UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (LGB) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff, Plaintiff, v. SQUARE ONE FUND LTD., Defendant.	Adv. Pro. No. 10-04330 (LGB)

MEMORANDUM OF LAW IN SUPPORT OF TRUSTEE'S
UNOPPOSED MOTION FOR SUMMARY JUDGMENT

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Plaintiff Irving H. Picard, as trustee ("**Trustee**") for the substantively consolidated SIPA[1] liquidation of Bernard L. Madoff Investment Securities LLC ("**BLMIS**") and the Chapter 7 estate of Bernard L. Madoff respectfully submits this Memorandum of Law in Support of his Unopposed[2] Motion for Summary Judgment against Square One Fund Ltd. ("**Square One**") under Rule 56 of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

It is undisputed in this adversary proceeding that the Trustee has established his *prima facie* case as to his lone remaining claim under 11 U.S.C. § 548(a)(1)(A). Indeed, the Trustee has proven, and Square One has admitted, that BLMIS made the relevant transfers to Square One. The Trustee has also proven, and Square One has admitted, that at all relevant times BLMIS ran its investment advisory business as a Ponzi scheme and, therefore, BLMIS made the transfers at issue here with an actual intent to hinder, delay, or defraud its creditors. The Trustee has thus established that he is entitled to avoid and recover the relevant transfers as a matter of law unless Square One can create a triable issue of fact with respect to any of its four affirmative defenses in this litigation.

Square One has not met its burden. This Court has already addressed and rejected three of Square One's defenses in this or other related adversary proceedings in this liquidation as a matter of law. Square One's remaining affirmative defense—that it received the transfers in good faith—can also be determined as a matter of law at this stage of the litigation because Square One has not offered any evidence that creates a triable issue of fact as to that defense. To the contrary, Square One chose not to rebut any of the reports submitted by the Trustee's experts including the Trustee's

[1] SIPA refers to the Securities Investor Protection Act of 1970, codified at 15 U.S.C. §§ 78aaa-*lll*, *et seq*.

[2] On March 4, 2025, Square One represented that it "does not intend . . . to file any opposition to any motions that [the Trustee] might make" in this adversary proceeding. ECF No. 318.

red flag expert, Dr. Steve Pomerantz, who concluded Square One was aware of myriad red flags indicating BLMIS was a fraud. Square One did not seek evidentiary documents or testimony from third parties during fact discovery to support its affirmative defenses.[3]

The limited evidence that Square One produced removes any doubt that it was on inquiry notice that BLMIS was a fraud. Its documents confirm that Square One knew as early as August 2002 that BLMIS was likely a fraud that could "blow up" at any moment. These documents also confirm that Square One's founder, director, and manager (Luc Estenne) warned his close friends and colleagues against investing in BLMIS and went out of his way to implement a "No Madoff" policy in his other businesses to protect his family's wealth and his businesses' reputation. These documents also demonstrate that Estenne conducted quantitative and qualitative diligence studies into BLMIS that concluded that BLMIS was not executing the strategy it purported to be executing and that the operations of BLMIS's investment advisory business had all of the hallmarks of a fraud.

Witness testimony corroborated that Square One was aware as early as 2002 that BLMIS was a fraud. Estenne testified that, since the late 1990s, he had been "repeatedly" warned by some of his colleagues that BLMIS was a "fraud." One such colleague, Peter Fletcher, testified that he had always suspected that BLMIS was "jack[ing] up" its trades and commingling investor funds. Another colleague, Jérôme Müller, testified that he told Estenne that BLMIS's investment returns were "impossible to explain," "too good to be true," and had to be the result of "illegal" activity.

[3] As set forth in Judge Maas's Order and Opinion dated August 27, 2024, Square One did not adequately preserve its electronically stored information, which ultimately resulted in the discovery arbitrator issuing several spoliation sanctions against Square One, including the payment of certain of the Trustee's attorneys' fees. ECF No. 311. On December 12, 2024, the discovery arbitrator entered an order awarding the Trustee approximately $115,000 in attorneys' fees and costs. ECF No. 315. To date, Square One has not complied. For this reason, on March 27, 2025, the Trustee moved for additional sanctions against Square One before the discovery arbitrator. The discovery arbitrator has yet to rule on that motion. If this Court grants summary judgment, the adversary proceeding would be closed, and the discovery arbitrator would lose jurisdiction. Accordingly, the Trustee respectfully requests that, if the Court grants this motion, the Court delay entering judgment against Square One until the discovery arbitrator issues his ruling.

And another colleague, Albert Collette, testified that the Swiss investment management colleagues with which Estenne regularly spoke believed that investing with BLMIS was akin to a cyclist who was "doping during the Tour de France."

Square One never reconciled its concerns about BLMIS. Square One admitted that it never asked BLMIS any diligence questions, despite having unfettered access to Bernard Madoff and his right-hand officer, Frank DiPascali. Estenne testified that Square One believed investing in BLMIS was a "take it or leave it" situation where it "was not possible" to ask diligence questions because it would have resulted in BLMIS ending the investment. Estenne also acknowledged that he taught investors at that time that if an investment manager "will not tell you what he is doing you have to question what you are doing investing with him" but that he departed from his own teachings only with respect to BLMIS, choosing to look the other way so that he could continue taking the millions of dollars in management fees that were generated by Square One's investment in BLMIS (while at the same time protecting his family's wealth and his businesses' reputation from BLMIS).

Square One does not dispute any of the foregoing, nor could it since almost all of the facts detailed above originate from its documents and witnesses. Perhaps for that reason, in March 2025, Square One filed a statement with the Court confirming that it will no longer defend itself against the Trustee's claim in this adversary proceeding, thereby underscoring the reality that there is no triable issue, and this Court can resolve this dispute at this stage of the litigation and as a matter of law. For these reasons, as well as those set forth below and in the accompanying Declarations and Statement of Material Facts, the Trustee respectfully requests that the Court grant summary judgment on his remaining claim against Square One and enter an Order avoiding the initial transfers and judgment in the Trustee's favor in the amount of $6,410,000 plus prejudgment interest.

STATEMENT OF FACTS

I. SQUARE ONE INVESTED IN BLMIS

Luc Estenne, an investment professional based in Switzerland, formed Square One in 1998 in the British Virgin Islands. (Statement of Material Facts in Support of Motion for Summary Judgment ("**Stmt.**"), ¶ 107). Estenne created Square One to give investors access to BLMIS. (Stmt. ¶ 170). In 1998, Estenne opened account 1FR048 (the "**Square One Account**") with BLMIS's investment advisory business ("**IA Business**") after visiting with BLMIS's Chief Financial Officer, Frank DiPascali. (*Id*. ¶¶ 159-62). From December 15, 1998 through December 11, 2008 (the "**Relevant Period**"), Square One invested $28,097,165 in the IA Business through the Square One Account. (*Id*. ¶ 132). Over that Period, BLMIS transferred $25,852,737 to Square One, including transfers of $6,410,000 in the two-year period immediately before December 11, 2008 (the "**Filing Date**"). (*Id*. ¶ 132-33).

Square One at all times understood the split strike conversion strategy ("**SSC Strategy**") that BLMIS purported to execute for its IA Business. (*Id*. ¶¶ 161, 169). Square One provided a detailed description of the SSC Strategy in its offering memoranda and in its memorialization of in-person meetings with BLMIS between 1998 and 2001. (*Id*.). The SSC Strategy purportedly executed by BLMIS was a hedging strategy that called for the purchase of equities and options to create a collar that limited gains in up markets but also limited losses in down markets. Because BLMIS purported to select stocks from the companies in the Standard & Poor's ("**S&P**") 100 Index, the SSC Strategy's performance should have correlated to the performance of the S&P 100. (*Id*. ¶ 308).

II. BLMIS OPERATED AS A PONZI SCHEME

It is undisputed that, throughout the Relevant Period, BLMIS's IA Business operated as a Ponzi scheme. (*See* Square One's Am. Answer at 2, ECF No. 240 ("Square One admits that Madoff perpetrated a Ponzi scheme through BLMIS . . . .")).

Madoff admitted the IA Business did not execute trades on behalf of its customers. (Stmt. ¶ 92). Frank DiPascali, BLMIS's Chief Financial Officer, also admitted that BLMIS falsified investment account statements to reflect transactions that never took place and that "[f]rom at least the early 1990s through December of 2008 . . . [n]o purchases of [*sic*] sales of securities were actually taking place in [customers'] accounts." (*Id*. ¶ 98). David Kugel, a manager and trader at BLMIS, admitted that he falsified trading records as far back as the early 1970s. (*Id*. ¶¶ 100-01). Kugel provided historical trade information to create fake trades that gave the appearance of profitable trading when no such trading had actually occurred. (*Id*. ¶ 101). Irwin Lipkin, BLMIS's accountant, admitted BLMIS's revenue was falsely inflated through fraudulent bookkeeping entries and annual audited reports. (*Id*. ¶ 102). Eric Lipkin, the payroll manager at BLMIS, admitted BLMIS created fake reports replicating those of the Depository Trust & Clearing Corporation to purportedly confirm non-existent positions in investment advisory accounts. (*Id*. ¶¶ 103-04). Also, Enrica Cotellessa-Pitz, BLMIS's accountant and comptroller, admitted that investment advisory customer money was funneled to BLMIS's proprietary trading and market making businesses to falsely inflate revenue and hide losses. (*Id*. ¶¶ 105-06).

Bruce Dubinsky, a certified forensic fraud examiner and forensic accountant retained by the Trustee, confirmed that the IA Business was a Ponzi scheme. As set forth in Mr. Dubinsky's unrebutted expert report, BLMIS did not execute its reported strategy on behalf of its customers. (*Id*. ¶ 19). Rather, BLMIS's trading records demonstrated that, as far back as the 1970s, BLMIS used historical trade information to fabricate trades for its customers and reported those fake trades

on customer statements. (*Id*. ¶¶ 21). Similarly, the unrebutted report of the Trustee's expert Lisa Collura, a forensic accountant and certified fraud examiner, shows that BLMIS customer funds were deposited into a checking account maintained by BLMIS. (*Id*. ¶ 71). Both Mr. Dubinsky's and Ms. Collura's analysis and opinions concluded that customer deposits were the only sources of cash available to the IA business because that Business did not have legitimate income-producing activities. (*Id*. ¶ 75). By the Filing Date, BLMIS's assets totaled $530 million, and its liabilities totaled $19.7 billion, and the customer property on hand at BLMIS was grossly insufficient to pay the claims of its customers. (*Id*. ¶ 83).

III. SQUARE ONE IS A SOPHISTICATED INVESTOR

At all relevant times, Estenne and Partners Advisers managed and/or directed Square One's investments in BLMIS. Square One had no employees. (Stmt. ¶ 152-53). Estenne served as Square One's director at all relevant times. (*Id*. ¶ 135). Estenne also controlled Square One's investment manager, Square Asset Management, Ltd. ("**SAM**"). (*Id*. ¶ 137). SAM, in turn, delegated its duties vis-à-vis Square One to another investment firm that Estenne wholly owned and controlled, Partners Advisers, S.A. ("**Partners Advisers**"). (*Id*. ¶ 138). Partners Advisers is an investment firm based in Geneva that provides investment advisory services. (*Id*. ¶ 136). At all relevant times, Square One relied on Partners Advisers to conduct investment diligence on its behalf and to memorialize the findings in reports and studies. (*Id*. ¶¶ 152-58).

During the Relevant Period, Estenne held himself out to investors as an expert at spotting investment fraud and in conducting investment due diligence. (*Id*. ¶¶ 142-48). For example, during an April 2004 conference, Estenne held himself out as a "due diligence specialist[]" on various investment due diligence issues, such as "How to spot fraud?" "Why do funds fail?" "What is the psychology behind manager impropriety?" and "What are the structural issues?" (*Id*. ¶ 148). Estenne also participated as a panelist at industry conferences where he lectured about the

importance of transparency when evaluating an investment adviser, how to conduct investment due diligence, and how to identify and mitigate investment risk. (*Id*. ¶ 146). In those conferences, Estenne and his co-panelists indicated that "[i]f a fund manager will not tell you what he is doing, you have to question what you are doing investing with him." (*Id*. ¶ 145).

In 2000, Estenne authored a book chapter titled "Risk Management Issues for the Family Office" in the book "Managing Hedge Fund Risk." (*Id*. ¶ 142). He wrote a second version of that chapter in 2005 (together with the first version, the "**Chapter**"). (*Id*. ¶ 143). The Chapter states that it is "paramount" that investors conduct both pre-investment and ongoing due diligence on the investment manager "to identify which risks are taken by hedge fund managers in order to generate their performance, and how these risks are measured and managed." (*Id*. ¶ 144). The Chapter also identifies 30 risk factors that investors should study when conducting investment due diligence and recommends that investors should demand transparency from an investment adviser, providing that the "best transparency level usually available takes the form of monthly or quarterly portfolio snapshots" and that periodic in-person diligence visits are necessary to obtain "a vote of confidence on the ethics" of the investment adviser. (*Id*.).

During the Relevant Period, Partners Advisers was regarded for its investment diligence practices and conservative approach to selecting investments. (*Id*. ¶ 141). In 2014, Partners Advisers was named Switzerland's "Most Trusted Investment Management Company of the Year" at the International Hedge Fund Awards. (*Id*.).

IV. SQUARE ONE WAS AWARE OF RED FLAGS INDICATING BLMIS WAS A FRAUD

A. As Early As 2002, Square One Was Warned that BLMIS Was an Illegal Operation

Estenne and Partners Advisers created and managed the Absolute Return Target Fund ("**ART Fund**") to offer their customers a portfolio of investments that Partners Advisers hand

selected. (Stmt. ¶ 193). To put his "money where [his] mouth is," Estenne invested his and his family's wealth in the ART Fund. (*Id*. ¶ 195). From 2000 to 2002, one of the portfolio's best-performing investments was Square One, which offered the ART Fund consistently positive returns during the bear market of the early 2000s that followed the bursting of the "dot.com bubble" and the 9/11 attacks. (*Id*. ¶¶ 196-98). But this consistently positive performance raised flags at Partners Advisers because the SSC Strategy purportedly executed by BLMIS did not correlate as expected to the performance of the S&P 100 Index. (*Id*. ¶ 197). So, on behalf of the ART Fund, Partners Advisers performed additional diligence on BLMIS.

This diligence occurred in or around August 2002 and was carried out by Jérôme Müller, a Partners Advisers employee. (*Id*. ¶ 199). As part of this diligence, Müller analyzed two BLMIS feeder funds other than Square One. (*Id*. ¶¶ 199-203). Müller testified that he came away from this diligence convinced that BLMIS was ***not*** executing the SSC Strategy because "there was no way to explain Madoff's return[s]" under that Strategy. (*Id*. ¶ 204). Müller also testified that the SSC Strategy was supposed to correlate closely with the S&P 100 but that, in reality, BLMIS's reported returns had little-to-no correlation with that index. (*Id*. ¶ 205). Müller also testified that the BLMIS feeder fund representatives that he consulted told him that BLMIS's consistently positive returns were generated by random market-timing, which concerned Müller because he understood that "[m]arket timing doesn't work" given that it is "impossible to forecast where the market is going, repeatedly." (*Id*. ¶ 202). His overall takeaway from his diligence was that BLMIS's investment advisory business was "***too good to be true***." (*Id*. ¶ 213) (emphasis added).

To test his diligence, Müller consulted respected investment professionals in Geneva who had also vetted BLMIS. (*Id*. ¶ 206). They shared with Müller their suspicions that BLMIS must be executing some illegal scheme. (*Id*.). Specifically, the individuals with whom he spoke likened

investing in BLMIS to doping during the Tour de France because BLMIS's investors knew, or should have known, that BLMIS's consistently positive returns were the result of some method of cheating. (*Id*. ¶ 210). Müller testified that some of these individuals told him that they believed that BLMIS was "front-running" by using nonpublic information from its market-making business to assist the trades made by its IA Business; a practice that Müller understood to have been "illegal" in the United States. (*Id*. ¶ 214). Müller came away from these discussions convinced that BLMIS's IA Business's "return stream was impossible to explain" unless BLMIS had been engaging in illegal activity. (*Id*. ¶ 212). He reported these concerns to Estenne in or around August 2002 and recommended that the ART Fund should no longer be invested in Square One and should not invest in any BLMIS feeder fund in the future. (*Id*. ¶ 216-18).

This was not the first time that Estenne and Square One had been warned about BLMIS. In the late 1990s, Peter Fletcher, an investment professional in Geneva, repeatedly warned Estenne that BLMIS was "a fraud." (*Id*. ¶ 219). Fletcher had vetted BLMIS and concluded that BLMIS "couldn't have done the trades" that it purported to have made "[b]ecause there wasn't the volume on the stock exchange." (*Id*. ¶ 224). Fletcher also suspected that BLMIS's customer assets weren't segregated and that BLMIS was doing something to "jack up" its reported performance. (*Id*. ¶¶ 223-24). On December 12, 2008, a day after BLMIS's fraud became public, Fletcher e-mailed Estenne: "[a]lways knew this is a fraud, is [*sic*] only taken 15 years[,]" to which Estenne replied: "Yes, patience is a virtue!" (*Id*. ¶ 226).

B. Square One's Independent Diligence into BLMIS around This Time Corroborated the Concerns That Müller and Fletcher Communicated to Square One

Square One's diligence into BLMIS around this time confirmed Müller's and Fletcher's concerns that BLMIS was not executing the SSC Strategy and, instead, was engaging in fraudulent activity.

1. The Estenne Studies Showed BLMIS Could Not Generate Its Purported Returns with the SSC Strategy

Beginning in mid-1999, Estenne and Partners Advisers, on Square One's behalf, tracked and analyzed BLMIS's performance as compared to the S&P 500 Index and compiled quantitative findings in a series of studies (the "**Estenne Studies**"). (Stmt. ¶ 179). The Estenne Studies revealed to Square One that BLMIS could not have achieved its purported returns using the SSC Strategy.

Square One understood that the SSC Strategy was designed to have "high correlation" with the S&P 100 and 500 indices, given that BLMIS purported to trade in a basket of stocks registered in the S&P 100. (*Id*. ¶¶ 161, 205). The Estenne Studies, however, demonstrated that there was little-to-no correlation between the S&P indices and the SSC Strategy's purported performance. (*Id*. ¶ 182). For example, the December 2002 Estenne Study uncovered that, during the bear market of the early 2000s, the S&P 500 reported negative returns 58% of the time whereas BLMIS reported negative returns only 2% of the time. (*Id*. ¶ 181). Other Estenne Studies confirmed that only 5% of Square One's returns could be explained by the gyrations of the S&P 500. (*Id*. ¶ 284). Square One noted in a contemporaneous report that it had been a "mystery" how BLMIS could "generate such consistent returns with such a simplistic strategy." (*Id*. ¶ 189).

As explained in Dr. Steve Pomerantz's unrebutted expert report,[4] the regression analyses in the Estenne Studies demonstrated that these consistently positive returns were not just a mystery, but, rather, were statistically impossible. Specifically, the Estenne Studies showed that, on average, BLMIS was generating a risk-adjusted return of 2.3% regardless of the performance of the stocks in which it was investing. (*Id*. ¶ 285). As Dr. Pomerantz explains, the level of confidence implied

[4] Square One did not submit any expert reports in this case, much less reports that attempted to rebut the conclusions and analysis of the Trustee's experts.

by this metric "is unattainable in the investment management industry" and amounted to "a red flag that Madoff was not executing the strategy he purported to implement, or indeed any strategy . . . the only reasonable explanation was fraud." (*Id*. ¶ 287).

The Estenne Studies also demonstrated that BLMIS was unlikely to be using a collar, which was a key feature of the SSC Strategy. Specifically, BLMIS purported to use a collar of put options to create a floor for the returns and call options to create a ceiling. (*Id*. ¶ 256). The point of this collar was to reduce volatility by limiting the downside during bear markets at the price of capping the upside during bull markets. (*Id*.). The expectation, therefore, was that BLMIS's largest gains should not have been as big as the largest gains in the S&P 500. (*Id*.). But the Estenne Studies demonstrated that the SSC Strategy consistently outperformed the S&P 500, even during the bull markets of the 1990s. (Stmt. ¶¶ 180-88). According to Dr. Pomerantz's expert testimony, these deviations from the SSC Strategy should have been an "alert factor" and "warning sign" to Square One about its investments in BLMIS. (*Id*. ¶ 266).

2. Other Red Flags about BLMIS's Operations

As of late 2002, Square One had identified other red flags that corroborated Müller's and Fletcher's concerns that BLMIS was engaging in illegal activities. One such red flag was BLMIS's lack of transparency into its operations. (*Id*. ¶¶ 169-78, 295). A panel that Estenne spoke on at the time discussed how "if a fund manager will not tell you what he is doing, you have to question what you are doing investing with him." (*Id*. ¶ 145). Yet he testified that he knew from the outset of Square One's relationship with BLMIS that Madoff would not answer questions concerning the operations at BLMIS and would terminate the investment relationship if pressed on this point. (*Id*. ¶ 165).

Square One also knew that BLMIS wanted to "keep a low profile" to prevent Square One's investors from conducting due diligence on BLMIS. (*Id*. ¶ 160). When Square One included

references to BLMIS in its 1999 offering memorandum, BLMIS admonished Estenne and ordered that Square One remove all such references immediately. (*Id*. ¶¶ 169-75). Estenne responded that, in his experience, he had "never been told" by another investment manager to do something like this, but Estenne obliged for the sake of appeasing BLMIS. (*Id*. ¶ 171). From that day on, Square One did not disclose BLMIS or Madoff on any of its offering documents. (*Id*. ¶ 175).

Square One also noted in diligence reports from the late 1990s and early 2000s "negative points" about BLMIS's operations. (*Id*. ¶ 178). For example, Square One noted that it was a "credit risk" that all the "assets are deposited at [BLMIS]" rather than in a third-party custodial account. (*Id*.). This setup violated Estenne's principles in his Chapter, which warned that it was a fraud risk to give the investment manager sole custody of the assets. (*Id*. ¶ 144). In Square One's June 2000 Investment Manager Information report, the following "negative points" about BLMIS are identified: "lack of independence in the [net asset value or 'NAV'] calculation; potential conflict of interest as Madoff is a broker, an investment adviser[] and a custodian; [and] dependent board of directors." (*Id*. ¶ 178). In Square One's May 2004 Manager Monitoring Report, Square One noted that there was a "lack of separation of functions as Madoff Investment Securities is its own broker, prime broke[r], custodian and administrator." (*Id*.).

C. Estenne Implements a "No Madoff" Policy at the ART Fund in Late 2002

In or around October 2022—approximately two months after Müller concluded his inquiry into BLMIS—Estenne implemented a "No Madoff" policy at the ART Fund. (*Id*. ¶ 218). As part of this policy, Partners Advisers ensured there were no BLMIS-related investments in the ART Fund's portfolio. (*Id*. ¶ 229). Ensuring that the ART Fund did not have exposure to BLMIS was important to Estenne because he personally invested a portion of his wealth in the ART Fund. (*Id*.

¶ 217). Additionally, Partners Advisers was Estenne's corporate brand, and he wanted to shield it from potential harm.

At that time, the only BLMIS investment in ART Fund's portfolio was Square One, one of its more profitable investments. (*Id*. ¶ 228). In October 2002, Partners Advisers removed Square One from the ART Fund's portfolio for the stated reason that "there [were] important conflicts of interests [with BLMIS], as the manager is his own custodian and valuates the portfolio himself. To avoid any other ***blow ups***, the position [in Square One] has been redeemed." (*Id*. ¶ 230) (emphasis added).

In furtherance of the "No Madoff" policy, Partners Advisers refused to add another BLMIS investment in the ART Fund's portfolio. In 2004, Partners Advisers replied to a questionnaire from a potential investor that the ART Fund "is not and never will be invested in Madoff." (Stmt. ¶ 236). In 2006, when asked if Partners Advisers would consider adding a BLMIS feeder fund to the ART Fund's portfolio, Müller wrote: "Absolutely not!" (*Id*. ¶ 237). And after the Filing Date, when BLMIS's fraud was exposed to the public, a Partners Advisers employee told colleagues that Partners Advisers and the ART Fund did not have exposure to that fraud because "Jerome [Müller] consistently refuted any proposal to invest in Madoff. He said it was too good to be true." (*Id*. ¶ 238). Due to the "No Madoff" policy, neither Estenne nor his family had direct or indirect investments in BLMIS when the fraud became public on the Filing Date.

D. Estenne Warned Close Friends and Colleagues about Investing in BLMIS

After implementing the "No Madoff" policy with respect to the ART Fund, Estenne began warning friends and colleagues about investing in BLMIS. For example, in October 2008, Estenne warned Catherine Lemaitre (one of his close friends) about the following "risks" with investing in BLMIS:

- *Investment professionals do not understand how with such a simple strategy, such a stable track record can be generated,*
- *No separation between asset management, brokerage, custodian and administration functions,*
- *Asset size unknown but in theory sufficient to significantly influence the equity derivatives market,*
- *Potential risk of front running?*
- *No access to management teams or on-site due diligence capacity to fully understand the strategy.*

(*Id*. ¶ 241). Two months later, after BLMIS's fraud became public, Lemaitre replied to Estenne: "we can say that you had warned me . . . ." (*Id*. ¶ 242).

In May 2003, Estenne communicated similar concerns to another colleague, Theo Nijssen. (*Id*. ¶ 239). Nijssen was scheduled to meet with BLMIS on behalf of another firm and requested that Estenne provide him with questions to address concerns about BLMIS that were circulating in the investment community. (*Id*.). Estenne recommended that Nijssen ask the following questions to Madoff:

- *Could you confirm to me that the strategy you implement is exclusively a split strike convergence strategy?*
- *Professional money managers specialized in index and volatility trading do not understand how you can produce such a regular and smooth performance. Could you explain to me what are your competitive advantages which would explain this regularity?*
- *How can you assure us that there is a Chinese wall between your asset management and market making activities?*
- *What is the structure of depositaries used i.e. do you use any sub-custodian and who ultimately holds the assets that are deposited with you?*
- *What is the best answer you could give to someone who is uncomfortable about the non-segregation of functions between, the manager, the market-maker, the administrator and the depositary?*

(*Id*.).

Also in 2003, Estenne warned Carlo Luigi Grabau (another colleague) about investing in BLMIS. Estenne sent Grabau an e-mail that included the MAR Hedge and Barrons articles from 2001 that reported numerous red flags concerning BLMIS's IA Business. (*Id*. ¶ 239).

E. Square One Did Not Terminate Its Investment Relationship with BLMIS

As noted above, by 2002 Estenne was on notice of red flags suggesting BLMIS was a fraud and, on account of those red flags, directed the ART Fund to terminate its investment relationship with BLMIS. Estenne, however, never directed Square One to terminate its investment relationship with BLMIS.

Nor did Estenne direct Square One to inquire further into the red flags suggesting fraud at BLMIS. In Estenne's Chapter, Estenne instructed investors to look into red flags by, among other things, confronting the investment manager (ideally in an in-person meeting) and the other service providers (*e.g.*, auditors) who have oversight over the investment. (*Id*. ¶ 143). Estenne, however, never directed Square One to confront BLMIS because he believed that investing in BLMIS was "was a 'take it or leave it' situation" where BLMIS would have terminated the investment if it believed that Square One was asking too many questions. (*Id*. ¶ 166). Square One took several in-person meetings at BLMIS during the Relevant Period but, in those meetings, it did not raise its concerns about the IA Business. (*Id*. ¶ 159, 178). Estenne tried to justify this inaction by testifying that it was his "understanding . . . that it was not possible to ask many questions about the strategy" to BLMIS. (*Id*. ¶ 167). Estenne also attempted to rationalize his inaction by claiming that Square One's investors had considered it "a favor to be investors into the strategy, which makes it difficult [for Square One] to inquire further about the details of the strategy." (*Id*. ¶ 168).

Instead of redeeming the investment or confronting BLMIS, Estenne continued soliciting investments from institutional investors into Square One. (*Id*. ¶ 243). These solicitations

represented that, *inter alia*, Square One "is the kind of fund that should be in every fund of funds" and BLMIS's SSC Strategy "is almost risk free investing." (*Id*. ¶ 245). Those solicitations did not disclose the myriad concerns about BLMIS that Estenne was sharing privately with his close friends and colleagues. (*Id*. ¶ 244). Estenne testified that he did not think it was necessary to share his concerns with Square One's investors because, according to Estenne, those investors "were [already] aware of the positives and the negatives" about BLMIS. (*Id*.). When pressed for evidence supporting this assertion, Square One provided none.

Over the life of Square One's investment with BLMIS, Estenne, via SAM, took between 1.25% and 2% in management fees from the investments that Square One solicited. (*Id*. ¶ 246). Estenne personally received millions of dollars in fees from those investments. (*Id*.).

ARGUMENT

I. STANDARD OF REVIEW

A court should grant summary judgment when there is no genuine issue of material fact to be tried and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). "If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must [then] 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.'" *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 84 (2d Cir. 2004) (quoting *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993)). To avoid summary judgment, the nonmovant must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324 (internal quotation marks omitted). "[T]he nonmoving party . . . may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." *Ying Jing*

Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993). The nonmoving party may not oppose summary judgment "on the basis of an unreasonable view of the facts." *Berk v. St. Vincent's Hosp. and Med. Ctr.*, 380 F. Supp. 2d 334, 342 (S.D.N.Y. 2005) (citation omitted).

II. THE TRUSTEE HAS PROVEN HIS PRIMA FACIE CASE UNDER 11 U.S.C. § 548(a)(1)(A)

Pursuant to SIPA § 78fff-2(c)(3), the Trustee may recover transfers by BLMIS whenever customer property is insufficient to pay customer claims. To date, the Trustee has recovered around $14.75 billion of the nearly $20 billion that the BLMIS estate owes to BLMIS's former customers.[5] Because customer property is insufficient to pay all of the outstanding customer claims, the Trustee can recover certain transfers that BLMIS made to customers prior to the Filing Date.

The Trustee brought this action, in part, to avoid and recover the $6,410,000 that BLMIS transferred to Square One in the two-year period before the Filing Date ("**Two-Year Transfers**"). To avoid the Two-Year Transfers under 11. U.S.C. § 548(a)(1)(A), the Trustee has to establish a *prima facie* case that: (i) BLMIS transferred those Transfers to Square One; (ii) within two years of the Filing Date; (iii) with "actual intent to hinder, delay, or defraud" the creditors of BLMIS. *See Adelphia Recovery Tr. v. Bank of Am., N.A.*, Nos. 05 Civ. 9050 (LMM), 03 MDL 1529, 2011 WL 1419617, at *2 (S.D.N.Y. Apr. 7, 2011), *aff'd*, 748 F.3d 110 (2d Cir. 2014). Once established, 11 U.S.C. § 550(a) authorizes the Trustee to recover the Two-Year Transfers unless Square One can prove an affirmative defense. *See In re Bernard L. Madoff Inv. Sec.*, 12 F.4th 171, 181 (2d Cir. Aug. 30, 2021) ("***Citibank***").

[5] *See SIPC v. BLMIS (In re BLMIS)*, Case No. 08-01789 (LGB), ECF No. 24848 at 1 (Bankr. S.D.N.Y. Apr. 30, 2025).

A. BLMIS Transferred $6,410,000 to Square One Two Years Before the Filing Date

There is no dispute that Square One received the Two-Year Transfers during the two-year period immediately before the Filing Date. Square One maintained investment account 1FR048 at BLMIS. (Stmt. ¶ 108). BLMIS's documents show that, between December 11, 2006 and December 11, 2008, Square One withdrew $6,410,000 from that account. (Stmt. ¶ 110). This fact is also established by the unrebutted expert report of Lisa M. Collura. (*Id*. ¶¶ 113-18). Moreover, in its Amended Answer, Square One "admit[ted]" that it received the Two-Year Transfers from BLMIS during this period. (*Id*. ¶ 112). The Trustee has therefore established this element of his *prima facie* case under 11 U.S.C. § 548(a)(1)(A).

B. BLMIS Made the Two-Year Transfers with Actual Intent to Hinder, Delay, or Defraud Its Creditors

The Trustee has established that BLMIS made the Two-Year Transfers with an actual intent to hinder, delay, or defraud BLMIS's creditors. *See* 11 U.S.C. § 548(a)(1)(A). Square One admits that BLMIS made the Two-Year Transfers while BLMIS ran a Ponzi scheme. (Stmt. ¶ 112). This admission is dispositive because when a debtor runs a Ponzi scheme, any transfers it made during that scheme are presumed to have been made with an intent to hinder, delay, or defraud the debtor's creditors as a matter of law. *See e.g.*, *In re BLMIS, LLC*, 440 B.R. 243, 255 (Bankr. S.D.N.Y. 2010) ("It is now well recognized that the existence of a Ponzi scheme establishes that transfers were made with the intent to hinder, delay and defraud creditors."); *Picard v. Cohmad Sec. Corp.*, 454 B.R. 317, 330 (Bankr. S.D.N.Y. 2011) ("[T]he fraudulent intent on the part of the debtor/transferor . . . is established as a matter of law by virtue of the 'Ponzi scheme presumption'"); *In re Agric. Rsch. & Tech. Grp., Inc.*, 916 F.2d 528, 535 (9th Cir. 1990) ("[T]he debtor's actual intent to hinder, delay or defraud its creditors may be inferred from the mere existence of a Ponzi scheme . . ."). This presumption exists because, in a Ponzi scheme, the failure to honor an investor's withdrawal

request "would promptly have resulted in demand, investigation, the filing of a claim and disclosure of the fraud." *In re Bayou Grp., LLC*, 396 B.R. 810, 843 (Bankr. S.D.N.Y. 2008). Thus, every redemption payment "*in and of itself* constituted an intentional misrepresentation of fact" of the investor's rights to their falsely inflated account statement and "an integral and essential part" of the fraud. *Id.* (emphasis in original).

To be sure, the evidence that BLMIS's IA Business operated as a Ponzi scheme in the two-year period immediately before the Filing Date is manifest. BLMIS's executives and employees admitted to criminal authorities that the IA Business had been operating as a Ponzi scheme well before the two-year period before the Filing Date. Madoff and DiPascali claimed the Ponzi scheme began in the early 1990s. (Stmt. ¶¶ 90-99). Kugel admitted that BLMIS was falsifying trading records (a key component of the Ponzi scheme) as far back as the early 1970s. (*Id*. ¶¶ 100-01). And other BLMIS employees admitted that the Ponzi scheme had been in place for decades before the Filing Date. (*Id*. ¶¶ 102-06). Their testimony is supported by contemporaneous documents regarding the IA Business. In his expert report, Dubinsky analyzed these documents and concluded that they establish the IA Business was falsifying trading records and customer statements since the 1970s. (*Id*. ¶¶ 8-21). Similarly, Collura analyzed BLMIS's bank records in her expert report and concluded that they confirm that BLMIS commingled the IA Business's customer funds in a single bank account for decades. (*Id*. ¶ 70).

This Court and the District Court have previously considered this evidence in other related adversary proceedings and concluded the Trustee has met his burden of proof as to this element. *See e.g.*, *Sec. Inv. Prot. Corp. v. BLMIS*, 603 B.R. 682, 693 (Bankr. S.D.N.Y. 2019) (holding that "there is no genuine disputed issue of fact that BLMIS was a Ponzi scheme" and that it made transfers to its customers "in furtherance of the Ponzi scheme within two years of the Filing Date");

Picard v. Katz, 462 B.R. 447, 453 and n.5 (S.D.N.Y. 2011) (holding that "it is patent that all of Madoff Securities' transfers during the two-year period were made with actual intent to defraud present and future creditors"); *Picard v. Chais*, 445 B.R. 206, 220 (Bankr. S.D.N.Y. 2011) ("The breadth and notoriety of the Madoff Ponzi scheme leave no basis for disputing the application of the Ponzi scheme presumption, particularly in light of Madoff's criminal admission.").

Accordingly, the Trustee has met his burden here of demonstrating that BLMIS made the Two-Year Transfers in furtherance of a Ponzi scheme and with an actual intent to hinder, defraud, and delay its creditors. The Trustee has, therefore, established his *prima facie* case against Square One for the avoidance and recovery of the Two-Year Transfers.

III. SQUARE ONE'S AFFIRMATIVE DEFENSES CAN BE DETERMINED AS A MATTER OF LAW

The only remaining issue is whether Square One has established a triable issue of fact with respect to its affirmative defenses. As set forth in its Amended Answer, Square One's defenses are that: (i) the Amended Complaint fails to state a claim upon which relief could be granted; (ii) the Trustee's claims are barred to the extent they have been dismissed by the Court; (iii) Square One received the Two-Year Transfers in good faith and for value; and (iv) the Trustee's claims are barred by the safe harbor under 11 U.S.C. § 546(e). (Am. Answer at 62-65, ECF No. 240).

Square One has not met, and cannot meet, its burden of establishing there is a genuine issue for trial as to any of its defenses. *See Celotex Corp.*, 477 U.S. at 324 (It is the non-movant's burden to "go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial." (internal quotation marks omitted)).

Perhaps for this reason, Square One recently filed a statement "that it will no longer actively defend the claim . . . in this adversary proceeding" and that it "does not intend, among other things, . . . to file any opposition to any motions that Plaintiff might make, to present or cross examine

witnesses, to make any arguments before the Court, or to appear at trial." (Square One Statement of Determination to Cease Actively Defending Adversary Proceeding, ECF No. 318). Square One's decision to not defend this case underscores its failure to create a triable issue of fact with respect to its affirmative defenses. For these reasons and those below, the Court should grant the Trustee's motion for summary judgment in its entirety. *See, e.g.*, *Orient Overseas Container Line Ltd. v. Crystal Cove Seafood Corp.*, No. 10 Civ. 3166 (PGG), 2011 WL 4444527, at *2 (S.D.N.Y. Sept. 26, 2011) (stating that where a nonmoving party bears the burden at trial, the moving party need only point to an absence in support of an essential element of the nonmoving party's claim for summary judgment to be granted in its favor).

A. There Is No Genuine Triable Issue as to Square One's Good Faith Defense

Square One bears the burden under 11 U.S.C. § 548(c) to prove that it took the Two-Year Transfers in good faith. *See Citibank*, 12 F.4th at 196. To meet this burden, Square One must demonstrate it was not on "inquiry notice" of BLMIS's insolvency or of BLMIS's fraudulent purpose behind the Two-Year Transfers. *Id.* at 186-91. To determine if Square One has created a genuine triable issue under this defense, this Court must assess whether Square One has established that there is a material factual dispute with respect to whether: (i) Square One knew of indicia of fraud or insolvency at BLMIS; (ii) those indicia would have led a reasonable investor in Square One's shoes to conduct a further inquiry; and (iii) a diligent inquiry by Square One would have discovered the fraudulent purpose of the transfer or that BLMIS was insolvent. *Id.* at 191-92.

There is no genuine issue of material fact with respect to any of the three inquiries underlying the inquiry notice test.

1. There Is No Genuine Dispute that Square One Knew of Indicia that BLMIS Was a Fraud

The evidence establishes Square One was aware of red flags that BLMIS was a fraud as early as 2002. This component of the inquiry notice standard is subjective in nature; what matters is whether Square One actually knew of red flags about BLMIS. *Citibank*, 12 F.4th at 191-92. Dr. Pomerantz explains in his report that, in the investment industry, a "red flag" is "information that raises doubt or concern regarding an investment opportunity" and can include: (i) any inconsistencies with industry customs and practices; (ii) any indications that the advisor is not executing the strategy; (iii) any inconsistencies with the stated strategy; (iv) any potential changes in the advisor and/or his organization, investment process, or philosophy; (v) any situations that create an opportunity for fraud; (vi) any indicia of fraud or changes to the risk profile of the invested assets; and (vii) any impossibilities where the only reasonable explanation is fraud." (Stmt. ¶ 251).

It is not a defense under the inquiry notice standard that Square One did not understand or appreciate the red flags. *See, e.g.*, *In re Sentinel Mgmt. Grp. Inc.*, 809 F.3d 958, 962 (7th Cir. 2016) (holding that a recipient can be on inquiry notice despite its failure to appreciate the suspicious nature of the information due to its "obtuseness"). Nor is it a defense, as Square One asserts in its Amended Answer, that the red flag was something other than "BLMIS was not trading securities or was a . . . Ponzi scheme." (Am. Answer at 63, ECF No. 240). Courts routinely hold that an investor is on inquiry notice of a Ponzi scheme so long as the red flags indicated that the investment could be fraudulent in some manner. *See, e.g.*, *In re Manhattan Inv. Fund*, 397 B.R. 1, 5-6, 23-24 (S.D.N.Y. 2007) (holding that prime broker of fund was on inquiry notice of a Ponzi scheme because it became aware that the fund's reported performance did not match the prime broker's records); *In re Bayou Grp.*, *LLC*, No. 09 Civ. 02340(PGG), 2012 WL 386275, at *3 (S.D.N.Y.

Feb. 6, 2012) (investors were on inquiry notice of a Ponzi scheme where investors were aware of concerns that had been raised with respect to the fund, including the fund's refusal to address such concerns); *In re Goldberg*, 623 B.R. 225, 237-38 (Bankr. D. Conn. 2020) (holding investor was on inquiry notice of a Ponzi scheme where others warned him investment may not be legitimate and the terms of the investment were outside of standard industry practice).

The evidence here demonstrates that Square One and its agents knew (and appreciated) the numerous indicia of BLMIS's fraud several years before the Two-Year Transfers, including but not limited to: (i) warnings from a trusted colleague that BLMIS was a "fraud"; (ii) warnings from trusted colleagues that BLMIS was engaged in illegal activity, such as frontrunning, jacking up returns, and not segregating assets; (iii) warnings from trusted colleagues that investing in BLMIS was like "doping during the Tour de France"; (iv) evidence that BLMIS was not trading in accordance with the SSC Strategy; (v) assertions by Square One's agents that BLMIS's returns were "too good to be true"; (vi) assertions by Square One's agents that BLMIS would not allow any diligence questions; (vii) assertions by Square One's agents that a BLMIS investment is likely to "blow up" (*i.e.*, reach a value of zero); (viii) quantitative studies (*i.e.*, the Estenne Studies) that confirmed that BLMIS's performance had no correlation to the market; (ix) qualitative studies that identified several "negative points" about BLMIS; and (x) irregularities in the documents created by BLMIS.

Estenne and Partners Advisers uncovered certain of these red flags while performing due diligence on behalf of the ART Fund in 2002. Because Estenne served as Square One's director at the same time, his knowledge of these red flags can be imputed to Square One. *See Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 255 (2d Cir. 1995) (knowledge of an officer or director is imputable to the company). The same is true for Partners Advisers, which at all times advised

Square One with respect to multiple matters, including investment due diligence. *See, e.g.*, *Picard v. Merkin (In re BLMIS)*, 515 B.R. 117, 146 (Bankr. S.D.N.Y. 2014) ("Under well-established principles of agency law, 'the acts of agents, and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to their principals.'") (citation omitted). Because "the mind of the agent cannot be divided into compartments," Square One "should be bound by" what Estenne and Partners Advisers learned when investigating BLMIS on behalf of the ART Fund. Restatement (Second) of Agency § 276 (1958); *see also Makofsky v. Ultra Dynamics Corp.*, 383 F. Supp. 631, 640 (S.D.N.Y. 1974) (holding board members' knowledge about one corporation was "imputed . . . as a matter of law" to second corporation for which they served as agents).

a. Square One Was Aware of Facts Indicating that BLMIS Was a Fraudulent Operation

One of Partners Advisers' employees, Müller, testified at his deposition that he vetted BLMIS's IA Business in 2002 and came away from that diligence review with the following conclusions: (i) "there was no way to explain Madoff's return[s]" under the investment strategy that BLMIS purported to be executing, *i.e.*, the SSC Strategy (Stmt. ¶ 204); (ii) BLMIS's purported return had little-to-no correlation with the market, which ran contrary to what the SSC Strategy purported to do (*Id*. ¶ 205).; (iii) BLMIS appeared to have been randomly timing the market with near-perfect precision, which concerned Müller because he understood that "[m]arket timing doesn't work" because it would have been "impossible to forecast where the market is going, repeatedly" (*Id*. ¶ 202); and (iv) what BLMIS was selling to its investors was "too good to be true" (*Id*. ¶¶ 213, 238).

Müller further testified that he tested these conclusions by consulting professionals in Geneva that he trusted and who had previously vetted BLMIS. (*Id*. ¶¶ 206-08). Those professionals

told Müller that they, too, could not reconcile BLMIS's returns with the SSC Strategy and that the only way they could explain BLMIS's returns is by assuming that BLMIS was engaging in illegal activities, such as front-running or some other kind of fraud. (*Id*.). Müller testified the overall consensus from those discussions was that investing in BLMIS was like doping during the Tour de France because the investors should know that BLMIS was doing something illegal to generate the returns that it purported to generate at that time. (*Id*. ¶ 210).

Müller also testified that he reported all of these concerns to Estenne (and, by extension, to Square One) in or around 2002. (*Id*. ¶ 216). At his deposition, Estenne admitted to being aware of Müller's negative diligence report on BLMIS. (*Id*. ¶¶ 217-18). He also admitted that this was not the first time someone warned him that BLMIS could be engaging in illegal activity. Specifically, Estenne admitted that for years, one of his trusted colleagues, Fletcher, warned him repeatedly that BLMIS was "a fraud." (*Id*. ¶¶ 219). At his deposition, Fletcher confirmed this fact and testified that he believed at the time of his discussions with Estenne that the assets weren't segregated at BLMIS and that BLMIS was doing something to "jack up" its performance. (*Id*. ¶ 223). When Fletcher was proven right in December 2008, he gloated to Estenne: "[a]lways knew this is a fraud, is [*sic*] only taken 15 years." (*Id*. ¶ 226).

b. Estenne Implemented a "No Madoff" Policy at Partners Advisers to Protect His and His Family's Investments from BLMIS

Estenne and Partners Advisers were so concerned that BLMIS was a fraud that they created and implemented a "No Madoff" policy for the ART Fund, the investment vehicle through which they invested their money and their customers' money. (*Id*. ¶ 230-34, 235-36). Müller testified that under this policy, the ART Fund could never invest in BLMIS or a BLMIS feeder fund, without exception. (*Id*. ¶ 235). Consequently, in late 2002, Partners Advisers removed Square One from the ART Fund's investment portfolio, despite it being one of its best-performing investments. (*Id*.

¶¶ 228-30). Partners Advisers' reason for this withdrawal was that there were "important conflicts of interests [at BLMIS], as the manager is his own custodian and valuates the portfolio himself" and that removing exposure to BLMIS was important to avoid a "blow up[]" in the ART Fund portfolio. (*Id*. ¶ 230).

As part of this "No Madoff" policy, Partners Advisers reported to investors that it "is not and never will be invested in Madoff" and that it would "[a]bsolutely not!" reconsider this position. (*Id*. ¶ 236-37). Due to this policy, when BLMIS's fraud became public in December 2008, Partners Advisers told its investors and colleagues that it had no exposure to BLMIS's fraud because it had "consistently refuted any proposal to invest in Madoff" on account that "it was too good to be true" (*Id*. ¶ 238).

In addition to protecting his and his family's wealth and his reputation from BLMIS by implementing the No Madoff policy at Partners Advisers, Estenne also warned certain of his close colleagues and friends about the significant risks in investing with BLMIS. For example, in late 2008 Estenne "warned" Lemaitre that he could not reconcile BLMIS's returns with the SSC Strategy and that one possible explanation could be that BLMIS was "front running" the markets – a type of investment fraud. (*Id*. ¶ 241). Estenne also implied to Lemaitre that BLMIS could be making up the returns altogether, as indicated by his warning that if BLMIS were truly investing the assets under management there should have been "significant[] influence [in] the equity derivatives market," which had not been reported. (*Id*.). Estenne also warned Lemaitre that conditions for fraud existed because the IA Business at BLMIS had "[n]o separation between asset management, brokerage, custodian, and administration functions," and "[n]o access to management teams or on-site due diligence capacity to fully understand the strategy." (*Id*.). Estenne noted similar concerns in an e-mail to Nijssen in 2003, in which Estenne wrote that

"money managers specialized in index and volatility trading do not understand how [BLMIS] can produce such a regular and smooth performance" and flagged the fact that BLMIS appears to be the custodian of the assets he is trading. (*Id*. ¶ 240).

c. Square One's Internal Diligence Uncovered Indicia of Fraud at BLMIS

Throughout the Relevant Period, Square One (via Estenne and Partners Advisers) drafted quantitative analyses of BLMIS's purported performance (*i.e.*, the "Estenne Studies") that studied how BLMIS's performance compared to the S&P 500. (*Id*. ¶¶ 179-88). Square One understood from its meetings with BLMIS that the SSC Strategy had to correlate strongly with the S&P 500 because BLMIS traded in stocks from the S&P 100, which are included in the S&P 500 Index. (*Id*. ¶ 161). The Estenne Studies, however, showed there was only about a 5% correlation between BLMIS's purported returns and the S&P 500. (*Id*. ¶ 284). These Studies also confirmed that BLMIS was not implementing the options collar (puts and calls) that was the defining feature of the SSC Strategy. (*Id*. ¶¶ 23, 268). Further, the Estenne Studies demonstrated that BLMIS obtained the same returns regardless of the state of the markets, which was antithetical to the objective behind the SSC Strategy. (*Id*. ¶¶ 179-88).

Square One's internal diligence reports also memorialized "negative points" about BLMIS. These "negative points" included that BLMIS was a "credit risk" because the invested "assets are deposited at" BLMIS rather than with a third-party custodian. (*Id*. ¶ 178). Other negative points were: (i) "lack of independence in the NAV calculation"; (ii) "[p]otential conflicts of interest as Madoff is a broker, an investment adviser and a custodian"; and (iii) "[d]ependent board of directors." (*Id*.). Square One's internal files also flagged BLMIS's instruction that Square One had to remove all references to BLMIS or Madoff from its offering materials – an instruction that caused Estenne to remark to BLMIS that he had "never been told" to do anything like that by any

other investment manager. (*Id*. ¶ 171). Estenne also testified at his deposition that Square One understood that it was not allowed to ask BLMIS any diligence questions and that doing so would likely result in BLMIS terminating the investment relationship. (*Id*. ¶ 165).

Last, but not least, Square One was also aware of numerous irregularities through its review of the trade confirmations and other BLMIS account statements. These irregularities are detailed at length in Pomerantz's expert report and include: (i) BLMIS's reported option trading volume widely exceeded daily volume on the options exchanges; (ii) trades were reportedly made at prices outside the price ranges for the underlying securities; (iii) BLMIS's failure to implement an options collar; (iv) atypical frequency of dividends from the U.S. Treasuries in which BLMIS purported to invest; (v) lack of scalability of the SSC Strategy; and (vi) incomplete trade confirmations and statements. (*Id*. ¶¶ 247-91).

2. There Is No Genuine Dispute that a Reasonable Investor in Square One's Shoes Would Have Conducted a Diligent Inquiry

The next question is the objective component of the inquiry notice standard that turns on whether a person with the same level of sophistication as Square One would have undertaken a diligent inquiry after becoming aware of the same information Square One knew about BLMIS. *See Citibank*, 12 F.4th. at 191 (when a transferee "is aware of suspicious facts that would lead a reasonable person in the transferee's position to inquire further," a duty to conduct a diligent investigation arises); *In re Bayou Grp.*, 439 B.R. 284, 310-13 (S.D.N.Y. 2010).

Institutional fund investors, like Square One, are presumed to be sophisticated enough to identify red flags of fraud in their investments. *See Manhattan Inv. Fund*, 397 B.R. at 23 (holding that as a sophisticated party, prime broker should have appreciated red flags). This sophistication is indisputable here, particularly given who ran Square One, *i.e.*, Estenne and Partners Advisers. As noted earlier, Estenne is a self-proclaimed expert at identifying investment fraud and even

authored a book chapter advising investors how to prevent investing in a fraud. (Stmt. ¶¶ 141-43). Estenne's firm—Partners Advisers—was at all relevant times highly regarded for its investment due diligence and won the title of "Most Trusted Investment Management Company of the Year" in 2014. (*Id*. ¶ 141).

As Dr. Pomerantz explains, highly sophisticated investors like Square One have a general obligation to monitor investments because the primary goal of any investment should be "to maximize reward while simultaneously limiting risk," which can only be done by "perform[ing] due diligence." (*Id*. ¶ 249). Similarly, in his Chapter, Estenne teaches that it is "paramount" that investors conduct both pre-investment and ongoing due diligence on investment advisers "to identify which risks are taken by [them] in order to generate their performance, and how these risks are measured and managed." (*Id*. ¶ 144). Further, Estenne teaches that it is essential for investors to question investment advisers to get "a vote of confidence on the[ir] ethics." (*Id*.). As Dr. Pomerantz explains, if diligence uncovers a red flag, it is industry custom for sophisticated fund investors is to conduct additional diligence to confirm or debunk the suspicion raised by the red flag. (*Id*. ¶ 252). If the only reasonable explanation is fraud, the custom is to end the inquiry and refuse to invest:

> When a red flag is an indicia of fraud or creates an opportunity for fraud, it is industry custom and practice for the fund manager to perform additional due diligence to ferret out whether the indicia of or opportunity for fraud leads to another red flag. Similarly, when red flags are uncovered that indicate the advisor is not executing or is operating inconsistent with the stated strategy, it is industry custom and practice to perform additional due diligence to determine whether the information leads to another red flag. If due diligence identifies a significant red flag where the only reasonable explanation is fraud, a fund manager would typically stop the due diligence process and not invest or redeem their investments. It is not necessary to perform each and every due diligence activity if a single activity reveals a significant red flag where the only reasonable explanation is fraud.

(*Id*. ¶ 253).

Square One does not dispute any of the foregoing. Instead, Square One's position (as stated in its Amended Answer) is that no reasonable person in its shoes would have needed to conduct a further inquiry into BLMIS because Square One was not aware of red flags suggesting that BLMIS was a "fraud" or a "Ponzi scheme." (Am. Answer at 62-65, ECF No. 240). To be sure, Square One has not offered any evidence to support this assertion, and therefore, it is insufficient to create a genuine triable issue of fact. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008) ("A party opposing summary judgment does not show the existence of a genuine issue of fact to be tried merely by making assertions that are conclusory.").

In any event, Square One's assertion that it was not aware of red flags was contradicted by Estenne himself during discovery. *See, e.g.*, *Berk*, 380 F. Supp. 2d at 342 (nonmoving party may not oppose summary judgment "on the basis of an unreasonable view of the facts" (citation omitted)). For example, Estenne testified at his deposition that, in the 1990s and early 2000s, Fletcher repeatedly warned him (and by extension, Square One) that BLMIS was a "fraud." (Stmt. ¶¶ 219). In particular, Fletcher warned Estenne of red flags that suggested BLMIS was a Ponzi scheme, such as Fletcher's beliefs that BLMIS's assets weren't segregated and that BLMIS was "jack[ing] up" its purported performance. (*Id*. ¶ 223). Estenne was also warned by Müller in mid-2002 that: (i) BLMIS was not conducting the SSC Strategy; (ii) it was impossible to reconcile BLMIS's investment returns; (iii) BLMIS's returns were "too good to be true" and could only be explained if BLMIS was engaging in illegal activity, such as "front running"; (iv) investing with BLMIS was like doping during the Tour de France; and (v) the ART Fund's investment in Square One should be removed to prevent a "blow up" in the ART Fund's portfolio because of "important conflicts of interests [with BLMIS], as [Madoff] is his own custodian and valuates the portfolio himself. (*Id*. ¶¶ 204, 212, 215, 210, 230). Courts have held that receiving warnings that an

investment may be fraudulent triggers a duty to investigate under the inquiry notice standard. *See, e.g.*, *Bayou*, 2012 WL 386275, at *3 (finding that inquiry notice was triggered where investor was warned that investment may not be legitimate); *Goldberg*, 623 B.R. at 238 (same); *In re Bressman*, 327 F.3d 229, 236 (3rd Cir. 2003) ("If a transferee possesses knowledge of facts that suggest a transfer may be fraudulent, and further inquiry by the transferee would reveal facts sufficient to alert him that the property is recoverable, he cannot sit on his heels, thereby preventing a finding that he has knowledge.").

Beyond that, Square One's internal diligence documents reflect myriad concerns that it had with respect to BLMIS. For example, its Estenne Studies confirmed that BLMIS was not executing the strategy it purported to be executing, which in and of itself should have been an "alert factor" and "warning sign" according to Estenne's contemporaneous teachings. (Stmt. ¶ 266). The Estenne Studies also confirmed that BLMIS was reporting the same performance regardless of the market conditions at a level of confidence that, according to Dr. Pomerantz, is "unattainable in the investment management industry" and for which "the only reasonable explanation was fraud." (*Id*. ¶ 287). In other diligence documents, Square One noted several "negative points" about BLMIS, including that: (i) there were irreconcilable conflicts of interest because BLMIS was its own broker, manager, and custodian; (ii) there was no evidence that BLMIS was conducting billions of dollars in options trades, as BLMIS purported it was doing; and (iii) BLMIS did not allow diligence questions. (*Id*. ¶ 177). Courts have held in other avoidance actions that these types of red flags are sufficient to trigger the duty of further investigation. *See Bayou*, 2012 WL 386275, at *3 (investors were aware of inconsistencies and potential inaccuracies in reported returns and the manager did not allow questions); *Berman*, 623 B.R. at 230, 237-38 (returns were inexplicably consistent regardless of market); *In re Diamond Fin. Co., Inc.*, 658 B.R. 748, 777-78 (E.D.N.Y. 2024)

(irregularities with the operations of the manager); *In re M & L Bus. Mach. Co., Inc.*, 84 F.3d 1330, 1338 (10th Cir. 1996) (inexplicably high rates of return).

Square One's assertion that it was not on notice of any red flags that would have triggered an investigation is further refuted by the undisputed fact that ***the ART Fund conducted further inquiries into BLMIS in 2002 when it became aware of the same indicia of fraud***. At that time, the ART Fund, which invested in BLMIS indirectly through Square One, had become concerned that BLMIS was posting consistently positive returns given that it was a bear market and BLMIS's purported strategy was supposed to correlate closely with the market's performance. (Stmt. ¶¶ 197-98). The ART Fund's investment adviser, Partners Advisers, conducted a further inquiry into BLMIS, resulting in Müller vetting BLMIS feeder funds and conferring with trusted colleagues who had also vetted BLMIS. (*Id*. ¶¶ 199-215). After further inquiry, Partners Advisers reported that BLMIS's returns were "too good to be true" and the lack of access to BLMIS as well as the conflicts of interest with BLMIS's operation meant that the investment in Square One could "blow up." (*Id*. ¶¶ 213, 230). Because of these red flags, the ART Fund made the decision to divest its investment in Square One and implemented a "No Madoff" policy where it would never invest in any BLMIS feeder fund and summarily rejected invitations to invest directly or indirectly in BLMIS. (Stmt. ¶ 235-37). Accordingly, it strains credulity for Square One to contend that no reasonable person would have investigated when its own director (Estenne) and manager (Partners Advisers) did exactly that when acting for the ART Fund and based on the same indicia of fraud that Square One knew (through Estenne and Partners Advisers).

Square One did not redeem its investment in BLMIS, despite being aware of the same indicia of fraud and being run by the same investment advisers (Estenne and Partners Advisers) as the ART Fund. Estenne made millions of dollars in management fees from Square One's investors

because BLMIS did not take any cut of the management fees as a method of inducing investments into the Ponzi scheme. (*Id*. ¶ 311). So while Estenne was willing to protect his professional brand (Partners Advisers) and his and his family's investments in the ART Fund from BLMIS, he continued to maintain Square One's investment with BLMIS because he was not willing to walk away from the significant fees. As this Court has already held, this behavior "implies that Estenne questioned the bona fides of BLMIS's trades and its financial success" and that, by extension, Square One suspected BLMIS to be a fraud. *See* Tr. of May 29, 2019 Mot. to Dismiss Hrg. at 42:16-43:11, ECF No. 181.

Accordingly, there is no genuine dispute that a reasonable person in Square One's shoes would have conducted a diligent inquiry into BLMIS given what Square One knew as late as 2002.

3. There Is No Genuine Dispute that Square One Did Not Conduct a Diligent Inquiry into BLMIS

The third and final component of the inquiry notice standard is whether there is a genuine issue of triable fact as to whether Square One conducted a diligent inquiry upon becoming aware of red flags indicating BLMIS was a fraud. *See Citibank*, 12 F.4th at 191-92. The Trustee's position is that Square One did not conduct any inquiry into BLMIS after becoming aware of the red flags that Estenne and Partners Advisers uncovered. This position is not in dispute because Square One admitted in its Amended Answer that it did not conduct any such inquiry. (Am. Answer at 62-65, ECF No. 240).

This conclusion is also plain from Estenne's testimony, which provides that, despite having direct access to BLMIS and having had many in-person meetings with Madoff and/or DiPascali, Square One made the conscious decision not to confront BLMIS or its service providers with any of the red flags. (Stmt. ¶ 165). Specifically, Estenne testified that Square One viewed investing with BLMIS as a "take it or leave it situation" where any diligence would have resulted in BLMIS

terminating the investment relationship. (*Id*. ¶ 166). For that reason, Square One decided not "to inquire further about the details of the strategy." (*Id*. ¶ 168). Under these circumstances, this Court should reject Square One's good faith defense as a matter of law. *See Diamond*, 658 B.R. at 778 (A "conscious failure to make any inquiry into the Debtor's operations prevents" the transferee "from asserting that it acted with the requisite good faith.").

In its Amended Answer, Square One alleges that its failure to investigate should be excused because "a diligent inquiry by Square One would not have discovered that BLMIS was not trading securities or was a fraud or a Ponzi scheme" because the Securities and Exchange Commission ("**SEC**") did not uncover that fraud. (Am. Answer at 64-65, ECF No. 240). As an initial matter, a transferee cannot prove its good faith defense simply by claiming that it would have been futile to conduct a diligent investigation. Indeed, courts have held that a transferee can only prove its good faith defense by establishing that it conducted a diligent inquiry into the red flag. *See e.g.*, *Citibank*, 12 F.4th at 191-92 (holding transferees must prove that they "conducted a reasonably diligent investigation after being put on inquiry notice" and that conducting a reasonable inquiry is a "duty" of the transferee defendant); *Manhattan Inv. Fund*, 397 B.R. at 24 (To prevail on a good faith defense, the transferee must show that "its investigation of the [debtor] was diligent"); *see also Janvey v. GMAG, LLC*, 592 S.W.3d 125, 131-32 (Tex. 2019) (on certification from the Fifth Circuit, rejecting claim that a transferee can prove a good faith defense simply by claiming an investigation would have been futile); *SEC v. Forte*, Civil Nos. 09-63, 09-64, 2012 WL 1719145, at *7 (E.D. Pa. May 16, 2012) (same). And the Trustee is not aware of any authority that stands for the proposition that a transferee can prove its good faith defense without attempting to conduct this inquiry (and Square One cited to no such authority in its Amended Answer).

Moreover, Square One cannot invoke a defense based on the SEC's inaction. *See, e.g.*, 15 U.S.C. § 78z ("No action or failure to act by the Commission . . . shall be construed to mean that the particular authority has . . . passed upon the merits of, or given approval to, any security or any transaction . . . ."); *SEC v. Bank of Amer. Corp.*, No. 09 Civ. 6829 (JSR), 2009 WL 4797741, at *1 (S.D.N.Y. Dec. 8, 2009) (holding the SEC's "[f]ailure to act...[cannot] be construed to mean that [it] has in any way passed upon the merits of, or given approval to,…any transaction").

In any event, Square One never presented any evidence supporting its futility defense. That defense is based on self-serving and conclusory assertions in the Amended Answer that cannot, in and of themselves, create a genuine issue of triable fact. *See Major League Baseball*, 542 F.3d at 310 ("[M]erely [] making assertions that are conclusory . . . or based on speculation" is not enough to defeat summary judgment.). Also, those statements are inconsistent with Estenne's deposition testimony, which acknowledged that Square One had the means and access to confront BLMIS as to the red flags but Square One opted against this confrontation out of its fear that BLMIS would have terminated the investment relationship. (Stmt. ¶ 165). Threat of termination of the investment does not equate to futility.

Square One's futility defense is further refuted by the evidence demonstrating that similarly situated parties to Square One who were on notice of the same indicia of fraud conducted a diligent investigation that resulted in a determination that BLMIS was likely a fraud. Indeed, Fletcher investigated BLMIS and concluded that it was a fraud that involved "jack[ing] up" trades and commingling the customer funds. (Stmt. ¶ 223). Müller investigated BLMIS and concluded that BLMIS's returns were "too good to be true" and likely the result of some illegal operation that could "blow up" any investment with BLMIS. (*Id*. ¶¶ 213, 230). And Geneva-based investment managers that Müller consulted had vetted BLMIS and conclude that investing with BLMIS was

akin to doping during the Tour de France. (*Id*. ¶ 210). Pomerantz explains in his expert report that, when an investigation concludes "the only reasonable explanation is fraud," the diligence inquiry can "stop," and investors should conclude that it should "not invest or redeem their investments." (*Id*. ¶ 253). That is precisely what happened as a result of the ART Fund investigations.

Square One was on notice of the same red flags as the ART Fund as early as 2002. Square One should have, therefore, ended its investment relationship with BLMIS at that time. If Square One wanted to preserve its investment, it should have at a minimum confronted BLMIS with its concerns, consistent with what Estenne taught in his Chapter. Square One instead chose to have its cake and eat it, too: it kept the investment relationship intact without ever confronting BLMIS on the concerns that Estenne privately shared with his colleagues. (*Id*. ¶ 166). Square One's good faith defense should, therefore, be rejected as a matter of law. *See, e.g.*, *Ameriserv Fin. Bank v. Commercebank, N.A.*, Civil Action No. 07-1159, 2009 WL 890583, at *5 (W.D. Pa. Mar. 26, 2009) (granting summary judgment motion because the defendant-transferee's decision to "sit on its heels" after becoming aware of indicia of fraud foreclosed its good faith defense as a matter of law (citation omitted)); *see also Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 607-08 (11th Cir. 1991) (stating that summary judgment is appropriate where the moving party met its burden by showing that the non-moving party would not be able to meet their burden of proof at trial).

B. Square One's Other Defenses Fail as a Matter of Law

The remaining three affirmative defenses in the Amended Answer should also be resolved as a matter of law. These defenses allege that: (i) the Trustee has not stated a claim upon which relief can be granted; (ii) the Trustee's claims are barred to the extent they have been dismissed by the Court or are based on allegations that have been dismissed by the Court; and (iii) the Two-Year Transfers cannot be avoided because under the safe harbor pursuant to 11 U.S.C. § 546(e). (Am. Answer at 62-65, ECF No. 240).

1. The Trustee Has Stated a Claim under 11 U.S.C. § 548(a)(1)(A)

In February 2019, Square One filed a motion to dismiss the Amended Complaint for failure to state a claim. (ECF No. 170). The Court denied the motion, in part, holding that the Trustee met his pleading burden with respect to his avoidance claim under 11 U.S.C. § 548(a)(1)(A). *See* Order Granting in Part and Denying in Part Mot. to Dismiss, ECF No. 177. At the time, the Trustee bore the burden of demonstrating that Square One did not receive the transfers in good faith, and the standard he had to meet was significantly more difficult than the inquiry notice standard because it required him to show that Square One believed that there was a "high probability of fraud" at BLMIS and willfully blinded itself of this fact. (ECF No. 181 at 39-43.) Even so, this Court held that the Trustee adequately stated a claim with this added burden and under the more exacting test for good faith. It did so based on allegations about how Estenne responded when he (and by extension, Square One) learned that Müller uncovered BLMIS was likely a fraud. Rather than inquiring further, Estenne took steps to protect his corporate brand (Partners Advisers) and his personal wealth from BLMIS while simultaneously feeding other people's money to BLMIS through Square One and charging them millions of dollars in fees in the process. *Id.* at 42-43. Those allegations are now supported by the record.

Since that decision, the Second Circuit ruled in *Citibank* that the transferee-defendant now has the burden of demonstrating that it received the transfers in good faith (rather than the Trustee demonstrating the transferee lacked good faith when it received the transfers). 12 F.4th at 195-200. Accordingly, this Court's prior decision that the Trustee stated an avoidance claim under 11 U.S.C. § 548(a)(1)(A) against Square One stands on even firmer ground. To state a claim against Square One the Trustee only has to establish his *prima facie* case that BLMIS made the Two-Year Transfers to Square One with intent to delay, hinder, and defraud BLMIS's creditors. As noted above, Square One does not dispute that the Trustee has satisfied his burden here. For that reason,

its affirmative defense that the Trustee has not stated a claim pursuant to 11 U.S.C. § 548(a)(1)(A) can be denied as a matter of law.

2. This Court Has Not Barred the Trustee's Claim against Square One for Two-Year Transfers Nor any of the Allegations Supporting that Claim

Square One's second affirmative defense can also be denied as a matter of law because the Court has not dismissed the Trustee's avoidance action under 11 U.S.C. § 548(a)(1)(A) nor any of the allegations upon which it stands.

3. The Trustee's Claim Is Not Covered by the Safe Harbor Provision

Square One's remaining defense under 11 U.S.C. § 546(e) should also be denied as a matter of law. This clause is a "safe harbor" that protects a transfer made in relation to securities trading from claims pursuant to sections 544, 547, and 548(a)(1)(B) of the Bankruptcy Code. 11 U.S.C. §546(e); *Sec. Inv. Prot. Corp. v. BLMIS*, 12 MC 115(JSR), 2013 WL 1609154, at *2 (S.D.N.Y. Apr. 15, 2013), aff'd, 773 F.3d 411 (2d Cir. 2014), *cert. denied*, 576 U.S. 1044 (2015). It has no import here because the text of 11 U.S.C. § 546(e) expressly carves out claims under 11 U.S.C. § 548(a)(1)(A) from the scope of this safe harbor, as confirmed by this Court in related proceedings in this liquidation. *See, e.g.*, *Katz*, 462 B.R. at 453 & n.5 (interpreting 11 U.S.C. § 546(e)); *Picard v. Greiff*, 476 B.R. 715, 722 (S.D.N.Y. 2012) (same). Thus, this defense can be denied at this phase of the litigation as a matter of law.

IV. THE TRUSTEE IS ENTITLED TO PREJUDGMENT INTEREST

The Trustee is entitled to an award of prejudgment interest at a rate of 4% from the Filing Date on December 11, 2008 through the date of judgment because "[f]ull compensation to the estate for the avoided transfer[s] normally requires prejudgment interest to compensate for the value over time of the amount recovered." *In re Cassandra Grp.*, 338 B.R. 583, 599 (Bankr.

S.D.N.Y. 2006). This Court has consistently granted prejudgment interest accruing at a rate of 4% to the Trustee in related adversary proceedings. *See, e.g.*, *Picard v. 151797 Canada Inc.*, 10-04631 (CGM), ECF No. 71, Judgment (Jan. 9, 2023) (awarding prejudgment interest at a rate of 4% from the Filing Date through judgment); *Picard v. Estate of Goodman*, 10-05079 (CGM), ECF No. 109, Judgement (Sept. 21, 2023) (same); *Picard v. Goodman*, Adv. Pro. No. 10-04709 (CGM), ECF No. 117, Judgment (Oct. 18, 2023) (same). If the Court grants summary judgment here, the Trustee will submit a proposed judgment in due course with precise calculations regarding the appropriate amount of prejudgment interest.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court grant summary judgment on his remaining claim against Square One under 11 U.S.C. §§ 548(a)(1)(A) and 550(a) and enter judgment in the Trustee's favor in the amount of $6,410,000 plus prejudgment interest.

Dated: June 24, 2025
New York, New York

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