UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor.	
A & G GOLDMAN PARTNERSHIP and PAMELA GOLDMAN, Appellants, v. CAPITAL GROWTH COMPANY, *et al.*, Appellees, and IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Appellees.	1:16-cv-2058-GHW **(Lead)** 1:16-cv-2065-GHW **ORAL ARGUMENT REQUESTED**

BRIEF OF APPELLEE IRVING H. PICARD

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

Attorneys for Appellee
Irving H. Picard, Trustee

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

COUNTER-STATEMENT OF ISSUES ON APPEAL 4

STANDARD OF REVIEW 5

COUNTER-STATEMENT OF THE CASE 6

I. THE SECOND CIRCUIT'S NET EQUITY DECISION 6

II. THE TRUSTEE'S AVOIDANCE ACTION 7

III. THE PICOWER SETTLEMENT AND ISSUANCE OF THE INJUNCTION 9

IV. THE SETTLEMENT AND ISSUANCE OF THE INJUNCTION ARE AFFIRMED AND TWO SETS OF POTENTIAL CLASS ACTIONS PLAINTIFFS ARE ENJOINED IN *FOX I* 9

V. THE BANKRUPTCY COURT AND THE DISTRICT COURT ENFORCE THE INJUNCTION AGAINST APPELLANTS IN *GOLDMAN I* 10

A. The *Goldman I* Complaints 10

B. The Bankruptcy Court Holds that *Goldman I* Violates the Injunction 11

C. The District Court Holds that *Goldman I* Violates the Injunction 12

VI. THE BANKRUPTCY COURT AND THE DISTRICT COURT ENFORCE THE PERMANENT INJUNCTION AGAINST APPELLANTS AGAIN IN *GOLDMAN II* 13

A. The *Goldman II* Complaint 13

B. The Bankruptcy Court Holds that *Goldman II* Violates the Injunction 14

C. The *Fox II* Complaint: the Bankruptcy and District Courts Hold that *Fox II* Violates the Injunction 14

VII. THE BANKRUPTCY COURT ENFORCES THE INJUNCTION AGAINST APPELLANTS IN *GOLDMAN III* 16

A. The *Goldman III* Complaint 16

TABLE OF CONTENTS
(continued)

Page

B. The Bankruptcy Court Holds the *Goldman III* Claims Derivative of the Trustee's Claims 17

SUMMARY OF ARGUMENT 19

ARGUMENT 20

THE INJUNCTION SHOULD BE ENFORCED 20

I. The *Goldman III* Claims Derive from the Trustee's Claims 20

A. Most of Appellants' Allegations Were Previously Held to Violate the Injunction 20

B. The "New" Allegations Are Barred by the Injunction 22

II. The Bankruptcy Court Followed the Proper Standard For Determining a Derivative Claim 26

III. The Trustee Has Standing to Enforce the Injunction and the Doctrine of *In Pari Delicto* Is Inapplicable 28

IV. Appellants' Purported Securities Claims and Damages Are Barred 30

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

Cases

A & G Goldman P'ship v. Picard (In re Bernard L. Madoff Inv. Sec. LLC),
No. 12-cv-6109 (RJS), 2013 WL 5511027 (S.D.N.Y. Sept. 30, 2013) ..... *passim*

Baker v. Dorfman,
239 F.3d 415 (2d Cir. 2000).....21

In re Bernard L. Madoff Inv. Sec. LLC,
424 B.R. 122 (Bankr. S.D.N.Y. 2010).....6, 7

In re Bernard L. Madoff Inv. Sec. LLC,
654 F.3d 229 (2d Cir. 2011)..... *passim*

Buchwald v. The Renco Group, Inc. (In re Magnesium Corp. of Am.),
399 B.R. 722 (Bankr. S.D.N.Y. 2009).....29, 30

In re Dreier LLP,
429 B.R. 112 (Bankr. S.D.N.Y. 2010).....20

In re Educators Group Health Trust,
25 F.3d 1281 (5th Cir. 1994) 29

Fox v. Picard (In re Bernard L. Madoff),
848 F. Supp. 2d 469 (S.D.N.Y. 2012)..... *passim*

Fox v. Picard (In re Bernard L. Madoff Inv. Sec. LLC),
531 B.R. 345 (S.D.N.Y. 2015)..... *passim*

Goldin v. Primavera Familienstifung, Tag Assocs. Ltd. (In re Granite Partners),
194 B.R. 318 (Bankr. S.D.N.Y. 1996).....29

H & C Dev. Group, Inc. v. Miner (In re Miner),
229 B.R. 561 (2d Cir. 1999) 5

Hirsch v. Arthur Andersen & Co.,
72 F.3d 1085 (2d Cir. 1995).....29, 30

Kalb, Voorhis & Co. v. Am. Fin. Corp.,
8 F.3d 130 (2d Cir. 1993) 29

In re Lehman Bros. Inc.,
519 B.R. 434 (S.D.N.Y. 2014).....5

Marshall v. Picard (In re Bernard L. Madoff Inv. Sec. LLC),
740 F.3d 81 (2d Cir. 2014)..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Metaldyne Corp.,
421 B.R. 620 (S.D.N.Y. 2009).....5

Picard v. A & G Goldman P'ship (In re Bernard L. Madoff),
546 B.R. 284 (Bankr. S.D.N.Y. 2016)..... *passim*

Picard v. Fairfield Greenwich Ltd.,
762 F.3d 199 (2d Cir. 2014).....29

Picard v. Fox (In re Bernard L. Madoff),
429 B.R. 423 (Bankr. S.D.N.Y. 2010).....3, 10

Picard v. JPMorgan Chase & Co.,
721 F.3d 54 (2d Cir. 2013).....1, 4, 29

Picard v. Marshall (In re Bernard L. Madoff),
511 B.R. 375 (Bankr. S.D.N.Y. 2014)..... *passim*

Rieger v. Drabinksy (In re Livent, Inc. Noteholders Sec. Litig.),
151 F. Supp. 2d 371 (S.D.N.Y. 2001).....6

Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff),
477 B.R. 351 (Bankr. S.D.N.Y. 2012)..... *passim*

Sec. Investor Protection Corp. v. Bernard L. Madoff Inv. Sec. LLC,
499 B.R. 416 (S.D.N.Y. 2013).....7

Suzanne Gaston v. Jack Post Corp.,
971 F. Supp. 1084 (N.D. Miss. 1997).....21

Statutes

15 U.S.C. § 78*lll*(4).....7

PRELIMINARY STATEMENT

In a landmark settlement, the Picower Parties[1] paid $7.2 billion to the Trustee and the government for distribution to the victims of the Madoff fraud ("Settlement"). In approving the Settlement, the bankruptcy court entered a permanent injunction ("Injunction") barring the assertion of claims that derive from the settled claims. Appellants have tried and failed three times to bring claims against the Picower Parties that would fall outside the ambit of the Injunction. In the decision below, the bankruptcy court admonished Appellants that it would consider sanctions against them were they to bring another derivative lawsuit against the Picower Parties. *Picard v. A & G Goldman P'ship (In re Bernard L. Madoff)*, 546 B.R. 284, 306 (Bankr. S.D.N.Y. 2016). As the bankruptcy court further stated, it is time for the Goldmans to stop wasting the time and resources of the court, the Trustee, and the Picower Parties. *Id.*

Appellants argue that the bankruptcy court erroneously held that a Section 20(a) control person claim is derivative of the Trustee's claims. In fact, the bankruptcy court held that Appellants' complaint does not state ***any*** independent claim against the Picower Parties, whether labeled as a Section 20(a) claim or anything else. Nor did the bankruptcy court, as Appellants suggest, create some new standard by holding that their claim is derivative. "A claim is derivative when it 'seeks relief against third parties that pushed the debtor into bankruptcy . . . [and asserts a] claim that arises from harm done to the estate.'" *Picard v. Marshall (In re Bernard L. Madoff)*, 511 B.R. 375, 390 (Bankr. S.D.N.Y. 2014) (quoting *Picard v. JPMorgan Chase & Co.*, 721 F.3d 54, 70 (2d Cir. 2013)). Appellants never quote this settled

[1] The "Picower Parties" refers to Capital Growth Company; Decisions, Inc.; Favorite Funds; JA Primary Limited Partnership; JA Special Limited Partnership; JAB Partnership; JEMW Partnership; JF Partnership; JFM Investment Companies; JLN Partnership; JMP Limited Partnership; Jeffry M. Picower Special Company; Jeffry M. Picower, P.C.; The Picower Foundation; The Picower Institute of Medical Research; The Trust f/b/o Gabrielle H. Picower; Barbara Picower, individually and as Executor of the Estate of Jeffry M. Picower, and as Trustee for the Picower Foundation and for the Trust f/b/o Gabrielle H. Picower.

definition of a derivative claim from the Second Circuit. And it is no wonder. The facts alleged in the newest Goldman action ("*Goldman III*") are no different from those alleged in every previous iteration of the complaint before. At most, they allege conduct by a BLMIS customer that harmed every other BLMIS customer and creditor in the same way: by propping up the Ponzi scheme in order to withdraw fictitious profits, and deepening the insolvency of BLMIS.

The reasons that Appellants have not stated, and cannot state, an independent claim have existed since the start of their efforts some five years ago.

First, Jeffry Picower was only a BLMIS customer. He did not hold a position with BLMIS, was not a money manager or salesperson, and is not alleged to have had any oversight of BLMIS's day-to-day operations or to have communicated with any other BLMIS customers. Rather, everything alleged against him is drawn from his transactions in his own BLMIS accounts in his capacity as a BLMIS customer.

Appellants take issue with the bankruptcy court's factual finding that everything Picower is alleged to have done was incidental to his activity in his own accounts. That finding supports the court's legal conclusion that Appellants' claim is derivative. Appellants' slippery slope argument that the court's reasoning would improperly bar any claim against "control persons, corporate insiders, and any other conspirator" who is liable under securities laws and who also happens to be subject to a fraudulent transfer claim, is mistaken. (*See* App. Br. at 3.) It assumes the answer to the very question the bankruptcy court was considering: whether the facts alleged in *Goldman III* allege some independent liability against Picower—as a control person, corporate insider, a conspirator, or anything else—or whether they allege only the same harm alleged by the Trustee's fraudulent transfer claims.

The court determined that there is no non-conclusory conduct alleged that links Picower's actions to harm beyond that which he allegedly caused to the BLMIS estate. In so holding, the court joined every other court that has examined the various iterations of the complaint—that is, bankruptcy court Judges Lifland and Bernstein, and District Court Judge Sullivan, as well as District Court Judge Koeltl and the Second Circuit Court of Appeals in the context of similar complaints against the Picower Parties by other putative class-action plaintiffs.[2] As much as Appellants attempt to distinguish their current allegations from those already rejected as derivative, the specific conduct alleged as to Picower remains related to nothing other than the transactions in Picower's own accounts that allowed him to withdraw fictitious profits.

Second, Appellants persist in their attempts to transform Picower into a BLMIS "control person" in an effort to sidestep the Second Circuit's "Net Equity Decision," which determined the amount of customer recoveries in the liquidation. *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 242 (2d Cir. 2011). But to allow class action attorneys to seek to recover from another customer when they lack an independent basis to do so would create a "shadow estate," undermining the Net Equity Decision and the Trustee's authority to settle claims, as three different judges have now recognized. *See Fox*, 848 F. Supp. 2d at 490–91 (Koeltl, J.) ("Allowing the [actions] to go forward . . . would allow . . . litigants who are unhappy with the order of priority for the disbursement of funds to BLMIS customers to stand between BLMIS customers who lost their principal investments in the Madoff Ponzi scheme and billions of dollars in recovery."); *A & G Goldman P'ship*, 546 B.R. at 304 (Bernstein, J.) ("Allowing the

[2] *A & G Goldman P'ship v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, No. 12-cv-6109 (RJS), 2013 WL 5511027 (S.D.N.Y. Sept. 30, 2013); *Marshall*, 511 B.R. 375; *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)* (*Goldman I*), 477 B.R. 351 (Bankr. S.D.N.Y. 2012); *see Marshall v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 740 F.3d 81 (2d Cir. 2014); *Fox v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 531 B.R. 345 (S.D.N.Y. 2015); *Fox v. Picard (In re Bernard L. Madoff)*, 848 F. Supp. 2d 469 (S.D.N.Y. 2012); *Picard v. Fox (In re Bernard L. Madoff)*, 429 B.R. 423 (Bankr. S.D.N.Y. 2010).

[actions] to go forward would carry real risks to the estate, implicating the . . . possibility of future settlements, and providing an avenue for BLMIS customers who are displeased with the Net Equity Decision to undermine that decision by directly pursuing claims that are wholly derivative of claims already brought by the Trustee.") (quoting *Fox*, 848 F. Supp. 2d at 490–91); *Goldman I*, 477 B.R. at 357 (Lifland, J.) ("[T]his appears to be yet another attempt by the same counsel to re-litigate this Court's Net Equity Decision.").

Third, Appellants' other arguments as to why their claim should proceed are unavailing, and have been found so by numerous courts. Twisting existing cases, they argue that the Trustee lacks standing or is barred by the doctrine of *in pari delicto* from enforcing the Injunction. But every court that has looked at these arguments has held that the Trustee has standing to enforce the Injunction, and that he need not demonstrate that he could bring Appellants' claims to show he can enjoin Appellants from proceeding. *See, e.g.*, *Fox*, 848 F. Supp. 2d at 483–85; *A & G Goldman P'ship*, 546 B.R. at 304–05. The Second Circuit has affirmed the scope of the Injunction and the Trustee's enforcement of it. *Marshall*, 740 F.3d 81 (2d Cir. 2014). The Second Circuit has also recognized his ability to enforce this Injunction regardless of his ability to bring common law claims. *JPMorgan Chase & Co.*, 721 F.3d at 71 n.20.

As previous courts have consistently held, Appellants' claims derive from those of the Trustee and should be enjoined. The decision and order below should be affirmed.[3]

COUNTER-STATEMENT OF ISSUES ON APPEAL

1) Whether the bankruptcy court clearly erred in finding that *Goldman III* sought to recover for conduct that was incidental to the claims settled by the Trustee and described an injury suffered by the estate and by BLMIS customers generally; **2)** whether the bankruptcy

[3] The Trustee also adopts the legal arguments in the Picower Parties' appellate brief.

court clearly erred in finding that *Goldman III* failed to allege any facts linking Picower to activity other than that related to his own accounts; **3)** whether the bankruptcy court properly held that *Goldman III* stated derivative and duplicative claims barred by the Injunction; **4)** whether the bankruptcy court abused its discretion by enforcing the Injunction in connection with *Goldman III*; and **5)** whether the bankruptcy court properly held that the Trustee has standing to enforce the Injunction and that neither *in pari delicto* nor the *Wagoner* Rule prevented the Trustee from seeking to enforce the Injunction.

STANDARD OF REVIEW

In reviewing an order entered by the bankruptcy court, the "district court functions as an appellate court." *In re Lehman Bros. Inc.*, 519 B.R. 434, 440 (S.D.N.Y. 2014). The district court reviews the bankruptcy court's findings of fact for clear error and its legal conclusions *de novo*. *In re Metaldyne Corp.*, 421 B.R. 620, 624 (S.D.N.Y. 2009).

A party seeking to overturn the bankruptcy court's findings of fact "bears a heavy burden," *H & C Dev. Group, Inc. v. Miner (In re Miner)*, 229 B.R. 561, 565 (2d Cir. 1999), and this Court "must be left with a 'definite and firm conviction' that a mistake has been made." *In re Metaldyne Corp.*, 421 B.R. at 624 (citations omitted). The bankruptcy court found, among other things, that there were no specific facts contained in Appellants' allegations that Picower acted outside of his own BLMIS accounts. Based on this factual determination and others, the bankruptcy court held that Appellants' underlying complaint was barred by the Injunction.

In ruling on and enforcing the Injunction, the bankruptcy court did not look to any of the criminal testimony on which Appellants purport to rely. *A & G Goldman P'ship*, 546 B.R. at 294 n.10. But this Court is free to do so. If allegations are not supported or are contradicted by the testimony on which they rely, this Court "need not feel constrained to accept [them] as true." *See*

Rieger v. Drabinksy (In re Livent, Inc. Noteholders Sec. Litig.), 151 F. Supp. 2d 371, 405–06 (S.D.N.Y. 2001).

COUNTER-STATEMENT OF THE CASE

The details of Madoff's Ponzi scheme and the background of the bankruptcy proceedings have been set forth numerous times and need not be repeated here. *See, e.g.*, *Fox*, 848 F. Supp. 2d at 473–77; *In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 125–32 (Bankr. S.D.N.Y. 2010).

Appellants' repeated attempts to circumvent the Injunction and automatic stay also have an extensive history. Their initial action ("*Goldman I*") was held to be duplicative and derivative of the Trustee's claims against the Picower Parties by both the bankruptcy court and the Honorable Richard J. Sullivan of the district court. *Goldman I*, 477 B.R. at 358, *aff'd sub nom.*, *A & G Goldman P'ship*, 2013 WL 5511027, at *1. Appellants did not appeal Judge Sullivan's decision. Instead, they tried again to avoid the Injunction and automatic stay by seeking to file a new complaint ("*Goldman II*"). Appellants were again enjoined by the bankruptcy court, and appealed, and subsequently withdrew their appeal of *Goldman II* from the district court. *Marshall*, 511 B.R. at 395. In *Goldman III*, they simply repeat their previous allegations—allegations already held twice to be barred by the Injunction—and add only two seemingly new assertions. But the new allegations are conclusory and, in any event, could not state an independent claim.

I. THE SECOND CIRCUIT'S NET EQUITY DECISION

Appellants' repeated attempts to circumvent the Injunction stem from their dissatisfaction with the Second Circuit's Net Equity Decision. *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 242 (2d Cir. 2011). In liquidation proceedings under the Securities Investor Protection Corporation Act ("SIPA"), customers with allowed claims may share *pro rata* in the estate's

customer property to the extent of their net equity.[4] *In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 124–25 (Bankr. S.D.N.Y. 2010). Consistent with SIPA, the Trustee determined that each customer's net equity should be calculated by crediting the amount of cash the customer deposited into its BLMIS account, less any amounts withdrawn from the customer's BLMIS account, referred to as the "net investment method." *Id.* at 125.

The bankruptcy court approved the Trustee's use of the net investment method to calculate net equity and the Second Circuit affirmed that order in its Net Equity Decision. *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d at 235. The Second Circuit reasoned that permitting customers their false profits would "have the absurd effect of treating fictitious and arbitrarily assigned paper profits as real and would give legal effect to Madoff's machinations." *Id.*

II. THE TRUSTEE'S AVOIDANCE ACTION

The Trustee filed a complaint against Jeffry M. Picower (since deceased) and the other Picower Parties on May 12, 2009. (AA72–130.)[5] The complaint identified more than $6.7 billion in net withdrawals that the Trustee alleged the Picower Parties had received from BLMIS. (AA91.)[6] The complaint alleged that the Picower Parties knew or should have known that BLMIS was engaged in fraud and sought recovery of the entire amount known at the time of filing to have been transferred from BLMIS to the Picower Parties throughout the history of the Picower Parties' BLMIS accounts. (AA75, 82, 89, 99–100.) Picower's knowledge was an

[4] SIPA defines customer property as "cash and securities (except customer name securities delivered to the customer) at any time received, acquired, or held by or for the account of a debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted." (15 U.S.C. § 78*lll*(4); *see Sec. Investor Protection Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 499 B.R. 416, 420 (S.D.N.Y. 2013) (SIPA creates a separate customer property estate that takes priority over the debtor's general estate).

[5] The Trustee refers to the designated and counter-designated record items, contained in the Joint Appendix, using the prefix "AA__."

[6] After filing the complaint, the Trustee identified additional transfers from BLMIS to the Picower Parties, bringing the total amount of net withdrawals sought by the Trustee to $7.2 billion. (AA145.)

element of the Trustee's avoidance action, allowing the Trustee to assert claims to recover transfers.

The Trustee's complaint contained numerous allegations that the Picower Parties directed backdating in their BLMIS accounts, had actual knowledge of the Ponzi scheme, were "complicit[] in the fraud," and were compensated through their accounts for perpetuating the Ponzi scheme. (AA91; *see* AA96.)

The Trustee's complaint also included allegations dealing with margin loans, as also alleged in the Goldman complaints. (*See, e.g.*, AA97 ("In December 2005, BLMIS also created backdated 'purchases' on margin . . . ."); AA491–92 (*Goldman I*) ¶¶ 52–55; AA633–34 (*Goldman II*) ¶¶ 73–75; AA668 (*Goldman III*) ¶ 88.) Moreover, the Trustee's complaint addressed what Appellants describe in *Goldman III* as a $125 million "loan" made in April 2006:

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

(AA93.)

Finally, in the Trustee's brief in opposition to the Picower Parties' motion to dismiss, the Trustee stated that Picower propped up the Ponzi scheme by accepting only a fraction of his requested redemptions when Madoff could not pay those redemptions. (AA147–48.) In short, the Trustee settled the claims that Picower "invest[ed] and maintain[ed]" funds in BLMIS in order to reap the benefits of knowingly withdrawing fictitious profits from his accounts.

III. THE PICOWER SETTLEMENT AND ISSUANCE OF THE INJUNCTION

After months of extensive negotiations, the Trustee, the Picower Parties, and the Department of Justice ("DOJ") reached a global Settlement. The Picower estate agreed to forfeit and return $7.2 billion, of which the Trustee received $5 billion for the benefit of the BLMIS estate and the government retained $2.2 billion. (AA222.) Through the Settlement, one hundred percent of the net withdrawals received by the Picower Parties over the lifetime of their investments with BLMIS then became available for eventual distribution to BLMIS victims, without the need for litigation. (*Id.*)

The bankruptcy court approved the Settlement and entered the Injunction. (AA247–48.) Bankruptcy Judge Lifland overruled objections and approved the Settlement, issuing the following Injunction:

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

(AA248.)

IV. THE SETTLEMENT AND ISSUANCE OF THE INJUNCTION ARE AFFIRMED AND TWO SETS OF POTENTIAL CLASS ACTIONS PLAINTIFFS ARE ENJOINED IN FOX I

Both the district court and the Second Circuit affirmed the Settlement and the issuance and enforcement of the Injunction against another set of third-party plaintiffs represented by Adele Fox and Susanne Stone Marshall ("Fox Plaintiffs"), who brought putative class actions against the Picower Parties in 2010 in a Florida district court ("*Fox I*"). *See, e.g.*, *Marshall*, 740 F.3d at 96. The Fox Plaintiffs asserted common-law and other claims, and sought damages as a result of the fraudulent transfers the Picower Parties received from BLMIS.

Fox I contained a "conspiracy" claim, which the Fox Plaintiffs characterized as alleging "the Picower Defendants work[ed] hand-in-glove with Madoff and BLMIS to perpetuate the Ponzi scheme." *Id.* at 92. But the complaint simply alleged conduct by Picower within his own accounts, which was incidental to his withdrawal of fictitious profits. The bankruptcy court held that *Fox I* violated the automatic stay and that the Fox Plaintiffs violated the Injunction. *Fox*, 429 B.R. at 437. The Honorable John G. Koeltl of the district court affirmed, holding that the bankruptcy court was "plainly correct in finding that the Florida Actions violated the automatic stay," because they were a "transparent effort" to pursue claims that "were duplicative of claims brought by the Trustee and that belonged to the Trustee on behalf of all creditors of BLMIS." *Fox*, 848 F. Supp. 2d at 473.

On January 13, 2014, the Second Circuit upheld the Injunction against the Fox Plaintiffs. *Marshall*, 740 F.3d at 96. The Second Circuit held that the *Fox I* complaints "impermissibly attempt to 'plead around'" the Injunction because they "allege nothing more than steps necessary to effect the Picower Parties' fraudulent withdrawals of money from BLMIS, instead of 'particularized' conduct directed at BLMIS customers." *Id.* at 84.

V. THE BANKRUPTCY COURT AND THE DISTRICT COURT ENFORCE THE INJUNCTION AGAINST APPELLANTS IN *GOLDMAN I*

A. The Goldman I Complaints

In the midst of the *Fox I* injunction litigation, Appellants sought permission from the bankruptcy court in 2011 to file two putative class actions in a Florida district court (the "*Goldman I* Actions"). (AA465–76.) While Pamela Goldman sought to represent so-called "net losers"—customers who had not received back the amount of their investment with BLMIS, A & G Goldman Partnership sought to represent "net winners"—customers who had received fictitious profits. (*See id.*) Together, they sought to represent customers already before the

bankruptcy court, whose net equity had been determined by the Trustee using the method approved by the Second Circuit.

As demonstrated in Exhibit A annexed to the bankruptcy court's order in *In re Madoff*, 477 B.R. 351, the *Goldman I* complaints were virtual carbon copies of *Fox I*. The only thing different in *Goldman I* was the labeling of the claims as securities fraud claims instead of conspiracy claims. As now, Appellants claimed that Picower was a control person and was jointly and severally liable with BLMIS for BLMIS's violations of Rule 10b-5 of the Exchange Act. (*See, e.g.*, AA502–03.) *Goldman I* alleged that Picower's ability to make enormous withdrawals and direct fraudulent recordkeeping within the Picower Parties' accounts demonstrated that he "controlled cash flow and the cash distributions at BLMIS" and "exercised control over the day to day operations of BLMIS." (AA492.)

B. The Bankruptcy Court Holds that Goldman I Violates the Injunction

Following Appellants' filing and briefing of motions to determine whether their proposed complaints violated the Injunction or automatic stay, on June 20, 2012, the bankruptcy court held that *Goldman I* violated the Injunction and the automatic stay. *See In re Madoff*, 477 B.R. at 352–53. The court rejected Appellants' attempts to circumvent the Net Equity Decision, *In re Bernard L. Madoff Inv. Sec. LLC*, 645 F.3d 229 (2d Cir. 2011), by pleading around the Injunction: "It's *déjà vu* all over again. The Class Action Plaintiffs are attempting to use inventive pleading to sidestep the automatic stay and the Injunction." *Id.* at 354 (internal quotations omitted). The bankruptcy court emphasized that Appellants "have simply repeated, repackaged, and relabeled the wrongs alleged by the Trustee [against the Picower Parties] in an attempt to create independent claims where none exist." *Id.*

The bankruptcy court further held Appellants' claims to be "derivative of the Trustee's." *Id.* at 356. Indeed, the court found that the alleged harms are "limited to 'general direction and

control and action to the detriment of all [BLMIS's] creditors.'" *Id.* at 357. Thus, the court found that Appellants did not state a particularized injury against the Picower Parties.

The bankruptcy court found the *Goldman I* complaints, as with *Fox I*, to be "yet another attempt by the same counsel to re-litigate [the] Net Equity Decision." *Id.* The court reasoned that any award would result in a "windfall" to the class members above amounts they would be entitled to under the Net Equity Decision. *Id.*

C. The District Court Holds that Goldman I Violates the Injunction

Judge Sullivan affirmed the bankruptcy court's order and upheld the Injunction against Appellants in *Goldman I*. *A & G Goldman P'ship*, 2013 WL 5511027, at *1. Rejecting "a purely formalistic approach" that looks only at the nominal title of a cause of action, the court determined that Appellants' claims "are not bona fide securities fraud claims." *Id.* at *6–7. The district court recognized that *Goldman I* pled "nothing more than that the Picower Parties traded on their own BLMIS accounts," alleged fraudulent trading activity that BLMIS conducted "for the Picower Parties," and that, "[i]n other words, the Complaints plead nothing more than that the Picower Parties fraudulently withdrew money from BLMIS." *Id.* at *7.

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

> . . . Plaintiffs do not in fact claim that the Picower Parties directed BLMIS to make misrepresentations above and beyond what was necessary to document the Picower Parties' false withdrawals. *The fraudulent representations Class Action Plaintiffs point to were incident to the fraudulent withdrawals.* Regardless of what Class Action Plaintiffs call their claims, the Goldman Complaints plead

> fraudulent conveyance claims. Accordingly, they are clearly derivative of the Trustee's already-settled claims.

Id. at *9 (emphasis added). The court held the claims came "within the plain scope of the Injunction" and that the bankruptcy court had jurisdiction to enjoin them. *Id.* at *10–11. Appellants did not appeal the district court's order and decision.

VI. THE BANKRUPTCY COURT AND THE DISTRICT COURT ENFORCE THE PERMANENT INJUNCTION AGAINST APPELLANTS AGAIN IN *GOLDMAN II*

A. The Goldman II Complaint

On January 6, 2014, Appellants commenced a declaratory judgment action in the Florida district court. (AA599–613.) The declaratory judgment action attached a proposed class action complaint, *Goldman II*, and sought a declaration that the proposed complaint did not violate the Injunction or the automatic stay. (*See* AA599–640.)

In substance, *Goldman II* was identical to *Goldman I*. It again attempted to assert a claim under Section 20(a) of the Exchange Act against the Picower Parties for loss in the value of the investments made by putative class members as BLMIS customers. (AA630, 637–38.) The main difference was that *Goldman II* averred Appellants' theory as to why Picower's conduct within his own accounts demonstrated that he was a control person: the complaint alleged repeatedly that an action by Picower in his own accounts "resulted directly" in false records being created in other customers' accounts, and resulted in other customers' receiving false information from BLMIS. (*See, e.g.*, AA616, 631–33.) It also contained conclusory allegations that "Picower directly or indirectly induced BLMIS's misleading statements to others." (AA638.) But it did not allege any specific action by Picower with respect to other customers, other customer accounts, or indeed any action at BLMIS outside of his own accounts.

B. The Bankruptcy Court Holds that Goldman II Violates the Injunction

On June 23, 2014, the bankruptcy court held that *Goldman II* violated the Injunction. *Marshall*, 511 B.R. at 394. Setting aside Appellants' conclusory allegations, the bankruptcy court held that *Goldman II* violated the Injunction because *Goldman II*, "like its predecessors, relie[d] on the Picower Parties' fraudulent withdrawals and fictitious entries in their own accounts, and if these allegations are ignored, there is nothing left." *Id.* at 393. Because *Goldman II* only restated the legal standard for control person liability under Section 20(a) without alleging that Picower "was an officer of BLMIS" or including any "particularized allegations that Picower Parties did anything besides fraudulently withdraw money from BLMIS and cause BLMIS to make phony entries in the records *of their accounts*," the bankruptcy court held their claim derivative. *Id.* (emphasis added). Appellants voluntarily withdrew their appeal of *Goldman II* at the district court level.

C. The Fox II Complaint: the Bankruptcy and District Courts Hold that Fox II Violates the Injunction

A month after *Goldman II* was filed, the Fox Plaintiffs tried again to bring an independent claim against the Picower Parties. The proposed *Fox II* complaint was attached as an exhibit to a motion to re-open *Fox I* in the Florida district court on February 18, 2014. The Fox Plaintiffs took a page from Appellants' playbook and purported to assert a Section 20(a) claim, along with federal and state RICO claims, aiding and abetting and other common law claims. *See Marshall*, 511 B.R. at 383. The bankruptcy court's *Goldman II* decision, discussed above, which resulted from a combined hearing along with the *Fox II* complaint, also enforced the Injunction against the plaintiffs in *Fox II*, and for the same reasons. *Id.* at 394 ("Absent particularized allegations that the Picower Defendants directed BLMIS to send false financial information or participated in its dissemination, the Fox Plaintiffs' claims are based on the

secondary effects of the fraudulent transfers to the Picower Defendants and are inseparable from the Trustee's claim."). *Fox II* also included broader allegations about Picower's conduct, such as an allegation that "[a]ccording to Madoff, Picower . . . actively encouraged people to enter into investment advisory agreements with BLMIS" and that "Picower induced Madoff to solicit customers for . . . BLMIS." *Id.* The bankruptcy court found that these allegations were "wholly conclusory," and that "whether labeled a control person claim, a RICO claim or a common law claim," the complaint was an impermissible attempt to "plead around" the injunction. *Id.* at 394–95.

While appellants did not perfect their appeal of *Goldman II* to the district court, the Fox Plaintiffs did appeal *Fox II*. The Honorable John G. Koeltl of the district court affirmed the bankruptcy court's enforcement of the Injunction against the Fox Plaintiffs. *Fox*, 531 B.R. 345. The district court held that the Fox Plaintiffs' Section 20(a) claims—akin to those raised by Appellants—were derivative of the Trustee's claims and thereby properly barred under Injunction because the Fox Plaintiffs had "merely repackaged" the same facts as in *Goldman I* and *Fox I* "without any new particularized injuries of the appellants that are directly traceable to the Picower defendants." *Id.* at 353.

Moreover, the district court agreed with the bankruptcy court that allegations regarding Picower's involvement in misrepresentations BLMIS made to its customers were "entirely conclusory." *Id.* at 352. With respect to the other claims in *Fox II*, the district court concluded that the bankruptcy court was "plainly correct in finding those claims to be derivative" for the same reasons. *Id.* at 353. Finally, Judge Koeltl held "that any allegations purporting to show an injury directly traceable to the Picower defendants' conduct [were] too conclusory to present a 'bona fide' claim independent from the Trustee's action." *Id.*

VII. THE BANKRUPTCY COURT ENFORCES THE INJUNCTION AGAINST APPELLANTS IN *GOLDMAN III*

A. The Goldman III Complaint

As before, *Goldman III* again alleges that Picower was a control person under Section 20(a) of the Exchange Act. (AA648 ¶ 1.) *Goldman III* makes six types of allegations: that Picower (1) backdated trades (AA666–68 ¶¶ 82–87); (2) took out margin loans (AA668 ¶¶ 88–90); (3) knew that there was false information in BLMIS' financial disclosures (AA669–70 ¶¶ 91–96); (4) referred clients to BLMIS (AA662 ¶ 64); (5) made loans to BLMIS (AA650 ¶ 10, AA663–64 ¶¶ 67–70); and (6) agreed to be listed as an options counterparty and to notify Madoff if regulators or anyone else asked him about his counterparty status. (AA650 ¶ 11, AA666 ¶¶ 79–81.)

The first three allegations previously were made in *Goldman I* and *Goldman II* and were specifically held by the bankruptcy court (and, in the case of *Goldman I*, the district court) to be derivative. *Marshall*, 511 B.R. at 391–93; *A & G Goldman P'ship*, 2013 WL 5511027 at *8 n.9. *Compare* AA631–32 ¶¶ 65–69, *with* AA666–68 ¶¶ 82–87 (alleging backdated trades); *compare* AA633–34 ¶¶ 73–75, *with* AA668 ¶¶ 88–90 (alleging margin loans); *compare* AA630–633 ¶¶ 64, 67–68, 71 *with* AA669–70 ¶¶ 91–96 (alleging knowledge of false financial disclosures). *See* AA1854–96 (chart comparing the allegations in *Goldman III*, *Goldman I*, and the Trustee's complaint against the Picower Parties).

The fourth allegation is that "Picower . . . used his extensive connections in Palm Beach and his stature on Wall Street to recruit and refer clients to the BLMIS scheme, despite his knowledge that it was a fraud." (AA662 ¶ 64.) No "clients" or other specifics about recruiting or referrals are identified in the complaint. This sort of conclusory assertion was rejected by the bankruptcy and district courts in *Fox II,* and held insufficient to create an independent basis for a

control person claim. C*ompare Fox*, 531 B.R. at 352–53, *and Marshall*, 511 B.R. at 394–95, *with* AA662 ¶ 64. *See* AA1086 ¶ 46 (*Fox II*) ("Picower . . . actively encouraged people to enter into investment advisory agreements with BLMIS.").

Of all the allegations in *Goldman III*, only two had not previously been asserted by either Appellants or the Fox Plaintiffs:[7] that Picower made loans to BLMIS (AA650 ¶ 10, AA663–64 ¶¶ 67–70) and that Picower agreed to be listed as an options counterparty (AA650 ¶ 10, AA663–64 ¶¶ 67–70.) These two additions to *Goldman III* are purportedly based on the criminal testimony of Enrica Cotellessa-Pitz, Annette Bongiorno, and Frank DiPascali, Jr. (*See* AA647–48.)

B. The Bankruptcy Court Holds the Goldman III Claims Derivative of the Trustee's Claims

On November 17, 2014, the Trustee and the Picower Parties each brought an adversary proceeding in the bankruptcy court to enforce the Injunction against Appellants. On February 17, 2016, the bankruptcy court enjoined the Goldman Plaintiffs from prosecuting *Goldman III*. *A & G Goldman P'ship*, 546 B.R. 284. The bankruptcy court considered "whether the particularized factual allegations in the Complaint assert a claim that is derivative or duplicative of the Trustee's fraudulent transfer claims against the Picower Parties." *Id.* at 299. Following Second Circuit precedent, the court defined derivative to mean claims that "'arise from harm done to the estate[,] seek relief against third parties that pushed the debtor into bankruptcy,' [and] are 'based upon a secondary effect from harm done to the debtor . . . .'" *Id.*

The bankruptcy court held that Appellants' claims "were incidental to the fraudulent withdrawals of $7.2 billion." *Id.* at 300. The alleged conduct "injured the BLMIS estate and

[7] The Fox Plaintiffs currently make similar allegations in "*Fox III*," which is pending before the bankruptcy court. *Marshall v. Capital Growth Co.*, Adv. Pro. No. 15-01293 (Bankr. S.D.N.Y. filed Aug. 29, 2015). Both the Picower Parties and the Trustee have moved to enforce the Injunction in *Fox III* and the matter has been fully briefed and was argued on February 11, 2016. *Id.*

indirectly affected all creditors in the same way" because it contributed to BLMIS's deepening insolvency. *Id.* at 301. The court reasoned that the allegation that Picower controlled BLMIS in order to steal $7.2 billion from other customers was "the very claim the Trustee settled" and that "every investor could assert the same claim." *Id.*

The court held that Appellants' allegations that attempted to link Picower to misrepresentations made by BLMIS were "entirely conclusory" and were based on the effect that Picower's withdrawals and fraudulent trading activity in his own accounts had on the financial information BLMIS sent to customers. *Id.* Likewise, the allegations that Picower's transactions with BLMIS influenced customers' decisions to invest in BLMIS were "wholly conclusory." Citing Judge Sullivan's decision in *Goldman I*, the court held that "the only particularized allegations that Picower gave express directions to BLMIS employees concerning certain specific transactions . . . relate to transactions in the Picower Parties' own accounts, and have been rejected as the basis for a *bona fide* section 20(a) claim." *Id.* at 302–03 (citing *A & G Goldman P'ship*, 2013 WL 5511027, at *6–7).

With respect to the loan allegations, the court found as a factual matter that the first alleged loan in 1992 or 1993 was made more than two years before Appellants even alleged Picower to be a control person, and the second alleged loan in 2006 was in fact a deposit by Picower into his own BLMIS account that was subsequently withdrawn (along with fictitious profits), and which was part of the Trustee's claim that Picower had knowingly received fraudulent transfers. *Id.* The court likewise found that the allegations about Picower's alleged agreement to serve as a counterparty to phony options trades by BLMIS lacked particularity: the allegation "doesn't say when this occurred, how it occurred, whether Picower lied to anyone

about the option trades or whether the phony counterparty information was ever shared with any customer." *Id.*

Judge Bernstein held that *Goldman III* "in reality seeks to augment a 'shadow estate' that will benefit all net losers the same way. . . ." *Id.* at 304. The complaint sought to recover $18 billion in losses, which was the total amount of principal lost in the BLMIS fraud by customers who filed claims with the Trustee. *Id.* at 304-05. The court stated that every net loser could assert the same claim. *Id.* at 305. And allowing *Goldman III* to go forward could create risks for the BLMIS estate by implicating the viability of the Picower Settlement and future settlements, "providing an avenue for BLMIS customers who are displeased with the Net Equity Decision to undermine that decision by directly pursuing claims that are wholly derivative of claims already brought by the Trustee." *Id.* (quoting *Fox*, 848 F. Supp. 2d at 490–91.)

Finally, the court admonished Appellants, stating that "[t]he gatekeeping function has been expensive and time-consuming, but the Court is confident that the Goldman Parties will not cause any further needless expenditure of resources or time," and provided that the Trustee or the Picower Parties could seek appropriate sanctions if they were to do so. *Id.* at 306.

SUMMARY OF ARGUMENT

Goldman III runs afoul of the Injunction because its allegations derive from the Trustee's settled claims. Under Second Circuit law, to be non-derivative, creditors must "have a claim for injury that is particularized to them, [such that] they are exclusively entitled to pursue that claim, and the bankruptcy trustee is precluded from doing so." *Marshall*, 740 F.3d at 88. There are no allegations here that Picower had particular dealings with any BLMIS customer, much less the named plaintiffs themselves. Appellants seek to represent a "shadow estate" of BLMIS customers but they are forbidden from doing so because their claims stem from nothing more than Picower's own account activity.

Appellants' arguments that *Goldman III* is somehow different from *Goldman I* and *II* are based on distorted readings of both the relevant case law and the criminal testimony upon which *Goldman III* relies. Appellants also ignore case law that definitively rejects their legal arguments, *see, e.g.*, *Marshall*, 511 B.R. 375, as well as their counsel's own admission that some of their new allegations are based only on inferences drawn from a *prosecutor's question* rather than a *witness's response*. (AA1462–63, AA1475.)

Lacking an independent claim, Appellants dress up their claims as securities claims and make conclusory allegations about Picower's conduct in an effort to morph him into something more than a BLMIS customer. Judges Lifland, Sullivan, Koeltl, and now Judge Bernstein, have all seen through such a guise, and so should this Court.

ARGUMENT

THE INJUNCTION SHOULD BE ENFORCED[8]

I. THE *GOLDMAN III* CLAIMS DERIVE FROM THE TRUSTEE'S CLAIMS

A. Most of Appellants' Allegations Were Previously Held to Violate the Injunction

Appellants allege that the Picower Parties: 1) backdated trades in their own accounts; 2) took out margin loans; 3) knew about false information in FOCUS Reports; and 4) referred unspecified clients to Madoff. (AA662 ¶ 64, AA666–69 ¶¶ 82–96.) These allegations in *Goldman III* mirror those in *Goldman II* and *Fox II*, which were found to be barred by the Injunction. *A & G Goldman P'ship*, 2013 WL 5511027, at *6–9; *Marshall*, 511 B.R. at 391–94. Appellants do not contend that these previously rejected allegations now form the basis of an

[8] Because *Goldman III* alleges generalized claims that are duplicative and derivative of those of the Trustee, it also violates the automatic stay of the Bankruptcy Code. The Injunction made the automatic stay permanent as to duplicative and derivative claims brought against Picower. *See In re Dreier LLP*, 429 B.R. 112, 133 (Bankr. S.D.N.Y. 2010); *Fox*, 848 F. Supp. 2d at 479.

independent claim. Nor could they.[9] Putting aside their waiver of any such argument by failing to raise it here, to the extent Appellants seek to re-litigate the same allegations rejected in *Goldman II*, they are collaterally estopped from doing so because they failed to perfect their appeal of *Goldman II*. *See Fox*, 531 B.R. 345; *Marshall*, 511 B.R. 375. Regardless, even if they could resurrect the *Goldman II* complaint, those allegations would still fall within the Injunction.

First, with respect to backdating allegations, Appellants use the same allegations made by the Trustee to contend that Picower's backdating in his own accounts *affected other BLMIS accounts*. (Compare AA667 ¶ 84, AA668 ¶ 87, with AA92–98 ¶ 63(d)–(i).) Appellants and the Fox Plaintiffs have repeatedly alleged that transfers in Picower's own accounts, by necessarily impacting the accounts of other customers, support an inference of greater liability, however this argument has repeatedly been rejected. *See, e.g.*, *Fox*, 531 B.R. at 353. Similarly, Appellants argue these same allegations show that Picower had the power to direct the actions of BLMIS employees. (*See, e.g.*, AA667 ¶ 84.) As in every prior complaint, the only BLMIS employee conduct Picower is alleged to have controlled was with respect to his own accounts. (*See* AA667–68.) Those same arguments and allegations have been rejected time and again by the bankruptcy court, the district court, and the Second Circuit, all of which have held that Picower's conduct within his own accounts does not support an independent claim against the Picower Parties. *See A & G Goldman P'ship*, 2013 WL 5511027, at *8; *Marshall*, 740 F.3d at 93.

Second, Appellants' allegation that Picower "directed BLMIS to make a margin 'loan'" to one of Picower's accounts is identical to allegations in *Goldman I* and *II*. (AA668 ¶ 88.) These allegations have been rejected as derivative claims and barred by the Injunction, as they concern

[9] *See, e.g.*, *Baker v. Dorfman*, 239 F.3d 415, 426 n.6 (2d Cir. 2000) (party waived argument that he was entitled to prejudgment interest by failing to appeal lower court's determination of prejudgment interest); *Suzanne Gaston v. Jack Post Corp.*, 971 F. Supp. 1084 (N.D. Miss. 1997) (plaintiff was collaterally estopped from arguing that she suffered adverse employment decision because she failed to appeal lower court's finding against her on this issue).

nothing more than activity in Picower's own accounts. *A & G Goldman P'ship*, 2013 WL 5511027, at *7–9.

Third, Appellants' allegations that Picower knew that the false information regarding his own accounts would be reflected in financial reports such as FOCUS Reports, (AA669 ¶ 94), is another way of alleging that Picower's activity within his own accounts necessarily impacted the financials of BLMIS, and therefore other customers. These allegations, again, have been specifically and conclusively rejected as failing to support any independent claim against the Picower Parties. *A & G Goldman P'ship*, 2013 WL 5511027, at *7–9.

Fourth, Appellants allege that Picower recruited and referred customers to Madoff. (AA662 ¶ 64.) But this allegation is conclusory, failing to name a single customer recruited or referred by Picower, much less how, when, where or how Picower is alleged to have interacted with any customer. It failed before for this reason when raised by the Fox Plaintiffs, and must now fail again. *Marshall*, 511 B.R. at 394–95.

Accordingly, Judge Bernstein held that these allegations could not provide a basis for an independent claim. *A & G Goldman P'ship*, 546 B.R. at 303.

B. The "New" Allegations Are Barred by the Injunction

The only allegations introduced for the first time in *Goldman III* concern allegations that Picower made loans to BLMIS and agreed to be identified as a counterparty to BLMIS transactions in order to conceal the fraud. (*See* AA663–65 ¶¶ 67–74, AA665–66 ¶¶ 78–81.) As a threshold matter, these allegations are conclusory, and are not supported by the "new evidence" on which Appellants purport to rely. But more to the point, even if these allegations had been true, at best they do nothing more than support the inference that Picower propped up the Ponzi scheme in order to withdraw fictitious profits from it—conduct that harmed every single customer of BLMIS in the same way, and which derives from the harm caused to the BLMIS

estate. Indeed, every customer who is alleged by the Trustee to have "invested" with BLMIS, knowing that it was a fraud, similarly propped up the fraud in order to reap the benefits. Judge Bernstein properly held these claims to be derivative of the Trustee's. *A & G Goldman P'ship*, 546 B.R. at 305.

With respect to the first "new" allegation, Appellants allege that Picower bolstered the Ponzi scheme by providing two loans to BLMIS, in 1992 and 2006. (AA663–65 ¶¶ 67–74.) They further allege that these loans demonstrated Picower's control over BLMIS and caused misrepresentations to BLMIS customers. (AA664–65 ¶¶ 73–74.) The 2006 "loan" is a $125 million payment that was alleged by the Trustee and considered in connection with the Settlement. More importantly, the $125 million dollar "loan" concerns the deposit and withdrawal of that money and the backdating of trades *in Picower's own accounts*, resulting in a profit. Such activity has been rejected by the Second Circuit, the district court and the bankruptcy court as providing any basis for an independent claim. *Marshall*, 740 F.3d at 93; *A & G Goldman P'ship*, 2013 WL 5511027, at *1; *Marshall*, 511 B.R. at 394.

Appellants purport to draw these allegations from the criminal cases involving BLMIS employees. Yet, at a February 5, 2015 hearing before the bankruptcy court, counsel for Appellants admitted that their loan allegations *were not based on responses provided by the criminal defendants but rather, on the prosecutor's questions*:

> *Mr. Stone*: [reading prosecutor's question from testimony] "Now, there were numerous times that Mr. Picower provided money to Madoff Securities to keep it going when it was low on cash. Isn't that true?" That's the one she answers, I don't know, to. But that's the U.S. Attorney asking a question that we believe we have the evidence to support.
>
> *The Court*: That's pretty speculative.
>
> *Mr. Stone*: I don't know that it's speculative at a complaint stage when the rest of the documentation shows that there were loans.

The Court: I can't infer from the "I don't know" that the answer is, yes.

(AA1474–75.)

The other "loan" alleged by the Appellants concerns allegations that Picower lent money to BLMIS in 1992 in connection with the SEC's investigation of BLMIS feeder fund Avellino & Bienes. (AA663.) But Appellants' argument that these "loans" are somehow separate from the transactions in Picower's own accounts are contradicted by the very testimony upon which Appellants rely. Frank DiPascali, Jr. testified that Picower had that alleged "loan" placed in his own account. (*See* AA2994–95 ("[Madoff] instructed Annette receive [the securities] into Mr. Picower's account at Madoff . . . .").) The "loan" was thus a deposit by Picower into his own account, from which he then withdrew fictitious profits. (AA93.) Moreover, *Goldman III* does not allege that Picower became a control person until 1995—indeed at one point the complaint alleges that the fraud did not begin until 1995—and as such, the 1992 loan allegations do not support a control person claim. (AA662); *see A & G Goldman P'ship*, 546 B.R. at 303.

Fundamentally, all of the loan allegations, whether from 1992 or 2006, allege nothing more than that Picower propped up the Ponzi scheme through activity incidental to his own accounts—which is precisely what the Trustee alleged. (AA91–98.) The alleged harm caused by Picower's propping up of the scheme damaged all BLMIS customers and creditors in the same way: by furthering the fraud and ultimately depleting BLMIS's ability to pay creditors. Such generalized claims belong to the Trustee and are barred by the Injunction: "[t]hose alleged losses were suffered by every BLMIS customer . . . and any cause of action asserting those damages . . . are therefore common to all BLMIS customers." *Fox*, 848 F. Supp. 2d at 481; *see Marshall*, 740 F.3d at 92. Judge Bernstein thus properly held that the "new" loan allegations, because they were merely incidental to Picower's own account activity, could not support an independent claim against the Picower Parties. *See A & G Goldman P'ship*, 546 B.R. at 300.

With respect to the second "new" allegation, Appellants allege that Picower agreed to be identified in BLMIS's books and records as a counterparty for purported options transactions if regulators were to ask, and that by so agreeing, disseminated misrepresentations and omissions, inducing investment. (AA650 ¶ 11; AA665–66 ¶¶ 78–81.) As a threshold matter, this allegation—like the allegation that Picower recruited unnamed clients for BLMIS—is wholly conclusory. As the bankruptcy court found, there are no specifics alleged as to any misrepresentations or omissions, to whom they were made, or in connection with which transactions. Nor are there any allegations that Picower was ever "questioned by regulators or anyone else" about such transactions. (AA666 ¶ 79.) Moreover, Appellants rely for this allegation on testimony from the Madoff criminal trial. But the testimony relied on does not support the allegation that Picower agreed to anything, or that he even knew that Madoff would use his name. (*See, e.g.*, AA3632–34.)

Nor does *Goldman III* link Picower's alleged "agreement" with Madoff to any actual misrepresentation made to or relied on by any third party, much less any customer who lost money with BLMIS. But even if this alleged agreement, *arguendo*, did harm Appellants, that harm would be derivative of the harm caused to the estate. *A & G Goldman P'ship*, 546 B.R. at 302–03.

Furthermore, Appellants are incorrect when they argue that the counterparty allegations are "not related to cash withdrawals from Picower's BLMIS accounts." (AA666 ¶ 81.) Picower's only identified connection with BLMIS was that he held customer accounts into which he deposited and from which he withdrew funds. Even the testimony on which Appellants rely demonstrates that the allegations would relate to conduct within Picower's own accounts, as DiPascali testified that fictitious treasury bills would have to be deposited *into Picower's*

account to internalize option trades. (*See* AA3633, 3636–38 (discussing how fictitious treasury bills would be "deposited" into certain clients' accounts, including Picower's.)

And even taking Appellants' counterparty allegations as true would not help Appellants' cause, as an allegation that Picower would have allowed his name to be used in order to create false statements to regulators is, at best, an allegation that Picower helped prop up the Ponzi scheme. There are no allegations that any customer was targeted or affected in any specific way by the alleged conduct. Rather, as with all the other allegations in *Goldman III*, all customers and creditors would have been harmed in the same way if Picower had been identified as a counterparty, through Picower's propping up the Ponzi scheme and depleting estate assets. As the Second Circuit held, "secondary effect[s] from harm done to the debtor" are claims belonging to the Trustee. *Marshall*, 740 F.3d at 89; *A & G Goldman P'ship*, 546 B.R. at 290.[10]

II. THE BANKRUPTCY COURT FOLLOWED THE PROPER STANDARD FOR DETERMINING A DERIVATIVE CLAIM

Appellants contend that the bankruptcy court's reading of the Injunction is overly broad: "the Bankruptcy Court summarily concluded that everything Picower did to prop up and conceal the scheme 'was incident to' the fraudulent withdrawals and therefore in essence the withdrawals themselves" and thus "sets a dangerous precedent." (App. Br. at 3.) They further argue that previous rulings have only barred claims concerning Picower's withdrawals from his own accounts, not other transactions in those accounts. (*Id.* at 7–11.) Appellants are wrong.

It is not the bankruptcy court that lowered the bar for the Injunction, but Appellants who now seek to raise it. The bankruptcy court followed the Second Circuit's and Judge Sullivan's

[10] Appellants argue that their complaint would render the Picower Parties liable under section 20(a) even if they "never withdrew a single dime" from their accounts. (App. Br. at 12.) But this ignores that their allegations are completely founded upon the Picower Parties' withdrawals from their accounts as well as conduct by the Picower Parties *within their accounts to facilitate those withdrawals*. *Marshall*, 740 F.3d at 93; *A & G Goldman P'ship*, 2013 WL 5511027 at *9.

methodology when it determined that any harm flowing from the *Goldman III* allegations related to Picower's own account activity. Judge Sullivan held Appellants' claims to be derivative precisely because Picower's alleged fraudulent withdrawals and other actions were "*necessarily incident*" to those withdrawals. *A & G Goldman P'ship*, 2013 WL 5511027, at *8, 14–16 (emphasis added). The Second Circuit, too, recognized that derivative claims are based broadly "upon a secondary effect from harm done to the debtor . . . ." *Marshall*, 740 F.3d at 89.

Moreover, it is not only fraudulent withdrawals that trigger the Injunction. The previous decisions involving Appellants and/or the Fox Plaintiffs stand for the proposition that derivative claims relate to any secondary effects of Picower's own account activity. *See, e.g.*, *A & G Goldman P'ship*, 546 B.R. at 300 ("In short, the propping up loans, the counterparty conspiracy and everything else the Complaint alleges Picower did were incident to the fraudulent withdrawals of $7.2 billion."). The bankruptcy court recognized that the Second Circuit's decision in *Fox I* affirming the enforcement of the Injunction supports this notion. *See A & G Goldman P'ship*, 546 B.R. at 300 n.17. The bankruptcy court reasoned that the Injunction applied to claims based on *transactions* in the Picower Parties' accounts because, as in earlier iterations of the complaint, the *Goldman III* complaint relied on fictitious entries in the Picower accounts and those entries included the allocation of fictitious profits that were not necessarily withdrawn from the accounts. *Id.* The court further reasoned that, in response to the Trustee's claims, the Picower Parties could have raised the defense that deposits into their accounts constituted value under section 548(c) of the Bankruptcy Code. *Id.* As the court properly concluded, the Trustee's claims and any defenses the Picower Parties may have had were settled by the Trustee. *Id.*

III. THE TRUSTEE HAS STANDING TO ENFORCE THE INJUNCTION AND THE DOCTRINE OF *IN PARI DELICTO* IS INAPPLICABLE

Appellants misread the Injunction itself and the case law on standing, the *in pari delicto* doctrine, and the *Wagoner* Rule. Their reasoning has been rejected by every court examining these issues.

Appellants contend that the Injunction does not reach their claims facially. They quote the Injunction, and interpret it as barring only fraudulent conveyance claims, that is, only claims that are *duplicative* of the Trustee's. (App. Br. at 6.) But that reasoning completely ignores that the Injunction bars *derivative* claims, that is, those that derive from claims brought by the Trustee, or which could have been brought by the Trustee.

Moreover, Appellants' assertion that "claims that could not have been brought by the Trustee are not subject to the Injunction," (*id.*), has been raised multiple times, and every court to consider it has rejected it. Whether or not the Trustee would have hypothetical standing to bring a cause of action with the label chosen by Appellants is not relevant. The relevant inquiry is whether the substance of Appellants' claim, however it is framed, is duplicative of or derives from the Trustee's claim. *A & G Goldman P'ship*, 2013 WL 5511027 at *6.

Appellants similarly argue that the Trustee cannot enforce the Injunction because he would be barred from bringing Appellants' claims under the doctrine of *in pari delicto* or the *Wagoner* Rule. But those doctrines have nothing to do with the Trustee's ability to enforce the Injunction. And, again, it would require the Court to rule hypothetically. Accordingly, this argument was also previously rejected by the bankruptcy court and the district court on appeal.[11] *Fox*, 848 F. Supp. 2d at 485–86.

[11] Moreover, the *in pari delicto* doctrine would be inapplicable in any event if, as Appellants plead, Picower was a BLMIS insider. (*See* AA650 ¶¶ 7–11, AA662–63 ¶¶ 63–66, AA669 ¶¶ 91–96.) In the Second Circuit, *in pari delicto*, "does not apply to corporate insiders or partners." *Goldin v. Primavera Familienstifung, Tag Assocs. Ltd. (In*

Relying on the same faulty reasoning, Appellants misread the Second Circuit's *JPMorgan* decision, in which the Court affirmed that the Trustee lacked standing to bring common law claims against certain banks. But whether the Trustee would have standing to bring a Section 20(a) claim is irrelevant because the Trustee is not attempting bring securities law claims—he is seeking to enforce the Injunction. The *JPMorgan* Court itself distinguished between the Trustee's standing to seek to enjoin third-party claims that are derivative of the Trustee's claims, and his standing to bring common law claims, explicitly condoning the district court's decision to enforce the Injunction in the analogous *Fox I* matter: "The customer claims [in the *Fox* Injunction action] were 'duplicative and derivative' of the Trustee's fraudulent transfer claim. Accordingly, the court found those claims to be 'general' in that they arose from 'a single set of actions that harmed BLMIS and all BLMIS customers in the same way.'" *JPMorgan Chase & Co.*, 721 F.3d at 71 n.20. The *JPMorgan* case thus supports the Trustee's position. Indeed, shortly after the Second Circuit decided *JPMorgan*, it decided the *Fox I* Injunction matter, in which it affirmed the enforcement of the Injunction on facts akin to those here.[12] *See Marshall*, 740 F.3d at 90 (distinguishing *JPMorgan*).[13]

---

re Granite Partners), 194 B.R. 318, 322 (Bankr. S.D.N.Y. 1996); *see Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 33 (2d Cir. 1993).

[12] Appellants' efforts to analogize their case to one in which there was actual independent conduct alleged, *i.e.*, *Picard v. Fairfield Greenwich Ltd.*, 762 F.3d 199, 209–10 (2d Cir. 2014), is unpersuasive. And Appellants' reliance on *In re Educators Group Health Trust*, 25 F.3d 1281 (5th Cir. 1994), is misplaced, as the plaintiff school districts in that case did allege direct injury to themselves that did not derive from any harm to the debtor. *Id.* at 1285.

[13] Appellants rely on *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085 (2d Cir. 1995) and *Buchwald v. The Renco Group, Inc. (In re Magnesium Corp. of Am.)*, 399 B.R. 722 (Bankr. S.D.N.Y. 2009), in an unsuccessful attempt to characterize their claims as individualized. (App. Br. at 24-25.) In *Hirsch*, certain creditors relied on misrepresentations contained in misleading private placement memoranda prepared by defendant auditors. 72 F.3d at 1093-94. Likewise, in *Magnesium*, former officers and directors of the debtor failed to disclose environmental liabilities to investors in a bond offering. 399 B.R. at 760. Unlike in *Hirsch* and *Magnesium*, Appellants' claims are based on the common harm to all investors and not on any individualized conduct by third parties. *See Marshall*, 740 F.3d at 92–93 (distinguishing *Hirsch*).

IV. APPELLANTS' PURPORTED SECURITIES CLAIMS AND DAMAGES ARE BARRED

Appellants further argue that securities law claims are by their very nature different from other claims. But, as every court examining the reach of the Injunction has held, it is not the name of the claim that matters, but whether that claim pleads something more than a duplicative or derivative claim. *See, e.g.*, *Marshall*, 740 F.3d at 91; *Fox*, 848 F. Supp. 2d at 482. Purported securities law claims are no different when they stem from nothing more than Picower's activity in his own accounts. *A & G Goldman P'ship*, 2013 WL 5511027, at *6. Nor does the fact that Appellants seek damages take their claims outside the scope of the Injunction. In *Fox I*, the Second Circuit rejected that very argument, finding that the "claimed damages, also suffered by all BLMIS customers, still remain mere secondary harms flowing from the Picower defendants' fraudulent withdrawals and the resulting depletion of BLMIS funds." *Id*.

Just as Appellants cannot recover damages for their derivative claim, Appellants cannot augment the amounts recoverable under the Net Equity Decision unless they can state an independent claim. They have not done so. Rather, Appellants are trying to create a shadow estate to assert claims directly settled by the Trustee. Judge Bernstein properly rejected this attempt.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court affirm the bankruptcy court's Decision and Order enforcing the Injunction against Appellants.

Dated: New York, New York
June 24, 2016

Respectfully submitted,

BAKER & HOSTETLER LLP

By: */s/ Keith R. Murphy*

Keith R. Murphy
kmurphy@bakerlaw.com
Deborah H. Renner
drenner@bakerlaw.com
Tracy L. Cole
tcole@bakerlaw.com
Amy E. Vanderwal
avanderwal@bakerlaw.com
Ferve E. Ozturk
fozturk@bakerlaw.com
Samuel M. Light
slight@bakerlaw.com

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

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