$17,000, of which the entire amount constituted preference payments (the “Geo Currencies Preference Period Transfers”). See Exhibit B, column 9.

351. The Preference Period Transfers are avoidable and recoverable under sections 547, 550 and 551 of the Bankruptcy Code and applicable provisions of SIPA, particularly section 78fff-2(c)(3).

The Transfers Were Subsequently Transferred to Other Defendants

352. Upon information and belief, the Management Defendants, the HSBC Defendants, the Beneficial Owners, the Individual Defendants Primeo, and, in the alternative, also Hermes, Thema Fund, and Lagoon Trust (the “Subsequent Transferee Defendants”) received subsequent transfers of the avoidable transfers referenced above (the “Subsequent Transfers”).

353. The Subsequent Transfers, or the value thereof, are recoverable from the Subsequent Transferee Defendants pursuant to section 550(a) of the Bankruptcy Code.

354. The Transfers and Subsequent Transfers were and continue to be Customer Property within the meaning of section 78III(4) of SIPA.

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

356. 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.

INITIAL TRANSFERS FROM BLMIS TO NON-PARTY FUNDS

357. The HSBC Defendants received subsequent transfers from Madoff Feeder Funds that are not named as defendants herein, including Sentry, Broad Market, Broad Market Portfolio, Harley, Kingate Global, Kingate Euro, Landmark, Defender, and Square One (collectively, the "Non-Party Funds")—each of which maintained one or more accounts with BLMIS.

358. The Trustee has filed an action against Sentry to avoid and recover the initial transfers of Customer Property. *See Picard v. Fairfield Sentry Ltd., et al. (In re Bernard L. Madoff Inv. Sec. LLC)*, No. 09-1239 (Bankr. S.D.N.Y filed May 18, 2009), as amended on July 20, 2010 (the "Fairfield Amended Complaint"). The Trustee incorporates by reference the allegations contained in the Fairfield Amended Complaint as if fully rewritten herein.

359. During the six years preceding the Filing Date, BLMIS made transfers to Sentry (account number 1G0092) of approximately \$206 million (the "Sentry Six Year Initial Transfers"). The Sentry Six Year Initial Transfers include approximately \$81.7 million that BLMIS transferred to Sentry during the two years preceding the Filing Date (the "Sentry Two Year Initial Transfers"). The Sentry Six Year Initial Transfers and Sentry Two Year Initial Transfers include approximately \$23 million which BLMIS transferred to Sentry during the 90 days preceding the Filing Date (the "Sentry Preference Period Initial Transfers"). The Sentry Six Year Initial Transfers, the Sentry Two Year Initial Transfers, and the Sentry Preference Period Initial Transfers (collectively, the "Sentry Initial Transfers") are set forth more fully in Exhibits D and E1.

360. The Trustee intends to file an action against Broad Market and Broad Market Portfolio, to be styled *Picard v. Rye Select Broad Market Fund, L.P., et al. (In re Bernard L. Madoff Inv. Sec. LLC)* (the “Tremont Complaint”), to avoid and recover the initial transfers of Customer Property. The Trustee incorporates by reference the allegations contained in the Tremont Complaint as if fully rewritten herein.

361. During the six years preceding the Filing Date, BLMIS made transfers to Broad Market (account number 1T0027) of approximately \$252 million (the “Broad Market Six Year Initial Transfers”). The Broad Market Six Year Initial Transfers include approximately \$60 million that BLMIS transferred to Broad Market during the two years preceding the Filing Date (the “Broad Market Two Year Initial Transfers”). The Broad Market Six Year Initial Transfers and Broad Market Two Year Initial Transfers include approximately \$30 million which BLMIS transferred to Broad Market during the 90 days preceding the Filing Date (the “Broad Market Preference Period Initial Transfers”). The Broad Market Six Year Initial Transfers, the Broad Market Two Year Initial Transfers, and the Broad Market Preference Period Initial Transfers (collectively, the “Broad Market Initial Transfers”) are set forth more fully in Exhibits D and E2.

362. During the six years preceding the Filing Date, BLMIS made transfers to Broad Market Portfolio (account number 1FR080) of approximately \$618 million (the “Broad Market Portfolio Six Year Initial Transfers”). The Broad Market Portfolio Six Year Initial Transfers include approximately \$354.6 million that BLMIS transferred to Broad Market Portfolio during the two years preceding the Filing Date (the “Broad Market Portfolio Two Year Initial Transfers”). The Broad Market Portfolio Six Year Initial Transfers and Broad Market Portfolio Two Year Initial Transfers include approximately \$275.7 million which BLMIS transferred to Broad Market Portfolio during the 90 days preceding the Filing Date (the “Broad Market

Portfolio Preference Period Initial Transfers”). The Broad Market Portfolio Six Year Initial Transfers, the Broad Market Portfolio Two Year Initial Transfers, and the Broad Market Portfolio Preference Period Initial Transfers (collectively, the “Broad Market Portfolio Initial Transfers”) are set forth more fully in Exhibits D and E3.

363. The Trustee has filed an action against Harley to avoid and recover the initial transfers of Customer Property. *See Picard v. Harley International (Cayman) Limited (In re Bernard L. Madoff Inv. Sec. LLC)*, No. 09-1187 (Bankr. S.D.N.Y filed May 12, 2009) (the “Harley Complaint”). The Trustee incorporates by reference the allegations contained in the Harley Complaint as if fully rewritten herein.

364. During the six years preceding the Filing Date, BLMIS made transfers to Harley (account number 1FN094) of approximately \$1.1 billion (the “Harley Six Year Initial Transfers”). The Harley Six Year Initial Transfers include approximately \$1.08 billion that BLMIS transferred to Harley during the two years preceding the Filing Date (the “Harley Two Year Initial Transfers”). The Harley Six Year Initial Transfers and Harley Two Year Initial Transfers include approximately \$427 million which BLMIS transferred to Harley during the 90 days preceding the Filing Date (the “Harley Preference Period Initial Transfers”). The Harley Six Year Initial Transfers, the Harley Two Year Initial Transfers, and the Harley Preference Period Initial Transfers (collectively, the “Harley Initial Transfers”) are set forth more fully in Exhibits D and E4.

365. On November 10, 2010, summary and default judgments were entered against Harley avoiding the Harley Two Year Initial Transfers and the Harley Preference Period Initial Transfers. *See Order Granting Entry of Summary and Default Judgments Against Harley International (Cayman) Limited* (Docket No. 00015).

366. The Trustee has filed an action against Kingate Global and Kingate Euro to avoid and recover the initial transfers of Customer Property. *See Picard v. Kingate Global Fund, Ltd., et al. (In re Bernard L. Madoff Inv. Sec. LLC)*, No. 09-1161 (Bankr. S.D.N.Y filed April 17, 2009), as amended on July 21, 2009 (the “Kingate Amended Complaint”). The Trustee incorporates by reference the allegations contained in the Kingate Amended Complaint as if fully rewritten herein.

367. During the six years preceding the Filing Date, BLMIS made transfers to Kingate Global (account number 1FN061) of approximately \$398.7 million (the “Kingate Global Six Year Initial Transfers”). The Kingate Global Six Year Initial Transfers include approximately \$163.4 million that BLMIS transferred to Kingate Global during the two years preceding the Filing Date (the “Kingate Global Two Year Initial Transfers”). The Kingate Global Six Year Initial Transfers and Kingate Global Two Year Initial Transfers include approximately \$101.8 million which BLMIS transferred to Kingate Global during the 90 days preceding the Filing Date (the “Kingate Global Preference Period Initial Transfers”). The Kingate Global Six Year Initial Transfers, the Kingate Global Two Year Initial Transfers, and the Kingate Global Preference Period Initial Transfers (collectively, the “Kingate Global Initial Transfers”) are set forth more fully in Exhibits D and E5.

368. During the six years preceding the Filing Date, BLMIS made transfers to Kingate Euro (account number 1FR086) of approximately \$475.5 million (the “Kingate Euro Six Year Initial Transfers”). The Kingate Euro Six Year Initial Transfers include approximately \$249 million that BLMIS transferred to Kingate Euro during the two years preceding the Filing Date (the “Kingate Euro Two Year Initial Transfers”). The Kingate Euro Six Year Initial Transfers and Kingate Euro Two Year Initial Transfers include approximately \$155.6 million which

BLMIS transferred to Kingate Euro during the 90 days preceding the Filing Date (the “Kingate Euro Preference Period Initial Transfers”). The Kingate Euro Six Year Initial Transfers, the Kingate Euro Two Year Initial Transfers, and the Kingate Euro Preference Period Initial Transfers (collectively, the “Kingate Euro Initial Transfers”) are set forth more fully in Exhibits D and E6.

369. The Trustee intends to file an action against Landmark, to be styled *Picard v. UBS AG, et al. (In re Bernard L. Madoff Inv. Sec. LLC)* (the “Landmark Complaint”), to avoid and recover the initial transfers of Customer Property. The Trustee incorporates by reference the allegations contained in the Landmark Complaint as if fully rewritten herein.

370. During the six years preceding the Filing Date, BLMIS made transfers to Landmark (account number 1FR133) of approximately \$52.4 million (the “Landmark Six Year Initial Transfers”). The Landmark Six Year Initial Transfers include approximately \$52.4 million that BLMIS transferred to Landmark during the two years preceding the Filing Date (the “Landmark Two Year Initial Transfers”). The Landmark Six Year Initial Transfers and Landmark Two Year Initial Transfers include approximately \$27.6 million which BLMIS transferred to Landmark during the 90 days preceding the Filing Date (the “Landmark Preference Period Initial Transfers”). The Landmark Six Year Initial Transfers, the Landmark Two Year Initial Transfers, and the Landmark Preference Period Initial Transfers (collectively, the “Landmark Initial Transfers”) are set forth more fully in Exhibits D and E7.

371. The Trustee intends to file an action against Defender, to be styled *Picard v. Defender Limited, et al. (In re Bernard L. Madoff Inv. Sec. LLC)* (the “Defender Complaint”) to avoid and recover the initial transfers of Customer Property. The Trustee incorporates by reference the allegations contained in the Defender Complaint as if fully rewritten herein.

372. During the six years preceding the Filing Date, BLMIS made transfers to Defender (account number 1FR132) of approximately \$93.9 million (the “Defender Six Year Initial Transfers”). The Defender Six Year Initial Transfers include approximately \$93.9 million that BLMIS transferred to Defender during the two years preceding the Filing Date (the “Defender Two Year Initial Transfers”). The Defender Six Year Initial Transfers and Defender Two Year Initial Transfers include approximately \$30.3 million which BLMIS transferred to Defender during the 90 days preceding the Filing Date (the “Defender Preference Period Initial Transfers”). The Defender Six Year Initial Transfers, the Defender Two Year Initial Transfers, and the Defender Preference Period Initial Transfers (collectively, the “Defender Initial Transfers”) are set forth more fully in Exhibits D and E8.

373. The Trustee has filed an action against Square One to avoid and recover the initial transfers of Customer Property. *See Picard v. Square One Fund Ltd., et al. (In re Bernard L. Madoff Inv. Sec. LLC)*, No. 10-04330 (Bankr. S.D.N.Y filed Nov. 29, 2010) (the “Square One Complaint”). The Trustee incorporates by reference the allegations contained in the Square One Complaint as if fully rewritten herein.

374. During the six years preceding the Filing Date, BLMIS made transfers to Square One (account number 1FR048) of approximately \$24.7 million (the “Square One Six Year Initial Transfers”). The Square One Six Year Initial Transfers include approximately \$6.5 million that BLMIS transferred to Square One during the two years preceding the Filing Date (the “Square One Two Year Initial Transfers”). The Square One Six Year Initial Transfers and Square One Two Year Initial Transfers include approximately \$17,300 which BLMIS transferred to Square One during the 90 days preceding the Filing Date (the “Square One Preference Period Initial Transfers”). The Square One Six Year Initial Transfers, the Square One Two Year Initial

Transfers, and the Square One Preference Period Initial Transfers (collectively, the “Square One Initial Transfers”) are set forth more fully in Exhibits D and E9.

375. The Sentry Initial Transfers, the Broad Market Initial Transfers, the Broad Market Portfolio Initial Transfers, the Harley Initial Transfers, the Kingate Global Initial Transfers, the Kingate Euro Initial Transfers, the Landmark Initial Transfers, the Defender Initial Transfers, and the Square One Initial Transfers (collectively, the “Non-Party Initial Transfers”), were and continue to be Customer Property within the meaning of SIPA § 78III(4) and are avoidable, should be avoided, and are recoverable under sections 544, 547, 548(a)(1), 550, and 551 of the Bankruptcy Code, applicable provisions of SIPA, particularly SIPA § 78fff-2(c)(3), and DCL sections 273-279.

**THE NON-PARTY INITIAL TRANSFERS FROM BLMIS WERE SUBSEQUENTLY
TRANSFERRED TO THE HSBC DEFENDANTS**

376. A sizeable portion of the Non-Party Initial Transfers was subsequently transferred by the Non-Party Funds to the HSBC Defendants.

377. A portion of the Sentry Initial Transfers, or the value thereof, was subsequently transferred, either directly or indirectly, to or for the benefit of the HSBC Defendants (the “Sentry Subsequent Transfers”).

378. A portion of the Broad Market Initial Transfers, or the value thereof, was subsequently transferred, either directly or indirectly, to or for the benefit of the HSBC Defendants (the “Broad Market Subsequent Transfers”).

379. A portion of the Broad Market Portfolio Initial Transfers, or the value thereof, was subsequently transferred, either directly or indirectly, to or for the benefit of the HSBC Defendants (the “Broad Market Portfolio Subsequent Transfers”).

380. A portion of the Harley Initial Transfers, or the value thereof, was subsequently transferred, either directly or indirectly, to or for the benefit of the HSBC Defendants (the “Harley Subsequent Transfers”).

381. A portion of the Kingate Global Initial Transfers, or the value thereof, was subsequently transferred, either directly or indirectly, to or for the benefit of the HSBC Defendants (the “KINGATE Global Subsequent Transfers”).

382. A portion of the Kingate Euro Initial Transfers, or the value thereof, was subsequently transferred, either directly or indirectly, to or for the benefit of the HSBC Defendants (the “KINGATE Euro Subsequent Transfers”).

383. A portion of the Landmark Initial Transfers, or the value thereof, was subsequently transferred, either directly or indirectly, to or for the benefit of the HSBC Defendants (the “Landmark Subsequent Transfers”).

384. A portion of the Defender Initial Transfers, or the value thereof, was subsequently transferred, either directly or indirectly, to or for the benefit of the HSBC Defendants (the “Defender Subsequent Transfers”).

385. A portion of the Square One Initial Transfers, or the value thereof, was subsequently transferred, either directly or indirectly, to or for the benefit of the HSBC Defendants (the “Square One Subsequent Transfers”).

386. The Sentry Subsequent Transfers, the Broad Market Subsequent Transfers, the Broad Market Portfolio Subsequent Transfers, the Harley Subsequent Transfers, the Kingate Global Subsequent Transfers, Kingate Euro Subsequent Transfers, the Landmark Subsequent Transfers, the Defender Subsequent Transfers, and the Square One Subsequent Transfers

(collectively, the “Non-Party Subsequent Transfers”), or the value thereof, are recoverable from the HSBC Defendants pursuant to section 550 of the Bankruptcy Code.

CUSTOMER CLAIMS

387. Certain Defendants filed customer claims (the “Customer Claims”) as reflected in Exhibit C.

388. The Trustee has not yet determined the Customer Claims on Exhibit C.

389. On December 23, 2008, this Court entered an Order on Application for 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 (“Claims Procedures Order”; Docket No. 12). The Claims Procedure Order includes a process for determination and allowance of claims under which the Trustee has been operating. The Trustee intends to resolve the Customer Claims and any related objections to the Trustee’s determination of such claims through a separate hearing as contemplated by the Claims Procedure Order.

COUNT ONE:
PREFERENTIAL TRANSFERS (INITIAL TRANSFEREES)
11 U.S.C. §§ 547(b), 550(a)(1), AND 551

Against All Feeder Fund Defendants Except Primeo

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

391. At the time of each of the Preference Period Transfers, the Feeder Fund Defendants each were a “creditor” of BLMIS within the meaning of section 101(10) of the Bankruptcy Code and pursuant to SIPA § 78fff-2(c)(3).

392. 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 SIPA § 78fff-2(c)(3).

393. Each of the Preference Period Transfers was to or for the benefit of the Feeder Fund Defendants.

394. Each of the Preference Period Transfers was made for or on account of an antecedent debt owed by BLMIS before such transfer was made.

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

396. Each of the Preference Period Transfers was made during the 90-day preference period under section 547(b)(4) of the Bankruptcy Code.

397. The Preference Period Transfers enabled each of the Feeder Fund Defendants to receive more than it 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) such transferees received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

398. 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 Feeder Fund Defendants as initial transferees, or from the entities for whose benefit such transfers were made, pursuant to section 550(a).

399. As a result of the foregoing, pursuant to sections 547(b), 550(a), and 551 of the Bankruptcy Code and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment: (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 Feeder Fund Defendants for the benefit of the estate of BLMIS.

COUNT TWO:
PREFERENTIAL TRANSFERS (SUBSEQUENT TRANSFEREES)
11 U.S.C. §§ 547(b), 550(a), AND 551

*Against The Management Defendants, The HSBC Defendants,
The Beneficial Owners, The Individual Defendants Primeo, and, in the Alternative,
Hermes, Lagoon, and Lagoon Trust*

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

401. Each of the Preference Period Transfers is avoidable under section 78fff-2(c)(3) of SIPA and section 547(b) of the Bankruptcy Code. Furthermore, 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 SIPA § 78fff-2(c)(3).

402. Upon information and belief, the Management Defendants, the HSBC Defendants, the Beneficial Owners, the Individual Defendants Primeo and, in the alternative, Hermes, Lagoon, and Lagoon Trust were immediate or mediate transferees of some portion of the Preference Period Transfers pursuant to section 550(a) of the Bankruptcy Code (the “Preference Period Subsequent Transfers”).

403. Each of the Preference Period Subsequent Transfers was made directly or indirectly to or for the benefit of the Management Defendants, the HSBC Defendants, the Beneficial Owners, the Individual Defendants Primeo or, in the alternative, Hermes, Lagoon, or Lagoon Trust.

404. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to sections 547(b), 550(a), and 551 of the Bankruptcy Code and SIPA § 78fff-2(c)(3) recovering the Preference Period Subsequent Transfers, or the value thereof, from the Management Defendants, the HSBC Defendants, the Beneficial Owners, the Individual Defendants Primeo and, in the alternative, Hermes, Lagoon, and Lagoon Trust for the benefit of the estate of BLMIS.

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

Against The Feeder Fund Defendants

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

406. Each of the Two Year Transfers were made on or within two years before the Filing Date.

407. Each of the Two Year Transfers constituted a transfer of an interest of BLMIS in property within the meaning of sections 101(54) and 548(a) of the Bankruptcy Code and pursuant to SIPA § 78fff-2(c)(3).

408. Each of the Two Year Transfers were made by BLMIS with the actual intent to hinder, delay, or defraud some or all of BLMIS's then existing or future creditors. BLMIS made the Two Year Transfers to or for the benefit of the Feeder Fund Defendants in furtherance of a fraudulent investment scheme.

409. Each of the Two Year Initial Transfers constitutes a fraudulent transfer avoidable by the Trustee pursuant to section 548(a)(1)(A) of the Bankruptcy Code and recoverable from the Feeder Fund Defendants pursuant to section 550(a) of the Bankruptcy Code and SIPA § 78fff-2(c)(3).

410. 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 Feeder Fund Defendants for the benefit of the estate of BLMIS.

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

Against The Feeder Fund Defendants

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

412. Each of the Two Year Transfers was made on or within two years before the Filing Date.

413. Each of the Two Year Transfers constitutes a transfer of an interest of BLMIS in property within the meaning of sections 101(54) and 548(a) of the Bankruptcy Code and pursuant to SIPA § 78fff-2(c)(3).

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

415. At the time of each of the Two Year Transfers, BLMIS was insolvent, or became insolvent, as a result of the Two Year Transfers.

416. 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 a business or a transaction, for which any property remaining with BLMIS was an unreasonably small capital.

417. 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's ability to pay as such debts matured.

418. Each of the Two Year Transfers constitutes fraudulent transfers avoidable by the Trustee pursuant to section 548(a)(1)(B) of the Bankruptcy Code and recoverable from the Feeder Fund Defendants pursuant to section 550(a) of the Bankruptcy Code and SIPA § 78fff-2(c)(3).

419. As a result of the foregoing, pursuant to sections 548(a)(1)(B), 550(a), and 551 of the Bankruptcy Code and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment: (a) avoiding and preserving the Two Year Transfers; (b) directing that the Two Year Transfers to be set aside; and (c) recovering the Two Year Transfers, or the value thereof, from the Feeder Fund 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 U.S.C. §§ 544, 550(a)(1), AND 551

Against The Feeder Fund Defendants

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

421. At all times relevant to the Six Year Transfers, there have been one or more creditors 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 are not allowable only under section 502(e) of the Bankruptcy Code.

422. Each of the Six Year Transfers constituted a conveyance by BLMIS as defined under DCL section 270.

423. Each of 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 Madoff Fund Defendants in furtherance of a fraudulent investment scheme.

424. The Six Year Transfers were received by the Feeder Fund Defendants with actual intent to hinder, delay, or defraud creditors and/or future creditors of BLMIS at the time of each of the transfers.

425. As a result of the foregoing, pursuant to DCL sections 276, 276-a, 278, and/or 279, sections 544(b), 550(a) and 551 of the Bankruptcy Code, and SIPA § 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 Feeder Fund Defendants for the benefit of the estate of BLMIS, and to return to injured customers, and (d) recovering attorney's fees from the Feeder Fund Defendants.

COUNT SIX:
FRAUDULENT TRANSFERS – NEW YORK DEBTOR AND CREDITOR LAW
§§ 273 AND 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(a), AND 551

Against The Feeder Fund Defendants

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

427. 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) of the Bankruptcy Code.

428. Each of the Six Year Transfers constituted a conveyance by BLMIS as defined under DCL section 270.

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

430. BLMIS was insolvent at the time that 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.

431. As a result of the foregoing, pursuant to DCL sections 273, 278, and/or 279, sections 544(b), 550(a), and 551 of the Bankruptcy Code and SIPA § 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; and (c) recovering the Six Year Transfers, or the value thereof, from the Feeder Fund Defendants 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), AND 551

Against The Feeder Fund Defendants

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

433. 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).

434. Each of the Six Year Transfers constituted a conveyance by BLMIS as defined under DCL section 270.

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

436. At the time that BLMIS made each of the Six Year Transfers, BLMIS was engaged or 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.

437. As a result of the foregoing, pursuant to DCL sections 274, 278, and/or 279, sections 544(b), 550(a)(1), and 551 of the Bankruptcy Code, and SIPA § 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; and (c) recovering the Six Year Transfers, or the value thereof, from the Feeder Fund 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

Against The Feeder Fund Defendants

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

439. 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).

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

441. At the time that 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.

442. As a result of the foregoing, pursuant to DCL sections 275, 278, and/or 279, sections 544(b), 550(a), and 551 of the Bankruptcy Code, and SIPA § 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; and (c) recovering the Six Year Transfers, or the value thereof, from the Feeder Fund Defendants for the benefit of the estate of BLMIS.

COUNT NINE:
RECOVERY OF ALL FRAUDULENT TRANSFERS
NEW YORK CIVIL PRACTICE LAW AND RULES 203(g) AND 213(8),
AND NEW YORK DEBTOR AND CREDITOR LAW §§ 276, 276-a, 278
AND/OR 279, 11 U.S.C. §§ 544, 550(a), AND 551

Against The Feeder Fund Defendants

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

444. 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.

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

446. Each of the Transfers constituted a conveyance by BLMIS as defined under DCL section 270.

447. Each of the Transfers was 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 Feeder Fund Defendants in furtherance of a fraudulent investment scheme.

448. Each of the Transfers was received by the Feeder Fund Defendants with actual intent to hinder, delay, or defraud creditors of BLMIS at the time of each of the Transfers, and/or future creditors of BLMIS.

449. As a result of the foregoing, pursuant to N.Y. C.P.L.R. 203(g), 213(8), DCL sections 276, 276-a, 278, and/or 279, sections 544(b), 550(a), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against the Feeder Fund Defendants: (a) avoiding and preserving the Transfers; (b) directing that the Transfers be set aside; (c) recovering the Transfers, or the value thereof, from the Feeder Fund Defendants for the benefit of the estate of BLMIS; and (d) recovering attorney's fees from the Feeder Fund Defendants.

COUNT TEN:
RECOVERY OF SUBSEQUENT TRANSFERS
NEW YORK DEBTOR AND CREDITOR LAW §§ 273-279
AND 11 U.S.C. §§ 544, 547, 548, 550(a), AND 551

*Against The Management Defendants, The HSBC Defendants,
The Beneficial Owners, The Individual Defendants Primeo and, In The Alternative,
Hermes, Thema Fund, and Lagoon Trust*

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

451. Each of the Transfers are avoidable under sections 544, 547, and 548 of the Bankruptcy Code, DCL sections 273-279, and SIPA § 78fff-2(c)(3).

452. Upon information and belief, the Subsequent Transferee Defendants received Subsequent Transfers, which are recoverable pursuant to Section 550(a) of the Bankruptcy Code.

453. Each of the Subsequent Transfers was made directly or indirectly to, or for the benefit of, the Subsequent Transferee Defendants.

454. The Subsequent Transferee Defendants are immediate or mediate transferees of the Subsequent Transfers.

455. Each of the Subsequent Transfers was received by the Subsequent Transferee Defendants with actual intent to hinder, delay, or defraud creditors of BLMIS, and/or future creditors of BLMIS, at the time of each of the Subsequent Transfers.

456. As a result of the foregoing, pursuant to DCL sections 278 and/or 279, sections 544, 550(a), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against Subsequent Transferee Defendants recovering the Subsequent Transfers, or the value thereof, and attorneys' fees, for the benefit of the estate of BLMIS.

COUNT ELEVEN:
DISALLOWANCE OF CUSTOMER CLAIMS

***Against Alpha Prime, Geo Currencies, Herald, Herald (Lux),
Lagoon, Senator, Thema International, And Thema Wise***

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

458. Alpha Prime, Geo Currencies, Herald, Herald (Lux), Lagoon, Senator, Thema International, and Thema Wise have filed Customer Claims which have not yet been determined, or which were the subject of timely filed objections. See Exhibit C.

459. Such Customer Claims should not be allowed pursuant to section 502(d) of the Bankruptcy Code because Alpha Prime, Geo Currencies, Herald, Herald (Lux), Lagoon, Senator, Thema International, and Thema Wise, who filed the Customer Claims, are the recipients of transfers of BLMIS's property which are avoidable and recoverable under sections 544, 547, 548 and/or 550(a) of the Bankruptcy Code, DCL sections 273-279, and SIPA § 78fff-2(c)(3) as set forth above, and Alpha Prime, Herald, Herald (Lux), Lagoon, Senator, Thema International, and Thema Wise have not returned the transfers to the Trustee.

460. The Claims Procedures Order includes a process for determination and allowance of claims under which the Trustee has been operating. As a result of the foregoing, the Trustee intends to resolve the Customer Claims of Alpha Prime, Geo Currencies, Herald, Herald (Lux), Lagoon, Senator, Thema International, and Thema Wise, and any related objections, through the mechanisms contemplated by the Claims Procedures Order.

COUNT TWELVE:
EQUITABLE SUBORDINATION

***Against Alpha Prime, Geo Currencies, Herald, Herald (Lux),
Lagoon, Senator, Thema International, and Thema Wise***

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

462. Alpha Prime, Geo Currencies, Herald, Herald (Lux), Lagoon, Senator, Thema International, and Thema Wise engaged in inequitable conduct, including behavior described in this Complaint, that has resulted in injury to the customers and creditors of the estate and has conferred an unfair advantage on these Feeder Fund Defendants.

463. Based on the inequitable conduct of Alpha Prime, Geo Currencies, Herald, Herald (Lux), Lagoon, Senator, Thema International, and Thema Wise, as described above, the customers and/or of BLMIS have been misled as to the true financial condition of the debtor; have been induced to invest without knowledge of the actual facts regarding BLMIS's financial condition; and/or are less likely to recover the full amounts due to them because of the conduct of Alpha Prime, Geo Currencies, Herald, Herald (Lux), Lagoon, Senator, Thema International, and Thema Wise.

464. The Court should exercise the full extent of its equitable powers to ensure that claims, payments, or benefits, of whatever kind or nature, which are asserted or sought, directly or indirectly against the estate, by Alpha Prime, Geo Currencies, Herald, Herald (Lux), Lagoon, Senator, Thema International, and Thema Wise—and only to the extent that such claims are allowed—are subordinated for distribution purposes pursuant to sections 510(c)(1) and 105(a) of the Bankruptcy Code.

465. Equitable subordination as requested herein is consistent with the provisions and purposes of the Bankruptcy Code.

COUNT THIRTEEN:
PREFERENTIAL TRANSFERS (SUBSEQUENT TRANSFEREE)
11 U.S.C. §§ 547(b), 550(a), AND 551

Against The HSBC Defendants

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

467. At the time of each of the Sentry Preference Period Initial Transfers, the Broad Market Preference Period Initial Transfers, the Broad Market Portfolio Preference Period Initial Transfers, the Harley Preference Period Initial Transfers, the Kingate Global Preference Period Initial Transfers, the Kingate Euro Preference Period Initial Transfers, the Landmark Preference Period Initial Transfers, the Defender Preference Period Initial Transfers, and the Square One Preference Period Initial Transfers (collectively, the “Non-Party Preference Period Initial Transfers”), each of the Non-Party Funds was a “creditor” of BLMIS within the meaning of section 101(10) of the Bankruptcy Code and pursuant to SIPA § 78fff-2(c)(3).

468. Each of the Non-Party Preference Period Initial 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 SIPA § 78fff-2(c)(3).

469. Each of the Non-Party Preference Period Initial Transfers was to, or for the benefit of, the Non-Party Funds.

470. Each of the Non-Party Preference Period Initial Transfers was made for, or on account of, an antecedent debt owed by BLMIS to the Non-Party Funds before such transfer was made.

471. Each of the Non-Party Preference Period Initial Transfers was made while BLMIS was insolvent.

472. Each of the Non-Party Preference Period Initial Transfers was made during the 90-day preference period under section 547(b)(4) of the Bankruptcy Code.

473. Each of the Non-Party Preference Period Initial Transfers enabled the Non-Party Funds to receive more than they 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) such transferee received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

474. Each of the Non-Party Preference Period Initial Transfers constitutes a preferential transfer avoidable by the Trustee pursuant to section 547(b) of the Bankruptcy Code.

475. The Trustee has filed lawsuits against the Non-Party Funds to avoid the Non-Party Preference Period Initial Transfers pursuant to section 547(b) of the Bankruptcy Code, and to recover the Non-Party Preference Period Initial Transfers, or the value thereof, from the Non-Party Defendants pursuant to section 550(a) of the Bankruptcy Code.

476. Upon information and belief, the HSBC Defendants were immediate or mediate transferees of some portion of the Non-Party Preference Period Initial Transfers pursuant to section 550(a) of the Bankruptcy Code (the “Non-Party Preference Period Subsequent Transfers”).

477. Each of the Non-Party Preference Period Subsequent Transfers was made, directly or indirectly, to, or for the benefit of, the HSBC Defendants.

478. As a result of the foregoing, pursuant to sections 547(b), 550(a), and 551 of the Bankruptcy Code and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment recovering the Non-Party Preference Period Subsequent Transfers, or the value thereof, from the HSBC Defendants for the benefit of the estate of BLMIS.

COUNT FOURTEEN:
FRAUDULENT TRANSFER (SUBSEQUENT TRANSFEREE)
11 U.S.C. §§ 548(a)(1)(A), 550(a), AND 551

Against The HSBC Defendants

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

480. The Sentry Two Year Initial Transfers, the Broad Market Two Year Initial Transfers, the Broad Market Portfolio Two Year Initial Transfers, the Harley Two Year Initial Transfers, the Kingate Global Two Year Initial Transfers, the Kingate Euro Two Year Initial Transfers, the Landmark Two Year Initial Transfers, the Defender Two Year Initial Transfers, and the Square One Two Year Initial Transfers (collectively, the “Non-Party Two Year Initial Transfers”) were made on or within two years before the Filing Date.

481. Each of the Non-Party Two Year Initial Transfers constituted a transfer of an interest of BLMIS in property within the meaning of sections 101(54) and 548(a) of the Bankruptcy Code and pursuant to SIPA § 78fff-2(c)(3).

482. Each of the Non-Party Two Year Initial Transfers was made by BLMIS with the actual intent to hinder, delay, or defraud some or all of BLMIS’s then existing and/or future creditors. BLMIS made the Non-Party Two Year Initial Transfers to or for the benefit of the Non-Party Funds in furtherance of a fraudulent investment scheme.

483. Each of the Non-Party Two Year Initial Transfers constitutes a fraudulent transfer avoidable by the Trustee pursuant to section 548(a)(1)(A) of the Bankruptcy Code and recoverable from the Non-Party Funds pursuant to section 550(a) of the Bankruptcy Code and SIPA § 78fff-(2)(c)(3).

484. The Trustee has filed lawsuits against the Non-Party Funds to avoid the Non-Party Two Year Initial Transfers pursuant to section 548(a)(1)(A) of the Bankruptcy Code, and

to recover the Non-Party Two Year Initial Transfers, or the value thereof, from the Non-Party Funds pursuant to section 550(a) of the Bankruptcy Code and SIPA § 78fff-2(c)(3).

485. The HSBC Defendants were immediate or mediate transferees of some portion of the Non-Party Two Year Initial Transfers (the “Non-Party Two Year Subsequent Transfers”).

486. Each of the Non-Party Two Year Subsequent Transfers was made, directly or indirectly, to, or for the benefit of, the HSBC Defendants.

487. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to sections 550(a) and 551 of the Bankruptcy Code and SIPA § 78fff-2(c)(3) recovering the Non-Party Two Year Subsequent Transfers, or the value thereof, from the HSBC Defendants for the benefit of the estate.

COUNT FIFTEEN:
FRAUDULENT TRANSFER (SUBSEQUENT TRANSFEREE)
11 U.S.C. §§ 548(a)(1)(B), 550(a), AND 551

Against The HSBC Defendants

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

489. The Non-Party Two Year Initial Transfers were made on or within two years before the Filing Date.

490. Each of the Non-Party Two Year Initial Transfers constituted a transfer of an interest of BLMIS in property within the meaning of sections 101(54) and 548(a) of the Bankruptcy Code and pursuant to SIPA § 78fff-2(c)(3).

491. BLMIS received less than a reasonably equivalent value in exchange for each of the Non-Party Two Year Initial Transfers.

492. At the time of each of the Non-Party Two Year Initial Transfers, BLMIS was insolvent, or became insolvent, as a result of each of the Non-Party Two Year Initial Transfers.

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

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

495. Each of the Non-Party Initial Two Year Transfers constitutes a fraudulent transfer avoidable by the Trustee pursuant to section 548(a)(1)(B) of the Bankruptcy Code and recoverable from the Non-Party Funds pursuant to section 550(a) of the Bankruptcy Code and SIPA § 78fff-(2)(c)(3).

496. The Trustee has filed lawsuits against the Non-Party Funds to avoid the Non-Party Initial Two Year Transfers pursuant to section 548(a)(1)(B) of the Bankruptcy Code, and to recover the Non-Party Initial Two Year Transfers, or the value thereof, from the Non-Party Funds pursuant to section 550(a) of the Bankruptcy Code and SIPA § 78fff-2(c)(3).

497. The HSBC Defendants were immediate or mediate transferees of some portion of the Non-Party Initial Two Year Transfers (the "Non-Party Two Year Subsequent Transfers").

498. Each of the Non-Party Two Year Subsequent Transfers was made, directly or indirectly, to, or for the benefit of, the HSBC Defendants.

499. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to sections 548(a)(1)(B), 550(a), and 551 of the Bankruptcy Code and SIPA § 78fff-2(c)(3) recovering the Non-Party Two Year Subsequent Transfers, or the value thereof, from the HSBC Defendants for the benefit of the estate.

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

Against The HSBC Defendants

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

501. At all times relevant to the Sentry Six Year Initial Transfers, the Broad Market Six Year Initial Transfers, the Broad Market Portfolio Six Year Initial Transfers, the Harley Six Year Initial Transfers, the Kingate Global Six Year Initial Transfers, the Kingate Euro Six Year Initial Transfers, the Landmark Six Year Initial Transfers, the Defender Six Year Initial Transfers, and the Square One Six Year Initial Transfers (collectively, the “Non-Party Six Year Initial 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 under section 502(e).

502. Each of the Non-Party Six Year Initial Transfers constituted a conveyance by BLMIS as defined under DCL section 270.

503. The Non-Party Six Year Initial Transfers were made by BLMIS with the actual intent to hinder, delay, or defraud the creditors of BLMIS. BLMIS made the Non-Party Six Year Initial Transfers to or for the benefit of the Non-Party Funds in furtherance of a fraudulent investment scheme.

504. Each of the Non-Party Six Year Initial Transfers were received by the Non-Party Funds with actual intent to hinder, delay, or defraud creditors and/or future creditors of BLMIS at the time of each of the Non-Party Six Year Initial Transfers.

505. The Trustee has filed lawsuits against the Non-Party Funds to avoid the Non-Party Six Year Initial Transfers pursuant to section 544 of the Bankruptcy Code, and DCL sections 276, 276-a, 278, and/or 279, and to recover the Non-Party Initial Transfers, or the value thereof, and attorney's fees from the Non-Party Funds pursuant to section 550(a) of the Bankruptcy Code and SIPA § 78fff-2(c)(3).

506. The HSBC Defendants were immediate or mediate transferees of some portion of the Non-Party Six Year Initial Transfers pursuant to section 550(a) of the Bankruptcy Code (the "Non-Party Six Year Subsequent Transfers").

507. Each of the Non-Party Six Year Subsequent Transfers was made, directly or indirectly, to or for the benefit of the HSBC Defendants.

508. Each of the Non-Party Six Year Subsequent Transfers was received by the HSBC Defendants with actual intent to hinder, delay, or defraud creditors and/or future creditors of BLMIS at the time of each of the Non-Party Six Year Subsequent Transfers.

509. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to DCL sections 276, 276-a, 278, and/or 279, sections 544(b), 550(a), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3) recovering the Non-Party Six Year Subsequent Transfers, or the value thereof, and attorney's fees from the HSBC Defendants for the benefit of the estate.

COUNT SEVENTEEN:
FRAUDULENT TRANSFER (SUBSEQUENT TRANSFEREE)
NEW YORK DEBTOR AND CREDITOR LAW §§ 273 AND 278
AND/OR 279, AND 11 U.S.C. §§ 544, 550(a), AND 551

Against The HSBC Defendants

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

511. 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).

512. Each of the Non-Party Six Year Initial Transfers constituted a conveyance by BLMIS as defined under DCL section 270.

513. BLMIS did not receive fair consideration for the Non-Party Six Year Initial Transfers.

514. BLMIS was insolvent at the time it made each of the Non-Party Six Year Initial Transfers or, in the alternative, BLMIS became insolvent as a result of each of the Non-Party Six Year Initial Transfers.

515. The Trustee has filed a lawsuit against the Non-Party Funds to avoid the Non-Party Six Year Initial Transfers pursuant to section 544 of the Bankruptcy Code, and DCL sections 273, 278, and/or 279, and to recover the Non-Party Six Year Initial Transfers, or the value thereof, from the Non-Party Funds pursuant to section 550(a) of the Bankruptcy Code and SIPA § 78fff-2(c)(3).

516. The HSBC Defendants were immediate or mediate transferees of some portion of the Non-Party Six Year Initial Transfers pursuant to section 550(a) of the Bankruptcy Code (the “Non-Party Six Year Subsequent Transfers”).

517. Each of the Non-Party Six Year Subsequent Transfers was made, directly or indirectly, to, or for the benefit of, the HSBC Defendants.

518. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to DCL sections 273, 278, and/or 279, sections 544(b), 550(a), and 551 of the Bankruptcy Code, and

SIPA § 78fff-2(c)(3) recovering the Non-Party Six Year Subsequent Transfers, or the value thereof, from the HSBC Defendants for the benefit of the estate.

COUNT EIGHTEEN:
FRAUDULENT TRANSFERS (SUBSEQUENT TRANSFEREE)
NEW YORK DEBTOR AND CREDITOR LAW §§ 274, 278,
AND/OR 279, AND 11 U.S.C. §§ 544, 550(a), AND 551

Against The HSBC Defendants

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

520. 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).

521. Each of the Non-Party Six Year Initial Transfers constituted a conveyance by BLMIS as defined under DCL section 270.

522. BLMIS did not receive fair consideration for the Non-Party Six Year Initial Transfers.

523. At the time BLMIS made each of the Non-Party Six Year Initial 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 Non-Party Six Year Initial Transfers was an unreasonably small capital.

524. The Trustee has filed a lawsuit against the Non-Party Funds to avoid the Non-Party Six Year Initial Transfers pursuant to section 544 of the Bankruptcy Code, and DCL sections 274, 278, and/or 279, and to recover the Non-Party Six Year Initial Transfers, or the

value thereof, from the Non-Party Funds pursuant to section 550(a) of the Bankruptcy Code and SIPA § 78fff-2(c)(3).

525. The HSBC Defendants were immediate or mediate transferees of some portion of the Non-Party Six Year Initial Transfers pursuant to section 550(a) of the Bankruptcy Code (the “Non-Party Six Year Subsequent Transfers”).

526. Each of the Non-Party Six Year Subsequent Transfers was made, directly or indirectly, to, or for the benefit of, the HSBC Defendants.

527. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to DCL sections 274, 278, and/or 279, sections 544(b), 550(a), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3) recovering the Non-Party Six Year Subsequent Transfers, or the value thereof, from the HSBC Defendants for the benefit of the estate.

COUNT NINETEEN:
FRAUDULENT TRANSFERS (SUBSEQUENT TRANSFEREE)
NEW YORK DEBTOR AND CREDITOR LAW §§ 275, 278,
AND/OR 279, AND 11 U.S.C. §§ 544, 550(a), AND 551

Against The HSBC Defendants

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

529. 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 under section 502(e).

530. Each of the Non-Party Six Year Initial Transfers constituted a conveyance by BLMIS as defined under DCL section 270.

531. BLMIS did not receive fair consideration for the Non-Party Six Year Initial Transfers.

532. At the time BLMIS made each of the Non-Party Six Year Initial 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.

533. The Trustee has filed a lawsuit against the Non-Party Funds to avoid the Non-Party Six Year Initial Transfers pursuant to section 544 of the Bankruptcy Code, and DCL sections 275, 278, and/or 279, and to recover the Non-Party Six Year Initial Transfers, or the value thereof, from the Non-Party Funds pursuant to section 550(a) of the Bankruptcy Code and SIPA § 78fff-2(c)(3).

534. The HSBC Defendants were immediate or mediate transferees of some portion of the Non-Party Six Year Initial Transfers pursuant to section 550(a) of the Bankruptcy Code.

535. Each of the Non-Party Six Year Subsequent Transfers was made, directly or indirectly, to, or for the benefit of, the HSBC Defendants.

536. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to DCL sections 275, 278, and/or 279, sections 544(b), 550(a), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3) recovering the Non-Party Six Year Subsequent Transfers, or the value thereof, from the HSBC Defendants for the benefit of the estate.

COUNT TWENTY:
UNJUST ENRICHMENT

Against The Management Defendants, The HSBC Defendants, The Beneficial Owners, and The Individual Defendants (The “Non-Fund Defendants”)

537. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein. This count is asserted against the Non-Fund Defendants for unjust enrichment pursuant to New York common law.

538. The Non-Fund Defendants have all been unjustly enriched. They have wrongfully and unconscionably benefited from the receipt of stolen money from BLMIS and the

Feeder Fund Defendants' investors, for which they did not, in good faith, provide fair value. These Non-Fund Defendants further were unjustly enriched from the acts described herein, including substantially enabling the Ponzi scheme through, at the very least, conscious avoidance of and willful blindness to Madoff's fraudulent activities in the Ponzi scheme. These acts perpetuated Madoff's fraud and deepened the insolvency of BLMIS. All of the money received by the Non-Fund Defendants came at the expense of BLMIS's victims.

539. Upon information and belief, the Management Defendants and the HSBC Defendants, collectively, received hundreds of millions of dollars in management fees, advisory fees, custodial fees, distribution and performance fees, and administrative fees for furthering and expanding the Ponzi scheme. Upon information and belief, certain of the Individual Defendants, certain of the Management Defendants, and the Beneficial Owners received substantial payments in the form of partnership distributions, salaries, bonuses, dividends, and/or other forms of payment. All of this money rightfully belongs to the BLMIS estate for equitable distribution by the Trustee in accordance with his statutory authority. None of this money has been returned to the Trustee for equitable distribution to BLMIS customers who lost billions of dollars in the Ponzi scheme.

540. The Non-Fund Defendants constantly were faced with evidence that BLMIS was a fraud. Yet, instead of warning their investors and Madoff's other customers, the Non-Fund Defendants continued to market BLMIS to their investors and funneled money into BLMIS. Faced with the prospect of losing substantial fees, the Non-Fund Defendants chose to cover up and ignore the compelling evidence of Madoff's fraud. As a result, they have been unjustly enriched by millions of dollars that rightfully belongs to BLMIS customers.

541. Equity and good conscience require full restitution of the moneys received, directly or indirectly, from BLMIS by the Non-Fund Defendants, as well as any assets derived from that money.

COUNT TWENTY-ONE:
MONEY HAD AND RECEIVED

Against The Non-Fund Defendants

542. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein. This count is asserted against the Non-Fund Defendants for money had and received pursuant to New York common law.

543. The Non-Fund Defendants all have received money that rightfully belongs to the victims of BLMIS. They likewise have benefited from the receipt of this money from BLMIS, which was taken from the Madoff Fund Defendants' investors.

544. Upon information and belief, the Management Defendants and the HSBC Defendants, collectively, received hundreds of millions of dollars in fees. Upon information and belief, certain of the Individual Defendants, certain of the Management Defendants, and the Beneficial Owners received millions of dollars in dividends, distributions, and/or other forms of payment. None of this money has been returned to the Trustee for equitable distribution to BLMIS customers who lost billions of dollars in the Ponzi scheme.

545. As described above, the Non-Fund Defendants were constantly faced with evidence that BLMIS was a fraud. However, the Non-Fund Defendants ignored this evidence and continued to market BLMIS to their investors, funneling substantial assets into BLMIS. As a result of this ongoing pattern of behavior, the Non-Fund Defendants have received money that rightfully belongs to BLMIS customers.

546. Equity and good conscience require full restitution of the moneys received, directly or indirectly, from BLMIS by the Non-Fund Defendants, as well as any assets derived from that money.

COUNT TWENTY-TWO:
AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

Against The Non-Fund Defendants

547. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein. This count is asserted against the Non-Fund Defendants for actions which aided and abetted the breach of BLMIS's fiduciary duty pursuant to New York law.

548. BLMIS owed a fiduciary duty to act in the best interests of investors and funds, and to perform its services with the degree of care, caution, and prudence expected in the financial services industry. BLMIS failed to fulfill its fiduciary duties by perpetrating a massive Ponzi scheme.

549. All of the Non-Fund Defendants, as described above, had actual knowledge of the breaches of fiduciary duty committed by BLMIS, were aware of numerous red flags strongly suggesting that BLMIS was engaged in fraudulent activity, and/or consciously avoided BLMIS's breach of fiduciary duty. By virtue of their long-standing relationships with BLMIS, their multiple investigations into BLMIS, their communications with clients and investors of the Feeder Fund Defendants, and their roles as managers, advisers, administrators and custodians of the Feeder Fund Defendants, the Non-Fund Defendants knew that BLMIS was engaged in fraudulent activity.

550. The Non-Fund Defendants were confronted with myriad red flags and indicia of fraud on the part of BLMIS, and by failing to investigate further, consciously avoided the clear

deficiencies and evident falsities associated with BLMIS. To the extent that the Non-Fund Defendants consciously avoided facts that, if confirmed, would have laid bare the fraudulent nature of the Ponzi scheme, the Non-Fund Defendants had actual knowledge of BLMIS's breach.

551. HSBC Private Bank (Suisse) substantially assisted BLMIS in its breach of fiduciary duty by marketing funds invested in BLMIS, encouraging clients to invest in BLMIS on the basis of purported due diligence, and funneling significant assets into BLMIS. The HSBC Custodian Defendants substantially assisted BLMIS in its breach of fiduciary duty by providing custody services to the funds invested in BLMIS and delegating their control of assets to BLMIS, which eliminated independent oversight of fund assets. The HSBC Administrator Defendants substantially assisted BLMIS in its breach of fiduciary duty by calculating the Feeder Fund Defendants' net asset value and disseminating the net asset value to customers. HSBC Bank (USA) substantially assisted BLMIS in its breach of fiduciary duty by leveraging feeder fund investments in BLMIS through swap agreements, thereby enabling BLMIS to attract more investor principal. The actions of the HSBC Defendants furthered the Ponzi scheme and deepened the insolvency of BLMIS.

552. The Management and Individual Defendants substantially assisted BLMIS in its breach of fiduciary duty by funneling billions of dollars into BLMIS, deepening the insolvency of BLMIS, and allowing BLMIS to continue its Ponzi scheme.

553. As a direct and reasonably foreseeable result of (a) BLMIS's breach of fiduciary duty and (b) the Non-Fund Defendants aiding and abetting in that breach, investors in BLMIS have suffered substantial injury.

COUNT TWENTY-THREE:
AIDING AND ABETTING FRAUD

Against The Non-Fund Defendants

554. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein. This count is asserted against the Non-Fund Defendants for actions which aided and abetted BLMIS's fraud pursuant to New York law.

555. As set forth above, BLMIS was engaged in a complex and longstanding plan to enrich itself at the expense of investors. As part of this plan, BLMIS repeatedly made false statements regarding the sale and repurchase of securities and other financial instruments, the value of investor accounts, and the total value of assets under management.

556. All of the Non-Fund Defendants, as set forth above, had actual knowledge of the fraud committed by BLMIS, were aware of numerous red flags strongly suggesting that BLMIS was engaged in fraudulent activity, and/or consciously avoided BLMIS's fraud. By virtue of their long-standing relationships with BLMIS, their multiple investigations into BLMIS, their communications with clients and investors of the Feeder Fund Defendants, and their roles as managers, advisers, administrators and custodians of the Feeder Fund Defendants, the Non-Fund Defendants knew that BLMIS was engaged in fraudulent activity.

557. The Non-Fund Defendants were confronted with myriad red flags and indicia of fraud on the part of BLMIS, and by failing to investigate further, consciously avoided the clear deficiencies and evident falsities associated with BLMIS. To the extent that the Non-Fund Defendants consciously avoided facts that, if confirmed, would have laid bare the fraudulent nature of the Ponzi scheme, the Non-Fund Defendants had actual knowledge of BLMIS's breach.

558. HSBC Private Bank (Suisse) substantially assisted BLMIS in its fraud by marketing funds invested in BLMIS, encouraging clients to invest in BLMIS on the basis of

purported due diligence, and funneling significant assets to BLMIS. The HSBC Custodian Defendants substantially assisted BLMIS in its fraud by providing custody services to the funds invested in BLMIS and delegating their control of assets to BLMIS, which eliminated independent oversight of fund assets. The HSBC Administrator Defendants substantially assisted BLMIS in its fraud by calculating the Feeder Fund Defendants' net asset value and disseminating the net asset value to customers. HSBC Bank (USA) substantially assisted BLMIS in its fraud by leveraging feeder fund investments in BLMIS through swap agreements, thereby enabling BLMIS to attract more investor principal. The actions of the HSBC Defendants furthered the Ponzi scheme and deepened the insolvency of BLMIS.

559. The Management and Individual Defendants substantially assisted BLMIS in its fraud by funneling billions of dollars into BLMIS, deepening the insolvency of BLMIS, and allowing BLMIS to continue its Ponzi scheme.

560. As a direct and reasonably foreseeable result of (a) BLMIS's fraud and (b) the Non-Fund Defendants aiding and abetting in that fraud, investors in BLMIS have suffered substantial injury.

COUNT TWENTY-FOUR:
CONTRIBUTION

Against The Non-Fund Defendants

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

562. As set forth above, all of the Non-Fund Defendants engaged in fraud, engaged in conspiracy to commit fraud, aided and abetted BLMIS's breach of fiduciary duty, aided and abetted BLMIS's fraud, and acted in concert with BLMIS in its breach of fiduciary duty.

563. The Non-Fund Defendants' tortious conduct funneled assets to BLMIS, expanded the Ponzi scheme, and deepened BLMIS's insolvency. All of these actions facilitated the harm committed by BLMIS, and the actions augmented the injury suffered by the victims of BLMIS's fraudulent activities.

564. The Non-Fund Defendants are therefore liable to the extent that they contributed to the damages suffered by investors in BLMIS, and the Trustee seeks contribution from the Non-und Defendants for its proportionate share and in an amount to be determined at trial.

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 547(b), 550(a)(1), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3): (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 Feeder Fund Defendants for the benefit of the estate of BLMIS;

(ii) On the Second Claim for Relief, pursuant to sections 547(b), 550(a)(2), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3): (a) avoiding and preserving the Preference Period Subsequent Transfers; (b) directing that the Preference Period Subsequent Transfers be set aside; and (c) recovering the Preference Period Subsequent Transfers, or the value thereof, from the Management Defendants, the HSBC Defendants, the Beneficial Owners, the Individual Defendants, Primeo, and, in the alternative, Hermes, Lagoon, and Lagoon Trust 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, and SIPA § 78fff-2(c)(3): (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 Feeder Fund 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, and SIPA § 78fff-2(c)(3): (a) avoiding and preserving the Two Transfers; (b) directing that the Two Year Transfers be set aside; and (c) recovering the Two Year Transfers, or the value thereof, from the Feeder Fund Defendants for the benefit of the estate of BLMIS;

(v) On the Fifth Claim for Relief, pursuant to DCL sections 276, 276-a, 278 and/or 279, sections 544, 550(a)(1), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3): (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 Feeder Fund Defendants for the benefit of the estate of BLMIS; and (d) recovering attorney's fees from the Feeder Fund Defendants;

(vi) On the Sixth Claim for Relief, pursuant to DCL sections 273, 278 and/or 279, sections 544, 550(a), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3): (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 Feeder Fund Defendants for the benefit of the estate of BLMIS;

(vii) On the Seventh Claim for Relief, pursuant to DCL sections 274, 278 and/or 279, sections 544, 550(a), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3): (a) avoiding and preserving the Six Year Transfers; (b) directing the Six Year Transfers be set

aside; and (c) recovering the Six Year Transfers, or the value thereof, from the Feeder Fund Defendants for the benefit of the state of BLMIS;

(viii) On the Eighth Claim for Relief, pursuant to DCL sections 275, 278 and/or 279, sections 544, 550(a), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3): (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 Feeder Fund Defendants for the benefit of the estate of BLMIS;

(ix) On the Ninth Claim for Relief, pursuant to N.Y. C.P.L.R. 203(g) and 213(8), DCL sections 276, 276-a, 278 and/or 279, sections 544, 550(a)(1), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3): (a) avoiding and preserving the Transfers; (b) directing that the Transfers be set aside; (c) recovering the Transfers, or the value thereof, from the Feeder Fund Defendants for the benefit of the estate of BLMIS; and (d) recovering attorney's fees from the Feeder Fund Defendants;

(x) On the Tenth Claim for Relief, pursuant to DCL sections 273-279, sections 544, 550(a), and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3): (a) avoiding and preserving the Subsequent Transfers; (b) directing that the Subsequent Transfers be set aside; and (c) recovering the Subsequent Transfers, or the value thereof, from the Management Defendants, the HSBC Defendants, the Beneficial Owners, the Individual Defendants, Primeo, and, in the alternative, Hermes, Lagoon, and Lagoon Trust for the benefit of the estate of BLMIS;

(xi) On the Eleventh Claim for Relief, that the claims filed by Alpha Prime, Geo Currencies, Herald, Herald (Lux), Lagoon, Senator, Thema International, and Thema Wise be disallowed;

(xii) On the Twelfth Claim for Relief, the Trustee is entitled to a judgment that the Customer Claims filed by and of the Defendants be equitably subordinated for distribution purposes pursuant to §§ 510(c)(1) and 105(a) of the Bankruptcy Code;

(xiii) On the Thirteenth Claim for Relief, pursuant to §547(b), 550(a) and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against the Subsequent Transferee Defendants recovering the Subsequent Transfers, or the value thereof, for the benefit of the estate of BLMIS;

(xiv) On the Fourteenth Claim for Relief, pursuant to §548(a)(1)(A), 550(a) and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against the Subsequent Transferee Defendants recovering the Subsequent Transfers, or the value thereof, for the benefit of the estate of BLMIS;

(xv) On the Fifteenth Claim for Relief, pursuant to §548(a)(1)(B), 550(a) and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against the Subsequent Transferee Defendants recovering the Subsequent Transfers, or the value thereof, for the benefit of the estate of BLMIS;

(xvi) On the Sixteenth Claim for Relief, pursuant to DCL §§ 276, 276-A, 278 and/or 279, § 548(a)(1)(A), 550(a) and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against the Subsequent Transferee Defendants recovering the Subsequent Transfers, or the value thereof, for the benefit of the estate of BLMIS;

(xvii) On the Seventeenth Claim for Relief, pursuant to DCL §§ 273, 278 and/or 279, § 548(a)(1)(A), 550(a) and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against the Subsequent Transferee Defendants recovering the Subsequent Transfers, or the value thereof, for the benefit of the estate of BLMIS;

(xviii) On the Eighteenth Claim for Relief, pursuant to DCL §§ 274, 278 and/or 279, § 548(a)(1)(A), 550(a) and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against the Subsequent Transferee Defendants recovering the Subsequent Transfers, or the value thereof, for the benefit of the estate of BLMIS;

(xix) On the Nineteenth Claim for Relief, pursuant to DCL §§ 275, 278 and/or 279, § 548(a)(1)(A), 550(a) and 551 of the Bankruptcy Code, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against the Subsequent Transferee Defendants recovering the Subsequent Transfers, or the value thereof, for the benefit of the estate of BLMIS;

(xx) On the Twentieth through the Twenty-Fourth Claims for Relief, compensatory, exemplary, and punitive damages of at least \$2 billion, with an exact amount to be proven at trial;

(xxi) On all Claims for Relief, pursuant to federal common law and N.Y. C.P.L.R. 5001 and 5004, awarding the Trustee prejudgment interest from the date on which the Transfers and/or Subsequent Transfers were received by the Defendants;

(xxii) On all Claims for Relief, establishment of a constructive trust over the proceeds of Initial Transfers, Subsequent Transfers, and unjust enrichment of the Defendants in favor of the Trustee for the benefit of BLMIS's estate;

(xxiii) On all Claims for Relief, assignment of the Defendants' rights to seek refunds from the government for federal, state, and local taxes paid on fictitious profits during the course of the scheme;

(xxiv) Awarding the Trustee all applicable interest, costs, and disbursements of this action; and

(xxv) Granting the Trustee such other, further, and different relief as the Court deems just, proper and equitable.

Dated: New York, New York
December 5, 2010

Of Counsel:

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

EXHIBIT 2

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: 001503

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

RECEIVED

In Liquidation

FEB 02 2009

DECEMBER 11, 2008

PLACE MAILING LABEL HERE

Provide your office and home telephone no.

OFFICE: +43 1 513 95 40

HOME: _____

Taxpayer I.D. Number (Social Security No.)

ALPHA PRIME FUND LTD

attn: HAUSMANINGER KLETTER
RECHTSANWÄLTE -- GESELLSCHAFT MBH
A-1010 WIEN, FRANZ JOSEFS-KAI 3
TEL. 01/513 95 40
FAX 01/513 95 40-12

(If incorrect, please change)

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 \$ _____
 - b. I owe the Broker a Debit (Dr.) Balance of \$ _____

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. \$ _____

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.

	<u>YES</u>	<u>NO</u>
a. The Broker owes me securities	<u>YES</u>	_____
b. I owe the Broker securities	_____	<u>NO</u>
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)
_____	<u>SEE ENCLOSED LISTS</u>	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

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.

- | | <u>YES</u> | <u>NO</u> |
|---|------------|-----------|
| 3. Has there been any change in your account since December 11, 2008? If so, please explain. | _____ | <u>NO</u> |
| 4. Are you or were you a director, officer, partner, shareholder, lender to or capital contributor of the broker? | _____ | <u>NO</u> |
| 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? | _____ | <u>NO</u> |
| 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) | _____ | <u>NO</u> |
| 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. | _____ | <u>NO</u> |
| 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. | _____ | <u>NO</u> |

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.

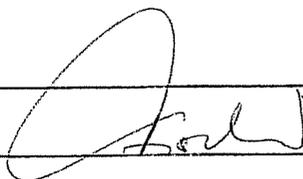
_____ NO

Please list the full name and address of anyone assisting you in the preparation of this claim form: PETER FISCHER
HOHENSTAUFGASSE 7/7, A-1010 VIENNA, AUSTRIA

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 _____ Signature _____
Date 1/23/2009 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

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: 001504

BERNARD L. MADOFF INVESTMENT SECURITIES LLC

In Liquidation

DECEMBER 11, 2008

RECEIVED

FEB 02 2009

PLACE MAILING LABEL HERE

Provide your office and home telephone no.

OFFICE: + 43 1 513 95 40

HOME: _____

Taxpayer I.D. Number (Social Security No.)

SENATOR FUND SPC

attn: HAUSMANINGER KLETTER
RECHTSANWÄLTE — GESELLSCHAFT MBH

A-1010 WIEN, FRANZ JOSEFS-KAI 3
TEL. 01/513 95 40
FAX 01/513 95 40-12

(If incorrect, please change)

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 \$ _____
 - b. I owe the Broker a Debit (Dr.) Balance of \$ _____

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. \$ _____

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.

	<u>YES</u>	<u>NO</u>
a. The Broker owes me securities	<u>YES</u>	_____
b. I owe the Broker securities	_____	<u>NO</u>
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)
_____	<u>SEE ENCLOSED LISTS</u>	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

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.

- | | <u>YES</u> | <u>NO</u> |
|---|------------|-----------------|
| 3. Has there been any change in your account since December 11, 2008? If so, please explain. | _____ | _____ <u>NO</u> |
| 4. Are you or were you a director, officer, partner, shareholder, lender to or capital contributor of the broker? | _____ | _____ <u>NO</u> |
| 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? | _____ | _____ <u>NO</u> |
| 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) | _____ | _____ <u>NO</u> |
| 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. | _____ | _____ <u>NO</u> |
| 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. | _____ | _____ <u>NO</u> |

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.

NO

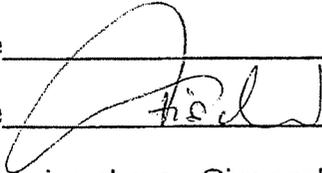
Please list the full name and address of anyone assisting you in the preparation of this claim form: PETER FISCHER
HOHENSTAUFENGASSE 7/7, A-1010 VIENNA, AUSTRIA

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Date _____ Signature _____

Date 1/23/2009 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.)

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Irving H. Picard, Esq.,
Trustee for Bernard L. Madoff Investment Securities LLC
Claims Processing Center
2100 McKinney Ave., Suite 800
Dallas, TX 75201

EXHIBIT 3

1AI7PICA
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 IRVING H. PICARD,
3
4 Plaintiff,

5 v. 11 Civ. 3882

6 FRANK J. AVELLINO, ET AL.,
6
7 Defendants.

8 -----x

9 October 18, 2011
9 2:30 p.m.

10 Before:

11 HON. JED S. RAKOFF
12 District Judge

13 APPEARANCES

14 BAKER & HOSTETLER LLP
15 Attorneys for Plaintiff
15 BY: OREN J. WARSHAVSKY
16 NICHOLAS CREMONA
17 KEVIN H. BELL
17 Attorney for SIPC

18 HAILE SHAW & PFAFFENBERGER
19 Attorneys for Defendants
19 BY: GARY WOODFIELD

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1 (Case called)

2 (In open court)

3 MR. WARSHAVSKY: Good afternoon, your Honor. Oren
4 Warshavsky of Baker Hostetler --

5 THE COURT: What's that name again?

6 MR. WARSHAVSKY: -- for the plaintiff Irving Picard,
7 whose name you may not have heard either.

8 MR. CREMONA: Good afternoon, your Honor. Nicholas
9 Cremona, also from Baker & Hostetler on behalf of the trustee.

10 MR. BELL: Good afternoon, your Honor. Kevin Bell for
11 the Securities Investor Protection Corporation.

12 THE COURT: Good afternoon.

13 MR. WOODFIELD: Gary Woodfield on behalf of the
14 Avellino defendants, your Honor. Good afternoon.

15 THE COURT: Good afternoon. Please be seated. So, I
16 think we are to some extent beginning to reach the point of
17 diminishing returns on oral argument since I have heard at
18 least the trustee's views on many of the points that are raised
19 here today, some of which are still sub judice with the court
20 and others of which have been decided.

21 For example, I have already decided that Section
22 546(e) presents withdrawable issues. On the other hand, though
23 I haven't yet decided, in previous arguments I have been
24 skeptical that the Stern v. Marshall entitlement to a jury
25 group of arguments presents a withdrawable issue. That remains

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1 to be seen; I haven't finally decided.

2 So, I just give that by way of introduction because I
3 think while I'm very happy to hear anything that the trustee or
4 counsel for SIPC wants to say, I think the main purpose of this
5 oral argument is to give defense counsel, who hasn't been heard
6 before, a full opportunity to make whatever arguments he wants
7 to make in addition to his papers. So, let's start with the
8 moving counsel.

9 MR. WOODFIELD: Sure, I will. Thank you, your Honor.
10 But essentially you stole whatever thunder I had. I think it's
11 a given obviously in light of your Honor's ruling in Katz and
12 the Grief decision with regard to 546(e) -- because again it
13 certainly can't be argued that we were a "me too" defendant.
14 We filed our motion to dismiss raising that issue back on June
15 6 and filed our motion to withdraw the reference that date also
16 well before your Honor decided those cases.

17 THE COURT: No, I'm not suggesting otherwise. But let
18 me ask you, because as I say that one is easy. There is no
19 doubt -- I don't think anyone disagrees -- that if you don't
20 consent to a jury trial then you are entitled to a jury trial
21 on any claims that meet the Sixth Amendment standard for a jury
22 trial. I've had greater difficulty understanding why you think
23 that entitles you to withdraw at this stage.

24 MR. WOODFIELD: Well, simply, your Honor, I think it's
25 just a matter of judicial efficiency. If we are going to have

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1 this matter tried by a jury -- and that is the desire of my
2 clients -- it seems like a more efficient use of judicial
3 resources to have the matter heard by one judge throughout.

4 THE COURT: Well, typically in bankruptcies there are
5 claims to which one is not entitled to a jury and other claims
6 to which one is entitled to a jury, and so I'm not sure which
7 the efficiencies cut. More importantly, as a practical matter
8 very few cases either in the bankruptcy court or indeed in the
9 district court actually go to trial.

10 MR. WOODFIELD: True.

11 THE COURT: I think the statistics in both courts are
12 well over 95 percent of all adversary proceedings get resolved
13 short of trial. So, I'm not sure that the ultimate entitlement
14 to a jury trial is really a good measure of efficiency is what
15 I'm saying.

16 MR. WOODFIELD: I understand, and we raise that in one
17 of many points.

18 Judge, if I may go back for a second though, and again
19 I profess not to fully understand it, but then again I don't
20 appear to be alone in that regard, and that is a full
21 understanding of that Stern decision and its potential
22 application here.

23 THE COURT: Well, it's true that what we really ought
24 to do of course is call up Chief Justice Roberts and ask him.

25 MR. WOODFIELD: I would, but they won't let me bring

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1 cell phones in this courthouse, so I'm precluded.

2 THE COURT: Actually that's not totally true. There
3 is now provisions for lawyers to bring cell phones. You have
4 to just go through rigmarole. And this being a bureaucracy,
5 how could you not expect to go through rigmarole?

6 MR. WOODFIELD: I practice in south Florida, I haven't
7 been in the Southern District in I'd say 15 or 20 years, but
8 each federal court you go to it has a different manner in which
9 they handle it, but so be it.

10 THE COURT: Well, in the Southern District of New York
11 our procedures are totally rational, which is why we change
12 them every few months, and everywhere else of course they're
13 totally idiosyncratic, so ...

14 MR. WOODFIELD: Just going back to Stern -- and again,
15 Judge, I don't profess to fully grasp it -- and of course the
16 decisions that I have read that interpret it seem to vary
17 widely.

18 THE COURT: Well, that of course is the main I think
19 basis for withdrawal, would be the considerable conflict in the
20 interpretation of Stern, and it's a conflict of not bankruptcy
21 law but a conflict over constitutional law, and that's the
22 argument for withdrawal.

23 MR. WOODFIELD: And we certainly would like to brief
24 that. Again, I'm certainly no expert in the field, but I think
25 it could be read -- and frankly while many argue that it should

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1 be narrowly interpreted, while that may be true I think the
2 language and breadth of it is quite broad, and I think it could
3 have implications here that again fully support -- or fully
4 support --

5 THE COURT: Well, it does say, does it not, that it's
6 not purported to change the basic balance of work load or words
7 to that effect. I don't have the exact quote in front of me.

8 MR. WOODFIELD: True. Well, it says a lot, but I'm
9 not sure that it doesn't have fairly significant ramifications.

10 THE COURT: All right. Anyway, that is certainly
11 something I've got to consider. Were there other things that
12 you wanted to say?

13 MR. WOODFIELD: No, your Honor. Thank you.

14 THE COURT: Thank you very much. Anything from the
15 trustee?

16 MR. WARSHAVSKY: Yes, your Honor. I would like to go
17 back to 546 for a moment, and a lot of these cases are very
18 different. In the last few weeks that we have been here we
19 have been discussing innocent investor cases. This case, as
20 well as a few others that your Honor has not yet heard,
21 presents very different facts. I think what we would suggest,
22 as we did a little bit in our papers, is that 546 here is a
23 factual issue.

24 If I could just shed some of the light on the facts
25 here, which is that in 1992 -- and this is all in the

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1 complaint -- the defendants had a problem with the SEC, they
2 went to Bernie Madoff, told him they had the problem, Bernie
3 Madoff created a new account for them, everything was
4 back-dated to give them \$65 million, all with trades both
5 commencing -- both the buy and the sell of the purported
6 equities happening back well before the account even opened,
7 all to the tune of \$65 million.

8 There are a few other irregularities, and I won't bore
9 you with them.

10 THE COURT: You are saying that no matter how one
11 interprets 546 they wouldn't qualify for the safe harbor. Is
12 that what you're saying?

13 MR. WARSHAVSKY: Well, that is. That is where I was
14 going to go, which is that I think they would need to believe
15 that it's a securities contract. And while we may have
16 arguments about why we don't think 546 applies in any of the
17 cases, certainly in the cases where we have demonstrated that
18 the defendants or we have pled that the defendants could not
19 have believed that there was securities trades happening, there
20 is at least a factual issue. And these defendants when pressed
21 with it in pre-filing discovery took the Fifth Amendment, which
22 is their right, but I think at the very least what that does is
23 that creates a factual issue as to whether or not they have a
24 546 defense. They may ultimately have one -- we obviously
25 would posit they do not --

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1 THE COURT: Well, I think the law on that is if you
2 take the Fifth Amendment in a civil proceeding the finder of
3 fact can, if he or it wishes, draw an adverse inference, but
4 that relates to what happens at the summary judgment or a trial
5 stage, not what happens at an earlier stage.

6 MR. WARSHAVSKY: Well, I guess I was putting that
7 together because it is in our pleading. What I was suggesting
8 to you is that if you read through our pleading here, our
9 pleading suggests that these defendants knew -- that they
10 couldn't escape the fact that there was no trading happening at
11 Bernie Madoff -- sorry -- at BLMIS -- and if we're right on
12 that then they should not be able to avail themselves of 546.
13 And what I would submit to your Honor is that we should at
14 least be able to have discovery on this issue, and that if at
15 the end of discovery they move on 546, that's when it would be
16 appropriate to determine whether or not they understood that
17 they had a securities contract with BLMIS.

18 THE COURT: OK. I'm not sure I'm persuaded, but I
19 certainly hear that argument. I will consider it.

20 MR. WARSHAVSKY: OK. In terms of Stern v. Marshall,
21 your Honor, it wasn't raised in the initial papers.

22 THE COURT: No, that's true. And normally I would
23 therefore have given you the opportunity to put in further
24 briefing, and I will if you really want to, but of course I
25 have heard your views on Stern v. Marshall before.

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1 MR. WARSHAVSKY: All I was going to suggest, your
2 Honor, is that in this case we have various defendants that
3 have filed customer claims, and that -- I may say the name of
4 the case wrong -- Katchen v. Landy, my smarter colleagues
5 tell, which is where the Supreme Court did say when we are
6 talking about a claim in an avoidance action, we put them
7 together, it goes to the bankruptcy court, and in those cases
8 actually when those are determined together, those defendants
9 that did file the claim, and if the trustee's action stems out
10 of the same set of transactions and occurrences, then they even
11 waive their right to a jury trial. Now, that's not all
12 defendants here but it is a lot of them.

13 THE COURT: OK, thank you very much.

14 Does counsel for SIPC want to say anything?

15 MR. BELL: Yes, your Honor. Mr. Warshavsky went
16 somewhere down the path that I was going. We have a 104 page
17 complaint, and the complaint lists --

18 THE COURT: One of your shorter complaints.

19 MR. BELL: Well, both Mr. Avellino and Mr. Beines have
20 a long history with the Madoff family, they worked as partners
21 in an accounting firm in New York with Mr. Madoff's
22 father-in-law going back a long way in time and, you know, the
23 SEC went after them in 1992 with regard to their activities.
24 We submit that there was no meeting of the mind, there was no
25 contract with regard to this. It is a legal question, I think,

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1 it's also a factual question with regard to 546(e). It says in
2 connection with a securities contract.

3 So, I would submit with these particular movants we
4 have a unique situation which I don't think speaks to
5 withdrawal at this moment, and I would agree with Mr.
6 Warshavsky because I remember Professor Wang as a first year
7 law student saying you have to have a meeting of the minds, and
8 if you know --

9 THE COURT: Yes, but I guess my question -- and I need
10 to go back and read the 104 page complaint -- is whether all
11 your claims, all your claims presuppose your establishing that
12 they didn't know about -- that they knew this was not a
13 securities contract.

14 MR. BELL: I think if, your Honor --

15 THE COURT: Because if they don't fit that pattern
16 then we still have a withdrawable issue.

17 MR. BELL: I think we go back in time to the SEC's
18 complaint in 1992, and this was a big issue at that time where
19 Mr. Avellino and Mr. Beines, the SEC filed a complaint in this
20 court and asserted that they were running an unregistered
21 investment advisory as accountants and they were sort of like
22 the Judas goats bringing people to Bernie Madoff. They
23 continued as that. We submit they continued with that
24 throughout.

25 I think that speaks to their mind it wasn't of a

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1 contract making nature, and I think that goes to the heart
2 really of your Honor -- I don't have the benefit of your
3 opinion on brief yet, your Honor, but I think that goes to the
4 benefit of your reading of the plain language, because the
5 plain language of 546(e) talks in connection with the
6 securities contract. And as Professor Wang taught me in first
7 year law school you have to have two people who are of the same
8 mind in order to get a contract. And if one person knows it's
9 a fiction that Bernie is running here, you don't have a
10 contract. That's all I would say.

11 THE COURT: I understand that argument. I guess my
12 question was: Are all the claims to which 546(e) would
13 otherwise apply removed by virtue of your argument from any
14 dispute other than a factual dispute? So, I --

15 MR. BELL: I'm only talking as to these particular
16 movants, your Honor. I am not talking about Grief or anybody
17 else.

18 THE COURT: No, I understand that completely.

19 MR. BELL: I want to stick particularly to this
20 motion.

21 THE COURT: You are saying -- this is what your
22 colleague was saying, as I understood it, as well. You are
23 saying regardless of the differences in view between the
24 trustee and this court on what 546(e) means and whether it
25 applies, for example, to someone who is an innocent investor in

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1 Mr. Madoff's company, if the person knows from the beginning
2 that this is a Ponzi scheme and there are no real securities
3 contracts, that the safe harbor is not available there, and
4 that while it may be true that the defendants may contest that
5 they knew it was a Ponzi scheme, that's a factual matter to be
6 developed in the bankruptcy court rather than a matter that
7 involves the legal complications of bankruptcy law versus
8 securities law that led to my withdrawal of the reference in
9 Katz. So, I understand that argument. I just want to make
10 sure there is nothing in the complaint that went beyond that
11 issue so far as a potential applicability as far as 546 is
12 concerned.

13 You see, in Katz the trustee was arguing -- this
14 wasn't his entire argument, but a large part of his argument
15 was 546(e) is really directed at the head of the stockbroker,
16 Madoff of course knew from day one that he wasn't involved in
17 securities transactions -- although he may have been involved
18 in some securities transactions; that's a different issue. And
19 what this court held was from the plain language, you are not
20 just looking at it from a stockbroker's standpoint. If an
21 investor has every reason to believe he is getting a securities
22 contract, that invokes the statute. What you are saying is
23 it's not really a meeting of the mind so much, what you are
24 really saying is if both sides are aware this is not a
25 securities contract, then 546(e) doesn't apply.

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1 MR. BELL: Exactly, your Honor.

2 THE COURT: OK.

3 MR. BELL: You used the term knowing, and I had a
4 smile on my face, because back from my Latin studying days I
5 call them cognescenti. And there is an element in this case, a
6 big criminal case, and I don't know if the Southern District
7 will ever get to where I am with regard to seeing cognescenti,
8 but I see cognescenti, and I assert and I think the complaint
9 asserts that we have cognescenti here in this motion.

10 And, you know, to have had the Commission go after you
11 16 years before for doing things, and you said you were going
12 to get out of the business, and then the facts as asserted in
13 the complaint show that you are still Judas goating people into
14 Bernie Madoff's enterprise --

15 THE COURT: Well, I understand the argument. I think
16 it has considerable force, although I do think cognescenti is
17 Italian, not Latin.

18 MR. BELL: No, your Honor, it is Latin, having studied
19 Latin for a long time.

20 THE COURT: Well, so did I, but we will have that
21 debate some other day.

22 OK. Anything from defense counsel?

23 MR. WOODFIELD: No. I would just add, your Honor,
24 that the complaint, with all due respect, is not a model of
25 clarity, and it says just about everything and anything in the

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1 104 pages. Quite frankly I have been waiting for the abridged
2 edition, but I guess that's not coming. But while there may be
3 allegations setting forth facts that one can infer knowledge on
4 the part of my clients, there are other numerous paragraphs
5 throughout the complaint which are identical to the other
6 complaints they have filed that attempt to establish a willful
7 blindness and a not knowing. So, the complaint literally says
8 everything. I don't believe that's going to be dispositive of
9 the issue of whether or not 546(e) applies.

10 THE COURT: OK, very good. Thank you all very much,
11 and I will take the matter sub judice.

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EXHIBIT 4

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MICHIGAN STATE HOUSING
DEVELOPMENT AUTHORITY, a
public body corporate,

Plaintiff,

v.

11-CV-3392 (JGK)

LEHMAN BROTHERS HOLDINGS INC.,
LEHMAN BROTHERS DERIVATIVE
PRODUCTS INC., LEHMAN BROTHERS
SPECIAL FINANCING INC.,

Defendants,

Oral Argument

COUNSEL OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF LEHMAN
BROTHERS HOLDINGS INC., et al.

Intervenor Defendants.

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New York, N.Y.
September 14, 2011
10:56 a.m.

Before:

HON. JOHN G. KOELTL,

District Judge

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APPEARANCES

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1
2 WILMER CUTLER PICKERING HALE AND DORR LLP
2 Attorneys for Plaintiff
3 BY: CRAIG GOLDBLATT, ESQ.
3 JEANNETTE K. BOOT, ESQ.
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6 STATE OPERATIONS DIVISION
6 For Plaintiff
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8 WEIL, GOTSHAL & MANGES LLP
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11 MILBANK, TWEED, HADLEY & McCLOY LLP
12 Attorneys for Intervenor Defendant
12 BY: DAVID S. COHEN, ESQ.
13 WILBUR F. FOSTER, JR., ESQ.
14 ALSO PRESENT:
15 KASOWITZ BENSON TORRES & FRIEDMAN LLP
15 Attorneys for Dante Noteholders
16 BY: MATTHEW B. STEIN, ESQ.
16
17 KIRKLAND & ELLIS LLP
17 Attorneys for Australian Liquidators
18 BY: ERIC F. LEON, ESQ.
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1 (In open court)

2 (Case called)

3 THE CLERK: Will all parties please state who they are
4 for the record.

5 Counsel? State who you are for the record.

6 THE COURT: So we can hear everyone and then you can
7 argue.

8 MR. GOLDBLATT: Sure. So Craig Goldblatt, your Honor,
9 on behalf of the Michigan State Housing Development Authority.

10 THE COURT: Good morning.

11 MR. GOLDBLATT: Good morning. And --

12 THE COURT: No. I want to --

13 MR. GOLDBLATT: Oh, absolutely. I apologize.

14 THE COURT: I want to find out who's here first.

15 MR. MILLER: Harvey Miller, your Honor, on behalf of
16 the Lehman entities, from Weil, Gotshal & Manges.

17 MR. COHEN: Good morning, your Honor. David Cohen,
18 Milbank, Tweed, Hadley & McCloy, on behalf of the Official
19 Committee of Unsecured Creditors of Lehman Brothers Holdings.

20 THE COURT: All right. I also got a letter from
21 Mr. Glenn on behalf of Dante Noteholders Kasowitz Benson, who
22 wanted the opportunity to submit an amicus brief in favor of
23 withdrawing the reference. If Mr. Glenn is here and wanted to
24 be heard, he can tell us.

25 MR. STEIN: Your Honor, Matthew Stein from Kasowitz,
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1 here in place of Andrew Glenn.

2 THE COURT: Okay. If there's anything you'd like to
3 add, I'll listen to you later, I guess right after
4 Mr. Goldblatt.

5 I should add at the outset that I know people at just
6 about all of the law firms involved, if not all the law firms.
7 Nothing about that affects anything that I do in the case.
8 Okay?

9 Mr. Goldblatt.

10 MR. GOLDBLATT: We certainly have no concerns in that
11 regard, your Honor.

12 I should add, if it's helpful, that I believe your
13 Honor also received a letter from Mr. Leon of Kirkland & Ellis
14 on behalf of the Australian Liquidators, and I know Mr. Leon is
15 also here in the courtroom this morning.

16 MR. LEON: Good morning, your Honor.

17 THE COURT: Also in favor of withdrawal?

18 MR. GOLDBLATT: That's right, your Honor.

19 MR. LEON: Correct.

20 THE COURT: Okay. I should point out that I have a
21 niece who is a nonshare partner at Kirkland in Washington.
22 Because she's a nonshare partner, I don't disqualify myself in
23 cases in which Kirkland represents one of the parties and
24 certainly not where they want to submit an amicus brief. But I
25 expect that she would not work on anything that's before me,

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1 and there is nothing about that that affects anything that I do
2 in this case.

3 MR. LEON: Thank you, your Honor.

4 THE COURT: Okay.

5 MR. GOLDBLATT: Thank you, your Honor. Good morning.

6 THE COURT: Good morning.

7 MR. GOLDBLATT: We very much appreciate the court's
8 time and the opportunity to be heard with respect to this
9 motion.

10 We ask that the court withdraw the reference over this
11 dispute because doing so will serve the interests of judicial
12 economy with respect to the particular dispute before the court
13 here and would provide a mechanism for effectively reviewing
14 the bankruptcy court's controversial decision in the BNY
15 Trustee case that has brought implications for the financial
16 markets more broadly.

17 In light of the Supreme Court's decision in Stern v.
18 Marshall, which was the subject of correspondence submitted
19 earlier in this matter, the bankruptcy court cannot issue a
20 final judgment on Lehman's counterclaim against MSHDA. At
21 most, it can make proposed findings and conclusions that would
22 be subject to de novo review here. Moreover --

23 THE COURT: Can we stop just for a moment there.

24 MR. GOLDBLATT: Certainly.

25 THE COURT: You're looking to withdraw the reference;

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1 right?

2 MR. GOLDBLATT: Correct.

3 THE COURT: So what would be withdrawn is the
4 adversary proceeding as well as the counterclaim; correct?

5 MR. GOLDBLATT: That's correct.

6 THE COURT: And I just want to make sure that I
7 understand.

8 MR. GOLDBLATT: So --

9 THE COURT: Hold on. Hold on.

10 MR. GOLDBLATT: Of course.

11 THE COURT: There's not necessarily a unified answer,
12 is there, with respect to whether each of the claims in the
13 adversary proceeding by the Michigan authorities are core
14 proceedings, nor is there necessarily a unified answer whether
15 every counterclaim is core or not core. And you can tell me if
16 anything I say is inaccurate. It would appear that, for
17 example, at least some of the counterclaims by Lehman are
18 plainly core. They're core under Stern because they're defined
19 as core in the statute. Then the question is, okay, they're
20 defined as core in the statute. Do they fall within the public
21 rights exception so that they're really a counterclaim which
22 wouldn't arise other than under the bankruptcy law and it's a
23 question of bankruptcy law which is involved rather than a
24 straight common law claim as at issue in Stern?

25 Taking the first counterclaim by Lehman for

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1 declaratory judgment as to whether the specific provision at
2 issue is unenforceable under the bankruptcy code ipso facto
3 provisions, how could that arise other than under the
4 bankruptcy law?

5 So -- hold on -- my first question is: Isn't it right
6 that the answer with respect to each of the claims and each of
7 the counterclaims may not be the same as to whether they're
8 core or not core, but it does appear that a lot of them are
9 core?

10 The second question is -- and I think that this is
11 what you were saying: Is the only significance of this,
12 whether the bankruptcy court, on a matter which is core, can
13 only make a report and recommendation to the court and that
14 this court would have to make the final decision reviewing the
15 matters de novo as opposed to a decision by the bankruptcy
16 court that would then be reviewed on appeal to this court with
17 the standard terms of any appeal in the same way as the Court
18 of Appeals would review a decision of this court? And if
19 that's the only distinction, the only relevant distinction at
20 least for purposes of this case on the difference between core
21 and not core, then does it really make any difference at all
22 because you want to withdraw the reference in order to make a
23 motion for summary judgment with respect to all of these issues
24 and the motion for summary judgment, once it's decided by the
25 bankruptcy court, would be reviewed de novo by this court in

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1 any event?

2 MR. GOLDBLATT: Okay. If I could take those two
3 questions in reverse order, with the court's permission.

4 THE COURT: Sure.

5 MR. GOLDBLATT: The answer to your second question
6 fundamentally is, that's correct, whether this is a core or
7 noncore matter. In any event, to the extent it's resolved on a
8 summary judgment motion, as we think it ought to be, it's a
9 legal dispute. There's disagreement about the law, not --
10 there may be some secondary factual questions, but the
11 principal dispute here is a legal one. Fundamentally it
12 doesn't make that much of a difference to the practical
13 questions of, does it make sense to withdraw the reference, and
14 indeed, that was our principal argument in the motion to
15 withdraw the reference before Stern v. Marshall because, as a
16 statutory matter, it is unquestionably correct that -- it's not
17 unquestionably correct, but as a statutory matter a
18 counterclaim to a claim filed against the estate and --

19 THE COURT: Of course it's correct. The statute says
20 it, the Supreme Court says the statute means what it says.

21 MR. GOLDBLATT: Correct. Although the Supreme Court
22 has gone on to say the statute is unconstitutional as applied
23 in certain cases, including the case here, where the claims --
24 if I can turn to the court's first question, so the answer --
25 the answer to the first part of your first question is -- does

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1 the answer to each of the claims need to be the same? The
2 answer is no. They can be different, in the following
3 respects.

4 We filed a claim in the bankruptcy case against
5 Lehman, saying they took \$2.4 million of our money
6 impermissibly on a postpetition basis. Whether that
7 affirmative claim, our claim to recover against them, is core
8 or noncore is an interesting question that arises out of the
9 postpetition conduct of the debtor. On the other hand, it's a
10 state law conversion claim.

11 THE COURT: You allege it's core in your complaint.

12 MR. GOLDBLATT: We did allege in our complaint that it
13 was core.

14 THE COURT: And you have five claims, and some of them
15 are unquestionably core. Your fifth claim is relief from the
16 stay.

17 MR. GOLDBLATT: Well, that's unquestionably core.
18 There's no question about that.

19 THE COURT: And --

20 MR. GOLDBLATT: Well, okay. So turning -- the
21 other -- I guess there are a few other points that I think are
22 important in response the court's question. With respect to
23 the --

24 THE COURT: Hold on.

25 MR. GOLDBLATT: Okay. Please.

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1 THE COURT: You're not just seeking to withdraw the
2 counterclaims; you're seeking to withdraw your adversary
3 proceeding along with the counterclaims, and some of the claims
4 would appear to be plainly core.

5 MR. GOLDBLATT: That's -- that's, as far as that goes,
6 correct. That is the relief we seek.

7 Now second, 157(b) makes clear that a reference may be
8 withdrawn in whole or in part. We'd ask for it to be withdrawn
9 in whole because we think that once it's here, it makes more
10 sense.

11 THE COURT: And none of the parties really in their
12 papers drew any distinctions among the various claims.

13 MR. GOLDBLATT: Right. After all, this is a comment
14 that's made about judicial economy and the notion that it
15 should be split up, no one is asking for. The court -- it is
16 within court's power. But we aren't asking for it and they
17 haven't asked for it.

18 With respect to the counterclaims, there is one
19 respect in which I think I disagree with some of the premises
20 of your question. Where the court -- we suggest that certain
21 of the claims in the counterclaim may be core and certain are
22 noncore. As we see it -- and we think this is clearly the best
23 reading of Stern v. Marshall -- the question of whether a claim
24 is core versus noncore shouldn't turn on whether the complaint
25 asserts a number of different counts. We think the way to

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1 think about it -- and this is what the Supreme Court says in
2 Stern v. Marshall -- is whether the claimed right to relief
3 flows from the bankruptcy code. That's at page 27 of the slip
4 opinion in Stern v. Marshall. And here, the estate's only
5 claimed right to relief against MSHDA arises under the terms of
6 a private contract. Now to be sure, whether they are entitled
7 to that claimed right for relief will require the court to
8 answer a number of questions of bankruptcy law.

9 THE COURT: But they seek a declaratory judgment in
10 their first count.

11 MR. GOLDBLATT: Right. And just -- but the
12 declaratory judgment action in itself isn't -- isn't a claim
13 for relief. There's only right -- constitutional standing to
14 be heard with respect to a declaratory judgment action if it
15 arises in a concrete dispute, because there's no abstract
16 entitlement to declaratory judgment. The reason they have
17 standing to seek that declaratory judgment is because they
18 assert a contract claim against us and the bankruptcy law
19 question arises in connection with resolving a contract
20 question.

21 THE COURT: In Stern, it was a straight common law
22 claim; right?

23 MR. GOLDBLATT: Absolutely.

24 THE COURT: There was no issue with respect to the
25 interpretation of the bankruptcy code or a right under the

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1 bankruptcy code or a provision of the bankruptcy code that
2 might remove a right under the common law that otherwise
3 existed. There was just no relationship to the bankruptcy code
4 other than it was a counterclaim filed in a bankruptcy
5 proceeding.

6 MR. GOLDBLATT: That is 99 percent correct. As it
7 turns out, in Stern v. Marshall, there were a variety of other
8 arguments that were made. For example, it was alleged that the
9 debtor in that case was solvent and therefore the cause of
10 action couldn't lie for the benefit of the debtor herself.
11 But -- but primarily, I don't mean -- that -- in fairness,
12 that's a quibble. Primarily the issues in Stern v. Marshall
13 were a state law claim.

14 THE COURT: And the issue here, the primary issue that
15 you're all here on is the proper interpretation of provisions
16 of the bankruptcy code.

17 MR. GOLDBLATT: That -- that, as a practical matter,
18 is true. We're not -- we're not -- I'm not here to say
19 otherwise. The reason you've drawn the crowd you have today is
20 because the question of the bankrupt -- about the meaning of
21 the bankruptcy code is an extremely important question with
22 enormous stakes, where the bankruptcy court has expressed its
23 view and we and many others disagree.

24 THE COURT: Okay. I don't want to throw you off your
25 argument or the order in which you want to give it.

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1 I will make an observation at this point because it's
2 related to what we've been talking about. I said earlier, it
3 appears that much of the argumentation, as eventually came out
4 in the papers as to whether this is core or noncore, is
5 somewhat beside the point because the real difference between
6 core and noncore is whether the bankruptcy court could make a
7 final decision subject to regular appeal to this court or
8 whether it would have to make a report and recommendation to be
9 reviewed by the court, but because all of the parties agree
10 that the issues to be decided by the bankruptcy court would be
11 reviewed de novo by this court on a motion for summary judgment
12 anyway, the distinction, even though it is said it's the
13 beginning of the answer to the question of whether the
14 reference should be withdrawn, isn't that important in this
15 case.

16 MR. GOLDBLATT: That's a hundred percent correct.

17 THE COURT: But let me follow up on that. It would
18 seem to follow, though, that you're all here because you say
19 there's an important issue that was decided by the bankruptcy
20 court in the BNY case. Of course, the circumstances in the BNY
21 case were -- and you can correct me if I'm wrong -- somewhat
22 different. The precise issue in the BNY case was whether the
23 agreement could validly change the priorities of claims to
24 collateral. The issue in this case is, could the parties, by
25 the prebankruptcy agreement, change the amount that the parties

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1 would receive after there is bankruptcy. Somewhat different.
2 In the BNY case, Judge McMahon saw that this was very important
3 in part because there was a conflict with the English courts,
4 which were deciding a similar question with respect to the same
5 agreement. But what do you do when you have a conflict between
6 American courts and English courts dealing with the same
7 agreement? Plainly an important issue, not raised in this case
8 because we have no English court that's deciding anything with
9 respect to the agreement that we're faced with here. And even
10 with all of that, the bankruptcy court made a decision in BNY,
11 which Judge McMahon then said, okay, I have a decision I'll
12 review. What you're asking me to do is to say, Judge, here's
13 what we think is an important issue of the bankruptcy law that
14 hasn't been decided by the bankruptcy court so take away the
15 reference and you decide it in the first case without getting
16 pure issue of law to be decided on a motion for summary
17 judgment, you decide it, Judge, without any advice from the
18 bankruptcy court, who regularly deals with bankruptcy issues,
19 without any expertise by the bankruptcy court, and without any
20 advice from the bankruptcy court as to how the application of
21 the ipso facto clause may be different in this case from the
22 application in the BNY case, and you say, this issue is so
23 important, but we don't have any decision of the bankruptcy
24 court in this matter or in any other matter because if there
25 were, then the parties could seek immediate review of the

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1 decision of the bankruptcy court. And there are lots of ways
2 to get expedited review of a decision of the bankruptcy court,
3 including immediate appeal to the Second Circuit. If you
4 wanted expedition, why worry about the district court? Why not
5 get to bankruptcy court and then move directly to the Court of
6 Appeals? But why would you not at least, on an issue of law,
7 get a decision from the bankruptcy court?

8 I know I'm moving ahead in the argument, but --

9 MR. GOLDBLATT: Well, I'm happy to address those in
10 any order that would be helpful to the court. The court's
11 identified the issue. We're not here claiming that the
12 procedural posture is other than what it is.

13 THE COURT: Can I ask just another question you can
14 answer as you go along?

15 MR. GOLDBLATT: That's what we're here for, your
16 Honor.

17 THE COURT: If this is so important and it affects so
18 many cases -- Lehman I think says it affects only nine -- but
19 if it is so important, why has there been no decision of the
20 bankruptcy court other than in the BNY case, which was
21 ultimately settled?

22 MR. GOLDBLATT: Okay. I think I can answer that
23 question promptly, which is the bankruptcy court had issued an
24 order subjecting all of those issues to mandatory mediation,
25 and I believe those cases -- and perhaps the counsel for the

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1 noteholders who are dealing with that can address that in more
2 detail.

3 THE COURT: That would certainly promote judicial
4 economy if those were all settled by mediation; right?

5 MR. GOLDBLATT: At some level, to be sure. On the
6 other hand, what I -- what Judge McMahon suggested in a
7 footnote was that -- that there was something at least untoward
8 about getting -- obtaining the BNY decision, preventing review
9 of that, and using the decision itself as essentially leverage
10 in mandatory mediation. Now no one has to settle.

11 THE COURT: But hold on. But that was in the context
12 of a conflicting decision with the decisions of the English
13 court, so the effect of it was to arm certain parties with a
14 decision of the bankruptcy court which is not being reviewed,
15 which is at odds with the decision of the English courts and
16 now go to mediation. No issue here.

17 MR. GOLDBLATT: Right. We are not in dispute in the
18 UK; that is true. I believe one of the reasons that the
19 potential amici have filed here is because they share our view
20 that with respect to the administration of justice more
21 broadly, the problem that led Judge McMahon to grant the
22 interlocutory review persists.

23 With respect to -- let me -- if I may, your Honor,
24 with respect to --

25 THE COURT: I didn't mean to throw you off on your

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1 argument. I wanted to set out for you my concerns, moving on
2 from the issue of core, the issue of core or noncore, the issue
3 of the centrality of the bankruptcy issue.

4 MR. GOLDBLATT: We're not here to present an argument
5 other than to address the court's concerns, so we appreciate
6 hearing what's on the court's mind.

7 With respect to the legal issue, there is no serious
8 dispute that while this case arises on different facts, we --
9 our issue is an assignment agreement with respect to a
10 reasonably garden variety swap, and the Dante or BNY issues
11 arise in connection with a more exotic form of structured
12 finance arrangement.

13 The underlying legal question is what it is.
14 Section 560 of the bankruptcy code provides that the exercise
15 of a contractual right of a swap participant to cause the
16 liquidation, acceleration, or termination of a swap agreement
17 is not subject to the prohibition on the enforcement of ipso
18 facto clauses that otherwise apply in bankruptcy. In the BNY
19 decision, what Judge Peck said was that the flip clause with
20 respect to the waterfall had the effect of changing the legal
21 rights of the parties and therefore wasn't within the
22 protection of a provision that is about the liquidation,
23 termination, or acceleration of a swap agreement. Our view in
24 this case -- well, let me back up.

25 What was argued there in BNY and in the appeal was --

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1 the argument was, look, when there's a contract provision and
2 it's in a swap agreement or related to a swap agreement and it
3 tells you how it is you reduce this bundle of rights in a
4 contract to a dollar figure, a sum certain owed from one party
5 to another, that is the liquidation or termination of a swap
6 agreement. That's what that provision does. In our case we
7 have the same issue. We have a provision of the agreement that
8 says, in the event of default, here's the mechanism for taking
9 this bundle of contractual rights and turning it into a sum
10 certain due from one party to another. If Judge Peck is right
11 in that provisions that affect the rights of the parties are
12 out by the safe harbor, I don't think we win this. If what he
13 says in BNY is correct, this is not safe harbor, and what we're
14 left with is a calculation dispute.

15 THE COURT: The issue is not, as you see it, really,
16 as to whether the ipso facto clause applies but only whether
17 the safe harbor applies?

18 MR. GOLDBLATT: Absolutely. This is an ipso facto
19 clause. It provides for a different scheme, in the event of
20 bankruptcy. That's what, if this -- but for the safe harbor,
21 that couldn't be enforced in bankruptcy. The case is about
22 whether this provision can be enforced because it is within the
23 safe harbor, because it is a provision dealing with the
24 liquidation or termination of a swap agreement, as we think it
25 unquestionably is, and we think the flip clause in -- at issue

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1 in BNY and at issue in the disputes that remain unresolved also
2 is, and we're either right or wrong about that.

3 And our basic argument here, just to be really, you
4 know, candid and focused, is, you know, we could go back to
5 bankruptcy court, raise this. You know, there may also be some
6 number of ancillary factual disputes that, before we get to a
7 final appealable order, we'd have to go through. We don't
8 think that's necessary. We think that the facts are not
9 complicated, but we -- we would expect our opponents to drag it
10 out. And all the while the Lehman position is that interest is
11 accruing at the default rate, which is in excess of 13 percent,
12 on their view. We dispute that, but that's certainly their
13 position. And while we could bring this question back to
14 bankruptcy court where our basic argument is, BNY is wrongly
15 decided, you should change your mind --

16 THE COURT: But if you proceeded before me, all of the
17 things that you worry about that Lehman would do in order to
18 delay by raising alleged factual issues that you say don't
19 exist could be raised before me, and unlike the bankruptcy
20 court, I wouldn't have the background and expertise to be able
21 to see through sham arguments that were being raised solely for
22 purposes of delay.

23 MR. GOLDBLATT: Your Honor, the point -- the
24 litigation will take however long it will take and we aren't
25 here because -- to argue that you'll do it better or faster.

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1 We're here to say that skipping the step is appropriate under
2 the circumstances. That's our judicial economy argument. This
3 is not, you know, an effort to say, we think -- we think that
4 the bankruptcy court isn't perfectly capable of resolving
5 discovery disputes, managing its docket, resolving cases on the
6 merits fairly and expeditiously. If we suggested that, I want
7 to apologize for it. That's not our suggestion. Our
8 suggestion is simply that the added step of going back into
9 bankruptcy court, where our principal argument is, we think you
10 made a mistake and you should change your mind, is an
11 unnecessary step that -- that -- with respect purely to dispute
12 between MSHDA and Lehman, forget the consequences to the
13 world -- that it would promote judicial economy to skip the
14 step. We're either right or wrong. It's a pure question of
15 law.

16 THE COURT: Could I -- if it were so important, even
17 as between Michigan and Lehman, why wouldn't the quicker, most
18 expeditious way be to get a decision from the bankruptcy court
19 and ask for immediate appeal to the Second Circuit? They gave
20 it in Madoff, not so long ago.

21 MR. GOLDBLATT: That's a fair question for you to ask.
22 Lehman, if they would agree to have the case resolved
23 expeditiously and would stipulate to certification, that might
24 be a better route. I don't expect that, if you ask that to our
25 opponents, that they will agree to have this resolved in such

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1 an orderly, expeditious way. Our interest is getting an
2 orderly and expeditious resolution to a clean legal question
3 and as to how that -- your Honor's suggestion of an alternative
4 mechanism isn't a bad one.

5 THE COURT: But it's not so crystal clear to me that
6 the issue presented is of such monumental importance as it was
7 in the issues of net equity in Madoff that it meets all of the
8 standards for such quick review by the Second Circuit and so I
9 would not be in a position to attempt to say that that's
10 necessarily the right result.

11 It gets back to the question I raised earlier whether
12 some of the issues that Judge McMahon dealt with were of such
13 consequence because of the international problem. The amount
14 of money involved in the BNY case was also substantially more
15 than the amount of money involved in this case.

16 MR. GOLDBLATT: That's unquestionably true. I think
17 that the counsel for the Australian liquidator, Mr. Leon, and
18 for the Dante noteholders here will say -- I don't want to
19 speak for them, but I think what their letters tell you is, the
20 problem that Judge McMahon identified that led her to grant
21 interlocutory review persists, that they have exactly the same
22 kind of problem. There's a UK decision that says that you can
23 enforce the flip clause, Judge Peck has issued a decision that
24 says you can't, and they are betwixt and between and don't have
25 an avenue, in light of the mandatory mediation, for obtaining

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1 review and that therefore there would be benefits to the
2 financial community. This isn't our -- this isn't a
3 consequence -- I don't, on behalf of MSHDA, have a stake in
4 this. But I think what they would tell you is that there would
5 be benefits to obtaining certainty and providing stability to
6 the financial community if the court were to provide a
7 mechanism to get a resolution one way or the other to that
8 question and that all of the reasons that apply to BNY and
9 Perpetual and the parties, the noteholders in that case are
10 applicable here, to their disputes, and that a resolution here
11 would have the same effect that Judge McMahon's determination
12 would have had.

13 In terms of the stakes, it is true that with respect
14 to the parties in this case, this is a dispute in the low tens
15 of millions of dollars. It's not, by its terms, a
16 billion-dollar dispute. That said, your Honor, I don't believe
17 that you would see the high-priced crowd in this courtroom if
18 all of the parties thought that what was really at stake here
19 was a \$20 million dispute. Clearly the issue raises an issue
20 with very high stakes that is very important. It is, I
21 should -- not to minimize with respect to my client MSHDA,
22 which is a, you know, public entity charged with an important
23 mission, of \$20 million. It's quite important for the state,
24 from the perspective of our client. We don't think we owe
25 that. We think what we did complied with the contract as

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1 enforceable and that getting a prompt determination is
2 important.

3 THE COURT: But it suggests that the high-priced
4 talent is here for a back-door review of BNY that's subject to
5 mediation before Judge Peck, and that's odd, that's really odd,
6 to look through the parties in this case in order to provide
7 another bargaining tool in the mediation in BNY.

8 MR. GOLDBLATT: Right. Your Honor --

9 THE COURT: And it is an indirect run around the
10 bankruptcy court to give another bargaining tool in the BNY
11 mediation.

12 MR. GOLDBLATT: Well, your Honor, purely with respect
13 to the dispute between MSHDA and Lehman, withdrawal of the
14 reference is fully appropriate because we're a public entity in
15 the state of Michigan, with a \$20 million dispute. It really
16 matters to us. They contend that interest is running at
17 something like 13 or 14 percent, and there is simply no reason
18 to go back to a bankruptcy court that's already made a decision
19 on the central legal question on which their case turns, and we
20 think it's appropriate to -- we could litigate the final
21 judgment and then either appeal or --

22 THE COURT: Could I just --

23 MR. GOLDBLATT: Yes.

24 THE COURT: It's not only litigate the final judgment
25 before Judge Peck, because the rules -- and I always take

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1 advice from counsel in argument -- the rules with respect to
2 appeals from orders of the bankruptcy court are much more
3 liberal than appeals from the district court to the Court of
4 Appeals, and I would have thought that you could get a ruling
5 from the bankruptcy court that was appealable.

6 MR. GOLDBLATT: Only upon certification by the
7 bankruptcy court, and I -- you know, again, if Lehman would
8 consent to having this resolved in an orderly and expeditious
9 way, get the legal issue presented, teed up for the Court of
10 Appeals, that's not a bad outcome. That's a sensible, rational
11 outcome.

12 THE COURT: No. I meant not appeal from the
13 bankruptcy court to the Court of Appeals. I was talking about
14 the appeal process from the bankruptcy court to the district
15 court.

16 MR. GOLDBLATT: Oh. With respect, your Honor, I don't
17 think that that's right. The appellate process with respect to
18 orders of a bankruptcy court to the district court in an
19 adversary proceeding, not a motion practice in bankruptcy where
20 there is greater flexibility, but with respect to an adversary
21 proceeding, one can -- has the equivalent of seeking the
22 equivalent of 1292(b) review on certification, or you have to
23 await final judgment, and I don't think there's a route there
24 that's any different from review in district court to the Court
25 of Appeals. Unlike contested matters in bankruptcy where

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1 they're brought by motion where, to be sure, there's a lot of
2 caselaw that says finality is flexible because of the inherent
3 nature of bankruptcy, I don't think that principle applies in
4 an adversary proceeding. I'm not aware of any case that so
5 states.

6 Fundamentally, your Honor, the question of whether to
7 withdraw the reference is a common sense inquiry about what
8 makes sense. It's a discretionary judgment, and it's in this
9 court's discretion. I think we've identified the reasons why
10 we think, in the scheme of things, it makes sense here to do
11 so. We think it makes sense with respect to the dispute
12 between MSHDA and Lehman because of the importance of the
13 issue, because of the common sense, practical point that going
14 back in front of Judge Peck and asking him whether he might
15 change his mind with respect to the meaning of the safe harbor
16 does not serve the interests of judicial economy.

17 In addition, we think there are benefits to the
18 financial community that would flow from obtaining review.
19 There's a benefit that Judge McMahon identified in BNY Trustee.
20 To be sure, that argument is out of the box in the sense that
21 this is not an appeal from BNY. We think in the real world it
22 is a benefit to obtaining review and having a decision one way
23 or the other with respect to the question, not -- regardless
24 of -- we're not here to say, you should withdraw the reference
25 because we think you're going to rule for us and we would like

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1 that. We're here to say, getting a resolution of the question
2 is orderly --

3 THE COURT: Oh, but --

4 MR. GOLDBLATT: We do think we're right.

5 THE COURT: But you are here because you think Judge
6 Peck will rule against you, and if you were before me, you
7 don't know what the answer would be, but it can't be worse than
8 you think will happen before Judge Peck.

9 MR. GOLDBLATT: That's not an unfair characterization
10 of our position.

11 We think that going through the motions of litigating
12 this in bankruptcy court only to get here later is an
13 unnecessary step, in view of the fact that the bankruptcy court
14 has already stated his view on the central legal question that
15 we believe the case presents.

16 So I'm happy to answer questions. I believe the court
17 appreciates our -- what our argument is, and if the court has
18 questions, we're happy to address them.

19 THE COURT: No. You've responded, and I thank you.

20 MR. GOLDBLATT: Thank you, your Honor.

21 THE COURT: Let me listen if there were any amicus
22 parties who wanted to add anything in support of withdrawal
23 before I listen to your argument.

24 MR. GRUENBERGER: Your Honor, before the amicus speak,
25 I would like to just put in the record some things that -- a

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1 collective bit of amnesia seems to have occurred with respect
2 to their position.

3 I'm Peter Gruenberger of Weil Gotshal & Manges
4 representing the debtors, and I'd like to put before the
5 court -- because we really do object to these amicus, four
6 months after this motion to withdraw was filed, sending letters
7 last night saying, we want to appear, and in those letters
8 failing to tell the court some very crucial things as a matter
9 of public record, including, in those things, a decision by
10 Judge McMahon denying them interlocutory appeal from their
11 attempt to intervene in yet another adversary proceeding, on
12 the same grounds that are presented in their letter.

13 This is the decision denying -- I mean dismissing
14 their interlocutory appeal of Judge McMahon on June 21, 2011,
15 and I have copies for everybody there, your Honor. I'm sorry.
16 If I could give --

17 THE COURT: Oh.

18 MR. GRUENBERGER: -- counsel the other copies. Thank
19 you. Thank you very much.

20 THE COURT: Okay. But they're not seeking to
21 intervene. They just want to be heard as amici.

22 MR. GRUENBERGER: No. In their letter they said
23 they'd like to intervene or be amici, your Honor.

24 THE COURT: Okay. I'm just going to listen to them as
25 amici at this point.

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1 MR. LEON: Your Honor, thank you. Eric Leon from
2 Kirkland & Ellis for the Australian liquidators. I'll be
3 brief.

4 I don't think this was a case of amnesia. I think
5 your Honor correctly realizes that we have not even taken a
6 position on a motion to withdraw. If the motion is granted, we
7 would like to at that point be heard as amici or potentially
8 seek to intervene at that point.

9 THE COURT: You don't want to be heard on the motion
10 to withdraw?

11 MR. LEON: I want to make one quick point, your Honor,
12 for the court's edification, if you'll indulge me, but if not,
13 I understand.

14 THE COURT: Okay.

15 MR. LEON: And I will be brief, and I understand --

16 THE COURT: I should say, I did not see your letter.
17 It may have come in, but I didn't see it. I saw the other --

18 MR. LEON: I have a copy I can hand up to the court,
19 if you'd like.

20 THE COURT: Sure.

21 (Pause)

22 MR. LEON: Your Honor, just very briefly, I want to
23 address one point.

24 Your Honor said, as I view it, the primary issue here
25 is one of interpretation of bankruptcy law -- the applicability

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1 of the ipso facto clause. That's where we disagree, and that's
2 where we think we are unified with the MSHDA folks here. We
3 view it, their case, the Australia liquidators case, the Dante
4 case as, very simply, a case of contract law. Everybody here
5 has entered into highly sophisticated credit default swap
6 agreements negotiated between highly sophisticated parties and
7 everybody -- MSHDA, my client, Australia liquidators -- are
8 just looking to enforce the plain terms of that contract. We
9 believe it's just a contract case. We believe MSHDA's case is
10 just a contract case. Now this ipso facto clause --

11 THE COURT: Well, sure, if you just read out the
12 bankruptcy law. The question is, can you read out the
13 bankruptcy law.

14 MR. LEON: Correct. That's exactly right, and that's
15 an argument that our friends at Lehman have raised, and on
16 LBSF.

17 THE COURT: And that's an issue of bankruptcy law.

18 MR. LEON: Your Honor, I agree with that, but we don't
19 believe that is the central issue here. We believe the central
20 issue here is one of contract enforcement. LBSF in the
21 counterclaim has raised the ipso facto clause, and the
22 bankruptcy court said, you know what, I buy the argument. Ipso
23 facto clause is going to invalidate a whole host of contractual
24 provisions in these credit default swap agreements.

25 Now the bankruptcy court says, I know my decision is

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1 going to have far-reaching implications; I know it's going to
2 be controversial. We would submit it's more than
3 controversial; we would submit it's wrong.

4 But here's the game that's going on. Having created
5 this unlevel playing field between LBSF and the noteholders,
6 the bankruptcy court then took pains to insulate its decision
7 from appellate review. It stayed all of the other adversary
8 proceedings, forced all of the noteholders into this mediation
9 on this unlevel playing field, and now LBSF, in its
10 mediation --

11 THE COURT: But that occurred in all of the cases
12 where there was a conflicting decision of the English courts;
13 right? That's the group of cases that the judge put into
14 mediation.

15 MR. LEON: The judge put all de novo cases into
16 mediation.

17 THE COURT: Which are the ones --

18 MR. LEON: Correct.

19 THE COURT: -- that have the conflicting decisions of
20 the English court; right?

21 MR. LEON: Correct.

22 THE COURT: The Michigan case before me doesn't
23 involve that. I mean, that argument, with all respect, as they
24 say, suggests that the bankruptcy court is acting in an
25 injudicious way, to put it mildly, that the bankruptcy judge

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1 has a fear that his decision, his interpretation of the safe
2 harbor provision may be wrong and so he is going about trying
3 to protect that decision against review and that's the reason
4 that he sent cases to mediation, in order to avoid any review
5 of his decision and it's the reason why he's going to go about
6 other cases which raise an issue of the ipso facto provision
7 and the safe harbor provision in a way to insulate himself from
8 review, by this court or by the Court of Appeals. That's quite
9 an indictment and one that's not justified by the way in which
10 one thinks of Judge Peck usually handling bankruptcy cases.
11 The noteholder cases, the other and more reasonable view would
12 be that Judge Peck did what Judge Peck thought was right in the
13 BNY case, that it raised significant issues because of a
14 conflict with English courts, that the decision itself -- and
15 Judge McMahon's decision reflected this too -- that there was
16 an effort to attempt to work out at least some sort of modus
17 vivendi between the English courts and their decision and the
18 American courts, and what do you do at the end of the day where
19 an American bankruptcy judge thinks that the law is one thing
20 under the American bankruptcy code and an English court
21 believes under English law there's another result and what
22 appears to be quite reasonable? The judge said, let's send it
23 to mediation to see if we can't resolve it. To suggest that
24 that would indicate that in this case Judge Peck would make a
25 decision on the ipso facto and the safe harbor and then attempt

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1 to protect himself in some way because he was concerned about
2 whether his decision would be confirmed on appeal is not the
3 way in which judges usually operate, and before you make that
4 charge against Judge Peck, I think you should have some
5 evidence that that's what Judge Peck is doing, because that
6 would be wrong.

7 MR. LEON: And your Honor, I appreciate that, and it
8 was not an indictment of Judge Peck, to be clear. I want to be
9 clear that it is LBSF that has put together the strategy of
10 insulating Judge Peck's ruling from appellate review, and if I
11 ever insinuated that it was Judge Peck himself doing that, it
12 was not my intention and I misspoke.

13 THE COURT: So you would expect that Judge Peck would
14 go about deciding this case in the way in which Judge Peck
15 usually decides cases. He'll decide the case, then it will be
16 subject to appeal to this court or to the Court of Appeals or
17 above.

18 MR. LEON: But here's what happens, your Honor, and I
19 just want to be clear. And our friend from Weil handed out our
20 motion to intervene, and that's correct, a motion that they
21 vehemently oppose. The only point I was trying to make, if you
22 can put aside the conflicting decisions of the English courts,
23 what happened, as a pragmatic matter, is that whatever Judge
24 Peck's ruling, there's an avenue to get it up on appeal. Our
25 friends over at LBSF either settle out that individual dispute

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1 or find other ways to block the appeal in Judge Peck's ruling
2 so that the noteholders are forced to play on this unlevel
3 playing field that was set up by Judge Peck's ruling. That's
4 the only point that I was trying to make before when I was --
5 said that this case presents the same issue, the broader issue,
6 which is an avenue to find an appeal of Judge Peck's underlying
7 ruling that invalidates so many of the terms of these credit
8 default swap agreements.

9 THE COURT: Okay.

10 MR. LEON: Thank you, your Honor.

11 MR. STEIN: Good morning, your Honor. Matthew Stein,
12 Kasowitz Benson Torres & Friedman, on behalf of the group of
13 noteholders. We've been calling ourselves the Dante
14 noteholders.

15 Before getting to the issue -- the issue here, I want
16 to clarify a couple of points.

17 First is that Lehman has said that there are nine
18 separate adversary proceedings that deal with the safe harbor
19 issue, and I don't want to misconstrue. I think that's -- I
20 note there are nine separate cases. Maybe that was something
21 that the -- there are a number of -- regardless of whether the
22 number is nine, there are a number of separate cases. Only
23 with respect to two noteholders, Perpetual, which -- who was
24 the -- who was the entity involved in the BNY decision, and the
25 Belmont noteholders, the only two plaintiffs -- the only two

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1 noteholders that were involved in the English court
2 proceedings -- all of the other noteholders were not parties to
3 the English court proceedings, and I just want to make that
4 clear that the current mediation impacts more than just those
5 noteholders that were involved in the English court
6 proceedings.

7 I also want to talk to you very briefly about what the
8 actual facts were as they happened in terms of -- starting with
9 the BNY decision that Judge Peck issued and where we are today
10 and try to give a little more color as to why this withdrawal
11 motion is before your Honor.

12 When Judge Peck issued the decision on the motion for
13 summary -- on the competing motion for summary judgment on
14 January 25th, 2010, there was an initial dispute for an
15 objection -- an initial dispute by LBSF that that alone did not
16 constitute a final decision. And it took a motion by BNY to
17 compel the court to either enter an order -- because at that
18 point only a decision was entered -- to compel Judge Peck to
19 enter an order or to -- there was also a motion -- motion for
20 reconsideration.

21 Once -- that order was issued six months after the
22 initial decision, and it was that order that BNY then took and
23 moved for interlocutory appeal. So when people talk about that
24 delay, that delay was the fact that an order was not issued
25 with that initial decision and there was that initial six-month

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1 delay before there could even be an interlocutory appeal, let
2 alone an appeal as of right.

3 In the separate proceeding, in what I refer to as the
4 main proceeding that is currently pending in the bankruptcy
5 court in the adversary proceeding number 10-03545, in which the
6 nine series that are held by my clients, that the notes were
7 also held by Lehman Brothers, Australia, and others.

8 MR. MILLER: If your Honor please, with all due
9 respect, your Honor, none of this is in the record in
10 connection with this motion that's before your Honor. Counsel
11 is rambling on about things that are not before the court.

12 THE COURT: Please. Thank you. It's better not to
13 interrupt him, but it doesn't really appear to be relevant on
14 the issue of --

15 MR. STEIN: Understood, but counsel also brought up
16 the denial by Judge Peck of intervention.

17 THE COURT: But I'm just listening to you as an amicus
18 at this point; right?

19 MR. STEIN: Understood. Understood.

20 THE COURT: Okay. Anything else?

21 MR. STEIN: Yeah. The -- with respect to actually the
22 core issue here, withdrawal, there is a core or noncore dispute
23 that your Honor has identified. That in itself is not solely
24 determinative of the issues. And as -- as counsel for MSHDA
25 also recognized, the overriding concern is this case and why

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1 withdrawal should be granted here is because of judicial
2 economy, because the issues underlying here and the issues of
3 whether or not 560 applies, and that core -- that core issue or
4 that sole issue is applicable across the board in the MSHDA
5 case here, in the case that's stayed before Judge Peck and
6 other cases. The fact that if the goal here is to reduce the
7 number of cases that the judge has to -- a judge or the court
8 has to hear the same case in which the facts are not in
9 dispute, the issue is the legal dispute, then judicial economy
10 says that the bet -- that it is a better use of judicial
11 resources for -- not to have the approach of repeated decisions
12 by the bankruptcy court and repeated attempts to appeal.

13 Thank you.

14 THE COURT: Okay. Thank you. All right.

15 MR. MILLER: Good morning, your Honor. Harvey Miller
16 on behalf of the Lehman entities.

17 If your Honor please, this is a motion which is made
18 pursuant to 28 U.S.C. 157(d) to withdraw the reference, and
19 the statute says that the district court may withdraw, in whole
20 or part, any case in any court proceeding referred to under
21 this section on its own motion or on timely motion of any party
22 for cause shown.

23 So we have two elements -- timely motion and cause
24 shown. Looking at cause shown as it's been expressed this
25 morning, your Honor, the cause that's being alleged is twofold:

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1 One, that the financial community and the investment community
2 is waiting with bated breath for this decision. That, your
3 Honor, is not true. Tomorrow marks the third anniversary of
4 the commencement of the Lehman bankruptcy case. The
5 derivatives markets and the financial markets are functioning
6 smoothly without any interruption in connection with the
7 trading and exchanging of derivative contracts.

8 So what is the cause shown? The cause that is alleged
9 here, your Honor, essentially is: We don't like what Judge
10 Peck is doing; we don't like his views on the ipso facto clause
11 application, irrespective that the facts are different here
12 than they were in connection with BNY. And the law is fairly
13 clear, your Honor, in determining cause shown, dislike of the
14 views of the court is not sufficient. You have to show
15 personal bias. And there's definitely no personal bias which
16 has been shown in connection with this motion to withdraw, your
17 Honor.

18 So what happens, our friend from Michigan --

19 THE COURT: They're not arguing for recusal.

20 MR. MILLER: No, your Honor, they're not arguing for
21 recusal, so they don't establish cause by simply saying, we
22 don't like what Judge Peck is doing. So there is no cause
23 shown.

24 And as far as time is concerned, this adversary
25 proceeding has been pending for over two years. The motion to

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1 withdraw the reference was made four months after the amended
2 counterclaim was filed. The case, your Honor, is remarkably
3 similar -- because what happens here, is Michigan is falling
4 back on judicial economy, and it is remarkably similar to the
5 Enron case, which is referred to in our memorandum, which is
6 reported at 2005 WL 1185804. And these were motions to
7 withdraw the reference before Judge Daniels. And what did
8 Judge Daniels describe it as? An attempt to find an escape
9 hatch out of bankruptcy, and that -- out of the bankruptcy
10 court. Excuse me. And that is exactly what Michigan is trying
11 to do -- find an escape hatch out of the bankruptcy court.

12 THE COURT: What would be your view with respect to a
13 motion by Michigan to move for summary judgment in the
14 bankruptcy court? They say they want to withdraw the reference
15 and make a motion for summary judgment here. Do you think that
16 a motion for summary judgment would be appropriate in the
17 bankruptcy court?

18 MR. MILLER: Yes, your Honor.

19 THE COURT: So you wouldn't oppose a motion. I mean,
20 you would --

21 MR. MILLER: I would oppose it.

22 THE COURT: You're saying it's wrong.

23 MR. MILLER: Yes, your Honor.

24 THE COURT: But you wouldn't say that it's
25 inappropriate to make the motion.

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1 MR. MILLER: No, your Honor, absolutely not. What is
2 the case all about, your Honor? It's a case that we -- that is
3 dependent upon the application of the three sections of the
4 bankruptcy code. Counsel for Michigan got up and said, this is
5 covered by 560. That's a provision in the bankruptcy code.
6 Lehman takes the position that 365(e) and 541 apply. That's
7 the issue. This is all related to the calculation of damages,
8 your Honor. And what is happening here, your Honor --

9 THE COURT: They say that if they made a motion for
10 summary judgment in the bankruptcy court, you would skillfully
11 raise all sorts of reasons why a motion for summary judgment
12 was premature, why there were issues of fact, why, for those
13 reasons, the bankruptcy court shouldn't reach the issue which
14 you say is plainly presented, the application of the ipso facto
15 provisions and the safe harbor provisions. Is that right?

16 MR. MILLER: That's correct, your Honor.

17 THE COURT: No. Is it correct that --

18 MR. MILLER: I would say, your Honor, yes.

19 THE COURT: That you would raise all of these
20 arguments that summary judgment is inappropriate because there
21 are issues of fact and we need further discovery and all of
22 that, or do you agree that this is an issue of law that can be
23 decided promptly on a motion for summary judgment before the
24 bankruptcy court?

25 MR. MILLER: I believe it's an issue of law, your

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1 Honor, and I would recommend that to my client.

2 THE COURT: And can be decided, so it can be teed up
3 for the bankruptcy court promptly.

4 MR. MILLER: Exactly, your Honor. And I mean, the
5 issue, as I --

6 THE COURT: There's a transcript to take to Judge Peck
7 as appropriate.

8 Go ahead.

9 MR. MILLER: And the issue, your Honor, is exactly as
10 determined by Judge Daniels in the Enron case, where there were
11 multiple motions to withdraw the reference, and in terms of
12 judicial economy, the Second Circuit said, your Honor, in the
13 Orion case, that it would be inefficient for district courts to
14 take core matters, where a bankruptcy court has had years of
15 experience and has a greater knowledge of the facts. And
16 that's exactly true in this case, your Honor. Judge Peck has
17 been administering this case and sitting in this case for three
18 years, starting tomorrow, your Honor, and what happened in
19 Enron and what Judge Daniels referred to in his decision, it
20 was appropriate to have the bankruptcy court determine that
21 issue because of his greater expertise and experience in
22 application and interpretation of the clauses of the bankruptcy
23 code. And so motions in that case and in the footnote in that
24 case, he lists a number of motions to disqualify -- to withdraw
25 the reference that were denied.

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1 There is a structure, your Honor, the structure which
2 is set up in a judicial system for the bankruptcy court to rule
3 on matters, there's a possible appeal to the district court,
4 and as your Honor pointed out, it can be certified to the Court
5 of Appeals.

6 Moreover, your Honor, as I understand it, counsel has
7 conceded this is a core matter. The applications of those
8 provisions of the bankruptcy code are definitely within the
9 jurisdiction of the bankruptcy court arising in or under the
10 bankruptcy case.

11 THE COURT: No. He would say that you do have to look
12 at the individual claims and counterclaims and that they are
13 primarily noncore because they're essentially simply a contract
14 dispute as to what's owed under the contract.

15 MR. MILLER: But it is not purely a contract dispute,
16 your Honor, because of the intervention of the bankruptcy law.

17 THE COURT: No. I understand the argument.

18 MR. MILLER: And counsel also conceded, your Honor,
19 that by commencing the adversary proceedings, Michigan filed a
20 claim in the bankruptcy court, and there's a very instructive
21 case as of the Eighth Circuit Bankruptcy Appellate Panel, your
22 Honor, that was just decided in August, In re Schmidt, and
23 which involves cases in which the bankruptcy -- the debtor had
24 removed replevin actions from the state court to federal court,
25 and then the plaintiffs in those replevin actions made a motion

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1 to remand the cases back to the state court. And the issue
2 turned on Stern v. Marshall and whether Stern v. Marshall took
3 away from the bankruptcy court the authority to render final
4 decisions. In deciding that case, your Honor, the Eighth
5 Circuit Bankruptcy Appellate Panel noted that the cases would
6 be -- the bankruptcy -- they reversed the bankruptcy court to
7 remand the cases back to the state court, but in the decision
8 they said, if the bank in replevin actions had filed a proof of
9 claim, then the bankruptcy court would have jurisdiction to
10 determine the issues relating to the guarantees involved in the
11 plenary actions.

12 So here we have a situation, your Honor, where
13 Michigan has filed a proof of claim. The case has been pending
14 since November of 2009. They waited four months to make a
15 motion to re -- to withdraw the reference. It is clearly, as
16 to the critical issue in the case, a core matter. It's
17 derivative and determined by the application of the ipso
18 facto -- unenforceability of ipso facto clause, and as counsel
19 said, they're going to argue that 560, that Section 560 of the
20 safe harbor applies.

21 So your Honor, it is purely a matter -- certainly as
22 to the critical issues that are before the bankruptcy court,
23 and it's not a question of judicial economy. It's a question
24 of the way the system is supposed to work, your Honor. It's
25 supposed to -- bankruptcy courts have a certain expertise and

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1 experience, and there's been no demonstration here that Judge
2 Peck has acted improperly and that, as your Honor has pointed
3 out, a motion for summary judgment may be very appropriate in
4 this case.

5 THE COURT: If the motion for summary judgment didn't
6 dispose of all of the issues in the adversary proceeding, would
7 there be any right to appeal to the district court or would it
8 only be certification as an interlocutory appeal?

9 MR. MILLER: I didn't understand the question, your
10 Honor.

11 THE COURT: In other words, a motion for summary
12 judgment is made in the bankruptcy court and I assume that
13 Michigan would say, we're entitled to this amount of money and
14 the ipso facto provisions don't apply, and there would be a
15 ruling from the bankruptcy court, but it might not finally
16 dispose of all of the issues in the case. Perhaps there's an
17 issue of damages, for example, that wasn't finally decided. If
18 that ruling on summary judgment did not finally dispose of all
19 of the issues, disposed of some but not all of the issues,
20 disposed, for example, of the proper interpretation of the safe
21 harbor, would there be a right to appeal to the district court
22 or would the appeal only be by certification?

23 MR. MILLER: In my view, your Honor, that would be a
24 dispositive decision of a critical issue in the case that could
25 be dispositive of the entire case and would be a final order

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1 appealable to the district court.

2 THE COURT: Okay. I think you differ from Michigan on
3 that, but go ahead.

4 MR. MILLER: That's fine. That's my view, your Honor.

5 So basically, your Honor, what we're saying is, this
6 is -- this involves core issues. It involves -- it's
7 derivative from the bankruptcy code. Stern v. Marshall really
8 doesn't apply. This is a case in which the bankruptcy court
9 has to construe and determine whether 365(e) applies or 541
10 applies and whether the defense of 560 provides a safe harbor.
11 Quite in the four corners of the jurisdiction of the bankruptcy
12 court. It will provide, ultimately, a final order, in my
13 opinion, your Honor, which will be appealable and may be
14 certifiable to the Court of Appeals. And for all the reasons
15 which your Honor stated, the motion to withdraw the reference
16 should not be granted.

17 Your Honor, any time -- bankruptcy courts deal in many
18 kinds of decisions. They interpret state law and the
19 reconciliation of claims and the allowance of claims and the
20 disallowance of claims all the time. Courts make decisions
21 about preferences, fraudulent transfers. What counsel is
22 saying: Well, we don't really like the decision that's made --
23 that were made in BNY, even though it's a different case, and
24 any time that happens, we ought to be entitled to get a
25 withdrawal of the reference. In that kind of context, your

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1 Honor, the district court is going to be flooded with
2 bankruptcy-type litigations that really belong in the
3 bankruptcy court. There is no issue, your Honor, with judicial
4 economy. That is a structure that was set up by Congress.
5 Stern v. Marshall doesn't deprive the bankruptcy court, in this
6 particular case, of the constitutional authority to make a
7 final decision in this particular case, your Honor, and we
8 submit that the motion to withdraw should be denied.

9 Thank you, your Honor.

10 THE COURT: Okay. Mr. Cohen?

11 MR. COHEN: Thank you, your Honor. David Cohen,
12 Milbank, Tweed, Hadley & McCloy, here on behalf of the Official
13 Committee of Unsecured Creditors of Lehman Brothers Holdings.

14 We agree with the court's observation that this is in
15 large part a factual review of the bankruptcy court's BNY
16 decision. We've heard a lot of talk about the Perpetual
17 decision, but this is a different contract. This is a
18 different contract provision, it is not governed by English
19 law, there are no conflicting decisions, there are no
20 noteholders here. The bankruptcy court has not reviewed,
21 considered, or issued an opinion on the application of the
22 bankruptcy code prohibitions on ipso facto provisions or the
23 safe harbor provision to the contract that MSHDA has with LBSF.
24 We think the bankruptcy court should have the opportunity to do
25 that and it should issue an opinion.

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1 We also agree with Mr. Miller that we think summary
2 judgment is the appropriate procedural vehicle. We think
3 summary judgment can be briefed and argued fairly
4 expeditiously. I would put in a caveat until we actually see
5 the summary judgment motion, I don't know whether limited
6 discovery will be needed, but there's Rule 56(f) that deals
7 with that. It would be expedited in the context of summary
8 judgment briefing. I don't think on the legal issues you need
9 a full-blown evidentiary record, but once papers get filed,
10 there may be facts that need to be adduced. That could be done
11 on a very expedited time frame.

12 The court asked Mr. Miller a question about the
13 ability to appeal as a matter of right if the case was not
14 fully resolved. I disagree with Mr. Miller's answer. I think
15 an interlocutory appeal would need to be certified. But we've
16 seen that happen before in the Lehman case, and if the grounds
17 exist for certification of interlocutory appeal, an appeal will
18 be certified.

19 I think at the end of the day, what we've heard here
20 is a concern that, based on Judge Peck's ruling in Perpetual,
21 Michigan State Housing Development Authority--

22 THE COURT: Has Judge Peck certified other issues for
23 immediate interlocutory appeal?

24 MR. COHEN: Not to my knowledge, but I may be unaware.
25 So I can't think of one that he has.

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1 MR. GRUENBERGER: Nor has anybody asked for it.

2 MR. COHEN: And as Mr. Gruenberger said, nor has any
3 request been made.

4 What we think here, your Honor, is that Michigan is
5 concerned about the way Judge Peck will rule on its contract,
6 given his ruling on a different contractual provision, and they
7 want to skip the first step. I think the court's observation
8 was that: You think Judge Peck will rule against you and you
9 don't know what I would do. Well, Michigan State Housing is
10 concerned that you would rule against them should they skip
11 this step and go directly to the Second Circuit. It's not the
12 way the process works. We think the bankruptcy court should
13 consider the issues in the first instance in an expedited
14 manner, and if either of the parties are displeased with the
15 decision, they should exercise whatever appeal rights they
16 have.

17 Thank you, your Honor.

18 THE COURT: Thank you. Okay.

19 MR. GOLDBLATT: Just briefly, your Honor.

20 THE COURT: Go ahead.

21 MR. GOLDBLATT: We've tried to be as candid as we can
22 be here. Just to clarify, we aren't making any claim or even
23 the shadow of a claim of judicial bias. We have no --

24 THE COURT: No. I didn't hear any such claims, and
25 it's the reason why I interrupted Mr. Miller, because there was

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1 no claim of bias or recusal or anything like that.

2 MR. GOLDBLATT: Our point is simple. Judge Peck, in
3 the BNY decision, issued a question of law. We think it's
4 controlling, and we think under the reasoning of that in front
5 of him, we lose.

6 THE COURT: And you think it's wrong.

7 MR. GOLDBLATT: And we think it's wrong. We don't
8 think it's in bad faith. We don't think that it's a view
9 that's impermissible to have. We just disagree with it. And
10 what we propose to do, just as a matter of common sense and
11 economy, is say, okay, we could go back and file our motions
12 there, have him say, I meant what I said in BNY, rule against
13 us and come up, and go through that step, or we can just skip
14 it, and it seems to us that when the statute says the motion
15 can be withdrawn and it's in the discretion of the district
16 court, that that was a sensible way to proceed.

17 THE COURT: I don't want to bind you on what you would
18 say in a motion for summary judgment, but I would have thought
19 that you would not only say that you thought that Judge Peck's
20 decision in BNY was wrong but that you thought it could be
21 distinguished, and that while it may be that the change in
22 priorities that was at issue in BNY might well be decided as
23 Judge Peck did it in BNY, that the difference in damages in
24 this case should not be controlled by the answer in BNY.

25 MR. GOLDBLATT: You know, I don't want to waive any

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1 argument on behalf of my client, but just to be candid, if you
2 take the language of BNY seriously and say that anything that
3 alters the rights of the parties is not the liquidation,
4 termination of a -- I don't -- I don't understand what it means
5 to say that altering the rights of the parties is different
6 from liquidation, termination, acceleration of a derivative. I
7 have a hard time understanding how -- if you take the language
8 seriously, I don't know why it doesn't govern on this alone.
9 Would we try? Sure. But just to be --

10 THE COURT: I don't want to foreclose you from making
11 any arguments that you choose to make.

12 MR. GOLDBLATT: And I appreciate that. I just want to
13 be -- we've tried through this process to be -- to be, you
14 know, as candid as can be, and we think that the suggestions
15 that there's something improper in our motives are quite
16 unfounded. We've come in with a pretty simple story. It's to
17 say: He said what he thinks. We disagree. We can go through
18 the motions there or we can skip the step. If the court says,
19 no, go through the motions, sure, we can do that. We very much
20 appreciate the court's assistance in developing a transcript in
21 which Mr. Miller explains that he agrees this should be done on
22 summary judgment. It should be expeditious. If that's where
23 we end up, to be sure that will be helpful. It's different
24 from what we had been promised by Lehman in earlier
25 conversations. So we're -- that's helpful.

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1 THE COURT: Scorched earth?

2 MR. GOLDBLATT: You know, we're a little entity with,
3 you know, relatively smaller stakes than -- period. I don't
4 want to make this an attack on anybody's motives.

5 THE COURT: Okay.

6 MR. GOLDBLATT: You know, with respect to --

7 THE COURT: Or tactics.

8 MR. GOLDBLATT: Everyone's entitled to litigate as
9 they see fit. I'm not here to complain or whine about that.
10 It's a pretty simple story as to why, in the world as it
11 exists, we think the relief we sought is appropriate. The
12 court can either agree or disagree.

13 THE COURT: No. But it is a matter of concern, and
14 I'm sure it would be to Judge Peck also, any efforts to prolong
15 or proliferate proceedings, because that increases the cost of
16 litigation, and particularly in a bankruptcy proceeding, that
17 really shouldn't be tolerated. You're right that matters
18 should be handled expeditiously and with the least cost
19 possible under all the circumstances. All that's true. So
20 concerns about whether matters would be delayed, whether
21 matters would be proliferated, whether an ultimate decision on
22 the issue of law would be frustrated by tactics are all matters
23 of concern. And yes, the fact that all the parties agree that
24 this is an issue of law that should be disposed of promptly and
25 that, in one way or another, if it is decided by the bankruptcy

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1 court, there should be a means of review, all of those are
2 significant factors.

3 I already said earlier, on the issue of interlocutory
4 appeal, particularly interlocutory appeal to the Second
5 Circuit, I certainly couldn't decide at this point or give any
6 advice at this point on whether such standards are met, but go
7 ahead.

8 MR. GOLDBLATT: Well, fair enough. I do think that to
9 the extent where -- this is about the question whether a
10 provision in the contract that says, in the event of a
11 bankruptcy default, this is the amount of money you're paid,
12 whether that is or isn't a protected provision within the 560
13 safe harbor, you know, again, this isn't the forum in which to
14 argue that. It's something that should be certified for appeal
15 or not, though Judge McMahon's discussion of why she granted
16 interlocutory review in BNY is basically about the application
17 of the same factors. It is true that that involved the
18 competing cases with issues that are not present here. I'm not
19 pretending that they are present here. But some of the same
20 concerns are.

21 Just on a few of the details, your Honor had it right
22 with respect to what our position is on core/noncore. We
23 think -- and we think that if one -- while your Honor is
24 correct that Stern v. Marshall didn't, by its terms, involve a
25 question of federal law so that the court didn't need to decide

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1 whether you look at the question on a claim-by-claim basis,
2 with the meaning of "claim" being counts in the complaint or
3 claim -- "claim" is a very ambiguous term in the law. We think
4 that the way to think about this is that a claim is an
5 entitlement to relief. We think that's the term in which it
6 was used in Stern v. Marshall.

7 THE COURT: How did the courts interpret it prior to
8 Stern v. Marshall? I mean, we have here an adversary complaint
9 that involves five separate causes of action. We have
10 counterclaims which have four separate causes of action. Prior
11 to Stern v. Marshall were the courts being careful in terms of
12 saying, okay, here's a motion to withdraw the reference, it is
13 a core proceeding or noncore proceeding, or were they saying,
14 it involves claims, some of which are core, some of which are
15 noncore?

16 MR. GOLDBLATT: Prior to -- the answer, your Honor,
17 is, prior to Stern v. Marshall, I do not believe that
18 bankruptcy judges, broadly, appreciated that there were serious
19 constitutional restrictions with respect to the ability to
20 issue final judgments, in these kinds of matters, and that
21 there wasn't the careful analysis of: does this claim for
22 relief raise a matter of public right versus private right that
23 Stern v. Marshall directs. So I don't think, in fairness, that
24 there is -- that there was the level of care in the bankruptcy
25 court decisions, broadly speaking, in the 20 some years between

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1 Marathon, the 1984 Act, and Stern v. Marshall, that is now
2 required, but analytically -- and I think that if you -- if one
3 looks at the Supreme Court decision in Stern, the way the
4 decision there talks about the claim for relief -- and that is
5 fully consistent with the way the Supreme Court generally
6 views -- the Supreme Court has said a number of times that
7 when -- a claim is ambiguous in the law, but broadly speaking,
8 when the court, for constitutional purposes, asks the question,
9 what is a claim, it routinely thinks of that question as a
10 plaintiff showing up and saying: I'm entitled to relief
11 against the defendant. That's what claim means, we believe,
12 for constitutional purposes.

13 THE COURT: Claim is equivalent to complaint?

14 MR. GOLDBLATT: Well, a complaint can assert multiple
15 claims. You can, in a complaint, bring a contract claim and a
16 tort claim. We think fundamentally claim is about entitlement
17 to relief, and for what it's worth, Lewis v. Casey is probably
18 the Supreme Court case that most clearly articulates that
19 principle.

20 So your Honor's right. Core/noncore, at the end of
21 the day, isn't the biggest deal in the world, particularly with
22 respect to a certain question of law. So I don't want to
23 overstate its importance. So for what it's worth -- and I
24 would, with some trepidation, suggest that Mr. Miller has
25 approached the question of bankruptcy law entirely wrong, but

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1 the notion that because we filed a claim against Lehman, that
2 is dispositive, is completely wrong. Marshall filed a proof of
3 claim against the debtor in that case and the Supreme Court
4 said: Yes, it's true you filed a claim. These are different
5 claims. And there's -- it's factually complicated as to how
6 different they are, but the Supreme Court says: Look, you can
7 resolve the proof of claim without resolving the counterclaim.
8 Therefore, the counterclaim is different. It -- here, that is
9 a hundred percent true. We filed a proof of claim saying: You
10 took \$2.4 million of ours in November of 2008 you weren't
11 entitled to. Totally different from the question of whether
12 they can recover against us on the contract.

13 So if Stern v. Marshall means anything and if I'm
14 right that you -- the claim means claim for relief, as the
15 Supreme Court said, then their counterclaim against us is a
16 noncore matter. Again, not that big a deal, but I do think,
17 and I think strongly, that that's the right answer and
18 therefore the bankruptcy court can't issue final judgment; it
19 can only make a report and recommendation.

20 There is an interesting question, for what it's worth,
21 your Honor. The statute provides that the bankruptcy court can
22 issue final judgment in core matters, in statutory core
23 matters, and in reports and recommendations in statutory
24 noncore matters, there isn't, technically speaking, a statutory
25 mechanism for report and recommendation in the matter that

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1 statutorily is core. We think that we could probably work
2 through that. But just --

3 THE COURT: Well, sure. It's because it's done --

4 MR. GOLDBLATT: It has to be done, under Stern v.
5 Marshall, there's a separability problem. We think it's
6 solvable, but just to be clear, there is that quirk that the
7 parties need to work through, and I'm sure we'll be able to
8 work through it with -- in any event, your Honor, withdrawing
9 the reference would have the benefit of avoiding that quirk.

10 We do think, for the reasons we've said, that
11 withdrawal of the reference is appropriate, would be helpful,
12 and, for those reasons, ask that the court grant the motion.

13 THE COURT: All right. Thank you. The parties have
14 sought expedition and the parties are entitled to expedition,
15 so I'm prepared to decide the motion.

16 And I appreciate the briefs and the argument of
17 counsel very much.

18 This is a motion to withdraw the reference for an
19 adversary proceeding begun by the Michigan State Housing
20 Development Authority (MSHDA) against various Lehman Brothers
21 entities (Lehman) in the Lehman Brothers bankruptcy in November
22 of 2009. The motion is brought pursuant to 28 U.S.C. 157(d)
23 and Rule 5011(a) of the Federal Rules of Bankruptcy Procedures.
24 MSHDA seeks permissive withdrawal of the reference primarily on
25 the grounds that the adversary proceeding raises significant

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1 legal issues of first impression that should be resolved in an
2 expedited manner by this court. In particular, MSHDA points to
3 the decision of the bankruptcy court in Lehman Brothers Special
4 Financing, Inc. v. BNY Corporate Trustee Services, Ltd.,
5 422 B.R. 407 (Bankr. S.D.N.Y. 2010) ("the BNY decision"),
6 holding that certain provisions in the derivative agreements at
7 issue in that case were invalid under the ipso facto provisions
8 of Sections 365 and 541 of the Bankruptcy Code and did not fall
9 within the safe harbor provisions of Section 560 of the Code.
10 Id. at 421-22. Judge McMahon of this court granted leave to
11 hear an interlocutory appeal of the BNY decision, which MSHDA
12 contends reflects the great importance and urgency of the legal
13 issues raised in that case. However, the parties to the BNY
14 case ultimately settled, and the district court never ruled on
15 these issues.

16 In this adversary proceeding, Lehman, in apparent
17 reliance on the BNY decision, has filed a counterclaim
18 asserting, among other arguments, that certain provisions of
19 the parties' agreements are unenforceable because of the Code's
20 ipso facto provisions. MSHDA seeks to bring a motion for
21 summary judgment in this court arguing that the safe harbor
22 provision of the Code exempts these contract provisions from
23 ipso facto challenge. MSHDA urges withdrawal of the reference
24 so that these legal issues, left uncertain after the BNY
25 decision, can be resolved in an expedited manner.

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1 Under 28 U.S.C. 157(d), a "district court may
2 withdraw... any case or proceeding referred [to the bankruptcy
3 court]... on its own motion or on a timely motion of any party,
4 for cause shown." 28 U.S.C. 157(d). The statute does not
5 define the term "cause," but the Second Circuit Court of
6 Appeals has identified a number of relevant factors, including:
7 (i) whether the proceeding is core or noncore; (ii) judicial
8 economy; (iii) uniformity of bankruptcy administration; (iv)
9 economical use of debtors' and creditors' resources; (v)
10 reduction of forum shopping; (vi) expediting the bankruptcy
11 process; and (vii) the presence of a jury demand. See Orion
12 Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures
13 Corp.), 4 F.3d 1095, 1101 (2d Cir. 1993); Kenai Corp. v. Nat'l
14 Union Fire Ins. Co. (In re Kenai Corp.), 136 B.R. 59, 61
15 (S.D.N.Y. 1992).

16 The threshold question in determining whether cause
17 for permissive withdrawal exists is whether the proceeding at
18 issue is core or noncore, because "it is upon this issue that
19 questions of efficiency and uniformity will turn." In re Orion
20 Pictures Corp., 4 F.3d at 1101. The courts in this district
21 are divided as to whether the bankruptcy court must decide in
22 the first instance whether the proceeding is core or noncore.
23 Compare In re CIS Corp., No. 92 Civ. 2740 (JFK), 1992 WL 176482
24 at *2 (S.D.N.Y. July 17, 1992) (motion for withdrawal was
25 premature because determination of whether proceeding is core

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1 should first be made by the bankruptcy court), with 176-60
2 Union Turnpike Inc. v. Howard Beach Fitness Ctr., Inc.,
3 209 B.R. 307, 311 (S.D.N.Y. July 17, 1992) (rejecting argument
4 that the "Bankruptcy Court alone decides whether a proceeding
5 is 'core' or 'noncore'"); see also Veyance Techs., Inc. v.
6 Lehman Bros. Special Fin., Inc., No. 09 Civ. 8851 (BSJ), 2009
7 WL 4496051 at *2 (S.D.N.Y. Dec. 3, 2009) (recognizing this
8 split in authority). Even if not required, it is certainly
9 preferable to obtain the view of the bankruptcy court on
10 whether the proceeding is core or noncore, if there is a
11 reasonable possibility to do so. See Veyance Techs., 2009 WL
12 4496051 at *2 ("[E]ven those courts that have not [considered
13 deferral to the bankruptcy court to be mandatory]... have
14 deferred unless the moving party provided a compelling reason
15 not to do so."); United Illuminating Co. v. Enron Power Mktg.,
16 Inc. (In re Enron Corp.), No. 03 Civ. 5078 (DLC) 2003 WL
17 22171695 at *2 (S.D.N.Y. Sept. 22, 2003) (motion for withdrawal
18 was premature because moving party had "provided no good reason
19 to depart from the practice of allowing the bankruptcy judge in
20 the first instance to determine if the proceeding is core or
21 noncore"). Thus, there is a strong argument that this motion
22 is premature and should await a determination by the bankruptcy
23 court as to whether the proceeding in question is core or
24 noncore.

25 Even if the motion is not premature, there remains a

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1 strong basis for concluding that at the very least, central
2 claims in this proceeding are core. While Section 157 of the
3 Code does not define the term "core proceeding," it does
4 provide a nonexhaustive list of such proceedings, including
5 "counterclaims by the estate against persons filing claims
6 against the estate." 28 U.S.C. Section 157(b)(2)(C). Here,
7 Lehman has asserted counterclaims against MSHDA seeking, among
8 other relief, a declaratory judgment that certain provisions in
9 the parties' agreement are unenforceable under provisions of
10 the Bankruptcy Code. Indeed, in addition to the declaratory
11 judgment counterclaim, at least two other counterclaims assert
12 the invalidity of a provision of the parties' agreement based
13 on the ipso facto provisions of the Bankruptcy Code. These
14 counterclaims are plainly an enumerated core proceeding under
15 Section 157(b)(2)(C), because they are counterclaims by the
16 debtor against a third party who brought an adversary
17 proceeding. See, e.g., *Stern v. Marshall*, 131 S.Ct. 2594,
18 2604-05 (2011) (counterclaim by debtor for tortious
19 interference was core proceeding under plain text of
20 28 U.S.C. 157(b)(2)(C); *In re Iridium Operating LLC*,
21 285 B.R. 822, 831 (S.D.N.Y. 2002) ("[W]here a creditor of the
22 estate files a proof of claim and the estate counterclaims
23 against him, asserting a setoff, it is entirely appropriate for
24 the action to be classified as a core proceeding."); *In re J.T.*
25 *Moran Fin. Corp.*, 124 B.R. 931, 939 (S.D.N.Y. 1991)

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1 ("Counterclaims by the estate against persons filing claims
2 against the estate are regarded as core proceedings pursuant to
3 28 U.S.C. 157(b)(2)(C)."); In re McCorhill Publ'g, Inc.,
4 90 B.R. 633, 634 (Bankr. S.D.N.Y. 1998) (trustee's
5 counterclaims against creditor who filed adversary proceeding
6 constitute core proceeding).

7 MSHDA argues that despite the plain language of
8 Section 157, these counterclaims are noncore because they
9 merely allege breach of contract, which MSHDA characterizes as
10 a paradigmatic noncore proceeding. However, the Supreme
11 Court's recent decision in Stern v. Marshall, 131 S.Ct. 2594
12 (2011), clearly contradicts this interpretation by reading
13 Section 157(b)(2)(C) to "designat[e] all counterclaims as
14 'core' proceedings." Id. at 2605. While the court concluded
15 that this broad reading raised serious constitutional concerns
16 and held that the bankruptcy court "lacked the constitutional
17 authority to enter final judgment on a state law counterclaim
18 that is not resolved in the process of ruling on a creditor's
19 proof of claim," Id. at 2620, such concerns are not present in
20 this case. First, the court in Stern specifically noted that
21 the counterclaim at issue "in no way derived from or [was]
22 dependent on bankruptcy law" but was instead "a state tort
23 action that exist[ed] without regard to any bankruptcy
24 proceeding." Id. at 2618. Unlike the counterclaim at issue in
25 Stern, Lehman's counterclaim, seeking a declaratory judgment

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1 based on the ipso facto provisions of the Code and at least two
2 other counterclaims that rely on the ipso facto provisions of
3 the Bankruptcy Code are firmly rooted in bankruptcy law and the
4 existing bankruptcy proceedings.

5 Moreover, MSHDA seeks to withdraw the reference for
6 the adversary proceeding, not only the counterclaim, and the
7 adversary proceeding includes its claims against various Lehman
8 entities as well as the counterclaims. Its adversary complaint
9 explicitly alleged that it is a core proceeding (see 16) and
10 included a request for relief from stay. Plainly, a core
11 proceeding.

12 In any event, the distinction between core and noncore
13 proceedings is not critical to the motion to withdraw the
14 reference in this case. MSHDA argues that this court should
15 withdraw the reference so that it can make a motion for summary
16 judgment specifically dealing with the applicability of the
17 ipso facto provisions of the Bankruptcy Code and the safe
18 harbor provision. If the same motion were made before the
19 bankruptcy court, any decision of the bankruptcy court would be
20 reviewed de novo because decisions on motions for summary
21 judgment are reviewed de novo as a matter of law. See, e.g.,
22 *In re Treco*, 240 F.3d 148, 155 (2d Cir. 2001) (Court of Appeals
23 reviews bankruptcy court's summary judgment decisions de novo);
24 *In re Enron N. Am. Corp.*, 312 B.R. 27, 28-29 (S.D.N.Y. 2004)
25 (district court reviews bankruptcy court's decision to grant

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1 summary judgment de novo); *In re Omni Mut., Inc.*, 193 B.R. 678,
2 680 (S.D.N.Y. 1996) (district court reviews bankruptcy court's
3 denial of summary judgment de novo).

4 Regardless of whether this proceeding is core or
5 noncore, MSHDA has failed to demonstrate that the court should
6 exercise its discretion to withdraw the reference in this case.
7 To the contrary, concerns of efficiency, judicial economy, and
8 the uniform administration of bankruptcy law weigh strongly
9 against withdrawing the reference here. See *In re Orion*
10 *Pictures Corp.*, 4 F.3d at 1101. The bankruptcy court is
11 familiar with the myriad financial transactions involved in the
12 Lehman bankruptcy and with how the provisions of the Code
13 implicated here fit into those transactions. Such familiarity
14 promotes efficiency and weighs in favor of the bankruptcy court
15 adjudicating the proceeding. See, e.g., *In re Iridium*
16 *Operating*, 285 B.R. at 835 (the fact that bankruptcy court was
17 "already intimately familiar with the Iridium Companies'
18 bankruptcies and the special issues" they implicated was reason
19 not to withdraw reference); *In re Ames Dep't Stores*,
20 190 B.R. 157, 163-64 (S.D.N.Y. 1995) (withdrawal of reference
21 would impede efficient use of judicial resources because it
22 would require the district court to duplicate the efforts of
23 the bankruptcy judge).

24 Moreover, the bankruptcy court has well-recognized
25 expertise in interpreting the Code that would be useful to this

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1 court in analyzing ipso facto and safe harbor provisions at
2 issue in Lehman's counterclaims. MSHDA's motion suggests that
3 these issues should be taken away from the bankruptcy court
4 before it has even had an opportunity to render a decision.
5 This would deprive this court and the Court of Appeals of the
6 expertise of the bankruptcy court on the application of the
7 Code's provisions to these particular transactions. This
8 outcome would not advance judicial economy or the uniform
9 administration of the Code. See *Enron N. Am. Corp. v. Random*
10 *House Inc. (In re Enron Corp.)*, No. 03 Civ. 9312 (LTS), 2007 WL
11 102085 at *3 (S.D.N.Y. Jan. 12, 2007) ("It would not serve the
12 interests of efficient administration of the bankruptcy system
13 for this court to preempt prematurely or unnecessarily" the
14 bankruptcy court's ability to interpret the Code).

15 MSHDA argues that withdrawal of the reference would
16 nonetheless be beneficial in this case because it would allow
17 for the expeditious resolution of legal issues of great
18 importance, namely, the scope of the Code's ipso facto and safe
19 harbor provisions. While MSHDA argues that many transactions
20 in the Lehman bankruptcy are affected by these issues, Lehman
21 contends that only nine cases are so affected. In any event,
22 if the Code provisions in question really did affect as many
23 transactions as MSHDA claims, one would expect that there would
24 at least be one decision of the bankruptcy court available for
25 appeal and that the court would not be required to intervene

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1 before the bankruptcy court has had a chance to issue an actual
2 ruling on an actual case which is subject to appeal.

3 Moreover, even assuming these legal issues are as
4 pressing as MSHDA claims, there is no reason to believe that
5 this court's resolution of these issues would be any more
6 expeditious than the bankruptcy court's. See RECAP Invs.
7 XI-Fund A, L.P. v. McCullough Harris LLC, 760 F.Supp.2d 371,
8 373 (S.D.N.Y. 2011) ("[T]he court is not persuaded... that
9 proceedings in the bankruptcy court would be necessarily less
10 expeditious than in this court..."). The parties have already
11 agreed before this court that the issues with respect to the
12 validity and applicability of the ipso facto provisions and the
13 safe harbor provisions can be decided expeditiously by the
14 bankruptcy court on a motion for summary judgment.
15 Continuation of the proceedings in the bankruptcy court may
16 well lead then to a prompt decision that would be subject to
17 interlocutory appeal or even direct appeal to the Court of
18 Appeals by permission if the issues were crucial to this case
19 or to other cases. See 28 U.S.C. 158(a), 158(d)(2)(A). In
20 addition, the only urgency identified by MSHDA in this case is
21 its concern that it will be found liable to Lehman for
22 additional interest if the court rejects its legal position.
23 However, such concerns are present with any decision of the
24 bankruptcy court and do not provide a persuasive basis for
25 short-circuiting the bankruptcy court process.

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1 Finally, concerns about forum shopping weigh heavily
2 against withdrawal of the reference in this case. Here, MSHDA
3 is plainly unhappy with the bankruptcy court's interpretation
4 of the ipso facto and safe harbor provisions in the BNY case
5 and seeks to avoid a decision by the bankruptcy court
6 invalidating the contractual provisions at issue here on the
7 same basis. However, avoiding an unfavorable decision is not a
8 proper basis for withdrawal of a reference. See, e.g., In re
9 Recoton Corp., No. 04 Civ. 2466 (DLC), 2004 WL 1497570 at *5
10 (S.D.N.Y. July 1, 2004) (denying motion to withdraw reference
11 in part because it was "a[n] attempt at forum shopping"); In re
12 Kenai Corp., 136 B.R. at 61 (courts should employ withdrawal
13 "judiciously in order to prevent it from becoming just another
14 litigation tactic for parties eager to find a way out of
15 bankruptcy court").

16 In sum, the Orion factors weigh heavily against
17 withdrawal of the reference for an adversary proceeding in this
18 case.

19 The court has considered all of the arguments of the
20 parties. To the extent not specifically addressed above, they
21 are either moot or without merit. For the reasons explained
22 above, the plaintiff's motion to withdraw the reference of the
23 adversary proceeding is denied. The clerk is therefore
24 directed to close this case.

25 So ordered.

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1 All right. I thank you all. Again, I thank you for
2 the arguments and I thank you for the briefs.
3 ALL COUNSEL: Thank you, your Honor.
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