No. 11-969

IN THE

Supreme Court of the United States

THERESA ROSE RYAN, *et al.*,

Petitioners,

—v.—

IRVING H. PICARD, as trustee for the liquidation proceeding of Bernard L. Madoff Investment Securities LLC and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the Second Circuit properly determined that “net equity” under the Securities Investor Protection Act could not be calculated based upon fraudulent brokerage statements reflecting fictitious securities trades that were never ordered by customers, were concocted after the fact and could not possibly have occurred in the marketplace, and were not reflected in the broker’s books and records.

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I. INTRODUCTION

The United States Court of Appeals for the Second Circuit determined, under the particular facts of this case, the proper method of calculating net equity as defined in section 78*lll*(11) of the Securities Investor Protection Act (SIPA), 15 U.S.C. § 78aaa *et seq*. Various claimants in the substantively consolidated SIPA liquidation of Bernard L. Madoff Investment Securities LLC (BLMIS) and Bernard L. Madoff (Madoff) that were parties to the appeal below petition the Court to review the Second Circuit's opinion.[1]

A writ of certiorari is not warranted in this case. The opinion of the court below does not conflict with a decision of this Court or another court of appeals. It did not decide an important federal question in a way that conflicts with relevant decisions of this Court. Nor did it decide an important federal issue that must be settled by this Court.

Instead, the Second Circuit applied SIPA in accordance with the plain language of the statute, the Second Circuit's own precedents, and other relevant authority. The two entities responsible for enforcing and interpreting SIPA, the United

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[1] The three petitions (collectively, petitions) for writs of certiorari are: *Sterling Equities Associates, et al. v. Picard*, No. 11-968 (Sterling Petitioners); *Ryan, et al. v. Picard, et al.*, No. 11-969 (Ryan Petitioners); *Velvel v. Securities Investor Protection Corporation, et al.*, No. 11-986 (Petitioner Velvel) (collectively, the petitioners). For the convenience of the Court, all citations to the appendices will be to the Sterling Petitioners' Appendix (Sterling Pet. App.), unless otherwise noted herein.

States Securities & Exchange Commission (SEC) and the Securities Investor Protection Corporation (SIPC), concur in the Second Circuit's holding. And the lower court issued a ruling explicitly limited to the particular facts before it. Accordingly, the petitions for a writ of certiorari should be denied.

II. STATEMENT OF THE CASE

In December 2008, victims of Bernard Madoff's multi-billion dollar Ponzi scheme learned that the double-digit returns that appeared on their brokerage statements, in good times and bad, were a fraud. Madoff never actually purchased securities with the cash deposited by investors, but instead concocted fictitious trades after the fact. Although the names of the securities issuers on the customer statements were generally real, those statements reflected securities transactions that were not—and could never have been—effectuated at the prices and volumes listed. Thus, when customers requested distributions of "profit" from their accounts, those funds were not derived from legitimate gains from securities trading. Instead, those distributions consisted only of the money invested by other customers. In short, Madoff perpetrated a classic Ponzi scheme, albeit one of epic proportions, through the façade of a brokerage house.

Because BLMIS was a brokerage house, its liquidation is governed by SIPA. SIPA was enacted in 1970 as part of Congress's effort to protect customers of failed broker-dealers, restore investor confidence in capital markets after a

period of contraction, and upgrade financial responsibility requirements for registered broker-dealers. *SIPC v. Barbour*, 421 U.S. 415 (1975). Before the enactment of SIPA and its predecessor statute, Section 60e of the former Bankruptcy Act, 11 U.S.C. § 96e (repealed 1979), customers of a bankrupt stockbroker could not reclaim their cash or securities unless they could trace them after placing them in their broker's hands; if they could not do so, they were considered general creditors. *Duel v. Hollins*, 241 U.S. 523, 527-29 (1916). Because serious inequities could and did result from these requirements, Congress enacted 60e of the former Bankruptcy Act, which was expanded upon with the creation of SIPA in 1970.

SIPA established a fund of customer property in which all customers share ratably and to the exclusion of general creditors. *See In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 133 (Bankr. S.D.N.Y. 2010). This structure gives customers a priority over all other creditors in the distribution of these assets as marshaled by a trustee. *See SIPC v. I.E.S. Mgmt. Grp.*, 612 F. Supp. 1172, 1177 (D.N.J. 1985) *aff'd*, 791 F.2d 921 (3d Cir. 1986). Although SIPA created a new form of liquidation proceedings designed to promptly return customer property, they are bankruptcy proceedings in many respects, and they share the same ratable distribution philosophy. *See e.g.*, *Mishkin v. Ensminger (In re Adler, Coleman Clearing Corp.)*, 263 B.R. 406, 463 (S.D.N.Y. 2001) (underlying philosophy of Bankruptcy Code and SIPA to maximize assets available for ratable distribution to similarly situated creditors).

In a SIPA proceeding, customers file claims for their "net equity," which is determined by calculating the liquidated value of the customer's securities positions on the filing date of the SIPA proceeding, plus any cash held for the customer, and subtracting any amounts owed by the customer to the brokerage. 15 U.S.C. § 78*lll*(11). Customers share *pro rata* in customer property to the extent of their net equity claims. If customer property is insufficient to satisfy their claims, SIPA authorizes payments from SIPC up to $500,000. 15 U.S.C. § 78fff-3(a). If a trustee collects enough customer property to satisfy net equity claims, the amounts advanced by SIPC to any particular customer may be recovered by SIPC. *Id*. Thus, a customer's net equity determines the extent to which they will share in customer property and the availability of advances by SIPC.

If a customer disputes a trustee's determination of a net equity claim, the claimant may file an objection to the claim determination in the bankruptcy court. From there, the parties may proceed through the appellate process. Thus, federal courts, rather than SIPA trustees, are the ultimate arbiters of disputed net equity claims in SIPA liquidations.

After Madoff's fraud was revealed, Irving H. Picard was appointed as the SIPA Trustee (the Trustee), and he is responsible for recovering, collecting, and distributing customer property to the customers of BLMIS pursuant to SIPA and in furtherance of his fiduciary duties to the estate. Specifically, he is obligated to pay net equity claims "insofar as such obligations are

ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee." 15 U.S.C. § 78fff-2(b).

Here, the books and records of the debtor, as well as the records of clearing firms and exchanges, revealed that BLMIS did not trade for its customer accounts. Instead, the securities listed on the customer statements were selected by BLMIS days after the purported trades occurred in order to achieve pre-determined, fabricated returns. Sterling Pet. App. 4a-5a. This permitted BLMIS to report "profits" to customers that could never have been obtained in the marketplace, and that were distributed unevenly among customers, as Madoff chose. *Id.* Thus, the only legitimate activity ascertainable to the Trustee in the customers' accounts were the deposits and withdrawals of cash. *Id.* at 5a.

Not only did the books and records contradict the customer statements, no claimant met the alternate condition of 15 U.S.C. § 78fff-2(b) of establishing the obligations listed on the customer statements "to the satisfaction of the trustee" because they could not show that they paid for the securities listed on their last statements. While the initial deposits made by BLMIS customers may have been sufficient to cover the initial "purchase" of securities reported on the customer statement, any subsequent purchases of equal or greater nominal value could only be afforded by virtue of the "profits" generated by the fictitious trading. To the extent that a customer made additional deposits beyond their initial investment, they could still only afford securities up to the amount of their net cash investment.

Thus, the last statements not only reflected securities transactions that could never have occurred, they reflected securities that the customers had not in fact paid for with real dollars. Sterling Pet. App. 59a ("The BLMIS books and records expose a Ponzi scheme where no securities were ever ordered, paid for or acquired").

Because BLMIS engaged in no securities transactions, and because the phony securities transactions listed on customers' statements could never have occurred in the marketplace, the only net equity reflected in the debtor's books and records was a customer's actual cash deposits and withdrawals. Sterling Pet. App. 16a-17a. Accordingly, consistent with SIPA, the Trustee determined net equity based on the "net investment method," where each customer's *pro rata* share of money recovered by the Trustee for the customer fund would depend on how much they had deposited into the Ponzi scheme, and how much they had withdrawn. *Id.* at 7a-8a. Both the SEC and SIPC concurred that this method was the only one consistent with SIPA.[2] *Id.* The bankruptcy court and the Second Circuit concurred as well, affirming the Trustee's net investment method. *Id.* at 9a, 11a, 25a.

[2] The SEC has taken the position that a claimant's net investment should be calculated in constant dollars, not current dollars, so as to adjust for the effects of inflation. As the Second Circuit noted, however, this is an issue "on which the bankruptcy court has not yet ruled and which is not before [the Second Circuit] on this interlocutory appeal." Sterling Pet. App. 11a n.7.

The petitioners contended below, as they do here, that the Trustee should have calculated net equity based on the amounts shown on their fraudulent statements from BLMIS, even though the books and records of BLMIS show those statements to be a fraud, and even though those transactions could never have occurred in the marketplace. *Id.* at 8a. The Second Circuit, like the bankruptcy court, rejected this argument, holding that it would have been "legal error" for the Trustee to "discharge claims upon the false premise that customers' securities positions are what the account statements purport them to be." *Id* at 24a.

In support of its holding that the net investment method was "legally sound," the Second Circuit examined the overall structure and purpose of SIPA. It noted that "the statute does not define 'net equity' by reference to a customer's last account statement." *Id.* at 2a, 16a. Rather, a SIPA trustee's obligation to pay customers based on their net equity must be read in tandem with SIPA's requirement that a trustee discharge those obligations "insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee." *Id.* at 15a-16a.

As the Second Circuit explained, "notwithstanding the BLMIS customer statements, there were no securities purchased and there were no proceeds from the money entrusted to Madoff for the purpose of making investments." *Id.* at 21a. Instead, "the profits recorded over time on the customer statements were after-the-fact constructs that were based on stock movements

that had already taken place, were rigged to reflect a steady and upward trajectory in good times and bad, and were arbitrarily and unequally distributed among customers." *Id.* at 16a-17a.

The Second Circuit agreed with the bankruptcy court that the inequitable consequence of the last statement method for calculating net equity would be "that those who had already withdrawn cash deriving from imaginary profits in excess of their initial investment would derive additional benefit at the expense of those customers who had not withdrawn funds before the fraud was exposed." *Id.* at 17a; *see also id.* at 71a ("Any dollar paid to reimburse a fictitious profit is a dollar no longer available to pay claims for money actually invested."). Therefore, "[u]se of the last statement method in this case 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.* at 12a.

The Second Circuit recognized that the net investment method may not apply in all situations, but that the facts of this case—a Ponzi scheme in which no securities were ordered or purchased, or even could have been purchased on the terms reflected on the customer statements—made it appropriate here. *Id.* at 16a-18a. The net investment method "allows the Trustee to make payments based on withdrawals and deposits, which can be confirmed by the debtor's books and records, and results in a distribution of customer property that is proper under SIPA." *Id.* at 18a.

Certain claimants filed motions for rehearing and rehearing *en banc*, which were denied by the Second Circuit.

III. REASONS FOR DENYING THE PETITIONS

The petitions seek a writ of certiorari on an issue over which there is no circuit split. The courts that have considered how to calculate net equity under the facts of this case agree that the net investment method is the proper method. The two entities responsible for administering SIPA also agree that the net investment method is proper. And the holdings of the Second Circuit and the bankruptcy court are consistent with the only appellate decisions on point, decisions that were issued by the Second Circuit itself.

Moreover, the Second Circuit did not determine a federal question in way that conflicts with the relevant decisions of this Court. Indeed, none of this Court's cases cited by the petitioners address SIPA. And none of the other issues raised by the petitioners are important federal issues requiring review of this Court. Accordingly, the petitioners have not demonstrated any compelling reason for the petitions to be granted.

A. The Opinion Does Not Conflict With Decisions Of Any Other Circuits

The petitioners point to no decisions from other circuits that conflict with the decision below.

Indeed, the only appellate decisions to confront similar circumstances to those here were issued by the Second Circuit itself, *see In re New Times Sec. Servs., Inc.*, 371 F.3d 68 (2d Cir. 2004) ("*New Times I*"); *In re New Times Sec. Servs., Inc.*, 463 F.3d 125 (2d Cir. 2006) ("*New Times II*"), and both the bankruptcy court and the Second Circuit held

that their opinions were consistent with Second Circuit precedent.

In *New Times I*, the Second Circuit held that net equity could not be calculated by reference to the "fictitious securities positions reflected in the Claimants' account statements." *New Times I*, 371 F.3d at 71. This is because "basing customer recoveries on fictitious amounts . . . would allow customers to recover arbitrary amounts that necessarily have no relation to reality." Because calculations based on a fiction would be "unworkable" and create "potential absurdities," the *New Times I* court held that net equity must be calculated "by reference to the amount of money the Claimants originally invested with the Debtors (*not* including any fictitious or dividend reinvestments)." *Id.* at 71 (emphasis in original).

In its subsequent discussion of *New Times I*, the Second Circuit stated: "The court declined to base the recovery on the rosy account statements telling customers how well the imaginary securities were doing, because treating the fictitious paper profits as within the ambit of customers' 'legitimate expectations' would lead to the absurdity of 'duped' investors reaping windfalls as a result of fraudulent promises made on fake securities." *New Times II*, 463 F.3d at 128 (quoting *New Times I*, 371 F.3d at 87-88).

As held by the Second Circuit and the bankruptcy court, the application of the net investment method is supported by *New Times I* and *New Times II*. Sterling Pet. App. 21a ("[O]ur precedent is consistent with the Trustee's decision to utilize the Net Investment Method under the circumstances of this case"); *see also id.* at 68a

("the [bankruptcy court] agrees with the Trustee that *New Times I* and *II* support using the Net Investment Method here").

B. The Petitioners Present No Issue of Federal Law That Must Be Decided By This Court

1. The Second Circuit's Ruling Was Limited To The Facts Of This Case

The Court also should not hear this matter because the ruling below was limited to the facts of this case. *See, e.g.*, Sterling Pet. App. 18a ("Under the circumstances of this case, the limitation on the objecting customers' recovery imposed by the Net Investment Method is consistent with the purpose and design of SIPA"). The Second Circuit concluded that SIPA's "statutory language does not prescribe a single means of calculating 'net equity' that applies in the myriad circumstances that may arise in a SIPA liquidation." *Id.* at 10a. Instead, "[d]iffering fact patterns will inevitably call for differing approaches to ascertaining the fairest method for approximating 'net equity.'" *Id.* at 11a.

Here, the Second Circuit held that the net investment method "allows the Trustee to make payments based on upon withdrawals and deposits, which can be confirmed by the debtor's books and records, and results in distribution of customer property that is proper under SIPA." *Id.* at 18a. By contrast, if the last statement method were used, "those who had already withdrawn cash deriving from imaginary profits in excess of their initial investment would derive additional

benefit at the expense of those customers who had not withdrawn funds before the fraud was exposed." *Id.* at 17a. This would have "undermined the main purpose of determining net equity, which is "to achieve a fair allocation of the available resources amongst customers." *Id.* at 21a.

While the opinion held that it would have been legal error to use the last statement method on the facts presented here, it did not proscribe use of the last statement method in future SIPA liquidations. In fact, the Second Circuit recognized that "a customer's last account statement will likely be the most appropriate means of calculating net equity in more conventional cases"—such as where securities were actually purchased by the debtor but converted, or where customers authorized purchases of specific stocks. *Id.* at 17a-18a. But here, the "extraordinary facts of this case"—including where Madoff "constructed account statements retrospectively, designating stocks based on advantageous historical price information and arbitrarily distributing profits among his customers—made the net investment method appropriate. *Id.* at 18a, 24a, 16a-18a.

The petitioners argue that the Second Circuit's refusal to issue a bright-line rule as to the proper method to calculate net equity requires this Court's review. But as courts have recognized, SIPA is not a one-size-fits-all statute. *Id.* at 24a (citing *Exch. Nat'l Bank of Chicago v. Wyatt*, 517 F.2d 453, 459 n. 12 (2d Cir. 1975) (SIPA liquidations "have been carefully designed to allow flexibility")). Indeed, a SIPA trustee is statutorily charged to calculate a customer's net equity

"insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee." 15 U.S.C. § 78fff-2(b); *see also* Sterling Pet. App. 14a-15a. These determinations are inherently fact-specific. And should the trustee's statutorily prescribed discretion to calculate net equity be disputed, claimants have the right—as they did in this case—to challenge those determinations before the bankruptcy court, and on appeal.[3]

Moreover, in a Ponzi scheme, as among equally innocent victims, "equality is equity." *Cunningham v. Brown*, 265 U.S. 1, 13 (1924). In this case, the net investment method achieved the fairest allocation of the available resources among BLMIS customers, disallowing payments to those customers who received fictitious profits from Madoff's scheme—at the expense of other customers—until those customers who lost principal in the scheme recover their net investment.

2. SIPA Does Not Provide Insurance

The Ryan Petitioners argue that SIPA acts as an insurance guarantee of the amounts listed on their customer statements, and complain that the lower court's decision undermined that notion.

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[3] The petitioners argue that SIPC is not permitted to amend the definition of net equity. *See, e.g.*, Sterling Pet. App. 15-16. But the Trustee's use of the net investment method *reflected* the statutory definition of net equity—and its obligation that net equity be calculated "insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee,"—it does not *amend* it.

Ryan Pet. 3-5. But unlike the Federal Deposit Insurance Act (FDIA), SIPA and its legislative history make clear that SIPA does *not* provide insurance. *See, e.g., In re Stratton Oakmont, Inc.*, 2003 U.S. Dist. LEXIS 20459, at *13 (S.D.N.Y. Nov. 13, 2003) (SIPA "was not intended to create an insurance fund for securities investors.") Accordingly, courts have recognized that "SIPC is not an insurer, nor does it guarantee that customers will recover their investments which may have diminished as a result of, among other things, market fluctuation or fraud." *SIPC v. Associated Underwriters, Inc.*, 423 F. Supp. 168, 170-71 (D. Utah 1975); *see also* Sterling Pet. App. 19a ("it is clear that the obligations imposed on an insurance provider do *not* apply to this congressionally-created nonprofit membership organization") (emphasis in original) (quotations omitted).

SIPA and the FDIA are "independent statutory schemes, enacted to serve the unique needs of the banking and securities industries, respectively. Congress recognized this when it rejected several early versions of the SIPA bill which were patterned on FDIA . . ." *SIPC v. Morgan Kennedy & Co.*, 533 F.2d 1314, 1318 (2d Cir.), *cert. den.*, 426 U.S. 936 (1976). The argument that SIPA and the FDIA are *in pari materia* and therefore should be construed in the same way has been expressly rejected, and should likewise be rejected here. *See In re Bell & Beckwith,* 104 B. R. 842, 851 (Bankr. N. D. Ohio 1989), *aff'd*, 937 F.2d 1104 (6th Cir. 1991).

Congress enacted SIPA in 1970 in order to protect customers from losses caused by the insolvency of broker dealers. *See In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. at 132; *see also*

SEC v. S.J. Salmon & Co., Inc., 375 F. Supp. 867, 871 (S.D.N.Y. 1974). But SIPA was not designed to provide full protection to all victims of a brokerage collapse. *See SEC v. Packer, Wilbur & Co.*, 498 F.2d 978, 983 (2d Cir. 1974). SIPA does not protect against investment loss, fraud, or misrepresentation, as was the case here. *See In re Brentwood Sec.*, 925 F.2d 325, 330 (9th Cir. 1991) ("SIPA protects investors when a broker holding their assets becomes insolvent. It does not comprehensively protect investors from the risk that some deals will go bad or that some securities issuers will behave dishonestly."); *In re Klein, Maus & Shire*, 301 B.R. 408 (Bankr. S.D.N.Y. 2003) ("claims for damages resulting from a broker's misrepresentations, fraud or breach of contract are not protected"); *see also SEC v. Howard Lawrence & Co.*, 1 Bankr. Ct. Dec. (CRR) 577, 579 (S.D.N.Y. 1975) ("SIPA does not protect customer claims based on fraud or breach of contract."); *In re Investors Ctr., Inc.*, 129 B.R. 339, 353 (Bankr. E.D.N.Y. 1991) ("Repeatedly, this Court has been forced to tell claimants that the fund created for the protection of customers of honest, but insolvent, brokers gives them no protection when the insolvent broker has been guilty of dishonesty, breach of contract or fraud.").[4]

[4] Even in the insurance context, courts have refused to compensate victims for the fictitious amounts on their BLMIS customer statements above their actual losses. *See Horowitz v. Am. Int'l Grp., Inc.*, 2010 U.S. Dist. LEXIS 103489, at *23 (S.D.N.Y. Sept. 30, 2010) ("The money reflected in the final account statement was not taken from the Plaintiffs by fraud; rather, it never belonged to them, or even existed in the first place due to fraud. Therefore, they did not lose this money; they lost the mistaken belief that they owned this money").

3. The Petitioners' Remaining Arguments Were Considered And Rejected Below

The remaining issues raised by the petitioners fail to present any compelling reason for this Court to grant a writ of certiorari. In fact, their arguments were presented to the courts below, in oral argument and/or briefing, and were not discussed in either of the lower courts' opinions.

The Sterling Petitioners claim that this Court's review is necessary to resolve the question of whether Article 8 of the Uniform Commercial Code (UCC) is relevant to the question of a net equity claim under SIPA. They argue that Article 8 of the UCC provides that a broker "owes" its customer the securities on the statements issued, and that therefore, the customer statements dictate the amount of "net equity" under SIPA.

But as the Official Comment to the UCC explains, SIPA, not the UCC, is controlling in liquidation proceedings: "If the intermediary fails and its affairs are being administered in an insolvency proceeding, the applicable insolvency law governs how the various parties having claims against the firm are treated. For example, the distributional rules for stockbroker liquidation proceedings under the Bankruptcy Code and the Securities Investor Protection Act . . . provide that all customer property is distributed pro rata among all customers." *Id.*; *see also Am. Sur. Co. of N.Y. v. Sampsell*, 327 U.S. 269, 272 (1946) ("[F]ederal bankruptcy law, not state law, governs the distribution of a bankrupt's assets to his creditors.").

Moreover, to the extent that the UCC conflicts with SIPA, SIPA controls. SIPA provides that "customer property" is to be distributed in accordance with a customer's "net equity" claim. *See* 15 U.S.C. § 78fff-2(c)(1). Any state law that would resolve the question differently is preempted as inconsistent with SIPA. *See* U.S. Const., art. VI, cl. 2; *First Fed. Sav. & Loan Ass'n of Lincoln v. Bevill, Bresler & Schulman, Inc. (In re Bevill, Bresler & Schulman, Inc.)*, 59 B.R. 353, 378 (D.N.J. 1986), *appeal dismissed*, 802 F.2d 445 (3d Cir. 1986) (state law that is inconsistent with SIPA is preempted under the Supremacy Clause). Thus, SIPA governs the amount and priority of customer claims by reference to the debtor's books and records, not the UCC, and to the extent that the UCC or any other state law would lead to a result contrary to the SIPA priority scheme, it is preempted, as the Sterling Petitioners conceded before the Second Circuit. *See* Reply Brief of Sterling Petitioners, *In re Bernard L. Madoff Inv. Sec.*, No. 10-2378 (2d Cir. Oct. 11, 2010) (ECF No. 338), at 5; *see also Travelers Cas. & Sur. Co. Am. V. Pac. Gas & Electr. Co.*, 549 U.S. 443, 450-51 (2007) ("[p]roperty interests are created and defined by state law, unless some federal interest requires a different result . . .") (internal citation and quotations omitted).

The final issue raised to this Court is not a substantive legal issue, but rather, is a request for discovery that has already been denied below. Petitioner Velvel claims that this Court must permit him discovery regarding the motives of SIPC and the Trustee in selecting the net investment method. Velvel Pet. App. 78A-79A. But

the bankruptcy court properly denied him this irrelevant "motive" discovery in a protective order from which Velvel did not appeal. *Id.* This discovery matter is not relevant to the statutory interpretation of SIPA and is not a compelling reason to seek this Court's review.

C. The Second Circuit's Interpretation Of SIPA Is Supported By Both Entities Responsible For Enforcing The Statute

The two entities responsible for enforcing and interpreting SIPA, the SEC and SIPC, also agree that net equity cannot be calculated using the last statement method in this case. Sterling Pet. App. 8a. Given this Court's traditional deference to agency interpretations of the federal statutes over which they have enforcement authority, and given that their interpretation of net equity is consistent with the decisions of the lower courts in this matter, this Court's review is not warranted.

IV. CONCLUSION

The petitions for a writ of certiorari should be denied.

Dated: March 9, 2012

Respectfully Submitted,

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No. 11-986

IN THE

Supreme Court of the United States

LAWRENCE R. VELVEL,

Petitioner,

—v.—

SECURITIES INVESTOR PROTECTION CORPORATION
and IRVING H. PICARD, Trustee for the Liquidation of
Bernard L. Madoff Investment Securities LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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Liquidation of Bernard L. Madoff
Investment Securities LLC and
Bernard L. Madoff

QUESTION PRESENTED

Whether the Second Circuit properly determined that "net equity" under the Securities Investor Protection Act could not be calculated based upon fraudulent brokerage statements reflecting fictitious securities trades that were never ordered by customers, were concocted after the fact and could not possibly have occurred in the marketplace, and were not reflected in the broker's books and records.

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I. INTRODUCTION

The United States Court of Appeals for the Second Circuit determined, under the particular facts of this case, the proper method of calculating net equity as defined in section 78*lll*(11) of the Securities Investor Protection Act (SIPA), 15 U.S.C. § 78aaa *et seq*. Various claimants in the substantively consolidated SIPA liquidation of Bernard L. Madoff Investment Securities LLC (BLMIS) and Bernard L. Madoff (Madoff) that were parties to the appeal below petition the Court to review the Second Circuit's opinion.[1]

A writ of certiorari is not warranted in this case. The opinion of the court below does not conflict with a decision of this Court or another court of appeals. It did not decide an important federal question in a way that conflicts with relevant decisions of this Court. Nor did it decide an important federal issue that must be settled by this Court.

Instead, the Second Circuit applied SIPA in accordance with the plain language of the statute, the Second Circuit's own precedents, and other relevant authority. The two entities responsible for enforcing and interpreting SIPA, the United

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[1] The three petitions (collectively, petitions) for writs of certiorari are: *Sterling Equities Associates, et al. v. Picard*, No. 11-968 (Sterling Petitioners); *Ryan, et al. v. Picard, et al.*, No. 11-969 (Ryan Petitioners); *Velvel v. Securities Investor Protection Corporation, et al.*, No. 11-986 (Petitioner Velvel) (collectively, the petitioners). For the convenience of the Court, all citations to the appendices will be to the Sterling Petitioners' Appendix (Sterling Pet. App.), unless otherwise noted herein.

States Securities & Exchange Commission (SEC) and the Securities Investor Protection Corporation (SIPC), concur in the Second Circuit's holding. And the lower court issued a ruling explicitly limited to the particular facts before it. Accordingly, the petitions for a writ of certiorari should be denied.

II. STATEMENT OF THE CASE

In December 2008, victims of Bernard Madoff's multi-billion dollar Ponzi scheme learned that the double-digit returns that appeared on their brokerage statements, in good times and bad, were a fraud. Madoff never actually purchased securities with the cash deposited by investors, but instead concocted fictitious trades after the fact. Although the names of the securities issuers on the customer statements were generally real, those statements reflected securities transactions that were not—and could never have been—effectuated at the prices and volumes listed. Thus, when customers requested distributions of "profit" from their accounts, those funds were not derived from legitimate gains from securities trading. Instead, those distributions consisted only of the money invested by other customers. In short, Madoff perpetrated a classic Ponzi scheme, albeit one of epic proportions, through the façade of a brokerage house.

Because BLMIS was a brokerage house, its liquidation is governed by SIPA. SIPA was enacted in 1970 as part of Congress's effort to protect customers of failed broker-dealers, restore investor confidence in capital markets after a

period of contraction, and upgrade financial responsibility requirements for registered broker-dealers. *SIPC v. Barbour*, 421 U.S. 415 (1975). Before the enactment of SIPA and its predecessor statute, Section 60e of the former Bankruptcy Act, 11 U.S.C. § 96e (repealed 1979), customers of a bankrupt stockbroker could not reclaim their cash or securities unless they could trace them after placing them in their broker's hands; if they could not do so, they were considered general creditors. *Duel v. Hollins*, 241 U.S. 523, 527-29 (1916). Because serious inequities could and did result from these requirements, Congress enacted 60e of the former Bankruptcy Act, which was expanded upon with the creation of SIPA in 1970.

SIPA established a fund of customer property in which all customers share ratably and to the exclusion of general creditors. *See In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122, 133 (Bankr. S.D.N.Y. 2010). This structure gives customers a priority over all other creditors in the distribution of these assets as marshaled by a trustee. *See SIPC v. I.E.S. Mgmt. Grp.*, 612 F. Supp. 1172, 1177 (D.N.J. 1985) *aff'd*, 791 F.2d 921 (3d Cir. 1986). Although SIPA created a new form of liquidation proceedings designed to promptly return customer property, they are bankruptcy proceedings in many respects, and they share the same ratable distribution philosophy. *See e.g.*, *Mishkin v. Ensminger (In re Adler, Coleman Clearing Corp.)*, 263 B.R. 406, 463 (S.D.N.Y. 2001) (underlying philosophy of Bankruptcy Code and SIPA to maximize assets available for ratable distribution to similarly situated creditors).

In a SIPA proceeding, customers file claims for their "net equity," which is determined by calculating the liquidated value of the customer's securities positions on the filing date of the SIPA proceeding, plus any cash held for the customer, and subtracting any amounts owed by the customer to the brokerage. 15 U.S.C. § 78*lll*(11). Customers share *pro rata* in customer property to the extent of their net equity claims. If customer property is insufficient to satisfy their claims, SIPA authorizes payments from SIPC up to $500,000. 15 U.S.C. § 78fff-3(a). If a trustee collects enough customer property to satisfy net equity claims, the amounts advanced by SIPC to any particular customer may be recovered by SIPC. *Id*. Thus, a customer's net equity determines the extent to which they will share in customer property and the availability of advances by SIPC.

If a customer disputes a trustee's determination of a net equity claim, the claimant may file an objection to the claim determination in the bankruptcy court. From there, the parties may proceed through the appellate process. Thus, federal courts, rather than SIPA trustees, are the ultimate arbiters of disputed net equity claims in SIPA liquidations.

After Madoff's fraud was revealed, Irving H. Picard was appointed as the SIPA Trustee (the Trustee), and he is responsible for recovering, collecting, and distributing customer property to the customers of BLMIS pursuant to SIPA and in furtherance of his fiduciary duties to the estate. Specifically, he is obligated to pay net equity claims "insofar as such obligations are

ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee." 15 U.S.C. § 78fff-2(b).

Here, the books and records of the debtor, as well as the records of clearing firms and exchanges, revealed that BLMIS did not trade for its customer accounts. Instead, the securities listed on the customer statements were selected by BLMIS days after the purported trades occurred in order to achieve pre-determined, fabricated returns. Sterling Pet. App. 4a-5a. This permitted BLMIS to report "profits" to customers that could never have been obtained in the marketplace, and that were distributed unevenly among customers, as Madoff chose. *Id.* Thus, the only legitimate activity ascertainable to the Trustee in the customers' accounts were the deposits and withdrawals of cash. *Id.* at 5a.

Not only did the books and records contradict the customer statements, no claimant met the alternate condition of 15 U.S.C. § 78fff-2(b) of establishing the obligations listed on the customer statements "to the satisfaction of the trustee" because they could not show that they paid for the securities listed on their last statements. While the initial deposits made by BLMIS customers may have been sufficient to cover the initial "purchase" of securities reported on the customer statement, any subsequent purchases of equal or greater nominal value could only be afforded by virtue of the "profits" generated by the fictitious trading. To the extent that a customer made additional deposits beyond their initial investment, they could still only afford securities up to the amount of their net cash investment.

Thus, the last statements not only reflected securities transactions that could never have occurred, they reflected securities that the customers had not in fact paid for with real dollars. Sterling Pet. App. 59a ("The BLMIS books and records expose a Ponzi scheme where no securities were ever ordered, paid for or acquired").

Because BLMIS engaged in no securities transactions, and because the phony securities transactions listed on customers' statements could never have occurred in the marketplace, the only net equity reflected in the debtor's books and records was a customer's actual cash deposits and withdrawals. Sterling Pet. App. 16a-17a. Accordingly, consistent with SIPA, the Trustee determined net equity based on the "net investment method," where each customer's *pro rata* share of money recovered by the Trustee for the customer fund would depend on how much they had deposited into the Ponzi scheme, and how much they had withdrawn. *Id.* at 7a-8a. Both the SEC and SIPC concurred that this method was the only one consistent with SIPA.[2] *Id.* The bankruptcy court and the Second Circuit concurred as well, affirming the Trustee's net investment method. *Id.* at 9a, 11a, 25a.

[2] The SEC has taken the position that a claimant's net investment should be calculated in constant dollars, not current dollars, so as to adjust for the effects of inflation. As the Second Circuit noted, however, this is an issue "on which the bankruptcy court has not yet ruled and which is not before [the Second Circuit] on this interlocutory appeal." Sterling Pet. App. 11a n.7.

The petitioners contended below, as they do here, that the Trustee should have calculated net equity based on the amounts shown on their fraudulent statements from BLMIS, even though the books and records of BLMIS show those statements to be a fraud, and even though those transactions could never have occurred in the marketplace. *Id.* at 8a. The Second Circuit, like the bankruptcy court, rejected this argument, holding that it would have been "legal error" for the Trustee to "discharge claims upon the false premise that customers' securities positions are what the account statements purport them to be." *Id* at 24a.

In support of its holding that the net investment method was "legally sound," the Second Circuit examined the overall structure and purpose of SIPA. It noted that "the statute does not define 'net equity' by reference to a customer's last account statement." *Id.* at 2a, 16a. Rather, a SIPA trustee's obligation to pay customers based on their net equity must be read in tandem with SIPA's requirement that a trustee discharge those obligations "insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee." *Id.* at 15a-16a.

As the Second Circuit explained, "notwithstanding the BLMIS customer statements, there were no securities purchased and there were no proceeds from the money entrusted to Madoff for the purpose of making investments." *Id.* at 21a. Instead, "the profits recorded over time on the customer statements were after-the-fact constructs that were based on stock movements

that had already taken place, were rigged to reflect a steady and upward trajectory in good times and bad, and were arbitrarily and unequally distributed among customers." *Id.* at 16a-17a.

The Second Circuit agreed with the bankruptcy court that the inequitable consequence of the last statement method for calculating net equity would be "that those who had already withdrawn cash deriving from imaginary profits in excess of their initial investment would derive additional benefit at the expense of those customers who had not withdrawn funds before the fraud was exposed." *Id.* at 17a; *see also id.* at 71a ("Any dollar paid to reimburse a fictitious profit is a dollar no longer available to pay claims for money actually invested."). Therefore, "[u]se of the last statement method in this case 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.* at 12a.

The Second Circuit recognized that the net investment method may not apply in all situations, but that the facts of this case—a Ponzi scheme in which no securities were ordered or purchased, or even could have been purchased on the terms reflected on the customer statements—made it appropriate here. *Id.* at 16a-18a. The net investment method "allows the Trustee to make payments based on withdrawals and deposits, which can be confirmed by the debtor's books and records, and results in a distribution of customer property that is proper under SIPA." *Id.* at 18a.

Certain claimants filed motions for rehearing and rehearing *en banc*, which were denied by the Second Circuit.

III. REASONS FOR DENYING THE PETITIONS

The petitions seek a writ of certiorari on an issue over which there is no circuit split. The courts that have considered how to calculate net equity under the facts of this case agree that the net investment method is the proper method. The two entities responsible for administering SIPA also agree that the net investment method is proper. And the holdings of the Second Circuit and the bankruptcy court are consistent with the only appellate decisions on point, decisions that were issued by the Second Circuit itself.

Moreover, the Second Circuit did not determine a federal question in way that conflicts with the relevant decisions of this Court. Indeed, none of this Court's cases cited by the petitioners address SIPA. And none of the other issues raised by the petitioners are important federal issues requiring review of this Court. Accordingly, the petitioners have not demonstrated any compelling reason for the petitions to be granted.

A. The Opinion Does Not Conflict With Decisions Of Any Other Circuits

The petitioners point to no decisions from other circuits that conflict with the decision below.

Indeed, the only appellate decisions to confront similar circumstances to those here were issued by the Second Circuit itself, *see In re New Times Sec. Servs., Inc.*, 371 F.3d 68 (2d Cir. 2004) ("*New Times I*"); *In re New Times Sec. Servs., Inc.*, 463 F.3d 125 (2d Cir. 2006) ("*New Times II*"), and both the bankruptcy court and the Second Circuit held

that their opinions were consistent with Second Circuit precedent.

In *New Times I*, the Second Circuit held that net equity could not be calculated by reference to the "fictitious securities positions reflected in the Claimants' account statements." *New Times I*, 371 F.3d at 71. This is because "basing customer recoveries on fictitious amounts . . . would allow customers to recover arbitrary amounts that necessarily have no relation to reality." Because calculations based on a fiction would be "unworkable" and create "potential absurdities," the *New Times I* court held that net equity must be calculated "by reference to the amount of money the Claimants originally invested with the Debtors (*not* including any fictitious or dividend reinvestments)." *Id.* at 71 (emphasis in original).

In its subsequent discussion of *New Times I*, the Second Circuit stated: "The court declined to base the recovery on the rosy account statements telling customers how well the imaginary securities were doing, because treating the fictitious paper profits as within the ambit of customers' 'legitimate expectations' would lead to the absurdity of 'duped' investors reaping windfalls as a result of fraudulent promises made on fake securities." *New Times II*, 463 F.3d at 128 (quoting *New Times I*, 371 F.3d at 87-88).

As held by the Second Circuit and the bankruptcy court, the application of the net investment method is supported by *New Times I* and *New Times II*. Sterling Pet. App. 21a ("[O]ur precedent is consistent with the Trustee's decision to utilize the Net Investment Method under the circumstances of this case"); *see also id.* at 68a

("the [bankruptcy court] agrees with the Trustee that *New Times I* and *II* support using the Net Investment Method here").

B. The Petitioners Present No Issue of Federal Law That Must Be Decided By This Court

1. The Second Circuit's Ruling Was Limited To The Facts Of This Case

The Court also should not hear this matter because the ruling below was limited to the facts of this case. *See, e.g.*, Sterling Pet. App. 18a ("Under the circumstances of this case, the limitation on the objecting customers' recovery imposed by the Net Investment Method is consistent with the purpose and design of SIPA"). The Second Circuit concluded that SIPA's "statutory language does not prescribe a single means of calculating 'net equity' that applies in the myriad circumstances that may arise in a SIPA liquidation." *Id.* at 10a. Instead, "[d]iffering fact patterns will inevitably call for differing approaches to ascertaining the fairest method for approximating 'net equity.'" *Id.* at 11a.

Here, the Second Circuit held that the net investment method "allows the Trustee to make payments based on upon withdrawals and deposits, which can be confirmed by the debtor's books and records, and results in distribution of customer property that is proper under SIPA." *Id.* at 18a. By contrast, if the last statement method were used, "those who had already withdrawn cash deriving from imaginary profits in excess of their initial investment would derive additional

benefit at the expense of those customers who had not withdrawn funds before the fraud was exposed." *Id.* at 17a. This would have "undermined the main purpose of determining net equity, which is "to achieve a fair allocation of the available resources amongst customers." *Id.* at 21a.

While the opinion held that it would have been legal error to use the last statement method on the facts presented here, it did not proscribe use of the last statement method in future SIPA liquidations. In fact, the Second Circuit recognized that "a customer's last account statement will likely be the most appropriate means of calculating net equity in more conventional cases"—such as where securities were actually purchased by the debtor but converted, or where customers authorized purchases of specific stocks. *Id.* at 17a-18a. But here, the "extraordinary facts of this case"—including where Madoff "constructed account statements retrospectively, designating stocks based on advantageous historical price information and arbitrarily distributing profits among his customers—made the net investment method appropriate. *Id.* at 18a, 24a, 16a-18a.

The petitioners argue that the Second Circuit's refusal to issue a bright-line rule as to the proper method to calculate net equity requires this Court's review. But as courts have recognized, SIPA is not a one-size-fits-all statute. *Id.* at 24a (citing *Exch. Nat'l Bank of Chicago v. Wyatt*, 517 F.2d 453, 459 n. 12 (2d Cir. 1975) (SIPA liquidations "have been carefully designed to allow flexibility")). Indeed, a SIPA trustee is statutorily charged to calculate a customer's net equity

"insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee." 15 U.S.C. § 78fff-2(b); *see also* Sterling Pet. App. 14a-15a. These determinations are inherently fact-specific. And should the trustee's statutorily prescribed discretion to calculate net equity be disputed, claimants have the right—as they did in this case—to challenge those determinations before the bankruptcy court, and on appeal.[3]

Moreover, in a Ponzi scheme, as among equally innocent victims, "equality is equity." *Cunningham v. Brown*, 265 U.S. 1, 13 (1924). In this case, the net investment method achieved the fairest allocation of the available resources among BLMIS customers, disallowing payments to those customers who received fictitious profits from Madoff's scheme—at the expense of other customers—until those customers who lost principal in the scheme recover their net investment.

2. SIPA Does Not Provide Insurance

The Ryan Petitioners argue that SIPA acts as an insurance guarantee of the amounts listed on their customer statements, and complain that the lower court's decision undermined that notion.

[3] The petitioners argue that SIPC is not permitted to amend the definition of net equity. *See, e.g.*, Sterling Pet. App. 15-16. But the Trustee's use of the net investment method *reflected* the statutory definition of net equity—and its obligation that net equity be calculated "insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee,"—it does not *amend* it.

Ryan Pet. 3-5. But unlike the Federal Deposit Insurance Act (FDIA), SIPA and its legislative history make clear that SIPA does *not* provide insurance. *See, e.g., In re Stratton Oakmont, Inc.*, 2003 U.S. Dist. LEXIS 20459, at *13 (S.D.N.Y. Nov. 13, 2003) (SIPA "was not intended to create an insurance fund for securities investors.") Accordingly, courts have recognized that "SIPC is not an insurer, nor does it guarantee that customers will recover their investments which may have diminished as a result of, among other things, market fluctuation or fraud." *SIPC v. Associated Underwriters, Inc.*, 423 F. Supp. 168, 170-71 (D. Utah 1975); *see also* Sterling Pet. App. 19a ("it is clear that the obligations imposed on an insurance provider do *not* apply to this congressionally-created nonprofit membership organization") (emphasis in original) (quotations omitted).

SIPA and the FDIA are "independent statutory schemes, enacted to serve the unique needs of the banking and securities industries, respectively. Congress recognized this when it rejected several early versions of the SIPA bill which were patterned on FDIA . . ." *SIPC v. Morgan Kennedy & Co.*, 533 F.2d 1314, 1318 (2d Cir.), *cert. den.*, 426 U.S. 936 (1976). The argument that SIPA and the FDIA are *in pari materia* and therefore should be construed in the same way has been expressly rejected, and should likewise be rejected here. *See In re Bell & Beckwith,* 104 B. R. 842, 851 (Bankr. N. D. Ohio 1989), *aff'd*, 937 F.2d 1104 (6th Cir. 1991).

Congress enacted SIPA in 1970 in order to protect customers from losses caused by the insolvency of broker dealers. *See In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. at 132; *see also*

SEC v. S.J. Salmon & Co., Inc., 375 F. Supp. 867, 871 (S.D.N.Y. 1974). But SIPA was not designed to provide full protection to all victims of a brokerage collapse. *See SEC v. Packer, Wilbur & Co.*, 498 F.2d 978, 983 (2d Cir. 1974). SIPA does not protect against investment loss, fraud, or misrepresentation, as was the case here. *See In re Brentwood Sec.*, 925 F.2d 325, 330 (9th Cir. 1991) ("SIPA protects investors when a broker holding their assets becomes insolvent. It does not comprehensively protect investors from the risk that some deals will go bad or that some securities issuers will behave dishonestly."); *In re Klein, Maus & Shire*, 301 B.R. 408 (Bankr. S.D.N.Y. 2003) ("claims for damages resulting from a broker's misrepresentations, fraud or breach of contract are not protected"); *see also SEC v. Howard Lawrence & Co.*, 1 Bankr. Ct. Dec. (CRR) 577, 579 (S.D.N.Y. 1975) ("SIPA does not protect customer claims based on fraud or breach of contract."); *In re Investors Ctr., Inc.*, 129 B.R. 339, 353 (Bankr. E.D.N.Y. 1991) ("Repeatedly, this Court has been forced to tell claimants that the fund created for the protection of customers of honest, but insolvent, brokers gives them no protection when the insolvent broker has been guilty of dishonesty, breach of contract or fraud.").[4]

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[4] Even in the insurance context, courts have refused to compensate victims for the fictitious amounts on their BLMIS customer statements above their actual losses. *See Horowitz v. Am. Int'l Grp., Inc.*, 2010 U.S. Dist. LEXIS 103489, at *23 (S.D.N.Y. Sept. 30, 2010) ("The money reflected in the final account statement was not taken from the Plaintiffs by fraud; rather, it never belonged to them, or even existed in the first place due to fraud. Therefore, they did not lose this money; they lost the mistaken belief that they owned this money").

3. The Petitioners' Remaining Arguments Were Considered And Rejected Below

The remaining issues raised by the petitioners fail to present any compelling reason for this Court to grant a writ of certiorari. In fact, their arguments were presented to the courts below, in oral argument and/or briefing, and were not discussed in either of the lower courts' opinions.

The Sterling Petitioners claim that this Court's review is necessary to resolve the question of whether Article 8 of the Uniform Commercial Code (UCC) is relevant to the question of a net equity claim under SIPA. They argue that Article 8 of the UCC provides that a broker "owes" its customer the securities on the statements issued, and that therefore, the customer statements dictate the amount of "net equity" under SIPA.

But as the Official Comment to the UCC explains, SIPA, not the UCC, is controlling in liquidation proceedings: "If the intermediary fails and its affairs are being administered in an insolvency proceeding, the applicable insolvency law governs how the various parties having claims against the firm are treated. For example, the distributional rules for stockbroker liquidation proceedings under the Bankruptcy Code and the Securities Investor Protection Act . . . provide that all customer property is distributed pro rata among all customers." *Id.*; *see also Am. Sur. Co. of N.Y. v. Sampsell*, 327 U.S. 269, 272 (1946) ("[F]ederal bankruptcy law, not state law, governs the distribution of a bankrupt's assets to his creditors.").

Moreover, to the extent that the UCC conflicts with SIPA, SIPA controls. SIPA provides that "customer property" is to be distributed in accordance with a customer's "net equity" claim. *See* 15 U.S.C. § 78fff-2(c)(1). Any state law that would resolve the question differently is preempted as inconsistent with SIPA. *See* U.S. Const., art. VI, cl. 2; *First Fed. Sav. & Loan Ass'n of Lincoln v. Bevill, Bresler & Schulman, Inc. (In re Bevill, Bresler & Schulman, Inc.)*, 59 B.R. 353, 378 (D.N.J. 1986), *appeal dismissed*, 802 F.2d 445 (3d Cir. 1986) (state law that is inconsistent with SIPA is preempted under the Supremacy Clause). Thus, SIPA governs the amount and priority of customer claims by reference to the debtor's books and records, not the UCC, and to the extent that the UCC or any other state law would lead to a result contrary to the SIPA priority scheme, it is preempted, as the Sterling Petitioners conceded before the Second Circuit. *See* Reply Brief of Sterling Petitioners, *In re Bernard L. Madoff Inv. Sec.*, No. 10-2378 (2d Cir. Oct. 11, 2010) (ECF No. 338), at 5; *see also Travelers Cas. & Sur. Co. Am. V. Pac. Gas & Electr. Co.*, 549 U.S. 443, 450-51 (2007) ("[p]roperty interests are created and defined by state law, unless some federal interest requires a different result . . .") (internal citation and quotations omitted).

The final issue raised to this Court is not a substantive legal issue, but rather, is a request for discovery that has already been denied below. Petitioner Velvel claims that this Court must permit him discovery regarding the motives of SIPC and the Trustee in selecting the net investment method. Velvel Pet. App. 78A-79A. But

the bankruptcy court properly denied him this irrelevant "motive" discovery in a protective order from which Velvel did not appeal. *Id.* This discovery matter is not relevant to the statutory interpretation of SIPA and is not a compelling reason to seek this Court's review.

C. The Second Circuit's Interpretation Of SIPA Is Supported By Both Entities Responsible For Enforcing The Statute

The two entities responsible for enforcing and interpreting SIPA, the SEC and SIPC, also agree that net equity cannot be calculated using the last statement method in this case. Sterling Pet. App. 8a. Given this Court's traditional deference to agency interpretations of the federal statutes over which they have enforcement authority, and given that their interpretation of net equity is consistent with the decisions of the lower courts in this matter, this Court's review is not warranted.

IV. CONCLUSION

The petitions for a writ of certiorari should be denied.

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Respectfully Submitted,

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