

13-1785-bk

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

IRVING H. PICARD, TRUSTEE FOR THE SUBSTANTIVELY CONSOLIDATED
SIPA LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC
AND THE ESTATE OF BERNARD L. MADOFF,

—against— *Plaintiff-Appellant,*

ERIC T. SCHNEIDERMAN, BART M. SCHWARTZ, RALPH C. DAWSON,
J. EZRA MERKIN, GABRIEL CAPITAL CORPORATION,

Defendants-Appellees,

SECURITIES INVESTOR PROTECTION CORPORATION,
STATUTORY INTERVENOR PURSUANT TO SECURITIES INVESTOR
PROTECTION ACT, 15 U.S.C. § 78eee(d),

Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**JOINT APPENDIX
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and Gabriel Capital Corporation*

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----	X	
In re:	:	
	:	
	:	SIPA LIQUIDATION
BERNARD L. MADOFF INVESTMENT SECURITIES LLC,	:	
	:	No. 08-01789 (BRL)
Debtor.	:	
	X	

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,	:	
	:	
Plaintiff,	:	
	:	Adv. Proc. No. 09-01182 (BRL)
v.	:	
	:	
J. EZRA MERKIN, GABRIEL CAPITAL, L.P., ARIEL FUND LTD., ASCOT PARTNERS, L.P., GABRIEL CAPITAL CORPORATION,	:	
	:	
Defendants.	:	
	:	
-----	X	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANTS
J. EZRA MERKIN AND GABRIEL CAPITAL CORPORATION TO
WITHDRAW THE REFERENCE TO THE BANKRUPTCY COURT**

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Defendants J. Ezra Merkin (“Merkin”) and Gabriel Capital Corporation (“GCC,” and collectively the “Merkin Defendants”), respectfully submit this memorandum of law and the accompanying declaration of Neil A. Steiner, dated April 2, 2012 (the “Steiner Decl.”), in support of Merkin and GCC’s motion to the United States District Court for the Southern District of New York (the “District Court” or “this Court”), pursuant to 28 U.S.C. § 157(d), Rule 5011(a) of the Federal Rules of Bankruptcy Procedure, and Rule 5011-1 of the Local Rules of the Bankruptcy Court, for an order withdrawing the reference to the Bankruptcy Court of this action filed by plaintiff Irving Picard (the “Trustee”), as Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC (“BLMIS”).

Preliminary Statement

In this action, the Trustee of BLMIS, appointed under the Securities Investor Protection Act (“SIPA”), 15 U.S.C. § 78aaa *et seq.*, seeks to recover from the Merkin Defendants unspecified transfers allegedly made to them by defendants Gabriel Capital, L.P. (“Gabriel Fund”), Ariel Fund Ltd. (“Ariel Fund”), Ascot Partners, L.P. (“Ascot Partners,” and together with Gabriel Capital and Ariel Fund, the “Funds”) of amounts the Funds had received in redemptions from Madoff. The Funds were net losers of more than \$550 million in unredeemed principal investment with BLMIS. The Trustee acknowledges in the Second Amended Complaint that the Funds invested more than \$1 billion with BLMIS, never came close to redeeming the amount of their principal investment and in fact lost at least \$435 million of unredeemed *principal investment* when Madoff’s massive Ponzi scheme was revealed. Indeed, the Funds believed based on the account statements issued by BLMIS that the total value of their BLMIS accounts as of November 30, 2008, was more than \$2.4 billion, and the Merkin

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Defendants personally believed that they had more than \$110 million invested with BLMIS through their investments in the Funds.

The Merkin Defendants have not filed a proof of claim in the SIPA liquidation of BLMIS, and therefore are entitled to a jury trial on the Trustee's claims against them. The Merkin Defendants do not consent to a jury trial before the Bankruptcy Court. Moreover, the Bankruptcy Court lacks jurisdiction to enter final judgment on the Trustee's claims. The interests of judicial efficiency and uniformity support permissive withdrawal of the reference for this entire case "for cause shown." Withdrawal of the reference at the time of trial would avoid piecemeal litigation and the unnecessary expenditure of time and money that would be required if this action were to proceed in two courts. Consistent with the interest of judicial efficiency, the Bankruptcy Court may continue to oversee discovery, resolve discovery disputes and issue a Report and Recommendation on the Merkin Defendants' anticipated motion for summary judgment.¹

Background

The Trustee filed a Complaint on May 6, 2009, an Amended Complaint on August 6, 2009, and a Second Amended Complaint on December 23, 2009, seeking to avoid and recover alleged preferential and fraudulent transfers made to or for the benefit of the Defendants as initial or subsequent transferees under Sections 544, 547, 548, 550, and 551 of the Bankruptcy Code and various sections of the NYDCL. The Second Amended Complaint also seeks to recover certain transfers under state partnership law from Merkin as general partner of Ascot, to disallow the Fund Defendants' SIPA claims, and to obtain turnover and accounting under section 542 of

¹ In the event the Court withdraws the reference based on any additional ground asserted by any Fund Defendant in the action, withdrawal of the reference with respect to the same or interrelated claims asserted against the Merkin Defendants would also be appropriate and would promote judicial efficiency and uniformity.

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the Code and SIPA section 78fff-2(c)(3). (*See* Second Amended Complaint, Steiner Decl., Ex. A.)

On January 25, 2010, the Merkin Defendants moved to dismiss the Second Amended Complaint for failure to state a claim. The Bankruptcy Court denied that motion on November 17, 2010. (*See* Order of November 17, 2010, Steiner Decl., Ex. B.) Since then, the parties have engaged in extensive discovery. Fact discovery is currently scheduled to end July 2, 2012, with expert discovery to be completed by October 15, 2012. Motions for summary judgment are due December 14, 2012, with responses due January 25, 2013, and replies February 15, 2013. (*See* Second Amended Case Management Order of January 31, 2012, Steiner Decl., Ex. C.) In light of the Bankruptcy Court's Order that all motions for withdrawal of the reference in this matter be filed on or before April 2, 2012, the Merkin Defendants respectfully file this motion to withdraw the reference at this time, to preserve their right to a trial by jury.

Argument

District Courts have original jurisdiction over cases "arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). District Courts are, however, permitted to refer cases or proceedings within that jurisdiction to bankruptcy judges. 28 U.S.C. § 157(a). In this District, a standing order provides for the automatic reference of such matters to the Bankruptcy Court. Nevertheless, Congress has provided that a District Court may, and in certain circumstances is required to, withdraw that reference:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

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28 U.S.C. § 157(d). The decision to withdraw the reference is made by the District Court, not the Bankruptcy Court. Fed. R. Bankr. P. 5011(a) (2011) (“A motion for withdrawal of a case of proceeding shall be heard by a district judge.”); Fed. R. Bankr. P. 5011 advisory committee’s note (“The withdrawal decision is committed exclusively to the district court.”).

The factors to be considered include the efficient use of judicial resources and delay and costs to the parties. *See, e.g., In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir. 1993); *In re Nw. Airlines Corp.*, 384 B.R. 51, 59 (S.D.N.Y. 2008) (“[T]he critical question is efficiency and uniformity.” (alteration in original; quotations omitted)). For the reasons set forth below, this Court should withdraw the reference at the time of trial as to the Merkin Defendants “for cause shown.”

Withdrawal of the reference for trial in the District Court is required here. The Merkin Defendants have not filed a proof of claim in the SIPA liquidation of BLMIS. Accordingly, the Merkin Defendants are entitled to a jury trial on the Trustee’s claim against them. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 36, 58 (1989); *see also Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Bankruptcy Court may only hold a jury trial if it is “specially designated” to do so by the District Court and if it has “the express consent of all the parties.” 28 U.S.C. § 157(e). In addition, while Bankruptcy Court may issue a Report and Recommendation on the Merkin Defendants’ anticipated motion for summary judgment, it cannot enter a final judgment in this action. Because the Merkin Defendants have demanded a jury trial in their Answer and do not consent to a jury trial in the Bankruptcy Court, in the event any part of this action remains against the Merkin Defendants following their motion for summary judgment, this action will be tried in the District Court. However, because discovery is ongoing before the Bankruptcy Court, the Merkin Defendants respectfully request that discovery continue to proceed as scheduled in

the Bankruptcy Court and that the Bankruptcy Court consider and issue a Report and Recommendation on the Merkin Defendants' anticipated motion for summary judgment motion.

Conclusion

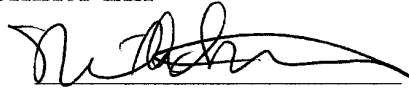
For the foregoing reasons, the Merkin Defendants respectfully request that the District Court enter an order withdrawing from the Bankruptcy Court the reference of this action for the purpose of any trial herein.

Dated: New York, New York
April 2, 2012

Respectfully submitted,

DECHERT LLP

By:



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Neil A. Steiner
1095 Avenue of the Americas
New York, New York 10036
Telephone: (212) 698-3500
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*Attorneys for Defendants J. Ezra Merkin and
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EXHIBIT G

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STANTON, J.

 ORIGINAL

SECURITIES INVESTOR PROTECTION CORPORATION
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DATE FILED: 12/15/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,)

Plaintiff,)

v.) Civ. 08-10791

BERNARD L. MADOFF, and)

BERNARD L. MADOFF INVESTMENT)

SECURITIES LLC,)

Defendants.)

SECURITIES INVESTOR PROTECTION)

CORPORATION,)

Applicant,)

v.)

BERNARD L. MADOFF INVESTMENT)

SECURITIES LLC,)

Defendant.)

ORDER

On the Complaint and Application of the Securities Investor Protection Corporation ("SIPC"), it is hereby:

I. ORDERED, ADJUDGED and DECREED that the customers of the Defendant,

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Case: 13-1785 Document: 94-1 Page: 32 06/06/2013 958006 171

Bernard L. Madoff Investment Securities LLC, are in need of the protection afforded by the Securities Investor Protection Act of 1970, as amended ("SIPA", 15 U.S.C. §78aaa *et seq.*).

II. ORDERED that pursuant to 15 U.S.C. §78eee(b)(3), Irving H. Picard, Esquire is appointed trustee for the liquidation of the business of the Defendant with all the duties and powers of a trustee as prescribed in SIPA, and the law firm of Baker & Hostetler LLP is appointed counsel for the trustee. The trustee shall file a fidelity bond satisfactory to the Court in the amount of

✓ \$ 250,000.00

LLS

III. ORDERED that all persons and entities are notified that, subject to the other provisions of 11 U.S.C. §362, the automatic stay provisions of 11 U.S.C. §362(a) operate as a stay of:

- A. the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other proceeding against the Defendant that was or could have been commenced before the commencement of this proceeding, or to recover a claim against the Defendant that arose before the commencement of this proceeding;
- B. the enforcement against the Defendant or against property of the estate of a judgment obtained before the commencement of this proceeding;
- C. any act to obtain possession of property of the estate or property from the estate;
- D. any act to create, perfect or enforce any lien against property of the estate;
- E. any act to create, perfect or enforce against property of the Defendant any lien to the extent that such lien secures a claim that arose before the commencement of this proceeding;
- F. any act to collect, assess or recover a claim against the Defendant that arose before the commencement of this proceeding;
- G. the setoff of any debt owing to the Defendant that arose before the commencement

of this proceeding against any claim against the Defendant; and

H. the commencement or continuation of a proceeding before the United States Tax Court concerning the Defendant's tax liability for a taxable period the Bankruptcy Court may determine.

IV. ORDERED that all persons and entities are stayed, enjoined and restrained from directly or indirectly removing, transferring, setting off, receiving, retaining, changing, selling, pledging, assigning or otherwise disposing of, withdrawing or interfering with any assets or property owned, controlled or in the possession of the Defendant, including but not limited to the books and records of the Defendant, and customers' securities and credit balances, except for the purpose of effecting possession and control of said property by the trustee.

V. ORDERED that pursuant to 15 U.S.C. §78eee(b)(2)(B)(i), any pending bankruptcy, mortgage foreclosure, equity receivership or other proceeding to reorganize, conserve or liquidate the Defendant or its property and any other suit against any receiver, conservator or trustee of the Defendant or its property, is stayed.

VI. ORDERED that pursuant to 15 U.S.C. §§78eee(b)(2)(B)(ii) and (iii), and notwithstanding the provisions of 11 U.S.C. §§362(b) and 553, except as otherwise provided in this Order, all persons and entities are stayed, enjoined and restrained for a period of twenty-one (21) days, or such other time as may subsequently be ordered by this Court or any other court having competent jurisdiction of this proceeding, from enforcing liens or pledges against the property of the Defendant and from exercising any right of setoff, without first receiving the written consent of SIPC and the trustee.

VII. ORDERED that, pursuant to 15 U.S.C. §78eee(b)(2)(C)(ii), and notwithstanding 15 U.S.C. §78eee(b)(2)(C)(i), all persons and entities are stayed for a period of twenty-one (21) days,

or such other time as may subsequently be ordered by this Court or any other court having competent jurisdiction of this proceeding, from foreclosing on, or disposing of, securities collateral pledged by the Defendant, whether or not with respect to one or more of such contracts or agreements, securities sold by the Defendant under a repurchase agreement, or securities lent under a securities lending agreement, without first receiving the written consent of SIPC and the trustee.

VIII. ORDERED that the stays set forth above shall not apply to:

- A. any suit, action or proceeding brought or to be brought by the United States Securities and Exchange Commission ("Commission") or any self-regulatory organization of which the Defendant is now a member or was a member within the past six months; or
- B. the exercise of a contractual right of a creditor to liquidate, terminate, or accelerate a securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, or master netting agreement, as those terms are defined in 11 U.S.C. §§101, 741, and 761, to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with one or more of such contracts or agreements, or to foreclose on any cash collateral pledged by the Defendant, whether or not with respect to one or more of such contracts or agreements; or
- C. the exercise of a contractual right of any securities clearing agency to cause the liquidation of a securities contract as defined in 11 U.S.C. §741(7); or
- D. the exercise of a contractual right of any stockbroker or financial institution, as defined in 11 U.S.C. §101, to use cash or letters of credit held by it as collateral, to cause the liquidation of its contract for the loan of a security to the Defendant or

for the pre-release of American Depository Receipts or the securities underlying such receipts; or

E. the exercise of a contractual right of any “repo” participant, as defined in 11 U.S.C. §101, to use cash to cause the liquidation of a repurchase agreement, pursuant to which the Defendant is a purchaser of securities, whether or not such repurchase agreement meets the definition set forth in 11 U.S.C. §101(47); or

F. the exercise of a contractual right, as such term is used in 11 U.S.C. §555, in respect of (i) any extension of credit for the clearance or settlement of securities transactions or (ii) any margin loan, as each such term is used in 11 U.S.C. §741(7), by a securities clearing bank. As used herein, “securities clearing bank” refers to any financial participant, as defined in 11 U.S.C. §101(22A), that extends credit for the clearance or settlement of securities transactions to one or more Primary Government Securities Dealers designated as such by the Federal Reserve Bank of New York from time to time; or

G. any setoff or liquidating transaction undertaken pursuant to the rules or bylaws of any securities clearing agency registered under section 17A(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78q-1(b), or by any person acting under instructions from and on behalf of such a securities clearing agency; or

H. any settlement transaction undertaken by such securities clearing agency using securities either (i) in its custody or control, or (ii) in the custody or control of another securities agency with which it has a Commission approved interface procedure for securities transactions settlements, provided that the entire proceeds thereof, without benefit of any offset, are promptly turned over to the trustee; or

I. any transfer or delivery to a securities clearing agency by a bank or other depository, pursuant to instructions given by such clearing agency, of cash, securities, or other property of the Defendant held by such bank or depository subject to the instructions of such clearing agency and constituting a margin payment as defined in 11 U.S.C. §741(5).

IX. ORDERED that pursuant to 15 U.S.C. §78eee(b)(4), this liquidation proceeding is removed to the United States Bankruptcy Court for the Southern District of New York.

X. ORDERED that the trustee is authorized to take immediate possession of the property of the Defendant, wherever located, including but not limited to the books and records of the Defendant, and to open accounts and obtain a safe deposit box at a bank or banks to be chosen by the trustee, and the trustee may designate such of his representatives who shall be authorized to have access to such property.

Date: December 15, 2008

4:08 PM

Louis L. Stanton
UNITED STATES DISTRICT JUDGE



A-916

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 ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

- against - :

BERNARD L. MADOFF and
BERNARD L. MADOFF INVESTMENT
SECURITIES LLC, :

Defendants. :

-----X

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08 Civ. 10791 (LLS)
ECF CASE

**ORDER ON CONSENT IMPOSING PRELIMINARY INJUNCTION,
FREEZING ASSETS AND GRANTING OTHER RELIEF AGAINST DEFENDANTS**

The Securities and Exchange Commission (“SEC”) having filed a Complaint in this matter on December 11, 2008; the SEC that same day having filed an Application for Emergency Preliminary Relief Against Defendants Bernard L. Madoff (“Madoff”) and Bernard L. Madoff Investment Securities LLC (“BMIS”) (collectively, “Defendants”); Defendants that same day having entered a general appearance and consented to the Court’s jurisdiction over the Defendants and the subject matter of this action; Defendants on December 12, 2008 having consented to the entry of a temporary restraining order, asset freeze, appointment of a receiver and other relief against Defendants; the Court that same day having entered such an Order; the Court on December 15, 2008 having issued an Order appointing Irving H. Picard, Esq. (“SIPC Trustee”), as trustee for the liquidation of the business of Defendants with all the duties and powers of a trustee described in the Securities Investor Protection Corporation (“SIPC”), and appointing the law firm of Baker & Hostetler LLP as appointed counsel for the trustee; and Defendants having consented to the entry of this Order On Consent Imposing Preliminary

Injunction, Freezing Assets And Granting Other Relief Against Defendants, waived findings of fact and conclusions of law, and waived any right to appeal from this P.I. Order:

I.

IT IS HEREBY ORDERED, pending a final disposition of this action, that Defendants, and each of their partners, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, telephonic notice, notice by e-mail or otherwise, are preliminarily enjoined from, directly or indirectly, singly or in concert, in the offer, purchase or sale of any security, by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails:

- a. employing any device, scheme or artifice to defraud;
- b. obtaining money or property by means of an untrue statement of material fact or omitting to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading; and
- c. engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser,

in violation of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

II.

IT IS FURTHER ORDERED, pending a final disposition of this action, that Defendants, and each of their partners, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by

personal service, facsimile service, telephonic notice, notice by e-mail or otherwise, are preliminarily enjoined from, directly or indirectly, singly or in concert, by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails:

- a. employing any device, scheme or artifice to defraud any client or prospective client;
- b. engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon any client or prospective client,

in violation of Sections 206(1) and 206(2) of the Advisers Act.

III.

IT IS FURTHER ORDERED, pending a final disposition of this action, that Defendants, and each of their financial and brokerage institutions, agents, servants, employees, attorneys, and those persons in active concert or participation with either of them who receive actual notice of this Order by personal service, facsimile service, telephonic notice, notice by e-mail, or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds, or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of, Defendants, whether held in the name of Madoff, BMIS, Madoff International or Madoff Ltd. or for the direct or indirect beneficial interest of one or both of them, wherever situated, in whatever form such assets may presently exist and wherever located, and direct each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of Defendants,

LLS

to hold or retain within its control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties, including, but not limited to: (1) all assets, funds, or other properties held in the name of, held by, or under the control of one or both of the Defendants; (2) all accounts in the name of Madoff or BMIS or on which Madoff is a signatory, including the accounts listed on the attached Exhibit A; (3) all artwork, property, motor vehicles, jewelry and other items of personalty held in the name of, held by, or under the control of Madoff or BMIS; and (4) all real property held in the name of, held by, or under the control of Madoff or BMIS.

IV.

IT IS FURTHER ORDERED, pending a final disposition of this action, that Defendants, and any person or entity acting at their direction or on their behalf, are preliminarily enjoined from destroying, altering, concealing or otherwise interfering with, the access of the Plaintiff Commission and/or SPIC Trustee to any and all documents, books and records, that are in the possession, custody or control of Defendants, and each of their partners, agents, employees, servants, accountants, financial or brokerage institutions, attorneys-in-fact, subsidiaries, affiliates, predecessors, successors and related entities that refer, reflect or relate to the allegations in the Complaint, including, without limitation, documents, books, and records referring, reflecting or relating to Defendants' finances or business operations, or the offer or sale of securities by Defendants and the use of proceeds therefrom.

V.

IT IS FURTHER ORDERED that Defendants and their partners, agents, employees, attorneys, or other professionals, anyone acting in concert with them or on their behalf, and any

third party, are preliminarily enjoined from filing a bankruptcy proceeding against Defendants without filing a motion on at least three (3) days' notice to the Plaintiff, and approval of this Court after a hearing.

VI.

IT IS FURTHER ORDERED that:

1. Defendant Madoff shall serve upon Plaintiff, on or before December 31, 2008, a verified written accounting, under penalty of perjury, of:
 - a. All assets, liabilities and property currently held, directly or indirectly, by or for the benefit of Defendant Madoff, including, without limitation, bank accounts, brokerage accounts, investments, business interests, loans, lines of credit, and real and personal property wherever situated, describing each asset and liability, its current location and amount;
 - b. All money, property, assets and income received by Defendant Madoff, or for the direct or indirect benefit of Defendant Madoff, at any time through the date of such accounting, describing the source, amount, disposition and current location of each of the items listed;
 - c. The names and last known addresses of all bailees, debtors, and other persons and entities that currently are holding the assets, funds or property of Defendant Madoff; and
 - d. The names and locations of all entities where Defendant BMIS, or entities controlled by, or related to, BMIS, held, without limitation, bank accounts, brokerage accounts, investments, or assets.

Defendant Madoff shall serve such verified written accountings by hand delivery, facsimile transmission, email or overnight courier service on the Commission's counsel, Alex Vasilescu, Esq., Securities and Exchange Commission, 3 World Financial Center, Room 400, New York, NY 10281, vasilescua@sec.gov.

VII.

IT IS FURTHER ORDERED that Lee Richards, Esq., of Richards Kibbe & Orbe LLP, continues as the appointed receiver for the assets of Madoff Securities International Ltd. ("Madoff International"), Madoff Ltd., and any other broker-dealer, market making, or investment advisory businesses (the "Foreign Entities") not located in the United States of America that are owned or controlled, in whole or in part, by Madoff, BMIS and their partners, agents, employees, attorneys, or other professionals, anyone acting in concert with them or on their behalf, and any third party, to (i) preserve the status quo, (ii) ascertain the extent of commingling of funds between Madoff, BMIS and the Foreign Entities; (iii) ascertain the true financial condition of the Foreign Entities and the disposition of investor funds; (iv) prevent further dissipation of the property and assets of the Foreign Entities; (v) prevent the encumbrance or disposal of property or assets of the Foreign Entities and the investors; (vi) preserve the books, records and documents of the Foreign Entities; (vii) respond to investor inquiries regarding the foreign entities; (viii) protect the assets of the Foreign Entities from further dissipation; (ix) determine whether the Foreign Entities should undertake bankruptcy filings; and (x) determine the extent to which the freeze should be lifted as to certain assets in the custody of the Foreign Entities.

To effectuate the foregoing, the receiver is empowered to:

- (a) Take and retain immediate possession and control of all of the assets and property, and all books, records and documents of, the Foreign Entities;
- (b) Have exclusive control of, and be made the sole authorized signatory for, all accounts at any bank, brokerage firm or financial institution that has possession or control of any assets or funds of the Foreign Entities;
- (c) Conduct business, including making trades, and pay from available funds necessary business expenses, as required to preserve or maximize the value of the assets and property of the Foreign Entities, notwithstanding the asset freeze imposed by paragraph III, above;
- (d) Locate assets that may have been conveyed to third parties or otherwise concealed by the Foreign Entities;
- (e) Engage and employ persons, including accountants, attorneys and experts, to assist in the carrying out of the receiver's duties and responsibilities hereunder, including appointing a person or entity to manage any aspect of the business of the Foreign Entities, including any investment adviser business and market-making businesses of the Foreign Entities, and to use available funds as required to preserve the assets and property of the Foreign Entities, notwithstanding the asset freeze imposed by paragraph III, above;
- (f) Report to the Court and the parties by January 26, 2009, subject to such reasonable extensions as the Court may grant, the following information:
 - 1. All assets, money, funds, securities, and real or personal property then held directly or indirectly by or for the benefit of the Foreign Entities,

- including, but not limited to, real property, bank accounts, brokerage accounts, investments, business interests, personal property, wherever situated, identifying and describing each asset, its current location and value;
2. A list of secured creditors and other financial institutions with an interest in the receivership assets of the Foreign Entities;
 3. A list of customers and clients of the Foreign Entities, including investment advisory clients, and, to the extent practicable, the amounts received by Madoff from each such customer or client and the amounts withdrawn by each such customer or client;
- (g) Develop a preliminary plan for the administration of the assets of the receivership of the Foreign Entities, including a recommendation regarding whether bankruptcy cases should be filed for all or a portion of the assets subject to the receivership and a recommendation whether litigation against third parties should be commenced on a contingent fee basis to recover assets of the Foreign Entities for the benefit of the receivership.

Defendants agree to provide any written authorizations necessary for the receiver to exercise the foregoing powers over the Foreign Entities.

As this Court has entered an Order (referenced above) appointing the SIPC Trustee, and as the SIPC Trustee has roles and responsibilities with respect to BMIS, the receiver will have no authority over BMIS, except to the extent that such authority is necessary to carry out his responsibilities with respect to the Foreign Entities and that such authority is exercised with the

prior consent and approval of the SIPC Trustee.

VIII.

IT IS FURTHER ORDERED that each of the Receiver and his advisors be, and they hereby are, indemnified by each of the Defendants, Madoff International and Madoff Ltd., except for gross negligence, willful misconduct, fraud, and breach of fiduciary duty determined by final order no longer subject to appeal or certiorari, for all judgments, losses, costs, and reasonable expenses including legal fees (which shall be paid under the indemnity after court approval as they arise), arising from or related to any and all claims of whatsoever type brought against any of them in their capacities as receiver or advisors to the receiver; provided, however, that nothing herein shall limit the immunity of the receiver and his advisors allowed by law or deprive the receiver and his advisors of indemnity for any act or omission for which they have immunity.

IX.

IT IS FURTHER ORDERED that no creditor or claimant against the Defendants, or any person acting on behalf of such creditor or claimant, shall take any action to interfere with the control, possession, or management of the assets subject to the receivership.

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X.

IT IS FURTHER ORDERED that, pending final disposition of this action or such further order of the Court, Plaintiff may conduct expedited discovery, pursuant to Rules 26, 30, 31, 33, 34, 36 and 45 of the Federal Rules of Civil Procedure and without the requirement of a meeting pursuant to Fed. R. Civ. P. 26(f).

XI.

IT IS FURTHER ORDERED that this Order shall be, and is, binding upon Defendants and their partners, agents, servants, employees, attorneys, subsidiaries, affiliates and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, telephone, e-mail or otherwise.

XII.

IT IS FURTHER ORDERED that the Consent of Defendants to Preliminary Injunction Order filed herewith is incorporated herein with the same force and effect as if fully set forth herein, and that Defendants shall comply with all of the undertakings and agreements set forth therein.

Louis L. Stanton
UNITED STATES DISTRICT JUDGE

Issued at : 6 : 35 p.m.
December 18, 2008
New York, NY

Exhibit A

JP Morgan Chase Account No. 000000140081703
Account in the Name of: Bernard L. Madoff Investment Securities

JP Morgan Chase Account No. 000000066709466
Account in the Name of: Bernard L. Madoff Investment Securities

The Bank of New York Mellon Account No. 890-0402-393
Account in the Name of: Benard L Madoff Investment Securities

The Bank of New York Mellon Account No. 030-0951050
Account in the Name of: Bernard L Madoff

The Bank of New York Mellon Account No. 866-1126-621
Account in the Name of: Bernard L Madoff Investment Securities LLC

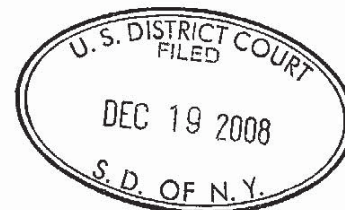
A-927

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ORIGINAL

**JAMES CLARKSON
ACTING REGIONAL DIRECTOR
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
3 World Financial Center – RM 400
New York, NY 10281
(212) 336-1020**



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

-----X
SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

- against - :

**BERNARD L. MADOFF and
BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,** :

Defendants. :

08 Civ. 10791 (LLS)
ECF CASE

-----X

**CONSENT OF DEFENDANT BERNARLD L. MADDOFF TO
PRELIMINARY INJUNCTION ORDER**

1. Defendant Bernard L. Madoff (“Madoff”), on his individual behalf, and to the extent, if any, he owns or controls Defendant Bernard L. Madoff Investment Securities LLC (“BMIS;” collectively, “Defendants”) and Madoff Securities International Ltd. (“Madoff International”), Madoff Ltd., and any other broker-dealer, market making, or investment advisory businesses (the “Foreign Entities”) acknowledge having been served with the summons and complaint in this action, enter a general appearance, and admit the Court’s jurisdiction over Defendants and over the subject matter of this action.

2. Defendants hereby consent to the entry of the proposed Order Imposing a Preliminary Injunction, Freezing Assets and Granting Other Relief Against Defendants in the form attached hereto (the "P.I. Order") and incorporated by reference herein.

3. Defendants waive the entry of findings of fact and conclusions of law pursuant to Rule 65 of the Federal Rules of Civil Procedure.

4. Defendants waive the right, if any, to appeal from the entry of the proposed P.I. Order.

5. Defendants enter into this Consent voluntarily and represent that no threats, offers, promises, or inducements of any kind have been made by the Commission or any member, officer, employee, agent, or representative of the Commission to induce Defendants to enter into this Consent.

6. Defendants agree that this Consent shall be incorporated into the P.I. Order with the same force and effect as if fully set forth therein.

7. Defendants will not oppose the enforcement of the P.I. Order on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waive any objection based thereon.

8. Defendants waive service of the P.I. Order and agree that entry of the P.I. Order by the Court and filing with the Clerk of the Court will constitute notice to Defendants of its terms and conditions.

9. Defendants acknowledge that no promise or representation has been made by the Commission or any member, officer, employee, agent, or representative of the Commission with regard to any criminal liability that may have arisen or may arise from the facts underlying this action or immunity from any such criminal liability. Defendants further acknowledge that the

Court's entry of a PI Order may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations. Such collateral consequences include, but are not limited to, a statutory disqualification with respect to membership or participation in, or association with a member of, a self-regulatory organization. This statutory disqualification has consequences that are separate from any sanction imposed in an administrative proceeding.

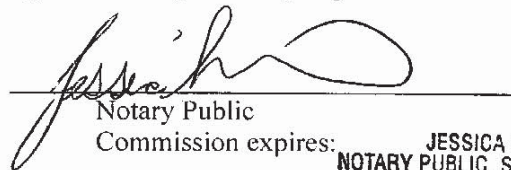
10. Defendants agree that the Commission may present the proposed P.I. Order to the Court for signature and entry without further notice.

Dated: 12/18/08




By: Bernard L. Madoff
In his individual capacity and in his capacity, if any,
as the owner or controlling person of Bernard L.
Madoff Investment Securities LLC, Madoff
Securities International Ltd. and Madoff Ltd.

On Dec 18, 2008, Bernard L. Madoff, a person known to me,
personally appeared before me and acknowledged executing the foregoing Consent.


Notary Public
Commission expires:

JESSICA SHANNON
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01SH6136253
QUALIFIED IN BRONX COUNTY
COMMISSION EXPIRES 11/07/2009

Approved as to form:


Ira Lee Sorkin
1177 Avenue of the Americas
New York, NY

A-930

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T: (212) 277-6576

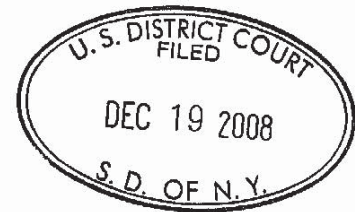
*Attorney for Defendants Bernard L. Madoff
and Bernard L. Madoff Investment Securities LLC*

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ORIGINAL



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

-----X
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

**BERNARD L. MADOFF and
BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,**

Defendants.
-----X

**08 Civ. 10791 (LLS)
ECF CASE**

**CONSENT OF SIPC TRUSTEE TO PRELIMINARY INJUNCTION
ORDER**

1. David Sheehan, Esquire, on behalf of Irving Picard ("SIPC Trustee"), who is the appointed trustee Bernard L. Madoff Investment Securities LLC ("Defendant BMIS") and who has all the duties and powers of a trustee as prescribed in the Securities Investor Protection Act of 1970, hereby consents to the entry of the proposed Order Imposing a Preliminary Injunction, Freezing Assets and Granting Other Relief Against Defendants in the form attached hereto (the "P.I. Order") and incorporated by reference herein.

2. Defendant BMIS agrees that this Consent shall be incorporated into the P.I. Order with the same force and effect as if fully set forth therein.

3. Defendant BMIS waives service of the P.I. Order and agrees that entry of the P.I. Order by the Court and filing with the Clerk of the Court will constitute notice to Defendants of its terms and conditions.

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Case 1:08-cv-10791-LLS Document 8-3 Filed 12/18/08 Page 2 of 2

4. Defendant BMIS agrees that the Commission may present the proposed P.I. Order to the Court for signature and entry without further notice.

Dated: 12/18/08



David Sheehan, Esq.
Baker Hostetler
45 Rockefeller Plaza
New York, New York 10111
(212) 589-4616

Attorney for Irving H. Picard, SIPC Trustee
For Defendant Bernard L. Madoff
Investment Securities LLC

A-933

Case 4:12-cv-01733-JSR Document 4-18 Filed 09/05/12 Page 10 of 14

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

BERNARD L. MADOFF and
BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendants.
-----x

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 2/9/09

08 Civ. 10791 (LLS)
ECF CASE

**PARTIAL JUDGMENT ON CONSENT IMPOSING
PERMANENT INJUNCTION AND CONTINUING OTHER RELIEF**

The Securities and Exchange Commission ("SEC") having filed a Complaint in this matter on December 11, 2008; the SEC that same day having filed an Application for Emergency Preliminary Relief Against Defendants Bernard L. Madoff ("Madoff") and Bernard L. Madoff Investment Securities LLC ("BMIS") (collectively, "Defendants"); Defendants that same day having entered a general appearance and consented to the Court's jurisdiction over the Defendants and the subject matter of this action; Defendants on December 12, 2008 having consented to the entry of a temporary restraining order, asset freeze, appointment of a receiver and other relief against Defendants; the Court that same day having entered such an Order; the Court on December 15, 2008 having issued an Order appointing Irving H. Picard, Esq. ("SIPC Trustee"), as trustee for the liquidation of the business of Defendants with all the duties and powers of a trustee described in the Securities Investor Protection Corporation ("SIPC"), and appointing the law firm of Baker & Hostetler LLP as appointed counsel for the trustee; and the Court having entered on December 18, 2008, the Order On Consent Imposing Preliminary

Injunction, Freezing Assets And Granting Other Relief Against Defendants (the “P.I. Order”); and Defendant Madoff having consented to entry of this Partial Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction), waived findings of fact and conclusions of law, and waived any right to appeal from this Partial Judgment:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Madoff, and each of his partners, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, telephonic notice, notice by e-mail or otherwise, are permanently enjoined from, directly or indirectly, singly or in concert, in the offer, purchase or sale of any security, by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails:

- a. employing any device, scheme or artifice to defraud;
- b. obtaining money or property by means of an untrue statement of material fact or omitting to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading; and
- c. engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser, in violation of Section 17(a) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. § 77q(a)], Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78j(b)], and Rule 10b-5 thereunder, [17 C.F.R. § 240.10b-5].

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Madoff, and each of his partners, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, telephonic notice, notice by e-mail or otherwise, are permanently enjoined from, directly or indirectly, singly or in concert, by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails:

- a. employing any device, scheme or artifice to defraud any client or prospective client; or
- b. engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon any client or prospective client, in violation of Sections 206(1) and 206(2) of the Advisers Act of 1940 (“Advisers Act”) [15 U.S.C. §§ 80b-6(1), (2)].

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Madoff shall pay disgorgement of ill-gotten gains, prejudgment interest thereon, and a civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] and Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9]. The Court shall determine the amounts of the disgorgement and civil penalty upon motion of the SEC. Prejudgment interest shall be calculated from the date of the first violation, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). In connection with

the SEC's motion for disgorgement and/or civil penalties, and at any hearing held on such a motion: (a) Defendant Madoff will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant Madoff may not challenge the validity of the Consent or this Partial Judgment; (c) solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the SEC's motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate non-parties.

IV.

IT IS HEREBY FURTHER ORDERED that Sections III through XII of the Court's Order On Consent Imposing Preliminary Injunction, Freezing Assets And Granting Other Relief Against Defendants, entered on December 18, 2008, are incorporated into this Partial Judgment and shall remain in full force until this action is fully resolved or as otherwise ordered by this Court.

V.

IT IS FURTHER ORDERED that this Partial Judgment shall be, and is, binding upon Defendant Madoff and his partners, agents, servants, employees, attorneys, subsidiaries, affiliates and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, telephone, e-mail or otherwise.

A-937

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VI.

IT IS FURTHER ORDERED that the Consent of Defendant Bernard L. Madoff to a Partial Judgment filed herewith is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant Madoff shall comply with all of the undertakings and agreements set forth therein.

Louis L. Stanton

UNITED STATES DISTRICT JUDGE

Issued at : 12 : 19 p.m.
February 9, 2009
New York, NY

ms

EXHIBIT H

Bloomberg

Madoff Trustee Drops \$279 Million From Claim Against Merkin

By Erik Larson - Nov 07, 2009

Nov. 7 (Bloomberg) -- The liquidator for [Bernard Madoff's](#) firm reduced by \$279 million the amount of fake profit he wants returned from [J. Ezra Merkin's](#) Ariel and Gabriel funds, which invested one-fourth of their money with the con man.

Trustee [Irving Picard](#), who is suing Madoff's biggest investors to help repay victims, on Nov. 2 dropped one of 12 claims against the hedge fund manager in U.S. Bankruptcy Court in New York, citing "further review of the law."

In the abandoned claim, he had sought the return of "intra-fund" transfers of Madoff-linked money to Ariel and Gabriel from Merkin's third fund, Ascot, which is also named in the lawsuit and invested all of its money with Madoff.

"We've determined that the facts don't support a finding for the original fund being a conduit for the money," Picard said yesterday in a phone interview. "The ultimate amount we are seeking in the lawsuit doesn't change."

The receiver still seeks a total of \$564.6 million from the three funds, as well as from Merkin and his management company, Gabriel Capital Corp. With the claim dropped, Picard will have to try to get more money damages from Ascot, which lost almost all of its \$1.7 billion in the fraud.

Ascot withdrew \$527.6 million in fake profit from Madoff's firm from 1995 to 2008, according to Picard's complaint. Ariel and Gabriel, which managed a total of \$2.6 billion, withdrew \$40 million in fake profit from 2000 to 2008, Picard says.

Remaining Claims

Cayman Islands-based Ariel and New York-based Gabriel, among the biggest Madoff investors, are being liquidated by court-appointed receiver [Bart M. Schwartz](#), who believes Picard's remaining claims are meritless.

“We continue to press forward with our motion to dismiss those claims,” Schwartz said in a letter yesterday to the New York State Court, where the funds are being liquidated.

Ascot is being liquidated separately by the court-appointed receiver [David Pitofsky](#) of the firm Goodwin Procter LLP. In July, Picard won a freeze on Ascot’s remaining assets of about \$10 million.

Lawyers for Ariel and Gabriel claim the funds’ managers didn’t know about Madoff’s fraud and withdrew only about 10 percent of their holdings in Bernard L. Madoff Investment Securities LLC.

Merkin, of New York, was closely associated with Madoff on a business and social level since at least the 1990s, according to the complaint. The men sat together on the board of trustees for Yeshiva University, Picard said.

New York Attorney General [Andrew Cuomo](#) sued Merkin and Gabriel Capital Corp. in April over claims he secretly placed client money with Madoff in exchange for \$470 million in fees. Merkin has denied the claims and wants the lawsuit dismissed.

Madoff pleaded guilty in March to using his investment company as a Ponzi scheme. He is serving a 150-year sentence.

The case is Picard v. Merkin, 09-ap-01182, U.S. Bankruptcy Court, Southern District of New York (Manhattan).

To contact the reporter on this story: [Erik Larson](#) in New York at elanson4@bloomberg.net.

To contact the editor responsible for this story: David E. Rovella at drovella@bloomberg.net.

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

<p>SECURITIES INVESTOR PROTECTION CORPORATION,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>BERNARD L. MADOFF INVESTMENT SECURITIES LLC,</p> <p style="text-align: right;">Defendant.</p>

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

SIPA LIQUIDATION

(Substantively Consolidated)

<p>In re:</p> <p>BERNARD L. MADOFF INVESTMENT SECURITIES LLC,</p> <p style="text-align: right;">Debtor.</p>

<p>IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>ERIC T. SCHNEIDERMAN, as successor to ANDREW M. CUOMO, Attorney General of the State of New York; BART M. SCHWARTZ, as Receiver for ARIEL FUND LTD. and GABRIEL CAPITAL, L.P.; DAVID PITOFSKY, as Receiver for ASCOT PARTNERS L.P., ASCOT FUND, LTD.; J. EZRA MERKIN; and GABRIEL CAPITAL CORPORATION,</p> <p style="text-align: right;">Defendants.</p>

Adv. Pro. No. 12-01778


**NOTICE OF JOINDER IN
MOTION TO WITHDRAW THE REFERENCE**

PLEASE TAKE NOTICE that Defendants J. Ezra Merkin and Gabriel Capital Corporation (collectively, the “Merkin Defendants”) hereby join in the motion to withdraw the reference to the Bankruptcy Court filed by Defendants Eric T. Schneiderman, as successor to Andrew M. Cuomo, Attorney General of the State of New York (the “NYAG”), Bart M. Schwartz, as Receiver for Ariel Fund Ltd. and Gabriel Capital, L.P., David Pitofsky, as Receiver for Ascot Partners L.P. , (collectively, the “Receivers”). The legal arguments as to why withdrawal of the reference is mandatory or, in the alternative, why permissive withdrawal is appropriate, are fully addressed in

the joint memorandum of law of the NYAG and the Receivers. Rather than burden the Court with duplicative briefing, the Merkin Defendants join in those legal arguments (but not any factual characterizations in the brief).

Dated: New York, New York
August 31, 2012

DECHERT LLP

By: 

Andrew J. Levander

Neil A. Steiner

1095 Avenue of the Americas

New York, New York 10036

Telephone: (212) 698-3500

*Attorneys for Ezra J. Merkin and Gabriel
Capital Corporation*

SOUTHERN DISTRICT OF NEW YORK
-----x

IRVING H. PICARD,,

Plaintiff,

v.

12 CR 6733 (JSR)

ERIC T. SCHNEIDERMAN, et al.,

Defendants.

-----x

New York, N.Y.
November 19, 2012
5:30 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

BAKER & HOSTETLER LLP
Attorneys for Trustee Irving Picard
DAVID J. SHEEHAN
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STATE OF NEW YORK

OFFICE OF THE ATTORNEY GENERAL, ERIC T. SCHNEIDERMAN

DAVID ELLENHORN

DANIEL SANGEAP

SECURITIES INVESTOR PROTECTION CORPORATION

NATHANIEL S. KELLEY

1 (Case called; in open court)

2 THE COURT: Before we get into the argument on the
3 issues that were presented on the papers, I guess I have what's
4 a factual slash legal question, and I guess I'll put this
5 question first to Mr. Sheehan: As I understand it, the suit by
6 the Attorney General was brought in April of 2009, yes?

7 MR. SHEEHAN: Yes, your Honor.

8 THE COURT: And you did not seek a stay at that time;
9 is that right?

10 MR. SHEEHAN: That's correct.

11 THE COURT: Or at any time up till now?

12 MR. SHEEHAN: That's correct, your Honor.

13 THE COURT: Why isn't that a waiver?

14 MR. SHEEHAN: Well, I think because in our case there
15 are literally hundreds of lawsuits out there. This is a very
16 prominent lawsuit, but there are dozens of them. When an
17 action is about to take place which we believe imperils the
18 assets of the estate, we then move -- as we did in Picower,
19 when we got the settlement, as with we did Maxam when they went
20 offshore, and as we did in the Stahl case, when those cases
21 started to proceed to the point where the judgment was about to
22 take place and we were imperilled at that point.

23 What we did in every instance when there is a lawsuit,
24 we do write, as we did in this instance and said that we
25 believe that the assets that you're seeking belong to the

1 estate, that if you in any way receive any of those assets, we
2 are going to move against you for a turnover.

3 So we put them on notice of that, and we tell them --

4 THE COURT: But the automatic stay is a stay against
5 the lawsuit going forward at all, correct?

6 MR. SHEEHAN: Correct, your Honor.

7 THE COURT: And this was certainly a prominent lawsuit
8 that you were aware of, yes?

9 MR. SHEEHAN: Oh, absolutely.

10 THE COURT: So, I'm still not understanding: You
11 could have, assuming your legal theory is right, you could have
12 applied to the bankruptcy court to enjoin the lawsuit right at
13 the beginning. Instead, you let it percolate and people go
14 forward -- for what, two or three years -- and only then
15 intervened or sought to intervene through injunctive
16 prohibition.

17 Why isn't that a waiver?

18 MR. SHEEHAN: Well, I think at the time we argued the
19 injunction, I think that's an issue that may come up. I would
20 submit to your Honor that we have an obligation to muster our
21 resources in such a way we could engage literally -- as your
22 Honor knows, we have quite a few litigations. We can have
23 literally dozens of applications for injunctive relief.

24 What we decided --

25 THE COURT: How long does it take to bring on a motion

1 to stay before the bankruptcy judge back in 2009? It's A
2 two-page brief at that point, one would have thought. They may
3 have contested it, and it might become a bigger thing, but, in
4 fact, you probably could have brought on an omnibus motion
5 involving dozens of lawsuits if that was the problem.

6 MR. SHEEHAN: Well, it's very interesting. That was
7 considered, and the bankruptcy court didn't think it was a good
8 idea, because each of these relies on --

9 THE COURT: The bankruptcy court didn't think it was a
10 good idea?

11 MR. SHEEHAN: No, it did not.

12 THE COURT: You got a ruling from Judge?

13 MR. SHEEHAN: No, we did not get a ruling from Judge
14 Lifland. We were down there and we had a number of these
15 things filed and suggested we should bring an omnibus motion.
16 And he said to us, quite correctly I think, what we should be
17 doing is, each of these relies on its own sets of facts, each
18 rises or falls depending on the nature of the claim, the nature
19 of the assets, the timing of them, et cetera, and each of those
20 should then be brought in the series and at whatever time we
21 thought it was appropriate.

22 Now, we run a risk. I'm not suggesting to your Honor
23 that was carte blanche to bring whatever we thought we should,
24 but at the same time, we were mustering our assets to do them
25 in a way that made sense, made sense to us. There was no

1 question that we were talking to each other, that each side
2 knew what -- sort of -- the other side was doing.

3 We had been actively litigating the Merkin case in the
4 bankruptcy court the whole time this case has been taking
5 place. They participated in that, they moved for summary
6 judgment, they lost -- moved for dismissal, I should say, and
7 lost. All kinds of activity has taken place on both sides
8 allegedly. We did not participate, however, in the state court
9 proceeding. There was a motion pending for almost -- well, I
10 think it's still pending but for over a year for summary
11 judgment.

12 So, we were just sitting, watching that, and at some
13 point, when the assets might become imperiled, which they might
14 be at this point obviously, but we were notified of this
15 settlement, we then moved promptly at that point -- last August
16 I guess it was -- seeking the injunctive relief that is the
17 subject of this motion to withdraw the reference.

18 I don't believe that's a waiver. Your Honor may see
19 it otherwise, but I think in the course of events that
20 transpire over a case of the magnitude of Madoff, the size of
21 what's going on, the issues that are involved, this is one, as
22 I say, of dozens of these lawsuits. And you're right, perhaps
23 we could have brought seriatim two-page, if you will, motions,
24 but --

25 THE COURT: I'm very far from reaching any conclusion

1 on this or any other of the issues before me today, but it
2 seems very strange, in light of normal bankruptcy practice,
3 which normally just says everyone stop, the only court that's
4 going to go forward is the bankruptcy proceeding, and, everyone
5 else, you don't go forward, you're enjoined from going forward
6 and if you do go forward, you're in contempt of the bankruptcy
7 court's injunction.

8 Here, from what you're telling me, in an important
9 lawsuit -- I'm sure it was by no means the only one, I hear
10 what you're saying there -- you allow to go on and everyone is
11 doing their thing and moving towards what was ultimately a
12 settlement, all with you being fully aware of it and doing
13 nothing to stop it. And then, three years later, when they
14 finally get a resolution, you say, oops -- or not oops, rather,
15 I guess what you say is, now is the time.

16 MR. SHEEHAN: Yes and no. There's no question that
17 this is a triggering event, but to ignore the last three-year
18 history as a matter of fact in their -- we didn't talk about
19 this because we didn't think we were going to talk about the
20 injunction, we talked about the motion to withdraw the
21 reference, but in their papers, they point out, we talked, we
22 had settlement discussions; it wasn't as though we were
23 ignorant of each other.

24 For a year they didn't talk to us at all. I didn't
25 take it personally, but they were on their own, we were still

1 litigating the Merkin case while that was all going on. We all
2 knew about each other.

3 THE COURT: The reason I raise this is because it
4 seems to me if there is a significant question -- and there may
5 not be -- of what constitutes waiver, it's a question of
6 federal nonbankruptcy law and therefore relevant to the
7 withdrawal issue. That's why I thought it ought to be raised
8 today.

9 MR. SHEEHAN: Well, I guess that hasn't been briefed.
10 And, quite frankly --

11 THE COURT: No, it hasn't been briefed, and your
12 adversary hasn't raised it, so they may have waived the waiver
13 argument.

14 MR. SHEEHAN: I think they did, actually. But
15 seriously, your Honor, that's an interesting thought. I don't
16 know why the waiver itself of an injunction of seeking to
17 enforce the automatic stay wouldn't be something within the
18 province of the bankruptcy court itself.

19 THE COURT: Well, because I don't think it's -- it may
20 be.

21 MR. SHEEHAN: Right.

22 THE COURT: I don't have any views yet of the final
23 sort, but the argument would be, it's a function of federal
24 common law, not a function of bankruptcy law. Arguably, it
25 doesn't matter whether the injunction was issued by the

1 bankruptcy court or any federal court whatsoever.

2 It certainly is true in many circumstances that a
3 failure to move for injunctive relief is an impediment to
4 getting injunctive relief, because the argument there, which
5 federal courts hear all the time, on which they find a close
6 question and not a slam dunk, is that you can't have been
7 irreparably harmed because if you were, if there was a threat
8 of you being irreparably harmed, you would have moved six
9 months ago.

10 Now, here, what you're saying is you weren't really
11 irreparably harmed until they got to the settlement, so that is
12 an argument. But my point is, that issue is not necessarily a
13 bankruptcy issue, I don't think.

14 MR. SHEEHAN: Well, I don't mean to prolong this, your
15 Honor, but the thought is that waiver just doesn't stand in
16 isolation, it's wrapped around a set of circumstances in the
17 law, it seems to me to here, that would have to be analyzed in
18 conjunction with whether the waiver was appropriate or not, is
19 the automatic stay and its implications in a bankruptcy
20 proceeding in terms of protecting the assets and, as you say,
21 preserving them.

22 THE COURT: That would be a fair argument, but the
23 argument the other way would be, it's not a question of waiver
24 vis-a-vis the automatic stay, it's waiver vis-a-vis the request
25 for injunctive relief, which is not a peculiarly bankruptcy

1 issue. But I just want to flag this and let me hear if your
2 adversary wants to say anything on this issue.

3 MR. ELLENHORN: Sure. May I?

4 THE COURT: Yes.

5 MR. ELLENHORN: Am I allowed to speak from there?

6 THE COURT: Yes.

7 MR. ELLENHORN: I think it's easier.

8 THE COURT: Shall we start on the fact you didn't
9 raise this issue? So I guess must think it's not worth it's
10 worth raising, or you chose to waive it.

11 MR. ELLENHORN: I did not choose to waive it. What we
12 did do, here's what we did do: We did not raise it in the
13 full-blown sense that you're raising it as a nonbankruptcy
14 issue, which needs to be a subject of withdrawing the
15 reference, et cetera, et cetera. What we did do was to lay out
16 in the papers the history of our relationships, of our two
17 offices. We pointed out, whether this leads to a waiver or
18 it's just a question of the propriety of an injunction,
19 certainly a three-year delay is something the Court would take
20 into account terms of the propriety of an injunction.

21 THE COURT: Let me ask you this. If I understood what
22 Mr. Sheehan just said, they told you early on that you
23 proceeded at your peril, so to speak?

24 MR. ELLENHORN: Yeah, that's right. What they did in
25 particular -- we had two meetings one in 2009, I believe, and

1 one in 2011, was a phone call. In 2011 I got a phone call --
2 it's in my affidavit, which is before you -- I got a phone call
3 from Marc Powers of their office saying -- this is almost a
4 year and a half ago probably -- I hear there is a possible
5 settlement of your case with Merkin, which had been going on
6 vigorously for two and a half years. I said, well, there might
7 be, there could be, but it's not imminent. He said, well,
8 unless you agree within 48 hours that any money that you get
9 belongs to us, we'll take control of it and you'll subject
10 yourself to the bankruptcy court's jurisdiction, we're going to
11 sue you, and you have 48 hours to decide.

12 My answer was that --

13 THE COURT: Gee, I'm amazed he gave you that much
14 time.

15 MR. ELLENHORN: Well, I said that Hitler gave the
16 president of Czechoslovakia a lot longer to decide whether to
17 turn over Czechoslovakia to the Germans, that I didn't think it
18 was appropriate --

19 THE COURT: It does seem like an inapt analysis.

20 MR. ELLENHORN: Well, it was an inapt -- well, it was
21 an analogy having to do with the time you need to make a
22 decision.

23 But I didn't need 48 hours; the answer as no. But
24 what I did say was, that if you wanted to come over and talk to
25 us about some possible resolution -- this, that, and the other

1 thing of our relationships, et cetera -- we welcome that, and
2 so forth. Never heard from the man again for a year and a
3 half, until this lawsuit. And that's in our papers, and that's
4 the factual setting from which one could derive the argument of
5 the waiver or at the very least laches, in terms of the
6 propriety of entering an injunction.

7 Unless you would like to pursue that further, I would
8 like to describe generally factually what we're doing here.

9 THE COURT: OK. Because this wasn't in the papers, I
10 want to make one quick note on what you all just said, although
11 we have a transcript but I find it very useful. This will just
12 take one second and then I'll hear from you.

13 (Pause)

14 THE COURT: OK.

15 MR. ELLENHORN: Now, what Mr. Picard is doing here, he
16 himself is seeking to prevent the Attorney General's Office
17 from consummating the \$410 million settlement that we got after
18 two and a half years of litigation. That's what he wants to
19 do. He wants to declare our action void ab initio -- that's
20 his term -- and at the same time take the fruit of it, I guess.

21 It's quite an interesting situation. On the one hand,
22 he wants a declaration that our case is void, it was void
23 ab initio because it violated the automatic stay provision, we
24 should never have brought it at the same time. I guess he
25 wants us to take the \$410 million and give it to him to

1 distribute to all the Madoff victims.

2 So, in effect, what he's happy to have us do is act as
3 his collection agent. And he describes himself this request --
4 and I'm reading from his papers -- as he says, "I bring this
5 motion with full awareness of the unusual, if not
6 extraordinary, nature of the relief sought here." And indeed,
7 as far as both sides can tell, it is essentially an
8 unprecedented request, to enjoin a state agency, law
9 enforcement agency, from distributing --

10 THE COURT: Yes, but of course that --

11 MR. ELLENHORN: Doesn't make it wrong.

12 THE COURT: Well, I wasn't saying that. It doesn't
13 make it automatically withdrawable.

14 MR. ELLENHORN: It doesn't make it what?

15 THE COURT: Automatically withdrawable, which is the
16 issue here.

17 MR. ELLENHORN: No, I understand that. It does
18 suggest, however, that if this case is not automatically
19 withdrawable or mandatorily --

20 THE COURT: It might be discretionarily withdrawable?

21 MR. ELLENHORN: Yes, absolutely. And we don't care
22 which way we get here, we just want to be here.

23 Now, what the essence of what they are saying is
24 that -- and I'm going to quote very briefly from the same
25 document, it's a memorandum of law in support of their

1 preliminary injunction motion -- they say that what they're
2 trying to do by taking this money from Merkin is to, quote,
3 wreak havoc, close quote, on the jurisdiction of the bankruptcy
4 court, that somehow our action, which is based on legal
5 theories that have absolutely nothing to do with the theories
6 on which they have sued Mr. Merkin, totally separate universe,
7 but they say nevertheless, we are wreaking havoc with the
8 bankruptcy system, we are interfering with the administration
9 of the Madoff estate.

10 This cannot be true, it is not true. Our case, as I
11 think you know, was brought --

12 THE COURT: I think you should assume that the judge
13 is a dumbbell because not even --

14 MR. ELLENHORN: Not a bit.

15 THE COURT: Well, my wife can fill you in chapter and
16 verse.

17 MR. ELLENHORN: All right, I'll assume that -- well,
18 look, we sued Merkin under the Martin Act, and the gravamen of
19 the case was that Mr. Merkin, according to us, had defrauded
20 hundreds of investors who put up a couple of million dollars
21 with him because he didn't tell them and he affirmatively
22 concealed from them the fact that he was turning over all of
23 the money from one fund and a substantial portion from the
24 other fund to Bernie Madoff. He told them and led them to
25 believe, I'm managing your money.

1 Most of these people, not everyone, never heard of
2 Bernie Madoff, didn't know about Bernie Madoff, assumed that
3 Merkin was handling their money. And that is the essence of
4 our case.

5 We also claim that he breached some duties to them,
6 fiduciary duties, to investigate the Madoff operation, even
7 though they didn't know Madoff was involved. That's our case.
8 We won a very strong motion to dismiss the complaint that Andy
9 Levander and Mr. Steiner brought. Judge Lowe rejected their
10 motion -- very strong opinion -- we moved for summary judgment
11 after two years of litigation, and we are on the verge --
12 everyone knew we were going to get summary judgment, it was
13 clear we were going to get summary judgment, although obviously
14 the decision wasn't rendered. We asked the judge to hold up
15 the decision while we were negotiating a settlement, and we got
16 a spectacular settlement, if you don't mind me saying so -- my
17 supervisor is here so I have to say it but it also is true --
18 \$410 million settlement.

19 (Continued on next page)

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1 MR. ELLENHORN: (Continuing) And that money we were
2 about to start to distribute through the receivers,
3 distinguished receivers, David Pitofsky and Bart Schwartz, to
4 hundreds of people who are victims of a fraud by Merkin. It
5 has nothing to do with Madoff. These people have no
6 relationship with Madoff. They have no SIPC insurance. They
7 are not investors with Madoff. They were investors with Ezra
8 Merkin, the money manager, who pocketed hundreds of millions of
9 dollars in commissions earning fees for managing this money.
10 That's what our case is about.

11 Now, their case, and you're familiar with it, a
12 fraudulent conveyance case and so forth, has nothing to do with
13 our case. And so this is not like the trio of cases they
14 relied on, one by Judge Koeltl, one by Judge Hellerstein, and
15 the third judge, I am sorry, I don't remember who, who did
16 issue injunctions against people who were suing the same party
17 that Picard was suing. And Judge Koeltl pointed out in the
18 Madoff v. Picard, he granted an injunction to stop somebody
19 from suing Picower in Florida.

20 THE COURT: The third judge was Judge Oetken.

21 MR. ELLENHORN: That's right. Thank you.

22 I happen to have before me Judge Koeltl's decision in
23 which he says very clearly, he says, nobody disputes "that the
24 factual allegations in the respective Florida complaints are
25 virtually identical to those made by Picard in his New York

1 action." That's a totally different situation from our
2 situation.

3 Now, why do we think you are required to withdraw the
4 reference? Very simple. In order for them to prevail, they
5 would have to show that the automatic stay applied, and that
6 would mean they would have to show what we are doing and have
7 done is to interfere with property, or take control of
8 property, or interfere with property of the Madoff estate. And
9 they can't do that because Judge Lifland has already ruled in
10 the Merkin litigation with Picard that Merkin's general money,
11 his assets, which come from many sources, including his
12 father's inheritance, legitimate business operations, artworks,
13 fees from the Madoff operation, and a whole bunch of other
14 sources, he has got money, it's fungible, that money, according
15 to Judge Lifland, and correctly so, is not property of the
16 bankrupt estate. And so to get around that ruling, what they
17 have done is to try to say in their complaint against us that
18 it is actually, quote, customer property under SIPA.

19 Their complaint has about seven different paragraphs,
20 including 6, 10, 11, 21, 24, and 37, in which they say that we
21 are interfering, by getting Merkin's money, getting a
22 settlement with him, which we obtained \$410 million, that money
23 is really customer property of the Madoff estate. Now, it
24 isn't, but that goes to the merits. But in order for you to
25 determine or some judge to determine the validity of that

1 claim, which I suspect is none, you have to interpret SIPA, and
2 that makes it mandatory withdrawal.

3 THE COURT: I wasn't sure I followed your Grupo
4 Mexicano argument.

5 MR. ELLENHORN: Not as strong, but here is the
6 argument. I say it's not as strong -- I want to be completely
7 candid -- because the withdrawal statute, as you well know,
8 says that you have to have mandatory withdrawal if you have to
9 interpret a non-bankruptcy law. I would think ordinarily that
10 means a statute. I don't know. We have argued to the
11 contrary, but I think it's not clear. We have argued that it
12 also means, if you have to interpret, as you would here, some
13 judge has to, the application of Grupo Mexicano to this
14 situation, you're interpreting and applying a Supreme Court of
15 United States decision, whether that is the type of law that is
16 contemplated by the mandatory withdrawal statute. I don't
17 know. I'm not sure.

18 THE COURT: Notwithstanding *Erie v. Tompkins*, there's
19 plenty of areas where federal common law provides the law.

20 MR. ELLENHORN: Absolutely.

21 THE COURT: It would seem strange that the withdrawal
22 statute wouldn't apply there.

23 MR. ELLENHORN: We have argued that. I just said I
24 didn't know the case clearly on point on whether it does or
25 not.

1 THE COURT: Which would be another issue of federal
2 law that might be a basis for mandatory withdrawal.

3 MR. ELLENHORN: We have argued that when and if we get
4 to the merits of this matter, we consider that case, that
5 Supreme Court case, to be basically dispositive of this matter
6 that a federal court cannot issue an injunction to prevent
7 Mr. Merkin from settling with one of the people, in this case
8 the attorney general of the state of New York, who sued him and
9 beat Mr. Picard to the courthouse or beat him to a settlement.

10 In any event, they have to argue that Grupo Mexicano
11 doesn't apply in this proceeding. Again, that requires an
12 interpretation of whether Grupo Mexicano applies to a SIPA
13 proceeding, and that's a matter that you have to hear.

14 So those are the principal reasons why we think there
15 is mandatory withdrawal.

16 In terms of discretionary withdrawal, I can only say
17 two things really. Number one, this is, and I think everyone
18 agrees, indeed they say so in their papers, a most
19 extraordinary case. I know there are hundreds of Madoff cases.
20 I know you have hundreds yourself, or pieces of them. This is
21 an extraordinary one. It is the only one, with one exception
22 that I will mention in a second, with a lawsuit against a
23 sovereign law enforcement agency that has completed the
24 litigation, ready to distribute the money. But for the fact
25 that they brought this proceeding, David Pitofsky and Bart

1 Schwartz were in the process of getting ready to contact
2 several hundred investors all over the world, mostly in America
3 and New York, to get them lined up for applying for their share
4 of the \$410 million.

5 Now, we are getting held up by this very lawsuit from
6 doing that as a practical matter. We couldn't go ahead and do
7 it even though there is no TRO. So we think it is an
8 extraordinary case. It is very important. That's a reason for
9 you to hear it if you're not required to hear it. We certainly
10 think you ought to hear it.

11 I don't have too much more to add. The two receivers
12 are represented here by Mr. Glosband and Mr. McCarroll. They
13 have arguments as to why there is mandatory withdrawal, which
14 are really more appropriate for them to make than for me to
15 make because they really relate directly to the action against
16 the funds and Merkin, and because they are bankruptcy lawyers
17 and I am not. So if you don't mind.

18 THE COURT: That's fine. Let's hear from them now.

19 MR. MCCARROLL: James McCarroll of Reed Smith on
20 behalf of Bart Schwartz as New York State court appointed
21 receiver for Ariel Fund Ltd and Gabriel Capital, L.P. I will
22 seek not to retread any of the ground that Mr. Ellenhorn has
23 covered, but by way of further context for the Court, I will
24 note that Ariel and Gabriel, which are the names I will use for
25 the funds rather than the full names, with the Court's

1 permission, Ariel and Gabriel both were funds that were
2 represented to investors to be invested in broadly diversified
3 pools of largely distressed debt focused assets that Mr. Merkin
4 would manage, spend substantially all of his working hours
5 actively managing.

6 In fact, as alleged in our complaint against the
7 Merkin defendants, Mr. Merkin and his company Gabriel Capital
8 Corp., the assets of those funds were invested approximately 25
9 to 30 percent secretly in the Madoff entity, in BLMIS, and the
10 remainder was largely turned over to another asset manager, an
11 entirely legitimate asset manager, that in fact generated quite
12 nice returns, but that was not what investors were told.

13 Mr. Ellenhorn described the attorney general's suit
14 against the Merkin defendants. The Ariel and Gabriel receiver
15 brought a separate suit against the Merkin defendants in which
16 we allege breaches of fiduciary duty, breaches of contract, and
17 other state law claims.

18 Now, the trustee seeks to conflate, in our view,
19 property of the estate and other claims. We make no argument
20 whatsoever that the trustee's fraudulent transfer claims are
21 purely property of the estate. We are not prosecuting shadow
22 fraudulent transfer claims. We are certainly not going to a
23 foreign court seeking an injunction. We are prosecuting claims
24 that the trustee, as this court has held, specifically cannot
25 prosecute. The trustee is prosecuting his own claims. His

1 claims are property of the estate. The receivers' and
2 certainly the New York attorney general's claims are not
3 property of the estate.

4 Similarly, the Merkin defendants' assets are not
5 property of the estate. Judge Lifland has held that they are
6 not subject to immediate turnover pursuant to bankruptcy code
7 section 542. That was the one count that was dismissed.

8 THE COURT: But his holding, even you and Mr.
9 Ellenhorn emphasized of course, is itself a reason against
10 withdrawal because that's been determined, that's been
11 determined in your favor, there is no issue there. It was a
12 bankruptcy issue to begin with and he determined it. So the
13 question is, do you have an argument for withdrawal that is
14 different from the arguments that Mr. Ellenhorn just put forth?

15 MR. McCARROLL: Yes, your Honor. I would expand a bit
16 on the Grupo issue, if I may.

17 THE COURT: Sure.

18 MR. McCARROLL: With regard to the Grupo case, we
19 certainly agree with the court's general view that Supreme
20 Court precedent in the non-bankruptcy context is federal
21 non-bankruptcy law that would require withdrawal, consideration
22 of which would require withdrawal. The Grupo Mexicano case
23 very clearly prohibits a mid-litigation asset freeze. That is
24 precisely what is sought here. The trustee seeks to freeze
25 assets not property of the estate.

1 THE COURT: If it is property of the estate, as he
2 argues, then Grupo Mexicano would be irrelevant, wouldn't it?
3 So doesn't it dovetail back to the issue whether it's property
4 of the estate or not, which he would argue is a pure bankruptcy
5 issue, rather than to apply a different non-bankruptcy issue
6 that warrants mandatory withdrawal? Of course, discretionary
7 withdrawal is a different possibility, but on just a mandatory
8 withdrawal I am not understanding fully what the invocation of
9 Grupo Mexicano brings to the table.

10 MR. McCARROLL: Certainly, your Honor. As we read the
11 trustee's injunction motion, memorandum of law in support of
12 the injunction motion, indeed, his responsive papers with
13 regard to our motion to withdraw the reference, which
14 admittedly our motion to withdraw the reference touches a good
15 deal on the substance of the underlying action, the trustee's
16 response does as well. As we read the trustee's papers, he is
17 reaching for a SIPA basis on which Mr. Merkin's property
18 becomes --

19 THE COURT: That's the argument that your colleague
20 just said is your strongest argument, and I am by no means
21 suggesting that that isn't equally applicable to your client as
22 well. The other arguments that were raised, the Grupo
23 Mexicano, the Barton doctrine, the various arguments raised, I
24 appreciate Mr. Ellenhorn's candor because I am having trouble
25 seeing how those are strong arguments. That's why I want to

1 hear you on it.

2 MR. McCARROLL: With regard to the application of
3 Grupo, I would submit that application of Grupo in the context
4 whereas the trustee, we would submit, here is reaching to find
5 a definition under SIPA to expand the property of the estate,
6 to bring in a non-debtor, non-controlled party, non-affiliate's
7 assets into the estate.

8 THE COURT: If he is right about SIPA, or if there is
9 no meaningful issue under SIPA that I have to decide, so that
10 that, for the sake of argument, can't supply the basis for
11 withdrawal, then how does Grupo Mexicano supply an independent
12 basis for a withdrawal?

13 There are three possibilities. It's a slam dunk that
14 he is right about this being property of the estate, SIPA gives
15 him full power, etc. etc. The second possibility is he is
16 wrong. It is obviously not. Neither of those gives me
17 necessarily the right for mandatory withdrawal. The third
18 possibility is there is a real novel, interesting
19 non-bankruptcy issue under SIPA, which has both bankruptcy and
20 non-bankruptcy aspects, and I need to resolve it. OK. That
21 might be a basis for withdrawal.

22 If that is enough basis for withdrawal, because it is
23 either clear-cut one way or the other, then how does Grupo
24 Mexicano add anything? How is it an independent basis for
25 withdrawal? What is the issue under Grupo Mexicano that would

1 apply even if he were right about SIPA?

2 MR. McCARROLL: Your Honor, I would submit that if the
3 trustee is right about SIPA and SIPA makes Mr. Merkin's assets
4 somehow property of the estate, that does require substantial
5 and material interpretation. Even if it were clear, I suppose
6 it would be the first time it's clear.

7 THE COURT: So that's all the SIPA issue. I am still
8 not seeing what the Grupo Mexicano issue provides in the way of
9 an independent basis for withdrawal.

10 MR. McCARROLL: Well, your Honor, the trustee seeks a
11 mid-litigation asset freeze against Mr. Merkin.

12 THE COURT: Let's assume that it is property of the
13 estate. Grupo Mexicano would not prevent that, would it?

14 MR. McCARROLL: If we assume that Mr. Merkin's assets
15 are property of the estate, then this is an application of the
16 automatic stay as though we were suing the debtor himself.

17 THE COURT: If, on the other hand, it's not property
18 of the estate, then he can't stop it regardless of Grupo
19 Mexicano. He has no basis to apply the stay period.

20 MR. McCARROLL: Your Honor, I apologize if I am headed
21 in the wrong direction, but I do think this comes back to the
22 novel interpretations under SIPA of property of the estate and
23 of assets.

24 THE COURT: I agree that that may be a real
25 withdrawable issue. I think we are going a little bit in

1 circles here. It may be my denseness. I am failing to see
2 what Grupo Mexicano adds to the equation.

3 MR. McCARROLL: Certainly, your Honor. I also would
4 note that the trustee seeks a creative, if I may, and expansive
5 reading of bankruptcy code section 105(a).

6 THE COURT: He has long since proved himself to be a
7 master of creativity, but that's not necessarily your fault.

8 All right. Unless you had anything further to say, I
9 need to hear from your other colleague.

10 MR. McCARROLL: If I may touch briefly on the Barton
11 doctrine.

12 THE COURT: Yes.

13 MR. McCARROLL: The receivers were appointed in June
14 2009 by order of the New York State Supreme Court. In the
15 order appointing each of the receivers, there was an express
16 injunction and prohibition against commencement of any action
17 against the receivers, except in or with permission of the
18 court overseeing the receivership actions. This is precisely
19 consistent with what was contemplated by Barton v. Barbour.
20 It's a venerable case from the 1880s. It, indeed, is still
21 quite active and very much good law. Coincidentally, I am
22 sure, that was acknowledged in an article published by a
23 partner of Baker & Hostetler on the very day that this action
24 was commenced against the receivers, and that article is
25 attached as an exhibit to my declaration in support of our

1 withdrawal motion.

2 The Barton doctrine is quite straightforward I
3 believe. Simply, it holds that if one seeks to pursue an
4 action against a receiver, the party seeking to pursue that
5 action must go to the appointing court, seek leave of that
6 court, or proceed before that court to seek relief. In his
7 responsive papers, the trustee cites a number of cases where a
8 bankruptcy trustee proceeded before the bankruptcy court that
9 appointed that trustee seeking to enforce the Barton doctrine
10 to halt litigation against the bankruptcy trustee in a foreign
11 court, in a state court or a federal court.

12 Respectfully, that is precisely the opposite of what
13 is happening here. The trustee argues that this is within the
14 core competency of the bankruptcy court to hear and decide
15 application of the Barton doctrine. We submit that is
16 incorrect. In fact, this is the first instance where we are
17 aware of, and the trustee doesn't cite any cases, where the
18 Barton doctrine is applied in the context of a SIPA proceeding.

19 Moreover, your Honor, this is precisely the Grupo
20 situation of a need for substantial and material interpretation
21 of federal non-bankruptcy law, a Supreme Court precedent that
22 has been considered and has been the basis upon which, as we
23 cite in our papers, it's been the basis upon which numerous
24 federal courts have found they lack subject matter jurisdiction
25 over receivers and dismissed proceedings accordingly.

1 THE COURT: Thank you very much. Let me hear from
2 your other colleague.

3 MR. McCARROLL: Thank you, your Honor.

4 MR. GLOBAND: Good afternoon, your Honor. I want to
5 address why Rule 65 applies here and why in turn that
6 implicates a need to withdraw the reference.

7 The trustee says in his papers that in seeking a
8 Section 105 injunction, Rule 65 standards don't apply, and he
9 lifts a few quotations out of context from which you can reach
10 that conclusion, but if you put them back into context, or you
11 read the rest of the cases, they don't say that.

12 The cases that he cited, in particular, Calpine and
13 the Chateaugay case, both are reorganization cases and they
14 stand for what is a fairly uncontroversial principle, which is
15 that Rule 65 standards have to be modified a little bit to fit
16 the bankruptcy context. So, for example, the proof of
17 irreparable harm is not necessarily to the plaintiff if it were
18 a reorganization case. Instead, the proof of irreparable harm
19 is to the reorganization process. And the issue of whether the
20 party seeking the injunction can demonstrate success on the
21 merits is not necessarily in finding on the merits in the
22 litigation, but instead, you can focus on whether there is a
23 likelihood of successful reorganization.

24 So in that sense, there has been in this circuit a
25 recognized modification of the Rule 65 standards, but otherwise

1 they apply, all of them.

2 So here we have a liquidation and the only case among
3 those that the trustee cites that involves a liquidation is one
4 where the court applies the traditional standards.

5 THE COURT: I think there is an argument perhaps, and
6 I want to stress I am making no determinations today, but there
7 is an argument that the bankruptcy court, as a specialized
8 court so to speak, has in some decisions attempted to carve out
9 a different view of what is required for injunctive relief than
10 is common in the rest of federal law, and that that's a
11 difficult and somewhat novel issue that involves not just
12 bankruptcy law but Rule 65 and federal law generally -- again,
13 I think there is federal common law that may come into play
14 here -- and that that's an appropriate basis for a withdrawal.

15 And I am reminded -- I say this really so the trustee
16 can address it -- the federal circuit some years ago took the
17 position that the characteristics of intellectual property law
18 allowed that court to frame a different view of what was
19 required for injunctive relief that was true in all the other
20 federal courts. Certain presumptions were recognized by the
21 federal circuit that were not recognized elsewhere. And the
22 Supreme Court reversed. And the Supreme Court said in effect,
23 no, general principles of federal law govern, and the fact of a
24 particular kind of subject matter may not be irrelevant, but it
25 doesn't really fundamentally change the requirements of, in

1 that case, non-copyright law, in this case, non-bankruptcy law.

2 So I think there may be an issue there along the lines
3 that you're talking about. It's not a well settled area. But
4 was there anything further you wanted to say?

5 MR. GLOSBAND: Yes, your Honor.

6 Recognizing that that may be an issue, that was not
7 the issue that I was planning to argue. Because if in fact
8 some permutation of rule 65 does apply in bankruptcy, and it
9 clearly does, bankruptcy rule 7065 says rule 65 applies for
10 requests for an injunction under Rule 7001. So you start off
11 with a rule scheme that says rule 65 applies.

12 If we assume that it applies, perhaps subject to
13 modification slightly in bankruptcy, then it's going to require
14 not just that the trustee demonstrate some likelihood of
15 success on the merits of his injunction action, those are the
16 property issues which implicate SIPA issues as Mr. Ellenhorn
17 described, but it also means he has got to demonstrate some
18 likelihood of success on his underlying avoidance action on
19 which much of his state complaint is premised. He says,
20 basically, we are trying to collect \$560 million from
21 Mr. Merkin, and if Mr. Ellenhorn gets 410 of that, we are
22 prejudiced.

23 (Continued on next page)

24

25

1 MR. GLOSBAND: (Continuing) So I think it's necessary
2 to look at the allegations in the underlying avoidance action,
3 each and every one of them. And there are 12 counts each, and
4 every one of which implicates a SIPA issue on which your court
5 has separately withdrawn reference. And to evaluate those,
6 there's not a one that isn't either eliminated if we accept
7 your Honor's position on either Section 546(e) or severely
8 impugned if we accept your position on the standard of
9 disproving good faith. Those either eliminate or create good
10 defenses for or reduce the liability numbers materially.

11 So, to determine whether or not they have a chance of
12 succeeding on the merits of their underlying case, which was
13 the basis in large part for their request for injunctive
14 relief, you have to basically import all of those SIPC issues
15 because they infect the entire matter.

16 So, in our view at least, that necessitates withdrawal
17 of the reference of this case because you can't not consider
18 those.

19 THE COURT: All right. Thank you very much.

20 I think we're ready to hear from the trustee.

21 MR. SHEEHAN: Your Honor, I guess what we're here
22 again today to talk about is a substantial material
23 consideration. Nothing I've heard with regard to the Martin
24 doctrine, Grupo Mexicano has anything to do with the
25 substantial material consideration of federal nonbankruptcy

1 law.

2 I don't think that -- as a matter of fact, I really
3 like the Grupo Mexicano case, I love reading a good judge,
4 Scalia, and how he analyzes things. And he makes it perfectly
5 clear, perfectly clear, that when you're talking about a Mareva
6 injunction -- that's what was involved there, that is, a
7 prejudgment writ -- you have to do one of two things; you
8 either have to take advantage of the state court, because
9 that's what Congress says, state court laws can be used --
10 people do do that. For what? You can be in the bankruptcy
11 court, where over centuries what has developed there is a way
12 to preserve the assets. Congress has indeed spoken here. It's
13 why Judge Daniels in Adelpia correctly said that Grupo
14 Mexicano has no place in the context of a bankruptcy
15 proceeding.

16 So where's the substantial material issue here when we
17 have clear guidance from Judge Scalia -- Justice Scalia, Judge
18 Daniels, and it's pretty plain on its face we're not talking
19 about the kind of injunctive relief that was talked about in
20 Grupo Mexicano. We're not talking about a Mareva injunction
21 here; we're talking about the automatic stay. And as your
22 Honor has said, the most important thing there is this: Are we
23 talking about property in the estate, and if we are, that ends
24 the inquiry.

25 And I suggest to your Honor -- and I know your Honor's

1 very familiar with this, I must have read the St. Vincent's
2 case at this point about five times. I've reread it again
3 yesterday. And what I particularly liked about it was of
4 course your holding but on top of that was the fact that your
5 Honor chose to use as a springboard for suggesting what the
6 powers are under the bankruptcy act was a Madoff case, it was
7 in fact the Fox/Marshall case, the one that was affirmed by
8 Judge Koeltl and now stands before the Second Circuit, that
9 made it very plain what we were talking about in that
10 particular case was in fact property of the estate.

11 So, what are we talking about here? We're talking
12 about property of the estate.

13 Before I go there, though, I want to make one point:
14 Who made that decision? Who can make that decision, makes it
15 every day? Doesn't have to get into a substantial material
16 consideration of nonfederal bankruptcy law to get there. The
17 bankruptcy judge does. Judge Lifland did there, and he did it
18 again in the other two cases that have also been affirmed.
19 This does not require an Article III decision with regard to a
20 substantial interpretation of a nonfederal bankruptcy law,
21 including SIPA. And I'll get to that in a minute.

22 Why is it the property of the estate, though,
23 something that Judge Lifland certainly has ALL the capacity to
24 understand and decide? What we're talking about here is this:
25 \$560 million leaves BOMIS and goes to Merkin's three funds.

1 That's what we're talking about. Any doubt that's property of
2 the estate? Does not that SIPA statute incorporate the
3 bankruptcy law that says that that's property of the estate?

4 The fact that it might also be, in addition to that,
5 customer property is of no real consequence to that ultimate
6 decision. We argue that -- your Honor knows that, we keep
7 using that mantra that I won't repute because you know what it
8 is -- but the point is that at the end of the day, it's
9 property of the estate. The only thing in it was other
10 people's money -- I used it anyway, I'm sorry it slipped out,
11 but in any event, at the end of the day, that's what it was and
12 that's what went to Mr. Merkin. That's what we're trying to
13 get back. We're not talking about Cerberus or any of his other
14 funds or any of his other investments. We're talking about
15 that money.

16 Why is it important? And I'm repeating something your
17 Honor already knows from St. Vincent's but I'll say it very
18 quickly: Once we have lawsuits proliferating all over the
19 place, going after that property of the estate, what do we
20 have? Very uneven results. We have people getting advances in
21 the courthouse, people getting more money than others are
22 getting -- just what the bankruptcy code says shouldn't happen,
23 the exact reason why you have the automatic stay, to freeze all
24 the assets in place, to make sure that they return to what the
25 bankruptcy code provisions that provide for an equitable

1 distribution.

2 If we don't do this, then what happens is we have the
3 whole scheme fall apart. It's why --

4 THE COURT: But in some ways -- and I don't mean to
5 beat a dead horse -- this is why I was troubled by your failure
6 to intervene until three years down the line, because it seems
7 to me that you are right, that a purpose, maybe a primary
8 purpose, of the automatic stay is so that the trustee or
9 whoever can proceed unfettered by other lawsuits that are going
10 after -- and this of course assumes that I were to agree with
11 your view that this is property of the estate, but assuming
12 that, then the time to cut it off is right at the beginning.

13 MR. SHEEHAN: Well, yes, I --

14 THE COURT: Why do you allow folks to spin their
15 wheels, the State of New York to spin its wheels, for years?

16 MR. SHEEHAN: Well, we did write that letter, so we
17 did tell them where we were coming from.

18 But here's the other issue, though, your Honor, and
19 that is, there's really no prejudice to us at that point, no
20 money was leaving Mr. Merkin, it wasn't going anywhere, it
21 wasn't going to leave until some action took place. And we do
22 have a number of other things to pursue, we put these fellows
23 on notice, we told them where we were.

24 By the way, I can't get into discussions here because
25 408 precludes it, but there's a lot of things that happened

1 here that aren't being discussed here today. So, it's not as
2 though this all happened in a vacuum. Mr. Ellenhorn alluded to
3 some of it. I'm not going to get into the rest of it because I
4 can't, I won't. But to suggest that somehow we just sat there,
5 like cigar store Indians watching them literally fighting over
6 what we thought was property of the estate and were not an
7 active participant and watching what was going on and going
8 back and forth, being involved -- not true.

9 So, then it gets to the point where they're not acting
10 like a cigar store Indian, now they're act like a war party,
11 and they're coming out and they're going to try to take the
12 money. We jump in blow the bugle and say -- I love all the
13 analogies, but in any event at the end of the day, what should
14 happen here is that the automatic stay should be invoked and
15 that property of the estate should be preserved.

16 Let me make --

17 THE COURT: I have a question: What was the last time
18 you saw a cigar store Indian.

19 MR. SHEEHAN: You know.

20 MR. ELLENHORN: At a movie about Lincoln this weekend,
21 I saw one.

22 MR. SHEEHAN: In any event, your Honor, just to stick
23 with this for another moment -- it's why I think it's really
24 important and why I think -- I think the Martin doctrine has no
25 application here, and certainly Judge Lifland again, certainly

1 capable much handling it, he handled the Martin doctrine in the
2 Maxam case, did it there, but let's look at it this way, let's
3 go back and we can get into Stern/Marsh and we can do a lot of
4 good things here.

5 They filed a claim, they filed a claim with us, all
6 right. So they're sitting there saying they're owed all this
7 money, but all three of the funds filed the claim. We then sue
8 them -- avoidance action, right? It's all where? Being
9 resolved in the bankruptcy court. Ultimately, those claims
10 will be decided. Whether they settle or not, this litigation
11 continues against them and against the Merkins.

12 So, at the end of the day, that's where it all should
13 be resolved, and that's where it's going to continue to be
14 resolved. And it makes sense then therefore that that property
15 of the estate be preserved pending the outcome of all the
16 resolution of those issues, that will be resolved in toto by
17 virtue of the resolution of the claims and the resolutions of
18 the avoidance action, just again what Congress anticipated
19 should happen will happen and is going to happen.

20 The temporal experience that your Honor relates, I
21 understand your concern and your pause there, but I don't think
22 it changes materially any of the facts, nor do I think it gives
23 rise to what would be a substantial material consideration of a
24 nonfederal statute.

25 THE COURT: But --

1 MR. SHEEHAN: I'm sorry -- if you're ready, I'm ready
2 to sit down.

3 THE COURT: I wanted to hear from your colleague.

4 MR. SHEEHAN: All right.

5 THE COURT: I don't know if you wanted to be heard or
6 not.

7 MR. KELLEY: Thank you, your Honor. Just briefly, as
8 discussed in our brief, a liquidation under SIPA must be
9 referred to the bankruptcy court and is to be conducted as a
10 bankruptcy proceeding. That's the default, that's the starting
11 point, as in an ordinary bankruptcy proceeding. The matter
12 must only be withdrawn if it requires consideration of or
13 substantial interpretation --

14 THE COURT: Mandatory; there's also discretionary?

15 MR. KELLEY: Yes, right. But as far as mandatory
16 withdrawal is concerned --

17 THE COURT: There are limited situations where -- we
18 don't have to worry about this tonight, but where the Court on
19 its own, under the statute, can withdraw the reference if it
20 threatens the jurisdiction of the Court, for example, or
21 something like that, of the district court.

22 MR. KELLEY: Right, your Honor.

23 But in this case, the issues raised by the movants can
24 all be handled -- and are regularly handled -- by bankruptcy
25 courts. The trustee only needs to rely upon the bankruptcy

1 code in Sections 362, 105(a), 541, in order to succeed on its
2 motion for an injunction.

3 The movants argue that Grupo Mexicano and Barton
4 haven't been considered in the context of a SIPA proceeding,
5 but a substantial interpretation of SIPA isn't necessary to
6 resolve those issues. Because those are some of the -- in the
7 case of Grupo, it's not applicable to a bankruptcy proceeding
8 and there's no argument why SIPA would change our result.

9 As the trustee's counsel explained, Barton can easily
10 be handled under the bankruptcy code as well, and there's no
11 need for SIPA to be invoked to change that result as well.

12 In short, there are a lot of issues that have never
13 been considered in a SIPA proceeding, but because this is a
14 SIPA liquidation, which is supposed to be conducted as a
15 bankruptcy proceeding, and because there's really no argument
16 that SIPA changes the result and that the trustee can proceed
17 strictly on the bankruptcy code, mandatory withdrawal of the
18 reference is not warranted.

19 THE COURT: All right, thank you so much.

20 Let me hear briefly in rebuttal from movants, if you
21 want to be heard.

22 MR. ELLENHORN: Well, very briefly, I'll be extremely
23 brief.

24 Two points only: They keep bouncing away from their
25 reliance on SIPA as a basis for saying this is customer

1 property and therefore we're interfering with it. They're
2 right, Judge Lifland has ruled that Merkin's assets, Merkin's
3 money, which comes from many sources, is not property of the
4 estate, he's ruled on that. So they're trying to get around
5 it. How are they going to get around it? Well, we don't think
6 they can ultimately, but they're trying to get around it by
7 pleading in six different paragraphs in their complaint that
8 it's actually customer property -- it's a fine line -- under
9 SIPA and that therefore requires you to determine the validity
10 of that argument, which we think it has none but that's not for
11 today.

12 The second and last point that I wish to address more
13 goes to the general framework of what we're doing here. What
14 they're saying is, we, Irving Picard, are the only ones to
15 distribute this money, \$410 million. Why? Because it's the
16 only equitable thing to do. And they have this mantra, that
17 they keep feeding to the press in particular, that says that
18 there's something inappropriate about the Attorney General
19 turning over money to Merkin's victims who will then somehow be
20 better off or something than Madoff's victims. This is absurd.

21 I don't want to reargue what I have already argued
22 today, but the hundreds of people who are the intended
23 beneficiaries of our lawsuit did not invest with Bernie Madoff,
24 and they do not have \$500,000 each of SIPA insurance and they
25 have nothing to do with Bernie Madoff. It just happens that

1 Merkin turned the money over to Madoff. He could have turned
2 it over to somebody else and we'd still have the same lawsuit
3 if the money had gone down.

4 And so to try to lump these hundreds of people who
5 invested with Merkin and put them in the same huge boat as to
6 13,000 people or whatever it is who invested with Bernie Madoff
7 is just fundamentally wrong. It's wrong as a matter of law,
8 it's wrong as a matter much fairness, it's wrong politically,
9 it's wrong equitably, it's just wrong. But it's that notion
10 that lies behind this whole attack on our office, as an office
11 that is somehow trying to either interfere with what they're
12 doing for the Madoff victims or somehow taking -- et cetera,
13 acting unfairly, trying to jump the Merkin victims to the head
14 of the line. This is just not true.

15 Thank you.

16 THE COURT: Thank you.

17 Yes, sir.

18 MR. MCCARROLL: Yes, your Honor, thank you. Very
19 briefly.

20 First, I would simply address the Court's point with
21 regard to waiver and the later-raised issues of waiver of
22 waiver arguments, simply to note that we did not endeavor to
23 brief all of the merits of the underlying action in connection
24 with this motion to withdraw the reference. There's an ample
25 and relatively well settled body of case law on the standards

1 for waiver in the context of prosecuting an injunction action,
2 as Mr. Glosband has noted, the applicability of Rule 65 and a
3 number of other substantive federal issues where the law is
4 well settled or in some instances otherwise before this Court,
5 the reference already having been withdrawn would be briefed in
6 full in the context of the preliminary injunction and the
7 declaratory judgment action. And we certainly reserve our
8 position and would intend to pursue a waiver argument in that
9 context.

10 With regard to Barton and Grupo, I would simply note
11 again that these are substantial issues of federal
12 nonbankruptcy law. Mr. Ellenhorn has already touched on the
13 reality of the SIPA overlay here and the trustee relying
14 heavily upon SIPA.

15 I also simply would note that the avoidance actions
16 that Mr. Sheehan refers to -- the avoidance actions against
17 Mr. Merkin and each of the funds represented by the
18 receivers -- will be a largely decided before this Court in
19 light of withdrawal of the reference on the substantial volume,
20 perhaps the great majority of the underlying claims.

21 THE COURT: All right, very good.

22 Yes, I'm sorry, and then I'll give Mr. Glosband
23 perhaps the final say.

24 MR. GLOS BAND: Your Honor, there are two aspects of
25 property that we're considering here. And we have talked

1 mostly about Mr. Merkin's assets and whether those are property
2 of the estate or not in light of both the Second Circuit's
3 ruling in Colonial Realty, your adoption of that in some other
4 matters, and also in light of the ruling by the bankruptcy
5 court on whether it's customer property, so we have property of
6 the estate and then customer property being two different sets
7 of cases.

8 But we haven't talked much about the claims that are
9 at issue here, and Mr. Ellenhorn described the nature of the
10 Attorney General's claims. Those claims are very different
11 from the claims in the Stahl and the Fox cases, which were
12 claims brought by Madoff customers on what were clearly causes
13 of action that belonged to the trustee. So they were
14 interfering with property of the estate because they were
15 trying to prosecute causes of action that belonged to the
16 trustee.

17 The Attorney General's claims are much more like the
18 claims in the JP Morgan and the HSBC cases, that don't belong
19 with the trustee. So that raises the question of can the
20 trustee stay litigation of a claim that he doesn't have
21 authority to bring. And at least to my thinking, because
22 determining whether the trustee had rights to those kinds of
23 claims was a SIPA issue, determining whether he can stay
24 somebody else prosecuting those kinds of claims is similarly a
25 SIPA issue -- does it somehow extend beyond what are

1 traditional doctrines in this court, Kaplan versus Marine
2 Midland and the like, that say those claims don't belong to the
3 trustee, they're somebody else's? As Judge McMahon said, you'd
4 be usurping -- that's somebody else's rights if the trustee had
5 the right to bring those claims.

6 So I just wanted to focus on those separate property
7 issues with respect to the claims and say that I think that
8 implicates SIPA questions that require withdrawal.

9 THE COURT: All right, thank you.

10 MR. SHEEHAN: The only reason I wanted to speak, your
11 Honor -- because you did invite me to and then I forgot to get
12 to it, and, that is, Rule 65 and a wonderful Federal Circuit
13 case that I'm very familiar case and the Supreme Court decision
14 with regards to copyrights and whether it applies to trademarks
15 et cetera. Two things very quickly on that, because it is
16 late:

17 I understand what your Honor suggests, that there was
18 a tradition in the Federal Circuit and certainly in a lot of
19 the copyright cases for years, that there was a presumption of
20 irreparable harm basically because of the difficulty to prove;
21 it's just hard to go out and get that proof, so they have
22 presumption. And Justice Thomas said, well, that doesn't get
23 you there, you need to go with Rule 65. I'm aware of that.

24 But I would suggest to your Honor that each of those
25 has to be viewed in their own context. And here, 105 has been

1 in the bankruptcy code for a long, long time, interpreted every
2 day by the bankruptcy judges, even was again in the
3 Fox/Marshall case that your Honor referred to, where the
4 judge -- Judge Lifland did, I think, the right thing in a
5 sense, and I think that what happened with him in every case --
6 what he found is he doesn't bother 105, it didn't need to have
7 irreparable harm and all the trappings of a Rule 65 but he
8 found it met it anyway; in other words, he's fully capable of
9 doing it, and that's what he did.

10 I'm not suggesting that that's a basis for your
11 Honor's decision if you think it's mandatory they should do
12 that, but all I'm suggesting is that 105 is a very unique, as
13 you know, broad, broad power given to the bankruptcy court
14 judge, to step in in a variety of different ways to make sure
15 that the bankruptcy code's provisions are effectuated
16 appropriately.

17 And what he was doing there -- and what we're asking
18 for here in our motion -- is to set in essence enhancing, if
19 you will, the protections that the bankruptcy code can provide
20 to us in addition to the automatic stay, and that he can reach
21 into his power that 105 gives him and allow him to do that,
22 again something bankruptcy court judges do every day, not in
23 contravention of federal common law or Rule 65 but consonant
24 with the powers given to them by Congress.

25 THE COURT: All right, thank you very much.

1 Well, I thank all counsel for an excellent set of
2 arguments. I like to set myself deadlines so that people can
3 know when these matters are going get decided, so I will get
4 you at least a bottom-line decision on the withdrawal by no
5 later than December 31st and we'll see where we go from there.

6 Thanks very much.

7 COUNSEL: Thank you, your Honor.

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A-989

Case 1:12-cv-06733-JSR Document 14 Filed 12/28/12 Page 1 of 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

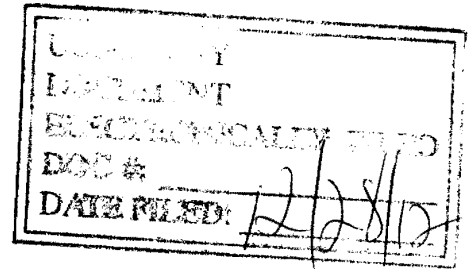
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SECURITIES INVESTOR PROTECTION :
CORPORATION, :

Plaintiff, :

-v- :

BERNARD L. MADOFF INVESTMENT :
SECURITIES LLC, :

Defendant. :



12 MC 115 (JSR)

----- X
In re: :

MADOFF SECURITIES :
----- X

ORDER

PERTAINS TO THE FOLLOWING CASE: :
----- X

IRVING H. PICARD, :

Plaintiff, :

-v- :

12 Civ. 6733 (JSR)

ERIC T. SCHNEIDERMAN, as successor to :
ANDREW M. CUOMO, Attorney General of :
the State of New York; BART M. :
SCHWARTZ, as Receiver for ARIEL FUND :
LTD. and GABRIEL CAPITAL, L.P.; DAVID :
PITOFISKY, as Receiver for ASCOT :
PARTNERS, L.P. and ASCOT FUND, LTD.; :
J. EZRA MERKIN; and GABRIEL CAPITAL :
CORPORATION, :

Defendants. :

----- X
JED S. RAKOFF, U.S.D.J.

Defendants Eric Schneiderman, Attorney General of the State of New York, Bart M. Schwartz, as receiver for the Ariel and Gabriel Funds, David Pitofsky, as receiver for Ascot Partners, J. Ezra Merkin, and the Gabriel Capital Corp. have moved to withdraw the reference to the Bankruptcy Court of the adversarial proceeding brought against them by Irving H. Picard ("the Trustee"), the trustee of Bernard L. Madoff Investment Securities LLC ("Madoff Securities") appointed pursuant to the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa et seq. Defendants seeks withdrawal of the reference on four issues relating to the Trustee's request for a stay and motion for a preliminary injunction filed August 1, 2012 in the bankruptcy court, which seeks to enjoin the consummation of a settlement among the above-named defendants on causes of action against Ezra Merkin and his funds. After carefully considering the parties' written submissions and oral argument, the Court hereby grants the defendants' motion to withdraw the reference on all issues. An opinion explaining the reasons for this ruling will issue in due course. Counsel are directed to jointly call Chambers no later than January 4, 2013 to set a schedule for briefing on the merits of the Trustee's claims.

The Clerk of the Court is hereby ordered to close item number 1 on the docket of 12 Civ. 6733.

SO ORDERED.

Dated: New York, New York
December 27, 2012


JED S. RAKOFF, U.S.D.J.

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

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff,

- against -

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Debtor.

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

Plaintiff,

- against -

ERIC T. SCHNEIDERMAN, as successor to
ANDREW M. CUOMO, Attorney General of
the State of New York; BART M.
SCHWARTZ, as Receiver for ARIEL FUND
LTD. and GABRIEL CAPITAL, L.P.; DAVID
PITOFISKY, as Receiver for ASCOT
PARTNERS L.P., ASCOT FUND, LTD.; J.
EZRA MERKIN; and GABRIEL CAPITAL
CORPORATION,

Defendants.

Civil Action No.: **12 Civ 6733 (JSR)**

**DECLARATION OF DAVID N. ELLENHORN IN SUPPORT
OF DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO TRUSTEE'S
APPLICATION FOR ENFORCEMENT OF THE AUTOMATIC STAY AND ISSUANCE
OF A PRELIMINARY INJUNCTION**

DAVID N. ELLENHORN, an attorney duly admitted to practice in the State of New York, and a member of the bar of this Court, hereby declares the following to be true and correct, under penalty of perjury:

1. I am a Senior Trial Counsel in the Office of the Attorney General of the State of New York. I have been in charge of the AG's action against J. Ezra Merkin, and his solely-owned management company, Gabriel Capital Corp. ("Merkin"), since inception. I submit this declaration to provide a context to the opposition to the Trustee's motion for enforcement of the automatic stay and issuance of a preliminary injunction.

The AG's Action

2. Merkin was the general partner of Ascot Partners, L.P. and Gabriel Capital, L.P. and an investment advisor to Ascot Fund Limited and Ariel Fund Limited (collectively, the "Funds"). The assets of the two Ascot Funds were wholly invested with and controlled by Bernard Madoff, almost from their inception in 1992, and between 25% and 30% of the Ariel and Gabriel assets generally were invested with Madoff.

3. In 2009, following a four-month investigation by ten NYAG attorneys in which the AG reviewed thousands of documents, deposed Merkin and others, and interviewed hundreds of Merkin investors, the AG filed a complaint against Merkin in New York Supreme Court alleging violations of the Martin Act, Executive Law §63(12), the Not-for-Profit Corporation Law, and common-law causes of action. The case was assigned to Justice Richard B. Lowe, III. On May 28, 2009 the AG filed an amended complaint which added the Funds as Relief Defendants.

4. The Complaint alleged, in substance, that Merkin had systematically misled investors by assuring them that he, and he alone, was actively managing their investments, when, in fact, he had delegated all investment responsibility to Madoff for the Ascot Funds, and all Ariel and

Gabriel assets to Madoff and other undisclosed managers. For example, an Ascot Offering Memoranda stated that “All decisions with respect to the management of the capital of the Partnership are made exclusively by J. Ezra Merkin.” In fact, the Ascot Funds actually were managed by Madoff. In addition, Madoff’s role was concealed by Merkin in various oral conversations with investors and potential investors. The Complaint also alleged that Merkin breached his fiduciary duties by failing to conduct appropriate due diligence and supervision of Madoff’s activities.

5. Within days of filing the Complaint, the AG obtained a freeze order against Merkin’s assets to prevent their dissipation, and in May and June 2009, the AG obtained receivership orders removing the Funds from Merkin’s control and placing them under the authority of the New York Supreme Court. Bart Schwartz of Guidepost Partners was appointed receiver of the Ariel and Gabriel funds, and David Pitofsky of Goodwin Procter appointed receiver of Ascot Partners, L.P. Subsequently, the AG and the Receivers conducted an extensive analysis of Merkin’s assets, including his bank accounts, investment holdings, and corporate and personal records.

6. On July 1, 2009, Merkin filed a motion to dismiss the Complaint. The AG responded on August 3, 2009. In a February 8, 2010 decision, Justice Lowe denied Merkin’s motion to dismiss in its entirety. The Court found that the AG had pled sufficient facts showing that Merkin had misled investors in violation of the Martin Act and Executive Law §63(12), and failed to conduct appropriate due diligence, in breach of his fiduciary duties. A copy of the decision is annexed hereto as Exhibit A.

7. From April 2009 through September 2010, the parties took additional discovery. Seven NYAG attorneys invested significant portions of their time over three years in pursuing the

action from investigation to settlement. Hundreds of Merkin investors were contacted and interviewed during discovery in order to generate investor affidavits, in preparation for the NYAG's summary judgment motion and the opposition to Merkin's cross-motion. Hundreds of thousands of pages of documents were reviewed. After first giving sworn testimony during the pre-complaint Martin Act investigation, Merkin was deposed twice, for a total of four days. Six of Merkin's employees and former employees were deposed. Investment managers to whom Merkin outsourced investment responsibilities, other than Madoff, were interviewed and examined in detail, as were fund managers with whom Merkin had done business. The parties engaged in motion practice concerning multiple discovery disputes, on which the NYAG prevailed. On October 18, 2010, the AG filed a motion for partial summary judgment seeking recovery of fees Merkin had received from the Funds and other relief. After extensive briefing, the motion was argued in February 2011.

Settlement Discussions Between Merkin, the AG and the Receivers

8. Beginning in early 2010, Merkin and the AG engaged in extensive settlement negotiations. The Receivers also participated. After over a year of negotiations they reached a settlement and a settlement agreement was executed in December 2011. Under this agreement, Merkin was to pay \$415 million to the AG for distribution to the Funds' investors by the Receivers. The Agreement was conditioned, however, on Merkin and the Funds receiving a release from claims made against them by the SIPC Trustee, Irving Picard. In order to facilitate the Trustee's provision of releases, the Trustee was given a copy of the settlement agreement, and in December 2011 one of my colleagues and I met with David Sheehan and Tom Long of Baker Hostetler to explain to them the mechanics and terms of the agreement.

Settlement Discussions Between the Receivers, Merkin and the Trustee

9. Over the next four months, the Receivers and counsel for Merkin sought to negotiate a settlement of the Trustee's claims against Merkin and the Funds. These efforts included numerous meetings between the Receivers and the Trustee's counsel, in which there was full disclosure of Merkin's assets, liabilities, and financial condition. While these negotiations were taking place, the parties asked Justice Lowe to withhold his decision on the AG's summary judgment motion, and the Court did so. However, the Trustee rejected or failed to respond to various offers made by the Receivers and Merkin, and, I am informed, declined to make any counter-offer. At the end of April 2012, the Trustee's attorneys stated that the Trustee was not interested in further negotiations.

The Merkin Settlement Agreement

10. As a result, the settlement agreement with Merkin was renegotiated so that the Trustee's release of Merkin and the Funds would no longer be required. On June 13, 2012, a new agreement was executed by the AG, Merkin, and the Receivers.

11. The final Settlement Agreement provides that Merkin will return \$410 million in fees he received from the Funds to settle the AG's claims. The bulk of these moneys will be distributed to eligible investors to compensate them for cash losses they suffered. Pursuant to the Agreement, all eligible investors will receive 42.5% of the first \$5 million of their cash losses. Large investors (defined as investors with more than \$5 million in cash losses) may submit to a simple process which will determine whether they knew that Merkin had delegated investment responsibility to Madoff. Those large investors who were not aware of this delegation may participate in a 'large investor settlement pool' which could provide up to 42.5% of their net losses *above* \$5 million. (Large investors who do not wish to participate in this claims process or

had knowledge of Madoff's role and do not seek to qualify, will instead receive an additional 2.5% of their net losses above \$5 million.) Contrary to the Trustee's Complaint, this process is neither "complex" nor "costly" and is expected to involve very few investors. The claims process will be overseen by an independent settlement fund administrator and is expected to be conducted at minimal cost.

12. The settlement funds will be distributed to investors in two stages. The first distribution will occur approximately six months after the closing, and will be funded by approximately \$200 million that was realized from the sale of an art collection Merkin owned jointly with his wife, which was escrowed by an order of the New York court. The second stage will take place on a rolling basis over the next three years, and will be funded through the ongoing liquidation of Merkin's interests in the Ariel and Gabriel portfolios, under the direction of their Receiver. No moneys will be distributed until months after the closing of the Settlement Agreement, which the AG has voluntarily agreed to postpone until the Trustee's motion for a preliminary injunction is heard.

The Trustee and the AG

13. On May 6, 2009, the Trustee sued Merkin and the Funds to recover allegedly fraudulent transfers made to the Funds by Madoff. An amended complaint was filed on December 23, 2009 to add a count to recover moneys transferred from the Funds to Merkin.

14. In November 2009, the Trustee informed the AG that he would seek to enjoin the AG's action against Merkin unless the AG agreed to turn over any funds he might obtain from Merkin to the Trustee. The AG declined to provide such assurances and provided the Trustee with reasons why the Trustee could not enjoin his enforcement action against Merkin. In addition, the AG invited the Trustee to enter into negotiations to settle their differences. After some

preliminary discussions, the Trustee failed to respond to the AG's invitation to continue negotiations.

15. In mid-2011, I received a telephone call from Marc Powers, one of the Trustee's attorneys. He told me that he had heard that the AG was close to a settlement with Merkin, and if the AG did not agree within forty-eight hours that the Bankruptcy Court would have exclusive jurisdiction over any disputes between the Trustee and the AG, the Trustee would sue the AG to enjoin implementation of any settlement with Merkin. I told Mr. Powers that the AG would not agree to this demand but would be willing to discuss the matter with the Trustee. He responded that he would call me in a day or two to set up a meeting, but I never heard from him again.

16. In June 2012, after the AG publicly announced the settlement with Merkin, I received a request from one of Picard's counsel for a copy of the Settlement Agreement. We considered providing the Trustee with a copy, but ultimately decided not to do so because we believed it would prejudice the Funds in their defense of Trustee's lawsuit against them. I did however assure counsel that no funds would be distributed pursuant to the settlement agreement for many months. In addition, the principal terms, including those relating to the distribution of proceeds to investors, remained unchanged in the final Merkin Settlement from the December version provided to the Trustee.

17. On August 1, 2012, without notice, the Trustee sued the AG for a declaration that the AG's suit against Merkin is void *ab initio*. The Complaint seeks an injunction preventing the AG from completing the settlement or distributing any of Merkin's assets pursuant to the settlement.

18. In his Complaint, the Trustee alleges that the AG seeks to "abrogate" the "fundamental tenet" of SIPA and the Bankruptcy Code that "every victim should be treated equally" because,

the Trustee claims, Merkin's assets should be distributed to all Madoff investors. In fact, that would have the effect of providing direct Madoff investors with a higher percentage recovery than Merkin investors would receive. The Merkin settlement funds are to be distributed to parties who did not invest with Madoff and were not customers of BLMIS but, rather, with Merkin, and they are in an entirely different category from Madoff's direct investors. Among other things, SIPC provides up to \$500,000 to each direct Madoff investor starting from the first dollar of losses. Soon after the Madoff fraud was disclosed, the Trustee announced that indirect Madoff investors, such as investors in Ascot, Ariel, and Gabriel, are ineligible for any SIPC payments.

19. Hundreds of Merkin investors had cash losses of \$500,000 or less. Had they been direct Madoff investors and received SIPC payments they would have recovered the bulk of their losses. Instead, they will receive distributions from the AG's settlement and their share of whatever money, if any, the Trustee ultimately distributes to the Funds, following resolution of his claims against the Funds, and theirs against him.

20. As shown in the AG and Receivers joint memorandum of law, the Trustee has no right to enjoin or interfere with the Merkin settlement. The Trustee himself admits that his claim is "unusual, if not extraordinary" and it is unsupported by legal precedent. It is also inequitable.

Dated: New York, NY
January 25, 2013

/s/David N. Ellenhorn
David N. Ellenhorn

A-999

EXHIBIT A

to

**DECLARATION OF DAVID N. ELLENHORN IN SUPPORT
OF DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO TRUSTEE'S
APPLICATION FOR ENFORCEMENT OF THE AUTOMATIC STAY AND
ISSUANCE OF A PRELIMINARY INJUNCTION**

26 Misc.3d 1237(A), 907 N.Y.S.2d 439, 2010 WL 936208 (N.Y.Sup.), Blue Sky L. Rep. P 74,821, 2010 N.Y. Slip Op. 50430(U)

(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 26 Misc.3d 1237(A), 2010 WL 936208 (N.Y.Sup.))

C

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, New York County, New York.
The PEOPLE of the State of New York By Andrew M. CUOMO, Attorney General of the State of New York, Plaintiff,

v.

J. Ezra MERKIN and Gabriel Capital Corporation,
Defendants.

No. 450879/09.

Feb. 8, 2010.

Sangeap, Daniel, Rosen, Harriet B., Kadosh, Shmuel, for Claimant/Plaintiff/Petitioner The People of the State of New York by [Andrew M. Cuomo](#), Attorney General of the State of New York.

Steiner, Neil A., Mennitt, Gary J. Esq., Levander, Andrew J., for Merkin, J. Ezra and Gabriel Capital Corporation.

Laffey, Casey D., Tulchin, Matthew T. Pitofsky, David B., for Ascot Partners L.P. (Relief Defendants).

Laffey, Casey D., Bensky, Eric A., Schiffman, Howard, for Ascot Fund Limited (Relief Defendants), Gabriel Capital L.P. (Relief Defendants), Ariel Fund Limited (Relief Defendants), Gabriel Assets LLC (Relief Defendants) and Gabriel Alternative Assets LLC (Relief Defendants).

Kaswan, Beth A., New York University, individually and derivatively (non-party).

[RICHARD B. LOWE, J.](#)

*1 Defendants J. Ezra Merkin (“Merkin”) and Gabriel Capital Corporation (“GCC”) move for an order

dismissing the complaint pursuant to [CPLR 3211](#) (a)(1) and (7).

The Attorney General (“AG”) is bringing this action against Merkin and his investment management company, based on violations of the Martin Act, [Executive Law § 63](#)(12), the Not-for-Profit Corporation Law and common-law claims. Allegedly, Merkin made misrepresentations and omissions to investors, including many charities, who entrusted him with their money. The AG further alleges that Merkin blindly fed the investors' funds into a Ponzi scheme orchestrated by Bernard L. Madoff (“Madoff”) while claiming that Merkin was actively managing those funds. Merkin also allegedly failed to conduct adequate due diligence of Madoff's activities, despite information given to him indicating that Madoff may have been engaged in misconduct. According to the complaint, Merkin's investors lost over \$1.2 billion, while he collected more than \$470 million in management and incentive fees from his funds including: Ascot Partners L.P., Ascot Fund Limited, Ariel Fund Limited, and Gabriel Capital L.P.

BACKGROUND

Accepting the allegations of the complaint as true ([Leon v. Martinez](#), 84 N.Y.2d 83 [1994]), the following facts emerge: Defendant Merkin is the general partner of Ascot Partners, L.P. and Gabriel Capital, L.P. (“Gabriel”), domestic hedge funds. Merkin is the sole shareholder and director of GCC (Complaint, ¶¶ 16-17). GCC serves as the manager of Ascot Fund Limited (“Ascot”) and Ariel Fund Limited (“Ariel”), both of which are offshore funds. Merkin collected annual management fees equal to 1% of the capital invested in Ariel, Gabriel, and Ascot. In 2003, Merkin raised the Ascot management fee to 1.5% of the capital invested (*id.*, ¶ 24). He also collected an annual incentive fee of 20% of any appreciation in the assets of Gabriel and Ariel (*id.*).

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Merkin and Madoff met in the late 1980s, early 1990s (*id.*, ¶ 26). In the early 1990s, Madoff described to Merkin his investment strategy, known as a “split strike conversion strategy,” in which Madoff would buy stocks from the S & P’s 100 Index, and simultaneously, buy put options below the current stock price to protect against large decreases, and sell call options above the current price to fund the purchase of the put options (*id.*, ¶ 27). Madoff claimed that he could produce steady returns of 10% per year no matter what the market was doing overall (*id.*).

In 1988, Merkin established Ariel and Gabriel (*id.*, ¶ 66). By 2008, Gabriel had approximately 200 investors with \$1.4 billion under management, and Ariel had 78 investors with about \$1.3 billion under management (*id.*). From 2001 to 2008, between 20-30% of the assets of Gabriel and Ariel were managed by Madoff (*id.*, ¶¶ 67-79). The remainder of the assets were not managed by Merkin, but by third parties (*id.*). From 1989 to 2007, Merkin collected annual management and incentive fees from Gabriel that totaled approximately \$277 million, and from Ariel approximately \$242 million (*id.*, ¶ 69).

*2 According to the complaint, in 1992, Merkin created Ascot to serve solely as a feeder fund to Madoff, and substantially all of Ascot’s assets were turned over to Madoff (*id.*, ¶ 32). Most of Ascot’s investors were not aware that Ascot was a feeder fund for Madoff (*id.*, ¶ 33). Thirty-five non-profit organizations had invested \$215 million of the \$1.7 billion invested in Ascot by the end of 2008 (*id.*, ¶ 36). From 1995 through 2007, Merkin received management fees of \$169 million from the Ascot Fund (*id.*, ¶ 35), and by 2008, Merkin was receiving annual Ascot management fees of approximately \$25.5 million (*id.*).

The complaint alleges that after Madoff’s arrest in December 2008, Merkin surprised Ariel and Gabriel investors by telling them, for the first time, that the funds had significant Madoff exposure. Thus, the Ariel and Gabriel investors were unaware of the

true nature of the investment they were making (*id.*, ¶ 99).

Based on these and other more specific allegations of misrepresentations and omissions by Merkin, the AG has brought six causes of action. The first through third claims are for securities fraud under the Martin Act, [General Business Law \[GBL\] § 352](#), [352-c](#) (1)(a) and (c), and [353](#). The fourth claim, alleged only against Merkin, asserts violations of the [Not-for-Profit Corporation Law §§ 112, 717, and 720](#). The fifth claim is for breach of fiduciary duty to the investors of Ascot, Ariel, and Gabriel, and seeks damages and disgorgement of compensation. The sixth claim, asserted under [Executive Law § 63](#) (12), maintains that Merkin’s and GCC’s conduct constituted repeated fraudulent or illegal acts, or constituted persistent fraud in the transaction of business, and seeks restitution and damages.

The AG seeks to enjoin and restrain defendants from the alleged acts and practices, enjoin Merkin from serving as a general or managing partner, director or officer of any investment fund or otherwise managing investments, and enjoin him from serving as a board member, trustee, director or officer of any non-profit organization. The AG also seeks an accounting of all fees and other compensation, and to recover costs and attorneys’ fees.

Merkin and GCC now move to dismiss the complaint in its entirety.

DISCUSSION

On a motion to dismiss pursuant to [CPLR 3211](#), the court’s task is to determine whether the complaint states a cause of action. The motion will be denied if, within the four corners of the pleading, factual allegations are discerned which taken together manifest a claim cognizable at law ([511 West 232nd Owners Corp. v. Jennifer Realty Co.](#), 98 N.Y.2d 144, 151-152 [2002]). The complaint will be liberally construed, and the court will accept as true all facts in the complaint and in plaintiff’s sub-

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missions in opposition to the motion (*id.* at 152). Plaintiff will be accorded the benefit of all possible favorable inferences (*id.*). “Dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” “ (*id.*, quoting *Leon v. Martinez*, 84 N.Y.2d at 88).

Martin Act and Executive Law Claims

*3 The Martin Act (General Business Law Article 23-A) prohibits various deceitful and fraudulent practices in the distribution, sale, exchange, and purchase of securities. Thus, it prohibits the use or employment of “[a]ny fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale” (General Business Law § 352-c [1][a]). It also prohibits:

(c) Any representation or statement which is false, where the person who made such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made;

where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities, as defined in section three hundred fifty-two of this article, regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted

(General Business Law § 352-c [1][c]). The Martin Act is remedial in nature and should be liberally construed (*People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d 588, 595 [1976]). The terms “fraud” and “fraudulent practices” are given a broad meaning so that all deceitful practices, even acts “not originating in any actual evil design to perpetrate fraud or injury upon others, which do tend to deceive or mislead the purchasing public” are covered (*id.* at 595). In addition, the AG need not prove in-

tent or reliance in a Martin Act claim (*State of New York v. Sonifer Realty Corp.*, 212 A.D.2d 366, 367 [1st Dept 1995] [fraudulent practices need not constitute fraud in the classic common-law sense, and it is not necessary to show reliance]).

In support of the Martin Act claim, the AG has plead that Merkin concealed and failed to disclose Madoff's role, and misrepresented Merkin's role in the funds' management. For example, the AG alleges that the offering documents, such as the Ascot Memoranda, falsely represented that Merkin was involved in the fund's day-to-day management, and that the success of the fund depended on Merkin's abilities as a money manager. The Memoranda stated, for example, that he exclusively made the capital management decisions using his skill and experience, and that he would devote substantially all his time to managing its assets (Complaint, ¶¶ 39, 42-43). These documents could be construed as misrepresenting that Merkin would be controlling and actively managing the funds, and as concealing that Ascot was a feeder fund to Madoff (*id.*, ¶ 43).

The Ascot Memoranda, starting in 1996, indicated that multiple money managers might be used (*id.*, ¶ 45), which was false and misleading, because allegedly all of the funds were entrusted to a single money manager, Madoff (*id.*). The risk factors set forth in the Ascot Memoranda indicated a wide variety of investment strategies, none of which had anything to do with the “split strike conversion” strategy being employed by Madoff with the Ascot funds (*id.*, ¶ 46).

*4 While in the March 2006 Ascot Offering Memorandum, Merkin mentioned Madoff's name, by indicating that Madoff, was one of Ascot's two prime brokers, and that he cleared Ascot's transactions effected through other brokerage firms, this allegedly misrepresented Madoff's role because 98% of Ascot's transactions were both effected and cleared by Madoff, and Madoff had custody of over 99% of Ascot's securities holdings (*id.*, ¶ 47). Therefore, based on these allegations, the AG has adequately pleaded that these misrepresentations

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constitute fraudulent practices under the Martin Act.

Where the Martin Act claims are based on the defendant's omissions or failure to disclose, the omitted facts must be material—that is, that there is a substantial likelihood that the omitted fact would have assumed actual significance in the deliberations of a reasonable investor (*State of New York v. Rachmani Corp.*, 71 N.Y.2d 718, 726 [1988]). “[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix’ of information made available” (*id.*, quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 [1976]; see also *State of New York v. McLeod*, 12 Misc.3d 1157[A] *5, 2006 N.Y. Slip Op 50942[U] [Sup Ct, N.Y. County 2006]).

With respect to Merkin's alleged omissions in failing to reveal Madoff's actual role, and the actual investment strategy being employed, the complaint sufficiently pleads that these omitted facts are material, that is, that there is a substantial likelihood that disclosure of these facts would have been viewed by the reasonable investor as having significantly altered the total mix of information made available (see *id.*, ¶¶ 56, 57, 59). Materiality is a mixed question of fact and law. Therefore, it is inappropriate for resolution at the motion to dismiss stage (see *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F3d 187, 197 [2d Cir2009]; *In re NovaGold Resources Inc. Sec. Litig.*, 629 F Supp 2d 272, 292 [SD N.Y.2009]).

With regard to the Ariel and Gabriel Funds, the AG alleges misrepresentations with regard to the types of investments in which the funds would be involved. Thus, for example, the offering documents indicated that these funds focused on distressed debt and merger arbitrage, without disclosing that up to 30% of the funds were turned over to Madoff, who was using a completely different strategy.

In addition, the AG alleges misrepresentations and omissions regarding the ways in which the funds were going to operate. The offering documents indicated that Ariel did not use any self-clearing money managers. However, Madoff self-cleared all his transactions, and had custody of and managed a significant portion of Ariel's assets (*id.*, ¶ 82). Ariel's November 2002 Prospectus stated that brokers for the funds would not perform managerial or policy-making functions for the Fund (*id.*, ¶ 83, and Exhibit 23 annexed thereto). Madoff, however, was performing such managerial functions, and effecting, clearing, and settling transactions, all at the same time (*id.*, ¶¶ 83-84). The March 2006 Offering Memorandum stated that Morgan Stanley was the principal prime broker for Ariel, but this was false and misleading, because Morgan Stanley did not clear Madoff's trades, and was not the custodian for securities managed by Madoff.

*5 The AG also alleges oral misrepresentations by Merkin in which he or his employees denied that Ascot was managed by Madoff, denied that they were doing the same thing as Madoff, or minimized Madoff's role. The complaint also asserts that Merkin also made oral misrepresentations to an investor who was aware that Madoff was involved in Ascot, that Merkin required BDO Seidman, Ascot's auditor, to visit Madoff's offices two or three times a year to perform standard operational due diligence. In fact, however, BDO did not perform such due diligence or any other examination of Madoff's operation (*id.*, ¶ 63). The Ascot Subscription Agreement provided that the investors were given the opportunity to ask questions of, and receive answers from, the General Partner (Merkin and GCC) concerning matters pertaining to the investment. This essentially gives the investors the right to rely upon information the General Partner conveyed to the investor, orally or otherwise (see *Heller v. Goldin Restructuring Fund, L.P.*, 590 F Supp 2d 603, 615 [SD N.Y.2008]). Taken together, all of these alleged oral and written misrepresentations sufficiently state a claim for fraudulent practices under the Martin Act.

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The defendants' reliance on a provision in the 2006 Offering Memoranda that Merkin might delegate investment management duties to independent money managers without first providing notice to, or obtaining the consent of, investors, is misplaced. They contend that any alleged misrepresentations were sufficiently balanced by this cautionary language. Defendants appear to be relying upon the "bespeaks caution" doctrine set forth in federal securities cases, which are persuasive authority in determining Martin Act claims (*see e.g. All Seasons Resorts, Inc. v. Abrams*, 68 N.Y.2d 81, 87 [1986] [in applying Martin Act, federal securities law cases are persuasive authority]). Under this doctrine, misrepresentations or omissions "in conjunction with the purchase or sale of securities are considered immaterial where contained in communications or documents including cautionary language sufficiently specific to render reliance on the false or omitted statement unreasonable" ' and not actionable (*United States SEC v. Meltzer*, 440 F Supp 2d 179, 191 [ED N.Y.2006] [citations omitted]; *see Halperin v. eBanker USA.com, Inc.*, 295 F3d 352, 357 [2d Cir2002]). Generalized disclosures regarding unspecified risks, however, will not shield defendants from liability. Instead, regarding the prospective representations, the cautionary language must expressly warn of, and be specific and factual (*Halperin v. eBanker USA.com, Inc.*, 295 F3d at 359). This doctrine is limited to forward-looking statements only, and is not applied to misrepresentations of present or historical facts which cannot be cured by cautionary language (*P. Stolz Family Partnership L.P. v. Daum*, 355 F3d 92, 96-97 [2d Cir2004]). The cautionary language warns investors that "bad things may come to pass-in dealing with the contingent or unforeseen future" (*id.* at 97). It, therefore, does not apply to historical or present fact knowledge, because "[s]uch facts exist and are known; they are not unforeseen or contingent" (*id.*). An offeror may not knowingly misrepresent historical facts and at the same time disclaim the misrepresented facts with cautionary language (*id.*; *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 122 F Supp 2d 407, 419 [SD N.Y.2000], *abrogated on*

other grounds In re IPO Securities Litigation, 241 F Supp 2d 281, 352 n 85 [SD N.Y.2003] [a defendant cannot use the bespeaks caution doctrine where it knew that its statement was false when made]).

*6 The misrepresentations at the center of this complaint involve Madoff's role as the manager of all of Ascot's funds and a substantial portion of Ariel's and Gabriel's funds. Merkin gave Madoff complete control and investment discretion over all of Ascot's and a substantial portion of Ariel's and Gabriel's funds. Thus, he had already delegated all investment discretion to this money manager, a fact Merkin was presently aware of at the time of the Offering Memoranda. In addition, given that Merkin admitted that he formed Ascot for the purpose of investing with Madoff and that virtually all of its assets were tendered to him, to the extent that the representations that Merkin would exercise discretion in managing the funds, and the performance of the funds depended on his skill and judgment could be construed "as to the future," the misrepresentations were "beyond reasonable expectation" (GBL § 352-c [1] [b]). The reference to Madoff's role as a prime broker, as mentioned above, was misleading because such brokers do not make investment management decisions like Madoff was making, and the mischaracterization of Madoff's role was a historical, present known fact. Further, particularly with regard to Ariel and Gabriel, the misrepresentation regarding their present investment strategy of investing in distressed businesses, also referred to a false historical fact. Defendants have failed to show that no reasonable investor could have been misled about the nature of the risk when he or she invested (*P. Stolz Family Partnership, L.P. v. Daum*, 355 F3d at 97). This cautionary language also does not address the other misrepresentations and omissions, such as Merkin's failure to exercise judgment in supervising the delegation of investment management to Madoff, his failure to conduct due diligence, and to audit Madoff's activities regarding the funds, and the fact that Merkin ignored the warnings of fraud from his own people and from fund investors. Therefore, the existence of the cautionary language

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does not negate the materiality of the misrepresentations and omissions alleged in the complaint.

The documentary evidence submitted by defendants, consisting of e-mails from about 10 investors, indicating that these investors were aware that monies were invested with Madoff, fail to demonstrate that dismissal is warranted at this early stage of this action. Whether some of the investors of Ascot, Ariel, and Gabriel were aware that the funds were invested with Madoff, does not bar the AG's claims. The complaint details claims that hundreds of investors were not so aware and therefore the e-mails do not provide a basis for dismissal as a matter of law. Finally, defendants' argument that dismissal is warranted on the ground that the AG cannot show loss causation is also rejected. Loss causation is not an element of a Martin Act claim. A misrepresentation may violate the statute "regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted" (GBL § 352-c [1][c]; *State of New York v. Sonifer Realty Corp.*, 212 A.D.2d at 367). Therefore, the first through third causes of action for violations of the Martin Act are sufficient to withstand this motion to dismiss.

*7 The AG's Executive Law claim similarly survives this dismissal motion. Executive Law § 63 (12) gives the AG the power to bring a claim against any person or entity which engages in "repeated fraudulent or illegal acts" or "otherwise demonstrate[s] persistent fraud or illegality in the carrying on ... or transaction of business." Like the Martin Act, the statute broadly construes the definition of fraud "so as to include acts characterized as dishonest or misleading and eliminating the necessity for proof of an intent to defraud" (*People v. Apple Health and Sports Clubs, Ltd.*, 206 A.D.2d 266, 267 [1st Dept], *lv dismissed in part, denied in part* 84 N.Y.2d 1004 [1994]; see *People v. General Elec. Co.*, 302 A.D.2d 314 [1st Dept 2003]). The test for fraud thereunder is whether the acts have the capacity or tendency to deceive, or creates an atmosphere conducive to fraud (*People v. General Elec. Co.*, 302 A.D.2d at 314). Like the Martin Act,

since the repeated fraudulent practices targeted by the statute do not need to constitute fraud in the classic common-law sense, reliance need not be shown (*State of New York v. Sonifer Realty Corp.*, 212 A.D.2d at 367). The AG may apply for an injunction, and seek restitution and damages (Executive Law § 63[12]).

As in the Martin Act claims, the allegations here are sufficient to satisfy Executive Law § 63(12). As determined above with regard to the Martin Act claims, Merkin's representations, as alleged in the pleadings, were fraudulent and his omissions were material. In addition, the AG has alleged that the defendants engaged in "repeated" and/or "persistent" fraudulent acts in violation of Executive Law § 63(12). Again, the AG need not show reliance or loss causation with respect to this claim. Therefore, the defendants' motion with regard to the sixth cause of action is denied.

Not-for-Profit Law Claim

The AG's fourth claim is for violations of the Not-for-Profit Corporation Law §§ 112, 717, and 720. In this claim, the AG alleges that Merkin failed to discharge his duties as an officer or director of "Merkin-Affiliated Non-Profits" with the degree of care, skill, and diligence that an ordinarily prudent person in his position would exercise (Complaint, ¶ 133). These failures included that he received a personal benefit from investments made by "Non-Profit Organizations A, C, and G," failed to disclose that he was actively earning his management fees, failed make diligent inquiries into the risks of investing with Madoff, ignored numerous indications that Madoff was engaging in fraud, and failed to disclose his conflicts of interest (*id.*). The complaint alleges that Merkin was an officer, director, trustee and sat on the investment committees of three non-profits, and collected a personal benefit from the investments made by the two entities referred to as Non-Profit Organizations A and C, on whose board of directors' investment committees he sat, and a third, referred to as Non-Profit Organiza-

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tion G, for which he served as investment advisor (*id.*, ¶ 5, 65, 120-124, 133). It alleges that Merkin was such a regular at the Investment Committee meeting of Non-Profit Organization G that he was “referred to as the Chair in the minutes,” and, as this organization's investment advisor, he created a special relationship of trust as its fiduciary (*id.*, ¶ 123). It further asserts that Merkin and Madoff both were on the Board of Trustees of Non-Profit Organization A, which had a large investment in Ascot. The complaint alleges that Merkin breached his fiduciary duty by accepting Non-Profit Organization A's investment in Ascot, where he would earn a significant management fee, when Merkin could have arranged for a direct investment with Madoff without the extra fees (*id.*). The AG further alleges that Merkin breached his fiduciary duties by concealing Madoff's role in Ascot, Ariel, and Gabriel, by failing to disclose conflicts of interest Merkin had in recommending investments, and by making false statements regarding his fee structure. The complaint asserts that Merkin's conduct breached his fiduciary duties in violation of sections 112, 717, and 720 of the Not-for-Profit Corporation Law (N-PCL).

*8 Defendants challenge this claim, asserting that the AG has failed to plead specifically the non-profit corporation of which Merkin was an officer or director. They contend that the complaint only alleges that he was a trustee of Non-Profit Organization A, and that he sat on the investment committees and served as an investment advisor with regard to Non-Profit Organizations C and G.

N-PCL § 112 authorizes various remedial measures that may be pursued in an action or special proceeding brought by the AG under the N-PCL (N-PCL § 112). Section 720 provides that an action may be brought against a director or officer of a not-for-profit corporation to compel the defendant to account for neglect, failure to perform, or other violation of his duties in the management of corporate assets, and the acquisition by himself or transfer to others, loss, or waste of corporate assets due to

neglect of, failure to perform, or other violation of his duties (N-PCL § 720). Section 720(b) specifically provides that the AG may bring an action for the relief provided in the section.

The fiduciary duties of care and loyalty are the legal standards that govern the conduct of not-for-profit directors and officers in their daily relationship with the not-for-profit corporation they serve (N-PCL § 717 [a]). Section 102(a)(6) of the N-PCL defines “director” to mean “any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title. The term board' means board of directors' (N-PCL § 102[a][6]).

The complaint, here, adequately pleads that Merkin was a trustee of Non-Profit Organization A, which falls within the definition of director under N-PCL § 102(a)(6). Defendants' submission, at oral argument,^{FN1} of the minutes of a meeting of the Board of Trustees for Yeshiva University, which defendants claim is Non-Profit Organization A, at which Merkin attended and spoke as a member of the Board's Investment Committee, supports this conclusion. With regard to the other non-profit organizations designated C and G, this court will not dismiss the claim at this early stage of the litigation. The allegations that Merkin sat on the investment committees of these organizations, and was their investment advisor, even being referred to at one meeting as “Chair,” is sufficient at this point.

FN1. Both parties acknowledge that the documents submitted at oral argument on October 15, 2009 before this court, are subject to a confidentiality stipulation between the parties. Therefore, they will be returned to the defendants. However, the defendants are directed to file redacted copies of these documents for the court file.

Moreover, contrary to defendants' argument, Merkin's alleged breaches of his fiduciary duty, as set forth above, are sufficiently specific. Defendants'

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contention that the claim of undisclosed conflicts of interest should be dismissed based on documentary evidence they submit, is rejected. While the documents submitted at oral argument indicate that Merkin disclosed to Yeshiva University in March 2001 and March 2002 that he had conflicts with regard to Ascot, indicating the fees he collected, it is not clear whether this disclosure was made to the other non-profit corporations (C and G), and it is not clear if Yeshiva University also invested in Ariel and Gabriel, and whether Merkin's fees and conflicts with regard to Ariel and Gabriel were disclosed to any of the Merkin affiliated non-profit corporations. Therefore, because the defendants' documentary evidence does not clearly refute all of the assertions regarding Merkin's failures under the N-PCL, the court concludes that the motion to dismiss this claim also must fail.

Breach of Fiduciary Duty Claim

*9 The breach of fiduciary duty claim also survives defendants' motion. In this claim, the AG alleges that Merkin utterly failed to manage, supervise, or monitor the investments of Ascot, Ariel, and Gabriel, as he was obligated to as their investment manager. By turning over the funds to Madoff without conducting adequate due diligence, despite information given to Merkin by his own associates, as well as some of the funds' investors, indicating that Madoff may have been engaged in misconduct (*see* Complaint, ¶¶ 107-115), Merkin breached his fiduciary duties to the funds and the investors. The complaint also alleges that while Merkin was aware of certain aspects of Madoff's operations that raised the possibility of fraud by Madoff, including Madoff's use of paper trade confirmations, the secrecy of Madoff's operations, the fact that Madoff was self-clearing, and that his operations were controlled exclusively by himself and close family members (*id.*, ¶ 116), Merkin never questioned Madoff's operations.

Defendants challenge this claim on several grounds. First, they claim that the AG does not have *parens*

patriae standing. *Parens patriae* is a common-law doctrine regarding standing. It allows the state to bring an action to prevent harm to its sovereign interests, such as the health, safety, comfort, and welfare of its citizens. To invoke the doctrine, the AG must show: (1) a quasi-sovereign interest in the public's well-being; (2) distinct from that of a particular private party; and (3) injury to a sufficiently substantial segment of the population (*see Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 [1982]; *see also People v. Grasso*, 11 NY3d 64, 69, n 4 [2008]). A "quasi-sovereign interest" has been held to consist of a set of interests which the state has in the well-being of its populace" (*State of New York v. McLeod*, 12 Misc.3d 1157[A], *10, 2006 N.Y. Slip Op 50942[U]). Courts have held that "a state has a quasi-sovereign interest in protecting the integrity of the marketplace" (*People v. Grasso*, 11 NY3d at 69 n 4, citing *State of New York v. General Motors Corp.*, 547 F Supp 703 [SD N.Y.1982]; *People v. H & R Block, Inc.*, 16 Misc.3d 1124[A], 2007 N.Y. Slip Op 51562 [U] [Sup Ct, N.Y. County 2007] [Moskowitz, J.], *affd* 58 AD3d 415, 417 [1st Dept 2009]).

Here, the recovery of damages for aggrieved investors is just a part of the AG's case. The AG's focus is on obtaining injunctive relief designed to "vindicate the State's quasi-sovereign interest in securing an honest marketplace for all consumers" (*People v. H & R Block, Inc.*, 16 Misc.3d 1124 [A],* 7, 2007 N.Y. Slip Op 51562[U]). Specifically, the AG has identified a strong quasi-sovereign interest in ensuring that the "financial markets as a whole, and the hedge fund industry in particular, operate honestly and transparently" (AG's Memorandum of Law, at 23; *see People v. H & R Block, Inc.*, 58 AD3d at 417 ["New York's vital interest in securing an honest marketplace in which to transact business" was a sufficient basis for *parens patriae* standing]; *People v. Liberty Mut. Ins. Co.*, 52 AD3d 378, 379 [1st Dept 2008]; *see also People v. Coventry First LLC*, 2007 WL 2905486 [Sup Ct, N.Y. County 2007], *affd as mod* 52 AD3d 345, 346 [1st

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Dept 2008], *affd* 13 NY3d 108 [2009] [upholding parens patriae standing to secure honest marketplace for claims including breach of fiduciary duty]. The fact that the AG is seeking recovery on behalf of an identifiable group of investors, here, does not require this court to ignore the purpose of this breach of fiduciary duty claim, and to characterize it, as defendants do, as one brought solely to benefit a few private investors (*see People v. H & R Block, Inc.*, 16 Misc.3d 1124[A], * 7, 2007 N.Y. Slip Op 51562[U]; *see also State of New York v. General Motors Corp.*, 547 F Supp at 706-707).

*10 With respect to injury to a substantial segment of the population, Merkin's alleged misconduct touched many investors, many of whom are New York State residents. They were not just individuals, but also funds and financial institutions representing individuals, charities, and foundations. This is sufficient to show injury to a substantial segment of the population (*see People v. Liberty Mut. Holding Co.*, 2007 WL 900997 [Sup Ct, N.Y. County 2007], *affd as mod* 52 AD3d 378 [1st Dept 2008]). Defendants' contention that the AG must show an inability of the allegedly injured individuals to obtain relief in a private suit, is without merit. Case law does not demonstrate such a requirement (*see Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, *supra*). The fact that some private investors may choose to pursue or not to pursue claims on their own behalf does not detract from the substantial public interest at stake in this action. In addition, it is unclear whether all of the investors can obtain individual relief. Therefore, the AG has shown a sufficient basis for parens patriae standing with regard to the breach of fiduciary duty claim.

The defendants also contend that the Martin Act preempts this claim. They fail, however, to cite cases in support of this argument and this court has found no precedent holding that the Martin Act preempts the AG from bringing a common-law claim. The Martin Act cases to which defendants do cite involve claims brought by private parties, in

which, under certain circumstances, the courts find that to allow such a claim would circumvent the bar to private actions under the Martin Act (*see Horn v. 440 East 57th Co.*, 151 A.D.2d 112, 120 [1st Dept 1989]; *In re Bayou Hedge Fund Litig.*, 534 F Supp 2d 405 [SD N.Y.2007], *affd* 573 F3d 98 [2d Cir2009]; *Kassover v. UBS AG*, 619 F Supp 2d 28 [SD N.Y.2008] [AG has exclusive jurisdiction to enforce the Martin Act]; *but see Caboara v. Babylon Cove Dev., LLC*, 54 AD3d 79 [2d Dept 2008] [individual's common-law fraud claim, resting on same facts as Martin Act, not preempted, so long as satisfies pleading standards]; *Scalp & Blade, Inc. v. Advest, Inc.*, 281 A.D.2d 882, 883 [4th Dept 2001] [breach of fiduciary duty claim not preempted by Martin Act). The Martin Act preemption doctrine is to preserve the AG's exclusive jurisdiction to enforce the statute, and to permit the claim here does not undermine that exclusive enforcement jurisdiction. In fact, the AG has pursued Martin Act claims along with common-law claims, including claims for breach of fiduciary duty (*see e.g. People v. Coventry First LLC*, 13 NY3d 108, *supra* [Martin Act claims and breach of fiduciary duty and fraud claims permitted to proceed together]; *compare People v. H & R Block, Inc.*, 158 AD3d 415, *supra* [Executive Law § 63(12) claims pursued with breach of fiduciary duty and fraud claims]).

Defendants' reliance on *People v. Grasso* (11 NY3d at 70) to urge that the principles that govern private parties regarding preemption based on the Martin Act, must be applied to the AG's claim here, is misplaced. The *Grasso* case was brought by the AG under the N-PCL. The AG asserted non-statutory claims against Richard Grasso, as an officer or director of a non-profit corporation, the NYSE, based on specific provisions of the N-PCL. The Court determined that the Legislature's comprehensive enforcement scheme in the N-PCL required a finding of fault-that the officer or director lacked good faith in executing his duties. It found that the non-statutory claims asserted in that action, based on specific N-PCL statute provisions, were devoid of any

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fault-based elements. Thus, the nonstatutory claims had a lower burden of proof than that specified by the statute, overriding the Legislature's fault-based scheme. As such, the Court found that they were fundamentally inconsistent with the N-PCL, and reached beyond the bounds of the AG's authority. In the instant case, the breach of fiduciary duty claim is not based specifically on any Martin Act provisions, or, for that matter, on any provisions in the N-PCL. Moreover, the Martin Act, like the breach of fiduciary duty claim, does not require deceitful intent (see *Horn v. 440 East 57th Co.*, 151 A.D.2d at 120). Therefore, there is no inconsistency between the statutory Martin Act claims, and the breach of fiduciary duty claim. Finally, the fifth cause of action sufficiently states a claim for breach of fiduciary duty. To state a claim for breach of fiduciary duty, a plaintiff must plead: (1) the existence of a fiduciary duty between the parties; (2) a breach of that duty; and (3) damages resulting from the breach (see *People v. H & R Block, Inc.*, 16 Misc.3d 1124[A], * 7, 2007 N.Y. Slip Op 51562[U]). The AG has adequately pled this claim against Merkin by asserting that, as the General Partner of Ascot Partners and Gabriel Capital, L.P., the two domestic funds, he had fiduciary duties to his investors. In fact, in his testimony to the AG, Merkin admitted that he had "fiduciary responsibilities for oversight of the portfolios" (Complaint, ¶ 24 and Exhibit 1 annexed thereto, at 101). With regard to the offshore funds, Ariel and Ascot Fund Limited, investment advisors, such as Merkin, owe fiduciary duties to their clients, particularly where the investment advisor has broad discretion to manage the client's investments (see *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19-20 [2005] [underwriter as expert advisor with regard to market conditions held to owe fiduciary duty]; *Brooks v. Key Trust Co. Natl. Assn.*, 26 AD3d 628 [3d Dept 2006], lv dismissed 6 NY3d 891 [2006] [financial advisor with discretionary authority to act owes a fiduciary duty]; *Rasmussen v. A.C.T. Environmental Services Inc.*, 292 A.D.2d 710, 712 [3d Dept 2002] [investment advisor owes fiduciary duty]; *Bullmore v. Banc of Amer. Securities LLC*, 485 F

Supp 2d 464, 470-471 [SD N.Y.2007]; *Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC*, 376 F Supp 2d 385, 413-414 & n 182 [SD N.Y.2005] [collecting cases]). Individuals in positions of trust, such as "investment advisors, are subject to liability for breach of fiduciary duty when they deceive or defraud their clients" (*Bullmore v. Banc of Am. Securities LLC*, 485 F Supp 2d at 471). Merkin was the investment advisor and manager to the investors of all four of the funds, and he had complete discretion with regard to how the monies were invested. The relationship created by the Offering Documents imposed on Merkin a duty to act with care and loyalty independent of the terms of those agreements.

*11 Defendants urge that this claim should be dismissed because it may not be asserted individually by shareholders of a Cayman Islands corporation. *Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC* (376 F Supp 2d 385, *supra*) is instructive. In that case, individual investors in hedge funds sued the limited liability companies issuing the funds and their principals, alleging, among other claims, that the defendants had breached their fiduciary duties to the investors. The court rejected the defendants' argument that the wrong belonged only to the corporation. It found that the wrong was a fraud committed on the shareholders rather than on the funds, in that defendants had fraudulently overstated the net asset value of the funds, concealing the declines in the fund assets, and the investors were injured when they invested or retained their investments in reliance upon the misstatements (*id.* at 409). Here, the wrongs alleged include Merkin's misrepresentations and omissions regarding what the investors were investing in, and what his role would be in managing the funds, his affirmative misrepresentations to investors after he had already delegated all authority and discretion to Madoff, and his failure to perform due diligence and ignoring signs of fraud. These alleged wrongs were a fraud committed on the shareholder investors rather than on the funds, and the investors were injured when they invested or retained their investments in

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reliance upon the misstatements.

END OF DOCUMENT

Defendants' argument that there was no breach because the documents permitted Merkin to delegate his duties to other money managers without notice, lacks merit. The breach of fiduciary duty is not that he was permitted to and did delegate to other money managers. The breach alleged is based on Merkin's misrepresentations regarding his role in purportedly managing the funds and in conducting due diligence with regard to the investments, and in his concealment, both before and after the delegation of all or a portion of the funds to Madoff, that the funds were with Madoff. To the extent that the Offering Documents and Partnership Agreements with regard to Gabriel and Ascot Partners provide that Merkin's liability is limited to "bad faith, gross negligence, recklessness, fraud, or intentional misconduct" the breach of fiduciary duty claim for those investors may be so limited.

Injunctive Relief

Finally, defendants fail to demonstrate a basis to strike the AG's request for injunctive relief. It is entirely premature to determine whether the AG will be entitled to an injunction, and the extent of any such injunction under the Martin Act, the [Executive Law § 63\(12\)](#), or the Not-for-Profit Law. The exact nature of injunctive relief that may be awarded will await further determination of the claims.

CONCLUSION

The court has considered the remainder of defendants' arguments and finds them to be without merit.

Accordingly, the motion to dismiss is denied in its entirety.

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

<p>SECURITIES INVESTOR PROTECTION CORPORATION,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>BERNARD L. MADOFF INVESTMENT SECURITIES LLC,</p> <p style="text-align: right;">Defendant.</p>

<p>In re:</p> <p>BERNARD L. MADOFF INVESTMENT SECURITIES LLC,</p> <p style="text-align: right;">Debtor.</p>

<p>IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>ERIC T. SCHNEIDERMAN, as successor to ANDREW M. CUOMO, Attorney General of the State of New York, BART M. SCHWARTZ, as Receiver for ARIEL FUND LTD. and GABRIEL CAPITAL, L.P., DAVID PITOFISKY, as Receiver for ASCOT PARTNERS L.P., ASCOT FUND, LTD., J. EZRA MERKIN; and GABRIEL CAPITAL CORPORATION,</p> <p style="text-align: right;">Defendants.</p>

Civil Action No.: **12 Civ 6733 (JSR)**

**DECLARATION OF BART M. SCHWARTZ IN OPPOSITION TO
TRUSTEE’S APPLICATION FOR ENFORCEMENT OF
AUTOMATIC STAY AND ISSUANCE OF PRELIMINARY INJUNCTION**

BART M. SCHWARTZ, under penalty of perjury, declares the following to be true and correct:

- I am a member of the bar of this Court. In my capacity as the Receiver of Ariel Fund, Ltd. (“Ariel Fund”) and Gabriel Capital, L.P. (“Gabriel Fund” and together with Ariel

Fund, the "Ariel & Gabriel Funds"), I am named as a Defendant in this action, which has been commenced by the Trustee ("Trustee") for the Liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") to prevent the consummation of a settlement of claims held by the Ariel & Gabriel Funds and the New York Attorney General against Defendants J. Ezra Merkin ("Merkin") and Gabriel Capital Corporation ("GCC" and, together with Merkin, the "Merkin Defendants").

2. I respectfully submit this declaration in opposition to the Trustee's motion seeking enforcement of the automatic stay, related stay orders and a preliminary injunction (the "Motion").

3. In this declaration, I will address the serious prejudice that the Ariel & Gabriel Funds would suffer if the injunctive relief sought by the Trustee were granted. However, I respectfully refer the Court to the Declaration of David Ellenhorn (the "Ellenhorn Declaration"), also submitted in opposition to the Motion, for a fuller descriptions of the factual background.¹

The Ariel & Gabriel Funds, and Their Investors

4. I was appointed as Receiver for both Ariel Fund and Gabriel Fund by Justice Richard B. Lowe, III of the New York State Supreme Court pursuant to a Stipulation and Order Appointing Receiver, entered on June 10, 2009 (the "2009 Order"). A copy of that 2009 Order is annexed as Exhibit "A."

5. My appointment as Receiver – as well as the simultaneous appointment of David Pitofsky as the receiver of Ascot Partners L.P., another fund controlled by the Merkin Defendants – was made by Justice Lowe at the request of the New York State Attorney General

¹ Capitalized terms that are not defined in this Declaration have the meaning ascribed to those terms in the Ellenhorn Declaration.

and consented to by Merkin. In addition to appointing Receivers over the Funds, the 2009 Order also restrained Merkin from transferring assets or engaging in certain transactions.

6. The Ariel & Gabriel Funds collectively have nearly 300 investors, ranging from elderly individuals (many of whom I understand are now of relatively modest means, following the losses they sustained through their investments in one or both of the Ariel & Gabriel Funds, and in some instances other market impacts of 2008 and thereafter); to charities and endowments, both within and outside of New York; to relatively large financial management organizations (each of which ultimately is investing the monies of underlying individuals, who also no doubt represent a range of levels of new worth).

7. The Merkin Defendants invested between 25 and 30% of the assets of each of the Ariel & Gabriel Funds with BLMIS.

8. When I was appointed as the Receiver of the Ariel & Gabriel Funds, the assets of these funds included (i) causes of action against the Merkin Defendants and other parties, (ii) disputed claims against BLMIS, and (iii) a substantial portfolio of largely illiquid investments. Since my appointment as the Ariel & Gabriel Receiver, I have worked diligently to carefully and expeditiously liquidate the Ariel & Gabriel Funds' non-BLMIS investment portfolios without unduly sacrificing investment value, seeking to maximize both the speed and aggregate amount of distributions to investors. To date, Justice Lowe has authorized me to distribute more than \$500 million generated from the liquidation of the non-BLMIS investment portfolios to investors in the Ariel & Gabriel Funds.

The Ariel & Gabriel Funds' Litigations with BLMIS

9. I also have worked throughout my service as Ariel & Gabriel Receiver to achieve reasonable resolutions of all disputes, to the extent possible, in the interests of investors in the

Ariel & Gabriel Funds. In this regard, I first communicated with the Trustee shortly after my appointment in 2009, in an effort to determine the feasibility and advisability of any consensual resolution of the Trustee's claims of \$16 million to \$18 million against each of the Ariel & Gabriel Funds, and allowance of the Ariel & Gabriel Funds' net equity claims against BLMIS, each in an amount exceeding \$160 million.

10. The Trustee's response was to amend his claims against the Ariel & Gabriel Funds to increase them by more than \$275,000,000. However, following my prompt filing of a motion to dismiss, the Trustee voluntarily withdrew these additional claims, citing "further review of the law" as the reason for the withdrawal. *See*, Eric Larson, "*Madoff Trustee Drops \$279 Million from Claim against Merkin*", BLOOMBERG, November 7, 2009, (http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aebYeET87_BQ, retrieved on January 22, 2013).

11. Notwithstanding the Trustee's irresponsible response to initial discussions, I encouraged further discussions from time to time, and there were multiple meetings and other communications over more than three (3) years, but no settlement has been reached between the Ariel & Gabriel Funds and the Trustee.

12. Throughout my tenure as Receiver, I have sent more than two dozen periodic reports to the investors in of both Ariel and Gabriel. Most of these reports contained a section detailing the progress of the litigation against Merkin, as well as efforts to liquidate the claims against the Madoff estates.² For example, in one of my initial reports to investors in the Ariel Fund on September 8, 2009 report, I advised that my investigations of potential recovery actions

² Attached as Exhibit "B" and "C" are copies each of the 24 written communications that I have transmitted to investors in each of Ariel and Gabriel, respectively, since June 2009.

was ongoing and “[i]n addition to evaluating the merits and potential timing for commencement of direct recovery actions belonging to the Fund, the Receiver also is in close communication with the Office of the New York Attorney General regarding is pending action against J. Ezra Merkin and Gabriel Capital Corporation, as well as potential additional recovery efforts.” In my report of October 27, 2010, I notified investors that “[o]n September 16, we had filed a lawsuit seeking recovery of the Fund’s full losses against J. Ezra Merkin and his company Gabriel Capital Corporation. This suit asserts claims uniquely belonging to the Fund.”

13. My reports also discussed the claims asserted against the BLMIS estate. For example, in my December 15, 2009 report, after discussing the action which the Trustee had brought against Ariel & Gabriel, I pointed out to Ariel investors that “the Fund’s claim of approximately \$308 million against Madoff Trusteeship estate remains. While it has been challenged by the Madoff Trustee, if it survives, depending on the ultimate distributions from the Madoff Trusteeship estate, it may help to offset the losses sustained as a result of the Fund’s pre-receivership investment with Madoff.”

14. Knowing that I had filed claims on behalf of the Ariel & Gabriel Funds, most of the investors refrained from commencing individual litigations or arbitrations against the Merkin Defendants. Indeed, I am informed and believe that numerous investors have told members of my team in connection with this matter that they have forborne from taking such actions in specific reliance on the NYAG’s and my litigations protecting their rights, and maximizing their likelihood of recovery against the Merkin Defendants.

15. Consequently, if this Court were to enjoin consummation of the Merkin Settlement, investors in the investors of the Ariel & Gabriel Funds would be prejudiced in order to produce a benefit for the Madoff creditors. I understand that the Trustee has already made two

interim distributions to the Madoff customers that filed claims with him.³ Meanwhile, he seeks to prevent investors in the Ariel & Gabriel Funds from recovering for the distinct and unrelated losses that they suffered by reason of the acts of the Merkin Defendants in order that he can gain some putative advantage in his litigation with the Merkin Defendants.

The Ariel & Gabriel Funds' Litigations and Settlement With the Merkin Defendants

16. Following my appointment as Receiver, I began to explore the possibility of a consensual resolution of claims that the Ariel & Gabriel Funds have against the Merkin Defendants. These claims arose from Merkin's undisclosed delegation of his investment responsibilities to investment managers (of which BLMIS was only one) in violation of both his fiduciary duties to the Ariel & Gabriel Funds and applicable New York law. When I was unable to reach a resolution of those claims prior to the expiration of the two year anniversary of the funds' collapse, I commenced an action on behalf of the Ariel & Gabriel Funds against the Merkin Defendants in the New York State Supreme Court. This was in addition to the enforcement action that previously had been commenced by the NYAG.

17. In December 2011, after substantial negotiations that are described in the Ellenhorn Declaration, I agreed on behalf of the Ariel & Gabriel Funds to the terms of a settlement with the Merkin Defendants. Upon failure of that settlement – due, as described in greater detail in the Ellenhorn Declaration, to the inability to secure releases from the Trustee – I participated in further negotiations with the Merkin Defendants that ultimately resulted in the Merkin Settlement that is described in the Ellenhorn Declaration

³ On September 20, 2012, the Trustee issued a statement announcing that checks for the second *pro rata* interim distribution to eligible BLMIS customers (totaling approximately \$2.479 billion) had been mailed on September 19, 2012, six weeks after he commenced this action. The Trustee's first *pro rata* interim distribution of \$342.5 million had been made on October 5, 2011

18. While I have thus far been able to return relatively meaningful amounts to investors from the non-BLMIS portions of the Ariel & Gabriel Funds' portfolios, these investors have not received any recovery on account of the portions of the Ariel & Gabriel Funds that Merkin entrusted to BLMIS. Specifically, none of the investors in the Ariel & Gabriel Funds are eligible, nor will they ever be eligible, to receive SIPC payments in respect of their Ariel & Gabriel Funds investments.

19. Pursuant to the Merkin Settlement, each eligible investor in either of the Ariel & Gabriel Funds who elects to participate will receive 42.5% of the first \$5 million of their net BLMIS losses. Large investors (defined as investors with more than \$5 million in net BLMIS losses) may submit to a simple process which will determine whether they knew that Merkin had delegated investment responsibility to BLMIS. Those large investors who were not aware of this delegation may participate in a "*large investor settlement pool*" which could provide up to 42.5% of their net BLMIS losses *above* \$5 million. (Large investors who do not wish to participate in this claims process or had knowledge of Merkin's investments with BLMIS and do not seek to qualify, will instead receive an additional 2.5% of their net BLMIS losses above \$5 million.) The Trustee incorrectly characterizes this process as "complex" and "costly." In fact, it is expected to involve only a few investors. The process will be overseen by an independent settlement fund administrator, and is expected to be conducted efficiently and at modest cost.

The Ongoing Harm Caused to Investors in the Ariel & Gabriel Funds by the Stay Action

20. Prior to commencement of this action and the filing of the Injunction Motion, the NYAG, the Ascot Receiver and I had been preparing to consummate the Merkin Settlement, and transmit solicitation materials to all investors. Absent commencement of the Stay Action, we

projected that the first distributions would be made to eligible investors during the first quarter of 2013.

21. The commencement, and pendency of the Injunction Motion, has thwarted our ability to move forward with consummation of the Merkin Settlement, and the making of distributions from proceeds thereof to investors. This visits further delay and burden upon individual investors who already have waited nearly four years following the collapse of the Ariel & Gabriel Funds to receive any recompense for the funds' BLMIS-related losses.

Dated: January 25, 2013
New York, New York

s/ Bart M. Schwartz
Bart M. Schwartz

A-1019

EXHIBIT A

A-1020

PAGE 1 OF 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

J. EZRA MERKIN and GABRIEL CAPITAL CORPORATION,

Defendants,

and

ARIEL FUND LIMITED, ASCOT FUND LIMITED, ASCOT PARTNERS, L.P., GABRIEL ALTERNATIVE ASSETS, LLC, GABRIEL ASSETS, LLC, and GABRIEL CAPITAL, L.P.,

Relief Defendants.

Index No. 450879/2009

E-FILE

FILED
Jun 10 2009
NEW YORK
COUNTY CLERK'S OFFICE

Amended
This Court's order appointing a receiver dated May 28 2009 is as follows:

superceded

STIPULATION AND ORDER APPOINTING RECEIVER

WHEREAS this matter has come before this Court upon the stipulation of all the parties

in the above-captioned action to appoint a receiver as to Ariel Fund Limited ("Ariel Fund"), Gabriel Capital, L.P. ("Gabriel Fund") (together, the "Funds"), Gabriel Alternative Assets, LLC ("Gabriel Alternative"), and Gabriel Assets, LLC ("Gabriel Assets") (collectively, the "Receivership Defendants"), to effect certain changes, as listed below, in the structure and personnel of the Receivership Defendants, for the purpose of marshalling and preserving their assets, for the ultimate distribution of the proceeds to the respective investors of Ariel Fund and Gabriel Fund, and the other responsibilities delineated in this Order; and,

WHEREAS the Receivership Defendants are parties in this action for the purpose of ensuring the jurisdiction of the Court, and have voluntarily consented to the jurisdiction of the Court solely in the above-captioned action; and,

WHEREAS the Receivership Defendants have voluntarily consented to the appointment of a receiver of the Receivership Defendants hereunder, and the organizational changes set forth herein; and,

WHEREAS the Defendants deny any wrongdoing but have voluntarily consented to the appointment of a receiver of the Receivership Defendants hereunder, and the organizational changes set forth herein; and,

WHEREAS Plaintiff has brought an action alleging violations of New York's Martin Act and Executive Law, and is seeking equitable remedies for such violations to include the appointment of an equity receiver; and,

WHEREAS the Court has equitable powers to appoint a receiver in a New York Executive Law section 63(12) action, and pursuant to New York General Business Law section 353-a, to preserve the assets of the Receivership Defendants during the pendency of this action; and,

WHEREAS the Court has the power to appoint a replacement control party pursuant to Section 17-803(a) of the Delaware Revised Uniform Limited Partnership Act ("DRULPA"), to wind up the Gabriel Fund's affairs; and,

WHEREAS the Court finds that, based on the record in these proceedings and the submissions of the parties, the appointment of a receiver as to the Receivership Defendants in this action is appropriate; and,

WHEREAS this Court has personal jurisdiction over the Relief Defendants.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED

THAT:

Bart M. Schwartz (the "Receiver") (of Guidepost Partners LLC (together with its members, "Guidepost")), is hereby appointed to serve without bond as receiver for the estates of the Receivership Defendants.

I.

General Powers and Duties of Receiver

A. This Order is intended to vest in the Receiver all right, title and authority heretofore vested in the General Partner or senior-most executive or control party, as applicable, of each of the Receivership Defendants, to the fullest extent permitted by law. The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the officers, directors, managers, managing partners and general partners of the Receivership Defendants under applicable state, federal and foreign law; by the governing charters, bylaws, articles and/or agreements in addition to all powers and authority of a receiver at equity; and all powers conferred upon a receiver or liquidating trustee, as applicable, including by the provisions of: New York Civil Practice Law and Rules, Article 64; New York General Business Law Section 353-a; and Section 17-803 of the DRULPA, as applicable.

B. The Receiver shall have power to retain, dismiss or replace any and all trustees, officers, managers, employees, investment advisors, accountants, attorneys and other agents of the Receivership Defendants, and to the extent permissible by Cayman Islands law, the directors of the Receivership Defendants. Such persons and entities shall have no authority with respect to the Receivership Defendants' operations or assets, except to the extent expressly granted by the Receiver. The Receiver shall assume control of the operations and assets of the Receivership Defendants and shall pursue and preserve all of their claims and defenses.

C. In addition to the specific powers of receivership granted herein, the Receiver shall possess and exercise all of the rights, powers and duties held under applicable law by, and he shall serve as: (i) the Managing Partner and General Partner of the Gabriel Fund; (ii) the voluntary liquidator of the Ariel Fund; and (iii) the non-member manager of each of Gabriel Assets and Gabriel Alternative.

D. Persons currently holding a position with any of the Receivership Defendants shall possess authority to act on behalf of any of the Receivership Defendants unless expressly revoked by the Receiver.

E. The Receiver shall have all powers, authorities, rights and privileges accorded to receivers under the laws of the State of New York. Subject to the specific provisions in Sections II through XIII, below, the Receiver, without limitation, shall also have the following general powers and duties:

1. To use reasonable efforts to determine the nature, location and value of all property interests of the Receivership Defendants, including, but not limited to, monies, funds, securities, credits, effects, goods, chattels, lands, premises, leases, claims, rights and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind, which the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly ("Receivership Property" or, collectively, the "Receivership Estates");
2. To take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and Receivership Defendants' records relevant thereto;
3. To manage, control, operate, wind-down and maintain the Receivership Estates, to segregate and not commingle each Fund's income and proceeds in advance of any distribution, and hold in his possession, custody and control all Receivership Property, pending further Order of this Court;
4. To use Receivership Property for the benefit of the Receivership Estates, making payments and disbursements and incurring expenses as may be

necessary or advisable in the ordinary course of business in discharging his duties as Receiver;

5. To take any action which, prior to the entry of this Order, could have been taken by the officers, directors, partners, managers, trustees and agents of the Receivership Defendants;
6. To engage and employ persons in his discretion to assist in carrying out his duties and responsibilities hereunder, including, but not limited to, accountants, attorneys, securities traders, registered representatives, financial or business advisers, liquidating agents, real estate agents, forensic experts, brokers, traders or auctioneers;
7. To take such action as the Receiver determines for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property;
8. To bring such legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging his duties as Receiver;
9. To pursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates; and,
10. To take such other action as is consistent with this Order, the organizational documents of each of the Receivership Defendants or as may be approved by this Court.

F. The Receiver, without limitation, also shall have the authority for and in the name of the Receivership Defendants to take such action, as he deems necessary or advisable, to sell or otherwise dispose of the securities, financial instruments and assets owned for investment purposes by or on behalf of the Receivership Defendants (all such items being called herein a "Security" or "Securities"), to make follow-on investments, and to refinance, hedge or otherwise act to protect the value of and return on the Receivership Defendant's Securities until such Securities are liquidated. Such authority shall include, without limitation, the power to directly or through third party managers:

1. possess, transfer, mortgage, pledge or otherwise deal in, and to exercise all rights, powers, privileges and other incidents of ownership or possession with respect to, the Securities;
2. lend, with or without security, any of the Securities including by entering into reverse repurchase agreements;
3. borrow or raise funds, including by entering into repurchase agreements and secure the payment of obligations of the Receivership Defendants by mortgage upon, or pledge or hypothecation of, all or any part of the property of the Receivership Defendants;
4. engage in hedging transactions including, without limitation, currency forwards, currency futures, spot trades, interest rate swaps and credit default swaps;
5. open, maintain and close accounts, including margin, custodial and foreign currency accounts, with brokers, which power shall include the authority to issue all instructions and authorizations to brokers regarding the Securities and/or money therein; to pay, or authorize the payment and reimbursement of, brokerage commissions that may be in excess of the lowest rates available that are paid to brokers who execute transactions for the account of the Receivership Defendants and who supply or pay (or rebate a portion of the Receivership Defendant's brokerage commissions to the Receivership Defendants for payment of) for research or execution services utilized by the Receivership Defendants; provided that the Receivership Defendants do not pay a rate of commissions in excess of what is competitively available from comparable brokerage firms for comparable services, taking into account various factors, including commission rates, reliability, financial responsibility, strength of the broker and ability of the broker to efficiently execute transactions, the broker's facilities and the broker's provision or payment of the cost of research and other services or property that are of benefit to the Receivership Defendants or the Receiver;
6. open, maintain and close accounts; including custodial accounts, with banks, including banks located outside the United States, and draw checks;
7. enter into arrangements with brokers to open "average price" accounts and allocate the Securities or other assets so sold, on an average price basis, among such accounts;
8. do any and all acts on behalf of the Receivership Defendants, and exercise all rights of the Receivership Defendants, with respect to the Receivership Defendants' interest in any person, including, without limitation, the voting of Securities, participation in arrangements with creditors, the

institution and settlement or compromise of suits and administrative proceedings and other like or similar matters; and

9. to authorize any member, employee or other agent of Guidepost or GCC to act for and on behalf of the Receivership Defendants in all matters incidental to the foregoing.

II.

Receivership Defendants Structure, Personnel and Agreement Changes

A. The Defendants and the Receivership Defendants, by their counsel, have taken prior to the date of this Order or, if not already taken, have agreed to take all necessary and appropriate steps to seek to effectuate changes in the organizational structure, personnel and agreements of Defendants and the Receivership Defendants to ensure the Receiver fully controls, manages, directs and operates the Receivership Defendants. These steps include arranging for the following:

1. An agreement among the Receiver, the board of directors of the Ariel Fund and Gabriel Capital Corp. ("GCC"), authorizing and requesting the appointment of the Receiver by Fortis Prime Fund Solutions (Cayman) Limited ("Fortis") as Voluntary Liquidator of Ariel, with GCC remaining as investment advisor;
2. Requiring Fortis to take the following steps for the Ariel Fund to enter into voluntary liquidation under the laws of the Cayman Islands and appoint the Receiver as Voluntary Liquidator:
 - i. Directors of Ariel Fund pass a written resolution recommending the appointment of the Receiver as Voluntary Liquidator,
 - ii. Fortis passes a written resolution appointing the Receiver as Voluntary Liquidator
 - iii. Directors of Ariel Fund approve and execute a statutory declaration of solvency,
 - iv. Notice of appointment published in the Cayman Islands Official Gazette, and
 - v. Notice of winding up and the Voluntary Liquidator's consent to act filed with the Registrar of Companies of the Cayman Islands.
3. An amendment to the Gabriel Fund Limited Partnership Agreement, by which J. Ezra Merkin will appoint the Receiver as Managing Partner and General Partner and concurrently therewith will resign as General Partner

and Managing Partner and convert his economic interest in the Gabriel Fund to a limited partnership interest. In addition, the Gabriel Fund shall cause to be filed with the Secretary of State of the State of Delaware an amendment to the Gabriel Fund's Certificate of Limited Partnership reflecting the admission of the Receiver as a new general partner and the withdrawal by J. Ezra Merkin as general partner;

4. An amendment to the LLC Agreement of Gabriel Assets where the Receiver replaces J. Ezra Merkin as Non-Member Manager;
5. An amendment to the LLC Agreement of Gabriel Alternative Assets LLC where the Receiver replaces J. Ezra Merkin as Non-Member Manager;
6. The seeking of consent under the following agreements that the applicable counterparty will not terminate its agreement or impose adverse terms as a result of the appointment of the Receiver as Manager in Charge of Liquidation or Non-Member Manager, as applicable:
 - i. ISDA Master Agreement between Barclay's (formerly Lehman) and Gabriel Fund,
 - ii. ISDA Master Agreement between JPMorgan and Gabriel Fund,
 - iii. ISDA Master Agreement between JPMorgan and Ariel Fund,
 - iv. ISDA Master Agreement between Merrill Lynch and Gabriel Assets,
 - v. ISDA Master Agreement between Citibank and Gabriel Assets,
 - vi. Prime Broker Agreement between Merrill Lynch and Ariel Fund,
 - vii. Prime Broker Agreement between Merrill Lynch and Gabriel Fund,
 - viii. Prime Broker Agreement between Morgan Stanley and Gabriel Fund,
 - ix. Foreign Trading Annex between Morgan Stanley and Gabriel Fund,
 - x. Foreign Exchange Trading Annex between Morgan Stanley and Ariel Fund,
 - xi. Transfer Funds Agreement between Morgan Stanley and Gabriel Alternative,
 - xii. Master Securities Loan Agreement between Prime Dealer Services Corp. and Gabriel Alternative,
 - xiii. Master Securities Loan Agreement between Prime Dealer Services Corp. and Gabriel Assets,
 - xiv. Institutional Account Agreement between JPMorgan (formerly Bear Stearns) and Gabriel Assets,
 - xv. Share Registration Agreement between Fortis and Ariel; and,
7. The provision to the Receiver of a list of all trustees, directors, officers, managers, employees, investment advisors, accountants, attorneys and

other agents of the Receivership Defendants as of the date of this Order;
and

8. Such additional action as may be necessary or appropriate to effectuate the foregoing or as may be directed by this Court.

B. In the event that the Receiver deems it necessary that additional actions be taken to ensure the Receiver fully controls, manages, directs and operates the Receivership Defendants, the Defendants and the Receivership Defendants agree to take all steps the Receiver may reasonably direct to effectuate such purpose.

C. The aforementioned steps are supplemental, and do not derogate from, but only supplement the authority of the Receiver. To the extent any of the steps require a vote of partners in the Funds under Fund agreements, the absence of such vote will not derogate from the management authority vested otherwise in the Receiver by this Order. The failure of the Defendants, the Relief Defendants, or any court or regulatory authority, to take or complete any of the aforementioned steps shall have no impact on the authority or powers of the Receiver under the laws of the State of New York.

D. Subject to the direction of the Receiver, GCC will provide continuity of operations, internal record-keeping, financial accounting and back-office functions for the Receivership Defendants. The Receiver will cause the Funds to reimburse GCC for its expenses incurred in providing such services (including compensation of GCC's employees other than J. Ezra Merkin). The Receiver will have sole discretion to retain or dismiss GCC.

E. J. Ezra Merkin agrees to provide assistance as reasonably requested by the Receiver without compensation, for the benefit of the investors in the Funds.

F. J. Ezra Merkin and GCC will not receive any other fees from the Receivership Defendants, including, without limitation, any management, incentive, profit-sharing or deferred fee under any prior agreement, but without prejudice as to the claims of the parties concerning

any fees, including, without limitation, any management, incentive, profit-sharing or deferred fee claimed to have been earned or accrued prior to the appointment of the Receiver.

G. Nothing in this Order shall abrogate the Court's powers under the CPLR or its equitable powers. The parties hereto acknowledge and stipulate to the Court's power to modify or supplement this Order, for cause, at any time.

III.

Access to Information

A. The past and/or present officers, directors, agents, managers, general partner, managing partners, trustees, attorneys, accountants and employees of the Receivership Defendants, as well as those acting in their place, are hereby ordered and directed to turn over to the Receiver forthwith all paper and electronic information of, and/or relating to, the Receivership Defendants and/or all Receivership Property, in such manner as the Receiver may specify; such information shall include but not be limited to books, records, documents, accounts and all other instruments and papers.

B. The Receivership Defendants' past and/or present officers, directors, agents, attorneys, managers, shareholders, employees, accountants, debtors, creditors, managing partners, and general and limited partners, and other appropriate persons or entities shall produce all documents as required by the Receiver regarding the business of the Receivership Defendants, or any other matter relevant to the operation or administration of the receivership or the collection of funds due to the Receivership Defendants, in such manner as the Receiver may specify. In the event that the Receiver deems it necessary to require the appearance of the aforementioned persons or entities or their documents, the Receiver shall make its discovery requests in accordance with the New York Civil Practice Law and Rules.

IV.

Access to Books, Records and Accounts

A. The Receiver is authorized to take immediate possession of all assets, bank accounts or other financial accounts, books and records and all other documents or instruments of the Receivership Defendants. All persons and entities having control, custody or possession of any Receivership Property are hereby directed to turn such property over to the Receiver, in such manner as the Receiver may specify.

B. The Receivership Defendants, as well as their agents, servants, employees, attorneys, any persons acting for or on behalf of the Receivership Defendants, and any persons receiving notice of this Order by personal service, facsimile transmission or otherwise, having possession of the property, business, books, records, accounts or assets of the Receivership Defendants, are hereby directed to deliver the same to the Receiver, his agents and/or employees, in such manner as the Receiver may specify. Nothing in this paragraph shall impinge on a person's rights to assert any applicable privilege.

C. All banks, brokerage firms, financial institutions, and other persons or entities which have possession, custody or control of any assets or funds held by, in the name of, or for the benefit of, directly or indirectly, any of the Receivership Defendants, that receive actual notice of this Order by personal service, facsimile transmission or otherwise shall, in such manner as the Receiver may specify:

1. Not liquidate, transfer, sell, convey or otherwise transfer any assets, securities, funds, or accounts in the name of or for the benefit of the Receivership Defendants except upon instructions from the Receiver or as may be delegated by the Receiver;
2. Except as permitted in existing agreements, not exercise any form of set-off, alleged set-off, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of this Court or the Receiver;

3. Within ten business days of receipt of that notice, file with the Court and serve on the Receiver and the New York Attorney General a certified statement setting forth, with respect to each such account or other asset, the balance in the account or description of the assets as of the close of business on the date of receipt of the notice; and,
4. Cooperate expeditiously in the transfer of funds, other assets and accounts to the Receiver or at the direction of the Receiver.

D. J. Ezra Merkin and GCC have a continuing obligation to turn over to the Receiver all documents of the Receivership Defendants and all non-privileged documents (where the right to waive the privilege does not belong to the Receivership Defendants) related to the Receivership Defendants, including, without limitation, all mail, correspondence, and account statements, in such manner as the Receiver may specify.

V.

Access to Real and Personal Property

A. The Receiver is authorized to take immediate possession of all personal property of the Receivership Defendants, in such manner as the Receiver may specify, wherever located, including but not limited to bank records and accounts, savings records and accounts, brokerage records and accounts, certificates of deposit, stocks, bonds, debentures, and other securities and investments, contracts, mortgages, furniture, office supplies and equipment.

B. The Receiver is authorized to take immediate possession of all real property of the Receivership Defendants, wherever located, including but not limited to all ownership and leasehold interests and fixtures. Upon receiving actual notice of this Order by personal service, facsimile transmission or otherwise, all persons other than law enforcement officials acting within the course and scope of their official duties, are (without the express written permission of the Receiver) prohibited from: (a) entering such premises; (b) removing anything from such premises; or, (c) destroying, concealing or erasing anything on such premises.

C. The Receiver is authorized to open all mail directed to or received by or at the offices or post office boxes of the Receivership Defendants, and to inspect all mail directed to, or received by or on behalf of, the Receivership Defendants and opened prior to the entry of this Order, to determine whether items or information therein fall within the mandates of this Order.

VI.

Notice to Third Parties

A. The Receiver shall promptly give notice of his appointment to all known officers, directors, agents, employees, shareholders, creditors, debtors, managers and general and limited partners of the Receivership Defendants, as the Receiver deems necessary or advisable to effectuate the operation of the receivership.

B. All persons and entities owing any obligation, debt, or distribution with respect to an ownership interest to any Receivership Defendant shall, until further ordered by this Court, pay all such obligations in accordance with the terms thereof to the Receiver and its receipt for such payments shall have the same force and effect as if the Receivership Defendant had received such payment.

C. In furtherance of his responsibilities in this matter, the Receiver is authorized to communicate with, and/or serve this Order upon, any person, entity or government office that he/she deems appropriate to inform them of the status of this matter and/or the financial condition of the Receivership Estates. All government offices which maintain public files of security interests in real and personal property shall record this Order upon the request of the Receiver or the New York Attorney General.

D. The Receiver is authorized to instruct the United States Postmaster to hold and/or reroute mail which is related to the business, operations or activities of any of the Receivership Defendants, including all mail addressed to, or for the benefit of, the Receivership Defendants.

E. The Receiver is authorized to assert, prosecute and/or negotiate any claim under any insurance policy held by or issued on behalf of the Receivership Defendants, or their officers, directors, agents, employees or trustees, and to take any and all appropriate steps in connection with such policies.

VII.

Injunction Against Interference with Receiver

A. The Receivership Defendants and all persons receiving notice of this Order by personal service, facsimile or otherwise, are hereby restrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver, which would:

1. Interfere with the Receiver's efforts to take control, possession, or management of any Receivership Property; such prohibited actions include but are not limited to, using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any Receivership Property;
2. Hinder, obstruct or otherwise interfere with the Receiver in the performance of his duties; such prohibited actions include but are not limited to, concealing, destroying or altering records or information;
3. Dissipate or otherwise diminish the value of any Receivership Property, including but not limited to, releasing claims or disposing, transferring, exchanging, assigning or in any way conveying any Receivership Property, enforcing judgments, assessments or claims against any Receivership Property or any Receivership Defendant, attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate the due date of any lease, loan, mortgage, indebtedness, security agreement or other agreement executed by any Receivership Defendant or which otherwise affects any Receivership Property, provided, however, that nothing above shall restrict the existing authority provided for in agreements between the Receivership Defendants and investment managers or sub-managers (other than J. Ezra Merkin or GCC), and provided further that third parties may rely upon the instruction of GCC and its personnel if so authorized by the Receiver; or,

4. Interfere with or harass the Receiver, or interfere in any manner with the jurisdiction of this Court over the Receivership Estates.

B. If at any time any person or entity fails, appears to fail, or indicates an intention to fail, to comply in any way with the terms of this Order, the Receiver may seek immediate assistance of the New York Attorney General, and also may seek further Order of this Court, on such expedited notice as the Receiver deems appropriate in the circumstances, in aid of enforcement of this Order.

VIII.

Investigate and Prosecute Claims

A. The Receiver is authorized and empowered to investigate, prosecute, defend, intervene in or otherwise participate in, compromise, and/or adjust actions in any state, federal or foreign court or proceeding of any kind as may in his sole discretion be advisable or proper to recover and/or conserve Receivership Property.

B. The Receiver is authorized and empowered to:

1. Investigate the manner in which the financial and business affairs of the Receivership Defendants were conducted and to institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Estate, as the Receiver deems necessary and appropriate;
2. Seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits, asset turnover, avoidance of fraudulent transfers, rescission and restitution, collection of debts, and such other relief as may be necessary to enforce this Order; and,
3. Defend, compromise or settle legal actions in which the Receivership Defendants or the Receiver are a party; except, however, in actions where the Receivership Defendants are nominal parties, as in certain foreclosure actions where the action does not affect a claim against or adversely affect the value of any Receivership Property, the Receiver may file appropriate pleadings in the Receiver's discretion.

C. The Receiver hereby holds, and is therefore empowered to waive, all privileges, including the attorney-client privilege, held by all Receivership Defendants. Notwithstanding

any other term or provision of this Stipulation and Order, nothing herein shall constitute or require the waiver of any claim of privilege or work-product protection of J. Ezra Merkin or GCC.

IX.

Bankruptcy Filing

A. The Receiver may file voluntary petitions for relief under Title 11 of the United States Code (the "Bankruptcy Code") for the Receivership Defendants. If a Receivership Defendant is placed in bankruptcy proceedings, the Receiver, as the General Partner of the Gabriel Fund, the voluntary liquidator of the Ariel Fund, and the non-member manager of each of Gabriel Assets and Gabriel Alternative, shall become, and shall be empowered to operate, each of the Receivership Estates as a debtor in possession unless otherwise ordered by the Bankruptcy Court.

B. The Receiver is authorized to take any action which he deems to be necessary and appropriate in order to file for relief under the Bankruptcy Code, including the execution of all necessary corporate resolutions or directions.

X.

Liability of Receiver

A. The Receiver shall not be required to post bond or give an undertaking of any type in connection with his appointment in this matter.

B. The Receiver and Guidepost shall owe fiduciary duties to the Funds in accordance with law. Any claim against the Receiver or Guidepost based upon acts or omissions committed under authority of this Order shall be asserted only in this action or with prior leave of the Court. Neither the Receiver nor Guidepost shall have any liability unless the Court determines that the

Receiver or Guidepost engaged in gross negligence, willful misconduct or acted in bad faith or committed a material breach of fiduciary duty.

C. The appointment of the Receiver is a permanent appointment, subject, in all respects, to the power of the Court to remove and replace the Receiver for cause.

D. The Receiver may resign. In the event the Receiver decides to resign, the resignation shall not be effective until the Court appoints a successor. The Receiver shall then follow such instructions as the Court may provide.

E. The Receivership Defendants shall indemnify and hold harmless the Receiver and Guidepost with respect to any or all claims, rights and causes of actions of every type or nature whatsoever based upon acts or omissions committed under authority of this Order, unless this Court finds the Receiver or Guidepost engaged in gross negligence, willful misconduct or bad faith or committed a material breach of fiduciary duty. The Receivership Defendants shall further indemnify the Receiver and Guidepost for, and advance reasonable costs and attorneys' fees in defending against, any claims against the Receiver or Guidepost based upon acts or omissions committed under authority of this Order; provided, however, to the extent this Court finds that the Receiver or Guidepost engaged in gross negligence, willful misconduct or bad faith or committed a material breach of fiduciary duty, the Receiver or Guidepost shall immediately repay any advanced defense costs or attorneys' fees.

F. Any indemnity claim of any nature asserted by Defendant J. Ezra Merkin, his agents or affiliates (including in respect of the fees and disbursements of legal counsel representing any of the foregoing) against any Receivership Defendant or its assets shall be subordinated in all respects to the right of the Receiver and Guidepost to recover in full all amounts of any nature due to the Receiver and Guidepost under this Order (including pursuant to

the indemnity provisions of this Order); provided, however, that such subordination shall not be construed to be a waiver by Defendant J. Ezra Merkin, his agents or affiliates, of the right to seek indemnification from the Receivership Defendants in accordance with the terms of the agreements and other documents relating to such Receivership Defendants, which claims shall not be adversely affected by this stipulation and order.

XI.

Fees, Expenses and Accountings

- A. The Receiver need not obtain Court approval prior to the disbursement of Receivership Funds for expenses that the Receiver deems advantageous to the orderly administration and operation of the receivership. Further, prior Court approval is not required for payments of applicable federal, state or local taxes.
- B. Subject to Paragraph C immediately below, the Receiver is authorized to solicit persons and entities ("Retained Personnel"), including, without limitation, Guidepost and such outside legal counsel, accounting and financial professionals as he deems appropriate, to assist him in carrying out the duties and responsibilities described in this Order.
- C. Retained Personnel are entitled to reasonable compensation and expense reimbursement from the Receivership Estates. Such compensation shall be in amounts commensurate with the services performed by the Retained Personnel.
- D. The Receiver and Guidepost are entitled to reasonable compensation for its professionals and paraprofessionals, and expense reimbursement. The hourly billing rates for the Receiver and Guidepost professionals in 2009 shall be between \$600 to \$675. For the initial three months, the aggregate fees of the Receiver and Guidepost will be capped at \$135,000 per month, including up to \$123,000 for professional services, and \$12,000 for para-professional support. Fees for Retained Personnel will be paid in the amounts billed to the Receiver, without

any mark-up. The Receiver may, in his discretion, pay invoices for fees and expenses of the Receiver, Guidepost and Retained Personnel monthly, subject to review on 10 days' notice by the Attorney General, and absent notice to the Receiver of any objection by the New York Attorney General within such 10 day period. Amounts paid to the Receiver, Guidepost and for other Retained Personnel shall be included in the regular reports to the Investor Committee, and all invoice payments shall be made subject to final review and approval by the Court, on notice to the Investor Committee, no less than every four months.

E. In preparation for entry of this Order, the Receiver and Guidepost expended multiple billable hours, and incurred professional fees payable to professionals that, upon entry of this Order, may become Retained Personnel. The Receiver shall submit to the New York Attorney General invoices for all of his and Guidepost's billable hours, and for all fees and expenses incurred by him in connection with preparation and entry of this Order, within five business days following entry of the Order. The New York Attorney General shall review such invoices and inform the Receiver of any objections to payment thereof within five business days following the Receiver's submission of such invoices. In the absence of any timely objection by the New York Attorney General, the fees and expenses stated in such invoices shall then be due and payable.

F. The Receiver shall have the authority to make all payments due and payable for all periods prior to the date hereof to all banks, brokerage firms, financial institutions and other persons or entities that have engaged in business with any of the Receivership Defendants prior to the date hereof or from this date forward.

G. The Receiver shall not, without the prior approval of this Court, on notice: (i) make any distributions to the shareholders or limited partners of the Receivership Defendants,

including any such distributions to J. Ezra Merkin in such capacity, or (ii) make any payments of any sort to or for the account of J. Ezra Merkin.

XII.

Investor Committee

The Receiver shall provide regular reports to, and receive input from, an "Investor Committee" comprised of investors in the Funds selected by the Receiver, in consultation with Plaintiff, from among investors who volunteer to advise and consult with the Receiver without compensation, for the benefit of the Funds, and in order to provide transparency to investors in the Funds, including information regarding the liquidation of the assets of the Funds. The Receiver shall provide regular reports concerning: the financial conditions and operations of the Receivership Defendants; proposed budgets, if any; and fees and expenses of the Receiver and Retained Personnel. Prior to any distribution to investors, or payment of any kind to or for the benefit of J. Ezra Merkin (apart from payments made pursuant to II-D), the Receiver shall provide reasonable notice to the Investor Committee. At the appropriate time, the Receiver shall provide a plan of wind-down and distribution.

A-1040

XIII

Effective Date

The authority and powers of the Receiver shall vest and the Receivership over the Receivership Defendants shall take effect immediately upon the date of the Order by the Court.

**Dated: May 29, 2009
NEW YORK, NEW YORK**

**ANDREW M. CUOMO
Attorney General of the State of New York
120 Broadway, 23rd Floor
New York, New York 10271
(212) 416-8198**

By: _____



**DAVID A. MARKOWITZ, Chief
Investor Protection Bureau
Counsel for Plaintiff**

**J. EZRA MERKIN
GABRIEL CAPITAL CORPORATION**

By: _____



**DECHERT LLP
Andrew J. Levander
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500
Counsel for Defendants**

A-1041

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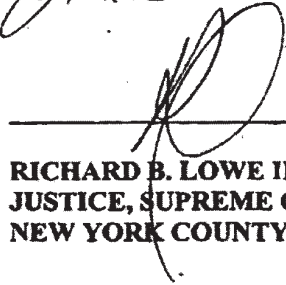
**ARIEL FUND LIMITED
GABRIEL ALTERNATIVE ASSETS, LLC,
GABRIEL ASSETS, LLC, and
GABRIEL CAPITAL, L.P.**

By: 

**SCHULTE ROTH & ZABEL LLP
Howard Schiffman
919 Third Avenue
New York, New York 10022
(212) 756-2000
*Counsel for Relief Defendants***

IT IS SO ORDERED, this 10 day of June, 2009.

FILED
Jun 10 2009
NEW YORK
COUNTY CLERK'S OFFICE



**RICHARD B. LOWE III
JUSTICE, SUPREME COURT
NEW YORK COUNTY**

A-1042

EXHIBIT B

A-1043

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Bart M. Schwartz
Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

June 8, 2009

**Re: Ariel Fund Limited, Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC, and Gabriel Assets, LLC**

To Whom It May Concern:

On June 1, 2009, I was appointed receiver ("Receiver") of Ariel Fund Limited, Gabriel Capital, L.P., Gabriel Alternative Assets, LLC, and Gabriel Assets, LLC (collectively, the "Entities") pursuant to an Order (the "Order") entered by the Supreme Court of the State of New York, New York County (the "Court"). The Receiver has been appointed for the principal purpose of marshalling and preserving the Entities' assets, for the ultimate distribution of proceeds to the respective investors of the Entities. The Receiver's duties and rights are broad, including determining the nature, location and value of all property interests of the Entities; taking custody, control and possession of all the Entities' property and records; managing, controlling, operating, winding down and maintaining the Entities' estates; prosecuting and defending all legal actions to which any or all of the Entities are now, or may in the future become, parties; and such further actions as are consistent with the provisions of the Order, and as the Receiver deems prudent in the pursuit of his duties. Attached for your reference is a notice formally announcing my appointment as Receiver.

Please note that the Entities continue to operate and conduct business, although they now operate under my supervision. You are expressly authorized to continue providing services to the Entities under any existing contract(s) and/or agreement(s).

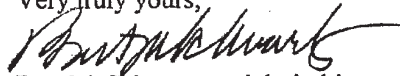
Furthermore, pursuant to Article IV.C. of the Order, on or before June 18, 2009, you are required to file with the Court and serve on the Receiver and the New York Attorney General, a certified statement identifying any assets, securities, funds or accounts you hold in the name of or for the benefit of any of the Entities, and the balance in each such account or description of any such assets as of the close of business on the date of receipt of this notice.

A-1044

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If you require additional information or have any questions, please call me at (212) 205-4189, send me an e-mail at bschwartz@guidepostpartners.com, or communicate with me in writing at the address listed above.

Very truly yours,



Bart M. Schwartz, solely in his capacity as
Receiver of the Entities

Enclosure

Bart M. Schwartz
Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

NOTICE OF APPOINTMENT OF RECEIVER

PLEASE TAKE NOTICE, that Bart M. Schwartz of Guidepost Partners LLC has been appointed receiver (the “Receiver”), pursuant to Order of the Supreme Court of the State of New York, County of New York, entered on June 1, 2009, in the action styled *The People of the State of New York v. J. Ezra Merkin and Gabriel Capital Corporation and Ariel Fund Limited, Ascot Fund Limited, Ascot Partners, L.P., Gabriel Alternative Assets, LLC, Gabriel Assets, LLC, and Gabriel Capital, L.P. as Relief Defendants*, Index No. 450879/2009 (the “Order”), of the following entities:

**Ariel Fund Limited
Gabriel Capital, L.P.
Gabriel Alternative Assets, LLC
Gabriel Assets, LLC**

PLEASE TAKE FURTHER NOTICE, that, among other authority granted to the Receiver pursuant to the terms of the Order, the Receiver is authorized to take custody, control and possession of all Receivership Property (as defined in the Order) and records relevant thereto from the Receivership Defendants (as defined in the Order); to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and Receivership Defendants’ records relevant thereto. You are not required to take any action in respect of any provision of this paragraph at this time. However, be advised that the Receiver or his legal

counsel or other representatives may in the future communicate further with you regarding one or more of the Receiver's duties and rights described herein, and in the Oder.

PLEASE TAKE FURTHER NOTICE, that, pursuant to Article IV.C. of the Order, if you are in possession, custody or control of any assets or funds held by, in the name of, or for the benefit of, directly or indirectly, any of the Receivership Defendants, you must, within ten business days of receipt of this Notice, file with the Court and serve on the Receiver and the New York Attorney General a certified statement setting forth, with respect to each such account or other asset, the balance in the account or description of the assets as of the close of business on the date of receipt of this Notice and cooperate in the transfer of funds, other assets and accounts to the Receiver. Furthermore, pursuant to Article IV.C. of the Order, **you are not permitted to:**

1. liquidate, transfer, sell, convey or otherwise transfer any assets, securities, funds, or accounts in the name of or for the benefit of the Receivership Defendants except upon instructions from the Receiver or as may be delegated by the Receiver; or
2. exercise any form of set-off, alleged set-off, lien or any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of the Court (as defined in the Order) or the Receiver, except as permitted in existing agreements.

PLEASE TAKE FURTHER NOTICE, that, pursuant to Article VII of the Order, **you are restrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver, which would:**

1. Interfere with the Receiver's efforts to take control, possession, or management of any Receivership Property; such prohibited actions include but are not limited to, using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any Receivership Property;
2. Hinder, obstruct or otherwise interfere with the Receiver in the performance of his/her duties; such prohibited actions include but are not limited to, concealing, destroying or altering records or information;
3. Dissipate or otherwise diminish the value of any Receivership Property, including but not limited to, releasing claims or disposing, transferring, exchanging, assigning or in any way conveying any Receivership Property,

enforcing judgments, assessments or claims against any Receivership Property or any Receivership Defendant, attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate the due date of any lease, loan, mortgage, indebtedness, security agreement or other agreement executed by any Receivership Defendant or which otherwise affects any Receivership Property, provided, however, that nothing above shall restrict the existing authority provided for in agreements between the Receivership Defendants and investment managers or sub-managers (other than J. Ezra Merkin or GCC), and provided further that third parties may rely upon the instruction of GCC and its personnel if so authorized by the Receiver; or

4. Interfere with or harass the Receiver, or interfere in any manner with the jurisdiction of this Court over the Receivership Estates.

Any inquires regarding the terms of this Notice, or compliance therewith, should be directed to the Receiver by telephone at 212.205.4189, by e-mail at bschwartz@guidepostpartners.com, or by written correspondence to the address indicated above.

Dated: June 8, 2009
New York, New York

A-1048

Vertical line

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

June 8, 2009

**Solicitation of Interest for Membership on
the Joint Investor Committee of
Ariel Fund Ltd. and Gabriel Capital, L.P.**

As you may know, pursuant to Order of the Supreme Court of the State of New York, County of New York, docketed on June 1, 2009, in the action pending under Index Number 450879/2009 (the "Receivership Order"), and certain corporate actions contemplated thereby, Bart M. Schwartz (the "Receiver"), of Guidepost Partners LLC, has been appointed to assume full control over various U.S. and Cayman investment funds, including Gabriel Capital, L.P. (the "Gabriel Fund") and Ariel Fund Ltd. (the "Ariel Fund" and, together with the Gabriel Fund, the "Funds"). Consistent with the terms of the Receivership Order, the Receiver will establish an Investor Committee, selected by the Receiver, in consultation with the New York Attorney General, from among investors who volunteer to advise and consult with the Receiver, without compensation, for the benefit of the Funds (the "Investor Committee").

In order to constitute the Investor Committee from the most robust possible pool of candidates, a "Confidential Questionnaire Concerning Interest and Qualifications to Serve on the Investor Committee of the Ariel & Gabriel Funds" (the "Committee Interest Form") is attached hereto. **Should you wish to be considered for membership on the Investor Committee, please complete and return the Committee Interest Form pursuant to the instructions printed on it by no later than the close of business on June 18, 2009.**

From the Committee Interest Forms received by June 18, the Receiver, in consultation with the New York Attorney General, will seek to identify candidates that the Receiver believes are representative of the investor community (which will include investors in each of the Funds, and may include both large and small, institutional and individual investors) and that also may bring specific knowledge or skill sets to the Investor Committee. The selected members will serve alongside New York University, which already has been selected to sit on the Investor Committee. The selection of Investor Committee members will be at the sole discretion of the Receiver, following consultation with the New York Attorney General, provided that only candidates who attest, in writing, to their independence from conflicts of interest, and execute a confidentiality agreement in form provided by and acceptable to the Receiver (the "Committee Confidentiality Agreement") will ultimately be seated as Investor Committee members.

Changes to the composition of the Investor Committee may be made in the future, for various reasons, including any resignation of an existing Investor Committee member. In the event of a vacancy going forward, the Receiver may select such replacement member or members as he deems appropriate, in consultation with the New York Attorney General.

In considering whether you wish to complete and return the Committee Interest Form, please note that service on the Investor Committee will be on a voluntary basis, without compensation or expense reimbursement. While the Receiver does not expect to call upon the Investor Committee to undertake any onerous travel or time commitments, there will be periodic conference calls and/or meetings, in which Investor Committee members will generally be expected to participate. Also, of course, Investor Committee members will be required to execute and abide by the terms of the Committee Confidentiality Agreement.

The Investor Committee will advise and consult with the Receiver, but neither it nor its members will have any decision making authority with regard to actions of the Receiver, or conduct of the Funds. Should you have any questions or comments, please do not hesitate to contact the Receiver, or Robert Rittreiser of Guidepost Partners, utilizing the information provided on the Committee Interest Form.

**Confidential Questionnaire Concerning Interest and Qualifications
to Serve on the Joint Investor Committee of the Ariel & Gabriel Funds**

All investors in Ariel Fund Ltd. and Gabriel Fund, L.P. (together, the “Funds”) who are interested in serving on the Investor Committee for the Funds must fully complete, sign and return this form, pursuant to the transmittal instructions below, so that it is received by no later than 5:00 p.m. EDT on June 18, 2009. Those who timely submit completed forms will be contacted with any questions, or the results of the Investor Committee selection process, by July 2, 2009. Information provided on this form will be treated as confidential, to the extent consistent with the Receiver’s duties and with otherwise applicable law.

This is not a Proof of Claim Form, and any information provided by you on this form will not be recorded for purposes of asserting a claim. You will receive a separate form for that purpose in the coming months.

NAME OF INVESTOR (Include full names of all legal and beneficial owners, and name of individual person that is proposed to act as representative on the Investor Committee): _____

CONTACT INFORMATION (Mail address, telephone, telecopier and e-mail): _____

INTERESTS HELD IN THE FUNDS (State all investment holdings in The Ariel Fund Ltd. and Gabriel Fund, L.P., divided by fund, and stating nature of ownership or interest, class of interests held, and NAV, including date of report on which NAV is based):

IDENTIFY AND EXPLAIN ANY PAST, PRESENT OR ANTICIPATED FUTURE AFFILIATIONS OR RELATIONSHIPS YOU HAVE WITH (i) J. EZRA MERKIN; (ii) ANY BUSINESSES OR VENTURES OWNED OR CONTROLLED, IN WHOLE OR IN PART, DIRECTLY OR INDIRECTLY, BY HIM; OR (iii) ANY BUSINESSES WITH WHICH, TO THE BEST OF YOUR KNOWLEDGE AND BELIEF, HE IS AFFILIATED: _____

PROVIDE ANY OTHER INFORMATION THAT YOU BELIEVE IS RELEVANT TO YOUR QUALIFICATIONS TO SERVE AS AN INVESTOR COMMITTEE MEMBER: _____

All of the foregoing is true, accurate and complete to the best of my personal knowledge and belief, after, to the extent applicable, due inquiry of others in my representative capacity,

Signature: _____

Printed Name: _____

Title / Position: _____

Date: _____

TO BE CONSIDERED FOR MEMBERSHIP ON THE INVESTOR COMMITTEE, YOU MUST COMPLETE AND SIGN THIS FORM, AND RETURN IT AS A PDF VIA E-MAIL TO brittereiser@guidepostpartners.com, OR VIA TELECOPIER TO +1 212 205 4199, SO THAT IT IS RECEIVED BY NO LATER THAN 5:00 P.M. EDT ON THURSDAY, JUNE 18, 2009. MR. RITTEREISER ALSO MAY BE REACHED BY TELEPHONE AT +1 212 205 4189, SHOULD YOU HAVE ANY QUESTIONS.

A-1053

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC (collectively, the "Funds"),
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

June 29, 2009

Introductory Report to Investors
by Bart M. Schwartz, as
Receiver / Liquidator of the Funds

As previously reported, pursuant to Order of the Supreme Court of the State of New York, County of New York, docketed on June 10, 2009 (superseding the prior Order docketed on June 1, 2009), in the action pending under Index Number 450879/2009 (the "Receivership Order"), and certain corporate actions contemplated thereby, Bart M. Schwartz (the "Receiver"), of Guidepost Partners LLC, has been appointed to assume full control over the above-listed U.S. and Cayman Funds. The purpose of this Introductory Report is to provide investors in the Funds with certain baseline information concerning the Funds, the Receiver, and the Receiver's plans for maximizing returns to all investors in the Funds through the Receivership.

THERE IS VALUE IN THE FUNDS

As a baseline for understanding the potential value to be realized from investments held by the Funds, please note that these Funds were not fully invested in Bernard L. Madoff Investment Securities or any affiliated Madoff entity ("Madoff"). The Receiver's initial investigation indicates that each of Ariel Fund Limited ("Ariel") and Gabriel Capital, L.P. ("Gabriel"), invested between 20% and 30% of its capital with Madoff. While the Receiver's investigation is ongoing, the information available to him today indicates that the majority of capital of each of the Funds ultimately is in facially legitimate investments, which in the aggregate retain meaningful value. Furthermore, the majority of the Funds' non-Madoff investments are custodied with well recognized, U.S. Government-regulated broker-dealers. Year to date (unaudited) returns for Gabriel are -4.4% and for Ariel are -2.4%.

COST AND OTHER CONTROLS

Promptly following entry of the Receivership Order, the Receiver worked to ensure that J. Ezra Merkin no longer maintained any positions of control or autonomous authority with regard to the Funds' assets and operations. While entities with which Mr. Merkin is affiliated continue to provide certain back office services to the Funds, such services are provided under the ultimate control, and at the discretion, of the Receiver. The Receiver has continued these operations at this time in the belief that it is the most cost-effective way for the Funds. J. Ezra Merkin does not profit from this arrangement.

The Receiver also has promptly met, and caused his colleagues at Guidepost Partners LLC, along with his legal counsel at Reed Smith LLP, to meet and speak telephonically with each outside party that manages or acts as custodian or material counterparty in respect of investments of the Funds. Principal focuses of these meetings and discussions have been to (i) inform parties with physical control over the Funds' assets that they are to take instructions only from the Receiver or his designees; (ii) assure investment counterparties that appointment of the Receiver will not result in any material disruption in the ordinary investment activities of the Funds; and (iii) afford the Receiver and his professionals opportunities to fully understand the Funds' investment positions, and to begin the process of formulating strategies for maximizing value through prudent divestiture of those positions. Initial meetings have now been completed successfully, and further such meetings and discussions will continue throughout the course of the Receivership.

K-1's AND AUDIT

The Receiver is focused on expeditiously having K-1's issued to all investors, and on completion of the Funds' 2008 audits. Regrettably, the Receiver has faced some delays in the audit process, owing principally to the need to retain auditors to replace the Funds' pre-Receivership auditors, BDO Seidman LLP, BDO Tortuga and BDO International. While the BDO entities continue working to complete the Funds' K-1's, the Receiver feels that, due to the pendency of multiple claims against the entities and certain of their affiliates (including claims asserted by the Receiver, as described below) it would be imprudent to have them continue as auditors for the Funds. The Receiver is presently interviewing well known, industry knowledgeable audit firms for the job, and expects promptly to select an auditor, and have it work expeditiously to undertake and complete the Funds' 2008 audits.

POTENTIAL AND INITIATED AFFIRMATIVE LITIGATION

In addition to taking control of the Funds and their assets, during his first three weeks of service the Receiver has begun to investigate potential causes of action against former fiduciaries of the Funds, as well as professionals retained by the Funds pre-Receivership, and outside parties. These investigations are in their nascent stages, but in order to avoid any risk of claims becoming invalid due to lapses of Statutes of Limitations under laws of the United States or the Cayman Islands, the Receiver

authorized Reed Smith to commence a recovery action on June 15 against BDO Seidman LLP, BDO Tortuga and BDO International. Additional recovery actions likely will be forthcoming, as the Receivership progresses.

INVESTOR COMMITTEE AND OTHER INQUIRES

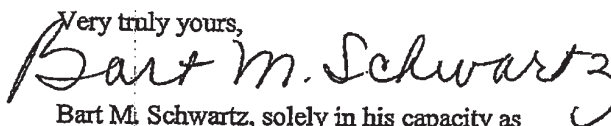
The Receiver, and his colleagues at Guidepost Partners, will be available throughout the course of the Receivership to respond to investor inquiries, and to receive input from investors. The Receiver invites investor input at all stages of the Receivership, and he and his professionals will at all times make their best reasonable efforts to be promptly responsive to all investor communications. You should already have received an Investor Committee Interest Form, which the Receiver will utilize in evaluating and, in consultation with the Office of the New York Attorney General, selecting members for a Joint Investor Committee of the Funds. Appointment of this Committee will help to ensure regular, informed input from representative investors who volunteer to serve, without compensation, on this consultative body. The existence of the Joint Investor Committee will, however, in no way displace the rights of all investors to have their views heard by the Receiver and his professionals.

CONCLUSION

The Receiver's ultimate focus is on maximizing distributions to investors in the Funds. The foregoing is a sampling of his initial efforts toward those ends. Throughout the course of the Receivership, he will endeavour to balance maximum realization on assets – including invested capital, and legal actions to recover damages – with certainty and speed of distributing proceeds to investors.

The Receiver, his colleagues at Guidepost Partners LLC, and his counsel at Reed Smith look forward to working to maximize recoveries for the Funds and their investors. Please do not hesitate to contact the Receiver now, or at any time in the future, should you have any questions or require further information with regard to your investments in the Funds, the Receivership, or any other relevant matter.

Very truly yours,



Bart M. Schwartz, solely in his capacity as
Receiver of the Funds

cc: Robert P. Rittreiser, Guidepost Partners LLC
brittreiser@guidepostpartners.com; 212-371-5207
Sheila Tendy, Guidepost Partners LLC
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James C. McCarroll, Esq., Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1057

Bart M. Schwartz
Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
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September 8, 2009

**Informational Update to Investors in Ariel Fund Limited
by Bart M. Schwartz, as
Receiver/Liquidator of the Funds**

This is our third letter to you and provides an update on your investment in Ariel Fund Limited and on the activities of the Receivership. Below you will find information regarding the commencement of the audit, investment management and performance, our communications with the Joint Investor Advisory Committee; and a status report on potential and ongoing litigations. Investors are encouraged to contact the Receiver or Guidepost Partners, LLC (Guidepost) with any questions or concerns they have about this letter, the Fund, or the Receivership.

Administrative, Accounting and Audit Activities

During the earliest weeks of the Receivership, much of our effort focused on gaining full control of all bank and brokerage accounts, the various agreements and authorities governing the Fund's business relationships, as well as familiarizing ourselves with existing operating procedures. We found the books and records to be in good order and properly controlled.

We have engaged Eisner LLP to conduct an audit of the Fund's investment portfolio as of December 31, 2008. Audit work has commenced and we will be communicating with you again in the near future about our progress. Eisner has been engaged to serve as the Fund's auditor going forward.

Investment Management and Performance

Today, subject to the ultimate control of the Receiver, approximately ninety-five percent (95%) of the Fund's investment portfolio is managed by a unit of Cerberus Capital Management; approximately four percent (4%) is managed by Cohanzick Management LLC; and the

remainder, which consists mainly of investments in litigation-related claims, is managed by an on staff portfolio manager.

The Fund declined 0.4% in June 2009 and as of June 30, 2009 it had declined 2.8 % year to date. However, the Fund has gained 0.1 % as of July 31, 2009, and has declined 2.7 % year to date.

The Cerberus investment strategy is to focus on strong operational control turnarounds and early stage exits once turnaround objectives are met. The current economic and market conditions continue to impact the efficacy of this strategy. The portfolio consists primarily of private equity, control related debt and equity positions that are less liquid than publicly traded securities, and thus, are not easily converted to cash. The holdings are in a broad spectrum of the Automotive, Real Estate and Consumer-related market sectors.

The Receiver and members of Guidepost Partners are examining the appropriate strategy and tactics to determine the optimum way to liquidate the existing portfolio over an appropriate time frame. We will be working closely with the Fund's managers during this process.

While our overriding bias is to liquidate positions as soon as possible, we must balance that goal against reasonable prospects for maximizing value realized in respect of investment positions through holding them over a longer term horizon. Moreover, you should be aware that in the exercise of his business judgment, the Receiver may determine in certain exceptional instances that it is in the best interest of the Fund and its investors to preserve and augment value through meeting limited reinvestment requirements and to incur investment and legal expenses in connection with such matters.

Investors have inquired as to when a distribution plan might be in place. In addition to the liquidity limitations of the investment portfolio that are described above, we are assessing litigations to which the Fund is or may become a party to enable us to lay the groundwork – including establishing appropriate reserve levels for such a plan. Realistically, this effort will continue through the balance of this year at which time we would expect to have a clearer view of the timing for making distributions to the Fund's investors.

Investor Committee and Communications

Pursuant to the Court Order appointing the Receiver, the Receiver has formed a Joint Investor Advisory Committee (the "Committee"). The members of the Committee are: Eric Dillon (Silver Creek Capital); Martin Dorph (NYU); Peter Graf (Distribution Management); John McCarthy and Richard Ziegler. We greatly appreciate these investors' willingness to serve in this capacity.

To date, the Committee has met twice and it is scheduled to meet again on September 8, 2009. Meetings are scheduled to be held approximately every six weeks, or more often, as deemed appropriate by the Receiver. The meetings allow the Receiver to receive input on strategy and specific situations that may arise from time to time. However, the Committee in no way displaces the rights of individual investors to voice their thoughts and questions with the Receiver.

The Receiver is in the process of establishing a monthly e-mail to investors that will summarize portfolio performance. If you would like to receive a monthly update of the Fund's performance, please provide either a fax number or email where you want this information sent to zjohnson@guidepostpartners.com. The first such e-mail will be sent near the end of September. This information will also be contained in the Receiver's periodic update letters.

Potential and Ongoing Litigation

As we have previously reported, in order to avoid any risk of claims becoming invalid due to lapses of Statutes of Limitations under laws of the United States or the Cayman Islands, during his first days in office, the Receiver authorized Reed Smith, LLP to commence a recovery action against BDO Seidman LLP, BDO Tortuga and BDO International. That action remains pending.

The Receiver's investigations of potential recovery actions against additional parties are ongoing. In addition to evaluating the merits and potential timing for commencement of direct recovery actions belonging to the Fund, the Receiver also is in close communication with the Office of the New York Attorney General regarding its pending action against J. Ezra Merkin and Gabriel Capital Corporation, as well as potential additional recovery efforts.

One or both of the Funds is a defendant in several lawsuits, including certain suits commenced by individual investors in the Funds, and a suit against both of the Funds by the Trustee of Bernard L. Madoff Investment Securities, LLC (the "Madoff Trustee"). The Receiver is actively managing the defense of each of these litigations.

For the most part, the individual investor suits, where one or both of the Funds are defendants, appear to have named the Funds as defendants based upon what the Receiver and his attorneys at Reed Smith view as the wholly incorrect legal theory that the Funds must be named as defendants in order for claims to be sustained against J. Ezra Merkin and Gabriel Capital Corporation as fiduciaries to the Funds. At the Receiver's direction, Reed Smith has met with counsel for the plaintiffs in each of these suits to explain the Receiver's views, and to request that the Funds be dismissed from the suits, while the suits proceed against the other defendants.

Each of the individual investor plaintiffs' attorneys has represented verbally that the investor plaintiffs are not seeking to recover monies from the Funds beyond the pro rata distributions that will be made to all investors in the ordinary course of the Receivership. In light of this, and of what the Receiver and Reed Smith believe to be the clear state of law, the Receiver is hopeful that those investors who have suits pending will direct their counsel to voluntarily dismiss the Funds as defendants, allowing the suits to proceed against all other defendants without causing further expense and burden to the Funds.

The Madoff Trustee commenced a lawsuit against both of the Funds on May 8, 2009, seeking to recover all redemption payments made to each of the Funds in the six years prior to revelation of the Madoff Ponzi Scheme. Notwithstanding his prior public representations that he did not intend to seek recoveries from "net losers" (investors in Madoff who lost more than the amounts of redemption payments that they had received), and the appearance that each of the Funds indeed is a net loser with regard to its Madoff investments, the Madoff Trustee has persisted in pressing his lawsuit. Indeed, on August 6, the Madoff Trustee amended his complaint to increase the amounts he seeks to disgorge from the Funds from an aggregate of approximately

\$33.6 million to \$246 million (consisting now of \$92.1 million from Ariel Fund Limited). The Receiver plans to file a motion with the court in which the Madoff Trustee commenced his lawsuit against the Funds to dismiss that lawsuit in its entirety as unsustainable under any theory of law.

Apart from the litigations referenced in this section, and those relating to ongoing investments referenced above, the only other substantive litigation to which either of the Funds is a party is an action commenced in December 2008 by an investor in Ariel Fund Limited in the Supreme Court of the State of New York, County of New York, wherein the investor sought to recover money for its own benefit, but also sought relief for the benefit of Ariel Fund Limited. That investor has now sought to voluntarily dismiss its litigation, but in so doing, it has also sought reimbursement of nearly \$1 million of attorneys' fees and expenses. The Receiver has filed papers in that action disputing the investor's entitlement to such reimbursement. The parties to the litigation have requested a hearing before the Court to argue the matter.

Conclusion

We are working vigorously to deal with the issues presented in this letter and all aspects of the Fund's affairs. I will continue to update investors periodically on issues and Fund performance or as events develop which prompt a communication. Please do not hesitate to contact the Receiver now, or any time in the future, should you have any questions with regard to your investments in the Funds, the Receivership, or any other relevant matter.

Very truly yours,



Bart M. Schwartz, as Receiver

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A-1062

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Bart M. Schwartz
Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
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December 15, 2009

Informational Update to Investors

Introduction

This is our fourth letter to you and provides an update on your investment in Ariel Fund Limited (“Ariel” or the “Fund”) and on the activities of the Receivership. Below you will find information regarding the Fund’s results, portfolio management activities, portfolio valuation processes, the progress of the 2008 audit, the status of pertinent litigation, and distribution-related issues. Investors are encouraged to contact the Receiver or Guidepost Partners, LLC (“Guidepost”) with any questions or concerns they have about this letter, the Fund, or the Receivership.

Fund Results

The estimated net asset value at the end of October 2009 was \$642,015,120. The Fund’s value increased 0.4% in October. Year to date the Fund has declined 2.5%.

The following two portions of our report are intended to explain our working arrangement with Cerberus Capital Partners and to discuss the process to determine net asset value estimates which we periodically provide.

Portfolio Management

Private equity investments are a major component of the Ariel holdings. As we previously reported, these positions are managed by Cerberus Capital Partners under a managed account agreement. The Receiver, through his staff and processes, oversees Cerberus’ activities with respect to investments it manages on behalf of Ariel and other entities over which the Receiver has control, and provides the authority for Cerberus to act on their behalf.

Prior to the Receiver's appointment, Cerberus executed its overall investment strategy, made investment decisions on behalf of various funds, principal accounts and partnerships, and, as we understand it, pursuant to standing agreements and approvals, allocated positions acquired to these entities. The acquisition of private control positions combined with the subsequent proactive management of the acquired entity was, and continues to be, an essential part of Cerberus' strategy for creating value.

The private equity holdings in Ariel upon the Receiver's appointment were the result of positions allocated to the Fund through this process. In many instances, the value of these positions derives in material part from, and therefore is linked to, the larger Cerberus control position. This segment of the portfolio is not actively traded in short term market-driven transactions. We do not make new investment commitments in this segment unless legally obligated to do so, as a result of pre-existing funding commitments or, if a failure to do so would result in a significant loss of value or cause significant dilution due to a corporate event such as a restructuring. In either of the latter instances, before making any reinvestment decision we have undertaken – and will continue in all such instances in the future to undertake – a careful cost benefit analysis is made to ensure that the decision is consistent with our overriding objectives.

Cerberus' active management of the portfolio is focused on the operating and financial condition of the underlying companies. In this respect, the portfolio tracks the economic performance of the companies rather than the market indicators of publicly traded instruments. As previously reported, the private investment portfolio consists of holdings spanning a broad geographic and industry spectrum.

In addition to our own reviews, we receive written reports from Cerberus on the individual holdings and periodically discuss the status of the individual companies with the appropriate Cerberus executive.

The Receiver's objective is to liquidate and wind down investment positions in an orderly and responsible manner, and to create liquidity without sacrificing current fair value. Therefore, when the opportunity exists, we choose to liquidate over holding for the potential of longer-term gain. Our objectives, generally, are consistent with the overall strategy Cerberus currently employs in managing these common investments. Cerberus is informed and aware of our objectives and is working with us accordingly.

In this most recently completed quarter, a public offering of a company which was one of Ariel's largest positions was successfully completed. A portion of our position was sold in the offering. What remains are publicly traded shares which are restricted from further sale until the second quarter of 2010.

In addition to the private equity portion of the portfolio, Cerberus manages a portfolio of mortgage backed securities, loans, currency hedge and derivative hedge positions. We actively review these areas, and some liquidation activity has occurred in these segments of the portfolio.

It should also be noted that Cohanzick Management has worked in close cooperation with the Receiver and has reduced the capital committed to its already comparatively small segment of the Ariel portfolio by over 50% since January 2009.

Portfolio Valuation

The unaudited estimated valuations that we provide represent the net asset value of the Fund's total holdings, including Cerberus, Cohanzick (primarily publicly traded, but illiquid distressed debt positions), and through the in-house managed portfolio of Legal Claims. Cash and cash equivalents are also included in the portfolio.

The value of the illiquid positions held with Cerberus is estimated as a result of a regular position by position valuation process conducted by Cerberus, reviewed in the normal course of audit work by Cerberus' auditors, then reviewed by a qualified third-party price validation service. This process is conducted twice annually. At month-end, in the interim months, price estimates are reviewed by Cerberus and appropriately adjusted. The prices are then provided to the Funds, which may or may not agree with the valuation change. Historically, non-acceptance of the adjusted mark very rarely occurred. In the few instances of which we are aware when the Fund did not adopt Cerberus' prices for a particular position, it was marked more conservatively. In any event, no such disagreements have occurred since commencement of the Receivership.

Most of the Cohanzick managed portion of the portfolio is linked to publicly traded vehicles, and is valued accordingly.

The value of the Legal Claims segment of the portfolio is based on a percentage of the estimated realizable value of the portfolio. This is a segment of the portfolio that's value does not vary significantly month to month unless a particular event occurs which affects a specific claim. However, at present valuations, it comprises less than 1% of the Ariel portfolio.

As discussed elsewhere in this report, Eisner LLP is currently conducting an audit as of December 31, 2008. A price valuation review is also part of this audit.

December 31, 2008 Audit

As previously reported, Eisner LLP has been engaged to conduct an audit of the Fund's Balance Sheet as of December 31, 2008. Completion of the audit is critical to confirming the Fund's positions and valuation as of December 31, 2008, and to establish the foundation for the future audit and tax reporting activities of the Fund.

In concert with Eisner, we have determined that a balance sheet audit will be conducted. The audit will confirm all cash balances and investment holdings as of December 31, 2008 and confirm the estimated valuation, custody, and location thereof. In the absence of the prior auditor's audit work papers and certain cooperation, this has required enhanced, and more extensive than anticipated, confirmation steps. Consequently, the

audit is taking longer than we originally estimated due to the additional time required for this due diligence and confirmation process.

Eisner is also performing a review of the Fund's allocation methodologies and the related record keeping. The unavailability of the prior auditor's work papers has necessitated additional work in this regard as well. The process of confirming the Cerberus holdings directly with each underlying Cerberus investment from which the Fund's positions derive also had to be accomplished without access to prior accounting work. Despite the fact that additional time is required, we believe this more conservative approach is appropriate.

While we had originally hoped to have the audit completed by year end 2009, the foregoing factors have made clear that completion of the audit in the first quarter of 2010 is more realistic.

Ongoing and Potential Litigations

Notwithstanding our ardent efforts to secure dismissal of all litigations pending against the Fund, the Fund remains a defendant in several lawsuits, including certain suits commenced by individual investors in the Fund, and a suit against both of the Funds by the Trustee of Bernard L. Madoff Investment Securities, LLC (the "Madoff Trustee"). Additionally, as noted below, the Fund remains subject to contingent claims – the amount and merits of which cannot be precisely quantified at this time.

Claims Against Which the Fund is Defending

The Madoff Trustee's Litigation Against the Fund

With regard to the Madoff Trustee litigation, while the suit remains pending in part against each of the Funds, we are pleased to note that, as reported to you and in the media last month, following our filing by our legal counsel, Reed Smith LLP, of a motion to dismiss the litigation in its entirety, the Madoff Trustee voluntarily withdrew \$279 million of his total claim – leaving a total claim against the Funds of only \$33.6 million (only \$16.2 million of which is asserted against Ariel).

Our motion to dismiss the remainder of the Madoff Trustee's claim against the Fund remains pending, and it presently is scheduled for argument on December 17, 2009.

We also note that the Fund's claim of approximately \$308 million against the Madoff Trusteeship estate remains. While it has been challenged by the Madoff Trustee, if it survives, depending upon ultimate distributions from the Madoff Trusteeship estate, it may help to offset the losses sustained as a result of the Fund's pre-receivership investment with Madoff.

The Investor Class Action Against the Fund

The previously reported "individual investor" suits against each of the Funds have been consolidated into a class action, which presently is pending before Judge Batts of the U.S. District Court for the Southern District of New York. This consolidated class action suit appears to have named each of the Funds as a defendant based upon what the Receiver and his attorneys at Reed Smith view as the wholly incorrect legal theory that the Funds must be named as defendants in order for claims to be sustained against J. Ezra Merkin and Gabriel Capital Corporation, as fiduciaries to the Funds. As previously reported, at the Receiver's direction, Reed Smith has met with counsel for the plaintiffs in these suits to explain the Receiver's views, and to request that the Funds be dismissed from the suits, while the suits proceed against the other defendants.

Each of the individual investor plaintiffs' attorneys had represented verbally that the investor plaintiffs are not seeking to recover monies from the Funds beyond the pro rata distributions that will be made to all investors in the ordinary course of the Receivership. In light of this, and of what the Receiver and Reed Smith believe to be the clear state of law, the Receiver was hopeful that those investors who have suits pending would direct their counsel to voluntarily dismiss each of the Funds as defendants, allowing the suits to proceed against all other defendants without causing further expense and burden to the Funds. However, as with nearly all class actions, this consolidated class action is not proceeding quickly, and notwithstanding the prior statements of plaintiffs' counsel, no voluntary dismissal has yet occurred.

The Receiver and his legal counsel are evaluating all options to achieve prompt dismissal of the Funds from this lawsuit, and will move forward with all reasonably possible speed to secure such dismissals. While we view the risk of the Fund being held liable for any meaningful amount in respect of this litigation as very small, the Fund's role as a defendant in the litigation creates an impediment to any potential interim distribution to investors and must be accounted for until this matter is resolved.

Other Pending Litigations

Apart from the litigations referenced above – and certain interpleader litigations, in which a fight is occurring over ultimate distribution of a fixed pool of assets, and the Fund's loss exposure is either non-existent or de minimis – the Fund also remains subject to a claim arising from an action that was commenced in December 2008 by an investor in Fund in the Supreme Court of the State of New York, County of New York, wherein the investor sought to recover money for its own benefit, but also sought relief for the benefit of Ariel Fund Limited.

That investor has now sought to voluntarily dismiss its litigation, but in so doing, it has also sought reimbursement of nearly \$1 million of attorneys' fees and expenses. The Receiver has filed papers in that action disputing the investor's entitlement to such reimbursement, and the dispute is pending, awaiting decision from the New York State Supreme Court.

Contingent, Unliquidated Claims That May Be Asserted Against the Fund

While no claims have yet been brought in court, we note that the Fund is party to multiple indemnity agreements. While we believe the Fund has strong – indeed, compelling – defenses to any indemnity claim that might be asserted, the facial validity of such claims must be accounted for in analyzing the Fund’s ability to make any interim distributions to investors, unless and until all such rights are definitively waived or denied by a court of competent jurisdiction.

The potential for substantial indemnity claims by parties against the Fund creates an impediment to any potential interim distribution to investors, unless and until all such claims have been settled or finally adjudicated.

Claims Being Prosecuted, or Which May Be Prosecuted, By the Fund

As we have previously reported, in order to avoid any risk of claims becoming invalid due to lapses of Statutes of Limitations under laws of the United States or the Cayman islands, during his first days in office, the Receiver authorized Reed Smith, LLP to commence a recovery action against BDO Seidman LLP, BDO Tortuga and BDO International. Our legal counsel has engaged in discussions with counsel for the various BDO entities, as well as with representatives of the Office of the New York Attorney General regarding the BDO entities. Our action against the BDO entities remains pending.

The Receiver’s investigations of potential recovery actions against additional parties are ongoing. In addition to evaluating the merits and potential timing for commencement of direct recovery actions belonging to the Fund, the Receiver also is in close communication with the Office of the New York Attorney General regarding its pending action against J. Ezra Merkin and Gabriel Capital Corporation, for the benefit of all of J. Ezra Merkin’s injured investors, as well as potential additional recovery efforts.

Investment-Related Legal Costs

In addition to the above-referenced litigation matters, we note that the Fund incurs legal costs associated with the maintenance, refinancing or other legal measures required to protect or create value of existing positions or claim holdings. These costs are considered, assessed versus probable returns and authorized or not when and if market or transaction events dictate.

Distribution Plan

Understandably, investors ask if and when a distribution of cash can be made. As we have previously reported, there is value within the Fund, including cash and cash equivalents. We define free cash as cash or highly liquid cash equivalents not currently

used to secure or collateralize an investment, related position, or transaction. At the present time, the free cash holdings in the Fund are approximately \$146.6 million. We are optimistic that meaningful distributions to investors will be made, however, we are unable to present a projection in the immediate-term.

We reach this conclusion because, prior to determining an amount available for distribution, the Receiver must calculate cash amounts to be reserved in respect of claims – including those currently asserted in specific amounts, and those that are contingent and unliquidated – as well as projected legal and operating costs. As noted above, in addition to the Madoff Trustee's remaining \$16.2 million pending claim, currently asserted claims against the Fund include a class action in an unliquidated amount that theoretically would encompass the full loss sustained by all investors. Additionally – and in fact, presenting a far greater impediment to any potential for near-term interim distributions – the presently contingent, unliquidated claims that may be asserted against the Fund, which are listed in the immediately preceding section of this report.

These claims are difficult to quantify at the present time. Until each of the above-referenced contingent, unliquidated amounts is quantified, or the claim underlying it is disallowed in its entirety, reserve calculations cannot reasonably be made. The Receiver is working to develop a strategy, which may include litigation, negotiation, and other steps, in an effort to reduce these potential claims to a more quantifiable number in order to present a plan for distribution.

The Receiver must consider these matters when determining how and when he may make distributions to investors. A clearer picture of the potential outcomes of these matters and a more definitive timeframe for their resolution must emerge before a specific distribution plan can be proposed by the Receiver to the Court.

Investor Committee

On October 19, 2009, we held an in-person Investor Committee meeting and on December 11th, 2009 we held a telephonic meeting with the Investor Committee. The next Investor Committee meeting is scheduled for February 9, 2010.

The Investor Committee has been helpful to the Receiver on various matters, particularly its input regarding portfolio review. We are appreciative of the time and effort of the members.

Other Activities

As mentioned in the *Portfolio Management* section of this letter, we reference the fact that some liquidation has occurred in segments of the portfolio apart from the Cerberus managed segment. Consistent with our investment strategy and as a result of discussions with the Investment Committee, we have initiated a special review of the mortgage-related holdings with the objective of liquidating positions at current prices. The liquidity

of mortgage related markets has improved significantly in 2009 and we have been and are continuing to look for opportunities to reduce our positions in these markets. Due to the events of last year, no 2008 audit was completed. As noted above, we are currently working towards producing an audit as of December 31, 2008. Based on requests from certain institutional investors with audit requirements unique to their situations, we, and the support staff at Gabriel Capital, have expended considerable effort to assist these investors in carrying out their interim and special audit procedures. The completion of the Fund's 2008 audit should eliminate the need for these special steps. However, if any similarly situated investor requires additional information prior to the completion of the 2008 audit, feel free to contact us.

Conclusion

Making distributions to investors as quickly as possible is a high priority for the Receiver, and resolution of all open issues that form impediments to such interim distributions will be areas of intensive focus as we move into 2010. Moreover, we are continuing to work on the issues outlined in this letter and all aspects of the Fund's affairs. We will continue to update investors periodically on issues and Fund performance or as events develop which prompt a communication.

Please do not hesitate to contact the Receiver now, or any time in the future, should you have any questions with regard to the Receivership and your investment in the Fund, or any other relevant matter.

Very truly yours,



Bart M. Schwartz, solely in his capacity as
Receiver of the Fund

A-1071

Bart M. Schwartz
Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

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March 18, 2010

Informational Update to Investors in Ariel Fund Limited

Introduction

As has been the case since my appointment in June 2009, I remain focused on the following goals:

1. To carefully and expeditiously liquidate the Fund's investment portfolio without unduly sacrificing investment value.
2. To return cash to investors to the maximum extent feasible and as promptly as possible, making my best reasonable efforts to do so via a series of distributions, beginning as quickly as possible.

My team and I have spoken with many of you, and we fully understand your orientation and goals. Consistent with your and my joint goals, in addition to the foregoing, it also is my objective to minimize the duration of this Receivership, although the affairs of the Fund are quite complex due to the nature, structure, and history of the Fund and its investments.

I would like to take this opportunity to report on the performance of the investment portfolio, and the steps we are taking to overcome the substantial impediments that presently exist to making a first interim distribution in the near-term.

Portfolio Performance

On a regular monthly basis, we provide a report providing the “current estimated net asset value” of the Fund to those investors who wish to receive one. The report also includes a note that the figures provided are “unaudited estimates.” Those numbers provide our current best estimates of the value of the Fund’s assets less the value of offsetting hedge positions. The estimates are derived from a series of regular procedures and judgments which we believe are reasonable and prudent. However in major portions of the portfolio, our estimates are of privately held, non-publicly traded securities. The private positions are not valued based on published prices. The estimates provided also take into account all current fees that have been approved for payment and recorded.

Please note, our estimate does not include any calculation of possible, but thus far unquantified, liabilities such as pending lawsuits in which the Fund may be a defendant, or contingent unliquidated contractual indemnity obligations that may be asserted against the Fund, some or all of which may or may not result in a future loss.

In the future, to be certain our approach is understood, our note will be expanded to clarify that, unless and until reserve amounts are approved for any particular claim by a final order of the Court before which the Receivership is pending, our asset value estimates do not include any reserve for future litigation or adverse legal decisions. If and when such an event may occur, investors will be advised and the necessary charges will be recorded by the Fund.

As you know from prior reports, more than 90% of the Fund’s assets are presently invested jointly with, alongside, or through Cerberus. As we also have previously reported, the economic performance in the private equity positions the Fund holds – which constitute the majority of its portfolio – continues to track the economy, and more pointedly, the economic conditions of the specific segments in which the Fund invested.

Major segments of the private equity portfolio are linked to the automotive, financing, and manufacturing industries, and to distressed real estate with a concentration in Asian and European real estate sectors. These segments continue to lag behind the overall economy. However, Cerberus management continues to proactively oversee the management of the portfolio with the objectives of generating monetization events in these companies.

Some investors have questioned why the Fund’s performance has not produced results commensurate with either market performance or other Cerberus returns it has noted as its benchmark. The nature of our holdings, some accumulation of cash by way of liquidations, and the smaller portion of the portfolio allocated to the most recent market rebounds in mortgage backed and high yield securities, are factors that have inhibited the appreciation of the portfolio’s overall value.

Please note, we are not actively trading out of positions and reinvesting in new positions. If we liquidate investment positions, we retain the cash and do not commit to new investments unless obligated to do so by a potential dilution event, a call to secure a hedge position, or binding

contractual financing obligation. We believe this is consistent with the overall mandate of the Receivership to generate cash for future distribution.

The unaudited results for the Fund are summarized below:

Fund Performance Year to Date	Ariel Fund Limited
Estimated Value @ 12/31/2008	\$656,820,468
Estimated Value @ 12/31/2009	645,848,482
Net Change	(\$10,971,986)
Estimated 2009 Return	-1.90%

One of the largest positions in our portfolio, a pharmaceutical company, went public in the 4th quarter of 2009. We were able to sell approximately 10% of our position; the remaining 90% is “locked up” under the terms for public offering until April 2010.

A major portion of positions in our mortgage backed securities portfolio was liquidated in the 4th quarter, representing approximately 30% of our capital in the sector. The remaining positions are under review for possible sale as well.

The portion of our portfolio managed by Cohanzick Management is approximately four percent (4%) of the total portfolio, consisting of tradable, distressed high yield bond bonds. The Cohanzick portfolio has performed very well both in terms of generating cash and increasing its value in the process during the past year.

Following the Receiver’s earliest meetings with Cohanzick management, manager David Sherman adopted a more proactive liquidation plan and generated over \$25 million in liquidating transactions while the underlying portfolio value increased by 13%.

We finished the year with approximately \$194 million in cash or cash equivalents, up from \$138 million at the end of the 3rd quarter of 2009. Because, in our view, the generation of additional cash reserves does not provide satisfactory investment returns at *de minimis* bank deposit account rates, we may retain certain interest-bearing saleable positions until a clearer picture emerges concerning potential distribution dates.

**Litigations, Potential Claims Against the Fund’s Assets,
and Potential for Interim Distributions to Investors**

As indicated from the outset, we have moved quickly but prudently to liquidate positions and dispose of or quantify potential creditor claims, such that we may be in a position to seek approval from the New York State Supreme Court, as required, to make an interim distribution to investors as expeditiously as is possible. Unfortunately, the path to accomplish the goal of making interim distributions is complicated by reason of pending litigation claims and the

existence of contractual indemnities that create contingent, unliquidated liabilities for both Funds. In our letter of December 8, 2009, we discussed several of these impediments.

Since transmittal of our December 8, 2009 letter, we have worked with our legal counsel, Reed Smith LLP, to aggressively press, to the fullest extent possible, toward resolution of each of the impediments to interim distributions. In addition to the dismissal of roughly 90% of the Madoff Trustee's \$330 million claims against the Funds that we previously reported, our efforts over the past 90 days have resulted in voluntary dismissal of both Funds from the investor class actions previously commenced against the Funds, which have now been consolidated before Judge Batts in the U.S. District Court for the Southern District of New York without either of the Funds named as a defendant. This is a substantial positive development, but there remain problematically large, and in certain cases as yet unquantifiable, claims against each of the Funds, as described in our letter December 8th.

The remaining outstanding claims have continued to hamper our ability to seek or obtain New York State Supreme Court approval to make interim distributions to investors, but we continue to work with Reed Smith to aggressively analyze and pursue all avenues that are reasonably likely to aid the establishment of appropriate cash retention reserves and the acceleration of distribution timing. We will, of course, keep you apprised of our progress in this regard to the fullest extent possible, within the appropriate constraints of confidentiality and litigation strategy.

We note one final litigation development relevant to the Ariel Fund only. On February 25, 2010, Judge Lowe's decision granting NYU's request for payment of attorneys' fees was issued by the Court. Both we and the Attorney General's office opposed NYU's request. In his February 25 decision, Judge Lowe writes: "...reimbursement of NYU's attorneys' fees is granted because the services ultimately benefited Ariel's investors to a great extent. The benefit was of such great measure that failure to pay such fees would be inequitable."

The final amount of fees awarded to NYU is subject to determination by a Special Referee. I am considering our options regarding Judge Lowe's decision in this matter and will inform investors of any future developments.

Audit Status

As previously reported, the audit of the funds as of December 31, 2008 has proven to be more difficult and time consuming than anticipated.

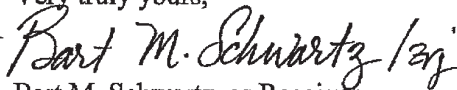
Our auditors, Eisner LLP, have been through a lengthy and detailed process of confirming the Fund's underlying investment positions and verifying their custody and terms. Simultaneously, a process of reviewing the valuation of the Fund's holdings as of December 31, 2008 is underway. We hope to complete the 2008 audit by the end of the first quarter.

In the meantime, we will soon initiate the 2009 audit in order to follow up promptly with the work done for the 2008 audit.

Investor Communications

We continue in ongoing, interactive communication with the Investor Committee. Our most recent meeting covering several subjects, including portfolio, audit, and distribution issues, was held on February 9, 2010 in New York. We also, of course, continue to issue monthly updates on the estimated portfolio values, and we remain available to answer any individual investor questions that you may wish to discuss with us.

Very truly yours,


Bart M. Schwartz, as Receiver

Cc: Robert P. Rittereiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-371-5207

Sheila Tendy, Guidepost Partners, LLC
stendy@guidepostpartners.com; 212-205-4191

James C. McCarroll, Esq. Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1077

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

May 28, 2010

Special Update to Investors of Ariel Fund Limited (the "Fund") Regarding Filing of the Receiver's Motion to Approve a First Interim Distribution to Investors

We are pleased to inform you that, on Monday, May 24, we filed with the Court overseeing the Fund's Receivership a motion seeking establishment of procedures for quantifying creditor claims and setting reserves for disputed creditor claims, and for authority to make a first interim distribution of more than \$167 million of cash to the Fund's injured investors (the "First Interim Distribution to Investors"). The Receiver has generated this cash through prudent, value preserving liquidations of investment positions over the past 11 months, and he now seeks to distribute it to investors of the Fund as expeditiously as possible, which he hopes will be by no later than the end of September. Thereafter, the Receiver expects to make one or more further distributions, including distributions of amounts generated through liquidation of the Fund's relatively substantial assets that will remain after the proposed First Interim Distribution to Investors; any additional amounts that may be recovered through the pending legal proceedings commenced by the New York Attorney General; and any additional amounts that the Receiver may recover for the benefit of all investors of the Fund.

Please note that you are not required to take any action at this time in order to receive your *pro rata* portion of the proposed First Interim Distribution to Investors.

If the Court overseeing the Receivership approves the procedures proposed by the Receiver, you will receive further correspondence from us in late June, which will include a statement of your *pro rata* portion of the proposed First Interim Distribution to Investors. We will ask you to review that correspondence carefully, but most investors will not be required to take any action in response to the correspondence. Thereafter, if the Court ultimately approves the making of the First Interim Distribution to Investors at a hearing we have asked to be scheduled for early September, we will endeavor to send you your *pro rata* portion of the First Interim Distribution to Investors by September 30.


A-1079

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A copy of the Memorandum of Law filed by Reed Smith LLP, on behalf of the Receiver, in support of ultimately making the First Interim Distribution to Investors is enclosed with this update, and you should feel free to review it at your convenience. A number of other documents were filed along with this Memorandum of Law, and we will be happy to provide them to you, upon request.

Should you have any questions or desire additional information, you should contact the Receiver (contact information appears above); Robert P. Rittereiser of Guidepost Partners (+1-212-205-4189; brittereiser@guidepostpartners.com); or James C. McCarroll of Reed Smith (+1-212-549-0209; jmccarroll@reedsmith.com).

Very truly yours,


Bart M. Schwartz, solely in his capacity as
Receiver of the Fund

Enclosure

A-1080

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
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New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

October 27, 2010

Informational Update to Investors in Ariel Fund Limited (the "Fund")

Introduction

As has been the case since my appointment in June 2009, I remain focused on the following goals:

1. To carefully and expeditiously liquidate the Fund's investment portfolio without unduly sacrificing investment value.
2. To return cash to investors to the maximum extent feasible and as promptly as possible, making my best reasonable efforts to do so via a series of distributions, beginning as quickly as possible.

This informational update contains details on performance of the Fund's investments, as well as my efforts during the third quarter of 2010 in furtherance of the above-referenced goals.

Portfolio Performance

As of September 30, 2010, the unaudited estimated results for the Fund are summarized below:

Fund Performance Year to Date	Ariel Fund Ltd.
Estimated Value at 9/30/2010	\$ 672,326,267
Estimated Value at 12/31/2009	647,350,402
Net Change	\$ 24,975,865
Estimated YTD 2010 Return	3.86%

The cash or cash equivalent component of the estimated Net Asset Value noted above is approximately \$231,000,000. As previously indicated, subject to Court approval, we plan to distribute \$167,000,000 of that amount through the First Interim Distribution to Investors.

We anticipate the closing of the Talecris-Grifols SA transaction which along with certain other sales should further increase the cash equivalent portion of the Portfolio, and as indicated above, enable a second interim distribution in the relatively near term.

As you know from prior reports, more than 90% of the Fund's assets are presently invested jointly with, alongside, or through Cerberus. As we also have previously reported, the economic performance in the private equity positions the Fund holds – which constitute the majority of its portfolio – continues to track the economy, and more pointedly, the economic conditions of the specific segments in which the Fund invested. Improved market conditions, refinancing and other operating improvements, produced improved results in certain holdings as reflected in the increased NAV calculations currently reflected in the report.

We continue to work closely with Cerberus Capital Management as efforts continue to create liquidity events for the Fund's holdings.

Interim Distributions to Investors

I am pleased to report that the September 20, 2010 Bar Date and deadline for objections to my proposed First Interim Distribution to Investors (the "Bar Date") passed without submission of any objections by parties alleging to be creditors that I can foresee materially impairing my ability to make most or all of the proposed \$167,000,000 First Interim Distribution to investors. My team and I are pressing forward assertively in an effort to secure approval to make the First Interim Distribution to Investors in advance of December 31, 2010.

We received an objection to making of the First Interim Distribution to Investors from Fortis, the Fund's former Share Registrar, arguing that I should be unable to distribute any amount to the Fund's injured investors unless and until I reserve \$5,000,000 from the proposed distribution amount to cover potential future indemnity claims that Fortis may assert. My legal counsel at Reed Smith LLP is communicating with Fortis and, unless Fortis withdraws its objection in advance of my November 4, 2010 deadline for filing a response to the objection with the New

York State Supreme Court (the "Court"), I plan to direct Reed Smith to vigorously oppose the objection. Even in a worst case scenario, however, it appears Fortis would succeed only in decreasing the amount to be distributed to investors at this time by \$4,000,000 (which is the amount by which the \$1,000,000 reserve I already had proposed for Fortis' indemnity claims would have to be increased). I believe such a substantial limitation on cash distributable to investors is unnecessary, and fundamentally unjust, and as noted, I will seek to oppose it, if Fortis should continue to press the issue.

In addition to the Fortis objection, I was surprised to receive a Proof of Claim from the U.S. Internal Revenue Service (the "IRS") shortly before the Bar Date, asserting that the Fund owes the IRS more than \$25,000,000 (the "IRS Claim"). I believe this IRS Claim is based largely on a misunderstanding by the IRS of the U.S. tax exempt structure of the Fund. My legal and financial teams had spoken with representatives of the IRS in advance of its submission of the IRS Claim, in an effort to dissuade the IRS from submitting what we view as an incorrect claim. Following my receipt of the IRS Claim, Reed Smith continues to seek to secure voluntary withdrawal of the IRS Claim. Additionally, Reed Smith recently submitted to the Court an objection seeking to disallow the IRS Claim.

Please note that, notwithstanding the IRS's claim submission, the IRS did not submit an objection to the proposed First Interim Distribution to Investors by the Bar Date. Therefore, pursuant to the Bar Date Order previously entered by the New York State Supreme Court, the pendency of the IRS Claim should have no impact on my ability to make the First Interim Distribution to Investors in the full proposed amount.

I plan to file the necessary documents with the Court seeking final approval of the proposed First Interim Distribution to Investors by the second week of November and, subject to the Court's calendar and its ultimate approval, I will endeavor to make the First Interim Distribution to Investors prior to December 31, 2010.

Assuming that we are able to complete the First Interim Distribution to Investors, we are hopeful that we will be able to make further interim distributions to investors in the relatively near-term. As we are seeking to surmount the great majority of administrative hurdles to the making of interim distributions in connection with this First Interim Distribution to Investors, we are hopeful that we will be able to make future interim distributions with lesser intervals elapsing between initial proposal and actual making of the distribution, and we will use all reasonable efforts to make that so.

Audit Status

As previously reported, due to the complexity of the legal structures and special purpose vehicles utilized to acquire and maintain the holdings of investments made in concert with Cerberus Capital Management, and due to the extensive international nature of these investments, we made a business decision during the during the spring of 2010 to complete the December 31, 2008 and December 31, 2009 audits of the Fund by engaging PricewaterhouseCoopers LLP ("PwC").

PwC is close to completing its audit of the Fund. In the next few weeks, we expect to complete the 2008 balance sheet only audit and to follow shortly thereafter with the completion of the full 2009 audit.

This process has taken longer than we had hoped, but as indicated earlier, the complexity of the holdings, the process that affect the audit of an earlier period and the structures that gave rise to the Receivership have affected the progress and schedule.

Litigations

On September 16, we filed a lawsuit seeking recovery of the Fund's full losses against J. Ezra Merkin and his company, Gabriel Capital Corporation. This suit asserts claims uniquely belonging to the Fund. It is generally complementary to the New York Attorney General's pending suit, but it asserts, and therefore protects, this Fund's individual, direct rights to recovery from the defendants. We are in communication with the New York Attorney General's Office concerning progress of its and our claims against the defendants, and we hope and expect to continue to coordinate to the fullest extent advisable with the New York Attorney General as we press forward in our ongoing efforts to recover the greatest amount possible from Mr. Merkin and his company.

Throughout the period since our July 30 letter, we have continued to press aggressively to secure dismissal – either voluntarily or by legal process – of all lawsuits pending against the Funds. As you know, we already had secured the Fund's dismissal from the great majority of previously commenced litigation. Our motion to dismiss the remaining \$16,200,000 of claims by the Madoff Trustee against the Fund continues to remain pending before the U.S. Bankruptcy Court for the Southern District of New York.

Investor Communications

During this quarter, we communicated with members of the Investors Committee with regard to several important issues. The Investor Committee's input is both valued and appreciated.

We continue to issue monthly updates on the estimated portfolio values to all investors who have requested them. If you are not already receiving these reports and would like to, please just let me, or one of my team members (whose contact details appear below), know by telephone or e-mail, and we will be pleased to add you to the distribution list.

A-1085

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We remain available to answer any individual investor questions that you may wish to discuss with us.

Very truly yours,

Bart M. Schwartz
Bart M. Schwartz, as Receiver *per, by permission*

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittreiser@guidepostpartners.com; 212-205-4189

Sheila Tandy, Guidepost Partners, LLC
stendy@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1086

A-1087

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Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
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212-205-4189
bschwartz@guidepostpartners.com

December 22, 2010

Re: First Interim Distribution to Investors of Ariel Fund, Ltd.

Dear Investor:

We are very happy to advise you that on December 16, 2010, the New York State Supreme Court issued an Order approving the Receiver's proposed First Interim Distribution of \$167,000,000 to investors of Ariel Fund, Ltd.

Please be advised that we are in the process of making the necessary arrangements to process the payments, which, based on advice of legal counsel, will be sent from counsel's UK escrow account, by express courier, utilizing the mailing information for each investor that exists in the Fund's books and records. For a variety of reasons, including the short interval between entry of the Order approving the distribution and year-end, we cannot honor wire transfer requests for this first distribution. We expect to be able to do so in the future, once additional procedures allowing this are in place.

We are delighted to be able to make this First Interim Distribution before year-end. We expect that we will be able to propose and complete future distributions in shorter timeframes as a result of the work done these past several months.

A-1088

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Thank you for your support and understanding, and we wish you all happy, healthy holiday seasons.

Very truly yours,

A handwritten signature in black ink, appearing to read "Bart M. Schwartz, as Receiver". The signature is fluid and cursive.

Bart M. Schwartz, as Receiver

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189
Sheila Tandy, Guidepost Partners, LLC
stendy@guidepostpartners.com; 212-205-4189
James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1089

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Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o

Guidepost Partners LLC

1185 Avenue of the Americas

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New York, NY 10036

212-205-4189

bschwartz@guidepostpartners.com

January 28, 2011

Informational Update to Investors in Ariel Fund Limited (“Ariel” or the “Fund”)

Introduction

As has been the case since my appointment in June 2009, I remain focused on the following goals:

1. To carefully and expeditiously liquidate the Fund’s investment portfolio without unduly sacrificing investment value.
2. To return cash to investors to the maximum extent feasible and as promptly as possible, making my best reasonable efforts to do so via a series of distributions, beginning as quickly as possible.

This informational update contains details on performance of the Fund’s investments, as well as my efforts during the fourth quarter of 2010 in furtherance of the above-referenced goals.

Portfolio Performance and Portfolio Management / Liquidation Activities

As of December 31, 2010, the unaudited estimated results for the Fund are as follows. The estimated Net Asset Value increased by approximately 7.4% from December 31, 2009, to \$576,739,106. This amount is after the distribution of \$167,000,000, accomplished on the distribution date of December 24, 2010 in accordance with the First Interim Distribution Plan. The Net Asset Value includes amounts retained from the distribution as previously indicated. All investors' pro-rata percentage interests in the Fund remain as they were prior to the distribution.

The cash or cash equivalent component of the estimated Net Asset Value noted above is approximately \$119,000,000.

We continue to anticipate the closing of the Talecris-Grifols SA transaction which remains under the review of the Federal Trade Commission. The Fund is a participant in the proposed sale of Chrysler Financial to Toronto-Dominion Bank, which is expected to close at the end of the first quarter of 2011. These transactions, when closed, will further increase the cash equivalent of the portfolio and as we have previously indicated, should enable the Receiver to propose a Second Interim Distribution in the second quarter of this year.

As you know from prior reports, more than 90% of the Fund's assets are presently invested jointly with, alongside, or through Cerberus. We, along with Cerberus, continue to actively seek liquidity events for these investments as market and business conditions, refinancings, and other operating improvements produce results that ultimately enable such events. As we also have previously reported, the economic performance in the private equity positions the Fund holds – which constitute the majority of its portfolio – continues to track the economy, and more pointedly, the economic conditions of the specific segments in which the Fund invested. Improved market conditions, refinancing and other operating improvements, produced improved results in certain holdings as reflected in the increased NAV calculations currently reflected in the report.

We continue to work closely with Cerberus Capital Management as efforts continue to create liquidity events for the Fund's holdings.

Interim Distributions to Investors

As noted in our letter of December 22 (a copy of which is enclosed herewith as Exhibit A), following resolution of the highly complex, and in some cases contentious, issues described in our prior correspondence on this subject, on December 17 the New York State Supreme Court approved our making of a First Interim Distribution to Ariel investors, in the full amount that we had proposed. For several reasons, it was necessary that this distribution be made in the manner that it was, via check, to investors' addresses of record as listed on the Fund's Share Register. This process precluded making distributions by wire transfer. I realize that for some investors, the collection process that this necessitated was longer than ordinarily experienced. We are pleased that, with the assistance of Reed Smith's London office, we were able to transmit all checks, and have them in the hands of nearly all investors, before December 31. Also with Reed Smith's assistance, we have sought to press on the bank from which the checks were issued to

clear, as expeditiously as possible, all checks that have been submitted. I enclose herewith as Exhibit B the cover letter that was sent along with all distributions made, for your reference.

In anticipation of making interim distributions going forward, we will shortly forward to you an Investor Information Update Form that we will ask you to complete and return at your earliest convenience. It will enable future transfers to be made by wire transfer for investors wishing to receive payment in that manner.

Audit Status

We are currently in the final stages of resolving final open items and PricewaterhouseCoopers ("PwC") has commenced its final review procedures with respect to our 2008 balance sheet only audit, and we will shortly thereafter complete the full 2009 audit.

This process has taken longer than we had hoped, but as previously indicated, the complexity of the holdings, the processes that affect the audit of an earlier period, and the situation that gave rise to the Receivership have affected the progress and schedule.

In connection with the First Interim Distribution and as a result of a claim submitted by the Internal Revenue Service, we initiated a review of withholding potential unpaid U.S. tax liabilities related to transactions in certain prior periods. We continue to review this matter in coordination with our tax professionals, legal counsel, and the IRS. Our preliminary review indicates that potential U.S. tax liability in the aggregate range of approximately \$4.3 million may exist for taxes not properly withheld from amounts paid with respect to dividend distributions over a four year period.

Litigations

On November 17, 2010, the U.S. Bankruptcy Court for the Southern District of New York issued a decision granting our motion to dismiss the lawsuit brought by the Madoff Trustee against Ariel in part, and denying it in part. This was the first decision issued on a motion to dismiss a claw back suit brought by the Madoff Trustee. If this decision stands, the ultimate result would be for most claims embodied in the suit to go forward through discovery, potentially further motion practice, and possible trial.

We believe the decision to deny meaningful parts of our motion to dismiss was incorrect on the legal issues, and we have sought leave to appeal it. Multiple defendants in other suits have submitted letters in support of our request to appeal. The issue is now pending before the U.S. District Court for the Southern District of New York (which hears appeals from Bankruptcy Court decisions within the Southern District). We will keep you apprised of future decisions on this matter.

We have continued to work cooperatively with the New York Attorney General in connection with its damages action against J. Ezra Merkin and his company, Gabriel Capital Corporation. Arguments on the cross motions for summary judgment by parties to that suit are presently

scheduled to occur on February 10. We also have continued in prosecution of the separate suit we have filed against Merkin and his company, to protect the individual, direct rights of Ariel.

We continue to seek opportunities for a global resolution of all matters pertaining to Merkin's liability, as well as the Madoff Trustee issues. We have worked, and will continue to work, closely with the Investor Committee, on all such issues, and will keep you apprised of any material developments as near to real-time as is prudent and reasonably possible.

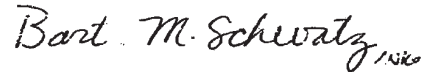
Investor Communications

During this quarter, we held two meetings of the Investor Committee, and otherwise communicated with members of the Investor Committee with regard to several important issues. The Investor Committee's input is both valued and appreciated.

We continue to issue monthly updates on the estimated portfolio values to all investors who have requested them. If you are not already receiving these reports and would like to, please just let me, or one of my team members (whose contact details appear below), know by telephone or e-mail, and we will be pleased to add you to the distribution list.

We remain available to answer any individual investor questions that you may wish to discuss with us.

Very truly yours,



Bart M. Schwartz, as Receiver

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Sheila Tandy, Guidepost Partners, LLC
stendy@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1094

EXHIBIT A

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o

Guidepost Partners LLC

1185 Avenue of the Americas

Suite 1750

New York, NY 10036

212-205-4189

bschwartz@guidepostpartners.com

December 22, 2010

Re: First Interim Distribution to Investors of Ariel Fund, Ltd.

Dear Investor:

We are very happy to advise you that on December 16, 2010, the New York State Supreme Court issued an Order approving the Receiver's proposed First Interim Distribution of \$167,000,000 to investors of Ariel Fund, Ltd.

Please be advised that we are in the process of making the necessary arrangements to process the payments, which, based on advice of legal counsel, will be sent from counsel's UK escrow account, by express courier, utilizing the mailing information for each investor that exists in the Fund's books and records. For a variety of reasons, including the short interval between entry of the Order approving the distribution and year-end, we cannot honor wire transfer requests for this first distribution. We expect to be able to do so in the future, once additional procedures allowing this are in place.

We are delighted to be able to make this First Interim Distribution before year-end. We expect that we will be able to propose and complete future distributions in shorter timeframes as a result of the work done these past several months.

A-1096

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Thank you for your support and understanding, and we wish you all happy, healthy holiday seasons.

Very truly yours,

A handwritten signature in black ink, appearing to read "Bart M. Schwartz", written in a cursive style.

Bart M. Schwartz, as Receiver

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189
Sheila Tandy, Guidepost Partners, LLC
stendy@guidepostpartners.com; 212-205-4189
James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

EXHIBIT B

A-1098

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Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

Re: First Interim Distribution to Investors of Ariel Fund, Ltd.

Dear Investor:

Following on our letter to you of December 22, 2010 (a copy of which is attached hereto for your convenience of reference), we are pleased to enclose a check for the amount of your First Interim Distribution in connection with the Receivership of Ariel Fund, Ltd.

As previously noted, our analysis of investors' relative rights is ongoing; including, among other things, with regard to any potential claims to claw back any payments made prior to my appointment. Consequently, this First Interim Distribution must be made subject to a reservation of my rights to seek in the future to offset payments made to any investor that has received, or will have received by virtue of any distribution, aggregate prior redemption payments and distributions through the Receivership that (a) are greater than the investor's total principal investment, or (b) would otherwise leave the investor better situated than any other investor in Ariel Fund, Ltd.

Should you have any questions regarding this First Interim Distribution, please do not hesitate to contact me, my colleagues at Guidepost Partners, or my legal counsel at Reed Smith, utilizing the contact information provided in this letter.

Very truly yours,

Bart M. Schwartz
Bart M. Schwartz, as Receiver

by permission

CHECK ENCLOSED

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189
Sheila Tendy, Guidepost Partners, LLC
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James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1099

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

April 1, 2011

Informational Update to Investors in Ariel Fund Limited (“Ariel” or the “Fund”)

Introduction

As has been the case since my appointment in June 2009, I remain focused on the following goals:

1. To carefully and expeditiously liquidate the Fund’s investment portfolio without unduly sacrificing investment value.
2. To return cash to investors to the maximum extent feasible and as promptly as possible, making my best reasonable efforts to do so via a series of distributions, beginning as quickly as possible.

This informational update contains details on performance of the Fund’s investments, as well as my efforts during the first quarter of 2011 in furtherance of the above-referenced goals.

Portfolio Performance

As of February 28, 2011, the unaudited estimated results for the Fund are as follows. The estimated Net Asset Value increased by approximately 1.7% to \$591,714,904. This amount is after the distribution of \$167,000,000, accomplished on the distribution date of December 24, 2010 in accordance with the First Interim Distribution Plan. The cash or cash equivalents component of the estimated Net Asset Value noted above is approximately \$119,000,000.

As indicated in our last update, we anticipate the closing of the Talecris-Grifols SA transaction which remains under the review of the Federal Trade Commission. Both companies recently extended their deadline for closing the proposed transaction until June 30, 2011. The transaction, if and when approved, will add additional cash to the Fund's current holdings. As also indicated in our last letter, the Fund is a participant in the pending sale of Chrysler Financial to Toronto-Dominion Bank, through a special purpose vehicle with other co-investors. This transaction closed on March 31, 2011. We expect funds to be distributed to us from the special purpose vehicle by mid-April, 2011. Overall, the portfolio has maintained or increased value steadily during the recent period of global economic revival. However, we hold positions in Japanese real-estate, transportation, and banking and do expect, at least over the next few months, to experience some diminution in value relating to these holdings in view of the tragic events that have affected Japan. It is too early to tell how our overall plans to prudently liquidate holdings may be affected in this region. Cerberus Capital Management remains deeply involved in the proactive management of these holdings, as well as in all aspects of the Cerberus-related portfolio. The overall strategy to prudently liquidate remains in effect.

The portion of the Fund's holdings that are managed by Cohanzick Management has been reduced from the level of less than 5% of the Fund's portfolio at the time of my appointment, to approximately 0.5% at present. This reduction in position has been accomplished while generating a gain of approximately \$8 million over December 31, 2008 values.

We, along with Cerberus, continue to actively seek liquidity events for these investments as market and business conditions, refinancings, and other operating improvements produce results that ultimately enable such events.

Interim Distributions to Investors

As noted above, a distribution of \$167,000,000, subject to reserves for disputed claims, was made in December. As indicated in the Portfolio Performance section of this letter, we are continuing to build cash balances. We expect to propose a Second Interim Distribution to Investors, which would be subject to Court review, as soon as feasible in the second quarter.

Taxes

Please note that as a result of the claims process in connection with the First Interim Distribution and the TEFRA audit of certain entities related to the Fund, it has been determined that certain dividend-related tax withholding procedures may not have been properly followed for the tax years of 2006 through 2009. Any final determination that the Fund under withheld will result in

the imposition of interest and may result in penalties due. This matter is under review and we are working to resolve this in conference with the IRS. We have agreed in the interim, through the First Interim Distribution's claims process, to hold back \$7 million from any future distribution until this matter is resolved.

Audit Status

We continue to work closely with PricewaterhouseCoopers ("PwC") to complete all aspects of the 2008 and 2009 audits. In addition to the work related to the existence and valuation of 100% of the Fund's holdings, we have incorporated in our work the tax matters referenced above. All aspects of the audit work and commentary have been subject to review and scrutiny on several levels appropriate for the circumstances that gave rise to the Receivership.

We expect to issue the final 2008 audit results in April. We expect to release 2009 audit results shortly thereafter.

Litigations

We have continued to work cooperatively with the New York Attorney General in connection with its damages action against J. Ezra Merkin and his company, Gabriel Capital Corporation. We also have continued in prosecution of the separate suit we have filed against Merkin and his company, to protect the individual, direct rights of Ariel Fund Limited.

Our motion for leave to appeal the Bankruptcy Court's decision denying in part our motion to dismiss the claims brought by the Madoff Trustee against the Fund remains pending in the U.S. District Court for the Southern District of New York.

We continue to seek opportunities for a global resolution of all matters pertaining to Merkin's liability, as well as the Madoff Trustee issues. We have worked, and will continue to work, closely with the Investor Committee, on all such issues, and will keep you apprised of any material developments as near to real-time as is prudent and reasonably possible.

Investor Communications

The next Investor Committee meeting will be scheduled as soon as final audit results are available and we are in the position to discuss future distribution plans. The Investor Committee's input is both valued and appreciated.

We continue to issue monthly updates on the estimated portfolio values to all investors who have requested them. If you are not already receiving these reports and would like to, please just let me, or one of my team members (whose contact details appear below) know by telephone or e-mail, and we will be pleased to add you to the distribution list.

We remain available to answer any individual investor questions that you may wish to discuss with us.

A-1103

Case 1:12-cv-06733-JSR Document 16-3 Filed 01/25/13 Page 2 of 78

Very truly yours,

Bart M. Schwartz / EFJ by
Bart M. Schwartz, as Receiver permission

cc: Robert P. Rittreiser, Guidepost Partners, LLC
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Sheila Tendy, Guidepost Partners, LLC
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James C. McCarroll, Reed Smith LLP
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A-1104

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o

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212-205-4189

bschwartz@guidepostpartners.com

July 29, 2011

Informational Update to Investors in Ariel Fund Ltd. (“Ariel” or the “Fund”)

Introduction

As has been the case since my appointment in June 2009, I remain focused on the following goals:

1. To carefully and expeditiously liquidate the Fund’s investment portfolio without unduly sacrificing investment value.
2. To return cash to investors to the maximum extent feasible and as promptly as possible, making my best reasonable efforts to do so via a series of distributions, beginning as quickly as possible.

This informational update contains details on performance of the Fund’s investments, as well as my efforts during the second quarter of 2011 in furtherance of the above-referenced goals.

Portfolio Performance

Fund Performance Year to Date	Ariel Fund Ltd.
Estimated Value at 6/30/2011	\$ 598,076,297
Estimated Value at 12/31/2010	582,690,983
Net Change	\$ 15,385,314
Estimated YTD 2011 Return	2.9%

The above-stated value is after the distribution of \$167,000,000, accomplished on the distribution date of December 24, 2010, in accordance with the First Interim Distribution Plan approved by the New York State Supreme Court. The cash or cash equivalents component of the estimated Net Asset Value noted above is approximately \$200,000,000.

As anticipated, the Chrysler Financial and Talecris Pharmaceutical transactions closed in the second quarter of 2011, significantly increasing the Fund's cash balances. My team and I continue to work with Cerberus Capital Management on the bulk of the remaining portfolio. The main objective continues to be to seek and create liquidity events for the Fund's holdings while continuing to improve and control the operating performance of the underlying entities.

In connection with current operating performance, Japan-based holdings have experienced some short-term challenges, but to date no long-term set backs are apparent.

Plans to Seek Approval to Make a Second Interim Distribution to Ariel Investors

As we have generated significant cash that we wish to distribute to investors as promptly as is possible, we presently plan to prepare a motion seeking authority to make a Second Interim Distribution to Ariel investors. Subject to final review of second quarter results, we plan to propose a Second Interim Distribution in excess of \$100 million.

In addition to the time required for the Court to review a Second Interim Distribution proposal, the pending review of our tax returns for the years 2006-2009 is a further factor that may impact timing of this potential Second Interim Distribution. The tax matter arose in connection with the First Interim Distribution claims process and the concomitant audit of certain capital gain and loss transactions which had been initiated by the IRS in connection with a transaction occurring in the 2007 tax year. The IRS objected to our proposed First Interim Distribution, and subsequently initiated a TEFRA audit of entities related to the Fund. We are in discussion with the IRS to respond to its inquiries and to resolve this matter as soon as possible. As a result of the claims process, we are obligated to hold back \$7 million as a reserve for the potential benefit of the IRS until this matter is resolved.

The IRS also has standing to object to any proposed Second Interim Distribution. We will be communicating with the IRS with regard to any proposed Second Interim Distribution and, failing agreement by it to forbear from objecting, we expect to oppose any objection it might lodge, as we did with its objection to the First Interim Distribution.

PLEASE MAKE NOTE, IN AUGUST WE WILL SEND A LETTER WHICH WILL INCLUDE A WIRE INSTRUCTION FORM TO THE ADDRESS OF RECORD OF EACH INVESTOR. THE FORM MUST BE COMPLETED, EXECUTED AND RETURNED AS INDICATED IN OUR FORTHCOMING LETTER IF YOU WISH TO RECEIVE ANY FUTURE DISTRIBUTION PAYMENTS BY WIRE TRANSFER. PLEASE PAY PROMPT ATTENTION TO THIS COMMUNICATION TO ALLOW US THE TIME NEEDED TO REVIEW AND APPROVE ANY SUCH INSTRUCTION WE RECEIVE. IN CASES WHERE WIRE INSTRUCTIONS ARE NOT RECEIVED AND APPROVED, PAYMENTS WILL BE MADE BY CHECK.

Audit Status

The 2008 audit has been completed and released. You should have received a copy of it by mail. If you have not yet received it, please let us know and we will be happy to re-transmit a copy to you.

We anticipate the release of the 2009 audit in early August. Also, work is currently underway on the 2010 audit, which we project will be completed late in the third quarter.

Litigations

We have continued to work cooperatively with the New York Attorney General in connection with its damages action against J. Ezra Merkin and his company, Gabriel Capital Corporation. We also have continued in prosecution of the separate suit we have filed against Merkin and his company, to protect the individual, direct rights of Ariel Fund Ltd.

Our motion for leave to appeal the Bankruptcy Court's decision denying in part our motion to dismiss the claims brought by the Madoff Trustee against the Fund remains pending in the U.S. District Court for the Southern District of New York.

We continue to seek opportunities for a global resolution of all matters pertaining to Merkin's liability, as well as the Madoff Trustee issues. We have worked, and will continue to work, closely with the Investor Committee, on all such issues, and will keep you apprised of any material developments as near to real-time as is prudent and reasonably possible.

Investor Communications

We continue to communicate with the Investor Committee, and to convene periodic meetings. We also continue to issue monthly updates on the estimated portfolio values to all investors who have requested them. If you are not already receiving these reports and would like to, please just let me, or one of my team members (whose contact details appear below), know by telephone or e-mail, and we will be pleased to add you to the distribution list.

We remain available to answer any individual investor questions that you may wish to discuss with us.

Very truly yours,

A handwritten signature in black ink that reads "Bart M. Schwartz" followed by a flourish and the name "B. Schwartz" written vertically.

Bart M. Schwartz, as Receiver

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
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James C. McCarroll, Reed Smith LLP
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A-1109

Case 1:12-cv-06733-JSR Document 16-3 Filed 01/25/13 Page 8 of 78

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
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bschwartz@guidepostpartners.com

January 27, 2012

Informational Update to Investors in Ariel Fund Ltd. (“Ariel” or the “Fund”)

Introduction

As has been the case since my appointment in June 2009, I remain focused on the following goals:

1. To carefully and expeditiously liquidate the Fund’s investment portfolio without unduly sacrificing investment value.
2. To return cash to investors to the maximum extent feasible and as promptly as possible, making my best reasonable efforts to do so via a series of distributions, beginning as quickly as possible.

This informational update contains details on performance of the Fund’s investments, as well as my efforts during the fourth quarter of 2011 in furtherance of the above-referenced goals.

Portfolio Performance

Fund Performance Year to Date	Ariel Fund Ltd.
Estimated Value at 11/30/2011	\$ 575,968,534
Estimated Value at 12/31/2010	582,690,983
Net Change	\$ (6,722,449)
Estimated YTD 2011 Return	-1.2%

The above-stated value is after the distribution of \$167,000,000, accomplished on the distribution date of December 24, 2010, in accordance with the First Interim Distribution Plan approved by the New York State Supreme Court. The cash or cash equivalents component of the November 30, 2011 estimated Net Asset Value noted above is approximately \$206,000,000 (pending potential approval of a second interim distribution to Ariel investors, as requested in November 2011, the status of which is discussed below). December estimates are not yet finalized.

The Chrysler Financial and Talecris Pharmaceutical transactions closed in the second quarter of 2011, significantly increasing the Fund's cash balances. My team and I continue to work with Cerberus Capital Management on the bulk of the remaining portfolio. The main objective continues to be to seek and create liquidity events for the Fund's holdings while continuing to improve the operating performance of the underlying entities. Current market conditions continue to affect the environment for this activity. Nevertheless, we can report that specific plans have been developed and are being pursued to achieve liquidity events in all of our major investments. Timing and final results will be affected by market conditions that develop over the next several months.

The Fund's holdings in domestic and international financial institutions have been negatively affected by the general economic conditions and the stress in Euro Zone banking in this period. Japan-based holdings had experienced some short-term impact from the March 2011 tsunami/earthquake events, but we can reaffirm the statement initially published in our July 2011 letter, that to date no long-term setbacks are apparent. The investment and economic climates in Japan appear to have improved and we expect that these stabilizing effects could enable us to generate additional cash through the sale of one or more of our large Japanese holdings this year.

Second Interim Distribution to Ariel Investors

As foreshadowed in our October 31, 2011 letter to you, we submitted a motion seeking authority to make a Second Interim Distribution to Ariel Fund Investors on November 1, 2011 (the "Second Interim Distribution Motion"). We are pleased to confirm that, if approved by the New York State Supreme Court, that distribution will be \$100 million.

A hearing on our Second Interim Distribution Motion was held on November 29. We are currently awaiting a ruling from the Court, which we are hopeful will permit us to make the \$100 million Second Interim Distribution to Ariel Fund Investors before the close of the first quarter.

Upon completion, the First and Second Interim Distributions to Ariel Fund Investors will have returned a total of \$267 million. We are hopeful that we will be in the position to communicate plans for an additional distribution late this year.

As described in previous letters, in August 2011, we mailed a wire instruction form that enables investors who wish to receive distributions by wire transfer to complete the form to make this request. It also enables the Receiver to review and approve the requests to prepare to make distributions in this manner when authorized to do so and to meet the various legal requirements to which this type payment is subject. If you wish to receive distributions by wire transfer, you should by now have completed and submitted this form, pursuant to the instructions transmitted therewith. If you have already sent in the form, there is no need for you to take any additional action. However, should you have any questions, or need another copy of the form for any reason, please contact us at your earliest convenience.

IN CASES WHERE WIRE INSTRUCTIONS HAVE NOT BEEN RECEIVED AND APPROVED IN ADVANCE OF THE MAKING OF AN INTERIM DISTRIBUTION, PAYMENTS WILL BE MADE BY CHECK, SENT TO THE INVESTOR'S ADDRESS ON FILE WITH THE FUND.

Audit Status

The 2008 audit was completed and transmitted to you in June 2011, and the 2009 audit was transmitted to you in early October. Both audits were completed by PricewaterhouseCoopers. Work is currently underway on the 2010 audit, which we understand from PwC is likely to be completed this quarter. We expect that a more normal schedule will be possible for the 2011 audit, with completion projected by mid-year 2012.

Litigations

We have continued to work cooperatively with the New York Attorney General in connection with its damages action against J. Ezra Merkin and his company, Gabriel Capital Corporation. We also have continued in prosecution of the separate suit we have filed against Merkin and his company, to protect the individual, direct rights of Ariel Fund Ltd.

Litigation of the Madoff Trustee's action against the Fund continues before the U.S. Bankruptcy Court for the Southern District of New York.

We continue to seek opportunities for a global resolution of all matters pertaining to Merkin's liability, as well as the Madoff Trustee issues. We have worked, and will continue to work closely with all parties related to this matter, and will keep you apprised of any material developments as near to real-time as is prudent and reasonably possible.

Tax Matters

As previously reported, we have continued to work with the IRS. To date, we have made considerable progress to resolve tax claims arising from the tax periods of 2006 through 2009. The principal focus of these claims is on the legal entities through which Ariel and other funds historically conducted most transactions, namely, Gabriel Assets LLC and Gabriel Alternative Assets – two other entities also under my control, as Receiver. We are not required to maintain any reserves within Ariel in respect of these claims. While the final amount of any tax or penalties due for the under-withholding of U.S. source income is still in dispute, a payment has been made to mitigate interest costs. Since 2009, our financial statements and therefore our net asset value calculations have reflected the Fund's portion of this payment.

We continue to work diligently to fully resolve all IRS claims as quickly as is possible, including through payment of any remaining penalty and interest amounts. Since this is a TEFRA audit, several levels of the IRS are involved in the completion of the settlement, and we understand that this process may take several more months.

Investor Communications

We continue in communication with Investor Committee members. We also continue to issue monthly updates on the estimated portfolio values to all investors who have requested them. If you are not already receiving these reports and would like to, please just let me, or one of my team members (whose contact details appear below), know by telephone or e-mail, and we will be pleased to add you to the distribution list.

We remain available to answer any individual investor questions that you may wish to discuss with us.

Very truly yours,

*Bart M. Schwartz / Jm, by
Permission*

Bart M. Schwartz, as Receiver

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A-1114

A-1115

Case 1:12-cv-06733-JSR Document 16-3 Filed 01/25/13 Page 14 of 78

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
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bschwartz@guidepostpartners.com

March 2, 2012

Special Update to Investors in Ariel Fund, Ltd. ("Ariel" or the "Fund")

As you know, on November 1, 2011, we filed a motion with the New York State Supreme Court seeking approval to make a Second Interim Distribution to Ariel investors in the total amount of \$100 million. No objections were filed to that proposed Second Interim Distribution, and a hearing on the matter was held on November 29. At that hearing, no material concerns were raised by the Judge, or by any other party, about the proposed distribution.

We have received inquiries from a number of investors as to potential timing for entry of an Order approving the proposed Second Interim Distribution. We continue to expect entry of an Order approving a distribution imminently, but we do not have any new information as to timing.

We are prepared to commence transmittal of Second Interim Distribution payments to all eligible Ariel investors immediately upon approval of such distributions. In the interim, as always, please do not hesitate to contact me, or one of my team members (whose contact details appear below), with any questions or concerns.

Very truly yours,

Bart M. Schwartz, as Receiver

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A-1116

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A-1117

Case 1:12-cv-06733-JSR Document 16-3 Filed 01/25/13 Page 16 of 78

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o

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March 27, 2012

Special Update to Investors in Ariel Fund, Ltd. ("Ariel" or the "Fund")

I am pleased to report that Justice Lowe signed the enclosed Order approving a Second Interim Distribution to Ariel investors in the total amount of \$100 million. We plan to commence transmittal of payments in respect of this Second Interim Distribution to all eligible Ariel investors tomorrow. We expect to have all payments out within 5 business days, by wire transfer to all who have previously completed, returned and obtained approval of the necessary forms. For all others, checks will be sent by Certified Mail or the equivalent to the address on file in the Fund's records. No amounts will be distributed to, or for the benefit of, J. Ezra Merkin, or any entities believed to be owned or controlled by him.

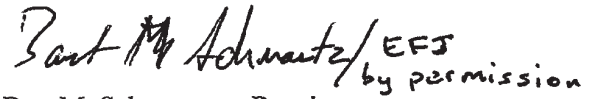
I am also enclosing a press release that is being issued today, discussing this development. You will note the statement in the enclosed release that we expect to have sufficient cash available to make an additional distribution in the relatively near-term. In fact, I am pleased to confirm that we plan to file a motion seeking approval of such a Third Interim Distribution, in an amount of at least \$50 million, within the next 60 to 90 days.

A-1118

Case 1:12-cv-06733-JSR Document 16-3 Filed 01/25/13 Page 17 of 78

As always, please do not hesitate to contact me, or one of my team members (whose contact details appear below), with any questions or concerns.

Very truly yours,

A handwritten signature in black ink that reads "Bart M. Schwartz / EFS by permission". The signature is written in a cursive style.

Bart M. Schwartz, as Receiver

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brittereiser@guidepostpartners.com; 212-205-4189

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James C. McCarroll, Reed Smith LLP
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A-1119

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FILED: NEW YORK COUNTY CLERK 03/26/2012

INDEX NO. 450879/2009

NYSCEF DOC. NO. 264

RECEIVED NYSCEF: 03/26/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE III
Justice

PART 56

People of State of New York

INDEX NO. 450879/09

MOTION DATE 11/29/11

MOTION SEQ. NO. 010

J. Ezra Merkin

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/26/12

HON. RICHARD B. LOWE III, J.S.C. (with signature)

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

_____ X

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

Index No.
450879/09

- against -

Motion Sequence No.
010

J. EZRA MERKIN and GABRIEL CAPITAL
CORPORATION,

Defendants,

and

ARIEL FUND LIMITED, ASCOT FUND LIMITED,
ASCOT PARTNERS, L.P., GABRIEL ALTERNATIVE
ASSETS, LLC, GABRIEL ASSETS, LLC and
GABRIEL CAPITAL, L.P.,

Relief Defendants.

_____ X

Richard B. Lowe, III, J:

In this motion, the relief defendants, Ariel Fund Limited (Ariel) and Gabriel Capital, L.P. (Gabriel), move, by Order to Show Cause: (1) for an order approving a second interim distribution to investors of Ariel and a first and second interim distribution to the investors of Gabriel, (2) to eliminate certain reserves previously established to cover certain contingent and unliquidated claims against Gabriel, and (3) modifying the reserves established in favor of the U.S. Internal Revenue Service.

For the reasons stated below, Ariel and Gabriel's motion is granted, only to the extent of approving a second interim distribution to investors of Ariel, as well as a first and second interim distribution to the investors of Gabriel, and modifying the reserves established in favor of the U.S. Internal Revenue Service (IRS), and is otherwise denied.

Background

In the instant motion, Bart M. Schwartz, Esq., the receiver for Ariel and Gabriel (the receiver),¹ seeks an order approving a second interim distribution to the investors of Ariel, as well as a first and second interim distribution to the investors of Gabriel. This court has previously approved a first interim distribution to the investors of Ariel,² which was effected in December of 2010. No interim distribution was made to Gabriel investors at that time, however, pending the resolution of an objection by Mervyn's LLC, Mervyn's Holdings, LLC and Mervyn's Brands, LLC (together, Mervyn's).

Mervyn's objection to the first interim distribution was based upon its claim against Gabriel, as set forth in Adversary Proceeding # 08-11586 in the U.S. Bankruptcy Court for the District of Delaware. Mervyn's filed the same objection to the receiver's instant motion.

On February 9, 2012, however, the receiver and Mervyn's entered into a stipulation (the Mervyn's stipulation), in which Mervyn's agreed to withdraw, with prejudice, those objections. Therefore, there is no longer an impediment to a first and second interim distribution to Gabriel investors.

¹The receiver was appointed by this court under a stipulation and order dated June 10, 2009.

² See the December 17, 2010 Order of this court.

As respects claims by the IRS, a December 3, 2010 stipulation between the IRS and the relief defendants (the December 3, 2010 stipulation) had previously led the IRS to forego its objection to a first interim distribution to either Ariel or Gabriel. Pursuant to that December 3, 2010 stipulation, Gabriel Assets, LLC (Gabriel Assets) was to maintain a security interest in the amount of \$69,000,000 in favor of the IRS, and cash reserves of \$7,000,000 in Ariel and \$7,000,000 in Gabriel were to be set up for the benefit of the IRS.

The requirements of the December 3, 2010 stipulation were declared null and void by a new, October 27, 2011, stipulation between the IRS and the relief defendants (the October 27, 2011 stipulation).³ The October 27, 2011 stipulation required the establishment of a segregated third-party interest-bearing \$11,500,000 account denominated as "Gabriel Alternative Assets LLC-IRS Reserve Account." According to the receiver, this new account has been established, and thus, in the instant motion, the receiver seeks a modification of the reserves established in the December 3, 2010 stipulation--such that the \$69,000,000 held by Gabriel Assets in favor of the IRS, as well as the cash reserves of \$7,000,000 in Ariel and \$7,000,000 in Gabriel, be released.

The Interim Distributions

The receiver contends that, effective July 31, 2011, the unaudited estimated asset value of Gabriel is \$379,865,422 and the unaudited estimated asset value of Ariel is \$596,233,248. Additionally, the receiver opines that he has possession of more than \$100,000,000 in cash or

³ Both the December 3, 2010 stipulation and the October 27, 2011 stipulation were "So Ordered" by this court.

cash equivalents in Ariel and \$136,000,000 in Gabriel,⁴ and that these monies should be distributed to investors.

To make the interim distributions to the Ariel and Gabriel investors as proposed, the reserves held in Ariel and Gabriel in favor of the IRS, pursuant to the December 3, 2010 stipulation (\$7,000,000 reserve held within Ariel and the \$7,000,000 reserve held within Gabriel), must be released. This court holds that, in light of the terms of the October 27, 2011 stipulation, the monies that have been held in reserve are released and may be distributed to the appropriate investors in the proposed distribution. Additionally, this court hereby vacates and removes the \$69,000,000 lien that has been held in favor of the IRS against Gabriel Assets.

The lien against Gabriel Assets and the reserves held in Ariel and Gabriel are hereby replaced by an \$11,500,000 segregated third-party interest-bearing account denominated as "Gabriel Alternative Assets LLC-IRS Reserve Account."

Finally, as respects the monies proposed to be distributed to Gabriel investors, the receiver seeks to have \$36,000,000 distributed as a first interim distribution and \$100,000,000 distributed in a second interim distribution. There is no question that the \$36,000,000 first interim distribution is to be made to the appropriate Gabriel investors. However, to distribute the \$100,000,000 second interim distribution, two creditor reserves must be vacated.

The receiver first seeks to vacate a reserve of \$7,962,036, held for a claim asserted against Gabriel in the Southern District of New York action, *Morris Fuchs Holdings, LLC v Gabriel Capital, LP*, Index No. 09-Civ-6483 (the Fuchs matter). The receiver avers that, the

⁴ These figures are net of: (1) reasonable reserves for ongoing capital requirements and expenses of Ariel and Gabriel, and (2) all reserves established in accordance with any orders of this court.

reserve should be vacated because, the complaint in the Fuchs matter has been dismissed. Additionally, the receiver seeks to vacate of a reserve of \$1,800,000, held for a claim asserted against Gabriel in the Southern District of New York action, *Croscill Inc. v Gabriel Capital, LP*, Index No. 09-Civ-6031 (the Croscill matter). According to the receiver, the complaint in the Croscill matter has also been dismissed.

In fact, both the complaints in Fuchs matter and in the Croscill matter were dismissed in a memorandum and order issued by District Court Judge Deborah Batts on September 23, 2011.⁵ However, on October 25, 2011, the Croscill and the Fuchs plaintiffs filed a motion seeking to alter or amend the judgment, seeking leave to file amended complaints, and requesting reconsideration of the court's refusal to exercise supplemental jurisdiction over plaintiffs' breach of contract claims. These motions are still pending.

In addition, a portion of Judge Batts' memorandum and order dismissed plaintiffs' non-fraud state law claims as barred by New York's Martin Act. Subsequently, in a December 20, 2011 decision, the New York Court of Appeals held that "the purpose of the Martin Act is not impaired by private common-law actions that have a legal basis independent of the statute because proceedings by the Attorney General and private actions further the same goal— combatting fraud and deceptions in securities transactions." *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Management Inc.*, 18 NY3d 341, 353 (2011). The law in New York regarding Martin Act claims was therefore changed after Judge Batts' decision was entered.

Given the changes in New York law since Judge Batts' September 23, 2011 memorandum and order, as well as the fact that the reconsideration motions are currently

⁵ Judgement was entered on September 27, 2011.

pending before Judge Batts in the Fuchs and Croscill matters, it is premature to vacate the \$9,762,036 in reserves held by Gabriel for the claims being addressed in the Fuchs and Croscill matters. Thus, the amount to be distributed by the receiver in the Gabriel second interim distribution is reduced by \$9,762,036 to \$90,237,964.

Order

Accordingly, it is hereby

ORDERED that Bart M. Schwartz, Esq., as the receiver for Ariel Fund Limited, is authorized to make a Second Interim Distribution of \$100,000,000 to the investors of Ariel Fund Limited; and it is further

ORDERED that, in accordance with Section of IV., "Distributions Under the Procedures and Plan," of Exhibit E of the July 30, 2010 Decision and Order of this court, a first and a second interim distribution to the investors of Gabriel Capital, LP, are approved; and it is further

ORDERED that Bart M. Schwartz, Esq., as the receiver for Gabriel Capital, LP, is authorized to make a first interim distribution of \$36,000,000 to the investors of Gabriel Capital, LP; and it is further

ORDERED that Bart M. Schwartz, Esq., as the receiver for Gabriel Capital, LP, is authorized to make a Second Interim Distribution of \$90,237,964 to Gabriel Capital, LP's investors; and it is further

ORDERED that no interim distributions authorized by this court today shall be made to either J. Ezra Merkin or Gabriel Capital Corp.; and it is further

ORDERED that, pursuant to the terms of the October 27, 2011 stipulation between the relief defendants and the United States Internal Revenue Service: (1) the \$69,000,000 security

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interest maintained by Gabriel Assets, LLC is released; (2) the \$7,000,000 cash reserve held in Ariel Fund Limited for the benefit of the United States Internal Revenue Service is released; and (3) the \$7,000,000 cash reserve held in Gabriel Capital, LP, for the benefit of the United States Internal Revenue Service is released; and it is further

ORDERED that \$11,500,000 is to be held in a segregated third-party interest-bearing account denominated as "Gabriel Alternative Assets LLC-IRS Reserve Account"; and it is further

ORDERED that all other portions of the motion by Bart M. Schwartz, Esq., as the receiver for Ariel Fund Limited and Gabriel Capital, LP, are denied.

Dated: March 26, 2012

ENTER:



HON. RICHARD B. LOWE III
J.S.C.

FOR IMMEDIATE RELEASE

**NEW YORK STATE SUPREME COURT APPROVES INTERIM CASH DISTRIBUTIONS
OF \$226 MILLION TO INJURED INVESTORS IN PARTIAL
MADOFF FEEDER FUNDS GABRIEL CAPITAL, L.P. AND ARIEL FUND, LIMITED –
ENTITIES FORMERLY MANAGED BY J. EZRA MERKIN**

*TOTAL DISTRIBUTIONS TO DATE OF NEARLY \$400 MILLION,
APPEARING TO BE THE MOST TO DATE BY ANY MADOFF-INVESTED ENTITIES;
DISTRIBUTIONS TO BE MADE BY BART M. SCHWARTZ, AS RECEIVER FOR THE FUNDS*

New York, NY – March 27, 2012 – Justice Richard B. Lowe, III, of the New York State Supreme Court in Manhattan, has granted the motions of Bart M. Schwartz, as Receiver for Gabriel Capital, L.P. and Ariel Fund Limited – two private investment funds formerly run by J. Ezra Merkin that are alleged to have secretly invested more than one-fourth of their assets with Bernard L. Madoff Investment Securities – to distribute a total of \$226 million of cash investment proceeds to investors who suffered losses through the funds. Total interim distributions to investors in these entities thus far will now equal nearly \$400 million, appearing to constitute the largest distributions to date by any Madoff-invested entities.

Payments will be sent to all investors in the funds, generally for delivery within the next 10 business days. This payment delivery schedule excludes Mr. Merkin and his affiliates, whose payments in respect of their investment holdings in the funds were withheld by the Receiver pending final resolution of claims against Mr. Merkin, including, among others, claims brought by the New York Attorney General, and directly by the Receiver.

Bart M. Schwartz was appointed as Receiver by Justice Lowe as a result of legal action by the New York Attorney General. Mr. Schwartz commented, “I am very pleased with Justice Lowe’s decision to allow us to make these further interim distributions of cash to injured investors. With regard to the Gabriel Capital, L.P. distributions in particular, decisions by the Court on complex, multi-jurisdictional legal issues were required. I am grateful that Justice Lowe, with the assistance of Court-appointed Special Master, Leslie Treff, was able to approve this interim relief for injured investors.”

Added Mr. Schwartz, “We will continue in our efforts to maximize overall returns to investors, including through prudent, value-preserving liquidation of the funds’ roughly \$1 billion in combined estimated value of remaining assets, and through pursuing additional recoveries from culpable parties. In making these interim distributions to investors, we have made sure to maintain reserves sufficient to cover all of the funds’ operating needs going forward, as well as any reasonably foreseeable potential liabilities.”

Regarding prospects and timing for future interim distributions to investors, Mr. Schwartz said, “we are making good progress in our ongoing value realization efforts, and we expect to be in a position to seek approval of a further interim distribution of cash to each of the funds’ injured investors in the relatively near-term, most likely in the next 60 to 90 days.”

The case is [The People of the State of New York v. J. Ezra Merkin, et al.](#) (Index No. 450879/2009).

CONTACTS:

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Receiver
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bschwartz@guidepostpartners.com

James C. McCarroll, Reed Smith LLP
Receiver’s legal counsel
(212)549-0209

jmccarroll@reedsmith.com

A-1128

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
 Ariel Fund Limited,
 Gabriel Capital, L.P.,
 Gabriel Alternative Assets, LLC,
 and Gabriel Assets, LLC,
 Pursuant to Order of the New York State Supreme Court,
 New York County, in the Action Bearing Index No. 450879/2009

c/o
 Guidepost Partners LLC
 1185 Avenue of the Americas
 Suite 1750
 New York, NY 10036
 212-205-4189
 bschwartz@guidepostpartners.com

April 30, 2012

Update on Progress of the Ariel Fund Ltd. (“Ariel” or the “Fund”) Receivership

Following on our recent Second Interim Distribution of \$100,000,000, which was discussed in my letter to you on March 27, 2012, I am pleased to provide you with a further update on progress made in the Ariel Receivership during the first quarter of 2012.

As has been the case since my appointment, I remain focused on the following goals:

1. To carefully and expeditiously liquidate the Fund’s investment portfolio without unduly sacrificing investment value.
2. To return cash to investors to the maximum extent feasible and as promptly as possible, making my best reasonable efforts to do so via a series of distributions, beginning as quickly as possible.

Portfolio Performance and Interim Distributions

Ariel Fund Ltd.	
Estimated Value at 3/31/2012	\$ 509,248,496
Estimated YTD 2012 Return	3.9%
<u>Cash Distributions to Date</u>	
First Interim Distribution to Investors	\$ 167,000,000
Second Interim Distribution to Investors	100,000,000
Total Distributed Cash	\$ 267,000,000

The above-stated March 31, 2012 estimated value is after the Second Interim Distribution of \$100,000,000, which all eligible investors should have received in late March or early April, depending upon the method of payment that you have elected. The cash or cash equivalents component of the March 31, 2012 estimated Net Asset Value noted above is approximately \$160,000,000. Total distributions to Ariel investors to date have equaled approximately \$267,000,000.

My team and I are in the process of completing an analysis of cash holdings and required holdbacks, and anticipate submitting a request for approval of a Third Interim Distribution to the New York State Supreme Court in the next few weeks. We will keep you apprised regarding timing, and the amount for which distribution approval will be sought from the New York State Supreme Court.

We continue to work with Cerberus Capital Management on the bulk of the remaining portfolio. The main objective continues to be to seek and create liquidity events for the Fund's holdings, while continuing to improve the operating performance of the underlying entities. Market conditions which affect this activity have improved in recent months. Plans have been developed and are being pursued to achieve liquidity events in all of our major investments. Timing and final results will be affected as market conditions continue to develop. Cash flows were positively affected by various distributions related to underlying investments during the first quarter.

The Fund's holdings in domestic and international financial institutions have been negatively affected by the general economic conditions and the stress in global banking in this period. The investment and economic climates in Japan appear to have improved and we expect that these stabilizing effects will improve the conditions for the efforts to monetize our holdings.

Audit Status

I am pleased that PricewaterhouseCoopers has completed its audit of the 2010 financial statements earlier this month which have been transmitted to you. We expect the 2011 audit to be completed by mid-year.

Litigations

My team and I continue to actively analyze, and where prudent pursue, potential opportunities for a global resolution of claims against, and by, J. Ezra Merkin, the Madoff Trustee, and others. Timing and progress of these efforts continues to be impacted by the substantial complexity, and multi-party and multi-jurisdictional nature, of the various matters.

While we continue with these analytical and negotiation efforts, we continue also to take all appropriate steps to protect the unique and direct interests of Ariel, for the ultimate benefit of all of its stakeholders. During the first quarter of 2012, these steps have included moving to withdraw the Madoff Trustee's litigation against Ariel from the U.S. Bankruptcy Court for the

Southern District of New York, and seeking to have it heard before Judge Rakoff, of the U.S. District Court for the Southern District of New York. That motion is now pending before Judge Rakoff, along with many other such motions that were filed contemporaneously with it in order to meet a deadline set by Judge Rakoff for filing of such motions. We will keep you apprised of progress with regard to this motion, and the litigation overall.

Our suit against Mr. Merkin and his company Gabriel Capital Corporation remains pending in the New York State Supreme Court. As you know, this suit seeks to enforce the individual rights and entitlements of Ariel, to the extent that they may not be fully satisfied through the New York Attorney General's pending suit.

We continue to work cooperatively with the New York Attorney General's Office in connection with prosecution of its suit, including, among other things, in connection with its pending motion for partial summary judgment against Mr. Merkin and his company, seeking forfeiture of substantially all fees paid to them without the need for a trial.

We will continue to keep you apprised of any material developments in these matters, as near to real-time as is prudent and reasonably possible.

Tax Matters

As previously reported, my team and I have continued to work with the IRS. To date, we have made considerable progress to resolve tax claims arising from the tax periods of 2006 through 2009. The principal focus of these claims with respect to the Fund is on the appropriate treatment of dividend withholding during this period at Gabriel Assets LLC and Gabriel Alternative Assets LLC – two other entities also under my control, as Receiver, which are the legal entities through which Ariel and other funds historically conducted most transactions. We are not required to maintain any reserves within Ariel in respect of these claims.

The process for resolving these IRS claims continues, including through potential payment of any remaining penalty and interest amounts. We are in regular contact with the IRS and this process may take several more months.

Wire Instruction Forms

As described in previous letters, in August 2011 we mailed a wire instruction form that enables investors who wish to receive distributions by wire transfer to make this request. It also enables the Receiver to review and approve the requests, to prepare to make distributions in this manner when authorized to do so, and to meet the various legal requirements to which this type of payment is subject. If you wish to receive future distributions by wire transfer, you should by now have completed and submitted this form, pursuant to the instructions transmitted therewith. If you have already sent in the form, there is no need for you to take any additional action unless you have reason to update your payment instructions. Should you need a copy of the form for

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any reason, please contact any of the team members whose information is listed at the close of this letter.

IN CASES WHERE WIRE INSTRUCTIONS HAVE NOT BEEN RECEIVED AND APPROVED IN ADVANCE OF THE MAKING OF AN INTERIM DISTRIBUTION, PAYMENTS WILL BE MADE BY CHECK, SENT TO THE INVESTOR'S ADDRESS ON FILE WITH THE FUND.

Investor Communications

My team and I continue in communication with Investor Advisory Committee members. Most recently, we convened a teleconference meeting on March 14, 2012.

We also continue to issue monthly updates on the estimated portfolio values to all investors who have requested them. If you are not already receiving these reports and would like to, please just let me, or one of my team members (whose contact details appear below), know by telephone or e-mail, and we will be pleased to add you to the distribution list. Please note that, beginning with the monthly estimated portfolio value updated for the period of March 31, 2012, such updates will reflect interim distribution payments made to date.

We remain available to answer any individual investor questions that you may wish to discuss with us.

Very truly yours,

Bart M. Schwartz (Signature), by
admission

Bart M. Schwartz, as Receiver

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
mklett@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1133

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o

Guidepost Partners LLC

1185 Avenue of the Americas

Suite 1750

New York, NY 10036

212-205-4189

bschwartz@guidepostpartners.com

July 10, 2012

Special Update to Investors in Ariel Fund, Ltd. ("Ariel" or the "Fund")

You may have seen the press reports regarding the settlement negotiated with Ezra Merkin. Within the next several weeks, once certain processes are complete, we will send documents to you that fully explain this agreement, and solicit your interest in participating in the settlement, which we will recommend that you do. Each investor will have the opportunity to individually elect whether to participate.

We regret the time lag between public announcement of the settlement and transmittal of the solicitation documents, but we note that the forthcoming solicitation package will be designed to provide you with full information, including minimum amounts to be distributed to you if you elect to participate in the settlement. The solicitation package also will address reasonably foreseeable questions, and at that time we will be able to respond to all individual questions.

In the interim, we are quite limited in the information we can provide on this settlement, but as always, I, and my team, will be happy to speak with you to the fullest extent we can about this subject, or in response to any other questions. Contact information for each of us appears below.

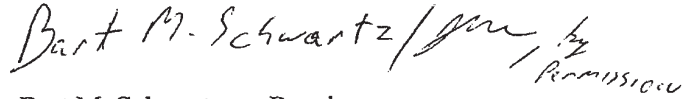
In addition to the settlement with Mr. Merkin, I am pleased to inform you that the New York State Supreme Court has authorized me to make a third interim distribution to investors in each of the funds – in the total amount of \$50 million to Ariel investors. I am enclosing a copy of the Judge's Order with this letter, along with a press release issued today on the subject. I expect to transmit all investor distributions pursuant to this Order within the next few days, by wire transfer to all who have properly submitted wire instructions, and otherwise by check. Please do not hesitate to contact any of us if you have questions about this positive development.

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As always, please do not hesitate to contact me, or one of my team members (whose contact details appear below), with any questions or concerns.

Very truly yours,

A handwritten signature in black ink that reads "Bart M. Schwartz" followed by a stylized flourish. To the right of the signature, the word "Permitted" is written vertically in a smaller, cursive script.

Bart M. Schwartz, as Receiver

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
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James C. McCarroll, Reed Smith LLP
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Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

July 30, 2012

Update on Progress of the Ariel Fund Ltd. (“Ariel” or the “Fund”) Receivership

Following on our recent announcement of the settlement negotiated with Ezra Merkin, as well as the Third Interim Distribution to Ariel investors of \$50,000,000, which were discussed in my letter to you on July 10, 2012, I am pleased to provide you with a further update on progress made in the Ariel Receivership during the second quarter of 2012.

As has been the case since my appointment, I remain focused on the following goals:

1. To carefully and expeditiously liquidate the Fund’s investment portfolio without unduly sacrificing investment value.
2. To return cash to investors to the maximum extent feasible and as promptly as possible, making my best reasonable efforts to do so via a series of distributions, beginning as quickly as possible.

Portfolio Performance and Interim Distributions

Ariel Fund Ltd.	
Estimated Value at 6/30/2012*	\$ 480,183,136
Estimated YTD 2012 Return	3.6%
<u>Cash Distributions to Date</u>	
First Interim Distribution to Investors	\$ 167,000,000
Second Interim Distribution to Investors	100,000,000
Third Interim Distribution to Investors	50,000,000
Total Distributed Cash	\$ 317,000,000

*Amount has been reduced by subsequent \$50m Third Interim Distribution that took place in July, 2012

The above-stated June 30, 2012 estimated value is after the Third Interim Distribution of \$50,000,000, which all eligible investors should have received by now, either by wire transfer or check, depending upon the method of payment that you have elected. The cash or cash equivalents component of the June 30, 2012 estimated Net Asset Value noted above is approximately \$72,000,000. Total distributions to Ariel Fund Investors to date have equaled approximately \$317,000,000.

We continue to work with Cerberus Capital Management on the bulk of the remaining portfolio. The main objective continues to be to seek and create liquidity events for the Fund's holdings, while continuing to improve the operating performance of the underlying entities. Market conditions which affect this activity have improved since the latter half of 2011. Plans are being pursued to achieve liquidity events in all of our major investments, however the timing and final results will be affected as market conditions continue to develop. Cash flows were positively affected by various distributions related to underlying investments during the first quarter, and to the extent possible, were included in the recent distribution.

The Fund's holdings in domestic and international financial institutions have been negatively affected by the general economic conditions, the changing and toughening regulatory environment and the stress in global banking in this period. The European monetary and economic crises have created uncertainty surrounding the future timing of potential liquidations of our European holdings, which include holdings in banking and real estate companies.

The investment and economic climates in Japan appear to have improved and we expect that these stabilizing effects will improve the conditions for the efforts to monetize our holdings. Progress in this area will be a key factor in determining the timing of a future distribution.

Audit Status

PricewaterhouseCoopers is currently finalizing the Fund's 2011 financial statement audit, which we expect will be issued in August.

Merkin Settlement

As discussed in my letter of July 10 (a copy of which is attached, for your convenience of reference), in concert with the New York Attorney General, we have reached a settlement with Ezra Merkin and his company, Gabriel Capital Corporation. Official settlement documents and related information are still being prepared and will be sent to you in the coming weeks. You can be assured that my team and I will be communicating with you both in connection with the mailing of the documents and on an ongoing basis with further relevant information, as it becomes available. In the meantime, we are happy to speak with you to the fullest extent we can about this subject, or in response to any other questions. My contact information appears in the header of this letter, and contact information for my lead team members appears below.

Litigations

We continue to analyze opportunities for a resolution of claims by and against the Madoff Trustee, while continuing to take all appropriate steps to protect the interests of Ariel for the ultimate benefit of all of its stakeholders. During the first quarter of 2012, these steps have included moving to withdraw the Madoff Trustee's litigation against Ariel from the U.S. Bankruptcy Court for the Southern District of New York, and seeking to have it heard before Judge Rakoff, of the U.S. District Court for the Southern District of New York. That motion is now pending before Judge Rakoff, along with many other such motions that were filed contemporaneously with it in order to meet a deadline set by Judge Rakoff for filing of such motions. We will keep you apprised of progress with regard to this motion, and the litigation overall.

Tax Matters

As previously reported, my team and I have continued to work with the IRS. To date, we have made considerable progress to resolve tax claims arising from the tax periods of 2006 through 2009. The principal focus of these claims in respect to the Ariel is on the appropriate treatment of dividend withholding during this period at Gabriel Assets LLC and Gabriel Alternative Assets LLC – two other entities also under my control, as Receiver, which are the legal entities through which Ariel and other funds historically conducted most transactions. We are not required to maintain any reserves within Ariel in respect of these claims.

The process for resolving these IRS claims continues, including through potential payment of any interest and penalty amounts. We are in regular contact with the IRS and this process may take several more months.

Investor Communications

My team and I continue in communication with Investor Advisory Committee members. Most recently, we convened a teleconference meeting on June 12, 2012.

We also continue to issue monthly updates on the estimated portfolio values to all investors who have requested them. If you are not already receiving these reports and would like to, please just let me, or one of my team members (whose contact details appear below), know by telephone or e-mail, and we will be pleased to add you to the distribution list. Please note that, beginning with the monthly estimated portfolio value updated for the period ending June 30, 2012, such updates will reflect interim distribution payments made to date, including the recently completed Third Interim Distributions made in July.

We remain available to answer any individual investor questions that you may wish to discuss with us.

Very truly yours,

Bart M. Schwartz / [Signature]
Bart M. Schwartz, as Receiver *Permission*

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
mklett@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1141

ATTACHMENT

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

July 10, 2012

Special Update to Investors in Ariel Fund, Ltd. ("Ariel" or the "Fund")

You may have seen the press reports regarding the settlement negotiated with Ezra Merkin. Within the next several weeks, once certain processes are complete, we will send documents to you that fully explain this agreement, and solicit your interest in participating in the settlement, which we will recommend that you do. Each investor will have the opportunity to individually elect whether to participate.

We regret the time lag between public announcement of the settlement and transmittal of the solicitation documents, but we note that the forthcoming solicitation package will be designed to provide you with full information, including minimum amounts to be distributed to you if you elect to participate in the settlement. The solicitation package also will address reasonably foreseeable questions, and at that time we will be able to respond to all individual questions.

In the interim, we are quite limited in the information we can provide on this settlement, but as always, I, and my team, will be happy to speak with you to the fullest extent we can about this subject, or in response to any other questions. Contact information for each of us appears below.

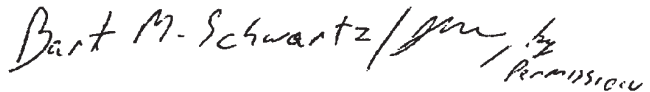
In addition to the settlement with Mr. Merkin, I am pleased to inform you that the New York State Supreme Court has authorized me to make a third interim distribution to investors in each of the funds – in the total amount of \$50 million to Ariel investors. I am enclosing a copy of the Judge's Order with this letter, along with a press release issued today on the subject. I expect to transmit all investor distributions pursuant to this Order within the next few days, by wire transfer to all who have properly submitted wire instructions, and otherwise by check. Please do not hesitate to contact any of us if you have questions about this positive development.

A-1143

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As always, please do not hesitate to contact me, or one of my team members (whose contact details appear below), with any questions or concerns.

Very truly yours,

A handwritten signature in black ink that reads "Bart M. Schwartz" followed by a stylized flourish. To the right of the flourish, the word "Permission" is written vertically in a smaller, cursive script.

Bart M. Schwartz, as Receiver

cc: Robert P. Rittereiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
mklett@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1144

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o

Guidepost Partners LLC

1185 Avenue of the Americas

Suite 1750

New York, NY 10036

212-205-4189

bschwartz@guidepostpartners.com

August 14, 2012

**Special Update to Investors in
Ariel Fund, Ltd. ("Ariel" or the "Fund") Regarding Merkin Settlement**

Unfortunately, on August 1, Irving Picard, the Trustee for the Bankruptcy Estate of Bernard L. Madoff Investment Securities, LLC (the "Madoff Trustee"), commenced an action in the U.S. Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") seeking to enjoin consummation of the Merkin Settlement that I wrote to you about in my July 10 and 31 update letters. I view this action by the Madoff Trustee (the "Madoff Trustee's Action") as a wholly improper attempt to interfere with a lawful, fair and binding settlement in which he has no legitimate interest.

This action by Picard will not interfere with my continuing efforts to liquidate the Funds' holdings and to make distributions. It will delay the distribution of the contemplated solicitation packages which were to be used to finalize distribution of the settlement proceeds. Once again, this action by Picard will not interfere with the liquidation and distribution of Fund assets other than what we would have received from the Merkin Settlement.

I, along with the New York Attorney General and the Ascot Receiver, intend to vigorously oppose the Madoff Trustee's Action. I understand the Merkin Defendants similarly will oppose the Madoff Trustee's Action.

We are moving forward with all reasonably possible speed in our efforts to dispose of this impediment to consummation of the Merkin Settlement. Our first step in this regard will be to file a motion later this month, seeking to have the Madoff Trustee's Action removed from the Bankruptcy Court, and to have it heard by Judge Rakoff of the U.S. District Court for the Southern District of New York (the "U.S. District Court"). We must do this because we do not

believe the Bankruptcy Court has the authority necessary to enter a final decision on the matter, and we want to ensure that we avoid further delays to the fullest extent possible. The Madoff Trustee has agreed to a schedule which will provide that the action in Bankruptcy Court will be delayed until Judge Rakoff decides our motion to bring the entire matter before him.

Following a decision on our motion to remove the Madoff Trustee's Action to the U.S. District Court, subject to any scheduling orders that the court then presiding over the action may enter, briefing by both sides on our opposition to the Madoff Trustee's request for an injunction against the Merkin Settlement may be completed in as little as 20 days, following which we will seek the earliest possible final ruling by the court.

It is difficult to estimate these things, but all of the above steps may not be completed for 60 to 90 days. But once again, the Madoff Trustee Action will not affect my ongoing administration of the Fund's Receivership in any other way. I will continue to seek to generate proceeds of investments as promptly as is consistent with prudent preservation of value; and, subject to approval of the New York State Supreme Court, to make interim distributions to investors of all cash that becomes available for such purpose.

As noted above, I view the Madoff Trustee Action as a wholly improper undertaking, and I am committed to seek to dispose of it as promptly as is possible, while seeking the most positive possible outcome for investors in the Fund. A copy of the motion that I will file will be posted on my website – www.guidepostpartners.com – immediately upon filing. In order to avoid the cost of transmitting this voluminous and somewhat technical document to all investors, it will not be mailed to you, unless you separately request a paper copy.

Following this next filing, I will keep you apprised of material interim developments. And as always, please do not hesitate to contact me, or one of my team members (whose contact details appear below), with any questions or concerns.

Very truly yours,

Bart M. Schwartz
Bart M. Schwartz, as Receiver
Just by Permission

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittreiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
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James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1147

Case 1:12-cv-06733-JSR Document 16-3 Filed 01/25/13 Page 46 of 78

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o

Guidepost Partners LLC

1185 Avenue of the Americas

Suite 1750

New York, NY 10036

212-205-4189

bschwartz@guidepostpartners.com

September 4, 2012

**Update to Investors in Ariel Fund, Ltd. ("Ariel" or the "Fund")
Regarding the Madoff Trustee's Efforts to Block Our Merkin Settlement**

As you know, on August 1, Irving Picard, the Madoff Trustee commenced an action in the U.S. Bankruptcy Court for the Southern District of New York, seeking to enjoin consummation of the Merkin Settlement that I wrote to you about previously. As noted in my August 14 letter to you, this action by Picard will not interfere with my continuing efforts to liquidate the Fund's holdings and to make distributions. It will, however, delay the distribution of the contemplated investor solicitation packages in connection with the Merkin Settlement.

On August 31, I, along with the New York Attorney General and the Ascot Receiver, filed a motion to remove the Madoff Trustee's action from the Bankruptcy Court, to have it heard and decided by Judge Rakoff, of the U.S. District Court for the Southern District of New York. In that filing, a copy of which is available on www.guidepostpartners.com, in addition to seeking to have the matter removed to a court with the full authority to dispose of it promptly, we inform the U.S. District Court of our view that the action is wholly without merit, and request that it be decided fully in our favor without further delay. The Preliminary Statement in our filing closes with the following sentence:

There is no basis in law, fact, or equity for the Trustee's claims, and we request that this Court withdraw the reference and dispose of them summarily.

I also submitted a declaration in support of the motion, which discusses the negative impact that ongoing pendency of the Madoff Trustee's action has on investors in the Fund. As that declaration is only a few pages, I include a copy with this letter. An electronic copy of my declaration, along with the much larger full motion package, can be found at www.guidepostpartners.com.

While I am hopeful that the U.S. District Court will move quickly to a decision dismissing the Madoff Trustee's action and allowing me, the New York Attorney General and the Ascot Receiver to proceed with consummation of the Merkin Settlement, it remains difficult to estimate the timing in which this may occur. The Madoff Trustee's response to our filing is due October 3, with the earliest likely timeframe for a decision being late October. The court may direct further briefing, and one or more additional hearings, following decision on our initial motion.

Once again, the Madoff Trustee's action will not affect my ongoing administration of the Fund's Receivership in any other way. I will continue to seek to generate proceeds of investments as promptly as is consistent with prudent preservation of value; and, subject to approval of the New York State Supreme Court, to make interim distributions to investors of all cash that becomes available for such purpose.

As always, please do not hesitate to contact me, or one of my team members (whose contact details appear below), with any questions or concerns.

Very truly yours,

/s/

Bart M. Schwartz, as Receiver

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittreiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
mklett@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

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

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff,

- against -

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

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

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Debtor.

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

- against -

Adv. Pro. No. 12-01778

ERIC T. SCHNEIDERMAN, as successor to
ANDREW M. CUOMO, Attorney General of
the State of New York; BART M.
SCHWARTZ, as Receiver for ARIEL FUND
LTD. and GABRIEL CAPITAL, L.P.; DAVID
PITOFISKY, as Receiver for ASCOT FUND,
LTD.; J. EZRA MERKIN; and GABRIEL
CAPITAL CORPORATION,

Defendants.

**DECLARATION OF BART M. SCHWARTZ IN SUPPORT
OF JOINT MOTION TO WITHDRAW THE REFERENCE**

BART M. SCHWARTZ, under penalty of perjury, declares the following to true and correct:

1. I am a member of the bar of this Court. I serve as the Ariel & Gabriel Receiver, as defined in the Joint Memorandum of Law in Support of Motion to Withdraw the Reference of the above-captioned Adversary Proceeding, in support of which I submit this declaration. All capitalized terms used, but not otherwise defined, herein shall have the meanings ascribed to them in that filing.

2. I respectfully refer to the Motion, and the Declaration of David Ellenhorn also submitted in support thereof, for fuller descriptions of the factual background and relevant legal points pertaining to this matter.

The Ariel & Gabriel Funds, and Their Investors

3. I submit this declaration to emphasize the adverse impact of filing, and ongoing pendency, of the Stay Action on investors in each of the funds for which I serve as Receiver: Ariel Fund, Ltd. ("Ariel Fund") and Gabriel Capital, L.P. ("Gabriel Fund") and together with Ariel Fund, the "Ariel & Gabriel Funds").

4. The Ariel & Gabriel Funds collectively have nearly 300 investors, ranging from elderly individuals (many of whom I understand are now of relatively modest means, following the losses they sustained through their investments in one or both of the Ariel & Gabriel Funds, and in some instances other market impacts of 2008 and thereafter); to charities and endowments, both within and outside of New York; to relatively large financial management organizations (each of which ultimately is investing the monies of underlying individuals).

5. As noted in the Motion, the Merkin Defendants invested between 25 and 30% of the assets of each of the Ariel & Gabriel Funds with BLMIS.

6. In addition to causes of action against the Merkin Defendants and other parties, and disputed claims against BLMIS, substantial, but largely illiquid, assets existed in each fund at the time of my appointment as Ariel & Gabriel Receiver.

7. Since my appointment as the Ariel & Gabriel Receiver, I have worked diligently to carefully and expeditiously liquidate the Ariel & Gabriel Funds' non-BLMIS investment portfolios without unduly sacrificing investment value, seeking to maximize both the speed and aggregate amount of distributions to investors. To date, I have secured approval from Justice Richard B. Lowe, III, of the New York State Supreme Court, to distribute more than \$500,000,000 to investors in the Ariel & Gabriel Funds, subject to investor eligibility.

The Ariel & Gabriel Funds' Litigations With BLMIS

8. I also have worked throughout my service as Ariel & Gabriel Receiver to achieve reasonable resolutions of all disputes, to the extent possible, in the interests of investors in the Ariel & Gabriel Funds. In this regard, I first communicated with the Trustee shortly after my appointment in 2009, in an effort to determine the feasibility and advisability of any consensual resolution of the Trustee's claims of \$16 million to \$18 million against each of the Ariel & Gabriel Funds, and allowance of the Ariel & Gabriel Funds' net equity claims against BLMIS, each in an amount exceeding \$160 million.

9. Immediately after my first meetings with the Trustee, he amended BLMIS' claims against the Ariel & Gabriel Funds to increase them by more than \$275,000,000. However, following my prompt filing of a motion to dismiss, the Trustee voluntarily withdrew these additional claims, and was quoted in a *Bloomberg* article on the subject on November 7, 2009, as having decided to do so "following further review of the law." Eric Larson, "*Madoff Trustee*

Drops \$279 Million From Claim Against Merkin”, BLOOMBERG, November 7, 2009,

http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aebYeET87_BQ.

10. Notwithstanding multiple meetings and other communications over the past three years, to date no settlement has been reached between the Ariel & Gabriel Funds and BLMIS.

The Ariel & Gabriel Funds’ Litigations and Settlement With the Merkin Defendants

11. Similarly, promptly following my appointment I began to explore the possibility of a consensual resolution of claims that the Ariel & Gabriel Funds possessed against the Merkin Defendants. In addition to the NYAG Action, when a settlement had not been reached between the Ariel & Gabriel Funds and the Merkin Defendants in advance of the two year anniversary of the funds’ collapse, I commenced my own action on behalf of the Ariel & Gabriel Funds against the Merkin Defendants.

12. After substantial negotiations, as described in some detail in the Declaration of David Ellenhorn also filed in support of the Motion, I agreed in December 2011, on behalf of the Ariel & Gabriel Funds, to a settlement with the Merkin Defendants. Upon failure of that settlement – due, as described in greater detail in the Declaration of David Ellenhorn, to the inability to secure releases for the Ariel & Gabriel Funds, the Ascot Funds, and the Merkin Defendants from the Trustee – I participated in further negotiations with the Merkin Defendants, resulting ultimately in the Merkin Settlement.

13. While I have thus far been able to return relatively meaningful amounts to investors from the non-BLMIS portions of the Ariel & Gabriel Funds’ portfolios, none of these investors has received any recovery from the Ariel & Gabriel Funds, nor to my knowledge from any other source, in respect of their net cash losses attributable to the funds’ BLMIS investments.

Specifically, none of the investors in the Ariel & Gabriel Funds are eligible, nor will they ever be eligible, to receive SIPC payments in respect of their Ariel & Gabriel Funds investments.

14. Pursuant to the Merkin Settlement, each eligible investor in either of the Ariel & Gabriel Funds who elects to participate will receive 42.5% of the first \$5 million of their net BLMIS losses. Large investors (defined as investors with more than \$5 million in net BLMIS losses) may submit to a simple process which will determine whether they knew that Merkin had delegated investment responsibility to BLMIS. Those large investors who were not aware of this delegation may participate in a 'large investor settlement pool' which could provide up to 42.5% of their net BLMIS losses *above* \$5 million. (Large investors who do not wish to participate in this claims process or had knowledge of BLMIS' role and do not seek to qualify, will instead receive an additional 2.5% of their net BLMIS losses above \$5 million.) The Trustee incorrectly asserts in the Stay Action that this process will be "complex" and "costly." In fact, it is expected to involve only a few investors. The process will be overseen by an independent settlement fund administrator, and is expected to be conducted efficiently and at modest cost.

The Ongoing Harm Caused to Investors in the Ariel & Gabriel Funds by the Stay Action

15. Prior to commencement of the Stay Action, I, along with the NYAG and the Ascot Receiver, were preparing to consummate the Merkin Settlement, and transmit solicitation materials to all investors. Absent commencement of the Stay Action, we projected that the first distributions would be made to eligible investors during the first quarter of 2013.

16. The commencement, and ongoing pendency, of the Stay Action, has thwarted our ability to move forward with consummation of the Merkin Settlement, and the making of distributions from proceeds thereof to investors. This visits further delay and burden upon

individual investors who already have waited nearly four years following the collapse of the Ariel & Gabriel Funds to receive any recompense for the funds' BLMIS losses.

17. For these reasons, beyond its absence of legal merit, as discussed in detail in the Motion, I view the filing and ongoing prosecution of the Stay Action as a fundamentally unjust further attack on the already injured investors of the Ariel & Gabriel Funds.

18. I look forward to the opportunity to have the Stay Action heard and decided promptly before a Court with full authority to enter dispositive rulings on the relief requested – rulings which I respectfully submit should result in dismissal of the Stay Action in its entirety.

Dated: August 31, 2012
New York, New York

/s/Bart M. Schwartz
Bart M. Schwartz

A-1156

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Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
Guidepost Partners LLC
1185 Avenue of the Americas
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New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

October 31, 2012

Informational Update to Investors in Ariel Fund Ltd. ("Ariel" or the "Fund")

Introduction

Following on our announcement of the settlement negotiated with Ezra Merkin, as well as the Third Interim Distribution to Ariel investors of \$50,000,000, which were discussed in my July 2012 letters to you, I am pleased to provide you with a further update on progress made in the Ariel Receivership during the third quarter of 2012.

As has been the case since my appointment, I remain focused on the following goals:

1. To carefully and expeditiously liquidate the Fund's investment portfolio without unduly sacrificing investment value.
2. To return cash to investors to the maximum extent feasible and as promptly as possible, making my best reasonable efforts to do so via a series of distributions, beginning as quickly as possible.

Portfolio Performance and Interim Distributions

Ariel Fund Ltd.	
Estimated Value at 9/30/2012	\$ 582,114,228
Estimated YTD 2012 Return	6.1%
Cash Distributions to Date	
First Interim Distribution to Investors	\$ 167,000,000
Second Interim Distribution to Investors	100,000,000
Third Interim Distribution to Investors	50,000,000
Total Distributed Cash	\$ 317,000,000

The above-stated September 30, 2012 estimated value is after the Third Interim Distribution of \$50,000,000 completed during the third quarter.

I am pleased to announce that my team and I have proposed a Fourth Interim Distribution to Ariel investors, in the amount of \$40,000,000. If approved by the Court, this will raise the total distributions to the Fund's investors to approximately \$317,000,000 since inception of the Receivership.

We continue to work with Cerberus Capital Management on the bulk of the remaining portfolio. The main objective continues to be to seek and create liquidity events for the Fund's holdings, while continuing to improve the operating performance of the underlying entities. As previously noted, market conditions which affect this activity have continued to improve since the latter half of 2011. Plans are being pursued to achieve liquidity events in all of our major investments, however the timing and final results will be affected as market conditions continue to develop.

As mentioned above, we have requested Court approval for a Fourth Interim Distribution. This has been enabled in part by a recent opportunity to liquidate a major part of the Fund's holdings in Grifols SA, a position that remained from our earlier investment in Talecris Pharmaceuticals.

The value of the Fund's holdings in domestic and international financial institutions has been sustained, but it is affected by the general economic conditions, changing and toughening regulatory environment, and the stress in global banking in this period. The instability of the European Union, slowdown in the Chinese economy, geopolitical events in the Persian Gulf, and the continuing fiscal crisis in the United States have created a climate of uncertainty that has affected the future timing of potential liquidations of our holdings, particularly those in banking and real estate companies.

The investment and economic climates in Japan appear to have stabilized. Though the Japanese economy is merely inching ahead, we expect that these stabilized conditions will assist in our efforts to monetize our holdings. The recent announcement of Cerberus' intention to sell part of its position in Aozora Bank, our largest holding, is a positive development. Progress in this area will be a key factor in determining the timing of future distributions.

Audit Status

PricewaterhouseCoopers completed the Fund's 2011 financial statement audit on October 12. You should have received a copy of this report within the last 10 days.

Merkin Settlement

As discussed in my prior letters to you, working with the New York Attorney General's Office and the Ascot Fund Receiver, we reached a settlement in June of all of our claims against Ezra Merkin and his company, Gabriel Capital Corporation. As also reported, on August 1, the SIPC Trustee for Bernard L. Madoff Investment Securities, LLC (the "Madoff Trustee") commenced an action in U.S. Bankruptcy Court seeking to enjoin consummation of our settlement. While we believe that the Madoff Trustee's suit is entirely without merit or legal basis, seeking to defeat his efforts has caused delays in consummation of the Merkin settlement.

As reported in my September 4 letter to you, we filed a joint motion with the New York Attorney General and the Ascot Fund Receiver on August 31 to withdraw the reference of this matter from the Bankruptcy Court, seeking to have it heard before Judge Rakoff, of the U.S. District Court for the Southern District of New York. The Madoff Trustee filed a responsive brief on October 3, and we filed our reply brief on October 11. Once the court in which the Madoff Trustee's action will be heard is decided, further briefing will occur. We will press for such further briefing to occur on an expedited basis. Thereafter, a decision will be rendered on whether the Madoff Trustee can enjoin the Merkin settlement.

We will press for all briefing of the Madoff Trustee's action to be completed with sufficient speed for a decision to be rendered before year-end. If we prevail, we are prepared to provide full details of the settlement to investors immediately, and to immediately begin the process of soliciting investors' interest in participating in the settlement.

You can be assured that my team and I will be communicating with you in connection with all matters relating to the settlement as they become available. In the meantime, we are happy to speak with you to the fullest extent we can about this subject, or in response to any other questions. My contact information appears in the header of this letter, and contact information for my lead team members appears below.

Litigations

In addition to the above-referenced injunction action, we continue to pursue a resolution of monetary claims by and against the Madoff Trustee, while continuing to take all appropriate steps to protect the interests of Ariel for the ultimate benefit of all of its stakeholders. As previously reported, these steps have included moving to withdraw the Madoff Trustee's litigation against Ariel from the U.S. Bankruptcy Court for the Southern District of New York, and seeking to have it heard before Judge Rakoff, of the U.S. District Court for the Southern District of New York. That motion is now pending before Judge Rakoff, along with many other such motions that were filed contemporaneously with it in order to meet a deadline set by Judge Rakoff for filing of such motions. We will keep you apprised of progress with regard to this motion, and the litigation overall.

Tax Matters

As previously reported, my team and I have continued to work with the IRS regarding claims arising from the tax periods of 2006 through 2009. To date, we have made considerable progress in our efforts to resolve these claims, but a number of issues remain open.

The principal focus of these claims in respect of Ariel is on reporting during the period periods under review of certain capital gain and capital loss transactions at Gabriel Assets LLC and Gabriel Alternative Assets LLC – two other entities also under my control, as Receiver, which are the legal entities through which Ariel and other funds historically conducted most transactions. At the end of 2011, payments were made in respect of taxes not previously withheld, and to reduce interest and penalty costs, which are still subject to ongoing negotiations.

The process for resolving these IRS claims continues, including through potential payment of any interest and penalty amounts. We are in regular contact with the IRS and this process may take several more months.

Investor Communications

My team and I continue in communication with Investor Advisory Committee members. We also continue to issue monthly updates on the estimated portfolio values to all investors who have requested them. If you are not already receiving these reports and would like to, please just let me, or one of my team members (whose contact details appear below), know by telephone or e-mail, and we will be pleased to add you to the distribution list. Please note that, beginning with the monthly estimated portfolio value updated for the period ending September 30, 2012, such updates will reflect interim distribution payments made to date, including the Third Interim Distributions made in July.

A-1161

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We remain available to answer any individual investor questions that you may wish to discuss with us.

Very truly yours,


Bart M. Schwartz, as Receiver *Permission*

cc: Robert P. Rittereiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
mklett@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1162

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o

Guidepost Partners LLC

1185 Avenue of the Americas

Suite 1750

New York, NY 10036

212-205-4189

bschwartz@guidepostpartners.com

November 5, 2012

Correction Regarding October 31, 2012 Informational Update to Investors in Ariel Fund Ltd.

I write to inform you of an error in the chart contained within our October 31, 2012 letter (a copy of which is attached for your convenience).

A corrected chart appears directly below:

Ariel Fund Ltd.	
Estimated Value at 9/30/2012	\$ 501,150,213
Estimated YTD 2012 Return	6.1%
<u>Cash Distributions to Date</u>	
First Interim Distribution to Investors	\$ 167,000,000
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Third Interim Distribution to Investors	50,000,000
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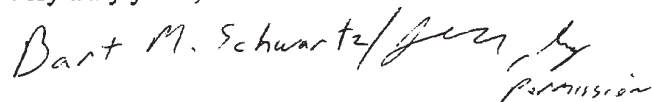
Our apologies for any inconvenience this may have caused.

A-1164

Case 1:12-cv-06733-JSR Document 16-3 Filed 01/25/13 Page 63 of 78

Please let me or any member of my team listed below know if you have any questions.

Very truly yours,

A handwritten signature in black ink that reads "Bart M. Schwartz" followed by a flourish and the word "permission" written in a smaller, cursive script below it.

Bart M. Schwartz, as Receiver

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
mklett@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1165

ATTACHMENT

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

October 31, 2012

Informational Update to Investors in Ariel Fund Ltd. ("Ariel" or the "Fund")

Introduction

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Audit Status

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Merkin Settlement

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You can be assured that my team and I will be communicating with you in connection with all matters relating to the settlement as they become available. In the meantime, we are happy to speak with you to the fullest extent we can about this subject, or in response to any other questions. My contact information appears in the header of this letter, and contact information for my lead team members appears below.

Litigations

In addition to the above-referenced injunction action, we continue to pursue a resolution of monetary claims by and against the Madoff Trustee, while continuing to take all appropriate steps to protect the interests of Ariel for the ultimate benefit of all of its stakeholders. As previously reported, these steps have included moving to withdraw the Madoff Trustee's litigation against Ariel from the U.S. Bankruptcy Court for the Southern District of New York, and seeking to have it heard before Judge Rakoff, of the U.S. District Court for the Southern District of New York. That motion is now pending before Judge Rakoff, along with many other such motions that were filed contemporaneously with it in order to meet a deadline set by Judge Rakoff for filing of such motions. We will keep you apprised of progress with regard to this motion, and the litigation overall.

Tax Matters

As previously reported, my team and I have continued to work with the IRS regarding claims arising from the tax periods of 2006 through 2009. To date, we have made considerable progress in our efforts to resolve these claims, but a number of issues remain open.

The principal focus of these claims in respect of Ariel is on reporting during the period periods under review of certain capital gain and capital loss transactions at Gabriel Assets LLC and Gabriel Alternative Assets LLC – two other entities also under my control, as Receiver, which are the legal entities through which Ariel and other funds historically conducted most transactions. At the end of 2011, payments were made in respect of taxes not previously withheld, and to reduce interest and penalty costs, which are still subject to ongoing negotiations.

The process for resolving these IRS claims continues, including through potential payment of any interest and penalty amounts. We are in regular contact with the IRS and this process may take several more months.

Investor Communications

My team and I continue in communication with Investor Advisory Committee members. We also continue to issue monthly updates on the estimated portfolio values to all investors who have requested them. If you are not already receiving these reports and would like to, please just let me, or one of my team members (whose contact details appear below), know by telephone or e-mail, and we will be pleased to add you to the distribution list. Please note that, beginning with the monthly estimated portfolio value updated for the period ending September 30, 2012, such updates will reflect interim distribution payments made to date, including the Third Interim Distributions made in July.

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We remain available to answer any individual investor questions that you may wish to discuss with us.

Very truly yours,



Bart M. Schwartz, as Receiver

Permitted

cc: Robert P. Rittereiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
mklett@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

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A-1172

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Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o

Guidepost Partners LLC

1185 Avenue of the Americas

Suite 1750

New York, NY 10036

212-205-4189

bschwartz@guidepostpartners.com

November 28, 2012

Special Interim Update to Investors in Ariel Fund, Ltd. ("Ariel" or the "Fund")

I write to update you on two ongoing matters.

First, I am pleased to report in regard to the anticipated \$40 million Fourth Interim Distribution to investors of the Fund that the New York State Supreme Court has set December 7 as the date for hearing on my motion for approval. If the Court grants the motion on that date, or within the next 10 days thereafter, we expect to be able to make distributions to all eligible investors before the end of the calendar year. I will update you on prospects in this regard following the December 7 hearing.

Second, with regard to the Merkin Settlement, as you know from my prior correspondence, on August 1, 2012, the Madoff Trustee commenced an action in the U.S. Bankruptcy Court for the Southern District of New York seeking to enjoin consummation of our settlement. As also reported previously, we have sought to have that proceeding withdrawn from the Bankruptcy Court to the U.S. District Court for the Southern District of New York.

A hearing on our motion to withdraw the Madoff Trustee's action to the U.S. District Court occurred on November 19. We believe our arguments were well understood by the U.S. District Judge presiding over the hearing, and the Judge has indicated that he expects to issue a ruling on the motion by December 31.


As noted in my prior correspondence, once a ruling on that motion is made, then briefing of the Madoff Trustee's action seeking to enjoin the Merkin Settlement will proceed, either before the District Court or the Bankruptcy Court. We will continue to press for the speediest possible resolution of the Madoff Trustee's action, and to move forward with the Merkin settlement.

A-1173

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As always, please do not hesitate to contact me, or one of my team members (whose contact details appear below), with any questions or concerns.

Very truly yours,

Bart M. Schwartz  *by permission*

Bart M. Schwartz, as Receiver

cc: Robert P. Rittereiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
mklett@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1174

A-1175

Case 1:12-cv-06733-JSR Document 16-3 Filed 01/25/13 Page 74 of 78

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of

Ariel Fund Limited,

Gabriel Capital, L.P.,

Gabriel Alternative Assets, LLC,

and Gabriel Assets, LLC,

Pursuant to Order of the New York State Supreme Court,

New York County, in the Action Bearing Index No. 450879/2009

c/o

Guidepost Partners LLC

1185 Avenue of the Americas

Suite 1750

New York, NY 10036

212-205-4189

bschwartz@guidepostpartners.com

December 20, 2012

Special Update to Investors in Ariel Fund, Ltd. ("Ariel" or the "Fund")

I am pleased to report that Justice Lowe has signed the enclosed Order, approving a Fourth Interim Distribution to Ariel investors of \$40 million.

We will be commencing this distribution to all eligible investors within the next week. We expect to have all payments out by the end of the year, by wire transfer to all who have previously completed, returned, and obtained approval of the necessary forms. For all others, checks will be sent to the address on file in the Fund's records.

Very truly yours,


Bart M. Schwartz, as Receiver

cc: Robert P. Rittreiser, Guidepost Partners, LLC
brittereiser@guidepostpartners.com; 212-205-4189

Michael Klett, Guidepost Partners, LLC
mklett@guidepostpartners.com; 212-205-4189

James C. McCarroll, Reed Smith LLP
jmccarroll@reedsmith.com; 212-549-0209

A-1176

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FILED: NEW YORK COUNTY CLERK 12/18/2012

INDEX NO. 450879/2009

NYSCEF DOC. NO. 300

RECEIVED NYSCEF: 12/18/2012

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE III
Justice

PART 56

People of State of New York
- v -
Enya Merkin

INDEX NO. 450879/09
MOTION DATE 12/7/12
MOTION SEQ. NO. 012
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 12/17/12

HON. RICHARD B. LOWE III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

A-1177

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

Index No.
450879/09

Motion Sequence No.
012

- against -

J. EZRA MERKIN and GABRIEL CAPITAL
CORPORATION,

Defendants,

and

ARIEL FUND LIMITED, ASCOT FUND LIMITED,
ASCOT PARTNERS, L.P., GABRIEL ALTERNATIVE
ASSETS, LLC, GABRIEL ASSETS, LLC and
GABRIEL CAPITAL, L.P.,

Relief Defendants.

RICHARD B. LOWE, III, J.:

The relief defendants Ariel Fund Limited (Ariel) and Gabriel Capital, L.P. (Gabriel) move, by Order to Show Cause, for an order approving a Fourth Interim Distribution to investors of Ariel and Gabriel. The instant motion is unopposed, and, for the reasons stated below, is granted.

Bart M. Schwartz, Esq. (Schwartz), the Receiver for Ariel and Gabriel, was appointed by this court pursuant to a Stipulation and Order dated June 10, 2009. In the instant motion, he seeks to make a fourth interim distribution of \$40 million to investors in Ariel and \$45 million to investors in

Gabriel.

This court has previously approved three previous interim distributions to such investors. In his affirmation supporting the instant motion, Schwartz avers that, as of August 31, 2012, the unaudited estimated asset value of Ariel was \$505,576,613 and the unaudited estimated asset value of Gabriel was \$512,717,760. Further, Schwartz has notified the court that, at the time he filed this motion, in addition to established reserves, he held \$40,304,661 in cash or cash equivalents in Ariel and \$45,675,348 in cash or cash equivalents in Gabriel.

Given the lack of opposition to the instant motion, Schwartz's assurances that the value of Ariel and Gabriel's remaining assets are more than sufficient to satisfy any foreseeable creditor claims, and that unaudited, estimated value of the assets of Ariel and Gabriel were approximately \$465,576,613 and \$467,717,760, respectively, at the time that this motion was made, such motion is granted.

Order

Accordingly, it is hereby

ORDERED that the motion is granted, and Bart M. Schwartz, Esq., as Receiver for Ariel Fund Limited, is authorized to make a Fourth Interim Distribution of \$40,000,000 to the investors of Ariel Fund Limited; and it is further

ORDERED that Bart M. Schwartz, Esq., as Receiver for Gabriel

A-1179

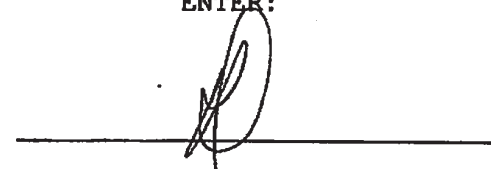
Case 1:12-cv-06733-JSR Document 16-3 Filed 01/25/13 Page 78 of 78

Capital, LP is authorized to make a Fourth Interim Distribution of \$45,000,000 to the investors of Gabriel Capita, L.P.; and it is further

ORDERED that no interim distributions authorized by this court today shall be made to either J. Ezra Merkin or Gabriel Capital Corp.

Dated: December 17, 2012

ENTER:



J.S.C.
HON. RICHARD B. LOYD III

A-1180

EXHIBIT C

A-1181

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Bart M. Schwartz
Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

June 8, 2009

**Re: Ariel Fund Limited, Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC, and Gabriel Assets, LLC**

To Whom It May Concern:

On June 1, 2009, I was appointed receiver ("Receiver") of Ariel Fund Limited, Gabriel Capital, L.P., Gabriel Alternative Assets, LLC, and Gabriel Assets, LLC (collectively, the "Entities") pursuant to an Order (the "Order") entered by the Supreme Court of the State of New York, New York County (the "Court"). The Receiver has been appointed for the principal purpose of marshalling and preserving the Entities' assets, for the ultimate distribution of proceeds to the respective investors of the Entities. The Receiver's duties and rights are broad, including determining the nature, location and value of all property interests of the Entities; taking custody, control and possession of all the Entities' property and records; managing, controlling, operating, winding down and maintaining the Entities' estates; prosecuting and defending all legal actions to which any or all of the Entities are now, or may in the future become, parties; and such further actions as are consistent with the provisions of the Order, and as the Receiver deems prudent in the pursuit of his duties. Attached for your reference is a notice formally announcing my appointment as Receiver.

Please note that the Entities continue to operate and conduct business, although they now operate under my supervision. You are expressly authorized to continue providing services to the Entities under any existing contract(s) and/or agreement(s).

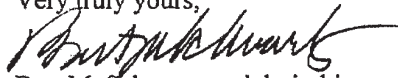
Furthermore, pursuant to Article IV.C. of the Order, on or before June 18, 2009, you are required to file with the Court and serve on the Receiver and the New York Attorney General, a certified statement identifying any assets, securities, funds or accounts you hold in the name of or for the benefit of any of the Entities, and the balance in each such account or description of any such assets as of the close of business on the date of receipt of this notice.

A-1182

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If you require additional information or have any questions, please call me at (212) 205-4189, send me an e-mail at bschwartz@guidepostpartners.com, or communicate with me in writing at the address listed above.

Very truly yours,



Bart M. Schwartz, solely in his capacity as
Receiver of the Entities

Enclosure

Bart M. Schwartz
Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

NOTICE OF APPOINTMENT OF RECEIVER

PLEASE TAKE NOTICE, that Bart M. Schwartz of Guidepost Partners LLC has been appointed receiver (the "Receiver"), pursuant to Order of the Supreme Court of the State of New York, County of New York, entered on June 1, 2009, in the action styled *The People of the State of New York v. J. Ezra Merkin and Gabriel Capital Corporation and Ariel Fund Limited, Ascot Fund Limited, Ascot Partners, L.P., Gabriel Alternative Assets, LLC, Gabriel Assets, LLC, and Gabriel Capital, L.P. as Relief Defendants*, Index No. 450879/2009 (the "Order"), of the following entities:

**Ariel Fund Limited
Gabriel Capital, L.P.
Gabriel Alternative Assets, LLC
Gabriel Assets, LLC**

PLEASE TAKE FURTHER NOTICE, that, among other authority granted to the Receiver pursuant to the terms of the Order, the Receiver is authorized to take custody, control and possession of all Receivership Property (as defined in the Order) and records relevant thereto from the Receivership Defendants (as defined in the Order); to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and Receivership Defendants' records relevant thereto. You are not required to take any action in respect of any provision of this paragraph at this time. However, be advised that the Receiver or his legal

counsel or other representatives may in the future communicate further with you regarding one or more of the Receiver's duties and rights described herein, and in the Oder.

PLEASE TAKE FURTHER NOTICE, that, pursuant to Article IV.C. of the Order, if you are in possession, custody or control of any assets or funds held by, in the name of, or for the benefit of, directly or indirectly, any of the Receivership Defendants, you must, within ten business days of receipt of this Notice, file with the Court and serve on the Receiver and the New York Attorney General a certified statement setting forth, with respect to each such account or other asset, the balance in the account or description of the assets as of the close of business on the date of receipt of this Notice and cooperate in the transfer of funds, other assets and accounts to the Receiver. Furthermore, pursuant to Article IV.C. of the Order, **you are not permitted to:**

1. liquidate, transfer, sell, convey or otherwise transfer any assets, securities, funds, or accounts in the name of or for the benefit of the Receivership Defendants except upon instructions from the Receiver or as may be delegated by the Receiver; or
2. exercise any form of set-off, alleged set-off, lien or any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of the Court (as defined in the Order) or the Receiver, except as permitted in existing agreements.

PLEASE TAKE FURTHER NOTICE, that, pursuant to Article VII of the Order, **you are restrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver, which would:**

1. Interfere with the Receiver's efforts to take control, possession, or management of any Receivership Property; such prohibited actions include but are not limited to, using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any Receivership Property;
2. Hinder, obstruct or otherwise interfere with the Receiver in the performance of his/her duties; such prohibited actions include but are not limited to, concealing, destroying or altering records or information;
3. Dissipate or otherwise diminish the value of any Receivership Property, including but not limited to, releasing claims or disposing, transferring, exchanging, assigning or in any way conveying any Receivership Property,

enforcing judgments, assessments or claims against any Receivership Property or any Receivership Defendant, attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate the due date of any lease, loan, mortgage, indebtedness, security agreement or other agreement executed by any Receivership Defendant or which otherwise affects any Receivership Property, provided, however, that nothing above shall restrict the existing authority provided for in agreements between the Receivership Defendants and investment managers or sub-managers (other than J. Ezra Merkin or GCC), and provided further that third parties may rely upon the instruction of GCC and its personnel if so authorized by the Receiver; or

4. Interfere with or harass the Receiver, or interfere in any manner with the jurisdiction of this Court over the Receivership Estates.

Any inquires regarding the terms of this Notice, or compliance therewith, should be directed to the Receiver by telephone at 212.205.4189, by e-mail at bschwartz@guidepostpartners.com, or by written correspondence to the address indicated above.

Dated: June 8, 2009
New York, New York

A-1186

A-1187

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Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

June 8, 2009

**Solicitation of Interest for Membership on
the Joint Investor Committee of
Ariel Fund Ltd. and Gabriel Capital, L.P.**

As you may know, pursuant to Order of the Supreme Court of the State of New York, County of New York, docketed on June 1, 2009, in the action pending under Index Number 450879/2009 (the "Receivership Order"), and certain corporate actions contemplated thereby, Bart M. Schwartz (the "Receiver"), of Guidepost Partners LLC, has been appointed to assume full control over various U.S. and Cayman investment funds, including Gabriel Capital, L.P. (the "Gabriel Fund") and Ariel Fund Ltd. (the "Ariel Fund" and, together with the Gabriel Fund, the "Funds"). Consistent with the terms of the Receivership Order, the Receiver will establish an Investor Committee, selected by the Receiver, in consultation with the New York Attorney General, from among investors who volunteer to advise and consult with the Receiver, without compensation, for the benefit of the Funds (the "Investor Committee").

In order to constitute the Investor Committee from the most robust possible pool of candidates, a "Confidential Questionnaire Concerning Interest and Qualifications to Serve on the Investor Committee of the Ariel & Gabriel Funds" (the "Committee Interest Form") is attached hereto. **Should you wish to be considered for membership on the Investor Committee, please complete and return the Committee Interest Form pursuant to the instructions printed on it by no later than the close of business on June 18, 2009.**

From the Committee Interest Forms received by June 18, the Receiver, in consultation with the New York Attorney General, will seek to identify candidates that the Receiver believes are representative of the investor community (which will include investors in each of the Funds, and may include both large and small, institutional and individual investors) and that also may bring specific knowledge or skill sets to the Investor Committee. The selected members will serve alongside New York University, which already has been selected to sit on the Investor Committee. The selection of Investor Committee members will be at the sole discretion of the Receiver, following consultation with the New York Attorney General, provided that only candidates who attest, in writing, to their independence from conflicts of interest, and execute a confidentiality agreement in form provided by and acceptable to the Receiver (the "Committee Confidentiality Agreement") will ultimately be seated as Investor Committee members.

Changes to the composition of the Investor Committee may be made in the future, for various reasons, including any resignation of an existing Investor Committee member. In the event of a vacancy going forward, the Receiver may select such replacement member or members as he deems appropriate, in consultation with the New York Attorney General.

In considering whether you wish to complete and return the Committee Interest Form, please note that service on the Investor Committee will be on a voluntary basis, without compensation or expense reimbursement. While the Receiver does not expect to call upon the Investor Committee to undertake any onerous travel or time commitments, there will be periodic conference calls and/or meetings, in which Investor Committee members will generally be expected to participate. Also, of course, Investor Committee members will be required to execute and abide by the terms of the Committee Confidentiality Agreement.

The Investor Committee will advise and consult with the Receiver, but neither it nor its members will have any decision making authority with regard to actions of the Receiver, or conduct of the Funds. Should you have any questions or comments, please do not hesitate to contact the Receiver, or Robert Rittreiser of Guidepost Partners, utilizing the information provided on the Committee Interest Form.

**Confidential Questionnaire Concerning Interest and Qualifications
to Serve on the Joint Investor Committee of the Ariel & Gabriel Funds**

All investors in Ariel Fund Ltd. and Gabriel Fund, L.P. (together, the “Funds”) who are interested in serving on the Investor Committee for the Funds must fully complete, sign and return this form, pursuant to the transmittal instructions below, so that it is received by no later than 5:00 p.m. EDT on June 18, 2009. Those who timely submit completed forms will be contacted with any questions, or the results of the Investor Committee selection process, by July 2, 2009. Information provided on this form will be treated as confidential, to the extent consistent with the Receiver’s duties and with otherwise applicable law.

This is not a Proof of Claim Form, and any information provided by you on this form will not be recorded for purposes of asserting a claim. You will receive a separate form for that purpose in the coming months.

NAME OF INVESTOR (Include full names of all legal and beneficial owners, and name of individual person that is proposed to act as representative on the Investor Committee): _____

CONTACT INFORMATION (Mail address, telephone, telecopier and e-mail): _____

INTERESTS HELD IN THE FUNDS (State all investment holdings in The Ariel Fund Ltd. and Gabriel Fund, L.P., divided by fund, and stating nature of ownership or interest, class of interests held, and NAV, including date of report on which NAV is based): _____

A-1190

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IDENTIFY AND EXPLAIN ANY PAST, PRESENT OR ANTICIPATED FUTURE AFFILIATIONS OR RELATIONSHIPS YOU HAVE WITH (i) J. EZRA MERKIN; (ii) ANY BUSINESSES OR VENTURES OWNED OR CONTROLLED, IN WHOLE OR IN PART, DIRECTLY OR INDIRECTLY, BY HIM; OR (iii) ANY BUSINESSES WITH WHICH, TO THE BEST OF YOUR KNOWLEDGE AND BELIEF, HE IS AFFILIATED: _____

PROVIDE ANY OTHER INFORMATION THAT YOU BELIEVE IS RELEVANT TO YOUR QUALIFICATIONS TO SERVE AS AN INVESTOR COMMITTEE MEMBER: _____

All of the foregoing is true, accurate and complete to the best of my personal knowledge and belief, after, to the extent applicable, due inquiry of others in my representative capacity,

Signature: _____

Printed Name: _____

Title / Position: _____

Date: _____

TO BE CONSIDERED FOR MEMBERSHIP ON THE INVESTOR COMMITTEE, YOU MUST COMPLETE AND SIGN THIS FORM, AND RETURN IT AS A PDF VIA E-MAIL TO brittereiser@guidepostpartners.com, OR VIA TELECOPIER TO +1 212 205 4199, SO THAT IT IS RECEIVED BY NO LATER THAN 5:00 P.M. EDT ON THURSDAY, JUNE 18, 2009. MR. RITTEIREISER ALSO MAY BE REACHED BY TELEPHONE AT +1 212 205 4189, SHOULD YOU HAVE ANY QUESTIONS.

A-1191

Bart M. Schwartz

Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC (collectively, the "Funds"),
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o Guidepost Partners LLC
1185 Avenue of the Americas
Suite 1750
New York, NY 10036
212-205-4189
bschwartz@guidepostpartners.com

June 29, 2009

Introductory Report to Investors
by Bart M. Schwartz, as
Receiver / Liquidator of the Funds

As previously reported, pursuant to Order of the Supreme Court of the State of New York, County of New York, docketed on June 10, 2009 (superseding the prior Order docketed on June 1, 2009), in the action pending under Index Number 450879/2009 (the "Receivership Order"), and certain corporate actions contemplated thereby, Bart M. Schwartz (the "Receiver"), of Guidepost Partners LLC, has been appointed to assume full control over the above-listed U.S. and Cayman Funds. The purpose of this Introductory Report is to provide investors in the Funds with certain baseline information concerning the Funds, the Receiver, and the Receiver's plans for maximizing returns to all investors in the Funds through the Receivership.

THERE IS VALUE IN THE FUNDS

As a baseline for understanding the potential value to be realized from investments held by the Funds, please note that these Funds were not fully invested in Bernard L. Madoff Investment Securities or any affiliated Madoff entity ("Madoff"). The Receiver's initial investigation indicates that each of Ariel Fund Limited ("Ariel") and Gabriel Capital, L.P. ("Gabriel"), invested between 20% and 30% of its capital with Madoff. While the Receiver's investigation is ongoing, the information available to him today indicates that the majority of capital of each of the Funds ultimately is in facially legitimate investments, which in the aggregate retain meaningful value. Furthermore, the majority of the Funds' non-Madoff investments are custodied with well recognized, U.S. Government-regulated broker-dealers. Year to date (unaudited) returns for Gabriel are -4.4% and for Ariel are -2.4%.

COST AND OTHER CONTROLS

Promptly following entry of the Receivership Order, the Receiver worked to ensure that J. Ezra Merkin no longer maintained any positions of control or autonomous authority with regard to the Funds' assets and operations. While entities with which Mr. Merkin is affiliated continue to provide certain back office services to the Funds, such services are provided under the ultimate control, and at the discretion, of the Receiver. The Receiver has continued these operations at this time in the belief that it is the most cost-effective way for the Funds. J. Ezra Merkin does not profit from this arrangement.

The Receiver also has promptly met, and caused his colleagues at Guidepost Partners LLC, along with his legal counsel at Reed Smith LLP, to meet and speak telephonically with each outside party that manages or acts as custodian or material counterparty in respect of investments of the Funds. Principal focuses of these meetings and discussions have been to (i) inform parties with physical control over the Funds' assets that they are to take instructions only from the Receiver or his designees; (ii) assure investment counterparties that appointment of the Receiver will not result in any material disruption in the ordinary investment activities of the Funds; and (iii) afford the Receiver and his professionals opportunities to fully understand the Funds' investment positions, and to begin the process of formulating strategies for maximizing value through prudent divestiture of those positions. Initial meetings have now been completed successfully, and further such meetings and discussions will continue throughout the course of the Receivership.

K-1's AND AUDIT

The Receiver is focused on expeditiously having K-1's issued to all investors, and on completion of the Funds' 2008 audits. Regrettably, the Receiver has faced some delays in the audit process, owing principally to the need to retain auditors to replace the Funds' pre-Receivership auditors, BDO Seidman LLP, BDO Tortuga and BDO International. While the BDO entities continue working to complete the Funds' K-1's, the Receiver feels that, due to the pendency of multiple claims against the entities and certain of their affiliates (including claims asserted by the Receiver, as described below) it would be imprudent to have them continue as auditors for the Funds. The Receiver is presently interviewing well known, industry knowledgeable audit firms for the job, and expects promptly to select an auditor, and have it work expeditiously to undertake and complete the Funds' 2008 audits.

POTENTIAL AND INITIATED AFFIRMATIVE LITIGATION

In addition to taking control of the Funds and their assets, during his first three weeks of service the Receiver has begun to investigate potential causes of action against former fiduciaries of the Funds, as well as professionals retained by the Funds pre-Receivership, and outside parties. These investigations are in their nascent stages, but in order to avoid any risk of claims becoming invalid due to lapses of Statutes of Limitations under laws of the United States or the Cayman Islands, the Receiver

authorized Reed Smith to commence a recovery action on June 15 against BDO Seidman LLP, BDO Tortuga and BDO International. Additional recovery actions likely will be forthcoming, as the Receivership progresses.

INVESTOR COMMITTEE AND OTHER INQUIRES

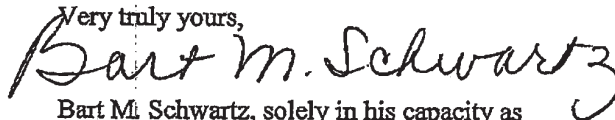
The Receiver, and his colleagues at Guidepost Partners, will be available throughout the course of the Receivership to respond to investor inquiries, and to receive input from investors. The Receiver invites investor input at all stages of the Receivership, and he and his professionals will at all times make their best reasonable efforts to be promptly responsive to all investor communications. You should already have received an Investor Committee Interest Form, which the Receiver will utilize in evaluating and, in consultation with the Office of the New York Attorney General, selecting members for a Joint Investor Committee of the Funds. Appointment of this Committee will help to ensure regular, informed input from representative investors who volunteer to serve, without compensation, on this consultative body. The existence of the Joint Investor Committee will, however, in no way displace the rights of all investors to have their views heard by the Receiver and his professionals.

CONCLUSION

The Receiver's ultimate focus is on maximizing distributions to investors in the Funds. The foregoing is a sampling of his initial efforts toward those ends. Throughout the course of the Receivership, he will endeavour to balance maximum realization on assets – including invested capital, and legal actions to recover damages – with certainty and speed of distributing proceeds to investors.

The Receiver, his colleagues at Guidepost Partners LLC, and his counsel at Reed Smith look forward to working to maximize recoveries for the Funds and their investors. Please do not hesitate to contact the Receiver now, or at any time in the future, should you have any questions or require further information with regard to your investments in the Funds, the Receivership, or any other relevant matter.

Very truly yours,



Bart M. Schwartz, solely in his capacity as
Receiver of the Funds

cc: Robert P. Rittreiser, Guidepost Partners LLC
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Bart M. Schwartz
Solely in his capacity as Receiver and/or Liquidator of
Ariel Fund Limited,
Gabriel Capital, L.P.,
Gabriel Alternative Assets, LLC,
and Gabriel Assets, LLC,
Pursuant to Order of the New York State Supreme Court,
New York County, in the Action Bearing Index No. 450879/2009

c/o
Guidepost Partners LLC
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New York, NY 10086
212-205-4189
bschwartz@guidepostpartners.com

September 8, 2009

**Informational Update to Investors in Gabriel Capital, LP
by Bart M. Schwartz, as
Receiver/Liquidator of the Funds**

This is our third letter to you and provides an update on your investment in Gabriel Capital L.P and on the activities of the Receivership. Below you will find information regarding the completion of the K-1s, commencement of the audit, investment management and performance, our communications with the Joint Investor Advisory Committee; and a status report on potential and ongoing litigations. Investors are encouraged to contact the Receiver or Guidepost Partners, LLC (Guidepost) with any questions or concerns they have about this letter, the Fund, or the Receivership.

Administrative, Accounting and Audit Activities

During the earliest weeks of the Receivership, much of our effort focused on gaining full control of all bank and brokerage accounts, the various agreements and authorities governing the Fund's business relationships, as well as familiarizing ourselves with existing operating procedures. We found the books and records to be in good order and properly controlled.

We have engaged Eisner LLP to conduct an audit of the Fund's investment portfolio as of December 31, 2008. Audit work has commenced and we will be communicating with you again in the near future about our progress. Eisner has been engaged to serve as the Fund's auditor going forward.

The Fund's predecessor auditor, BDO Seidman LLP, has completed form K-1s for all investors. These were mailed out in mid-July. If you did not receive a K-1, please contact Zach Johnson of Guidepost Partners by telephone at (212) 205-4189 or by e-mail at zjohnson@guidepostpartners.com.

Investment Management and Performance

Today, subject to the ultimate control of the Receiver, approximately ninety-five percent (95%) of the Fund's investment portfolio is managed by a unit of Cerberus Capital Management; approximately four percent (4%) is managed by Cohanziok Management LLC; and the remainder, which consists mainly of investments in litigation-related claims, is managed by an on staff portfolio manager.

The Fund declined 0.9% in June 2009 and as of June 30, 2009 it had declined 5.2% year to date. However, the Fund has gained 0.3 % as of July 31, 2009, and has declined 4.9% year to date.

The Cerberus investment strategy is to focus on strong operational control turnarounds and early stage exits once turnaround objectives are met. The current economic and market conditions continue to impact the efficacy of this strategy. The portfolio consists primarily of private equity, control related debt and equity positions that are less liquid than publicly traded securities, and thus, are not easily converted to cash. The holdings are in a broad spectrum of the Automotive, Real Estate and Consumer-related market sectors.

The Receiver and members of Guidepost Partners are examining the appropriate strategy and tactics to determine the optimum way to liquidate the existing portfolio over an appropriate time frame. We will be working closely with the Fund's managers during this process.

While our overriding bias is to liquidate positions as soon as possible, we must balance that goal against reasonable prospects for maximizing value realized in respect of investment positions through holding them over a longer term horizon. Moreover, you should be aware that in the exercise of his business judgment, the Receiver may determine in certain exceptional instances that it is in the best interest of the Fund and its investors to preserve and augment value through meeting limited reinvestment requirements and to incur investment and legal expenses in connection with such matters.

Investors have inquired as to when a distribution plan might be in place. In addition to the liquidity limitations of the investment portfolio that are described above, we are assessing litigations to which the Fund is or may become a party to enable us to lay the groundwork – including establishing appropriate reserve levels for such a plan. Realistically, this effort will continue through the balance of this year at which time we would expect to have a clearer view of the timing for making distributions to the Fund's investors.

Investor Committee and Communications

Pursuant to the Court Order appointing the Receiver, the Receiver has formed a Joint Investor Advisory Committee (the "Committee"). The members of the Committee are: Eric Dillon (Silver Creek Capital); Martin Dorph (NYU); Peter Graf (Distribution Management); John McCarthy and Richard Ziegler. We greatly appreciate these investors' willingness to serve in this capacity.

To date, the Committee has met twice and it is scheduled to meet again on September 8, 2009. Meetings are scheduled to be held approximately every six weeks, or more often, as deemed appropriate by the Receiver. The meetings allow the Receiver to receive input on strategy and

specific situations that may arise from time to time. However, the Committee in no way displaces the rights of individual investors to voice their thoughts and questions with the Receiver.

The Receiver is in the process of establishing a monthly e-mail to investors that will summarize portfolio performance. If you would like to receive a monthly update of the Fund's performance, please provide either a fax number or email where you want this information sent to zjohnson@guidepostpartners.com. The first such e-mail will be sent near the end of September. This information will also be contained in the Receiver's periodic update letters.

Potential and Ongoing Litigation

As we have previously reported, in order to avoid any risk of claims becoming invalid due to lapses of Statutes of Limitations under laws of the United States or the Cayman Islands, during his first days in office, the Receiver authorized Reed Smith, LLP to commence a recovery action against BDO Seidman LLP, BDO Tortuga and BDO International. That action remains pending.

The Receiver's investigations of potential recovery actions against additional parties are ongoing. In addition to evaluating the merits and potential timing for commencement of direct recovery actions belonging to the Fund, the Receiver also is in close communication with the Office of the New York Attorney General regarding its pending action against J. Ezra Merkin and Gabriel Capital Corporation, as well as potential additional recovery efforts.

One or both of the Funds is a defendant in several lawsuits, including certain suits commenced by individual investors in the Funds, and a suit against both of the Funds by the Trustee of Bernard L. Madoff Investment Securities, LLC (the "Madoff Trustee"). The Receiver is actively managing the defense of each of these litigations.

For the most part, the individual investor suits, where one or both of the Funds are defendants, appear to have named the Funds as defendants based upon what the Receiver and his attorneys at Reed Smith view as the wholly incorrect legal theory that the Funds must be named as defendants in order for claims to be sustained against J. Ezra Merkin and Gabriel Capital Corporation as fiduciaries to the Funds. At the Receiver's direction, Reed Smith has met with counsel for the plaintiffs in each of these suits to explain the Receiver's views, and to request that the Funds be dismissed from the suits, while the suits proceed against the other defendants.

Each of the individual investor plaintiffs' attorneys has represented verbally that the investor plaintiffs are not seeking to recover monies from the Funds beyond the pro rata distributions that will be made to all investors in the ordinary course of the Receivership. In light of this, and of what the Receiver and Reed Smith believe to be the clear state of law, the Receiver is hopeful that those investors who have suits pending will direct their counsel to voluntarily dismiss the Funds as defendants, allowing the suits to proceed against all other defendants without causing further expense and burden to the Funds.

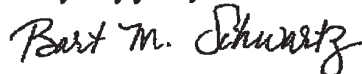
The Madoff Trustee commenced a lawsuit against both of the Funds on May 8, 2009, seeking to recover all redemption payments made to each of the Funds in the six years prior to revelation of the Madoff Ponzi Scheme. Notwithstanding his prior public representations that he did not intend to seek recoveries from "net losers" (investors in Madoff who lost more than the amounts

of redemption payments that they had received), and the appearance that each of the Funds indeed is a net loser with regard to its Madoff investments, the Madoff Trustee has persisted in pressing his lawsuit. Indeed, on August 6, the Madoff Trustee amended his complaint to increase the amounts he seeks to disgorge from the Funds from an aggregate of approximately \$33.6 million to \$246 million (consisting now of \$153.9 million from Gabriel Capital L.P). The Receiver plans to file a motion with the court in which the Madoff Trustee commenced his lawsuit against the Funds to dismiss that lawsuit in its entirety as unsustainable under any theory of law.

Conclusion

We are working vigorously to deal with the issues presented in this letter and all aspects of the Fund's affairs. I will continue to update investors periodically on issues and Fund performance or as events develop which prompt a communication. Please do not hesitate to contact the Receiver now, or any time in the future, should you have any questions with regard to your investments in the Funds, the Receivership, or any other relevant matter.

Very truly yours,



Bart M. Schwartz, as Receiver

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