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9 **UNITED STATES BANKRUPTCY COURT**
10 **SOUTHERN DISTRICT OF NEW YORK**

11 SECURITIES INVESTOR PROTECTION)
CORPORATION,)

12 Plaintiff,)

13 v.)

14 BERNARD L. MADOFF INVESTMENT)
15 SECURITIES LLC.,)

16 Defendant.)
17)

) Bankruptcy Case. No. 08-01789 (BRL)

) SIPA LIQUIDATION

18
19 **OBJECTION TO TRUSTEE’S DETERMINATION OF CLAIM**

20 David Lustig, account holder of NTC & Co., FBO David Lustig (IRA), hereby objects to
21 the Notice of Trustee’s Determination of Claim dated October 19, 2009, (“Determination
22 Letter”), attached as Exhibit A, as described herein.
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BACKGROUND

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2 1. David I. Lustig, account holder of NTC & Co., FBO David Lustig (IRA)
3 (hereinafter "David Lustig or "Lustig") is a "customer," as defined by the Securities Investor
4 Protection Act ("SIPA"), of Bernard L. Madoff Investment Securities, LLC ("BMIS").

5 2. Mr. Lustig's final BMIS statement, dated November 30, 2008, states that he
6 owns securities valued at \$1,133,322 ("Final BMIS Statement").

7 3. On December 11, 2008, the above-captioned liquidation proceeding was
8 commenced against BMIS, pursuant to the Securities Investor Protection Act of 1970 ("SIPA").
9 See Order, Securities and Exchange Commission v. Madoff, No. 08-10791 (S.D.N.Y. Dec. 15,
10 2008) (ordering relief under SIPA and transferring proceeding to the United States Bankruptcy
11 Court for the Southern District of New York) [Dkt. No. 4]. Irving Picard was appointed Trustee
12 ("BMIS Trustee"), charged with overseeing the liquidation of BMIS and processing customer
13 claims for money pursuant to SIPA. Id.; 15 U.S.C. 78fff-1(a).

14 4. On December 23, 2008, the Court issued an Order directing the Trustee to
15 disseminate notice and claim forms to BMIS customers and setting forth claim-filing deadlines.
16 See Order [Dkt. No. 12]. Upon information and belief, the BMIS Trustee disseminated notice
17 and claim forms to BMIS' s customers in accordance with the Court's Order.

18 5. The December 23, 2008 Order further provided that, to the extent the BMIS
19 Trustee disagrees with the amount set forth on a customer claim form, the BMIS Trustee "shall
20 notify such claimant by mail of his determination that the claim is disallowed, in whole or in
21 part, *and the reason therefor . . .*" See Order at 6 (emphasis added) [Dkt. No. 12]

22 6. On or about June 30, 2009, Mr. Lustig submitted a customer claim form to SIPC,
23 setting forth his claim in the amount of \$1,133,322, the amount set forth on Mr. Lustig's Final
24 BMIS Statement. See David Ivan Lustig, IRA Claim for Acct. No. 1-ZR297-3. ("Lustig IRA
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1 Customer Claim").

2 7. On October 19, 2009, the BMIS Trustee sent Mr. Lustig the Determination Letter
3 disallowing Mr. Lustig's claim in its entirety. See Determination Letter (Exhibit A).

4 8. Mr. Lustig hereby objects to the Determination Letter for the reasons described
5 below.

6 **GROUNDS FOR OBJECTION**

7 9. First Objection. The Determination Letter fails to comply with the Court's
8 December 23, 2008 Order, which directs the BMIS Trustee to satisfy customer claims and
9 deliver securities in accordance "with the Debtor's books and records." Dec. 23, 2008 Order at 5
10 [Dkt. No. 12]. Included with Mr. Lustig's IRA Customer Claim was his Final BMIS Statement
11 showing a final balance of \$1,133,322. See Lustig IRA Customer Claim. The Final BMIS
12 Statement is the best evidence of the amount owed based on the Debtor's books and records.
13 Accordingly, the claim should be allowed in the full amount of \$1,133,322.

14 10. Second Objection. The Trustee has set forth no legal basis for disallowing the
15 Lustig IRA Customer Claim in full as filed. The only explanations set forth in the Determination
16 Letter are that "[n]o securities were ever purchased for your account." Determination Letter at 1
17 (Exhibit A). This purported ground for disallowance does not have any statutory or other legal
18 basis. Moreover, the Determination Letter:

19 (a) does not clearly provide "the reason" for the disallowance, as required by
20 the Court's December 23, 2008 Order, see Order [Dkt. No. 12];

21 (b) is inadequate to rebut the prima facie validity of the Lustig IRA Customer
22 Claim as provided in Section 502(a) of the Bankruptcy Code and Fed. R. Bankr. P. 3001(f); and

23 (c) violates general principles of applicable law requiring that an objection to
24 a proof of claim set forth, at a minimum, the relevant facts and legal theories upon which the
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1 objection is based. See, e.g., Collier on Bankruptcy 3007.01(3) (15th ed.) ("[A]n objection to a
2 claim should . . . meet the [pleading] standards of an answer. It should make clear which facts are
3 disputed; it should allege facts necessary to affirmative defenses; and it should describe the
4 theoretical bases of those defenses."); In re Enron Corp., No. 01-16034, 2003 Bankr. LEXIS
5 2261, at * (Bankr. S.D.N.Y. Jan. 13, 2003) (same).

6 11. Third Objection. 15 U.S.C. Section 78fff-2(b) provides that a customer's claim
7 shall be allowed in the amount of the customer's "net equity." 15 U.S.C. § 78fff-2(b). Upon
8 information and belief, the Trustee objects to the Lustig IRA Customer Claim on the ground that
9 "net equity" should be determined by principal contributed to the account less any withdrawals,
10 without regard to any gains reflected in the Final BMIS Statement or prior BMIS statements. See
11 Determination Letter Table 1. This is incorrect for the following reasons:

12 (a) The Trustee's construction of the statute ignores SIPA's express language which
13 defines "net equity" as

14 the dollar amount of the account or accounts of a customer, to be determined by --

15 (A) calculating the sum which would have been owed by the debtor to such customer
16 if the debtor had liquidated, by sale or purchase on the filing date, all securities positions
17 of such customer (other than customer name securities reclaimed by such customer);
18 minus

(B) any indebtedness of such customer to the debtor on the filing date;

19 15 U.S.C. § 78111(11). The Trustee's proposed formulation has no support in the language of the
20 statute or interpreting case law and in fact, adds words and concepts to the statute which do not
21 exist.

22 (b) SIPA's legislative history emphasizes Congress's intention that the statute protect
23 customer expectations by ensuring that customers of retail brokerage firms can rely on their
24 account statements. The BMIS statements received by Mr. Lustig stated that he owned a list of
25 blue chip securities. It makes no difference whether the securities were purchased:

1 A customer generally expects to receive *what he believes* is in his account at the time the
2 stockbroker ceases business. But because securities may have been lost, improperly
3 hypothecated, misappropriated, *never purchased*, or even stolen, it is not always possible
4 to provide to customers that which they expect to receive, that is, securities which they
5 maintained in their brokerage account. . . . By seeking to make customer accounts whole
6 and returning them to customers in the form they existed on the filing date, the
7 amendments . . . would satisfy customers' legitimate expectations

8 S. Rep. No. 95-763, at 2 (1978) (emphasis added). While there may be a basis to disallow
9 customer claims for wholly fictitious securities of nonexisting entities, here the securities set
10 forth on Mr. Lustig's Final BMIS Statement and prior statements were those of actual companies
11 listed on the stock exchange.

12 (c) The Trustee's Determination Letter is contrary to SIPC's own policies and
13 practices, as reflected in the sworn testimony of Stephen Harbeck, SIPC's president and CEO,
14 and its actions in similar liquidation proceedings. For example, in the New Times SIPA
15 liquidation, in the context of discussing claims filing deadlines, Harbeck acknowledged that
16 SIPC would replace securities listed on customer account statements, even if the securities had
17 never been purchased:

18 Harbeck: [I]f you file within sixty days, you'll get the securities, without question.
19 Whether -- if they triple in value, you'll get the securities. . . . Even if they're not there.

20 Court: Even if they're not there.

21 Harbeck: Correct.

22 Court: In other words, if the money was diverted, converted - -

23 Harbeck: And the securities were never purchased.

24 Court. Okay.

25 Harbeck: And if those positions triple, we will gladly give the people their securities
positions.

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2 Transcript at 37-39, *In re New Times Securities Services, Inc.*, No. 00-8178 (Bankr.
3 E.D.N.Y. July 28, 2000). The Second Circuit's discussion of SIPC's claims processing in New
4 Times further indicates that, with respect to customers who thought they were invested in listed
5 securities, SIPC paid customer claims based on the customers' final account statements, even
6 where the securities had never been purchased:

7
8 Meanwhile, investors who were misled . . . to believe that they were investing in
9 mutual funds that in reality existed were treated much more favorably. Although
10 they were not actually invested in those real funds -- because Goren never
11 executed the transactions -- the information that these claimants received on their
12 account statements mirrored what would have happened had the given transaction
13 been executed. As a result, the Trustee deemed those customers' claims to be
14 "securities claims" eligible to receive up to \$500,000 in SIPC advances. The
15 Trustee indicates that this disparate treatment was justified because he could
16 purchase real, existing securities to satisfy such securities claims. Furthermore,
17 the Trustee notes that, if they were checking on their mutual funds, the "securities
18 claimants," . . . could have confirmed the existence of those funds and tracked the
19 funds' performance against Goren's account statements.

20
21 *In re New Times Secs. Servs.*, 371 F.3d 68, 74 (2d Cir. 2004). Mr. Lustig is situated no
22 differently from the "securities claimants" discussed by the Second Circuit. Accordingly, his
23 claim should be recognized in full.

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25 12. In the event that the Court should determine that claimed gains on deposited
funds should not be allowed, then in the alternative, Mr. Lustig is entitled to recover interest on
such deposited amounts. Such interest is required as a matter of state law, and the United States
Supreme Court has determined that in bankruptcy cases, creditor claims, including the right to
interest, are determined by state law. See *Travelers Cas. & Sur. Co. of Am. v. PG&E*, 549 U.S.
443, 450-51 (2007) ("[W]e have long recognized that the 'basic federal rule' in bankruptcy is that
state law governs the substance of claims, Congress having generally left the determination of
property rights in the assets of a bankrupt's estate to state law.").

1 (a) Under New York law, which is applicable here, funds deposited with the
2 Debtors under these circumstances are entitled to interest. *See, e.g.*, N.Y.C.P.L.R. § 5004; N.Y.
3 Gen. Oblig. § 5-501, et seq. Accordingly, Customer claims should be recalculated by adding
4 interest to all funds deposited by customers such as Mr. Lustig.

5 (b) Under New York law, which is applicable here, customers are entitled to
6 any returns the Debtors earned on the deposited funds under principles of unjust enrichment.
7 Accordingly, Customer claims should be recalculated by adding the amounts earned by the
8 Debtors on Mr. Lustig's deposits. *See, e.g.*, *Steinberg v. Sherman*, No. 07-1001, 2008 U.S. Dist.
9 LEXIS 35786, at *14-15 (S.D.N.Y. May 2, 2008) ("Causes of action such as ... conversion and
10 unjust enrichment qualify for the recovery of prejudgment interest."); *Eighteen Holding Corp. v.*
11 *Drizin*, 701 N.Y.S.2d 427, 428 (1st Dep't 2000) (awarding prejudgment interest on claims for
12 unjust enrichment and conversion).

13 13. Fourth Objection. The BMIS Trustee's action in reducing the amount shown on
14 Lustig IRA Customer Claim by any prior gains reflected on his Final BMIS statement or prior
15 BMIS statements is an attempt to avoid such gains without alleging any grounds for avoidance or
16 proving that such gains are avoidable under the Bankruptcy Code's avoidance provisions. As
17 such, any such disallowance is improper and unjustified, and the Determination letter should be
18 stricken. *See Fed. R. Bankr. P. 7001(1); 7008.*

19 14. Fifth Objection. The Trustee sets forth in the Determination Letter a list of
20 deposits and withdrawals from the BMIS account held by Mr. Lustig. There are more than one
21 withdrawal acknowledged by the Trustee to be transfers from one BMIS account to at least one
22 other BMIS account. In addition, Mr. Lustig did in fact withdraw \$2,000,000 on July 25, 2007
23 (the "July 07 Withdrawal") (see page 4 of Exhibit A) for the purpose of investing, and which was
24 immediately invested, with a third party feeder fund, which in turn invested said sum in Tremont
25 Capital and HSBC Luxemburg/Senator. All of the July 07 Withdrawal was deposited indirectly

1 into one or more BMIS accounts. Mr. Lustig is entitled to a credit for the July 07 Withdrawal in
2 addition to the acknowledged transfers into another BMIS account, resulting in a positive
3 balance of \$1,133,322. Mr. Lustig is entitled to receive immediate payment of \$1,133,322, plus
4 interest from the date of the determination and appropriate equitable relief as determined by the
5 Court.

6 15. Sixth Objection. In the event that the Court should determine that claimed gains
7 on deposited funds should not be allowed and the Trustee's "net equity" method of calculating
8 gains should be applied, then, in the alternative, Mr. Lustig is entitled to have his claims adjusted
9 for inflation. The "net equity" approach adopted by the Trustee benefits investors who happened
10 to invest late in BMIS accounts, or who never withdrew funds over the years. Conversely, the
11 Trustee's "net equity" approach unjustly devalues and outright denies Mr. Lustig's claim, who
12 invested earlier in his BMIS account and faces serious financial hardship as a result of the fraud.
13 By way of example, assume that one claimant invested \$500 in a BMIS account in 1987, and a
14 second claimant invested \$500 in 2007, and neither claimant withdrew any funds from their
15 accounts. The Trustee's "net equity" approach would treat both amounts the same although the
16 more recent contribution is worth about \$415 less than the investment made more than 20 years
17 ago. In order to avoid this gross inequity, and to make the Trustee's misguided "net equity"
18 calculations at least somewhat more equitable, the value of Mr. Lustig's deposits should be
19 adjusted for inflation and thereby increased. An adjustment for inflation would at least afford
20 Mr. Lustig a more just and proper opportunity to claim a cash loss under the Trustee's
21 objectionable "net equity" approach. It would also serve to put him on more equal footing with
22 other investors in BMIS accounts.

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RELIEF REQUESTED

16. For the reasons stated herein, the Lustig IRA Customer Claim should be allowed

1 in its entirety.

2 17. For the reasons stated herein, the Court should direct SIPC to issue immediate
3 payment to Mr. Lustig in the amount of \$1,133,322, plus interest from the date of the
4 Determination Letter, and such equitable relief as the Court deems appropriate.

5 18. The BMIS Trustee's determination amounts to an improper disallowance of a
6 claim that has prima facie validity. See Bankruptcy Code § 502(a). The BMIS Trustee has
7 offered no factual or legal basis for his Determination. The BMIS Trustee's Determination Letter,
8 and the objections contained therein, should be stricken, or alternatively, the BMIS Trustee
9 should describe his position in detail including all relevant facts, legal theories, and authorities.
10 Upon the filing of such a statement, this matter will be a contested proceeding under Rule 9014,
11 and Mr. Lustig will file a response.

12 19. Mr. Lustig requests such other relief as may be just and equitable.
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17 **CONCLUSION**

18 20. Mr. Lustig reserves the right to revise, supplement, or amend this Objection, and
19 any failure to object on a particular ground or grounds shall not be construed as a waiver of Mr.
20 Lustig's right to object on any additional grounds.

21 21. Mr. Lustig reserves all rights set forth Rule 9014, including, without limitation,
22 rights of discovery. See Fed. R. Bankr. P. 9014.

23 22. Mr. Lustig reserves all objections as to the competence, relevance, materiality,
24 privilege, or admissibility of evidence in any subsequent proceeding or trial of this or any other
25 action for any purpose whatsoever.

1 23. Mr. Lustig incorporates by reference all reservations of rights set forth in the
2 Lustig IRA Customer Claim.

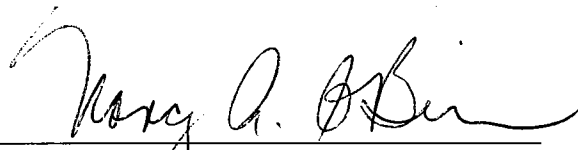
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4 Dated: December 17, 2009

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6 
7 DAVID I. LUSTIG

8 *Account Holder of David Ivan Lustig IRA*
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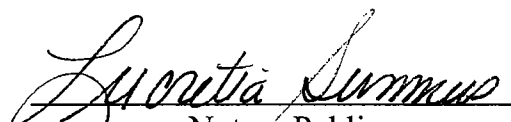
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the address designated by said attorney(s) for that purpose by delivering true copies thereof, in prepaid properly addressed wrappers, to an authorized agent of Federal Express, for overnight delivery as noted above and by filing electronically with the Court so as to serve same upon the parties in this action who receive electronic service through CM/ECF.



NANCY O'BRIEN

Sworn to before me this
17th day of December 2009.


Notary Public

LUCRETIA SUMMUS
Notary Public, State of New York
No. 010U5057452
Qualified in Nassau County
Commission Expires March 25, 20 10