Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Email: dsheehan@bakerlaw.com
Marc E. Hirschfield
Email: mhirschfield@bakerlaw.com
Seanna R. Brown
Email: sbrown@bakerlaw.com

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

Hearing Date: February 2, 2010
Hearing Time: 10:00 AM (EST)
Objection Deadline: November 13, 2009

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 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	

TRUSTEE'S MOTION FOR AN ORDER UPHOLDING TRUSTEE'S DETERMINATION DENYING CUSTOMER CLAIMS' FOR AMOUNTS LISTED ON LAST STATEMENT, AFFIRMING TRUSTEE'S DETERMINATION OF NET EQUITY, AND EXPUNGING THOSE OBJECTIONS WITH RESPECT TO THE DETERMINATIONS RELATING TO NET EQUITY

Pursuant to this Court's order of September 16, 2009 scheduling adjudication of the "Net Equity" issue (the "Scheduling Order"), Irving H. Picard, trustee ("Trustee") for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Corporation Act, 15 U.S.C. § 78aaa et seq. ("SIPA"),[1] and for Bernard L. Madoff ("Madoff") ("collectively, "Debtor"), respectfully submits this motion ("Motion") for an order (a) upholding the Trustee's determinations of the Claims listed on Exhibit A to the extent such determinations relate to the Trustee's interpretation of "Net Equity" as such term is used at 15 U.S.C. § 78*lll*(11), (b) upholding the Trustee's denial of the Claims to the extent they are a claim for the amounts listed on the respective customer's November 30, 2008 BLMIS customer statement, (c) affirming the Trustee's interpretation of "Net Equity," and (d) expunging the objections to the Trustee's determinations listed on Exhibit A insofar as they object to the Trustee's interpretation of the term "Net Equity:"

In support of his Motion, the Trustee states and represents as follows:

Factual Background:

1. On December 11, 2008, Madoff was arrested by the FBI in his Manhattan home and was criminally charged with a multi-billion dollar securities fraud scheme in violation of 15 U.S.C. §§ 78j(b) & 78ff and 17 C.F.R. 240.10b-5 in the United States District Court for the Southern District of New York, captioned *United States v. Madoff*, No. 08-CV-2735 (the "Criminal Action").[2]

[1] For convenience, future reference to SIPA will not include "15 U.S.C."

[2] On March 10, 2009, the Criminal Action was transferred to Judge Denny Chin in the United States District Court for the Southern District of New York and was assigned a new docket number, No. 09 CR 213 (DC).

2. Also on December 11, 2008 (the "Filing Date"),[3] the Securities and Exchange Commission ("SEC") filed a complaint in the United States District Court for the Southern District of New York (the "District Court") against Madoff and BLMIS (Case No. 08-CV-10791) (the "SEC Action").

3. On December 15, 2008, under section 78eee(a)(4)(A) of SIPA, the SEC consented to a combination of the SEC Action with an application of the Securities Investor Protection Corporation ("SIPC"). Thereafter, under section 78eee(a)(3) of SIPA, SIPC filed an application in the district court alleging that BLMIS was not able to meet its obligations to securities customers as they came due and that its customers needed the protection afforded by SIPA as a result.

4. That same day, the District Court entered a protective decree, to which BLMIS consented, which, in pertinent part:

(a) Appointed Irving H. Picard as trustee for the liquidation of the business of BLMIS, pursuant to section 78eee(b)(3) of SIPA;

(b) Appointed Baker & Hostetler, LLP as counsel to the Trustee ("Counsel") pursuant to section 78eee(b)(3) of SIPA;

(c) Removed the case to this Bankruptcy Court pursuant to section 78eee(b)(4) of SIPA; and

(d) Authorized the Trustee to take immediate possession of the property of the debtor, wherever located.

5. On December 23, 2008, this Court entered a claims procedure order that specifies the procedures for the filing, determination, and adjudication of customer claims in this

[3] In this case, the Filing Date is the date on which the SEC commenced its suit against BLMIS, December 11, 2008, which resulted in the appointment of a receiver for the firm. *See* Section 78*lll*(7)(B) of SIPA, 15 U.S.C. § 78 *lll*(7)(B).

proceeding. The order provides that under section 78fff-2(a)(2) of SIPA, all claims against BLMIS must be filed with the Trustee. The order further provides that the Trustee will determine customer and creditor claims in writing and allows any claimant who opposes the Trustee's determination to file an objection with this Court, after which the Court will hear the matter.

6. As the Trustee appointed under SIPA, the Trustee has the job of recovering and distributing customer property to BLMIS's customers, assessing claims, and liquidating any other assets of the firm for the benefit of the estate and its creditors. Pursuant to section § 78fff-1(a) of SIPA, the Trustee has the general powers of a bankruptcy trustee in addition to the powers granted by SIPA. Pursuant to section 78fff(b) of SIPA, Chapters 1, 3, 5 and Subchapters I and II of Chapter 7 of the Bankruptcy Code are applicable to this case.

7. In accordance with his statutory responsibilities, the Trustee is in the process of marshalling BLMIS's assets, and the liquidation of BLMIS's assets for the benefit of the estate's customers and creditors is well underway. To date, the Trustee has recovered more than $1.2 billion in assets to date, although it is not expected that the total value of assets ultimately recovered will be sufficient to fully reimburse the customers of BLMIS for the many billions of dollars they invested with BLMIS over the years. In addition, the Trustee has determined more than 1,530 customer claims and has committed to pay over $484 million to BLMIS customers in funds advanced from SIPC in full or partial satisfaction of those claims, upon the return of the appropriate assignment and release.

Trustee's Interpretation of Net Equity:

8. The statutory framework for the satisfaction of customer claims in a SIPA liquidation proceeding provides that customers share pro rata in customer property to the extent of their "net equity," as defined in section 78*lll*(11) of SIPA ("Net Equity"), and to the extent that a customer's Net Equity exceeds his or her ratable share of customer property, SIPC shall advance funds to the SIPA trustee up to $500,000 for securities for that customer.

9. The Trustee has determined each customer's Net Equity by crediting the amount of cash deposited by the customer into her BLMIS account, less any amounts withdrawn from her BLMIS customer account, otherwise known as the "cash in/cash out approach."

10. Certain claimants disagree with the Trustee as to the construction of the term Net Equity and how that term should be applied to determine the amount of the valid customer claim of each claimant.

11. Various claimants have asserted that Net Equity should be determined on the basis of each claimant's fictitious balance as shown on their fabricated November 30, 2008 account statement provided by BLMIS.

Motion for Scheduling Order on Net Equity:

12. After certain claimants objected to the Trustee's interpretation of Net Equity, the Trustee, moved the Court for a briefing schedule and hearing on the matter.

13. On September 16, 2009, this Court entered the Scheduling Order setting forth dates for briefing and hearing on the Net Equity issue. In accordance with the Scheduling Order, the Trustee submits the herein Motion.

Customer claims Determinations:

14. **Net Winners –** Under the parlance of this proceeding, a "net winner" is defined as a BLMIS customer that withdrew more funds from BLMIS than the customer deposited with BLMIS. Thus, the customer received payments constituting a full return of her principal investment, plus some amount of fictitious "profits" generated by BLMIS. Although she has already withdrawn all of her principal, along with some amount of fictitious profits (in reality, funds deposited by other customers), the "net winner" customer who objects to the Trustee's methodology is claiming that she is due the fictitious amount fabricated on her final fake November 30, 2008 BLMIS customer statement. The Trustee has to date received thirty one (31) timely filed objections (containing objections on the basis of Net Equity) from "net winners" (as defined above). Please see Exhibit A-1 for summaries of the "net winners" claims, determinations and objections.

15. **Net Losers (Over-the-Limit) –** Under the "cash in/cash out" approach, the customers that fall within the category of "over-the-limits net losers that have received full SIPC protection" are customers that withdrew less money from BLMIS than they deposited over time, and had net investment amounts in excess of $500,000. They are entitled to an allowed claim for the amount that they invested, less the amount that they have withdrawn from BLMIS. The difference between the amount invested and the withdrawn amount over time is the customer's Net Equity. The customer has received or will receive a *pro rata* share of any

customer property based upon her Net Equity, and will receive a check from the Trustee of $500,000 from funds advanced by SIPC against her share of customer property. Although the claims of these investors should be based on their Net Equity as measured by the net amount invested, these claimants assert that the amount of their Net Equity should be equal to the fictitious amounts represented on their final fake November 30, 2008 BLMIS customer statement. Some of these claimants also argue that their claim for this last reported fictitious amount should be satisfied in securities and not cash. The Trustee has to date received nine (9) objections (containing objections on the basis of Net Equity) from "net losers (over-the-limit)" (as defined above). Please see Exhibit A-2 for summaries of the "net losers (over-the-limit)" claims, determinations and objections.

16. **Net Losers (Under-the-Limit) –** Like the previous category, customers that fall within this category also have allowable claims because they invested more over time than they withdrew from the fraudulent scheme. The net investment amount is less than $500,000, so their respective SIPC protection is limited to the amount of their respective net investment. They will not be entitled to a further distribution from the fund of customer property because their Net Equity claim will have been fully satisfied by the SIPC advance, and SIPC will receive the customers' share of customer property as subrogee. These customers' respective final fake November 30, 2008 BLMIS customer statements may, however, show a balance higher than $500,000. The Trustee has to date received thirty eight (38) objections (containing objections on the basis of Net Equity) from "net losers (under-the-limit)" (as defined above). Please see Exhibit A-3 for summaries of the "net losers (under-the-limit)" claims, determinations and objections.

Relief Requested:

17. Pursuant to the Scheduling Order and for the reasons more fully developed in the memorandum of law submitted in support of this Motion, the Trustee respectfully requests an order (a) upholding the Trustee's determinations of the Claims listed on Exhibit A to the extent such determinations relate to the Trustee's interpretation of "Net Equity" as such term is used at 15 U.S.C. § 78*lll*(11), (b) upholding the Trustee's denial of the Claims to the extent they are a claim for the amounts listed on the respective customer's November 30, 2008 BLMIS customer statement, (c) affirming the Trustee's interpretation of "Net Equity", and (d) expunging the objections to the Trustee's determinations listed on Exhibit A insofar as they object to the Trustee's interpretation of the term "Net Equity."

NOTICE

1. Notice of this Motion has been provided by U.S. mail, postage prepaid, email, or by ECF to (i) customers listed in Exhibit A (ii) all parties that have filed a notice of appearance in this case; (iii) the SEC; (iv) the Internal Revenue Service; and (v) the United States Attorney for the Southern District of New York; (collectively, the "Notice Parties"). The Trustee submits that no other or further notice need be given.

WHEREFORE, the Trustee respectfully requests that the Court issue an order granting the relief requested herein, and grant such other and further relief to the Trustee as the Court deems proper.

Dated: New York, New York
October 16, 2009

BAKER & HOSTETLER LLP

By:/s/ *David J. Sheehan*
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Email: dsheehan@bakerlaw.com
Marc E. Hirschfield
Email: mhirschfield@bakerlaw.com
Seanna R. Brown
Email: sbrown@bakerlaw.com

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

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 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	

DECLARATION OF JOSEPH LOOBY IN SUPPORT OF TRUSTEE'S MOTION FOR AN ORDER UPHOLDING TRUSTEE'S DETERMINATION DENYING "CUSTOMER" CLAIMS FOR AMOUNTS LISTED ON LAST CUSTOMER STATEMENT, AFFIRMING TRUSTEE'S DETERMINATION OF NET EQUITY, AND EXPUNGING THOSE OBJECTIONS WITH RESPECT TO THE DETERMINATIONS RELATING TO NET EQUITY

I, Joseph Looby, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a Senior Managing Director with FTI Consulting, Inc. ("FTI"). I have more than 20 years of combined experience in the military, regulatory enforcement, investigations and technology, much of which has involved financial and fraud investigations. I am a certified fraud examiner ("CFE"), with a Bachelors degree in Economics, a Juris Doctorate, and am listed as the co-inventor of U.S. Patent "System, Software and Method for Examining a Database in a Forensic Accounting Environment." Additional information regarding my personal and professional experience is included in my Curriculum Vitae annexed hereto as **Exhibit 1.**

2. On or about December 30, 2008, FTI was retained by Irving H. Picard, the Trustee appointed by the United States District Court for the Southern District of New York for

the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS"), under the Securities Investor Protection Act ("SIPA"), and for Bernard L. Madoff ("Madoff"), to examine, among other things, the financial affairs of BLMIS.

3. I make this declaration based upon the information and knowledge acquired during the course of my retention, as described herein, and in support of the Trustee's motion ("Motion") for an order upholding the Trustee's determination denying "customer" claims for amounts listed on last customer statements, affirming the Trustee's determination of net equity, and expunging those objections with respect to the determinations relating to net equity.

4. During the course of carrying out my investigative duties in this matter, my colleagues and I have interviewed, in person or by telephone, business associates and other persons who have had business dealings with, or who we were told had information relevant to, the business and financial affairs of BLMIS and Madoff.

5. Also during the course of my involvement in this matter, I have personally reviewed thousands of documents, as well as schedules prepared and information collected by my colleagues, relating to the books and records of BLMIS, third party records, bank records and other documentation relevant to BLMIS and its customer accounts and information systems.

6. I have personally reviewed the BLMIS customer agreements executed by each of the 78 claimants that are the subject of the Trustee's Motion.

Organization of BLMIS

7. Corporate records[1] reveal that Madoff was the sole member and chairman of BLMIS at the time of its failure. Originally formed as a sole proprietorship in 1960, BLMIS was reorganized as a single member LLC on or around December 4, 2000.

8. BLMIS operated for many years up until the Filing Date[2] from its principal place of business at 885 Third Avenue, New York, New York. Madoff ran BLMIS together with several Madoff family members and a number of employees.

9. BLMIS was organized into three business units, the market making unit, the proprietary trading unit, and the investment advisory business (*hereinafter*, interchangeably referred to as "BLMIS" or the "IA Business").

10. BLMIS was registered with the SEC as a broker-dealer under § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*o*(b)) as of January 19, 1960, and, beginning in 2006, as an investment adviser. However, the Investment Advisor registration was falsified and only 23 of the thousands of IA Business customers were reported to the SEC. By virtue of the registration as a broker-dealer, BLMIS was a member of SIPC.

11. Madoff also operated a branch of the broker-dealer in London, England since February 1983, which was incorporated under the name Madoff Securities International Ltd. ("MSIL").

[1] The books and records of BLMIS are, at best, incomplete. The Trustee, through his counsel and his consultants such as FTI, is endeavoring to supplement the corporate books and records with third party records, including bank records, customer records, etc., where available.

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed in the Trustee's Memorandum of Law in support of the Motion.

12. BLMIS's annual audits were purportedly performed by Friehling & Horowitz, CPAs P.C., an accounting firm of three employees, one of whom was semi-retired. The firm's offices were located in a strip mall in Rockland County, New York.

13. BLMIS employees generally referred to the IA Business as "House 17" and the market maker and proprietary trading businesses combined as "House 5."

14. In or around 1993, the staff of the IA Business were physically separated from the other business units and relocated to the 17th floor of 885 Third Avenue ("17th Floor"). The market maker and proprietary trading business staff were located on the 18th and 19th floors of that address.

15. In or around 1993, BLMIS began using computer systems and software programs known as an IBM AS/400. Two (2) AS/400 computer systems were implemented on or around 1993; one for House 5 ("House 5 AS/400") and one for House 17 ("House 17 AS/400"). Both were located on the 17th floor.

16. The House 17 AS/400 was used only in connection with the IA Business. The House 5 AS/400 and other computer systems were used in connection with the market making and proprietary trading business.

BLMIS Bank Accounts & Customer Deposits

17. BLMIS used two primary bank accounts to fund its disbursements, one held at The Bank of New York Mellon (the "621 Account") and another held at JP Morgan Chase Bank, N.A. (the "703 Account").

18. The 703 Account was primarily used for customer deposits and withdrawals from the IA Business. Amounts invested in BLMIS by customers were deposited into the 703

Account. Similarly, the majority of redemptions by customers were withdrawn from the 703 Account.

19. Remaining cash balances in this account at the end of each business day were transferred to affiliated overnight investment accounts at J.P. Morgan Chase Bank and other investments until additional monies were needed to fund additional withdrawal requests by customers, capital needs of the broker-dealer operation of BLMIS, or Madoff's (and other insiders') personal needs.

20. BLMIS maintained a book which tracked certain customers' cash deposits and withdrawals from BLMIS.

21. Each day, BLMIS employees on the 17th floor prepared reports for Madoff indicating amounts of customer deposits into and withdrawals from the 703 Account. These funds were not reflected on the books and records of the House 5 operations.

22. By early December 2008, BLMIS generated client account statements for about 4,900 customer accounts (the "November 30, 2008 Statements"). When added together, and after netting out approximately $8.3 billion of amounts shown as owed to BLMIS, these statements erroneously showed approximately $64.8 billion of investments with BLMIS. In reality, BLMIS had assets on hand worth a small fraction of that amount.

23. The $64.8 billion balance recorded on BLMIS customer statements is net of "negative" accounts that approximate $8.3 billion. The total amount shown on the November 30, 2008 customer statements for the 4,900 accounts with purported positive equity balances aggregates to $73.1 billion.

24. Although the investigation is still ongoing, the total amount of funds that customers deposited but did not withdraw from their BLMIS accounts was less than $20 billion.

25. At all times relevant hereto, the monthly purported equity balances of BLMIS customer accounts far exceeded the amount of capital in the 703 Account.

The Proprietary Trading and Market Making Businesses

26. The proprietary trading and market making units of BLMIS were largely run as enterprises separate and apart from the BLMIS IA Business.

27. Review of the financial history of BLMIS demonstrates that neither of these business units would have been viable without the fraudulent IA Business, the proceeds of which were used to sustain those business operations from at least 2007 forward.

28. The market making and proprietary trading business units appear to have been largely involved in legitimate trading with institutional counterparties and utilized live computer systems including the House 5 AS/400 and trading platforms that interfaced with multiple third-party feeds and outside data sources often necessary for trading. BLMIS employed a sizeable information technology staff to support and maintain these trading platforms, as well as other technology associated with these business units.

29. The House 5 computer systems, including the House 5 AS/400, were connected, and/or reconciled to (i.e., interfaced with) the systems required to conduct legitimate securities trading with the outside world. For example, these systems interfaced with other trading platforms and programs including order entry, trade execution, securities clearing, and the Depository Trust & Clearing Corporation ("DTCC"). A diagram illustrating key differences between the House 17 and House 5 AS/400's is annexed hereto as **Exhibit 2**.

30. Unlike the House 17 AS/400, the House 5 AS/400 included outputs for regulatory review including FINRA, the Securities & Exchange Commission ("SEC"), and financial reporting. It was an open AS/400, consistent with a legitimate securities trading business.

31. In addition, the market making and proprietary trading units were subject to compliance and risk monitoring programs, by the exchanges they traded on, the clearing houses they utilized, and the Financial Industry Regulatory Authority ("FINRA"), among others.

The IA Business

32. Outwardly, the IA Business functioned as both an investment adviser to its customers and a custodian of their securities. The precise date on which BLMIS began purportedly engaging in investment advisory services has not been established, but it appears that BLMIS was offering such services as far back as the 1960s.

33. There were 25 individuals that worked for the IA Business of BLMIS.

34. Based on a review of standard customer opening agreements, BLMIS customers deposited their cash and were able to make withdrawals, but ceded all other rights associated with their accounts, including the authority to make investment decisions, to Madoff or BLMIS.

35. Upon the opening of their BLMIS customer account, customers signed a document such as a "Trading Authorization Limited to Purchases and Sales of Securities and Options," an example of which is annexed hereto as **Exhibit 3.** As indicated in **Exhibit 3**, the forms pertaining to IA account #1B0094 authorized Madoff as the account holder's "agent and attorney in fact to buy, sell and trade in stocks, bonds, options and any other securities in accordance with [Madoff's] terms and conditions."

36. Further, the account holder agreed that, "[i]n all such purchases, sales or trades [Madoff is] authorized to follow the instructions of Bernard L. Madoff in every respect concerning the undersigned's account with [Madoff]; and [Madoff]is authorized to act for the undersigned and in the undersigned's behalf in the same manner and with the same force and effect as the undersigned might or could do with respect to such purchases, sales or trades as well

as with respect to all other things necessary or incidental to the furtherance or conduct of such purchases, sales or trades. All purchases, sales or trades shall be executed strictly in accordance with the established trading authorization directive."

37. BLMIS did not provide its customers with electronic real-time online access to their accounts, which certainly by the year 2000 was customary in the industry.[3] BLMIS utilized technology that was severely outmoded relative to other participants in the exchange traded equity market to communicate with his clients, such as paper trade confirmations, transmitted through the United States Mail.

38. There were essentially two groups of IA Business customer accounts, the split-strike conversion strategy accounts, administered by Frank DiPascali ("DiPascali"), and the non-split-strike conversion accounts, administered by other BLMIS employees.

39. DiPascali started at BLMIS on September 11, 1975.

40. The House 17 AS/400 was designed to record and assist with the printing of the fictitious securities purportedly bought and sold by BLMIS, customer cash transactions, customer statements, trade confirmations, management reports, and Internal Revenue Service 1099 forms.

41. Importantly, the House 17 AS/400 was not connected, interfaced and/or reconciled to any of the systems used to facilitate or execute the purchase and sale of securities at BLMIS. It was a closed system, separate and distinct from any computer system utilized by the other BLMIS business units; consistent with one designed to mass produce fictitious customer statements.

[3] Of its thousands of customers, BLMIS provided customer statements in electronic form to only two customers, with six accounts between them. Even though they were electronic, the statements consisted of merely data files. No customer had real time access to its account information and trading data because there was no such data or information to be had in light of the fact that no trading was conducted.

42. As of about November 30, 2008, DiPascali was identified in the House 17 AS/400 as administering 4,659 active customer accounts, primarily the split-strike conversion accounts.

43. As of about November 30, 2008, the House 17 AS/400 identified 244 active accounts administered by other BLMIS employees. A summary schedule of account management and purported equity and cash trend activity is annexed hereto as **Exhibit 4.**

44. The House 17 AS/400 had software that could be utilized to enter fictitious "trades" with any desired price or trade date that could then be allocated, *pro rata*, to the various BLMIS customer accounts residing within its database.

45. BLMIS employees input the components of alleged security trades (e.g. stock/option, price, date, and volume) into the House 17 AS/400.

46. Inputting trade data into the House 17 AS/400 did not execute a buy or sell of a security, it merely created a record that could then be printed on a fictitious customer statement and trade confirmation.

47. Because fictitious trades require no opposite broker to execute and complete the trade, no counterparties existed and none were identified in the House 17 AS/400 system. None of the split-strike trades entered into the House 17 AS/400 were reconciled (or reconcilable) with the DTCC.

DiPascali and the "Split-Strike Conversion" Strategy

48. The strategy executed by DiPascali simulated a "basket of securities and options" based on a split-strike conversion strategy. This strategy consisted of purported investment in a basket of common stocks within the S&P 100 Index hedged by a collar of put and call options to limit the potential client investment loss (or gain) that may be caused by normal stock price volatility.

49. An examination of the BLMIS books and records reveals that the fictitious investment strategy focused on large cap stocks, presumably to preclude inquiry into the volume of stocks in which BLMIS was purportedly trading.

50. The split-strike conversion strategy involved the purported "sale" of the baskets, moving customer funds completely "out of the market" to purported investments in Treasuries, money market funds, and cash reserves until the next presumed trading opportunity arose. At the end of each quarter, all baskets would be allegedly "sold" and allegedly "invested" in Treasuries or money market funds, and cash reserves. The purported pricing and volume, i.e. purported value, of these alternative investments included the fictitious gains carried over from the BLMIS advantageous liquidation of purported baskets.

51. However, no securities were actually purchased by BLMIS for its customers and the money received from a customer was not invested in securities for the benefit of that customer, but was instead primarily used to make distributions to, or payments made on behalf of, other investors as well as withdrawals and payments to Madoff family members and employees.

52. Per SEC Rule 15c3-3 promulgated under the Securities Exchange Act of 1934, 17 C.F.R. § 240.15c3-3, brokers and dealers are required to maintain a "special reserve bank account for the exclusive benefit of customers." This special reserve bank account is "separate from any other bank account of the broker or dealer." The special reserve account is required to maintain a certain minimum balance according to the specifics of SEC Rule 15c3-3.

53. Institutional investment managers who exercise investment discretion over accounts having $100 million or more in Section 13(f) securities (i.e., exchange traded or NASDAQ-quoted securities) must report their holdings on Form 13F to the SEC. Form 13F

requires disclosure of the names of the institutional investment managers, the names of the securities they manage and the class of securities, the CUSIP number, the number of shares owned, and the total market value of each security.

54. BLMIS maintained a balance of $20,000 in its 15c3-3 account from late 2002 until the Filing Date, which was wholly inadequate given the purported value of the customer accounts according to the specifics of SEC Rule 15c3-3.

55. By allegedly "selling" the baskets before the end of the quarter, the equities in the baskets were not required to be disclosed in SEC Form 13F filings.

56. At no point while customer funds were purportedly either "in the market" or "out of the market," however, were such funds invested as shown on the fictitious statements. Instead, to the extent that customer funds had not already been expended, they were held in the BLMIS 703 Account at Chase Bank.

57. In fact, one of the money market funds in which customer resources were purportedly invested through BLMIS, as reflected on customer statements as late as 2008, was the Fidelity Brokerage Services LLC's "Fidelity Spartan U.S. Treasury Money Market Fund." However, Fidelity has acknowledged that, from 2005 onwards, Fidelity did not offer participation in any such money market fund for investment.

58. To facilitate the efficient inputting of alleged trades, DiPascali allocuted, and IA Business staff confirmed, that DiPascali directed the programming of a "basket trade" program within the AS/400. This was essentially a mail-merge program, but instead of printing names and addresses from a data file to a boilerplate letter, this program applied a basket (or fraction or multiple thereof) of purported security trades to a BLMIS customer statement.

59. Thus, one basket data file containing many fictitious trades could be replicated in customer statements of hundreds or thousands of customers without the need to manually type each trade on each customer statement.

60. Baskets were created by DiPascali and his staff to initiate purported trading for a specific trade date. Stocks in a basket were "priced" after the market closed (i.e., with knowledge of the prior published price history), and customer statements were then fabricated by BLMIS personnel using the House 17 AS/400 based on the basket and available funds reported in a customer's account. BLMIS staff confirmed it, the system facilitated it, and consistent returns could not have been achieved without it.

61. For example, if a basket was $400,000 and a customer had $800,000 available, two (2) baskets of securities and options would be purportedly "purchased" for the account.

62. The reported performance of the basket of stocks, selected from the S&P 100 Index, largely outperformed the movement of the S&P 100 Index overall due to the fabricated pricing and timing of the fictional basket "purchases" and "sales." To create the illusion that these stocks had been purchased or sold, BLMIS employees would use the AS/400 and its software programs to fabricate customer statements printed with the purchase and sale of baskets mimicking the purported split-strike conversion strategy.

63. BLMIS employees picked advantageous historical prices in order to achieve the sought after investment returns.

64. Once a basket "trade" was identified as one that achieved the fictitious return desired, certain employees, known as "key punch operators," were provided with the relevant basket information that they entered manually into the House 17 AS/400. The basket trade was then routinely (e.g., monthly) replicated in the selected BLMIS split-strike customer accounts

automatically and proportionally according to the fraction or number of baskets each customer's purported net equity could purportedly afford.

65. The baskets were monitored via a Microsoft Excel model to ensure that the prices chosen after-the-fact obtained returns that were neither too high nor too low.

66. With the benefit of backdating (i.e., with knowledge of previously published priced history), Madoff and his employees at BLMIS were able to consistently generate purported annual returns for split-strike conversion customer accounts generally between about 10 and 17%.

67. Over the course of its existence, millions of pages of fictitious customer statements and confirmations were printed containing the increasing output of this compounded false profit fiction.

68. Consistent with this strategy, the initial basket on a customer statement reflected purported purchases of stock and/or options comparable to the amount of principal invested with BLMIS. By the time of the basket's purported liquidation, remnants of the principal were commingled in the BLMIS bank account or diverted for other purposes.

69. By the time the next basket was "purchased," the false profits reportedly "earned" from the first basket were used to purportedly "buy" additional securities.

70. These false profits were compounded time and again, every time the IA Business accounts purportedly "got into the market" or "out of the market."

71. Accordingly, for each month after the initial customer statement, the only truthful and accurate information contained on BLMIS customer statements was the subsequent deposits and/or withdrawals of cash into the particular customer account. Whether or not the customer conducted any cash transactions, the customer statements would reflect purported trading activity

and resulting gains on the securities purportedly purchased and/or sold on behalf of that customer.

72. Because of the mass "buys" and "sells" in each fictitious basket over time; the fact that the IA Business "made up" trade dates and prices; the fact that in the aggregate, market volumes were exceeded; and, that trades were not directed by customers, it is impossible to trace a customer's money to specific trades. Even with respect to the first purported basket purchase, a customer's money may not equal the value of the securities purportedly purchased because the prices and trade dates were advantageously fabricated by the IA Business. For this reason, no market price can be ascertained.

73. Because customer funds were never exposed to the market, customer funds were not exposed to the uncertain risks associated with price movement in the market.

The Non-Split-Strike Accounts

74. The purported trading strategy executed on behalf of the non-split-strike conversion accounts was equally as fictitious as DiPascali's purported "split-strike conversion" strategy.

75. The non-split-strike conversion customer accounts included many long time customers of Madoff, including Stanley Chais's feeder funds and personal accounts, Jeffry Picower's personal and business accounts, and accounts held by various Madoff family members and employees. There were less than 245 of these and other accounts (i.e., accounts not assigned to Frank DiPascali), representing approximately 5% of the total active accounts as of November 30, 2008.

76. The non-split-strike conversion accounts reported unusually high rates of return, often in excess of 100%, in excess of the purported 10-17% that the accounts utilizing the split-

strike strategy reported. This rate of return is based on the IA Business AS/400 and/or company books and records including portfolio management reports.

77. BLMIS prepared customer statements for non-split-strike conversion strategy customer accounts that simulated engineered gains and losses through simulated one-off trades (i.e., not basket trades as described above). The customer statements were based on selections of stock and related prices using already published trading data in hindsight. Based on the analysis of BLMIS books and records conducted, there was backdating. This analysis included the reconstruction of timelines using time-stamped records or proxies of approximate time-stamps.

78. The non-split-strike conversion strategy customer accounts were handled on an account-by-account basis, meaning each of the trades were keyed into the trading system manually. Thousands of documents including customer statements, IA staff notes, account folders, and programs in the AS/400 were reviewed, and these documents confirm the fact that such statements were prepared on an account-by-account basis (i.e., not basket trading).

79. Consistent with the above, virtually none of the trades purportedly conducted on behalf of the non-split strike conversion strategy account holders took place.

The Trading Did Not Occur

80. To the extent records are available, BLMIS did not act as a true investment adviser in the interest of its customers and virtually no securities were purchased on behalf of customers of the IA Business.

81. For select months pertaining to select baskets of trades that the IA Business purportedly executed over time, ranging from 2002 to 2008, we compared basket files to the customer statements and to third party sources.

82. DTCC serves as a custodian for stock and government securities issued in the United States. As part of FTI's retention in this matter, transactions as recorded on BLMIS customer statements were compared to both House 5 AS/400 settled trade data and BLMIS DTCC records. The scope of this effort was limited to available DTCC records, and these records were made available to us from February 2002 through the date of the November 2008 BLMIS customer statements, the last statements prepared by BLMIS prior to the Filing Date.

83. In addition to DTCC and the BLMIS bank records, a review of responses received from various entities that may have information regarding possible IA Business option and equity trading activity was performed. These entities consisted of clearing firms, exchanges, and possible trading counterparties. The determination to request information from these parties was based on evidence of BLMIS's interaction with these organizations.

84. Specifically, a review of responses produced pursuant to subpoena, from the following entities, was performed:

a) Options Clearing Corporation ("OCC")
b) Clearstream Banking, S.A. ("Clearstream")
c) Chicago Board Options Exchange ("CBOE")
d) Chicago Mercantile Exchange/Chicago Board of Trade ("CME/CBOT")
e) BATS Exchange, Inc.
f) Knight Capital Group, Inc.
g) Interactive Brokers, LLC

85. The purpose of the review was to determine whether any materials produced by these entities were indicative of IA Business trading activity.

86. Akin to the role of DTCC for equities and government debt securities, the OCC serves as the central clearing house for exchange traded options listed on a United States

exchange. Because the Standard and Poor's 100 Index Options (the "S&P 100 Index Options") are listed on the CBOE, these options would clear through OCC.

87. Trading records for several specific dates from the OCC pertaining to select baskets of trades that the IA Business purportedly executed over time, ranging from 2002 to 2008, were obtained. The OCC records confirm that the mass volume and timing of S&P 100 options trades that would have been necessary to execute the split-strike conversion strategy that the IA Business was purportedly utilizing, were not executed through OCC; and, this conclusion was further supported by information from CBOE.

88. A review of subpoena responses received from the above listed entities for evidence of the mass equity trade executions that would have been required to effectuate the purported split-strike conversion strategy was performed. No evidence was found to support the requisite mass trading.

89. BLMIS had purportedly told some of its investors that it purchased the index options required to execute the split-strike conversion strategy in the OTC market. While this was unlikely due to the costs that would have been associated therewith, there was no evidence to support BLMIS' claim of transacting in the OTC market such as executed International Swaps & Derivatives Master Agreements ("ISDA") between OTC counterparties.

90. In total, more than 99.9% of the equity trades as recorded in the IA Business customer statements could not be traced through the House 5 settled trade data file or to DTCC records.

91. The House 5 AS/400 settled trade data file is BLMIS' system of record (i.e., corporate archive) for all House 5 trades that have settled. It is the source from which productions of trade data were historically made to regulated entities for examination and review.

92. Consistent with our findings as to the differences between the House 5 and House 17 AS/400 systems, the House 17 system does not include a "settled trade" data file. Instead, House 17 maintained only a "settled cash" data file. This file contains all IA customer account activity, including alleged trades, deposits, withdrawals, and dividends

93. House 5 was also not used to execute transactions for any of the purported split-strike conversion customer's accounts, described herein.

94. No IA Business customers held legitimate equities in House 5 and/or DTCC as of November 30, 2008. However, one customer was reported to hold bonds.

95. A relatively small amount of a single customer's IA Business transactions were similar to House 5 transactions, and there was evidence of directed trades. This customer sent checks to BLMIS with memos on the checks directing the purchase of specific securities. FTI did find similar securities purchased via the House 5 trading systems and at DTCC for this one customer.

96. As described above, BLMIS customer statements listed the sale of Treasuries and other money market funds to generate the cash required to purportedly purchase the basket securities. Review of DTCC and third party bank records support neither BLMIS's custody of the securities, nor the funds that would have been required to purchase such basket securities.

97. In many instances, there were not enough put and/or call option contracts available at the Chicago Board Options Exchange ("CBOE") to hedge properly the required volume, and in fact accomplish a split-strike conversion strategy, for the securities positions recorded on the BLMIS customer statements.

98. For example, in October 2002, BLMIS customer statements for 4,128 accounts falsely report the sale of $17.9 billion of Treasuries and money market funds as the means to purchase imaginary baskets of securities of similar value.

99. In October 2002, the 703 Account and related investments comprised less than $240 million and none of the $240 million was used to purchase securities for the 4,128 split-strike conversion account customers. See diagram annexed hereto as **Exhibit 5.**

100. The size of each imaginary "basket of securities and options" is staggering. For example, for the October 11, 2002 basket, the volume of S&P 100 ("OEX") options traded at the CBOE was reviewed. On that date, CBOE reported OEX volume of 6,298 calls and 6,407 puts. In contrast, BLMIS applied an imaginary basket to 279 accounts with a volume of 82,959 OEX calls and 82,959 puts – more than approximately 13 times the CBOE volume. See chart annexed hereto as **Exhibit 6.**

101. As an additional example, the aggregation of trades on customer statements reflect an October 16, 2002 purchase of 17.8 million shares of Exxon Mobil ("XOM") – these purported aggregated trades for the BLMIS IA Business would have exceeded the XOM market volume for that day by 131%. In contrast, DTCC records indicate the maximum BLMIS position for XOM in October of 2002 was just 5,730 shares.

102. These are not isolated incidents. BLMIS customer statements routinely falsely recorded millions and tens of millions of shares within imaginary baskets; however, DTCC records indicated that BLMIS held thousands or perhaps tens of thousands of shares – shares that are traceable to the House 5 business and not the IA Business, as **Exhibit 7** annexed hereto, illustrates.

103. Had these two basket trades of securities actually occurred, the massive volume of the transactions printed to the BLMIS customer statements in aggregate would have almost certainly had an impact on the market price of each such security, and in certain instances such as the XOM example described above, may not have been possible due to sheer volume alone.

104. Over time the volume of the fiction grew. For example, the volume of Amgen (AMGN) positions falsely reported on the November 30, 2008 customer statements would amount to more than 3 times the daily exchange traded volume on the Filing Date, or any other date in December of 2008 for that matter. Similarly, HP (HPQ) would be more than 2 times such volume, and Microsoft (MSFT) would be more than 1.5 times such volume.

105. Just as BLMIS did not have the funds to purchase the fictitious baskets of securities, it did not have the funds required to purchase the Treasuries listed on customer statements as part of that strategy. For example, the October 2002 customer statements falsely report a face value of $23 billion of Treasuries at the start of the month and $8.2 billion at the end of the month. At this time, DTCC reports that BLMIS never held more than $84 million in treasuries.

106. We identified many occurrences where purported trades were outside the exchange's low/high price range for the trade date. For example, in one instance a monthly account statement for December 2006 reported a sale of Merck (MRK) with a settlement date of December 28, 2006. BLMIS records reflect a trade date of December 22, 2006 at a price of $44.61 for this transaction. However, the daily price range for Merck stock on December 22, 2006 was a low of $42.78 to a high of $43.42.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 16, 2009
New York, New York

/s/ Joseph Looby
Joseph Looby, CFE
Senior Managing Director
FTI Consulting, Inc
Three Times Square, 11th Floor
New York, NY 10036

JOSEPH H. LOOBY, J.D., C.F.E.

POSITION

Senior Managing Director, FTI

EDUCATION

J.D., Union University School of Law at Albany, New York
B.A. in Economics, Fordham University

RANGE OF EXPERIENCE

Joe Looby is a senior managing director in FTI's Technology segment, delivering consulting expertise and advanced technology for investigations, antitrust and complex litigation matters. He has provided expert testimony and consulting on economic and technology issues and appeared before regulatory agencies on diverse technology matters.

Mr. Looby has spoken and written extensively on litigation technology, electronic evidence and computer forensics, and he is a contributing author and lecturer at the Sedona Conference, for projects including: Search & Retrieval Sciences; and, Achieving Quality in E-Discovery.

Joe has also participated in studies on search technology effectiveness, sponsored by the National Institute of Standards and Technology (NIST) and DOD Advanced Research and Development Activity (ARDA).

Prior to joining FTI, Mr. Looby provided forensic technology leadership to Deloitte's National Audit Technology Steering Committee, towards the detection of fraud in financial statement audits; he trained a team of more than 50 forensic technologists and accountants on the FASTech data interrogation approach; and, he led Deloitte's nationally deployed FASTech teams to perform forensic procedures for high-risk billion-dollar market cap audit clients.

Mr. Looby is a former U.S. Navy JAG Lieutenant, an experienced regulator, and published software developer.

EXAMPLES OF PROFESSIONAL AND BUSINESS EXPERIENCE

Investigations & Antitrust – Technology: Leader of forensic and technology teams on numerous highly confidential internal and regulatory investigations. Responded to regulator, audit committee, auditor and whistleblower concerns using forensics and technology, including for example computer forensics, investigation of accounting systems, and interviews of technology and business professionals.

Pharmaceutical – Electronic Evidence: Led a team that assisted an international pharmaceutical company in response to a multibillion

EXAMPLES OF PROFESSIONAL AND BUSINESS EXPERIENCE (Continued)

dollar class action, and regulatory investigation. The project involved more than 60 custodian's email and electronic files. Thousands of DVDs and numerous external hard drives were indexed and compiled into a comprehensive online review environment. FTI supported multiple review teams, across 5 client offices located throughout the EU and US. This engagement utilized advanced processing, review, and production technologies including Attenex, Ringtail and FTI proprietary software.

Services – Accounting Investigation: Led a team of forensic accounting and technology experts for outside counsel to a large, publicly-traded staffing company that was facing possible accounting, control and compliance issues at its North American operations that stalled the release of its financials. The company's audit and finance committee began an internal investigation into the issues while facing investigations from the SEC and U.S. Attorney's Office. FTI team assessed and analyzed the company's complex staffing management, payment, and billing systems, including the largest PeopleSoft implementation in the world. The team identified systems control issues relating to shared computer IDs that turned out to be a chief concern of the auditors.

Manufacturing – Lost Profits: Assisted defendant in a lawsuit alleging breach of contract and lost profits. Assisted with the discovery and analysis of financial data from plaintiff's various global accounting information systems. Tested the profitability of the product group used by plaintiff's expert and determined that he relied on the wrong one. Identified the correct one and determined that it was an unprofitable product line. This challenged plaintiff's claim for lost profits, and the case was favorably settled.

Pharmaceutical – Licensing Dispute: Assisted with a multibillion dollar pharmaceutical licensing dispute. The claim involved pricing, incentives, market share, and 10 years of sales. The parties provided 35 CDs of contracts, nine sales databases, four customer databases and two market share databases. Integrated the disparate data and built a computer model. The computer model showed the timing and effect of plaintiff's improper practices. Before trial, plaintiff retracted each claim that we were asked to test and respond to in our expert report.

Health Care – Employee Fraud: Engaged by an HMO to investigate a key executive suspected of committing a fraud. We used computer forensic technology to copy the suspect's hard drives, restore deleted files and search through e-mail and electronic files. Fraudulent invoices, e-mail, deleted and other suspicious files were recovered. Based on these leads, we designed tests to mine data and interrogate the client's financial systems. Through this process, we reduced the

EXAMPLES OF PROFESSIONAL AND BUSINESS EXPERIENCE (Continued)

number of "questionable" vendors/payments from 5,000 vendors and 35,000 payments to 48 vendors and 345 payments.

Hospitality – Class Action: Investigated the client's systems regarding alleged failure to pay overtime for hours worked. Our investigation revealed that overtime was tracked via monthly payroll reports and the supporting documentation was largely handwritten paper documents. We scanned and coded the documents, imported them into a litigation database (LDB), and wrote a software program to match payroll records to supporting documentation. Our client used the LDB to show that a system to track overtime was in place, significant overtime was in fact paid, and the named plaintiffs were not representative of the larger putative class.

Advertising Firm – Fraud Detection: Investigated the client's purchasing system regarding an employee who allegedly colluded with vendors to transfer charges between jobs. We determined the employee's transfer method, mapped seven years of archived data into a LDB, wrote a software program to identify suspect invoices, and pinpointed 220 (out of an original population of 85,000) invoices that were fraudulent.

Food & Feed – SEC Investigation: Assisted with an investigation of improper revenue recognition. We gathered six years of sales data from disparate corporate systems, restored data from backup tapes and built a data warehouse of over two billion records. Accounting staff reconciled the data to financial statements filed with the SEC. Technical staff designed complex algorithms to data mine the warehouse and identify transactions not compliant with GAAP. Economic staff statistically sampled and quantified the data as the company's basis for re-statement. Forensic staff imaged laptop computers to restore deleted files and review e-mails.

Leasing – Purchase Price Dispute: Assisted an investment bank with a purchase price dispute for its client, the seller of a three billion dollar equipment leasing company. The seller relied on a proprietary program to manage its portfolio of millions of leases. We wrote a custom software program to convert the client's data into a useable format. We data mined the lease portfolio and rapidly identified an anomalous cluster of high value leases that were written off with low residual values. Our efforts uncovered a basis to restate millions of dollars of value to the company.

Mining – Environmental Insurance Claim: Assisted a law firm with an environmental insurance claim. The claim was based on coverage for the client's historic environmental events. The client had completed a merger, and its information systems were transitioning

EXAMPLES OF PROFESSIONAL AND BUSINESS EXPERIENCE (Continued)

from local to global operation. To prove the claim, we retrieved and quantified three decades of environmental cost evidence from the client's existing and retired information systems and archives.

Health Care – Medical Claim Fraud: Engaged by a leading health care provider to review medical claims to identify indicators of fraud and abuse. The client's claims data were reconcilable with its management reports. We reconciled the data, imported it into our system, and data mined for providers that met fraud and abuse indicators. From the original 20,000 health care providers, we identified 170 that were positive for the indicators. Without reviewing "paper" claims, we identified suspicious claims in the one-half to three million dollar range.

Manufacturing – Vendor Fraud: Investigated allegations by a whistle-blower that a company's purchasing officer was sending business to preferred vendors for kickbacks. We retrieved four years of vendor payment data and applied data mining to the vendor payment transactions. We tested the data for anomalous vendor shifts, product price spikes, and preferential payment terms. We identified 400 vendors that had been shifted to despite the fact that such vendors charged a higher price for a generic product. We quantified the loss at one million dollars over the four-year period.

Banking – Payment Tracing: Engaged by a foreign bank to assist with a dispute over alleged interbank payments. Plaintiff's expert extracted financial communication (SWIFT) messages from back-up tapes, matched the messages to payment requests, and quantified the matched payments. We rebutted plaintiff's expert report based upon plaintiff's unreliable matching method and its failure to consider data that indicated whether a payment message had been rejected, pended, failed or receipted.

TESTIMONY EXPERIENCE

Hoechst Celanese Corporation v. XL Insurance (Bermuda) Company Ltd. (testified). Mr. Looby has also presented to regulatory agencies, auditors and audit committees.

SELECTED PUBLICATIONS

Achieving Quality in the E-Discovery Process, The Sedona Conference, Contributor, May 2009.

What If Search Terms Only Find 50 Percent Of Relevant Documents? Information Management, December 2008.

Best Practices on the Use of Search & Information Retrieval Methods in E-Discovery, The Sedona Conference, Contributor, Fall 2007.

PATENTS/ COPYRIGHTS

System, Software and Method for Examining a Database in a Forensic Accounting Environment, U.S. Patent 7,590,658, Co-Inventor.

VISTA, Copyright 1999-2000.

REGULATORY & LEGAL EXPERIENCE

NYS Department of Environmental Conservation – General Counsel's Office ("DEC"). Enforcement Attorney, 4/1993 – 7/2000.

Designed and programmed VISTA, a software program used by hundreds of professionals to track the detection and resolution of environmental violations. The software includes business intelligence components that enable managers to: estimate the resolution of case backlogs, assure compliance with EPA enforcement policy, identify trends in enforcement, and prioritize staff resources.

On a statewide basis, prosecuted CAA, CWA & RCRA (air, water and solid waste) multi-media administrative enforcement actions. Analyzed proposed enforcement settlements to ensure conformance with applicable State and Federal enforcement response and penalty assessment policies.

Lead counsel for CERCLA / Superfund efforts to recover natural resource damages. Negotiated the recovery of more than twenty million dollars in damages. Advised scientific staff on proof of harm and economic staff on valuation of harm. Liaison with Federal agencies and Tribal governments.

Represented DEC to the EPA Multi-Program Enforcement Steering Committee and the Environmental Council of States' Enforcement Coordination Forum. Advised on enforcement indicators, penalties, commitments, and targeting.

Presenter of numerous speeches to forums including the NYS Bar Association, and the NYS Business Council. Authored an article for the Albany Law School Environmental Outlook.

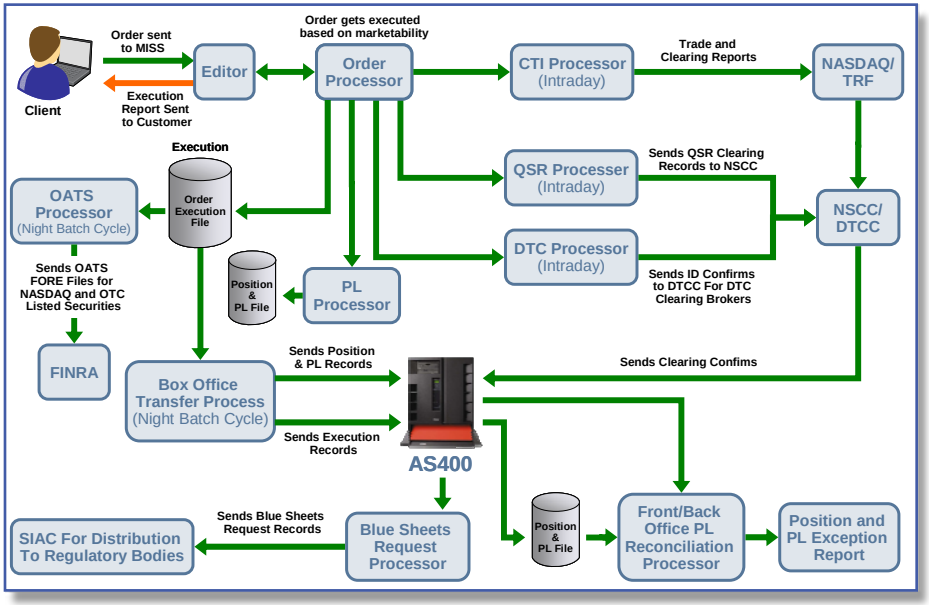
U.S. MILITARY SERVICE

US Navy Judge Advocate General's Corps ("JAG"). Lieutenant, 8/1989 -6/1993.

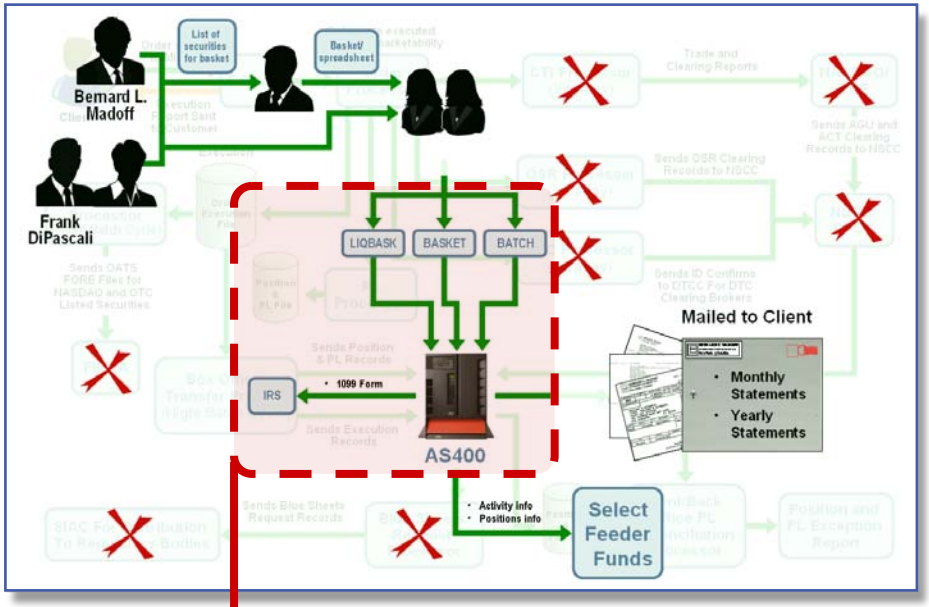
Served as general counsel for a US Navy Industrial Design, Manufacture and Test Center. Negotiated with EPA on all aspects of the center's environmental compliance. Prosecuted / defended at courts-martial and administrative discharge boards, investigated incidents, and handled civil matters for Navy personnel.

Ex. 2: BLMIS Systems Detail – Open vs. Closed Systems

18-19th Floor – Market Maker



17th Floor – Investment Advisor



Open System

Closed System

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC
885 Third Avenue New York, NY 10022

212 230-2424
800 334-1343
Fax 212 486-8178

TRADING AUTHORIZATION LIMITED TO PURCHASES AND SALES OF SECURITIES AND OPTIONS

To Whom It May Concern:

The undersigned hereby authorizes Bernard L. Madoff (whose signature appears below) as his agent and attorney in fact to buy, sell and trade in stocks, bonds, options and any other securities in accordance with your terms and conditions for the undersigned's account and risk and in the undersigned's name, or number on your books. The undersigned hereby agrees to indemnify and hold you harmless from, and to pay you promptly on demand any and all losses arising therefrom or debit balance due thereon.

In all such purchases, sales or trades you are authorized to follow the instructions of Bernard L. Madoff in every respect concerning the undersigned's account with you; and he is authorized to act for the undersigned and in the undersigned's behalf in the same manner and with the same force and effect as the undersigned might or could do with respect to such purchases, sales or trades as well as with respect to all other things necessary or incidental to the furtherance or conduct of such purchases, sales or trades. All purchases, sales or trades shall be executed strictly in accordance with the established trading authorization directive.

The undersigned hereby ratifies and confirms any and all transactions with you heretofore or hereafter made by the aforesaid agent or for the undersigned's account.

This authorization and indemnity is also a continuing one and shall remain in full force and effect until revoked by the undersigned by a written notice addressed to you and delivered to your office at 885 Third Avenue New York, NY. Such revocation shall not affect any liability in any way resulting from transaction initiated prior to such revocation. This authorization and indemnity shall enure to the benefit of your present firm and any successor firm or firms irrespective of any change or changes at any time in the personnel thereof for any cause whatsoever, and of the assigns of your present firm or any successor firm.

Dated, 11/8/04

[redacted] [redacted]
(City) (State)

Very truly yours, [redacted]
(Client Signature)

Signature of Authorized Agent: [redacted]

Affiliated with:
Madoff Securities International Limited
12 Berkeley Street, Mayfair, London W1J 8DT. Tel 020-7493 6222

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC
885 Third Avenue New York, NY 10022

212 230-2424
800 334-1343
Fax 212 486-8178

OPTION AGREEMENT

In order to induce you to carry accounts ("Option Accounts") for me (however designated) for transactions in option contracts (including, without limitations, purchase, sale, transfer and exercise) ("Option Transaction"), I hereby warrant, represent and agree with you as set forth below on this Option Agreement.

1. I understand, and am well aware, that option trading may be speculative in nature. I am also aware that on certain days, option trading may cease and this could result in a financial loss to me. I agree to hold the company, its other divisions, and its officers, directors and agents harmless for such loss.

2. I understand that any option transaction made for any account of mine is subject to the rules, regulations, customs and usages of The Options Clearing Corporation and of the registered national securities exchange, national securities association, clearing organization or market where such transaction was executed. I agree to abide by such rules, regulations, custom and usages and I agree that, acting individually or in concert with others, I will not exceed any applicable position or exercise limits imposed by such exchange, association, clearing organization or other market with respect to option trading.

3. If I do not satisfy my transaction obligations on a timely basis, you are authorized in your sole discretion and without notification, to take any and all steps you deem necessary to protect yourself (for any reason) in connection with option transactions for my account including the right to buy and/or sell for my account and risk any part or all of the shares represented by options handled, purchased, sold for my account, or to buy for my account and risk any option as you may deem necessary or appropriate. Any and all expenses or losses incurred in this connection will be reimbursed by me.

4. In addition to the terms and conditions hereof, my option account will be subject to all of the terms and conditions of all other agreements heretofore or hereafter at any time entered into with you relating to the purchase and sale of securities except to the extent that such other agreements are contrary to or inconsistent herewith.

5. This agreement shall apply to all puts or calls which you may have executed, purchased, sold or handled for any account of mine and also shall apply to all puts, or calls which you may hereafter purchase, sell, handle or execute for any account of mine.

6. I have received from the company the most recent risk disclosure document entitled "Characteristics and Risks of Standardized Options". I have read and understand the information contained in this document.

7. I understand that you assign exercise notices on a random basis. You may preferentially assign exercises of block-size (i.e. covering $1,000,000 or more of underlying securities) to block-size writing positions and you may preferentially assign smaller exercises to smaller writing positions. I understand that upon my request you will provide me with further information regarding the procedure used to assign exercise notices.

DATED _____ ACCOUNT NO. 1B0094-3

SIGNATURES

(If a Corporation)

_____
(Name of Corporation)

By_____

Title_____

SEAL

(If Individuals)

[redacted]

_____
(Second Party if Joint Account)

(If a Partnership)

_____
(Name of Partnership)

By_____
(A Partner)

MADF
BERNARD L. MADOFF
INVESTMENT SECURITIES LLC
885 Third Avenue New York, NY 10022

212 230-2424
800 334-1343
Fax 212 486-8178

CUSTOMER AGREEMENT

In consideration for you (the "Broker") opening or maintaining one or more accounts (the "Customer"), the Customer agrees to the terms and conditions contained in this Agreement. The heading of each provision of the Agreement is for descriptive purposes only and shall not be deemed to modify or qualify any of the rights or obligations set forth in each such provision. For purposes of this Agreement, "securities and other property" means, but is not limited to money, securities, financial instruments of every kind and nature and related contracts and options. This definition includes securities or other property currently or hereafter held, carried or maintained by you or by any of your affiliates, in your possession or control, or in the possession or control of any such affiliate, for any purpose, in and for any of my accounts now or hereafter opened, including any account in which I may have an interest.

1. APPLICABLE RULES AND REGULATIONS

All transactions in the Customer's Account shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market, and its clearing house, if any, where the transactions are executed by the Broker or its agents, including its subsidiaries and affiliates. Also, where applicable, the transactions shall be subject (a) to the provisions of the Securities Exchange Act of 1934, as amended, and (b) to the rules and regulations of (1) the Securities and Exchange Commission and (2) the Board of Governors of the Federal Reserve System.

2. AGREEMENT CONTAINS ENTIRE UNDERSTANDING/ASSIGNMENT

This Agreement contains the entire understanding between the Customer and the Broker concerning the subject matter of this Agreement. Customer may not assign The rights and obligations hereunder without first obtaining the prior written consent of the Broker.

3. SEVERABILITY

If any provision of this Agreement is held to be invalid, void or unenforceable by reason of any law, rule, administrative order or judicial decision, that determination shall not effect the validity of the remaining provisions of this Agreement.

4. WAIVER

Except as specifically permitted in this Agreement, no provision of this Agreement can be, nor be deemed to be, waived, altered, modified or amended unless such is agreed to in a writing signed by the broker.

5. DELIVERY OF SECURITIES

Without abrogating any of the Broker's rights under any other portion of this Agreement and subject to any indebtedness of the Customer to the Broker, the Customer is entitled, upon appropriate demand, to receive physical delivery of fully paid securities in the Customer's Account.

6. SALES BY CUSTOMER

The Customer understands and agrees any order to sell "short" will be designated as such by the Customer, and that the Broker will mark the order as "short". All other sell orders will be for securities owned ("long"), at that time, by the Customer by placing the order the Customer affirms that he will deliver the securities on or before the settlement date.

7. BROKER AS AGENT

The customer understands that the Broker is acting as the Customer's agent, unless the Broker notifies the Customer, in writing before the settlement date for the transaction, that the Broker is acting as dealer for its own account or as agent for some other person.

8. CONFIRMATIONS AND STATEMENTS

Confirmations of transactions and statements for the Customer's Account(s) shall be binding upon the Customer if the Customer does not object, in writing, within ten days after receipt by the Customer.

9. SUCCESSORS

Customer hereby agrees that this Agreement and all the terms thereof shall be binding upon Customer's heirs, executors, administrators, personal representatives and assigns. This Agreement shall ensure to the benefit of the Broker's present organization, and any successor organization, irrespective of any change or changes at any time in the personnel thereof, for any cause whatsoever.

10. CHOICE OF LAWS

THIS AGREEMENT SHALL BE DEEMED TO HAVE BEEN MADE IN THE STATE OF NY **AND SHALL BE CONSTRUED, AND THE RIGHTS AND LIABILITIES OF THE PARTIES DETERMINED, IN ACCORDANCE WITH THE LAWS OF THE STATE OF** NY.

11. CAPACITY TO CONTRACT, CUSTOMER AFFILIATION

By signing below, the Customer, represents that he/she is of legal age, and that he/she is not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capital stock, or of a member of any exchange, or of a member firm or member corporation registered on any exchange, or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business of dealing, either as broker or as principal, in securities, bills of exchange, acceptances or other forms of commercial paper, and that the Customer will promptly notify the Broker in writing if the Customer is now or becomes so employed. The Customer also represents that no one except the Customer has an interest in the account or accounts of the Customer with you.

12. ARBITRATION DISCLOSURES

*** ARBITRATION IS FINAL AND BINDING ON THE PARTIES.**

*** THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL.**

*** PRE-ARBITRATION DISCOVERY IS GENERALLY MORE LIMITED THAN AND DIFFERENT FROM COURT PROCEEDINGS.**

*** THE ARBITRATORS AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTY'S RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED.**

*** THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.**

MADF

13. ARBITRATION

THE CUSTOMER AGREES, AND BY CARRYING AN ACCOUNT FOR THE CUSTOMER THE BROKER AGREES THAT ALL CONTROVERSIES WHICH MAY ARISE BETWEEN US CONCERNING ANY TRANSACTION OR THE CONSTRUCTION, PERFORMANCE, OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN US PERTAINING TO SECURITIES AND OTHER PROPERTY, WHETHER ENTERED INTO PRIOR, ON OR SUBSEQUENT TO THE DATE HEREOF, SHALL BE DETERMINED BY ARBITRATION UNDER THIS AGREEMENT SHALL BE CONDUCTED PURSUANT TO THE FEDERAL ARBITRATION ACT AND THE LAWS OF THE STATE DESIGNATED IN PARAGRAPH 10, BEFORE THE AMERICAN ARBITRATION ASSOCIATION, OR AN ARBITRATION FACILITY PROVIDED BY ANY EXCHANGE OF WHICH THE BROKER IS A MEMBER, OR THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. AND IN ACCORDANCE WITH THE RULES PERTAINING TO THE SELECTED ORGANIZATION. THE CUSTOMER MAY ELECT IN THE FIRST INSTANCE WHETHER ARBITRATION SHALL BE BY THE AMERICAN ARBITRATION ASSOCIATION, OR BY AN EXCHANGE OR SELF-REGULATORY ORGANIZATION OF WHICH THE BROKER IS A MEMBER, BUT IF THE CUSTOMER FAILS TO MAKE SUCH ELECTION, BY REGISTERED LETTER ADDRESSED TO THE BROKER AT THE BROKER'S MAIN OFFICE, BEFORE THE EXPIRATION OF TEN DAYS AFTER RECEIPT OF A WRITTEN REQUEST FROM THE BROKER TO MAKE SUCH ELECTION, THEN THE BROKER MAY MAKE SUCH ELECTION, THE AWARD OF THE ARBITRATORS, OR OF THE MAJORITY OF THEM SHALL BE FINAL, AND JUDGMENT UPON THE AWARD RENDERED MAY BE ENTERED IN ANY COURT, STATE OR FEDERAL, HAVING JURISDICTION.

14. DISCLOSURES TO ISSUERS

Under rule 14b-1(c) of the Securities Exchange Act of 1934, we are required to disclose to an issuer the name, address, and securities position of our customers who are beneficial owners of that issuer's securities unless the customer objects. Therefore, please check one of the boxes below:

___ Yes, I do object to the disclosure of information.

__✓__ No, I do not object to the disclosure of such information.

THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE AT PARAGRAPH 13.

(X) [redacted]
(Customer Signature/date)

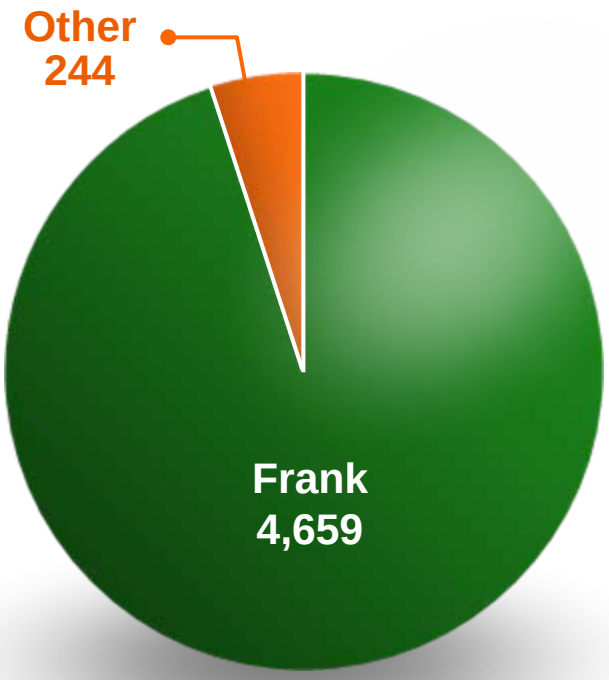
(X) [redacted]
(Customer Signature/date)

[redacted]
(Customer Address) [redacted]

1B0094-3
(Account Number)

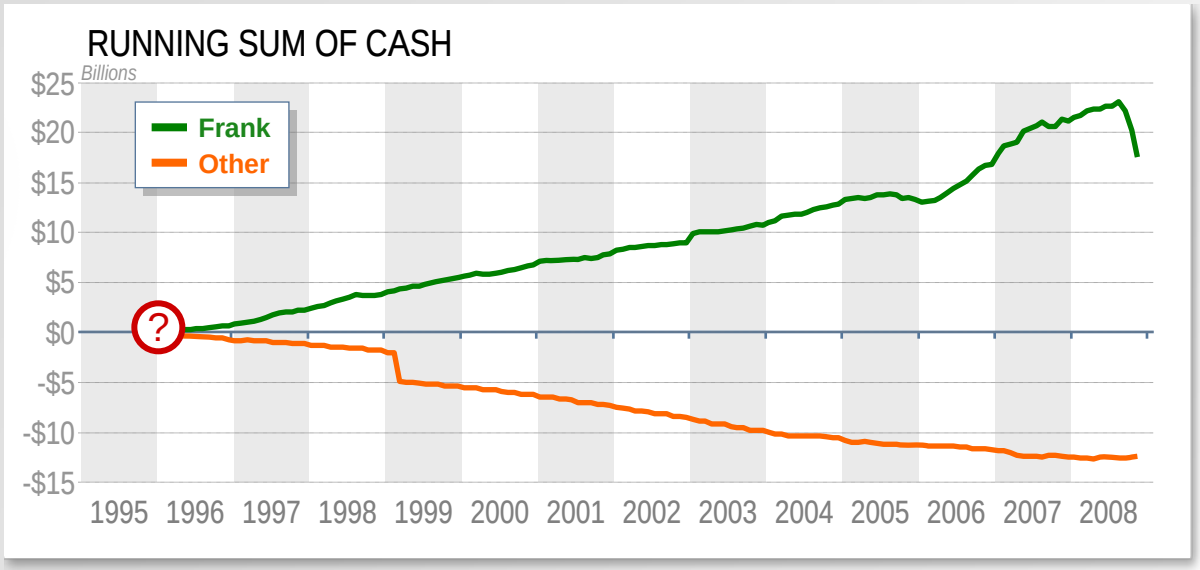
[redacted]

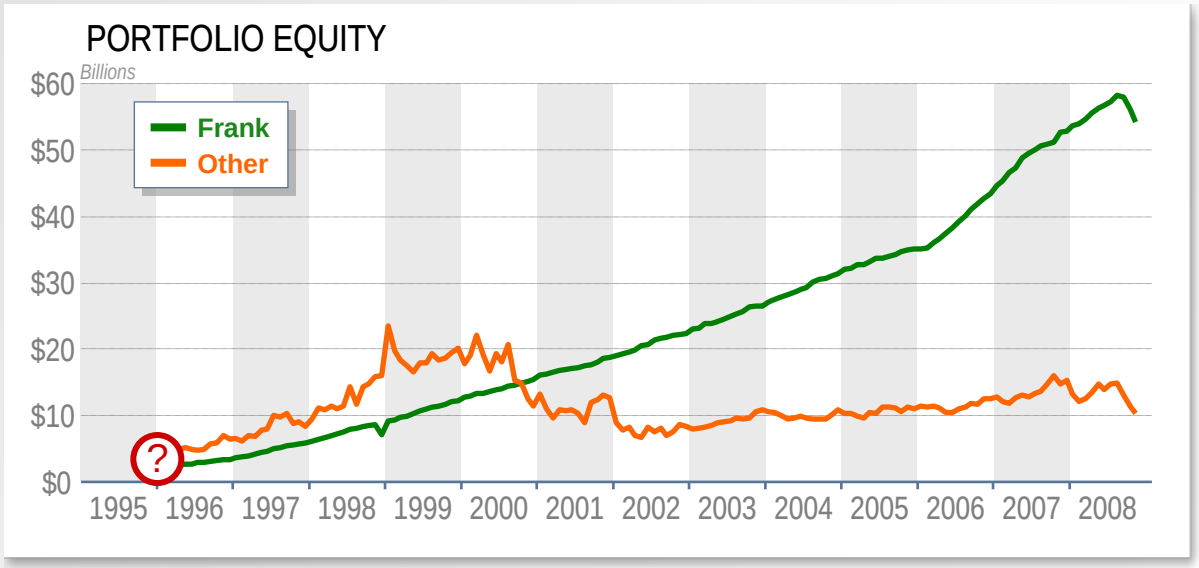
Ex. 4: Account Managers *(active accounts only as of 11/30/08)*



Manager	Count of Accounts	Ending Customer Statement Balance
Frank	4,659	$54,469,790,798
Other	244	$10,354,616,613

$64,824,407,412





Ex. 5: Basket Trading – October 2002

WHAT HAPPENED AT BLMIS

EQUITY

	10/11/02	10/15/02	10/16/02	10/16/02 REG
	48 stocks $410,000	48 stocks $431,000	48 stocks $440,000	37 stocks $440,000
	$3.4B	$4.0B	$4.1B	$6.4B
	279 Customers	279 Customers	279 Customers	3,849 Customers
MIN	CM089 - 4.4	1CM089 - 4.9	1CM089 - 4.9	1A0102 - 0.1
MAX	1FN012 - 874.5	1FN012 - 982.4	1FN012 - 987.8	1H0148 - 25.4

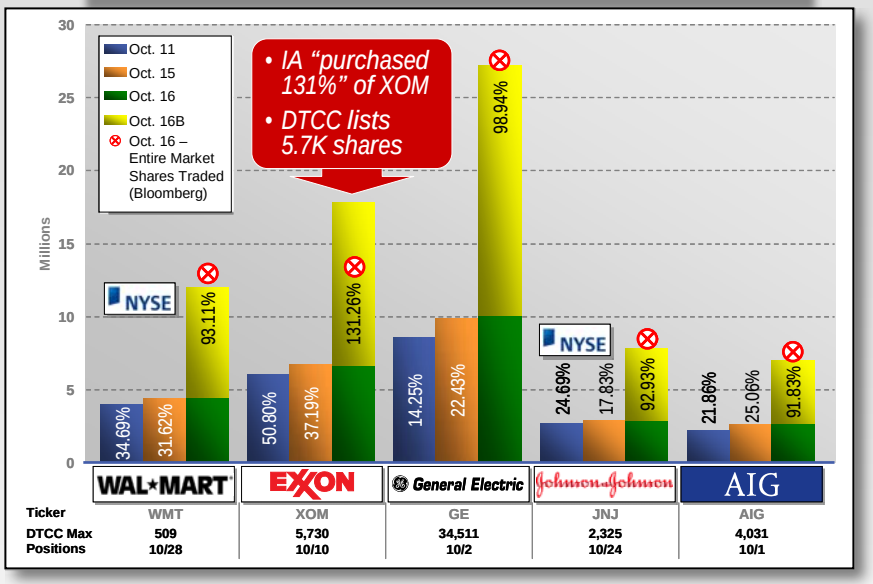
CASH

	Buy	Sell	Total
FIDELITY SPARTAN	$53,412,040.00	$121,248,206.00	($67,836,166.00)
U S Treasury Bill	$7,692,180,476.40	$25,497,799,792.40	($17,805,619,316.00)
Total	7,745,592,516	25,619,047,998	(17,873,455,482)

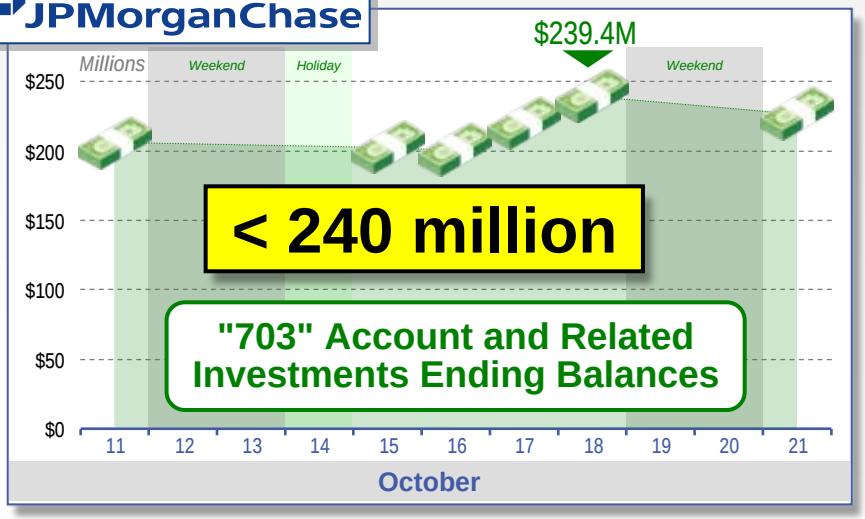
$17.9 billion

Fidelity INVESTMENTS

WHAT HAPPENED ELSEWHERE



JPMorganChase



< 240 million

"703" Account and Related Investments Ending Balances

Ex. 6: CBOE Options Reconciliation *(10/11/02)*

	Call (420[1])	Put (410[1])
CBOE Volume *October 11, 2002 (Trade Date)*	**6,298**	**6,407**

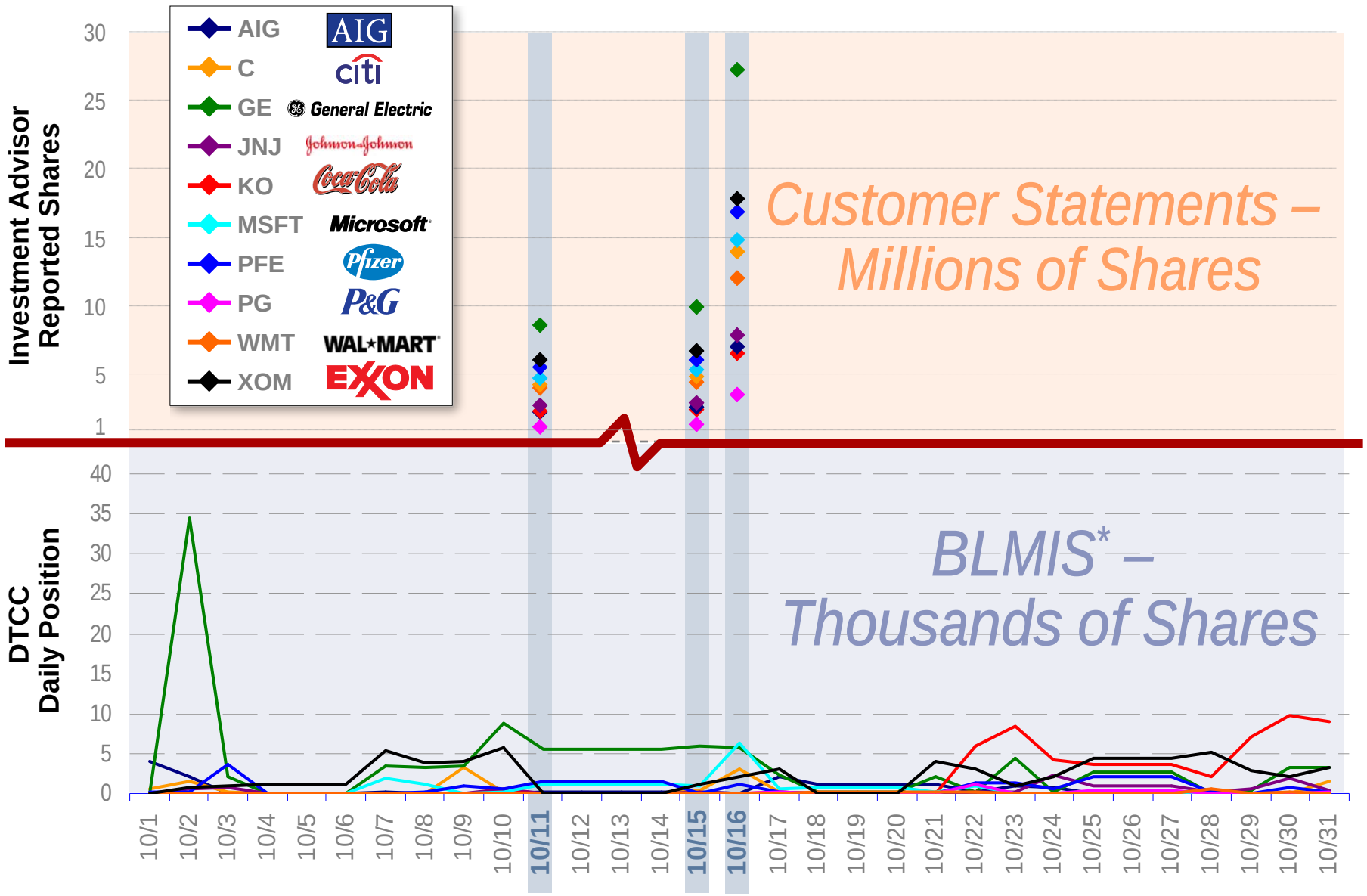
BERNARD L. MADOFF INVESTMENT SECURITIES LLC
New York □ London

Participants in October 11, 2002 Basket

		Puts/Calls # of each	Call (420[1]) % of Volume	Put (410[1]) % of Volume
1	1-FN069	8,745	139%	136%
2	1-FN070	8,363	133%	131%
3	1-FN061	7,504	119%	117%
4	1-FR008	4,124	65%	64%
5	1-C1260	3,250	52%	51%
6	1-FN094	2,703	43%	42%
7	1-FN095	2,610	41%	41%
8	1-FN005	2,389	38%	37%
9	1-A0058	2,103	33%	33%
10	1-D0026	1,784	28%	28%
	Remaining 269 Accounts	39,384	625%	615%
	BLMIS BASKET TOTAL	**82,959**	**1,317%**	**1,295%**

[1] This represents the strike price of the option

Ex. 7: DTCC Securities Reconciliation *(10/2002)*



* These securities are traceable to the Market Making business, and not the Investment Advisory business.

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 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	

DECLARATION OF BIK CHEEMA IN SUPPORT OF TRUSTEE'S MOTION FOR AN ORDER UPHOLDING TRUSTEE'S DETERMINATION DENYING "CUSTOMER" CLAIMS FOR AMOUNTS LISTED ON LAST CUSTOMER STATEMENT, AFFIRMING TRUSTEE'S DETERMINATION OF NET EQUITY, AND EXPUNGING THOSE OBJECTIONS WITH RESPECT TO THE DETERMINATIONS RELATING TO NET EQUITY

I, Bik Cheema, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an associate with Baker & Hostetler LLP ("BH"). I am member of the New York Bar Association and the Southern District of New York, and am in good standing.

2. Baker & Hostetler LLP is counsel to Irving H. Picard, the Trustee appointed by the United States District Court for the Southern District of New York for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS"), under the Securities Investor Protection Act ("SIPA"), and for Bernard L. Madoff ("Madoff").

3. On or about June 22, 2008, I began reviewing objections to determinations of customer claims in this SIPA liquidation.

4. I make this declaration based upon the information and knowledge acquired during the course of Baker & Hostetler LLP's engagement as counsel to the Trustee, as described herein.

Claims, Determinations and Objections

5. During the course of my engagement in this matter, I have personally reviewed thousands of documents, including claims filed by customers, determination letters issued by the Trustee in response to these claims, and objections filed by customers in response to the Trustee's determination of their claims.

6. As part of my review, I reviewed all objections received by the Trustee in response to his determination of all timely filed claims. Most of the objections I reviewed had more than one basis for objection, but for purposes of this motion, I have isolated the net equity[1] objections which were then categorized as follows:

"Net Winners" - Under the parlance of this proceeding, a "net winner" is defined as a BLMIS customer that withdrew more funds from BLMIS than the customer deposited with BLMIS. Thus, the customer received payments constituting a full return of her principal investment, plus some amount of fictitious "profits" generated by BLMIS. Although she has already withdrawn all of her principal, along with some amount of fictitious profits (in reality, funds deposited by other customers), the "net winner" customer who objects to the Trustee's

[1] The statutory framework for the satisfaction of customer claims in a SIPA liquidation proceeding provides that customers share pro rata in customer property to the extent of their "Net Equity," as defined in section 78*lll*(11) of SIPA, and to the extent that a customer's Net Equity exceeds his or her ratable share of customer property, SIPC shall advance funds to the SIPA trustee up to $500,000 for securities for that customer. The Trustee has determined each customer's Net Equity by crediting the amount of cash deposited by the customer into her BLMIS account, less any amounts withdrawn from her BLMIS customer account, otherwise known as the "cash in/cash out approach." Certain claimants disagree with the Trustee as to the construction of the term Net Equity and how that term should be applied to determine the amount of the valid customer claim of each claimant. Various claimants have asserted that Net Equity should be determined on the basis of each claimant's balance as shown on their November 30, 2008 account statement provided by BLMIS.

methodology is claiming that she is due the fictitious amount fabricated on her final fake November 30, 2008 BLMIS customer statement.

"***Net Losers" (over-the-limit)*** - Under the "cash in/cash out" approach, the customers that fall within the category of "over-the-limits net losers that have received full SIPC protection" are customers that withdrew less money from BLMIS than they deposited over time, and had net investment amounts in excess of $500,000. They are entitled to an allowed claim for the amount that they invested, less the amount that they have withdrawn from BLMIS. The difference between the amount invested and the withdrawn amount over time is the customer's Net Equity. The customer has received or will receive a *pro rata* share of any customer property based upon her Net Equity, and will receive a check from the Trustee of $500,000 from funds advanced by SIPC against her share of customer property. Although the claims of these investors should be based on their Net Equity as measured by the net amount invested, these claimants assert that the amount of their Net Equity should be equal to the fictitious amounts represented on their final fake November 30, 2008 BLMIS customer statement. Some of these claimants also argue that their claim for this last reported fictitious amount should be satisfied in securities and not cash.

"Net Losers" (under-the-limit) - Like the previous category, customers that fall within this category also have allowable claims because they invested more over time than they withdrew from the fraudulent scheme. The net investment amount is less than $500,000, so their respective SIPC protection is limited to the amount of their respective net investment. They will not be entitled to a further distribution from the fund of customer property because their Net Equity claim will have been fully satisfied by the SIPC advance, and SIPC will receive the

customers' share of customer property as subrogee. These customers' respective final fake November 30, 2008 BLMIS customer statements may, however, show a balance higher than $500,000.

In connection with the investigation, I drafted a document entitled "Description of Net Equity Claimants," which serves as Exhibit A ("Exhibit A") to the Trustee's Motion for an order upholding the Trustee's determination denying customer claims for amounts listed on last statement, affirming Trustee's determination of net equity, and expunging those objections with respect to the determinations relating to net equity.

Basis of Personal Knowledge

7. Specifically, in order to populate Exhibit A, I reviewed claims filed by claimants who objected on the basis of the Trustee's determination of net equity, reviewed the respective determination letters issued by the Trustee, and reviewed the respective objections by claimants.

8. In order to perform my review, I accessed and reviewed documents using PACER in addition to files filed by customers with the Trustee pursuant to this Court's Claims Procedures Order, determination letters issued by the Trustee, and objections to those determinations by claimants, filed with the Court.

9. The purpose of the review was to ascertain the number and details of each objecting claimant on the basis of the Trustee's determination of net equity.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
October 16, 2009

BAKER & HOSTETLER LLP

By:/s/ *Bik Cheema*_____
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
Bik Cheema
Email: bcheema@bakerlaw.com

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

Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Email: dsheehan@bakerlaw.com
Marc E. Hirschfield
Email: mhirschfield@bakerlaw.com
Seanna R. Brown
Email: sbrown@bakerlaw.com

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

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 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	

DECLARATION OF SEANNA R. BROWN IN SUPPORT OF TRUSTEE'S MOTION FOR AN ORDER UPHOLDING TRUSTEE'S DETERMINATION DENYING "CUSTOMER" CLAIMS FOR AMOUNTS LISTED ON LAST CUSTOMER STATEMENT, AFFIRMING TRUSTEE'S DETERMINATION OF NET EQUITY, AND EXPUNGING THOSE OBJECTIONS WITH RESPECT TO THE DETERMINATIONS RELATING TO NET EQUITY

Seanna R. Brown, under penalty of perjury, declares the following to be true and correct:

1. I am a member of the Bar of this Court and an associate with the firm of Baker & Hostetler, LLP, counsel for Irving Picard, Trustee for the SIPA liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff. I submit this declaration in support of the Trustee's motion ("Motion") for an order upholding the Trustee's determination denying "customer" claims for amounts listed on last customer statements, affirming the Trustee's determination of net equity, and expunging those objections with respect to the determinations relating to net equity.

2. Attached hereto as Exhibit A is a copy of the Transcript of the Madoff Plea Hearing held on June 29, 2009 in the United States District Court, Southern District of New York, *United States of America v. Bernard L. Madoff*; 09-cr-213 (DC).

3. Attached hereto as Exhibit B is a copy of the Transcript of the DiPascali Plea Hearing held on August 11, 2009 in the United States District Court, Southern District of New York, *United States of America v. Frank DiPascali*; 09-cr-764 (RJS).

4. Attached hereto as Exhibit C is a copy of the Brief For Appellants James W. Giddens As Trustee For The Liquidation Of The Businesses of New Times Securities Services, Inc. and New Age Financial Services, Inc. and Securities Investor Protection Corporation filed on October 17, 2002 in the United States Court of Appeals for the Second Circuit, *In re New*

Times Securities Services, Inc. and New Age Financial Services, Inc., Case No. 02-6166 (2d Cir. 2002).

Dated: New York, New York
October 16, 2009

s/Seanna R. Brown

BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, New York 10111
(212) 589-4200 / Fax (212) 589-4201
David J. Sheehan
Email: dsheehan@bakerlaw.com
Marc E. Hirschfield
Email: mhirschfield@bakerlaw.com
Seanna R. Brown
Email: sbrown@bakerlaw.com

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

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 09 CR 213 (DC)

BERNARD L. MADOFF,

Defendant.

----------x

New York, N.Y.
June 29, 2009
10:00 a.m.

Before:

HON. DENNY CHIN,

District Judge

(In open court)
(Case called)
THE COURT: Please be seated. Good morning. Mr. Madoff, would you please stand.
Mr. Madoff, you pled guilty on March 12th, 2009 to 11 counts of securities fraud, investment advisor fraud, wire and mail fraud, money laundering, making false statements, perjury, filing false documents with the SEC and theft from employee benefit funds You are here this morning to be sentenced for those crimes.
Have you reviewed the presentence report?
THE DEFENDANT: Yes, I have, your Honor.
THE COURT: Did you discuss it with your lawyers?
THE DEFENDANT: I have.
THE COURT: Mr. Sorkin, have you reviewed the presentence report and discussed it with your client?
MR. SORKIN: Yes, your Honor, we have.

THE COURT: Do you or your client have any objections to the factual recitations or the guidelines calculation?

MR. SORKIN: We do not, your Honor.

THE COURT: Thank you. You can be seated.

Ms. Baroni, does the government have any objections to the presentence report?

MS. BARONI: No, your Honor.

THE COURT: Thank you.

I accept and adopt the factual recitations set forth in the presentence report. I accept and adopt the guidelines calculation set forth in the presentence report with one clarification which I will discuss in a moment.

The total offense level is 52, the criminal history category is I. The PSR concludes that the guideline range is life imprisonment. That is not quite accurate, however, because the guidelines range cannot be life imprisonment as no count carries the possibility of a life sentence. Rather the most serious counts carry a maximum of 20 years' imprisonment.

I look then to Section 5G1.2(d) of the guidelines, which tells us that where there are multiple counts, and the guideline range exceeds the statutory maximum for the most serious count, the court must impose consecutive terms of imprisonment to the extent necessary to achieve the total punishment.

There is a little bit of ambiguity, however, as to what is meant by "total punishment" where the guideline calculation calls for life imprisonment, but Second Circuit case law makes clear that in such a situation, the district court is to stack or add up the maximum sentences for all the counts.

In United States v. Evans, for example, 352 F.3d 65, where the guideline calculation called for life imprisonment but no count carried a life sentence, the court held that the

guideline range is 240 years, the maximum sentences for all the counts added together.

Accordingly, here the guideline range is not life imprisonment, but 150 years, the maximum sentences for each of the 11 counts added together. Of course, in light of Booker and the case law that followed, the guideline range is advisory only. While I must give the guideline range fair and respectful consideration, I am not bound by it. In fact, the Probation Department recommends a sentence of 50 years. Instead I must make an individualized assessment based on all the facts and circumstances, including the factors set forth in the statute. In the end, I must impose a sentence that is reasonable.

We will proceed as follows:

First we will hear from the victims. Then Mr. Sorkin will speak on behalf of Mr. Madoff. Next Mr. Madoff may speak if he wishes. Finally, I will hear from the government.

First the victims. I have received several hundred written statements from victims including the e-mails and letters submitted back in March. Every victim who made a timed request to speak will be permitted to speak today except in two instances. Two members of the same family asked to speak, and

we will permit one person to speak on behalf of the family. Two victims have now withdrawn their request. Accordingly, we will hear from 9 victims today.

First we will hear from Mr. and Mrs. Ambrosino. The Ambrosinos can step up to the microphone. Go ahead. Mr. Ambrosino, go ahead. Come up to the microphone so everyone can hear you.

MR. AMBROSINO: Thank you, your Honor. My name is Dominic Ambrosino and my --

THE COURT: Sir, just keep your voice up.

MR. AMBROSINO: I thank the court for allowing me to speak today. As a retired New York City Correction Officer, I am very familiar with the inside of a courtroom. However, I never in my wildest dreams ever expected to be sitting in one as a victim of an indescribably heinous crime --

THE COURT: Mr. Ambrosino, slow down a touch so our Court Reporter can transcribe what you're saying.

MR. AMBROSINO: That dream came true on March 12th as I watched Bernie Madoff stand and be cuffed. However, the dream really started as a nightmare on December 11th. I can remember the exact second my wife told me the news. I immediately knew all the ramifications, but I don't think she did. The fallout from having your entire life savings drop right out from under your nose is truly like nothing you can ever describe. At first it was the obvious, and how will we pay our bills? How can someone do this to us?

We worked honestly and we worked so hard. This can't be real. We did nothing wrong.

I don't know if anyone other than another victim can explain what the less obvious effects are, how every decision directly and indirectly hinged on the fact that we had the security of our savings. When I was able to leave the job, we bought a motor home to travel the country. We took out a mortgage since it was better to keep our savings in Madoff. We sold the house my wife lived in for 27 years and also put all those profits -- and they were high -- into our Madoff account. We trusted that the savings and planning would see us through our retirement.

We had ideas of traveling the country. It all stopped abruptly on December 11th. As a result, we are left with no permanent house, a depreciating motor home, we are upside down on the loan and an income from my pension that is our life. This pension used to be perceived as spending money before December 11th, and now although it doesn't cover our monthly expenses, we rely on it fully. It is all we have.

I sustained a 52 percent hearing loss on my job, and at 49 years' old I can't go back to my previous career so I have taken on a job this summer in Arizona as an construction project coordinator. The job will only last until August. Then I don't know what I am going to do.

My wife's foot was run over by a van while in New York City. There was a plea hearing in March. She had a job lined up before the trip. The expenses of the trip were given to us

and we had to let it go since she was in a cast for eight weeks. She is now rehabilitating and still feels pain when she stands for long periods of time.

With that background as to who I am, I would like to share some of the specific problems Madoff's crime brought to us. My pension distribution, a one-time decision, and our health insurance plan, also one-time decision, were based on the fact that we had savings and security with Madoff. If I should die, my wife is left without my income or health insurance.

We sold our home in New York with the expectation that someday we would have the finances to purchase another one. We have no credit now and can't get a mortgage. We have been forced to take care of people's homes while they are traveling for the summer, as we used to do prior to December 11th.

We have through the generosity of friends been able to stay rent free on the RV lots of people in the community. This will come to a screeching halt in October when the owners return for the winter season. We don't know where we'll go at that time. We don't have enough income from my pension to pay monthly rent.

The most devastating to us is we lost our freedom. We lost the ability to share our life every day as we explore the country every day. We lost the time to hold hands as we walked. As they say in the commercial, this is priceless.

In closing, I would like to say, Judge Chin, sentencing Bernard L. Madoff to the fullest extent will certainly not eliminate any of the issues I wrote about. It probably won't even gain me satisfaction. As the guard who used to be on the right side of the prison bars, I'll know what Mr. Madoff's experience will be and will know that he is in prison in much the same way he imprisoned us as well as others.

He took from us the freedom that we held so preciously close to our lives, the very thing I always valued and never took for granted. In a sense, I would like someone in the court today to tell me how long is my sentence.

Thank you very much.

THE COURT: Thank you. Next we'll hear from Mr. and Mrs. FitzMaurice.

MS. EBEL: No, Judge Chin. I am next.

THE COURT: I saw the gentleman standing up next and I thought you were Maureen Ebel.

MS. EBEL: Yes, I am. I am here with may brother, William Thomas McDonough.

THE COURT: All right.

MS. EBEL: My name is Maureen Ebel and I am a victim of Bernard L. Madoff.

I have lost all of my life's hard-earned savings. I have lost my life savings because our government has failed me and thousands and thousands of other citizens. There are many

levels of government complicity in this crime. The Securities & Exchange Commission, by its total incompetence and criminal negligence, has allowed a psychopath to steal from me and steal

from the world.

I am a 61-year-old widow and I am now working full time. I have done many things to survive since December 11th, including selling a lot of my possessions and working three jobs at the same time. I have lost a home that my husband and I had owned for 25 years because of this theft.

I have lost my ability to care for myself in my old age. I have lost the ability to donate to charity, especially the Leukemia & Lymphoma Society. I have lost my ability to donate my time working for that charity as I had done in the past because now I must work full time in order to eat.

I have lost the ability to help future generations of my family get an education. I have lost the ability to help them with their housing needs. It pains my so much to remember my husband getting up in the middle of the night. He was a very fine physician. He would get up in the middle of the night year after year in all kinds of weather to go to the hospital to save someone's life in rain, ice and snow.

He would save someone's life so that Bernie Madoff could buy his wife another party rock. I have lost the ability to move around the world freely at this stage in my life using the money my husband and I have worked so hard to earn. We had

worked, saved and planned for our old age so that we could leave something behind and not be a burden when we became sick and old.

The emotional toll that this has taken on me has been devastating. I have had great pain and suffering at the hands of Bernie Madoff. My health deteriorated rapidly after December 11th. I could not eat or sleep. I was very agitated and hyperactive. I had all the signs and symptoms of someone undergoing great stress. I suffered rapid weight loss, rapid heart rate, sweating, insomnia and sometimes spells.

I had the horrible feeling that I had been pushed into the great black abyss, but I could not indulge these paralyzing feelings too long. I had work to do. While experiencing all these symptoms, I had to sell my home of 25 years, sell may car, sell may possessions and go to work full time. I accepted gifts of money from family and friends to pay for heat, electricity, gasoline and food.

I was the recipient of so many kindnesses and saw so much goodness in people. Goodness in people is something that you, Mr. Madoff, have been blind to your whole life, and that goodness is better than all the yachts and all the French homes in all the world put together.

Sadly, Mr. Madoff not only defrauded thousands of investors, he mastered the art of manipulating our government. FINRA and the Securities & Exchange Commission became his

tools. They were willing to relax all regulations that would have uncovered his fraud. The justification for relaxing the regulations was to ease the burden on Wall Street firms, the very firm that bankrupted the world economy.

THE COURT: Ms. Ebel, this is not the time to criticize the agencies. That is not before me. What is before me is what sentence to impose, so if you would address that, please.

MS. EBEL: I will, Judge Chin.

Mr. Madoff, I have read you will be making a statement about your guilt and shame. I do not believe you. Judge Chin, Mr. Madoff should stay in jail until every person who enabled him to cause such a massive devastation is brought to justice. He should stay in jail until the families of every one of his victims are able to restore their financial stability. That could easily take 150 years. Thank you.

THE COURT: Thank you. Next we'll hear from Mr. and Mrs. FitzMaurice.

MR. FITZMAURICE: Thank you, Judge Chin, for allowing us to be heard in your courtroom today.

My wife and I here are today representing the thousands of Madoff victims. We have all suffered extensively as a result of his actions. It has been well chronicled that Madoff did not limit his treachery to a few. He stole from the rich, he stole from the poor and he stole from the in-between.

He had no boundaries. He stole from individuals as well as charitable organizations of all types and denominations.

My wife and I are not millionaires. He has taken our entire life savings. We have not been overlooked just as many of his other victims. We have worked hard, long and hard for all of our lives to provide for our family and to be in a position to retire someday. I am now forced to work three jobs. My wife is working a full-time job only to make ends meet, to allow us to pay our mortgage and put food on the table.

We are 63 years' old. It will be no retirement for us in the next two or three years. There will be no trips to California to visit our one-year-old grandson. There will be no vacations of any type. Again we are too old to recoup the monies that he has taken from us. We can only work as long as our health will hold up and then we will have to sell our home and hope to survive on social security alone.

Madoff has shown no remorse. Please do not confuse his prepared statement as remorse. His crime was premeditated and calculated. He was attempting to scam investors only days before his arrest. If he had the opportunity, he would still be stealing from innocent investors. He has not truly cooperated with the authorities to recover the money that rightfully belongs to his investors, whom we are now known as victims.

He cheated his victims out of their money so that he and his wife Ruth and their two sons could live a life of luxury beyond belief. This life is normally reserved for royalty, not for common thieves.

Your Honor, we implore you to give him the maximum sentence at a maximum prison for this evil lowlife. This would be true justice. Minimum security prison would only allow Madoff too many freedoms that he does not deserve. He would be leading a life better than a lot of his victims. That is not true justice. His was a violent crime without the use of a tangible weapon.

His attorney will argue for a lenient sentence of up to twelve years. That is both insulting and another example of

Madoff's arrogance. The scope of the devastation he has wreaked is unparalleled. It is impossible to compare his crime to any past criminal act. The pain he has inflicted will continue for many years. My life will never be the same. I am financially ruined and will worry every day about how I will take care of my wife.

Where will we be able to live? How will we pay our bills? How will we get medical insurance?

All of his victims worldwide will be waiting to see that true justice is served. True justice is a maximum sentence in a maximum security prison. I have a quotation from my wife, since only one of us could speak. She wants to say:

"I cry every day when I see the look of pain and despair in my husband's eyes. I cry for the life we once had before that monster took it away. Our two sons and daughter-in-law have rallied with constant love and support. You, on the other hand, Mr. Madoff, have two sons that despise you. Your wife, rightfully so, has been vilified and shunned by her friends in the community. You have left your children a legacy of shame. I have a marriage made in heaven. You have a marriage made in hell, and that is where you, Mr. Madoff, are going to return. May God spare you no mercy."

THE COURT: Thank you.

Next we will hear from Carla Hirschhorn.

MS. HIRSCHHORN: Good morning and thank you, your Honor, for allowing me to address you.

My husband and I write to you to explain the devastation caused by Bernard L. Madoff to our lives. Since 1992 we were invested with Bernard L. Madoff Investment Securities. We have never been rich people. We have worked throughout all our adult lives. Over the years my husband has worked hard to learn a trade as a glazer which afforded him the opportunity to start a small business. I have been a physical therapist and worked through to the day I was graduated from college in 1980. We have both diligently saved our hard-earned money to invest with Bernard Madoff over the years. We used our money to raise our children, purchase our home and put our

savings in Bernard Madoff Securities.

On December 11th, 2008, our world crumbled beneath us as news of the Bernard Madoff ponzi scheme became public. This turn of events has been devastating to our family. We lost our entire life savings. This money was being used to provide our children with a college education they have worked so hard to deserve and to provide us with savings for a secure retirement.

Since December 11th, 2008 life has been a living hell. It feels like a nightmare that we can't wake from. I am so thankful that my father died two years ago and was spared from having to live in his terminal condition without the money to provide him 24/7 health care which allowed him to die with indignity.

My father died and left my mother believing she would be able to live a safe and secure life with the money in her Bernard Madoff accounts. Now all she has to live on is a sparce social security check and a small pension which will last less than one year. She may not have enough money to

maintain her home and living expenses.

It is our hope and in our prayers she does not become ill and require extraordinary means to sustain her. Our daughter who sits in this courtroom today to witness this horrific event is a junior at college and has worked two jobs since our Madoff accounts were stolen while going to school full time. The stress and worry about her family's financial

situation and health of her parents has been devastating to her. We have no idea how we will continue to pay for college without it being a terrible financial burden and worry on all of us.

Immediately after hearing the news of the ponzi scheme, we filed papers for financial aid to sustain our daughter through college. We were informed we were not eligible for any grant money, that our only hope would be to take out loans. However, in this financial environment, without SIPIC insurance and with concern about claw-back litigation, we can't possibly take loans out to send our daughter to college. The turmoil caused by our financial devastation has caused us serious physical and emotional problems from which we need medical treatment.

Your Honor, please understand that we, the investors, have been punished by Madoff's crime. We were devastated by the SEC's failure to uncover Madoff's fraud and its continued stamp of approval behind Madoff over the decades of his crime. We have been abandoned by our elected officials which refuse to require the SEC to find income. We have been betrayed by SIPIC, which in order to save money, has invented a new definition of net equity to deprive us of the $500,000 of insurance of which we were assured.

Please, your Honor, do not fail us. Please assure that Madoff is sentenced with the maximum possible time and he

is required to serve his sentence in a maximum security prison. This is not a man who deserves a federal country club.

Respectfully, Carla Hirschhorn.

THE COURT: Thank you.

It is not up to me, by the way, where Mr. Madoff will be designated. A number of people have made that suggestion, but it is up to the Bureau of Prisons.

Next we'll hear from Sharon Lissauer.

MS. LISSAUER: My name is Sharon Lissauer. Thank you, your Honor, for letting me speak. I am very emotional, so please bear with me if I break down into tears. As everyone knows, this nightmare has begun six and a half months ago and yet it seems like a lifetime.

I keep on thinking I am going to wake up from it. It keeps on getting worse. My life and my future have been ruined. I was always so careful with my money, but I entrusted everything I had to Mr. Madoff, my whole life savings from modeling and the inheritance of my mom. She just died last year, and as soon as I got the money, because I just miss her and I trusted Mr. Madoff so much, I gave it all to him, but now I don't have my mom or the money.

I know I am not alone. I know he has ruined thousands of people's lives. In the March hearing he said that he was

truly sorry, which I don't really believe, but even if it is a little bit true, then I am not asking him, I am begging him, if

he has any money from the offshore accounts or his family has any money obtained from this horrible fraud, that they disgorge it and give it back to the victims so they can have a little bit of their lives back.

With respect to his sentencing, I used to think that it didn't matter if he got 150 years, what would that do for the victims? It wouldn't get their money back. But now upon reflection, I think he should spend his whole life in jail because what he has done is just despicable. He has ruined so many people's lives. He killed my spirit and shattered my dreams. He destroyed my trust in people. He destroyed my life, and I have no other assets. I make very little money from modeling and he left me in a very difficult position to pay my bills and support myself. For the first time in my life I am very, very frightened of my future.

Thank you, your Honor.

THE COURT: Thank you.

Next we'll hear from Burt Ross. Mr. Ross.

MR. ROSS: Your Honor, my name is Burt Ross and my wife Joan and I lost $5 million because of the criminal acts of Bernard Madoff. Not only have I lost the inheritance of my father who worked his entire life, not only have I lost the inheritance of my father who worked for his entire life so that his children and his children's children can leave a better life, I have lost our retirement accounts and funds in trust

for our children.

The fact is though we are one of the fortunate ones because we still have a roof over our heads, food on our table, unlike so many others who have been forced to sell their homes, who have been forced to sell their homes and pick up the pieces of their lives.

Years ago I attended a Friends secondary school where we thought that in each person there was an inner light, that of God and everyone. For the life of me, as far as I have searched, I cannot find that inner light in Bernard Madoff.

What can we possibly say about Madoff, that he was a philanthropist, when the money he gave to charities he stole from the very same charities he ultimately devastated; that he was a good family man when he leaves his grandchildren a name that mortifies them, a name which will live in infamy; that he is genuinely remorseful for his conduct when the statement he read in this very court was totally without emotion, when even after confessing he fought to keep assets away from those he hurt, when we all know his only regret was getting caught.

Can we say Madoff was a righteous Jew who served on the boards of Jewish institutions when he sank so low, when he sank so low as to steal from Elie Weisel, as if Weisel hasn't already suffered enough in his lifetime.

A righteous Jew, when in reality nobody has done more to reinforce the ugly stereotype that all we care about is

money the fact is there are no people on this earth more charitable? But we will survive. We have survived worse than Madoff.

What Bernard L. Madoff did far transcends the loss of money. It involves his betrayal of the virtues people hold dearest -- love, friendship, trust -- and all so he can eat at the finest restaurants, stay at the most luxurious resorts, and travel on yachts and private jets. He has truly earned his reputation for being the most despised person to be in America today.

Several hundred years ago the Italian poet Dante in his "The Divine Comedy" recognized fraud as the worst of sins, the ultimate evil more than any other act contrary to God's greatest gift to mankind -- love. In fact, he placed the perpetrators of fraud in the lowest depths of hell, even below those who had committed violent acts. And those who betrayed their benefactors were the worst sinners of all, so in the three mouths of Satan struggle Judas for betraying Jesus Christ, and Brutus and Cassius for betraying Julius Caesar.

Please Allow me to take a liberty now by speaking for many of those victims who because of frailty, privacy, distance, or other reasons are unable to bear witness today. We urge your Honor to commit Madoff to prison for the remainder of his natural life, and when he leaves this earth virtually unmourned, may Satan grow a forth mouth where Bernard L. Madoff

deserves to spend the rest of eternity.

Thank you.

THE COURT: Thank you. Next we'll hear from Michael Schwartz.

MR. SCHWARTZ: Can everyone hear me?

My name is Michael Schwartz. I am 33 yearS' old. It was my family's trust fund that helped fund the money for Bernard Madoff's organization. Since I was a teenager, I invested into what I thought was a forthright and legitimate investment firm. During this time I made sure I lived well within my means, nothing extravagant. I viewed my investment as a safety net in case I should hit hard times or perhaps face medical issues.

Unfortunately, several months ago, my job was regionalized, eliminated. I was handed a letter of recommendation and sent on my way. It didn't hit me until I got home that the company that you ran had already taken my life savings. At 33, I was wiped out.

I am one of the lucky ones by far. I have my health. I am young, I have great friends, got a loving wife. Unfortunately, the money you took from other members of my family wasn't a minor setback. It was quite a bit more. Your Honor, part of the trust fund wasn't set aside for a house in the Hamptons, a large yacht or box seat to the Mets. No, part of that money was set aside to take care of my twin brother who

is mentally disabled, who at 33, he lives at home with my parents and will need care and supervision for the rest of his life.

In the final analysis, my family wants to remember

that in addition to stealing from retirees, veterans, widows, Bernard Madoff stole from the disabled. Every time he cashed a check and paid for his family's decadent lifestyle, he killed dreams. My parents had a simple dream for my brother, a week at summer camp, someday being able to live in a good, a good group home. Thanks to Bernard Madoff's greed, complete lack of ethics, that dream will be delayed.

At the end of the day my twin brother will be taken care of. My family is strong enough to weather this storm but, your Honor, I say this without any malice, Bernard Madoff should no longer be allowed back in society. I only hope that his prison sentence is long enough so that his jail cell becomes his coffin. Thank you.

THE COURT: Thank you.

We'll hear next from Miriam Siegman.

MS. SIEGMAN: I was born a few blocks from this courthouse. I still live here. On a cold winter's day just before my 65th birthday, the man sitting in front of me announced to the world that he had stolen everything I had. After that he refused to say another word to his victims. I am here today to bear witness for myself and others, silent

victims.

The streets of my childhood felt safe. The streets I wander now feel threatening. The man sitting in this courtroom robbed me. In an instant his words and deeds beat me to near senselessness. He discarded me like road kill. Victims became the byproduct of his greed. We are what is left over, the remnants of stunning indifference and that of politicians and bureaucrats.

Six months have passed. I manage on food stamps. At the end of the month I sometimes scavage in dumpsters. I cannot afford new eyeglasses. I long to go to a concert, but I never do. Sometimes my heartbeats erratically for lack of medication when I cannot pay for it.

I shine my shoes each night, afraid they will wear out. My laundry is done by hand in the kitchen sink. I have collected empty cans and dragged them to redemption centers.

I do this. People ask how are you? My answer always is I'm fine, but it is not always true. I have lived with fear. It strikes me at all hours. I calculate again and again how long I can hold out.

It is only a matter of time. I will be unable to meet my own basic needs, food, shelter, medicine. I feel grief at no longer being able to help support my beloved sister. I feel shame and humiliation asking for help.

I also feel overwhelming sadness. I know that another

human being did this to me and to all victims, but I don't know why. What I do understand frightens me. The man who did this had deep contempt for his victims.

There are many victims including those we never hear from or see; union members, pipe-fitters, laborers, women who work in nursing homes, bricklayers, firemen, working people. One victim shot himself. The inquest informs us he was a highly decorated former soldier who could not face the shame of his ruin, his last words on a humanitarian mission in

Afghanistan. By self-admission, this thief among us knew his victims were facing a kind of death at his hands, yet he continued to play with us as a cat would with a mouse.

What shall be the punishment for such a man? What sentence? Carry the burden we carry, feel his shame, humiliation and isolation as I do. Feel it each day wherever you are until life ends.

Face an acknowledge the murderous effects of your life's work. I long for the truth that might become of a trial and hope justice had placed a higher premium on truth and expediency. Forgiveness for now, it will have to come from someone other than me.

THE COURT: Thank you. Finally we'll hear from Sheryl Weinstein.

MS. WEINSTEIN: Hello, your Honor.

THE COURT: Good morning.

MS. WEINSTEIN: I was introduced to Bernard Madoff 21 years ago at a business meeting. At the time I was the chief financial officer of Hadassah, a charitable women's organization. I now view that day as perhaps the unluckiest day of my life because of the many events set into motion that would eventually have the most profound and devastating effect on me, my husband, my child, my parents, my in-laws and all those who depended upon us for their liveliness.

You have read and you appear from many of us, the old, the young, the healthy and infirm about the unimaginable extent of human tragedy and devastation. According to a Time Magazine article, there are over 3 million individuals worldwide who have been directly or indirectly affected. They, the press and the media, speak of us as being greedy and rich. Most of us are just ordinary working people, worker bees, as I like to refer to us.

My husband and I are now both in our 60's and have been married for 37 years. We have saved for most of our lives by living beneath our means in order to provide for our retirement. This past Thursday at 2:00 o'clock my husband and I sold our home of 20 years. People are always asking how much did we lose? My reply is that when you lose everything, it really doesn't matter because you have nothing left, and we have lost everything.

Many have told us we were lucky -- I no longer know --

to be able to sell in this depressed market although at a greatly reduced amount. We had to sell because four years ago we refinanced our mortgage and gave the excess cash to Bernie Madoff. There was very little left over after all was said and done at the closing.

It is difficult to describe how it feels due to circumstances outside of your control to be virtually forced out of your home, to leave unwillingly. Last Tuesday I walked out following the movers with a thought I would be back before the closing, but knowing in the back of my mind that I wouldn't.

My husband was the last to be in our home. He shared with me his hesitation of not wanting to leave, of wanting to remain, but realizing that staying was no longer an option. We

chose not to go to the closing because it would have been too difficult and painful for either of us to be there. For months after December 11th I would wake in the dark hours of the night and early morning and to my horror realize that there were no calming, soothing words I could say to myself because it wasn't a dream. The monster who visited me was true, a reality. Those same thoughts would occur to me upon waking in the morning and during the day and a deep, heavy depression would surround me and not lift.

This went one for many months. I went on after bad dreams, virtually not unable to eat. The sight of food was

making me feel sick, unable to escape the reality of my personal devastation. At times I could not even bear to be alone. I would ask my friends to either stay with me at the office even if there was very little work to do. It would prompt me to pick up the phone to call my husband to be reassured I was not alone.

This continued until March 12th when Madoff entered his plea of guilty. I began to speak out to the media, and the helpless and hopeless feelings began to retreat and I began to feel empowered. It came together for me while being interviewed by Katie Couric. She asked me wasn't I embarrassed being a CPA losing all my money? At that moment I realized and responded no, I am not embarrassed because I did not lose my money. My money was stolen from me.

Ms. Couric said to me you sound angry, and I said yes, you're right. When someone steals from you, you get angry. That was the beginning of my healing process.

I felt it was important for somebody who as personally acquainted with Madoff to speak. My family and I are not anonymous people to him. He knows my husband's name is Rob and my son's name is Eric. In fact, Eric worked for him one summer while in college many years ago. Eric would continue to call him over the years to ask for his advice and input. Eric entrusted him with his money that he worked and saved. a few months before all this happened Eric had spoken to him and

thanked him for doing such a good job.

I would now like to have the opportunity to share with you my personal feelings about Madoff and to speak to his sentencing.

I remember when my son was perhaps a few weeks' old and I would watch him as he slept and he would whimper, not a cry of hunger, but a whimper. Even at a few weeks' old there was something in his subconscious that could frighten him. It amazed me such a young child, an infant can have nightmares.

All of us from our earliest ages remember those times when the terror, the monsters and goblins would come visit us in those dark hours. Eventually we would be so frightened that we would awake sometimes calling out to our parents because of the fear.

It was calming to have our parents remind us it was only a dream. As we got older, we could wake ourselves and self-assure ourselves it was only a dream. That terror, that monster, that horror, that beast has a name to me, and it is Bernard L. Madoff. I will now attempt to explain to you the

nature of this beast who I called Madoff.
He walks among us. He dresses like us. He drives and eats and drinks and speaks. Under the facade there is truly a beast. He is a beast that has stolen for his own needs the livelihoods, savings, lives, hopes and dreams and futures of others in total disregard. He has fed upon us to satisfy his

own needs. No matter how much he takes and from whom he takes, he is never satisfied. He is an equal opportunity destroyer.
I felt it important for you to know in appearance, he would be just like everybody else and it is for this reason I am asking your Honor to keep him in a cage behind bars because he has lost the privilege of walking and being among us mortal human beings. He should not be given the opportunity to walk into our society again.
I would like to suggest that while any man, woman or child that has been affected by his heinous crime still walks this earth, Madoff the beast should not be free to walk among them. You should protect society from the likes of him. I have reread Madoff's March 12th statement to you. Certain quotes jumped out at me. His continuing self-serving references, and I quote, that his proprietary trading in the market making business managed by his brother and two sons was legitimate, profitable and successful in all respects, or that he felt, "compelled to satisfy my clients' expectations at any cost."
It sounds as if he is laying the blame on his clients' expectations and never admitting the truth he was stealing from these clients and the lives he ruined. If he was attempting to protect his family, he should not be given that opportunity because we, the victims, did not have the same opportunity to protect our families. Madoff the beast has stolen our ability

to protect our loved ones away from us. He should have no opportunity to protect his family.
We, the victims, are greatly disappointed by those agencies that were set up to protect us. SIPIC has now redefined what we are entitled to. The IRS approved their office request to be a custodian of our IRAs and pension funds and the SEC appears to have looked the other way on numerous occasions. This is a human tragedy of historic proportions and we ask -- no, we implore -- that those whose agencies may have failed us in the past through acts of omissions, step up to the plate, fulfill their responsibilities. I thank your Honor for your indulgence and I feel comfortable you will make sure justice is served.
Thank you.
THE COURT: Thank you.
Thanks to all the victims who spoke today and to all those who wrote. I appreciate hearing your views.
Mr. Sorkin.
MR. SORKIN: Good morning, your Honor.
THE COURT: Good morning.
MR. SORKIN: Before I speak, would your Honor respectfully acknowledge you have received both the government's sentencing memorandum and two responses?
THE COURT: Yes, I have your initial letter I received

yesterday and your reply brief. I have the government's

memorandum as well.
MR. SORKIN: Thank you.
THE COURT: I have read them all.
MR. SORKIN: Thank you, your Honor.
May I proceed?
THE COURT: Yes.
MR. SORKIN: Your Honor, I know I speak on behalf of all Mr. Madoff's counsel as well as Mr. Madoff who will speak. We cannot be unmoved by what we heard. There is no way that we cannot be insensitive to the victims' suffering.
This is a tragedy as some of the victims have said at every level. There is no doubt Mr. Madoff will speak. We represent a deeply flawed individual, but we represent, your Honor, a human being. We don't represent a statistic. We don't represent a number. We speak to the victims. We have heard what they've had to say and we can only imagine, your Honor, what we would have heard from others.
I say again, forgive me for being redundant, we represent a very flawed individual, an individual who appears before this court facing a sentence that is sufficient but not unreasonably necessary to carry out the mandate that this court has to carry out.
The magnificence of our legal system, your Honor, is that we do not seek an eye for an eye. To be sure, if it is any consolation to the victims, we have worked hopefully

diligently with the U.S. Attorney's Office in an atmosphere of trying to recover assets. To that extent, your Honor, we have provided the government with what we believe to be the assets that Mr. Madoff has gathered over the years which the victims have referred to, and again if it is any consolation to them, to the extent that the government has left him and his family, his wife impoverished, we are just about there with respect to everything the government believes it can show in order to obtain the appropriate assets for forfeiture.
Vengeance is not the goal of punishment. Our system of justice, your Honor, has recognized that justice is and must always be blind and fair -- not blind to the criminal acts that Mr. Madoff pleaded guilty to and certainly not blind to the suffering of the victims, but blind to the extent that it will achieve a sentence that has been set out over the years in the guidelines and the cases interpreting the guidelines, and the guidelines and the courts and the statutes, your Honor, do not speak of vengeance and revenge.
There is something bordering on the absurd, and we cited United States versus Ellison on this point, your Honor. For the government to ask for 150 years so that Mr. Madoff gets out of jail at the age of 221 because he is 71 now, he will face supervised release. By the same token, your Honor, it defies reason for the Probation Department to suggest that he be sentenced to 50 years in prison for the very same reasons.

I point out to the court, and forgive me, your Honor, for repeating what is in the letter we sent you most recently, that Mr. Madoff, as he pleaded to, as appears in the presentence report and appears in the information in which the government agrees, for most of the period of time that Mr. Madoff is alleged to have engaged in this ponzi scheme and, in fact, it was a ponzi scheme, it was money in and money out.

Most of the money, and I am quoting from the PSR, went for redemptions. People who invested money were given back money. To be sure, it was a fraud. To be sure, it was a ponzi scheme. To be sure, it was a crime, but nevertheless, your Honor, I point out, and in response respectfully to some of the victims, the PSR noted, and I think it is common knowledge in the industry that Mr. Madoff built up this firm on the proprietary trading side to the point in 1991, as the presentence report points out, the proprietary trading side which at the point of his arrest had approximately 200 employees separate and apart from the fraudulent advisory business, a hundred traders making markets and in 1991, your Honor, accounted for almost 10 percent of all transactions on the New York Stock Exchange.

Sufficient to provide revenue at the same time Mr. Madoff engaged in taking money in and taking money out, most of that money went for redemptions. As we point out in our letter of yesterday, and as the government notes and as the PSR notes,

the loans, the comingling, and we we do dispute this with the government, but I don't think it is a relevant issue, the comingling, the loans.

(Continued on next page)

MR. SORKIN: The loans, the commingling, commenced within the last eight to ten years. And as Mr. Madoff will say, things began to collapse. And there was commingling with $250 million over the last eight or so years, of advisory money, as well as money in, money out of investments.

I think it's important to note, your Honor, again that Mr. Madoff stepped forward. He chose not to flee. He chose not to hide money. To the extent money is overseas, we are still actively engaged -- we, his defense counsel -- in assisting the government, at the request of the government, to obtain assets located overseas, as we speak, and we submitted that voluntarily, and we have been trying to help, with Mr. Madoff's authorization, permission, and blessing.

Mr. Madoff is 71 years old, your Honor. Based upon his health, which is in the PSR, his family history, his life expectancy, that is why we ask for a sentence of 12 years, just short, based upon the statistics that we have, of a life sentence.

We also said, if your Honor is inclined, your Honor obviously makes the decision, 15 to 20 years. So that if Mr. Madoff ever sees the light of day, in his 90s, impoverished and alone, he will have paid a terrible price. He expects, your Honor, to live out his years in prison.

The PSR points out, your Honor, as we noted in our letter to you, that the loss in this case is $13,226,000,000.

The exact numbers are in the PSR. What has not been heard publicly, your Honor, is the fact that over $1,276,000,000 is held by the SIPC trustee, and we have no control over how that money is disbursed. And I say this for the victims we have heard. Again, we have no control over what the SIPC trustee does with the money that he obtains, nor do we have any control over what the SEC will do, nor do we have any control as to how the government to whom we have forfeited all of the assets but a few, which the government and we have agreed were weighed against the risk of litigation, we have no control how that money is disbursed.

Additionally to the $1,276,000,000, the SIPC trustee, according to the PSR, has recovered $1,225,000,000, has sent demand letters to individuals for 735 million, and has commenced litigation to seek a clawback from some very large funds to obtain redemptions and interest payments in the amount of $10,100,000,000. It is our hope, your Honor, our sincerest hope, that all that money is collected, in an amount in excess of $13,226,000,000, that that will be provided to investors.

The frenzy, the media excitement, that Mr. Madoff engaged in a Ponzi scheme involving $65 billion and that he has ferreted money away, as far as we know, your Honor, that is simply not true, and it is not borne out either by the government or by the PSR, and we take no issue with the PSR.

In closing, your Honor, there is no question that this

case has taken an enormous toll, not only on Mr. Madoff and his family, but to the victims to be sure. But it has also taken a toll, your Honor, as Mr. Madoff will say, on the industry that he helped revolutionize, that he helped grow, and now has become the object of disrespect and abomination, and that is a tragedy as well.

We ask only, your Honor, that Mr. Madoff be given understanding and fairness, within the parameters of our legal system, and that the sentence that he be given be sufficient, but not greater than necessary, to carry out what this Court

must carry out under the rules, statutes and guidelines.
Thank you, your Honor.
THE COURT: Thank you.
Mr. Madoff, if you would like to speak, now is the time.
THE DEFENDANT: Your Honor, I cannot offer you an excuse for my behavior. How do you excuse betraying thousands of investors who entrusted me with their life savings? How do you excuse deceiving 200 employees who have spent most of their working life working for me? How do you excuse lying to your brother and two sons who spent their whole adult life helping to build a successful and respectful business? How do you excuse lying and deceiving a wife who stood by you for 50 years, and still stands by you? And how do you excuse deceiving an industry that you spent a better part of your life

trying to improve? There is no excuse for that, and I don't ask any forgiveness.
Although I may not have intended any harm, I did a great deal of harm. I believed when I started this problem, this crime, that it would be something I would be able to work my way out of, but that became impossible. As hard as I tried, the deeper I dug myself into a hole. I made a terrible mistake, but it wasn't the kind of mistake that I had made time and time again, which is a trading mistake. In my business, when you make a trading error, you're expected to make a trading error, it's accepted. My error was much more serious. I made an error of judgment. I refused to accept the fact, could not accept the fact, that for once in my life I failed. I couldn't admit that failure and that was a tragic mistake.
I am responsible for a great deal of suffering and pain. I understand that. I live in a tormented state now knowing of all the pain and suffering that I have created. I have left a legacy of shame, as some of my victims have pointed out, to my family and my grandchildren. That's something I will live with for the rest of my life.
People have accused me of being silent and not being sympathetic. That is not true. They have accused my wife of being silent and not being sympathetic. Nothing could be further from the truth. She cries herself to sleep every night knowing of all the pain and suffering I have caused, and I am

tormented by that as well. She was advised to not speak publicly until after my sentencing by our attorneys, and she complied with that. Today she will make a statement about how she feels about my crimes. I ask you to listen to that. She is sincere and all I ask you is to listen to her.
Apologizing and saying I am sorry, that's not enough. Nothing I can say will correct the things that I have done. I feel terrible that an industry I spent my life trying to improve is being criticized terribly now, that regulators who I helped work with over the years are being criticized by what I have done. That is a horrible guilt to live with. There is nothing I can do that will make anyone feel better for the pain and suffering I caused them, but I will live with this pain, with this torment for the rest of my life.
I apologize to my victims. I will turn and face you.

I am sorry. I know that doesn't help you.
Your Honor, thank you for listening to me.
THE COURT: Thank you.
Mr. Sorkin, did I understand Mr. Madoff to say that Mrs. Madoff wanted to speak?
MR. SORKIN: No, your Honor. Mrs. Madoff after the sentencing will be giving a statement. And I add what Mr. Madoff said about belaboring it, that she was advised by counsel to wait till after sentence.
THE COURT: I thought he was saying she wanted to

speak. Thank you.
I will hear from the government.
MS. BARONI: This defendant carried out a fraud of unprecedented proportion over the course of more than a generation. For more than 20 years he stole ruthlessly and without remorse. Thousands of people placed their trust in him and he lied repeatedly to all of them. And as the Court heard from all of the victims, in their words and in the letters, he destroyed a lifetime of hard work of thousands of victims. And he used that victims' money to enrich himself and his family, with an opulent lifestyle, homes around the world, yachts, private jets, and tens of millions of dollars of loans to his family, loans of investors' money that has never been repaid.
The guideline sentence in this case, as your Honor knows, is 150 years and the government respectfully submits that a sentence of 150 years or a substantial term of imprisonment that will ensure that he spends the rest of his life in jail is appropriate in this case.
This was not a crime born of any financial distress or market pressures. It was a calculated, well orchestrated, long-term fraud, that this defendant carried out month after month, year after year, decade after decade. He created literally hundreds and hundreds of thousands of fake documents every year. Every time he told his clients that he was making trades for them he sent them trade confirmations filled with

lies. At every month end he sent them account statements that were nothing but lies. And the defendant knew that his clients made critically important life decisions, as your Honor heard today, based on these lies. Decisions about their children's education, their retirement, how to care for elderly relatives, and how to provide for their families. He knew this, and he stole from them anyway.
In doing so, he drove charities, companies, pension plans and families to economic ruin. And even on the most dispassionate view of the evidence, the scale of the fraud, which is at a conservative estimate, your Honor, $13 billion, when you look at the duration of the fraud, which is more than 20 years, when you look at the fact that the defendant could have stopped this fraud and saved the victims' losses, all of these facts justify a guideline sentence of 150 years.
And to address briefly some of Mr. Sorkin's arguments, despite Mr. Sorkin's arguments, the defendant here deserves no leniency and certainly does not deserve a sentence of 12 years' imprisonment.
Mr. Sorkin tries to argue that the loss amount is

actually going to be less than 13 billion because the trustee may recover some assets in clawback proceedings. As your Honor knows, that has nothing to do with the loss amount in this case. Further, the defendant shouldn't get any credit for anything the government or the trustee does after the fraud to

recover money.

In asking for 12 years, your Honor, the defendant is asking you to impose a sentence that a defendant would receive in a garden variety fraud case in this district, a case with about $20 million of losses and far fewer victims. In imposing a 12 year sentence in this case, on the facts and circumstances here, would be profoundly unfair. Not only would it not reflect the seriousness and the scope of the defendant's crimes, but, also, it would not promote the goals of general deterrence going forward.

Mr. Sorkin's argument that the defendant should get some credit for coming forward and turning himself in is also entirely meritless. The defendant continued his fraud scheme until the very end, when he knew the scheme was days away from collapse, when he was almost out of money and when he was faced with redemption requests from clients that he knew he could not meet. And even at that point, rather than turning himself in, he tried to take the last of his victims' money. He prepared $173 million in checks that he planned to give to his family, his friends, and some preferred clients. It was his final effort to put his interests above those of his clients, and had the FBI not arrested him when they did, he might well have succeeded.

Your Honor, in sum, for running an investment advisory business that was a complete fraud, for betraying his clients

for decades, and for repeatedly lying to regulators to cover up his fraud, for the staggering harm that he has inflicted on thousands of people, for all of these reasons and all of the reasons your Honor heard so eloquently from the victims, the government respectfully requests that the Court sentence the defendant to 150 years in prison or a substantial term of imprisonment that ensures that he will spend the rest of his life in jail.

Thank you.

THE COURT: Thank you.

I take into account what I have read in the presentence report, the parties' sentencing submissions, and the e-mails and letters from victims. I take into account what I have heard today. I also consider the statutory factors as well as all the facts and circumstances in the case.

In his initial letter on behalf of Mr. Madoff, Mr. Sorkin argues that the unified tone of the victims' letters suggests a desire for mob vengeance. He also writes that Mr. Madoff seeks neither mercy nor sympathy, but justice and objectivity.

Despite all the emotion in the air, I do not agree with the suggestion that victims and others are seeking mob vengeance. The fact that many have sounded similar themes does not mean that they are acting together as a mob. I do agree that a just and proportionate sentence must be determined,

objectively, and without hysteria or undue emotion.

Objectively speaking, the fraud here was staggering. It spanned more than 20 years. Mr. Madoff argues in his reply letter that the fraud did not begin until the 1990s. I guess it's more that the commingling did not begin until the 1990s, but it is clear that the fraud began earlier. And even if it is true that it only started in the 1990s, the fraud exceeded ten years, still an extraordinarily long period of time. The fraud reached thousands of victims.

As for the amount of the monetary loss, there appears to be some disagreement. Mr. Madoff disputes that the loss amount is $65 billion or even $13 billion. But Mr. Madoff has now acknowledged, however, that some $170 billion flowed into his business as a result of his fraudulent scheme. The presentence report uses a loss amount of $13 billion, but as I understand it, that number does not include the losses from moneys invested through the feeder funds. That's what the PSR states. Mr. Madoff argues that the $13 billion amount should be reduced by the amounts that the SIPC trustee may be able to claw back, but that argument fails. Those clawbacks, if they happened, will result in others who suffered losses. Moreover, Mr. Madoff told his sons that there were $50 billion in losses. In any event, by any of these monetary measures, the fraud here is unprecedented.

Moreover, the offense level of 52 is calculated by

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

using a chart for loss amount that only goes up to $400 million. By any of these measures, the loss figure here is many times that amount. It's off the chart by many fold.

Moreover, as many of the victims have pointed out, this is not just a matter of money. The breach of trust was massive. Investors -- individuals, charities, pension funds, institutional clients -- were repeatedly lied to, as they were told their moneys would be invested in stocks when they were not. Clients were sent these millions of pages of account statements that the government just alluded to confirming trades that were never made, attesting to balances that did not exist. As the victims' letters and e-mails demonstrate, as the statements today demonstrate, investors made important life decisions based on these fictitious account statements -- when to retire, how to care for elderly parents, whether to buy a car or sell a house, how to save for their children's college tuition. Charitable organizations and pension funds made important decisions based on false information about fictitious accounts. Mr. Madoff also repeatedly lied to the SEC and the regulators, in writing and in sworn testimony, by withholding material information, by creating false documents to cover up his scheme.

It is true that Mr. Madoff used much of the money to pay back investors who asked along the way to withdraw their accounts. But large sums were also taken by him, for his

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

personal use and the use of his family, friends, and

colleagues. The PSR shows, for example, that Mr. Madoff reported adjusted gross income of more than $250 million on his tax returns for the ten year period from 1998 through 2007. On numerous occasions, Mr. Madoff used his firm's bank accounts which contained customer funds to pay for his personal expenses and those of his family, including, for example, the purchase of a Manhattan apartment for a relative, the acquisition of two yachts, and the acquisition of four country club memberships at a cost of $950,000. Billions of dollars more were paid to individuals who generated investments for Mr. Madoff through these feeder funds.

Mr. Madoff argues a number of mitigating factors but they are less than compelling. It is true that he essentially turned himself in and confessed to the FBI. But the fact is that with the turn in the economy, he was not able to keep up with the requests of customers to withdraw their funds, and it is apparent that he knew that he was going to be caught soon. It is true that he consented to the entry of a $100 billion forfeiture order and has cooperated in transferring assets to the government for liquidation for the benefit of victims. But all of this was done only after he was arrested, and there is little that he could have done to fight the forfeiture of these assets. Moreover, the SIPC trustee has advised the Court Mr. Madoff has not been helpful, and I simply do not get the

sense that Mr. Madoff has done all that he could or told all that he knows.

Mrs. Madoff has stipulated to the transfer of some $80 dollars in assets to the government for the benefit of victims, but the record also shows that as it became clear that Mr. Madoff's scheme was unraveling, he made substantial loans to family members, he transferred some $15 million of firm funds into his wife's personal accounts, and he wrote out the checks that the government has just described.

I have taken into account the sentences imposed in other financial fraud cases in this district. But, frankly, none of these other cases is comparable to this case in terms of the scope, duration and enormity of the fraud, and the degree of the betrayal.

In terms of mitigating factors in a white-collar fraud case such as this, I would expect to see letters from family and friends and colleagues. But not a single letter has been submitted attesting to Mr. Madoff's good deeds or good character or civic or charitable activities. The absence of such support is telling.

We have heard much about a life expectancy analysis. Based on this analysis, Mr. Madoff has a life expectancy of 13 years, and he therefore asks for a sentence of 12 years or alternatively 15 to 20 years. If Mr. Sorkin's life expectancy analysis is correct, any sentence above 20 or 25 years would be

largely, if not entirely, symbolic.

But the symbolism is important, for at least three reasons. First, retribution. One of the traditional notions of punishment is that an offender should be punished in proportion to his blameworthiness. Here, the message must be sent that Mr. Madoff's crimes were extraordinarily evil, and

that this kind of irresponsible manipulation of the system is not merely a bloodless financial crime that takes place just on paper, but that it is instead, as we have heard, one that takes a staggering human toll. The symbolism is important because the message must be sent that in a society governed by the rule of law, Mr. Madoff will get what he deserves, and that he will be punished according to his moral culpability.

Second, deterrence. Another important goal of punishment is deterrence, and the symbolism is important here because the strongest possible message must be sent to those who would engage in similar conduct that they will be caught and that they will be punished to the fullest extent of the law.

Finally, the symbolism is also important for the victims. The victims include individuals from all walks of life. The victims include charities, both large and small, as well as academic institutions, pension funds, and other entities. Mr. Madoff's very personal betrayal struck at the rich and the not-so-rich, the elderly living on retirement

funds and social security, middle class folks trying to put their kids through college, and ordinary people who worked hard to save their money and who thought they were investing it safely, for themselves and their families.

I received letters, and we have heard from, for example, a retired forest worker, a corrections officer, an auto mechanic, a physical therapist, a retired New York City school secretary, who is now 86 years old and widowed, who must deal with the loss of her retirement funds. Their money is gone, leaving only a sense of betrayal.

I was particularly struck by one story that I read in the letters. A man invested his family's life savings with Mr. Madoff. Tragically, he died of a heart attack just two weeks later. The widow eventually went in to see Mr. Madoff. He put his arm around her, as she describes it, and in a kindly manner told her not to worry, the money is safe with me. And so not only did the widow leave the money with him, she eventually deposited more funds with him, her 401(k), her pension funds. Now, all the money is gone. She will have to sell her home, and she will not be able to keep her promise to help her granddaughter pay for college.

A substantial sentence will not give the victims back their retirement funds or the moneys they saved to send their children or grandchildren to college. It will not give them back their financial security or the freedom from financial

worry. But more is at stake than money, as we have heard. The victims put their trust in Mr. Madoff. That trust was broken in a way that has left many -- victims as well as others -- doubting our financial institutions, our financial system, our government's ability to regulate and protect, and sadly, even themselves.

I do not agree that the victims are succumbing to the temptation of mob vengeance. Rather, they are doing what they are supposed to be doing -- placing their trust in our system of justice. A substantial sentence, the knowledge that Mr. Madoff has been punished to the fullest extent of the law,

may, in some small measure, help these victims in their healing process.

Mr. Madoff, please stand.

It is the judgment of this Court that the defendant, Bernard L. Madoff, shall be and hereby is sentenced to a term of imprisonment of 150 years, consisting of 20 years on each of Counts 1, 3, 4, 5, 6, and 10, 5 years on each of Counts 2, 8, 9, and 11, and 10 years on Count 7, all to run consecutively to each other. As a technical matter, the sentence must be expressed on the judgment in months. 150 years is equivalent to 1,800 months.

Although it is academic, for technical reasons, I must also impose supervised release. I impose a term of supervised release of 3 years on each count, all to run concurrently. The

mandatory, standard, and special conditions are imposed, as set forth on pages 58 and 59 of the PSR.

I will not impose a fine, as whatever assets Mr. Madoff has, as to whatever assets may be found, they shall be applied to restitution for the victims.

As previously ordered, I will defer the issue of restitution for 90 days.

Finally, I will impose the mandatory special assessment of $1,100, $100 for each count.

Mr. Sorkin, any requests?

MR. SORKIN: Yes, your Honor.

As you pointed out to one of the victims, you cannot designate a prison, but we would ask, based upon an analysis that we have done that in 75 percent of the cases recommendations made by the court are followed by the Bureau of Prisons, we respectfully request that your Honor recommend to the Bureau of Prisons that Mr. Madoff be designated to Otisville.

THE COURT: I will recommend to the Bureau of Prisons that Mr. Madoff be designated to an appropriate facility in the northeast region of the United States.

MR. SORKIN: Thank you.

THE COURT: Ms. Baroni?

MS. BARONI: Two issues. If you can specifically incorporate by reference the forfeiture order of Friday,

pronounce it as part of the sentence.

THE COURT: The forfeiture order is hereby incorporated.

MS. BARONI: Special assessment.

THE DEFENDANT: I did the special assessment of $1,100.

MS. BARONI: Thank you.

THE COURT: Mr. Madoff, please stand one more time.

Mr. Madoff, you have the right to appeal at least certain aspects of this judgment and conviction. If you wish to appeal, you must do so within ten days. If you cannot afford an attorney, the court will appoint one for you.

We are adjourned.

(Adjourned)

17
18
19
20
21
22
23
24
25

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

v. 09 CR 764 (RJS)

FRANK DIPASCALI,

Defendant.
----------x

New York, N.Y.
August 11, 2009
3:15 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

LEV L. DASSIN
United States Attorney for the
Southern District of New York
MARC LITT
LISA BARONI
Assistant United States Attorney

BRACEWELL & GIULIANI
Attorneys for Defendant
MARC L. MUKASEY
CRAIG S. WARKOL
JAMIE RENNER
DANIEL S. CONNOLLY

Also Present:

Special Agent Keith D. Kelly
Special Agent Julia Hanish
Special Agent Steven Garfinkel
Natasha Ramesar, Pretrial Services

(In open court; case called)

THE DEPUTY CLERK: All parties can state their appearances for the record, please.

MR. LITT: Good afternoon, your Honor. Marc Litt for the United States. With me at counsel table is Lisa Baroni, Keith Kelley of the FBI, Julia Hanish, and Steven Garfinkel of the FBI, and Natasha Ramesar of the U.S. Pretrial Services Office.

THE COURT: Good afternoon to each of you.

For the defense.

MR. MUKASEY: Good afternoon, your Honor. Marc Mukasey from the law firm Bracewell & Giuliani for the defendant Frank DiPascali, who is seated to my left. With me are Dan Connolly, Craig Warkol, and Jamie Renner.

THE COURT: Good afternoon to each you and to Mr. DiPascali.

Let me just get a little bit of background so it is clear since this is the first appearance of anyone on this case. On Friday I received a letter from the government, Mr. Litt and Ms. Baroni, advising me that the defendant, Mr. DiPascali, was prepared to waive the indictment and plead guilty pursuant to an information in this case.

The government also included a notice of intent to file an information as opposed to an indictment, as well as a motion pursuant to Title 18, United States Code, Section 3771

regarding the right of victims. The government also provided a disclosure statement setting forth a list of potential victims of the criminal activity alleged in the case. This statement contained a 61-page, single-spaced list of victims which the government conceded was not an exhausted or complete list but was a list that they had been able to put together over the course of the investigation.

Mr. Litt, so far so good?

MR. LITT: Yes. I believe it is only institutional victims, corporate parties.

THE COURT: That's right. 61 pages of institutional victims.

In light of this fact that this case has not been assigned a docket number, it will not receive a docket number today after the defendant formerly waives indictment and pleads here in open court.

The government requested that I issue an order directing that its letter of August 7th be posted and the other materials I mentioned be posted on the web page created by the U.S. Attorney's Office for Madoff related cases. In the government's view this was the most practical and efficient way to notify potential victims of today's proceeding. So I issued such an order on Friday, August 7th.

Late yesterday afternoon I received a copies of a proposed information, a plea agreement, as well as a letter

from the government setting forth the bail conditions proposed by the parties in this case. I ordered that the last of these be posted similarly on the and U.S. Attorney's Office web page page. The information and plea agreement will presumably be posted today presuming the defendant waives indictment and executes the agreement that I received a draft of yesterday.

To ensure at least some notice to the victims, including those who may be present here today, I directed the government to summarize and post on the web page the charges contained in the information and the nature of the proposed plea agreement between the parties.

So are there any other additional facts that I left out, Mr. Litt?

MR. LITT: I don't believe so. No, your Honor.

THE COURT: Mr. Mukasey, anything you think is relevant to the record?

MR. MUKASEY: No, Judge. I think that is it.

THE COURT: Mr. Mukasey, I understand that your client wishes to plead guilty pursuant to the information that has been drafted and provided to me, is that correct?

MR. MUKASEY: That's correct, your Honor.

THE COURT: Mr. DiPascali, before I accept your guilty plea -- you can sit for the moment. Before I accept your guilty plea, I am going to ask you certain questions to ensure first of all that you are pleading guilty because you are

guilty and not for some other. And also to make sure that you fully understand your rights, your Constitution and statutory rights, including your right to a trial.

So if at any point during the course of my questioning you don't understand my question or require some further elaboration on my part, let me know and I will do everything to clarify. If at any point you wish to confer with Mr. Mukasey or your other attorneys, that is perfectly fine. I will give you as much time as I need. I don't want you to feel rushed into a plea in this matter.

At this point I am going to ask Ms. Levine to administer the oath. This is an oath that I ask you to rise for. This is an oath that you will answer truthfully my questions.

THE DEPUTY CLERK: Please raise your right hand.

(Defendant sworn)

THE COURT: Mr. DiPascali, having taken that oath, do you understand that any false answers to my questions could subject you to the penalties for perjury or for making a false statement, which would carry separate penalties and be accept and distinct from any of the crimes charged in the information in this matter?

THE DEFENDANT: I do, your Honor.

THE COURT: Again, if at any point you wish to confer with your attorneys before answering, that is fine. If at any

point you would like me to clarify a question before answering, that is also fine. In fact, you should do that. But don't make any false statements because that will compound any problems that you may already have.

THE DEFENDANT: Understood.

THE COURT: Mr. DiPascali, could you state your full name for the record?

THE DEFENDANT: Frank DiPascali, Jr.

THE COURT: How old are you, Mr. DiPascali?

THE DEFENDANT: 52.

THE COURT: How far you go in school?

THE DEFENDANT: High school.

THE COURT: Where was that?

THE DEFENDANT: Archbishop Malloy High School in Briarwood, Queens.

THE COURT: Are you now or have you recently been under the care of a doctor or a psychiatrist?

THE DEFENDANT: No.

THE COURT: Have you ever been treated for any type of mental illness or any type of addiction, including drug or alcohol addiction?

THE DEFENDANT: No, sir.

THE COURT: Have you taken any drugs or any medicine or any pills or have you drunk any alcohol in the past 48 hours?

THE DEFENDANT: Yes, sir.

THE COURT: Tell me about that.

THE DEFENDANT: I had a glass of wine at dinner the night before last.

THE COURT: The night before last?

THE DEFENDANT: That's correct.

THE COURT: No medication, no pills, no drugs of any kind?

THE DEFENDANT: No, sir.

THE COURT: No other alcohol?

THE DEFENDANT: Correct.

THE COURT: Is your mind clear today?

THE DEFENDANT: Crystal clear, sir.

THE COURT: Do you under the nature of this proceeding and what is going to take place here today?

THE DEFENDANT: I do.

THE COURT: Mr. Mukasey, do you have any doubt as to your client's mental competence to enter an informed plea at this time?

MR. MUKASEY: None whatsoever.

THE COURT: Let me ask Mr. Litt and Ms. Baroni if they share your confidence in that regard.

Mr. Litt?

MR. LITT: We do. We have no reason to think otherwise.

THE COURT: On the basis of Mr. DiPascali's responses to my questions, my observations of his demeanor, and on the representations of his counsel and the prosecutors, I find that Mr. DiPascali is competent to enter an information plea at this time.

Now, Mr. DiPascali, as I understand it you wish to plead guilty to an information, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had enough of an opportunity to discuss this information and the charges contained in it with your attorney, Mr. Mukasey?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with Mr. Mukasey's representation of you?

THE DEFENDANT: Absolutely.

THE COURT: Do you feel you need or require any additional time to review the information or review any of the other documents associated with this matter?

THE DEFENDANT: No, sir.

THE COURT: Now, have you received a copy of the information that I've been referring to?

THE DEFENDANT: I have.

THE COURT: Have you read it yourself?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed it with your attorney

Mr. Mukasey?

THE DEFENDANT: Yes, sir.

THE COURT: Do you waive the public reading of that information, or would you like me to read it to you here in open court?

THE DEFENDANT: I would prefer it to be waived.

THE COURT: You will waive the public reading. That's fine.

Now, do you have in front of you -- I don't know whether you have the original in front of you -- a waiver of indictment form?

THE DEFENDANT: I do.

THE COURT: Is that your signature on that document?

THE DEFENDANT: It is.

THE COURT: When did you sign that?

THE DEFENDANT: About 15 minutes ago.

THE COURT: Prior to signing that document had you reviewed the information in this case and discussed it with Mr. Mukasey?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Mukasey, is your signature on that form as well?

MR. MUKASEY: It is, Judge.

THE COURT: And prior to signing it, did you review the information and discuss it with your client?

MR. MUKASEY: Extensively.

THE COURT: Now, I want to make sure you understand, Mr. DiPascali, that you have a right, a constitutional right, to proceed by way of an indictment, which is a charging instrument returned by a grand jury rather than an information, which is simply a charging instrument brought by prosecutors.

Do you understand that?

THE COURT: I do. Under the Constitution you have a right to have evidence underlying the crimes charged in the information brought before the grand jury, which is a group of 23 citizens who would decide by majority vote whether probable cause had been established to demonstrate that you had committed the crimes charged in the charging instrument.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Only if the grand jury reached that determination of probable cause by a majority vote with a proper quorum of grand jurors present could those charges be returned against you.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: By waiving indictment, you will be giving up that right and you will be agreeing to go forward on the charges contained in the information without ever having the evidence brought before a grand jury.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Are you voluntarily and freely giving up that right to proceed by a grand jury?

THE DEFENDANT: Absolutely.

THE COURT: Now, I want to explain to you your other constitutional rights. Have you had a chance to review with your attorney, Mr. Mukasey, a three-page document probably entitled Advice of Rights Form that should have been provided to you by my chambers?

THE DEFENDANT: I have.

THE COURT: Is your signature on the second page of that document?

THE DEFENDANT: It is.

THE COURT: Before you signed that document, did you review it carefully with your attorney, Mr. Mukasey?

THE DEFENDANT: Yes, we did.

THE COURT: Did you have an opportunity discuss with him any questions you may have had or any further explanation of the rights described in that document?

THE DEFENDANT: Thoroughly.

THE COURT: Mr. Mukasey, did you sign the third page?

MR. MUKASEY: I did, Judge.

THE COURT: Before signing it, did you have a full and extensive opportunity to discuss the rights described in that

document with your client?

MR. MUKASEY: Yes.

THE COURT: I am going to mark that as a court exhibit. I will mark it as Court Exhibit 1. I will date it and I will initial it.

I am also going to ask you in open court, Mr. DiPascali, some questions about the rights that are contained in this document. The reason I do that is because these rights are so vitally important and it is so essential that you understand these rights because they are there rights that you will would be waiving. In addition to this document, I want to make sure you have had an ample opportunity to consider them so I will ask you questions that may seem redundant but I think is it a price worth paying for rights that are this serious.

Mr. DiPascali, under the Constitution and laws of the United States, you would be entitled to a speedy and public jury trial on the charges contained in the information.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: At trial you would be presumed to be innocent and the government would be required to prove you guilty by competent evidence beyond a reasonable doubt before you could be found guilty.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Now, at trial a jury of 12 people would have to agree unanimously that you were guilty before you could be found guilty.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You would not have to prove that you were innocent if you went to trial.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: The jury would have to be persuaded beyond a reasonable doubt and they would have to be persuaded unanimously of that fact before you could be found guilty.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, at trial and at every stage of your case, you would be entitled to be represented by an attorney and if you couldn't afford an attorney, one would be appointed for you at no cost to you.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: During a trial, the witnesses for the government would have to come into court and testify in your presence.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: It is called your right to confront your accusers. It is the confrontation clause of the Constitution. What that means is the witnesses would have to come and sit right here or in a box like it if it were in a different courtroom and you would be able to see them and hear them and they would be able to see you.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: At trial your attorney Mr. Mukasey would have an opportunity to cross-examine those witnesses.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I have seen him do it. He is really good at it. You would have that opportunity.

THE DEFENDANT: That is why I sit next to him.

THE COURT: He would also have an opportunity to object to the government's evidence if he wished and if he felt appropriate.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: At trial you would have the right to have subpoenas issued, or other compulsory process used to compel witnesses to testify if you wished.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If there are witnesses who you felt had valuable testimony, valuable to your defense and they didn't wish to testify, you could compel them to testify through subpoenas.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: At trial you yourself would have the right to testify if you chose.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Would you also have the right not to testify if you chose not to testify. If you chose not to testify then no one, particularly the jury, could draw any negative inference or any suggestion of your guilt by virtue of the fact that you chose not to testify.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I would tell the jury that more than once. I tell them at the beginning and I would tell them in the middle and at the end that this was a fundamental right and principle of bedrock proportions in our constitutional system, that the criminal defendant never has any obligation to do anything at a trial. The burden also rests with the government. So if a defendant were not to testify, they could not and must not draw any negative inference against that

witness by virtue of that nontestimony.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: Now, do you understand that if you went to trial and you were convicted at trial, you would then have a right to appeal the jury's verdict if you wished.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you plead guilty and if I accept your guilty plea, you will give up your right to a trial and all the other rights I have just described.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The only exception to that would be your right to counsel. That right would continue through your plea, through sentencing, and through appeal if you wished to appeal.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: But the other rights that I just described and are described in the document that we talked about before, Court Exhibit 1, those would be gone. You would be waiving those.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you have a right to

change your mind even now?

THE DEFENDANT: Yes.

THE COURT: There are a lot of people here, and your lawyers are here, the government is here. That is well and good but if you want to go to trial, you have a right to go to trial and nobody will be upset with you and annoyed at you.

Do you understand that?

THE DEFENDANT: I understand, sir.

THE COURT: Do you nevertheless wish to go forward with your guilty plea at this time?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that if you plead guilty and if I accept your guilty plea then you will be sentenced on the basis of that guilty plea among other things; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if you plead guilty, there will be no appeal on the question of whether or not you committed the offenses to which you pled guilty; do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Do you also understand if you plead guilty, I am going to ask you questions about what you did. I am going to ask you basically to give up your right not to incriminate yourself because I am going to need you to tell me

what you did that makes you guilty of these crimes before I will accept the plea; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I said a minute ago if you went to trial you would have a right not to testify and that of course is true. No negative inference could be drawn against you or considered by the jury. If you are going to plead guilty then I will need to be persuaded that you are pleading guilty because you are guilty and not for some other reason. So that is why I am going to ask you questions about what you did and how that makes you guilty of the offense.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand each and everyone of these rights, Mr. DiPascali?

THE DEFENDANT: I do.

THE COURT: Are you waiving your rights to a trial and all the other rights I just mentioned?

THE DEFENDANT: Yes, sir.

THE COURT: Now, the information that you have indicated you've read charged you in 10 separate counts.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I am not going to go through it in detail. I am not going to read it. The first count charges you with

conspiracy to commit securities fraud, investment advisory fraud, falsify books and records of a broker/dealer, falsify books and records of an investment fund, mail fraud, wire fraud, money laundering all in violation of Title 18, United States Code, Section 371-72.

Count Two charges you with a substantive count of securities fraud violation of 15, United States Code, Section 78j(b), 78ff.

The third count charges you with investment adviser fraud, in violation of Title 15, United States Code, Section 80b-6 and 80b-17.

The fourth count charges you with falsifying broker/dealer books and records in violation of Title 15, United States Code, Sections 78q(a) and 78ff as well as the regulation that is promulgated thereafter 17, C.F.R., Section 240.17(a)(3).

The fifth count charges you with falsifying investment adviser books and records in violation of 15, United States Code, Section 80(b)(4) and 80b-17 as well as a code section of the C.F.R.

Count Six charges you with mail fraud in violation of 18, United States Code, Section 1341.

Count Seven charges you with wire fraud in violation of Title 18, United States Code, 1343.

Count Eight charges you with money laundering in

violation of Title 18, United States Code, Section 1956(a)(2).

Count Nine charges you with perjury in violation of Title 18, United States Code, Section 1621.

Count Ten charges you with income tax evasion in violation of Title 26, United States Code, Section 7201.

So those are the 10 counts.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: In addition the information contains two forfeiture allegations. The first calls for you to forfeit all property and proceeds deprived from the crimes charged in Counts One, Two, Six and Seven for a total amount of $170 billion.

Do you understand that?

THE DEFENDANT: Yes I do.

THE COURT: Billion with a "B."

And the second forfeiture allegation charges or contains an allegation which would call for you to forfeit all the property derived from the money laundering count, Count Eight. That is for a total amount of at least $250 million.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I am going to ask the government now to state the elements of the offense. These are the things that the government would have to prove and the jury would have to

find beyond a reasonable doubt for you to be convicted on those counts of the information. These are the things that I will have to find have been demonstrated before I will accept the guilty plea on those counts. So I want you to listen very carefully as Mr. Litt or Ms. Baroni describes these elements. It may take a while frankly. But it is essential that you understand these elements.

I assume you have discussed the elements of these offenses with your attorney Mr. Mukasey.

MR. MUKASEY: In detail.

THE COURT: So, mr. Litt, do you want to go through the counts in the indictment and the elements? In the information. I think I said indictment. Information.

MR. LITT: With respect to Count One conspiracy, in order to prove the crime of conspiracy the government must establish each of the following elements beyond a reasonable doubt:

First, that the conspiracy charged in the information existed. In other words, that there was in fact an agreement or understanding to violate the law of the United States;

Second, that the defendant knowingly, willingly, and voluntarily became a member of the conspiracy charged;

Third, that any one of the co-conspirators knowingly committed at least one overt act in the Southern

District of New York in furtherance of the conspiracy during the life of the conspiracy.

Count Two, securities fraud. In order to prove the crime of securities fraud, the government must prove each of the following beyond a reasonable doubt:

First, that in connection with the purchase or sale of a security the defendant did any one or more of the following:

1: Employed a device, scheme or artifice to defraud or,

2: Made an untrue statement of a material fact or omitted to state a material fact which made what was said under the circumstances misleading or,

3: Engaged in an act, practice, or course of business that operated or would operate as a fraud or deceit upon a purchaser or seller.

Second, that the defendant acted knowingly, willfully, and with the intent to defraud; and,

Third, that the defendant knowingly used or caused to be used any means or instruments of transportation or communication in interstate commerce or the use of the mails in furtherance of the fraudulent conduct.

Count Three, investment adviser fraud. In order to prove the crime of investment adviser fraud, the government must prove beyond a reasonable doubt the four following

elements:

First, that the defendant was an investment adviser;

Second, that the defendant either (A) employed a device, scheme, or artifice to defraud clients and prospective clients, (B) engaged in a transaction, practice, or course of business which operated as a fraud and deceit upon those clients and perspective clients, or (C) engaged in an act, practice, and course of business that was fraudulent, deceptive and manipulative;

Third, that the defendant devised or participated in such allege device, scheme, or artifice to defraud, or engaged in such alleged transaction, practice, or course of business knowingly, willfully, and with the intent to defraud;

Fourth, that the defendant employed such alleged device, scheme, or artifice to defraud or engaged in such alleged transaction, practice, or course of business by use of the mails or other instrumentality of interstate commerce.

Count Four, falsifying broker/dealer books and records. In order to prove the crime of falsifying broker/dealer books and records, the government must prove beyond a reasonable doubt the following elements:

First, that at the time of the alleged offense, Bernard L. Madoff Investment Securities was a registered broker/dealer;

Second, that that company failed to make and keep certain accurate records as required under the SEC's rules and regulations;

Third, that the defendant aided and abetted the failure of that company to make and keep accurate records; and

Fourth, that the defendant acted knowingly and willfully.

Count Five, falsifying books and records of an investment adviser. In order to prove this crime, the government must prove beyond a reasonable doubt each of the following:

First, that at the time of the alleged offense, the Madoff firm was an investment adviser;

Second, that the firm failed to make and keep certain accurate records as required under the SEC's rules and regulations;

Third, that the defendant aided and abetted the failure of the firm to make and keep accurate records;

Fourth, that the defendant acted knowingly and willfully;

Fifth, that the offense involved the use of the mails and means of instrumentalities of interstate commerce.

In order to prove Count Six, mail fraud, the government must establish beyond a reasonable doubt each of the following:

First, that on or about the time alleged in the information, there was a scheme or artifice to defraud in order to obtain money or property by false and fraudulent pretenses, representations, or promises;

Second, that the false or fraudulent statements and representations concerned material facts;

Third, that the defendant knowingly and willfully devised or participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with specific intent to defraud;

Fourth, that the United States mails or a commercial carrier were used in furtherance of the scheme specified in the information.

In order to prove the crime of wire fraud, Count Seven, the government must establish beyond a reasonable doubt the following four elements:

First, that at or about the time alleged in the information, it was a scheme or artifice to defraud in order to obtain money or property by false and fraudulent pretenses, representations, or promises;

Second, that the false or fraudulent statements and representations concerned material facts;

Third, that the defendant knowingly and willfully devised or participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with specific

intent to defraud; and

Fourth, that interstate or foreign wire facilities were used in furtherance of the scheme to defraud and specified in the information.

In order to prove the crime of unlawful transportation of funds or monetary instruments with the intent to promote the carrying on of a specified unlawful activity --

THE COURT: This is what we are referring to as the money laundering count?

MR. LITT: Count Eight, money laundering count, the government must establish the following elements:

First, that the defendant transported a monetary instrument or funds from a place in the United States to or through a place outside the United States, or to a place in the United States from or through a place outside of the United States;

Second, that the defendant did so with the intent promote the carrying on specified unlawful activity.

In order to prove Count Nine, perjury, the government must prove beyond a reasonable doubt each of the following elements:

First, that the defendant took an oath to testify truly before the Securities and Exchange Commission, a body authored by law to administer oaths;

Second, that the defendant made false statements

as to matters about which the defendant testified under oath and set forth in the information;

Third, that the matters as to which it is charged that the defendant made false statements were material to the issues under inquiry by the Securities and Exchange Commission; and

Fourth, that such false statements were willfully made.

To prove the offense of the attempting to evade or defeat a tax or the payment thereof, which is Count Ten, the government must prove the following elements:

First, that the defendant attempted to evade or defeat a tax;

Second, that additional taxes were due and owing by the defendant;

Third, that the defendant acted knowingly and willfully.

I should point out that there are aiding and abetting charges as well with respect to the substantive counts set forth in Counts Two through Eight. So if the defendant caused or aided and abetted another in committing any of those crimes, he would be guilty as if a principal.

THE COURT: I think I may have neglected to mention the aiding and abetting counts.

You understand, Mr. DiPascali, in addition to the

substantive crimes charged after the conspiracy count, Counts Two through 10, some of those, most of those also charge aiding and abetting so that even if you didn't commit the crime, it is alleged that you aided and abetted others to commit the crime and so each of the elements would have to be met for aiding and abetting; all right?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand those are the elements of the offenses?

THE DEFENDANT: I do.

THE COURT: It took a long time but is that consistent with what you discussed with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Mukasey, do you agree those are the elements to the offenses in the information?

MR. MUKASEY: I do, Judge.

THE COURT: I want to go over with you, Mr. DiPascali, the maximum penalties you face for each of these offenses. Count One, the conspiracy count, carries a maximum term of imprisonment of five years, a maximum term of supervised release of three years, a maximum fine of the greatest of either $250,000, or twice the gross pecuniary or financial loss to persons, other than yourself, resulting from the offense, or twice the gross pecuniary gain derived from the offense, whichever is greatest of those three alternatives is the

maximum fine. In addition as part of your sentence, I can order restitution be paid to any victims and I can also order that you forfeit the proceeds or least -- Count One carries at least part of the forfeiture allegation, right?

MR. LITT: Yes.

THE COURT: In addition, Count One carries a mandatory special assessment of $100. That is in addition to any fine or forfeiture or restitution.

Count Two, which is the securities fraud count, carries a maximum term of imprisonment of 20 years, a maximum term of supervised release of three years, a maximum fine of the greatest of $5 million, or twice the gross gain or twice the gross loss as I previously described those things so whichever is greatest of those three, as well as restitution and forfeiture and $100 special assessment. The 100-dollar special assessment would be mandatory.

Count Three, which is the investment adviser fraud count, carries a maximum term of imprisonment of five years, a maximum term of supervised release of three years, a maximum fine of the greatest of either $250,000, or twice the gross pecuniary gain deprived from the offense or twice the gross pecuniary loss to persons, other than yourself, as well as restitution to any persons injured by this conduct, and a mandatory special assessment of $100.

Count Four, which is falsifying books and records of a

broker/dealer carries a maximum term of imprisonment of 20 years, a maximum term of supervised release of three years, a maximum fine again of the greatest $5 million, or twice the gross gain or twice the gross loss to persons, other than yourself, from the offense, as well as restitution, and again a mandatory special assessment of $100.

Counts Five, which is falsifying books and records of an investment adviser carries a maximum term of imprisonment of five years, a maximum term of supervised release of three years, a maximum fine of the greatest of $10,000, or twice the gross gain derived from the offense, or twice gross pecuniary loss to persons, other than yourself, resulting from offense, as well as restitution and again a $100 special assessment.

Count Six is the mail fraud count. It carries a maximum term of imprisonment of 20 years, a maximum term of supervised release of three years, a maximum fine of $250,000, or twice the gross gain or twice the gross loss, as well as restitution, and a mandatory special assessment of $100.

County Seven, wire fraud, carries similar penalties. Again, a 20-year maximum term of imprisonment, a three-year term of supervised release, a maximum fine of the greatest of 250,000, or twice the gross gain or twice the gross loss to persons, other than yourself, as well as a potential for restitution to any victims, and a $100 special assessment.

Count Eight, which is a money laundering count,

carries a maximum term of imprisonment of five years, a maximum term of supervised release of three years, a maximum fine of the greatest of $500,000, or twice the gross gain or twice the gloss loss resulting from the offense, as well as restitution to any victims, and a mandatory special assessment of $100.

Count Nine carries a maximum term of imprisonment of five years, the perjury count, a maximum term of supervised release of three years, a maximum fine of the greatest of $250,000, or twice the gross gain or twice the gross loss, and a mandatory special assessment of $100.

Count Ten, which is the tax evasion count, carries a maximum term of imprisonment five years, a maximum term of supervised of three years, a maximum fine of the greatest of $250,000, or twice the gross gain or twice the gross loss, whichever is the greatest, as well as restitution, and a mandatory special assessment of $100.

Do you understand those are the maximum penalties?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Litt, something you wanted to add? Did I misstate something?

MR. LITT: Your Honor, with respect to Count Six, Seven, and Eight, mail fraud, wire fraud, and money laundering, forfeiture is also a possible penalty.

THE COURT: Yes. I was going to mention the forfeiture. I thought I did with respect to the individual

counts. Understand for those counts for which the forfeiture allegation as been set forth in the information, in addition to any fine, in addition to any restitution, in addition to any mandatory special assessment you could also be ordered to forfeit any of the proceeds from the offense.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: The maximum possible penalties combined would be a maximum term of imprisonment of 125 years.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: The maximum special assessment, when you collectively add up would be $1,000, as well as the fines and everything else I mentioned.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Are you a United States citizen, Mr. DiPascali?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand as a result of your conviction, you could lose certain valuable civil rights, including your right to hold public office, your right to serve on a jury, your right to vote, and your right to possess any kind of firearm; do you understand that?

THE DEFENDANT: I do.

THE COURT: Now, are you serving any other sentences to day, state, federal or local at this time?

THE DEFENDANT: No, sir.

THE COURT: Now, with respect to supervised release, you should be aware that there are terms and conditions associated with supervised release. If you were to violate the terms of your supervised release, you then could be returned to prison for the full period of your supervised release and you would not get any credit for the good time on which you are on supervised release.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: I will give an illustration because it is not always clear. If I sentenced you to a term of imprisonment and then sentenced you to five years of supervised -- three years of supervised release, we will say, three years. What that means is after you have finished your prison sentence, you will be released and you would be supervised by the Probation Department. There will be conditions associated with your supervision including, among other things, that you not commit any further crimes, you not possess a firearm, you not use or possess any kinds of drugs, among other things.

Well, if for 35 months you were perfect, you did everything you were asked to do and then in the 36th month, the last month of supervised release you committed another crime,

or you possessed a firearm illegally, well, then I could violate your supervised release and I could return you to prison for three full years, the full term of supervised release even though for 35 out of 36 months you were perfect.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: Do you understand that parole has been abolished so you would not be released from prison any earlier as a result of parole?

THE DEFENDANT: I do.

THE COURT: Parole doesn't exist in the federal system. It exists in certain state systems, including New York State. It used to exist in the federal system and what that meant typically is a judge would impose a sentence usually of an indeterminate nature, five to 10 years, and someone else, a parole board typically, would determine when would be the appropriate time for the defendant to be released depending on whether or not they had been rehabilitated or are ready to resume life in the community. That is not a part of this federal system. So whatever sentence I impose is the sentence you will serve.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: The only exception to that is that you could receive up to 15 percent off for good behavior. That

would be a determination made by Bureau of Prisons and it would be no more than 15 percent of the sentence imposed.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: I want to go over a few other things with sentencing. First of all, in terming what your sentence will be, that is a decision for me to make.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: For the Court and no one else.

So whatever your attorneys may have told you, whatever the government may have told you, whatever any one else may have told you, that is not binding on me.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: I will determine what is the appropriate sentence after reviewing the presentence report, after reviewing submissions made by you if you wish, made by the government, made by the victims of the offenses.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Only then will I decide what is the appropriate sentence.

Now, I also want to go over with you the current state of the law. Under the law I am required to consider certain

factors before imposing sentence. I will tell you quite candidly even if I weren't required to consider these things, I would consider them. These are the factors that I think any civilized society would take into account in imposing a sentence on another human being.

Those things include, among other things, your own personal history and background. It also includes obviously the nature and circumstances of the offenses to which you have offered to plea guilty. It includes the need for me to impose a sentence that reflects the seriousness of the offenses and the need to promote respect for the law.

Another objective for sentencing is deterrence, that is both general and specific deterrence. I would be obliged to fashion a sentence that prevents you from committing crimes of this sort or any other sort in the future and that also would have the effect of deterring others who might consider engaging in this kind of criminal conduct to think twice, general deterrence.

I would consider your own needs, your own rehabilitative needs, your own medical needs, your own educational needs, those things. For you and for any defendant who comes before me I would consider those things before imposing a sentence.

I would also consider the needs of the victims of these crimes to receive restitution. That is obviously an

important factor that would have to be considered in imposing a sentence.

I would also consider the United States Sentencing Guidelines. Are you familiar with the Sentencing Guidelines, Mr. DiPascali?

THE DEFENDANT: I am.

THE COURT: You have discussed those with your attorney?

THE DEFENDANT: In detail.

THE COURT: I am not going to go over them in great detail. The United States Sentencing Guidelines are a big book. A new edition comes out each year. This year's version is about 600 pages long. I am not going to go into it in any kind of detail. What these guidelines attempt to do is provide objectives and transparent criteria by which an individual and the criminal conduct that an individual engaged in can be evaluated.

These guidelines are advisory. They are not binding on me. I am not required to follow them. I am required to consider them and I will consider them. What they essentially do is that for each crime or type of crime, they provide a framework to assess the seriousness of that crime. There are two calculations that are done. First, is a offense level calculation. For financial frauds, for example, the calculation would focus on the amount of loss involved, the

number of victims, the nature of the offense. And for each of those factors, it would be numerical value ascribed. And so in calculating these things, the Court would basically do math and come up with a number, which would be the offense level.

In addition there is a separate calculation for criminal history category and so not surprisingly a person engaged in other criminal conduct who has prior convictions and prior sentences would be treated more seriously and would get more criminal history points than someone who has no criminal history. On the basis of those two calculations, offense level on the one hand and criminal history category on the other, the guidelines comes up with a range in terms of months which in the view of the Commission that prepares these guidelines would be appropriate in the ordinary case.

So as I said I will consider those calculations, I will make calculations, and I will certainly consider the range that is provided for and proposed by these guidelines. At the end of the day, ultimately I don't have to follow them and I am free to go higher or lower as I see fit.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: Finally, I want to make sure that you understand whatever sentence I impose no matter how unhappy you may be with it, you will not be entitled to withdraw your guilty plea at that point and go forward with the trial.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: You will be entitled to your opinion that I got it wrong or I was too harsh, but you would not be able to say I would like to turn the clock back to August 11th and go to trial now because that option will have gone.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: I understand there is a plea agreement in this case, is that correct?

MR. MUKASEY: That's correct.

MR. LITT: Yes.

THE COURT: Is the original with you, Mr. Mukasey?

MR. MUKASEY: It is, your Honor.

THE COURT: You can keep that there for the moment. I received a draft. I have not received an executed or signed copy. Let me make sure it is the same as what you have. Bear with me for a second.

(Pause)

It is an August 11th letter. It is a seven-paged, single-spaced letter. It is from the government, Ms. Baroni and Mr. Litt, to Mr. Mukasey, your attorney.

Do you have a copy of this in front you, or the original in front of you?

THE DEFENDANT: I have the original.

THE COURT: Is your signature on the last page?

THE DEFENDANT: It is.

THE COURT: When did you sign it?

THE DEFENDANT: 35 minutes ago.

THE COURT: Before you signed it, did you have an opportunity to read this agreement?

THE DEFENDANT: In detail.

THE COURT: Did you have an opportunity discuss it with Mr. Mukasey in detail?

THE DEFENDANT: We have.

THE COURT: Do you require any additional time to review this agreement?

THE DEFENDANT: No, sir.

THE COURT: Mr. Mukasey, is that your signature on the last page as well?

MR. MUKASEY: It is, Judge.

THE COURT: Before you signed it, did you review this agreement in detail with your client?

MR. MUKASEY: Yes, we did.

THE COURT: Now, Mr. DiPascali, I am not going to go over this in tremendous detail because as I said it is a seven-paged, single-spaced letter. I want to make sure you understand the nature of this agreement. This agreement is what is known as cooperation agreement.

Is that your understanding?

THE DEFENDANT: Yes, it is.

THE COURT: By this agreement you have agreed to cooperate with the government and to take on certain obligations that are set forth in this agreement.

Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: The government has agreed if you provide substantial assistance, well, they will make a motion to the Court to apprise me of that assistance, which would then allow me for sentence you below the Sentencing Guidelines. So that is essence what the agreement is.

Is that your understanding?

THE DEFENDANT: Exactly, sir.

THE COURT: Is there any other agreement that you have besides this one, besides this August 11th agreement?

THE DEFENDANT: No, sir.

THE COURT: Is there any other oral agreement or any side agreement that exists beyond the confines of these seven pages?

THE DEFENDANT: No, sir.

THE COURT: Has anybody attempted to threaten you or induce you or otherwise persuade you to plead guilty to the charges contained in the information or to accept and sign this plea agreement?

THE DEFENDANT: No, sir.

THE COURT: You signed it of your own free will and voluntarily?

THE DEFENDANT: I have.

THE COURT: Now, I want to make sure you understand if the government decides that you provided substantial assistance -- as I say they can make this motion -- I am not required to follow it and I will still ultimately decide what is the proper sentence.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: Now, if the government decides that you did not provide substantial assistance, then that may limit my ability to sentence you below the guidelines. As I said the guidelines are just advisory so it ultimately wouldn't bar me from doing so. There was a time when it would have, but it wouldn't today. Certainly the government has the exclusive right to decide whether or not you provided substantial assistance under this agreement.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: Mr. Mukasey, are you aware of any of valid defense that would apply as a matter of law or any other reason why your client should not be allowed to enter a plea at this time?

MR. MUKASEY: No, Judge.

THE COURT: Now, at this point I am going to ask you to stand, Mr. DiPascali. I want you to tell me in your own words what it is that you did that makes you guilty of the offense -- excuse me -- the offenses charged in the information. So since there are 10 counts, this may take a while. I am not sure if you discussed with your lawyer how is the best way to do this, either count by count or groups of counts.

Mr. Mukasey, do you have a view?

MR. MUKASEY: Judge, we have we have worked together to prepare a statement that I think covers all the counts. I think we can have Mr. DiPascali read it if that is okay with the Court. I think that he will hit all the elements of all the counts. If you would like he can advise the Court of the counts that he is about to discuss if that is helps focus the Court.

THE COURT: Whatever you think is most appropriate. There is nothing wrong with reading a statement, Mr. DiPascali, as long as they are really your words. It is not usual a defendant in your position would work with their attorney to prepare a statement that would be their allocution to crimes charged in the information. But it is important that they be your words and that is something you are just reciting or reading.

I may ask you some questions or interrupt along the

way. If you have a statement, why don't we start with that and we will see if it is necessary to follow up in certain areas.

MR. MUKASEY: May I have one moment?

THE COURT: Yes.

While you are conferring if you could hand to Ms. Levine the plea agreement, I will mark that as a court exhibit. I will mark that as Court Exhibit 2. I will initial and date it as well.

(Pause)

THE COURT: Mr. DiPascali, are you ready?

THE DEFENDANT: Yes, I am.

THE COURT: Let me ask you to read slowly so the court reporter can get it down. We have very good court reporters, probably the best in the world, but there are limits to what 10 fingers can do. I frequently speak too quickly and they are too polite to remind me, but I will remind you.

THE DEFENDANT: Thank you, your Honor.

I am standing here today to say that from the early 1990s until December of 2008 I helped Bernie Madoff, and other people, carry out the fraud that hurt thousands of people. I am guilty and I want to explain a little bit about what I did and how I want everybody everyone to know that I take responsibility for my conduct.

Judge, I started working for Bernard Madoff Investment Securities in 1975 right after a graduated from high school. I

was a kid from Queens. I didn't have a college degree. I didn't know anything about Wall Street. I ended up spending the next 30 years working for Bernie Madoff and his firm until December 11th, 2008.

Over the first 15 or so years at the Madoff firm, I had a bunch of different jobs. I worked a research analyst, and options trader, and a guy who basically did whatever I was told to do around the office.

In 1987 I helped move our firm from the office at 110 Wall Street to our new office at 885 Third Avenue. Eventually Bernie Madoff's investment advisory business, which managed client accounts, took space on the 17th floor of 885 Third Avenue and I became sort of a supervisor of that floor.

During that first 15 or so years, I watched Bernie Madoff and other people at the firm. I learned how the securities industry worked, or at least how it worked in the Madoff universe. I thought I worked for a prestigious and successful securities firm.

By 1990 or so Bernie Madoff was a mentor to me and a lot more. I was loyal to him. I ended up being loyal to a terrible, terrible fault. By the early 1990s Bernie Madoff had stable clients whose accounts he managed as an investment adviser. He attracted a lot of these clients by telling them that the firm would apply a hedged investment strategy to their money. The clients were told that the strategy involved

purchasing what we call basket of blue chip common stocks. Hedging those investments by buying and selling option contracts, getting in and out of the market at opportune times and investing in government securities at other times.

By 2008 Bernie Madoff had thousands of clients who believed their funds were being invested this way. For years I was a main point of contact for many of those clients when they had questions about their account.

From at least the early 1990s through December of 2008, there was one simple fact that Bernie Madoff knew, that I knew, and that other people knew but that we never told the clients nor did we tell the regulators like the SEC. No purchases of sales of securities were actually taking place in their accounts. It was all fake. It was all fictitious. It was wrong and I knew it was wrong at the time, sir.

THE COURT: When did you realize that?

THE DEFENDANT: In the late '80s or early '90s.

I would like to address some of the counts in the information. Regarding Count One, conspiracy; Count Two, securities fraud; and Count Three, investment adviser fraud.

From our office in Manhattan at Bernie Madoff's direction, and together with others, I represented to hundreds, if not thousands, of clients that security trades were being placed in their accounts when in fact no trades were taking place at all.

THE COURT: How did you do that? Through documents or through oral communications?

THE DEFENDANT: Both.

THE COURT: Both.

THE DEFENDANT: Most of the time the clients' money just simply went into a bank account in New York that Bernie Madoff controlled. Between the early '90s and December '08 at Bernie Madoff's direction, and together with others, I did follow things: On a regular basis I told clients over the phones and using wires that transactions on national securities exchanges were taking place in their account when I knew that no such transactions were indeed taking place. I also took steps to conceal from clients, from the SEC, and from auditors the fact that no actual security trades were taking place and to perpetuate the illusion that they actually were.

On a regular basis I used hindsight to file historical prices on stocks then I used those prices to post purchase of sales to customer accounts as if they had been executed in realtime. On a regular basis I added fictitious trade data to account statements of certain clients to reflect the specific rate of earn return that Bernie Madoff had directed for that client.

Regarding Count Six, mail fraud, on a regular basis I caused the U.S. mail to be used to send fraudulent account statements to clients from our office in Manhattan. The

account statements listed security transactions that had supposedly taken place in the client accounts, although I knew that no such transactions had indeed taken place. For example, in December of 2008, I caused fake accounts statements to be mailed from the Madoff firm to a client in Manhattan.

Regarding the wire fraud, or Count Seven, on a regular basis I caused money to be wired from bank accounts in that New York to bank accounts in London, and other places abroad. For example, in March of '07 I caused about $14 million to be sent by wire from a bank account in London to a bank account in New York in furtherance of this fraudulent scheme.

THE COURT: How did it further this scheme?

THE DEFENDANT: Bernie Madoff was trying to present the scenario, Judge, to regulators and others that he was earning commission income on these fictitious trades in order to substantiate the ruse. He had me wire funds -- excuse me. He had our London office wire funds to New York that represented the theoretical amount of those commissioned incomes, had the regulators come in and added up all the tickets, if you will, to see our customer commissions. And in the example I cited in that particular instance, we would have had we actually done those trades earned $14 million in commission income. So he had the London office wire to the New York office a figure of about $14 million.

THE COURT: What was your role in connection with

those wire transfers?

THE DEFENDANT: I calculated the theoretical commissions and advised the London office where to send the money.

On Count Eight, sir, international money laundering, between 2002 and 2008, I caused money to be wired from a Madoff firm bank account in New York to a Madoff account in London, which again was used to continue this fraud. I participated in falsifying documents that were required to be made and kept accurately under the SEC rules and regulations, including ledgers, trade blotters, customer statements, and trade confirmations.

On Count Four and five, falsifying broker/dealer books and records and falsifying investment adviser books and records, between 2004 and 2008 the firm was a registered broker/dealer. Between September '06 and December '08 when the firm was also a registered as an investment adviser, it was required to make accurate books and records under the SEC rules. In January of '06, together with others, I used data from the Internet to create fake trade blotters that were made and kept and produced for the SEC.

In April of '08, together with others, I caused fake trade blotters, ledgers, and other books and records to be made and kept by the firm.

In order to discuss Count Nine, which is perjury, on

January 26, 2006, at Bernie Madoff's direction I lied to the SEC during testimony I gave under oath in Manhattan about the activities of the Madoff firm. My false testimony is set out in Paragraph 61 of the information.

I did all of these fraudulent activities, your Honor, in Manhattan.

THE COURT: Let me ask you about the perjury count. There is a number of specifications of false statements, eight, in particular with an underlying portions which I gather are the false or allegedly false statements. Is your statement here today that the underlying portions set forth in pages 41 through 43 were in fact false statements?

THE DEFENDANT: Yes, your Honor.

THE COURT: At the time you uttered these statements -- this is a transcript of your testimony, is that correct?

THE DEFENDANT: It is indeed a transcript describing the Madoff trading operation, which I knew at time when I was describing it was entirely fraudulent.

THE COURT: So you anticipated my next question. You knew at the time you made these statements that portions of the statements, in particular the underlying portions, were false?

THE DEFENDANT: Yes, sir.

THE COURT: You did this to mislead the SEC?

THE DEFENDANT: Yes, sir.

THE COURT: For what purpose?

THE DEFENDANT: To throw them off their tracks, sir.

THE COURT: Did you have a sense they were on the track?

THE DEFENDANT: Yes, sir.

THE COURT: At that point?

THE DEFENDANT: Yes, sir.

THE COURT: These statements were made all on one occasion, January 26, 2006?

THE DEFENDANT: Yes, sir.

THE COURT: And where was that?

THE DEFENDANT: Down at the SEC offices in the World Trade Center.

THE COURT: World Financial Center?

THE DEFENDANT: Correct.

THE COURT: I interrupted you. I think you were proceeding on to another count.

THE DEFENDANT: Judge, thousands of clients, institutions, individuals, funds, charities were all misled about the status of their accounts, what was being done with their money, and what their accounts were worth.

In order to discuss Count Ten, which is tax evasion, let me say that in the years 2002, 5, 6 and 7, I evaded federal taxes that I owed by putting some of my income in the name of a corporation I controlled and that I didn't fully and truthfully

report my income on my federal income tax returns.

Your Honor, while this was going on, I knew no trades were happening. I knew I was participating in a fraudulent scheme. I knew what was happening was criminal and I did it anyway.

I thought for a long time that Bernie Madoff had other assets that he could liquidate if the clients requested the return of their money. That is not an excuse. There is no excuse. I knew everything that I did was wrong and it was criminal and I did it knowingly and willfully. I regret everything that I did. I accept complete responsibility for my conduct. I don't know how I went from an 18-year-old kid happening to have a job to before someone standing before the Court today. I can only say I never wanted to hurt anyone. I apologize to every victim of this catastrophe and to my family and to the government. I am very, very sorry.

THE COURT: Thank you, Mr. DiPascali.

Let me ask you a couple questions about the tax fraud count.

This is the years between 2002 and 2007. It sound like it is 2002, 2005, 2006, and 2007; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And when you made the false statements to the IRS, where were you when you did that? This was in your tax returns you made these false statements?

THE DEFENDANT: In those years, sir, I did not file tax returns.

THE COURT: But at the time you either filed false tax returns or didn't file tax returns, you understood that you were liable for additional taxes, that you had hidden income so to speak through this company that you controlled?

THE DEFENDANT: Yes, sir.

THE COURT: Did any of the fraud associated with the tax evasion take place in New York?

MR. MUKASEY: May I have one moment, your Honor?

THE COURT: Certainly.

(Pause)

MR. MUKASEY: Your Honor, with respect to the venue on Count Ten, I think it is fair to say that the evidence would show that the income that was evaded was earned in New York and the money was transferred into this corporation from an account in New York. To the extent that that establishes venue, we offer that for venue. If not, Judge, we are willing to waive venue as to Count Ten.

He is a resident of New Jersey. A lot of his personal accounting actions take place in New Jersey. So it is a movement of the money into this account that he controlled in the Southern District of New York. If it is not enough to establish venue, we will waive venue on Count Ten.

THE COURT: Mr. DiPascali, do you understand what

Mr. Mukasey just said?

THE DEFENDANT: I do, sir.

THE COURT: We didn't talk really about venue when we were going through the elements of the offense. These are the 10 elements that Mr. Litt described and these were things that would have to be demonstrated and proven beyond a reasonable doubt if you went to trial.

Each of the counts of the information also have a requirement that venue be established. The standard of proof for venue is lesser. It is by a preponderance. It means a little more than halfway basically. So what Mr. Mukasey has said is he thinks there is such basis for venue to be established on the tax evasion case; but if there weren't that you would you be prepared to waive venue, which you can do.

Is that your understanding? Is that what you wish to do?

THE DEFENDANT: Yes, sir.

THE COURT: Give me a minute. There are 10 counts here so I want to take a quick look to make sure we covered the elements.

While I am doing that, Mr. Litt, to your mind is that a sufficient allocution with respect to each of the 10 Counts of the information?

MR. LITT: Yes, your Honor.

THE COURT: Mr. Mukasey, do you agree?

MR. MUKASEY: I do, your Honor.

Mr. DiPascali, has one or two more sentences.

THE COURT: I am sorry. I didn't mean to cut you off, Mr. DiPascali.

THE DEFENDANT: I wanted to make it very, very clear I know my apology means almost nothing but I hope my actions going forward with the government will mean something and I promise to dedicate all my energy to try to explain to others how this happened. I hope my help will bring some small measure of comfort to those who have been harmed.

THE COURT: Thank you.

THE DEFENDANT: Thank you.

(Pause)

THE COURT: Mr. Litt, let me ask you to summarize the government's evidence if it were to go to trial.

Mr. DiPascali, let me ask you to listen carefully to Mr. Litt as he summarizes the evidence and also as he summarizes your role in these offenses. Because after he is done, I am going to ask you if you take issue with or dispute anything he just said. So I want you to pay close attention.

MR. LITT: Yes, your Honor. If this case were to have proceeded to trial, the government would have proven through testimony and evidence beyond a reasonable doubt the facts set forth in the information. In summary, the government would have proven that beginning at least as early as the 1980s, a

conspiracy existed between Mr. DiPascali, Mr. Madoff, and others, to commit securities fraud, investment adviser fraud, falsifying books and records of a broker/dealer and of an investment adviser, mail fraud, wire fraud, and money laundering.

Mr. Madoff's firm, Bernard L. Madoff Investment Securities, LLC., was a registered broker/dealer throughout the period and was a registered investment adviser between about September 2006 and December 11th of 2008.

Mr. DiPascali worked at the firm in New York, New York, where the firm was located beginning in 1975. By the early 1990s, Mr. DiPascali was responsible under the direction of Mr. Madoff for a major part of the firm's investment advisory business. That part of the business purported to invest client funds in the basket of stocks from the S & P 100 hedged by options transactions. In fact, the evidence would demonstrate that Mr. DiPascali, Mr. Madoff, and others knew that no stocks or options were being purchased as had been promised to investors.

Mr. Madoff, Mr. DiPascali, and other co-conspirators made it appear as though clients' investments with the firm were profitable by sending those clients literally millions of pages of false account statements and trade confirmations through the U.S. mails. Those account statements and trade confirmations reported or purported to report transactions that

had been made up using historical price data and with the benefit of hindsight. None of the reported transactions were real.

In later years when revenues from other parties of Mr. Madoff's business declined, Mr. Madoff and Mr. DiPascali wired hundreds of millions of dollars of invested funds to a bank account in London and sent some of that money back to New York, New York to an operating account that funded other parties of Mr. Madoff's business. Among the uses of interstate wires -- I should say Mr. DiPascali used interstate wires in connection with the fraud both in speaking with investors located outside New York as well as to transfer money to and from bank accounts in New York, New York.

The government also would have proven that to conceal the fraud and to deceive the SEC under the direction of Mr. Madoff, Mr. DiPascali and other co-conspirators created false books and records, records that were required to be kept and maintained by the firm and were required by SEC regulation to contain true data.

THE COURT: Can I ask -- perhaps I should have asked Mr. DiPascali this -- is Mr. DiPascali an advisement adviser or broker/dealer licensed to do these things, or the firm does and he worked with the firm?

MR. LITT: He is not. He worked for the firm. And the aiding and abetting charges in the information cover that.

THE COURT: Thank you.

MR. LITT: As I was saying for the books and records, SEC rules and regulations require the firm to keep various books and records both in its capacity as a broker/dealer and as an investment adviser and Mr. Madoff, Mr. DiPascali, and others caused false and fraudulent records to be created, some of which were presented to the SEC as well. They did that to conceal the fraud and conceal some of the activities that the firm was engaged in.

At Mr. Madoff's direction Mr. DiPascali also committed perjury in sworn testimony from the SEC in New York. There are several instances of that set forth under the indictment.

THE COURT: Information.

MR. LITT: Sorry.

THE COURT: I did it before, too.

MR. LITT: In sum that false testimony disguised the nature and scale of the investment advisory business that the firm was engaged in.

Finally, the defendant attempted to evade federal income taxes by taking income through a nominee LLC, limited liability corporation, in which he controlled in failing to declare and pay taxes on that income.

THE COURT: Do you have a view with respect to venue on that count, Count Ten?

MR. LITT: I think the transfer of the money from New

York, New York probably is sufficient; but I think out of an abundance of caution I think a waiver of venue is appropriate and covers venue.

THE COURT: Is a waiver of venue contained in the agreement between the parties on Count Ten?

MR. LITT: It is not.

THE COURT: So that would be something that Mr. DiPascali has agreed to waive venue on Count Ten but it is not contained in the agreement?

MR. LITT: Yes.

THE COURT: Mr. DiPascali, did you hear what Mr. Litt just said.

THE DEFENDANT: I have.

THE COURT: Do you disagree or take issue with any of his characterization of the facts or the evidence in this case?

THE DEFENDANT: No, sir, I don't.

THE COURT: Have a seat.

At this time I had put out a couple sign-in sheets before to provide for victims if they wish to be heard on the issue of whether or not the plea should be accepted and the plea agreement should be accepted, and if they wish to speak later on the issue of bail and remand. I had one victim sign the sheet to be heard as to whether or not the plea and plea agreement should be accepted. That is Miriam seed man.

Is Ms. Seed man here?

Ms. Seed man, would you still like to be heard on this issue.

MS. SIEGMAN: I would.

THE COURT: Come up and use the lecturn if you don't mind. While I am here, if there is any other victim who wishes to be heard on this issue, and this issue only, who did not get a chance to sign, perhaps you can raise your hand now and I can send the sheet your way.

Is there anyone?

Let the record reflect that there is no other person here in the courtroom has signified that they wish to speak as a victim with respect to the issue of whether or not the Court should accept the plea and the plea agreement.

Ms. Siegman, identify yourself for the record, speak slowly, spell your name too, and then I am happy to hear you.

MS. SIEGMAN: Thank you, Judge Sullivan.

Can you hear me?

THE COURT: I can.

MS. SIEGMAN: My name is Miriam Siegman. M-i-r-i-a-m, last name, S-i-e-g-m-a-n.

THE COURT: I probably mispronounced your name. I apologize.

MS. SIEGMAN: That's fine.

I am a 65-year-old Madoff victim now penniless and facing homelessness. I stand before you, Judge Sullivan, to

ask that you consider rejecting this deal.

Criminal defendants in the Madoff case central to this murderous fraud want to cut deals by swapping information, naming names in exchange for lighter sentences. That, of course, is their right. To some victims, not all, but to some this behind-closed-doors bargaining seems to depend heavily on the quality and connectedness of the defendants' lawyers and a quest for expediency.

I ask, and others as well: Should these factors trump the victims and the public's need for the truth, the full truth that could come of a trial or the chance for victims to hear in open court evidence, witnesses' questioned, and cross-examined, or the chance to have brought before the mighty power of the Bench even the most exalted, the most highly placed, including government officials, and elected officials?

Has it been decided somewhere that a trial is too great a luxury, too much of an expense for the public quest for truth, too time consuming and bothersome or politically unpleasant?

Why, Judge Sullivan, am I asking you to consider my request to reject a deal? The crimes allegedly committed by Mr. DiPascali and already admitted to by Mr. Madoff, Mr. DiPascali's boss of 30 years, are enormous in scope. These crimes have affected thousands of men, women, and children, whole generations of families have been decimated, children,

parents, dependents who are ill. None of these victims knows how or why this has happened to them. The defendants won't say a word until today, even then very little, and the prosecutors have said very little to victims.

The alleged crimes were vast and systematic, executed with great attention to detail. The result total: Total destruction of normal daily life now and likely forever for thousands of us, certainly for me. Dazed, we are told that we have no need to know how the crimes against us were carried out. Today, a few tasty tidbits were thrown out into the court and I could see every snap to attention with a genuine interest in hearing those details and the need to know them.

Then there is the astonishing duration of the crime. Mr. DiPascali was an employee of Madoff for 30 -- well over 30 years or around 30 years. The criminal enterprise went and on. He, of course, had ample opportunity to do the right thing. Victims have no idea how this could have been possible, this long duration. Though, there are hints of horrendous dereliction of duty within and outside of government and in the street. One sentence about lying to the SEC doesn't tell the story.

There is also the corrupting ripple effect of Mr. DiPascali's alleged activities, activities which in the view of many victims encouraged and enabled criminal activity on the part of others, but we have learned nothing about how or why

and likely we will learn nothing about how or why.

And Finally, and perhaps the most troubling of all for me, the possible purchase of influence with the goal of protecting Madoff from investigation and legislation. Victims, and as importantly the American public, the little guy with a 401K or pension desperately need light to shine on this process. Victims want more than confirmation. They need information and knowledge. We want the kind of justice that allows the truth to be spoken out loud in a courtroom and we want to know that prosecutors will not conveniently pass over the too highly placed.

The crimes committed against me and others are life-shattering and they are forever. I want no others to suffer in this way. Judge Sullivan, you have the power to show the American people that justice works for victims and society as a whole as well as for defendants. Take the process out from behind closed doors and reject this plea deal.

In closing, if in the end you cannot, will you or someone help me and others victims understand why and how a plea deal will help them and the American public and allow men and women who run our public institutions to learn from this tragedy.

Thank you.

THE COURT: Thank you, Mr. Siegman. I appreciate the time and attention you obviously put into preparing those

remarks.

Is there any other victim that wishes to be heard?

Let me ask Mr. Litt or Mr. Mukasey if they wish to respond to anything that Ms. Siegman just said?

MR. LITT: Not at this time, your Honor, no.

THE COURT: Mr. Mukasey.

MR. MUKASEY: Simply that I think the allocution was sufficient for acceptance by the Court, Judge.

THE COURT: Ms. Siegman, I am certainly sensitive to the points you've made, but I think there is a difference between a criminal trial and a truth commission, which each may have their benefits to be sure. But I think a criminal trail is less ambitious than a truth commission.

Mr. Mukasey I think is correct in saying that the allocution that Mr. DiPascali gave is sufficient under the law and so the issue for me is there something manifestly unjust about the plea agreement or the plea that has been offered here. I don't believe that the request for the truth ends today. Certainly sentencing will not take place for several months. But before imposing sentence, I would expect to have more information than what I've heard today and what you've heard today. So I expect there will be more information and the Court will sentence on the basis of additional information. I assume that to be the case.

So in light of those remarks I will, I believe, accept

the plea. I have a few other things I would like to take up with Mr. DiPascali. I am certainly sensitive to your concerns, which I think are probably the concerns of many other people as well. Thank you for your time.

Let's me ask you now to rise again, Mr. DiPascali.

How do you now plead to Counts One through Ten of the information, guilty or not guilty?

THE DEFENDANT: Guilty, your Honor.

THE COURT: Did you do the things you are charged with doing in the information?

THE DEFENDANT: Indeed I did.

THE COURT: Are you pleading guilty because you are guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty voluntarily and of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. DiPascali, because you acknowledge that you are guilty as charged in Counts One through Ten of the information, because you know your rights and are waiving those rights, because your plea is entered knowingly and voluntarily and is supported by an independent basis in fact for each of the elements of the offenses charged in the information, I accept your guilty plea and I adjudge you guilty on Counts One through Ten of the information.

You may have a seat.

Mr. Litt.

MR. LITT: I would ask if the Court could inquire about whether the defendant Mr. DiPascali admits to the forfeiture allegations.

THE COURT: Fair enough.

Mr. DiPascali, let me also ask you about the forfeiture allegations. There are two forfeiture allegations in the information.

You indicated you have read them both, is that correct?

THE DEFENDANT: That's correct.

THE COURT: Do you admit the facts that are contained in each of the allegations?

THE DEFENDANT: Yes, I do.

THE COURT: Is that sufficient, Mr. Litt?

MR. LITT: Yes, it is.

THE COURT: Thank you.

Let's talk about sentencing now. The parties requested the sentencing be put over for a number of months in light of Mr. DiPascali's cooperation and had requested that I set a control date in May of 2010.

Is that still the position of the parties?

MR. LITT: It is of the government, your Honor.

THE COURT: Mr. Mukasey.

MR. MUKASEY: It is the position of the defense, Judge.

THE COURT: Tell me what exactly it is that you have in mind? So by that date I would get another submission or letter from the parties, or by that date we would have presumably a sentencing unless I adjourned it?

MR. LITT: Well, I think you would get a letter from the parties, your Honor.

THE COURT: On that date or a date before that date?

MR. LITT: On that date.

THE COURT: On that date. You expect that the cooperation will be going for at least that long?

MR. LITT: Yes, your Honor.

THE COURT: Or approximately that long?

MR. LITT: I would say at least.

THE COURT: Mr. Mukasey, that is your position as well?

MR. MUKASEY: Yes, Judge.

THE COURT: May 15th. I will expect a letter from the government apprising the Court as to whether or not it is prepared to go forward with sentencing, and if not proposing another control date. Obviously Mr. Mukasey should be CC'd on any correspondence.

Let's talk about bail pending sentencing. Title 18, Section 3143(a) provides that a defendant shall be detained

following a plea or conviction, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee. This is for the period between a jury's verdict or in the case of today a guilty plea and the sentencing.

So I had also had sign-in sheet to hear from any victims who wish to be heard on this sheet. No one has signed that sheet.

Does anyone wish to be heard with respect to bail or remand?

The parties have submitted a letter, which I referenced earlier. Bear with me while I am looking for it. I remember it well. It provided for a bond of $400,000 -- excuse me, $2.5 million to be secured by three financially responsible persons, to be secured with property of $400,000 which would in essence be the equity value in the home of Mr. DiPascali's sister, surrender of all travel documents with no new applications permitted, and travel restricted to the Southern District of New York, Eastern District of New York, and here it says the District of Pennsylvania but Pennsylvania has more than one district, as well as regular pretrial supervision.

Is that the position of the parties?

MR. LITT: We meant to say the Eastern District of Pennsylvania and the District of New Jersey, which is where the defendant lives.

MR. MUKASEY: That's right.

THE COURT: I see. Anything else that the parties wish to say on this?

MR. LITT: No, your Honor.

MR. MUKASEY: Yes, your Honor.

THE COURT: Mr. Mukasey.

MR. MUKASEY: By agreement with Mr. Litt, subject to approval of the Court, we would ask for one week from today until August 18th to satisfy those bail conditions if they are acceptable to your Honor.

THE COURT: I am not sure they are. I should state that up front. Following a jury's verdict or following a guilty plea there is a presumption that the defendant will be detained, remanded pending sentencing. That is for a variety of reasons. That is the Bail Reform Act of 1984. I think everyone at the front two tables understands that.

So I want to explore that. It seems to me that this defendant has ample incentive to flee. I understand he is cooperating with the government, but the defendant is 52 years old. He is facing a maximum term of imprisonment of 125 years. Although the plea agreement has no guidelines calculation, I certainly have done an admittedly quick and dirty guidelines calculation. But based on just the fraud counts, it seems to me that the guidelines calculation comes out at a fairly astronomical place based on the amount of the loss involved,

based on the abuse of trust that was involved in the course of the schemes to which Mr. DiPascali admitted.

So it seems to me under the guidelines, even with the acceptance the guidelines would call for a range of mandatory life. Now, because the maximum sentence is not life but 125 years, under the guidelines before considering cooperation, before considering the Section 3553(a) factors, the guidelines would be recommending a life term. So that is certainly serious, serious consequences facing Mr. DiPascali.

Now, the bail package proposed here by normal standards would seem pretty considerable. There is 2.5 million dollar bond that would have three financially responsible persons and property that is valued -- at least the equity value is $400,000. So by most standards that would be a pretty large package. But that amount is completely dwarfed by the amount of restitution and forfeiture in this case. $170 billion is what the plea agreement provides for Mr. DiPascali to forfeit. So it would seem to me that a 2.5 million dollar bond thrown on top of that mountain doesn't count for much.

Now, the next argument would be that the financially responsible persons, the co-signers and Mr. DiPascali's sister would have some moral suasion over him, that he would be disinclined to flee or do anything that might put them at risk, and only that might be persuasive. But in this case there are thousands of victims who many of them lost more than $2.5

million. So the fact that three more victims might be thrown on top of a long list of victims doesn't strike me as a terribly compelling basis to believe that Mr. DiPascali would be deterred from engaging in conduct that would constitute a violation of the terms of his bail or flight.

Now, the penalties for bail jumping are by most human standards considerable. It is five years' imprisonment, maximum, with a two-level enhancement for obstruction of justice on top of the guidelines calculation in this case. But here it would be again virtually meaningless. It would expand the maximum penalty from 125 years to 130 years. It would expand the guidelines calculation from what I think looks like a level 46 to a level 48. And for those of you unfamiliar with the guidelines level 43 is life. So you can't do much more than that.

So in light of this, the package strikes me as fairly symbolic and not terribly onerous in light of the other facts in this case. So it seems to me that it is really we are on an honor system. I am being asked to believe that Mr. DiPascali is not going to run away because he has turned his life around and that I should credit his statements here today that he is sorry for what he has done and he is committed to making amends to the best of his ability, which I can understand the sentiment. But the fact of the matter is the defendant's conduct which is admitted today doesn't give me great

confidence on that store.

Mr. DiPascali has admitted to a 20-year period of fraud in which he committed perjury to the SEC under oath. He maintained and manufactured false books and records that were designed to mislead regulators and auditors. He issued by his own account and the government's account literally thousands or even millions of statements to investors that were designed to mislead them and lull them into maintaining investments they had made or increasing the investments that they had made. The money laundering that is set forth in one of the accounts describes a fairly massive-scale scheme that continued as recently as December of 2008.

So I think all of that suggests to me that Mr. DiPascali is not a good bet. I think the argument that I anticipate is that, Well, Mr. DiPascali understands that if he violates the terms of his bail then his cooperation agreement will be ripped up and any hope he would have for a sentence below the guidelines would be greatly diminished. I understand that as well. But I don't think it would be irrational for a defendant faced with the kind of sentence that Mr. DiPascali is facing to decide that maybe cooperation is not going to do it.

So all of this basically leads me to the statute, back to the statute which is that I need to be persuaded as the judicial officer that there is clearing and convincing evidence that he is not going to flee and at this point I am not really

there.

So let me hear from counsel if they want to be heard on this. Mr. Mukasey.

MR. MUKASEY: Thirty seconds, Judge, to confer?

THE COURT: Certainly.

(Pause)

MR. MUKASEY: Judge, if I could be heard on the issue.

THE COURT: Certainly.

MR. MUKASEY: Mr. DiPascali, your Honor, has known that he has been under investigation that could put him in jail for the rest of his life since December 11th, 2008. At that time he was served with a grand jury subpoena. He has known that this day was coming for probably eight months.

THE COURT: Can I interrupt you?

Because it seems to me that based on what has been described to me is that Mr. DiPascali must have known that this house of cards was going to come crashing down for years but it didn't prevent him from doing what he did up until December of 2008.

MR. MUKASEY: As Mr. DiPascali mentioned, Judge, I think that he always thought that there would be a safe landing for many investors and it wasn't until really the end that he learned the full truth of this.

I would like to address my comments really to his ties to the community and why I think notwithstanding your guideline

analysis, which is pretty darn accurate, and notwithstanding the really cataclysmic nature of the fraud here, I think Mr. DiPascali is a clear and convincing bet to return to court.

He has known he has been under investigation for the better part of nine months. He has been speaking with the U.S. Attorney's Office. He has been following the guidance by the FBI. I am not shy to say that I believe he has established a relationship with the agents of trust. He is where he is supposed to be when they ask him to be there. He has been at every proffer, at every meeting, and every location that he is supposed to be at. He understands that he has but one way to ever see the light of day and that is to satisfy the government that he is trustworthy person.

I think the government is signing him up to the cooperation agreement says something about their trust in him. He understands that he has got miles to go in terms of providing substantial assistance. He is here today and he has known he was going to be here today to try to reach that goal. He understands that he is working his way down from probably a life sentence. I anticipate Mr. DiPascali, and I think the government would back me up on this, to be a cooperator in a white-collared case in a historic nature, somebody who can pull the curtain back on a fraud and answer a lot of questions that Ms. Siegman wants to be answered and the whole world wants to be answered.

We would not have gone through what was really a grueling process to convince the government that he was a person worthy of its trust if we didn't want to see this through to the end. Mr. DiPascali does want to see it through to the end and that is why he came here and admitted in open court a fraud of 30 years or the better part of 20 or 30 years.

Let me talk a little bit, Judge, about Mr. DiPascali's background. He has in Bridgewater, New Jersey, four children. He comes from an extremely close family. In fact, this is the first time I have ever seen him discuss the fraud without breaking down and crying. He is an emotional person. He is not a person that would ever do anything to harm his family. I think that really in the back of his mind he wasn't convinced that investors would be hurt here. Of course they could have been. I am not sure he was convinced that they would have been had Mr. Madoff actually had assets to back this up.

Let me tell you a little bit about each of Mr. DiPascali's kids and the relationship he has with them as well has his siblings. He has a daughter today who is starting Brooklyn Law School. Yesterday he went with her to move her in. He is incredibly close with her.

He has three sons -- Frank, Jr., Greg, and Mike. The two young ones live at home. Mr. DiPascali is their world and he is their world. He supports his mother who is 77 years old and also lives in Bridgewater with one of his sisters. Then he

has the other sister who is willing to post her house to show her confidence in Mr. DiPascali.

I think that if the amount of the bond were raised and perhaps if we could somehow find additional security that that could be thrown on to the pile as well. There is not a bail package in the universe that is not without some risk, but I think this is a bail package that can be fashioned into a bail package that gives the Court comfort, like the government has comfort in Mr. DiPascali.

It is worth pointing out that since January Mr. DiPascali has been operating under, to use your term, the honor system with the government. They have never frozen his assets. They never seized his bank accounts. He voluntarily turned over to the U.S. Marshal some of his property. He is prepared to turn over his property. He has been operating since January on really a letter agreement with the government regarding his spending knowing that he would be ultimately subject to a forfeiture order. He has not violated the government's trust once.

Every month we report to the government the amount of money he is spending. They are keeping him on a tight leash and he is abiding by that. He has almost no assets that are not forfeitable. So as soon as the government moves to freeze the bank accounts and seize the bank accounts, he is not going to have disposable income. He doesn't have an ability to flee.

He doesn't have anywhere to go frankly. We turned over his passport. My office has kept the passport for months.

To the extent it is worth knowing, he has put hundreds of hours into preparing to proffer with the government, learning about what it means to be a government witness, learning what it means to accept responsibility and hopefully get a 5K1 letter because he wants it not because he wants to take off. He takes care of his mother. The Pretrial Services officer asked this morning, Do you speak to your mother and your sisters on a weekly basis? And he said, No, much more than that. He speaks to them not on a daily basis but sometimes on a multiple-times-in-a-day basis.

It sounds maybe odd stacked up against this fraud, but he is a family person. He doesn't travel. He doesn't go on lavish vacations. He is a homebody. He wants to cause no more pain to his kids. He sat in our office a couple nights ago explaining to his family the possibilities and the consequences. He has been straight up with them, he has been straight up with us, and he has been straight up with the government.

You can take this bet, Judge, Mr. DiPascali is here to do the right thing. He wants the 5K letter. It would be inane for him to flee and leave his family with nothing as it is. They are going to have to endure very, very rough times. I don't think he thinks about it in terms of, Well, I am facing

life in prison, what is another two years if I get a bail jumping charge. He thinks of it in the opposite way, which is I am facing life in prison and I better show up every darn day if I am to avoid anything but that.

That is why we entered into the cooperation agreement. That is why we hope Mr. DiPascali can satisfy the Miriam Siegmans of the world and the government and this Court. I don't want to put anybody on the spot. I think the FBI agents would speak to diligence and his compliance and his ability to be trusted to continue to work with them. I think they would establish a very good relationship with him, professional and arm's length but very trusting. You can imagine the hill that the government faced in offering him a cooperation agreement. They I think came at this perhaps at the beginning with the same scepticism that your Honor does and he won them over. If your Honor releases him on an appropriate bail package, he will win your Honor over with trust and with compliance.

May I have one moment, Judge?

THE COURT: Certainly.

(Pause)

MR. MUKASEY: Thank you for hearing me, Judge.

THE COURT: Mr. Litt, anything you want to add?

MR. LITT: I would ask a couple of points that I think your Honor anticipated in the arguments. Mr. Mukasey hit on some of them.

Mr. DiPascali, we do believe has known since very early on -- December 11th, 12th -- that he was a key player in this and he was under investigation and has not fled. He has always cooperated with the government to date and appeared when called upon to do so. He showed up today knowing what the consequences of his actions today would be and certainly deserves credit for that.

He does appear to be close to his family and he does have significant ties to the community. The plea agreement that he has entered into gives him every incentive to appear and to try to fulfill the terms of that agreement because to do otherwise would likely confine him to the rest of his life in jail.

THE COURT: If he flees and you were able to get him back.

MR. LITT: Yes. That's right, your Honor.

With respect to the bail package and amount, the reason why there is less securities than there is in some other cases there might have been is related to the forfeiture issue and the fact that most of Mr. DiPascali's assets are subject to forfeiture. And over the coming weeks we expect to be presenting preliminary orders or forfeiture to your Honor which may be submitted any time prior to sentencing to start the process of accomplishing that. We have already to date confiscated some of Mr. DiPascali's assets.

Finally, the government believes that the assistance, if we did not believe that he could provide substantial assistance to the government, we wouldn't have entered into this agreement. We do believe that he can provide substantial assistance and we believe that his ability to do so would be hampered were he to be detained.

THE COURT: Why is that?

MR. LITT: This is a very documented intensive investigation, among other things. There are literally millions of pages of documents and data and computer equipment and the like that it will be very beneficial were he to be able to have access to provide the substantial assistance that we expect he will be able to do.

I think some of the concerns that your Honor has can be addressed in part through electronic monitoring and home detention if your Honor thinks that would add such an additional layer of surety about flight. There are flaws with that as your Honor well knows. There is no substitute in terms of assuring somebody's presence in court other than incarceration, but the government certainly believes that given his connections to the community, again his record with the government to date, the fact that he has not fled in the last eight months, the fact that he showed up today and admitted his guilt, exposed himself to 125 years of incarceration, that he has three family members who would be tremendously harmed were

he to flee if they were approved as cosigners on the package, that those things even without home detention and electronic monitoring in the government's view provide clear and convincing evidence in this case, and every case must be viewed on its own facts, to reasonably assure clear and convincing evidence that Mr. DiPascali would appear when required. Certainly those factors when necessary combined with home detention and electronic monitoring would do that.

THE COURT: Mr. Litt, I am looking at a submission you made to me in another case, which you reminded me that the Bail Reform Act of 1984 creates no general expectation of post verdict liberty. To the contrary, it establishes as a presumption in favor of detention. You then went on to remind me that "the interest in detaining defendants who have been found guilty beyond a reasonable doubt of such crimes also includes the need to encourage general respect for the law by signaling that a guilty person will not be able to avoid or delay imposition and service of the sentence prescribed by law."

So, look, let me say this: I have great respect for the lawyers in this room. I know them. I think they are good at what they do and I have great respect for them. Clearly they have taken the positions they take because they believe them and I don't disregard that lightly. On the other hand, I think everybody recognizes that each of us has an independent

role to play in this process.

Mr. Litt and Mr. Mukasey have focused on what Mr. DiPascali has done since December of 2008. I keep focusing on what he did for 20 or 30 years before that. I keep thinking of how many people put their trust in Mr. DiPascali and have lived to regret it deeply and I am frankly reluctant to put my trust in Mr. DiPascali. I don't see why he would anymore respect the oath he would take on a bail package than he would respect the oath he took in front of the SEC, another arm of the government. So I think we may have disagreement on this one.

I am not persuaded. Maybe I haven't heard enough about how remand would affect his ability to cooperate with the government. I think there are lots of individuals who are in custody who can still cooperate very effectively and work with law enforcement agents very effectively. On this record, in the length of time that this conspiracy went on, again the amount and nature of the misrepresentations to clients, to government entities, to auditors, I just cannot find by clear and convincing evidence that Mr. DiPascali does not pose a risk of flight. I just can't do it.

MR. MUKASEY: Judge, if I could add some facts to the record that might help persuade you that he is a trustworthy defendant. In terms of your concern about how he would be hampered from cooperating were he detained, not only he is going to cooperate with the U.S. Attorney's Office and with the

FBI, I can tell you from having been in these proffers, it is an extremely onerous process involving computers and documents and account statements and it requires the sort of 8-hour, 10-hour, 12-hour sessions that you just cannot have when you are remanded.

He is also going to be cooperating with the SEC, with the IRS, with any agency that wishes to speak with him, and we hope and we believe there will be a number of agencies both inside New York and outside New York that wish to speak with him. We've discussed among ourselves the Massachusetts Attorney General has been very, very active in this case.

Obviously he is a U.S. Attorney's Office cooperator, but I would hope that when the Madoff cases are going to spring up all over the country, Mr. DiPascali will be at least a very valuable witness to debrief to understand the operations and he is not a testifying witness. There are civil lawsuits that he may be able to help people out. I think he is going to be working chiefly with the FBI and SEC here in New York, but he can and is ready, willing and able to work with these other agencies.

The SEC of course have their limitations on where they can do and when they can go and when Mr. DiPascali can go if he were detained. I think it would seriously hinder his ability to work with the SEC. Part of what the world wants to know here is how did the SEC fail to catch this for lack of a better

phrase and just to use the terms of discussion of the day. I don't know the case that your Honor read back Mr. Litt's language to him but I would ask the Court consider whether that was a case of cooperation.

THE COURT: It was not.

MR. MUKASEY: And you make a good point obviously about --

THE COURT: You have to say that, Mr. Mukasey.

MR. MUKASEY: I am not saying I agree with everything. You make a good point about how do trust a guy who basically has been a fraudster for 25 years. Here is the answer: He lived in a universe for 25 years that he doesn't live in anymore. On December 11th he exited that universe. Once he got out of that universe -- by the way that universe was twisted and it was perverted, and it was almost impossible for somebody who wasn't living in that universe to understand. It was an alternative reality. It was not the kind of conspiracy where a bunch of people are down in the dungeon plotting how to rip off innocent old ladies. It wasn't like that.

Mr. DiPascali started with Mr. Madoff when he was 18 or 19 years old. He didn't know the way things run at Goldman Sachs. He didn't know the way things run at Morgan Stanley. So sat and watched and he learned and listened and at some point after several years I think a light went off, I think he said to himself, This is kind of a bizarre universe but this is

my universe. This is what Bernie tells me to do and this is what I am doing. By the way no one is going to get hurt at the end because Bernie Madoff has been telling me he has assets abroad and in real estate and in commodities that are going to make sure that all the clients' money will be able to be returned.

So he wasn't out there sort of ripping and robbing and stealing as you might think of it. He is guilty? 1,000 percent. No question about it. There is no way we could have a trial in this matter. He is absolutely guilty. He was living in a universe creating fake trade tickets and creating fake trade blotters. It is the way you did things. It was okay because Bernie was going to take care of it. Don't worry, Bernie will take care of it. That is how he went to sleep at night. That was the universe he was living in for 25 years, 20 years.

On December 11th he came to my office shaking, crying out of that universe. He stepped out of that universe and stepped into the real kind of world, the world that Ms. Siegman lives in, I live in, you live in. The world where you cannot create a fake trade ticket and say, Don't worry it is okay because no one is going to get hurt here. He realizes now, he is out of that universe. He is in a universe with laws and rules and regulations and oaths and promises and trusts.

I am happy to tell you that we had to knock hard on

the door of the U.S. Attorney's Office to get Mr. DiPascali in there because they originally have the same -- I don't want to speak for them. I would imagine prosecutors in the real world have the same degree of scepticism. The guy was a fraudster for 25 years. How could I trust him? How can I put him on the witness stand? Well, you know what? He earned their trust. He now I think has their trust. Because he stepped out of the universe, the one that you are focusing on, the one that said you have wanton disregard for these victims and you have a 20-year history of fraud.

He is in a new world where he talks to the FBI agents almost every day. They were at his house yesterday. He goes to the U.S. Attorney's Office at his job. It is going be his full-time job. Never has never missed an appearance. He comes early. He stays late. He goes outside to smoke and gets a class of water. Otherwise he is in there looking at records, explaining history.

So you are right there was a world that he is going get punished for. He doesn't live in that world anymore. Now he is in this world. Now he is in the world where he has got to live up to what he says and he has to tell the truth or he is going to go right back to that world where the only other inhabitant is Bernie Madoff spending 150 years in prison.

THE COURT: I understand the arguments and the sincerity of what you are saying and what Mr. Litt is saying

that you have each reached a conclusion that Mr. DiPascali would do that. Perhaps you know him better than I. I don't think I can overlook the conduct that he admitted to today, which I think coupled with the seriousness of the penalties that he is looking at I think provides ample incentive to flee if cooperation doesn't look like it is going to pan out the way he thought, or as he gets closer to the day of sentencing that the harsh realities of a sentence for this conduct starts staring him in the face. I think in light of all facts and all the conduct in this case and in light that Mr. DiPascali has made false statements to the SEC and to others and in light of the fact for decades he made false statements to people that entrusted him with their life savings -- I am not going to trust him with his life savings. I am just hoping he shows up to court. People entrusted him with the life savings. I am unpersuaded respectfully.

MR. MUKASEY: Perhaps if we can add some heft to the bail package, something such as home detention.

THE COURT: Well, look, I don't rule out the possibility of the parties to make another motion. Based on what is before me today and based on the proposal that has been made jointly by the parties for bail, I am going to deny that request. I am going to remand Mr. DiPascali. It not designed to be punitive. Time for sentencing is later. It is designed really I think to meet the objectives of the statute in light

of the facts as I understand them.

Mr. DiPascali, it may not be what you wanted or expected today but --

MR. MUKASEY: May I have one moment to discuss one matter with the government?

THE COURT: Certainly.

(Pause)

MR. LITT: Your Honor, if I could at the risk of trotting over ground that we've covered, first with respect to the brief that your Honor mentioned that, as your Honor knows, was in a case following three and a half years of intense litigation and a nine-week trial, not a cooperator.

THE COURT: A man whose fraud, total fraud was tiny in comparison to this defendant's, right.

MR. LITT: Yes. Absolutely, your Honor.

THE COURT: I don't want anyone to be in the dark here. I am referring to Mr. Litt's submission in the case of *United States v. Alberto Villar*, 05 CR 621.

MR. LITT: That's right. I guess what I am having difficulty articulating is it is essential I think is that we believe that Mr. DiPascali's cooperation, what he wants to do, what he says he wants to do will be hampered if we --

THE COURT: You have to take him out in order to bring him to the FBI. Look, we are all experienced with cooperators. We all know there are many cooperators who are in custody who

are able to cooperate and meet with law enforcement officials and engage in cooperation. He is not doing anything activity. He is not wearing a wire and going out. I am not sure I am persuaded that he needs to be out to be able to effectively cooperate.

MR. LITT: The documents involved in this case fill a half a floor of a New York office building and about 6,000 boxes in a warehouse and a computer server that was dedicated in large part to the investment advisory activities, a computer that Mr. DiPascali has a certain amount of specialized knowledge about, a server that has proprietary software, that is ancient by modern standards in terms of technology and the operating system and the like. The records and the unraveling of what happened in this case over decades requires looking through exactly what I just described, a half of a floor of an office building.

In going through this process, and I will just speak in hypotheticals, to present a document to a witness that triggers a recollection of something else. It is one thing to be able to walk across the room or pull a file and present that file in realtime and through that process get to the bottom of what happened and a very small piece of what happened in this case then it would be to do that process through the cumbersome circumstance of Mr. DiPascali's being incarcerated.

I think it will just be a lot more efficient, the

government will be able to get Mr. DiPascali's cooperation much more fully, completely, efficiently, and quicker if he is out. I would just urge the Court --

THE COURT: Let's me interrupt you, though. That is not really the consideration of 3143. It doesn't say or if the government thinks it would be more convenient to have a person out. So clearly the government has reached a conclusion. And I don't mean this disrespectfully. Clearly you reached a determination that bail is appropriate. I understand that. I am not persuaded by clear and convincing evidence that Mr. DiPascali is going to be here at the time of sentencing given the monumental sentence he is facing and given the amount of cooperation that is going to be needed to put a dent into that sentence.

So, look, I don't think there is much more that you folks can say today that is going to persuade me. If you want to make another submission, I will consider it. But on the basis of the facts as I have laid them out, I am not prepared to agree to the bail package that you have all proposed.

MR. MUKASEY: Understood that the current bail package on the table needs to be withdrawn and obviously I am told needs some more energy and some more heft. Judge, we were obviously surprised by your Honor's take on this and what I would propose is to allow us to brief this issue and or -- I guess the law is pretty clear. I am not sure how much briefing

there is going to be, but Mr. DiPascali's family is completely unprepared for this. He is completely unprepared for this. He is the financial provider to his family. I frankly didn't recognize --

THE COURT: Is he working, though?

MR. MUKASEY: No. But I think he is certainly taking care of his family, the four kids and the girl in law school and the boys that are home for the summer. I think that we can probably work out a package if your Honor were to give us 48 hours, 72 hours that was strict, that satisfied your Honor of his ties to the community.

I agree that cooperation is not one of the 3142, 43 prongs. However, I think it bears some thinking about really how he will be able to cooperator or not cooperate if he is remanded, and probably satisfy your Honor with a package that includes home detention, strict Pretrial Services reporting, perhaps less travel, and a lot more for those he loves to lose.

THE COURT: I am reacting to what I have in front of me now. The statute is pretty clear that unless I make the finding that I am not prepared to make, Mr. DiPascali is remanded. So I am going to order his remand without prejudice to renewing a motion whenever you see fit with whatever submissions you think appropriate.

Mr. DiPascali, we have not set a sentencing date for you. That is because it has been represented to me that your

cooperation will continue for some time. We have a control date in May. Then perhaps we will have more information as to when we will go forward with sentencing. I want to make sure you understand about sentencing, however. As I said before, the Probation Department will prepare a report, a presentence report, that will be quite extensive. They will interview a number of people, including the government to get more information about the offenses that are in the information, and also interview you, among others. So I would ask that you be cooperative with the Probation Department as they prepare that report.

Mr. Mukasey, I assume you wish to be present for any interview?

MR. MUKASEY: Yes, Judge.

THE COURT: I will direct that no interview is to take place unless Mr. Mukasey is present. So if they show up to interview you and Mr. Mukasey is not there, you remind them that I told you not to go forward. If Mr. Mukasey directs you not for answer certain questions, listen to him, but don't make any false statements to the Probation Department. If you were to do that, it could be a separate offense or an enhancement for obstruction of justice. So I think that would serve no one's interest. Be as cooperative as you can be.

Mr. Mukasey.

MR. MUKASEY: I am going to back to the bail issue. I

think that it might persuade your Honor what Mr. DiPascali is looking forward to in terms of his cooperation and the ties that he has to his family and the community and the cooperation that he has already given to the government is perhaps if I were allowed to ask the FBI Agent Keith Kelley some questions that --

THE COURT: Asking here in open court, you mean?

MR. MUKASEY: Yeah. I don't want to do anything that will put anybody on the spot, but I think there is a relationship of trust here that can be considered a tie to the community, in addition with the FBI and the government, which I think Special Agent Kelley would shed some light on, in addition to the very, very close ties Mr. DiPascali has with his family.

THE COURT: I am not sure what you are asking me. Are you asking me to put Mr. Kelley on the stand and let you examine him?

(Pause)

THE COURT: Counsel.

Mr. Mukasey.

MR. MUKASEY: I am going to withdraw that application.

THE COURT: If you folks want to renew the application, you can do so. I think I've explained what my concerns are and what the burden is.

Is there anything else we need to cover today,

Mr. Litt?

MR. LITT: No, your Honor.

THE COURT: Mr. Mukasey?

MR. MUKASEY: If I can have just one moment?

(Pause)

MR. MUKASEY: Nothing further, Judge.

THE COURT: Thank you all. I will hear from you May 15th if not before then. I appreciate all your time. Thank you to the court reporter, the marshals, and all the victims who came as well.

o0o

EXHIBIT C

US2C2002-6166-01
{D4E769BA-2DDB-4CE1-955B-1ECD31E32F8F}
{51036}{41-040409:121043}{101702}

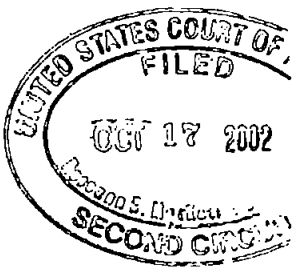
APPELLANT'S BRIEF

02-6166

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT



In re:

NEW TIMES SECURITIES SERVICES, INC. and
NEW AGE FINANCIAL SERVICES, INC.,

Debtors,

MYRNA K. JACOBS, SIMON and HELGA NOVECK, MIRIAM SEIDENBERG, FELICE LINDER, ANGELO SCARLATA, the ROSE MARIE CEPARANO IRREVOCABLE TRUST, the ESTATE of ALLAN A. BLYND, SALVATORE and STELLA DIGIORGIO, PROJECT EARTH ENVIRONMENTAL FUNDRAISERS, INC., NEW YORK OPTICAL, INC., the CARL CARTER IRREVOCABLE TRUST, CRAIG ROFFMAN, ELLEN ESCHEN, and JILL GUNDRY,

Claimants-Appellees.

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

BRIEF FOR APPELLANTS JAMES W. GIDDENS AS TRUSTEE FOR THE LIQUIDATION OF THE BUSINESSES OF NEW TIMES SECURITIES SERVICES, INC. and NEW AGE FINANCIAL SERVICES, INC., and SECURITIES INVESTOR PROTECTION CORPORATION

JAMES B. KOBAK, JR.
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

Attorneys for Appellant James W. Giddens as Trustee for the Liquidation of the Businesses of New Times Securities Services Inc., and New Age Financial Services, Inc.

STEPHEN P. HARBECK
KAREN A. CAPLAN
SECURITIES INVESTOR PROTECTION CORPORATION
Appellant
805 Fifteenth Street, N.W., Suite 800
Washinston, D.C. 20005-2207
(202) 371-8300

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellants James W. Giddens, as Trustee for the liquidation of the businesses of the substantively consolidated estates of New Times Securities Services, Inc., and New Age Financial Services, Inc., and the Securities Investor Protection Corporation certify that they have no corporate parents, affiliates and/or subsidiaries which are publicly held.

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

STATUTES

RULES

LEGISLATIVE MATERIALS

Page

MISCELLANEOUS

PRELIMINARY AND JURISDICTIONAL STATEMENT

Appellants James W. Giddens, (the "Trustee") as Trustee for the liquidation of the businesses of the substantively consolidated estates of New Times Securities Services, Inc. ("New Times") and New Age Financial Services, Inc. ("New Age") (together, the "Debtor") and the Securities Investor Protection Corporation ("SIPC") submit this brief in support of their Joint Appeal from the Judgment of the U.S. District Court for the Eastern District of New York (Judge Thomas C. Platt), which denied their motion for an order upholding the Trustee's determinations with respect to claims filed by fourteen claimants seeking SIPC cash advances equal to the fictitious value of one or more non-existent money market funds ("bogus mutual funds"). See SEC v. Goren, 206 F. Supp. 2d 344 (E.D.N.Y. 2002).

The District Court had jurisdiction over this contested matter pursuant to 15 U.S.C. § 78eee(b)(2)(A) (2002) and 28 U.S.C. § 158(a) (2002). This Court has jurisdiction over this Joint Appeal pursuant to 28 U.S.C. § 1291 (1993).

The District Court's judgment was entered on June 25, 2002. The Trustee and SIPC filed a timely Joint Notice of Appeal on July 1, 2002.

STATEMENT OF ISSUES

1. Whether the Trustee correctly determined that claimants should be treated as having claims for cash rather than securities covered by the Securities Investor Protection Act ("SIPA") where claimants deposited monies with an insolvent brokerage firm to purchase non-existent shares in bogus mutual funds that were:

(a) never organized as mutual funds or registered with the Securities and Exchange Commission ("SEC");

(b) never had any assets or market value;

(c) never issued prospectuses or complied with the nation's securities laws; and

(d) had no class or series of securities that could be identified or purchased on the open market.

2. Whether the Trustee correctly determined that claimants who seek cash advances from SIPC cannot be treated as having claims for SIPC advances with respect to wholly fictitious dividends and interest which were never in fact generated by bogus mutual funds, never received by the broker-dealer, and never deposited in the claimants' accounts.

STATEMENT OF THE CASE

This is an appeal from an order of the District Court sustaining the objections filed by fourteen claimants (the "Claimants")[1] to the Trustee's determinations of their claims. These Claimants (among a host of others who have not disputed the Trustee's position on this issue) deposited cash with the Debtor in order to purchase shares of bogus mutual funds. The Claimants received fictitious confirmations and fictitious account statements from the Debtor, indicating the purchase of the bogus shares. Even though the bogus mutual funds they intended to purchase never existed, were never registered with the SEC, never issued prospectuses, and never advertised or had their share prices listed in print (such as the newspaper), electronic, or live media, Claimants filed claims seeking their return or fictitious cash values. The Trustee determined that since no real "securities" under SIPA ever existed or could be purchased on the open market for return to Claimants, and since the bogus mutual funds had no market value, the Claimants could not have a claim for the return of the bogus mutual funds shares under SIPA. Instead, the only allowable SIPA claim that the Claimants could have was a claim for the return of the cash that they deposited with the Debtor in order to purchase securities, less any withdrawals or redemptions.

---

1. These Claimants are: Myrna K. Jacobs ("Jacobs"); Simon and Helga Noveck ("Novecks"); Miriam Seidenberg ("Seidenberg"); Felice Linder ("Linder"); Angelo Scarlata ("Scarlata"); the Rose Marie Ceparano Irrevocable Trust ("Ceparano Trust"); the Estate of Allan A. Blynd ("Blynd Estate"); Salvatore and Stella DiGiorgio ("DiGiorgios"); Project Earth Environmental Fundraisers, Inc., ("Project Earth"); New York Optical, Inc. ("New York Optical"); the Carl Carter Irrevocable Trust ("Carter Trust"); Craig Roffman ("Roffman"); Ellen Eschen ("Eschen"); and Jill Gundry ("Gundry").

The District Court disagreed with the Trustee's determination and held that claims for the fictitious value of the bogus mutual funds were claims for securities under SIPA. It ordered the Trustee to satisfy the claims with cash advances from SIPC equal to the wholly fictitious value of the bogus mutual funds as shown on the Claimants' final account statements. The District Court also determined that claims for completely fictitious interest/dividends that were supposedly to have been generated by the non-existent funds were allowable customer claims for securities. In its decision, the District Court relied entirely on rules adopted by SIPC (the "Series 500 Rules") that address whether an actual security transaction gives rise to a claim for cash or a claim for securities. The District Court, without discussion, assumed that the Series 500 Rules applied so as to convert bogus transactions into real ones, thereby ignoring all relevant case law. The relevant case law, SIPA, its legislative history and purpose, and the federal securities laws[2] confirm that the Series 500 Rules do not apply to convert fictitious transactions in fictitious securities into real ones that would give rise to a customer claim for securities as opposed to cash under SIPA.

STATEMENT OF FACTS

On May 18, 2000, the United States District Court for the Eastern District of New York entered an Order pursuant to the Securities Investor Protection Act of 1970 ("SIPA"), 15 U.S.C. § 78aaa et. seq.,[3] finding that the customers of New Times were in need of the protections afforded by SIPA. (Protective Decree ¶ I,

---

2. Pursuant to 15 U.S.C. § 78bbb, "the provisions of the Securities Exchange Act of 1934 apply [to SIPA] as if this chapter [of SIPA] constituted an amendment to, and was included as a section of, such Act."

3. For convenience, references hereinafter to provisions of SIPA shall omit "15 U.S.C."

J.A. 48.) Pursuant to SIPA § 78eee(b)(3), James W. Giddens was appointed as Trustee (the "Trustee") for the liquidation of the business of New Times, and Hughes Hubbard & Reed LLP his counsel. (Id. ¶ II, J.A. 48.) Pursuant to SIPA § 78eee(b)(4), the liquidation proceeding was removed to the Bankruptcy Court. (Id. ¶ IX, J.A. 51.)

In accordance with a standard Administrative Order, the Trustee sent notices and claim materials to each person who appeared from New Times' books and records to have been a customer of New Times during the year prior to the filing date. (Administrative Order, J.A. 93.)

While claims were being filed, the Trustee examined the operations of New Times and New Age and their principal William Goren ("Goren"). Based on his investigation, which revealed extensive intermingling of the two entities in communications with the public, the Trustee moved for an order substantively consolidating the estates of New Times and New Age. The Trustee, with SIPC's approval, sought the order so as to maximize recovery to victims of Goren's fraudulent activities, irrespective of whether they had dealt with New Times, the broker- dealer entity or New Age, the non broker-dealer entity. The Bankruptcy Court granted the Order on November 27, 2000 (the "Substantive Consolidation Order"). (Substantive Consolidation Order, J.A. 134.) Pursuant to the Substantive Consolidation Order, for purposes of determining "customer" claims under SIPA, the Debtor includes New Times and New Age for claims arising after April 19, 1995, the date that New Times became registered with the SEC and a member of SIPC. (Id., J.A. 137.) As a result of the Substantive Consolidation Order, these fourteen objecting Claimants have claims eligible for SIPC cash advances even though they actually transacted with Goren through an unregistered entity.

Nine hundred five (905) claims have been filed in the liquidation proceeding. One hundred seventy-four (174) of these claims relate to funds

deposited with the Debtor and the subsequent confirmation of a supposed purchase of non-existent shares of one or more bogus mutual funds. The Trustee has determined one hundred seventy three (173) of the 174 bogus mutual fund claims filed. The Trustee notified each claimant that his or her claim was allowed as a claim for cash in the amount deposited with the Debtor for the purpose of purchasing the bogus shares, minus any withdrawals or redemptions. The Trustee also notified claimants that amounts shown on account statements as dividends or interest earned on the fictitious funds were not allowable customer claims. Most claimants accepted the Trustee's determination of their claims. In fact, of all the bogus mutual fund claims determined, only these fourteen Claimants objected to the Trustee's determination by filing written objections to be resolved pursuant to the Claims Resolution Procedures set forth in the Administrative Order. Because the limit of protection for securities claims is higher than the limit on cash claims, these Claimants, though seeking only cash, sought to have their claims treated as claims for return of securities in order to be eligible for the higher level of SIPC cash advance.[4]

Claimants' objections arise from the fact that they were fraudulently induced by Goren or his employees to part with cash or other property that supposedly was to be invested in one or more bogus mutual funds—often called the New Age Securities Money Market Fund but sometimes called something else—allegedly held at Fleet Bank.[5] Claimants deposited money with New Age for investment in the bogus mutual funds based on Goren's misrepresentations. Allegedly, Goren

---

4. Thirteen of the objecting Claimants have claims that are over the $100,000 limit that SIPC may advance to satisfy claims for cash.

5. Goren also offered investors a tax-free version of the New Age Money Market Fund and another fictitious fund which he called the New Times Prime Money Market Fund.

misrepresented that the bogus mutual funds yielded higher interest rates than bank money market funds, that they would maintain constant share values of $1.00 per share, and that they would provide returns that were better than bank deposits. Goren promised the Claimants returns 1 to 1 ½ points higher than most bank savings accounts; these promised returns ranged from 5 ¼ to 6 ½ percent. The bogus mutual funds never existed; they were never organized as mutual funds, registered with the SEC, or issued prospectuses for investors as required by the Securities Act of 1933 and the Investment Company Act of 1940. The cash that Goren received for the bogus mutual funds was used to support his lavish lifestyle, to finance the Debtor's operating costs, to fund returns of principal, or to make supposed interest payments on promissory notes and to redeem mutual funds[6] allegedly purchased on behalf of other claimants.

---

6. Goren also purported to sell to other claimants shares in mutual funds that actually existed. Investors in this fund scheme believed that Goren was purchasing bona fide mutual funds (e.g., Vanguard, Putnam, Kemper) for their accounts and received written confirmations of such purchases and monthly account statements. Although these transactions were never executed, the information provided on the account and confirmation statements mirrored what would have happened had the given transaction been executed. Goren tracked each mutual fund that he purported to purchase on behalf of an investor in order to generate account statements that accurately reflected the value of the bona fide mutual fund in question. Because real securities existed at all times and could be purchased to satisfy these claims to complete the claimants' transactions with the Debtor, the Trustee has treated these claims as securities claims, rather than cash claims. In contrast to the situation with the Claimants in this appeal, claimants checking on their mutual funds would receive every indication that the fund existed, complied with all regulatory requirements and performed as Goren represented. Moreover, unlike the situation with respect to Claimants here, the Trustee could identify the shares of the real securities involved and use SIPC advances to purchase missing securities to return to claimants.

Pursuant to the Claims Resolution Procedures set forth in the Administrative Order, a hearing was held before the Honorable Stan Bernstein on June 25, 2001, to resolve the Claimants' objections. (Hr'g Tr., J.A. 511.) Judge Bernstein issued a "preliminary decision" in December 2001 denying the Trustee's motion to uphold his determination with regard to these Claimants. (Prelim. Op., J.A. 735.) Subsequently, on January 30, 2002, Judge Bernstein sua sponte recused himself from the case and vacated his preliminary decision. (Order Withdrawing Bench Op. and Recusing Ct., J.A. 750.) Claimants sought reconsideration of Judge Bernstein's recusal. (Claimants' Joint Mot. Recons., J.A. 757.) Judge Bernstein denied their motion for reconsideration on February 19, 2002, and suggested to the District Court that it withdraw the reference as to this contested matter. (Mem. and Order Den. Recons., J.A. 759.) On March 6, 2002, Judge Platt withdrew the reference and agreed to decide the issue de novo. (Mem. and Order, J.A. 761.)

Subsequently, on May 28, 2002, Judge Platt issued a Memorandum and Order denying the Trustee's motion to uphold his determinations and sustaining the Claimants' objections. (Mem. and Order, J.A. 773.) The District Court held that the receipt of bogus share purchase confirmations and monthly statements established that Claimants somehow had securities claims, whether or not the transactions confirmed involved actual securities. In addition, because the account statements indicated that bogus dividends were being reinvested to purchase additional bogus shares of the bogus mutual funds, the District Court held that the Claimants also were entitled to satisfaction of the fictitious dividends as securities claims. According to the District Court, the receipt of confirmation and account statements confirming only the purchase of bogus shares and reinvestment of

bogus dividends created a legitimate expectation in Claimants that they held securities in their accounts.[7]

SUMMARY OF THE ARGUMENT

The District Court ignored the relevant case law and the provisions of SIPA dealing with the satisfaction of customer claims, as well as SIPA's legislative history and purpose, in holding that the issuance of a fictitious confirmation of the purchase of a non-existent mutual fund gives rise to a claim for securities under SIPA. All of the case law on point -- which the District Court did not discuss or even cite -- makes clear that the proper way to treat claims for fictitious securities consistent with SIPA is for the Trustee to determine (as here) that Claimants have net equity claims for cash equal to the amounts deposited with the broker-dealer minus any withdrawals or redemptions. The decisions in these cases reach the only result that is consistent with the language of SIPA, its legislative history and purpose, and the federal securities laws of which SIPA is a part.

SIPA protects the "custodial" function broker-dealers perform for claimants and remedies claimants' losses by having the Trustee return to them the actual property that the broker-dealer should be holding for them in their accounts. Where a claimant's account should contain certain existent securities, but does not, the Trustee is authorized to use SIPC cash advances—up to $500,000—to purchase

---

7. In its May 28, 2002, Memorandum and Order, the District Court purported to calculate what each Clamant had claimed. Upon review of the District Court's decision, the parties realized that the District Court had improperly calculated some of the claims. The Trustee and Claimants entered into a Stipulation, which was subsequently signed by the District Court, agreeing on amounts that would be owed to Claimants if their claims were for securities and if they were entitled to the payment of non-existent dividends. (Stipulation Regarding Total Claimants' Claims, J.A. 794.)

securities of the "same class and series of an issuer" on the open market to the extent practicable to return to the claimant. SIPA §§ 78fff-1(b), 78fff-2(d). If the security in question is for some reason not available for purchase, SIPA authorizes the Trustee to provide cash in lieu of the security to the claimant based on the security's filing date market value. SIPA §§ 78fff-2(b), 78lll(11). Where a claimant's account should contain cash, but does not, the Trustee is authorized to use SIPC cash advances—up to $100,000—to return to the claimant. SIPA § 78fff-3(a)(1).

Though classifying Claimants' claims as claims for cash results in a lower SIPC advance being made to Claimants in satisfaction of their customer claims, this result is unavoidable. Since SIPA's enactment more than thirty years ago, a distinction has existed between the amount SIPC can advance to a SIPA Trustee to pay a claim for return of securities as opposed to a claim for return of cash. This distinction exists so that cash on deposit with a broker-dealer will not be better protected than cash deposited with a federally-insured bank, a situation that Congress believed would place the federally regulated banking system at a disadvantage to the federally regulated securities broker-dealer system. SIPA is a custodial statute which was never intended to be a panacea that protects against unscrupulous brokers' frauds. The theory behind the higher limit on securities claims is that a SIPA Trustee ordinarily will use the higher cash advance from SIPC to purchase identifiable securities for return to claimants who hold securities claims. In contrast, claimants whose broker-dealer could only have been holding cash for them will receive a SIPC cash advance similar to what the FDIC would pay for cash held in a bank account.

As all the cases on point hold, Claimants only can have claims for return of "cash" and not for return of "securities" where they deposit money with a broker-dealer for the purchase of non-existent or fictitious securities. A fictitious security,

such as the bogus mutual funds touted by Goren, is simply not a "security" covered by SIPA. It is not a security that the broker-dealer could have purchased. In turn, it cannot be returned to, or purchased on the open market for, a claimant by a SIPA trustee. A SIPA trustee cannot assign a filing date value (other than "zero") to a fictitious security or find a "similar" security to replace it without compounding the fiction.

Moreover, classifying the claims as claims for cash results in Claimants being afforded some degree of SIPA protection. If Claimants' claims in fact had been for securities, no delivery could have been made by the Trustee because no security existed to deliver. Instead, the statute would require the Trustee to treat the non-existent fund as "unavailable" and to satisfy the claim with cash in lieu of the non-existent security. Pursuant to the net equity definition in SIPA, the amount remitted to Claimants would be the filing date value of the bogus mutual fund. The filing date value of the bogus mutual fund is not the fraudulent value assigned to it by Goren on fictitious account statements, as the District Court held. Rather, it is the amount that would have been owed to Claimants had the debtor liquidated "by sale or purchase on the filing date, all securities positions of such customer" less any net indebtedness owed by the customer. SIPA § 78lll(11). Under this calculation the amount owed to Claimants would be zero. Thus, although classifying the Claimants' net equity claims as claims for securities would allow for the higher upper limit on SIPA protection to apply, it also would result in the Claimants having zero net equity claims.

The decision below ignores, and to a large extent undermines, the scheme of the securities laws, of which SIPA is a part. Indeed, the decision is an open invitation to fraud by broker-dealers and encourages a lack of vigilance by investors. Before something can be recognized as a security under SIPA, it must

have the basic requisites of a security under federal laws. The bogus mutual funds had none of these requisites.

There is no dispute that Claimants had the intent to deposit funds to purchase securities and therefore became "customers" of the Debtor entitled to some degree of SIPA protection. But no purchase of any actual security was ever entered into on their behalf or confirmed to them. Nor did the bogus mutual funds listed on their confirmations have any of the indicia of a real security that a prudent investor might have expected. For example, the account statement prices of the securities were not listed in newspapers or other sources. There were no prospectuses to review. No regulatory authority had any record of the funds' existence.

If a claim for securities can exist for unregistered, non-existent phantom entities, investors will have every incentive to believe unscrupulous brokers or even to go along with a wink and a nod as long as they receive a written confirmation or account statement. Such actions make the SIPC fund, which is funded by the legitimate portion of the securities industry, the guarantor of fraud and imprudence and turns the theory of investor protection and system of investor safeguards on its head. Allowing claims for fictitious securities as securities claims does not foster SIPA's goal of encouraging individuals to trade in the public securities market, but rather fosters fraud, and promotes a lack of vigilance among investors.

The District Court relied entirely on the Series 500 Rules to mandate that the Trustee treat the disputed claims as claims for securities. This reliance was manifest error. The Series 500 Rules do not govern a situation such as the one here, where the confirmation received purported to confirm the purchase of a non-existent security. The Series 500 Rules were passed for a limited purpose: to deal with the classification of claims where the trade date of a securities transaction (i.e. purchase or sale) straddled the filing date of the SIPA liquidation. The Series 500

rules do not rewrite the nation's securities laws to make fraudulent transactions bona fide or convert non-existent securities into real ones. The Series 500 Rules create bright-line, black letter rules for determining when an actual security has been purchased or sold for a customer. The Series 500 Rules have no bearing on determining whether a claimant has a customer claim for the return of fictitious securities rather than a claim for the return of funds deposited to purchase the fictitious securities. In order for Series 500 Rules to apply, the security in question must exist.

Finally, the District Court compounded the fiction and distortion of SIPA protection by adding non-existent interest and dividends to the supposed value of wholly fictitious securities. Like piling Pelion on Ossa, this may seem possible in a metaphorical world but is not possible in the real world of the securities laws and not under a statute crafted as precisely as SIPA. The case law under the statute is clear that non-existent dividends or interest supposedly "earned" on non-existent shares are not customer claims protected by SIPA.

STANDARD OF REVIEW

This Court reviews the District Court's conclusions of law de novo. Gurary v. Nu Tech Bio Med, Inc., 303 F.3d 212, 219 (2d Cir. 2002); Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 302 F.3d 18, 26 (2d Cir. 2002). There are no contested facts in this case.

ARGUMENT

I. THE TRUSTEE CORRECTLY DETERMINED THAT THE DISPUTED CLAIMS SHOULD BE TREATED AS CLAIMS FOR CASH AND NOT CLAIMS FOR THE FICTITIOUS VALUE OF THE BOGUS MUTUAL FUND.

The District Court ignored relevant case law, provisions of SIPA dealing with the satisfaction of customer claims, as well as SIPA's legislative history and purpose, in holding that the confirmation of the purchase of non-existent mutual funds gives rise to a claim for securities under SIPA. Under no circumstance can the confirmation of the purchase of non-existent securities transform bogus mutual funds into real ones. Claimants have conceded that the bogus mutual funds at issue here did not exist. They cannot meet their burden of demonstrating that they have claims for return of securities as opposed to claims for return of cash. SIPA § 78fff-2(b); SIPC v. Stratton Oakmont, Inc., 229 B.R. 273, 278 (Bankr. S.D.N.Y. 1999) ("Claimants bear the burden of proving that they are the type of priority creditors known as 'customers'"); In re Adler Coleman Clearing Corp., 204 B.R. 111, 115 (Bankr. S.D.N.Y. 1997) (burden of proof on claimants); see also SEC v. Packer, Wilbur & Co., 498 F.2d 978 (2d Cir. 1974).

A. ALL CASE LAW ON POINT SUPPORTS THE TRUSTEE'S DETERMINATIONS.

The central issue in this appeal is whether claims that are based on the intended purchase of non-existent securities are claims for return of cash or claims for return of securities under SIPA. Although this is an issue of first impression in this Circuit, this exact question has been decided directly by two Courts of Appeals and indirectly by a Bankruptcy Court. Both the Sixth and Third Circuits have held that claimants who deposit money for the purchase of non-existent securities whose purchase is later confirmed to them by the debtor have net equity claims for

cash. Plumbers & Steamfitters Local 490 Severance & Ret. Fund v. Appleton (In re First Ohio Secs. Co.), 39 F.3d 1181, No. 93-3313, 1994 WL 599433, at *1 (6th Cir. 1994) (unpublished opinion),[8] cert. denied, 514 U.S. 1018 (1995); SEC v. Aberdeen Secs., Co., 480 F.2d 1121, 1127 (3d Cir.), cert. denied sub nom. Seligsohn v. SEC, 414 U.S. 1111 (1973).

In Plumbers & Steamfitters Local 490 Severance & Retirement Fund, investors believed that they had purchased, collectively, over $3 million worth of "pooled certificates of deposit" offered by the debtor, First Ohio Securities Company ("First Ohio"). Plumbers & Steamfitters Local 490 Severance & Ret. Fund, 1994 WL 599433, at *1. Gilmartin, the founder of First Ohio, sent investors bogus purchase-confirmation notices and fictitious account statements, and used the investors' funds for his own personal use. Id. After SIPC initiated a liquidation proceeding, the investors filed claims with the Trustee for approximately $3 million in securities and cash. Id. The Trustee determined that the securities in question never existed and therefore treated their claims as claims for cash rather than for securities based on the information in the bogus account statements and confirmations. Id. The Trustee rejected claimants arguments that they had a legitimate expectation that their accounts contained securities. The District Court agreed with the Trustee's determination:

> All of the rules and legislative history cited by appellants on the legitimate expectations and satisfaction of claims for securities is

---

8. Appellants cite to this unpublished opinion of the Sixth Circuit (a copy of which is contained in the addendum to the brief) because, as this Court has previously recognized, "the Sixth Circuit allows parties (and, by extension, courts) to cite its unpublished opinion when such opinions have precedential value in relation to a material issue in a case and . . . there is no published opinion that would serve as well." United States v. Leon, 203 F.3d 162, 164 n.3 (2d Cir. 2000) (quoting 6th Circuit Rule 24(c)).

> determinative of a security of such type being in existence. Not only were these "securities" never purchased, they never existed. Therefore, with no evidence presented that would enable this Court to find the non-existence of the securities clearly erroneous, the conclusion of law that [claimants] were each entitled to one cash claim was correct as a matter of law.

Plumbers & Steamfitters Local 490 Severance & Ret. Fund v. Appleton (In re First Ohio Secs. Co.), No. 92CV0349, at 3 (N.D. Ohio Feb. 18, 1993) (Lambros, J.) (unpublished order)[9].

On appeal, the Sixth Circuit affirmed, stating:

> [u]nfortunately for the plaintiffs here, the record fully supports the finding by the trustee and by both the bankruptcy and district courts that the "pooled certificates of deposit" which were the subject of the agreement between the plaintiffs and the broker-dealer not only were not purchased by Gilmartin but, indeed, never even existed. Given this fact, the only legal conclusion possible is that the claims against First Ohio were ones "for cash" and not "for securities." As the district judge noted, SIPA is intended to protect investors against a broker-dealer's insolvency; it is not designed to achieve restitution for fraud.

Plumbers & Steamfitters Local 490 Severance & Ret. Fund, 1994 WL 599433, at *1 (emphasis added).

In SEC v. Aberdeen Securities Company, the claimant had purchased shares of a prospective new issue. Aberdeen Secs., Co., 480 F.2d at 1127. The shares were paid for, and the trade confirmed to the claimant by its broker, Aberdeen Securities Co. ("Aberdeen"). Although Aberdeen remitted the funds to the broker-dealer underwriting the offer, no certificates were received. Id. Instead, before the stock could be issued, both the issuer and the underwriter went into bankruptcy. A SIPA liquidation proceeding subsequently was initiated for Aberdeen, and the

---

9. A copy of Judge Lambros' order is contained in the addendum to the brief.

claimant filed a claim in that proceeding. Because the non-existent security had no value, the Aberdeen Trustee determined that no payment could be made to the claimant, a conclusion that was affirmed by the lower court. Id. On appeal, the Third Circuit disagreed, commenting as follows:

> because the facts demonstrate that since this particular stock was not in existence, the purchase never could be made. [Claimants], therefore, do not have a claim for the stock itself. . . . We have no doubt, however, that the "dollar amount" of a customer's account includes his cash which the broker has, or should have, been holding. . . . Thus, if under local law, or by virtue of regulations under which it operated, the debtor was obligated to refund the $500 to the [claimants] because of inability to deliver the Boatland stock, then there would be a claim for cash properly included in the term "net equity."

480 F.2d at 1127 (following remand the Trustee returned to claimants the cash they had deposited for the purchase of the Boatland stock).

In addition, in Appleton v. Hardy (In re First Ohio Secs., Co.), No. 590-0072, Adv. No. 92-5085 (Bankr. N.D. Ohio 1992) (unpublished Order),[10] the claimants deposited $140,000 with the debtor for the purchase of securities which included certificates of deposit ("CDs") and a mutual fund, the "All America Fund." Id. at 2. The Trustee determined that the claimants had a net equity claim for securities and paid them $141,203.58 (including interest). The Trustee made this payment based on his belief that the CDs and the "All America Fund" actually existed. Subsequently, the Trustee discovered that neither the CDs nor the All America Fund existed. Id. Because the securities were fictitious the Trustee asserted that the claimants' claim was not for securities but for cash and thus subject to the $100,000 statutory limit on SIPC advances for cash claims. He therefore filed a turnover proceeding to recover the $41,203.58 excess payment.

---

10. A copy of the Appleton order is contained in the addendum to the brief.

Id. The claimants filed a motion to dismiss the Trustee's action. Claimants argued that the Trustee could not recover the excess payment on two grounds: (1) a SIPA proceeding does not create an "estate" and pursuant to the Bankruptcy Code only "property of the estate" is recoverable by a Trustee, and (2) even if an estate is created, SIPC advances are not property of the estate. Id. After reviewing all the relevant materials and construing the facts in the light most favorable to claimants, the court held that the claimants' arguments were "specious" and therefore denied their motion to dismiss. Id. at 4. In doing so, the court implicitly acknowledged that the Trustee had a right to recover the overpayment made to the claimants based on his incorrect classification of their claim as one for securities when neither the funds nor the CDs existed. Accord Plumbers & Steamfitters Local 490 Severance & Ret. Fund, 1994 WL 599433, at *2 (affirming bankruptcy court's and district court's decision to uphold Trustee's determination that where certificates of deposit did not exist claimants had claims for cash not securities).

In all of these cases the purchase of a non-existent security was confirmed to the claimant. In all of these cases the courts relied on the fact that the security did not exist in ruling that the claimant had a claim for the return of cash and not on the existence, or lack of, a confirmation statement. These cases are directly on point and reach the only result that is consistent with SIPA, its purposes and legislative history and the securities regulatory scheme of which SIPA is a part. See also, SIPC v. Old Naples Secs., Inc., (In re Old Naples Secs., Inc.), 218 B.R. 981, 985-86 (Bankr. M.D. Fla. 1998), aff'd, 223 F.3d 1296 (11th Cir. 2000) (finding that claimants had asserted customer claim for cash in situation where claimants had received monthly account statements indicating investments in non-specified bonds but where no such bonds were "in fact" purchased); SIPC v. Pepperdine Univ., (In re Brentwood Secs., Inc.), 925 F.2d 325, 329 (9th Cir. 1991) (debtor broker-dealer did not hold shares of a security for a claimant where the

shares did not issue); SIPC v. C.J. Wright & Co., (In re C.J. Wright), 162 B.R. 597, 610 (Bankr. M.D. Fla. 1993) (because debtor misappropriated their money and certificates of deposit were not purchased claimants had a claim for the principal they invested and not for the interest promised); In re Investors Sec. Corp., 6 B.R. 415, 419-20 (Bankr. W.D. Pa. 1980) (where claimants intended to purchase bona fide certificates of deposit and had received interest payments on such purchases for seven months, but where no such purchases had in fact been made, and where certificate of deposit would have nonetheless matured into cash prior to the filing date even if it had been purchased, claimants had a claim for cash); In re June S. Jones Co., 52 B.R. 810, 813-14 (Bankr. D. Or. 1985) (distinguishing case from Aberdeen and Investors based on the fact that June S. Jones' claimants placed orders to purchase bona fide securities even though they were not actually purchased, while claimants in Aberdeen and Investors placed orders to purchase non-existent securities (Aberdeen) or securities that would have matured into cash on the filing date (Investors)).

B. SIPA AND ITS LEGISLATIVE HISTORY AND PURPOSE SUPPORT THE TRUSTEE'S DETERMINATIONS.

In interpreting SIPA, this Court must look first to its language. See Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979); SEC v. Ambassador Church Fin./Dev. Group, Inc., 679 F.2d 608, 611 (6th Cir. 1982); In re MV Secs., Inc., 48 B.R. 156, 159 (Bankr. S.D.N.Y. 1985). The language of SIPA makes clear that whether a customer has a "cash" or a "securities" claim depends upon whether his or her "net equity" is based on cash or securities as shown on the debtor's books and records or as otherwise established to the satisfaction of the Trustee. SIPA § 78fff-2(b). See In re Bell & Beckwith, 937 F.2d 1104, 1106 (6th Cir. 1991); SEC v. Albert &

Maguire Secs. Co., 378 F. Supp. 906, 911 (E.D. Pa. 1974)..[11] The fact that Claimants deposited monies with the Debtor for the purpose of purchasing securities qualifies them as "customers," but this does not change the fictitious transaction confirmed to them—a purported purchase of a bogus security—into the purchase of a real security that can be returned to them. See SIPA § 78lll(2). Indisputably, the bogus mutual fund at issue here was not a bona fide fund. Had it been, it would have been required to: (1) register with the SEC pursuant to Section 8 of the Investment Company Act of 1940 (the "1940 Act"), (2) comply with the registration requirements of the Securities Act of 1933 and periodic reporting requirements of the Securities Exchange Act of 1934, and (3) issue a prospectus for investors. In fact, Claimants conceded and the District Court acknowledged that the bogus mutual funds did not exist. SEC v. Goren, 206 F. Supp. 2d 344, 351 (E.D.N.Y. 2002). Since no securities ever existed, the Claimants' net equity claims had to be for cash.

Congress has mandated in clear and specific terms how a claimant's "net equity" is to be determined for purposes of permitting SIPC cash advances, and the courts as well as SIPA trustees and SIPC itself must adhere to that language. A claimant's net equity claim is determined by "calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities position of such customer" minus any

---

11. In pertinent part, section 78fff-2(b) of SIPA provides:

> After receipt of a written statement of claim . . . , the trustee shall promptly discharge, in accordance with the provisions of this section, all obligations of the debtor to a customer relating to, or net equity claims based upon, securities or cash, by the delivery of securities or the making of payment to or for the account of such customer . . . insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee.

indebtedness. SIPA § 78lll(11). Here, there were no securities that the Debtor could have liquidated by sale on the filing date. Instead, Claimants' accounts should have contained the cash that they had deposited with the Debtor to purchase securities. The fact that Claimants may have thought, reasonably or otherwise, that their accounts contained securities does not alter the nature of their net equity claims. Nowhere in the net equity definition does SIPA state that whether a claimant has a net equity claim for cash or securities depends upon his or her subjective legitimate expectation. The legislative history of SIPA does not support such a proposition.

1. SIPA's Legislative History Confirms that Claimants have Claims for Cash.

With roots in Section 60e of the Bankruptcy Act, a reclamation statute, SIPA is a federal statutory scheme designed to restore "customers" to the position they were in vis a vis their broker-dealer before it was placed in liquidation. A SIPA "customer" claim is similar to a claim for reclamation. As this Court has recognized, "SIPA was not designed to provide full protection to all victims of a brokerage collapse." SEC v. Packer, Wilbur & Co., 498 F.2d 978, 983 (2d Cir. 1974) (emphasis added). See SIPC v. Morgan, Kennedy & Co., 533 F.2d 1314, 1317, n.4 (2d Cir.), cert. denied, 426 U.S. 936 (1976) (noting that Congress enacted SIPA with the intent to protect the small investor only as is apparent in that at the time it was enacted 90% of the total dollar value of all accounts were unprotected); Schultz v. Omni Mut. Inc., No. 93-3700, 1993 WL 546671, at *1 (S.D.N.Y. Dec. 30, 1993) (noting that protections of SIPA are limited and SIPC "does not function as an insurer of all claims against an insolvent broker"). See also In re A.R. Baron & Co., 226 B.R. 790, 793 (Bankr. S.D.N.Y. 1998) (explaining that "SIPA is a federal statutory scheme designed to afford limited financial protection to the customers of registered broker-dealers who experience

financial difficulty"); In re Adler Coleman Clearing Corp., 195 B.R. 266, 273 (Bankr. S.D.N.Y. 1996) (recognizing that "SIPC's role in a SIPA liquidation is limited by statute; it does not attempt to make all customers whole.").[12] Instead, SIPA remedies customers' losses by having the Trustee return to them the actual property that the broker should have been holding for them in their accounts and that they could have claimed from the broker-dealer on the filing date. See SEC v. S.J. Salmon & Co., 375 F. Supp. 867, 871 (S.D.N.Y. 1974); SEC v. Howard Lawrence & Co., 74 Civ. 193, 1975 Bankr. LEXIS 15, at *7 (Bankr. S.D.N.Y. 1975) ("The Act is designed to remedy situations where the loss arises directly from the insolvency of the broker-dealer."); S. Rep. No. 95-763 at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 764. Where a customer's account should contain certain real securities, but does not, the Trustee is authorized to use SIPC cash advances only to purchase securities of the "same class and series of an issuer" on the open market to the extent practicable. SIPA §§ 78fff-1(b), 78fff-2(d). See In re Adler Coleman Clearing Corp., 195 B.R. 266, 273 (Bankr. S.D.N.Y. 1996) ("The distribution of a security of the same class and series of an issuer as the

---

12. As discussed earlier, SIPA was intended to insure against such practices as the broker-dealers' misappropriation of customer property in its possession, and failure to properly segregate securities entrusted to the broker-dealer for safekeeping, sale, or as collateral for margin loans. SIPA was not intended to provide protection in addition to that already provided by law for other types of claims against broker-dealers such as fraud and breach of contract. Hearings on Securities Investor Protection Act Before the Subcomm. on Commerce and Fin. of the House Comm. on Interstate and Foreign Commerce, 91st Cong. 2d Sess., at 230 (1970). See In re Adler Coleman Clearing Corp., 198 B.R. 70, 75 (Bankr. S.D.N.Y. 1996) (No SIPA protection for claims based on fraud or breach of contract.); Howard Lawrence Co., 1975 Bankr. LEXIS 15, at *7 ("The SIPA does not protect customer claims based on fraud or breach of contract.").

security credited to the customer's account on the filing date is deemed to satisfy that customer's claim for that security.") (Emphasis added).

In short, a SIPA Trustee is authorized to step into the shoes of the debtor and return the property the broker-dealer should have been holding on the filing date to the claimant. Where there is no issuer and no covered security of any class or series, the property that can be returned can only be the cash originally entrusted to the broker-dealer by the customer. There is no authority anywhere in the statute, case law, or Series 500 Rules for a Trustee to use cash advances to pretend to purchase nonexistent securities.

The statute's legislative history unambiguously reflects that the goal of a SIPA proceeding is to restore customers as nearly as possible their accounts as they actually existed on the filing date:

> Under present law, because securities belonging to customers may have been lost, improperly hypothecated, misappropriated, never purchased or even stolen, it is not always possible to provide to customers that which they expect to receive, that is, securities which they maintained in their brokerage account. Instead, when the customer claims for a security exceed the supply available to the trustee in the debtor's estate, then customers generally receive pro rata portions of the securities claims, and as to any remainder, they receive cash based on the market value as of the filing date. . . . A principal underlying purpose of the bill is to permit a customer to receive securities to the maximum extent possible instead of cash, in satisfaction of a claim for securities. By seeking to make customer accounts whole and returning them to customers in the form they existed on the filing date, the amendments not only would satisfy the customers' legitimate expectations, but also would restore the customer to his position prior to the broker-dealer's financial difficulties.

S. Rep. No. 95-763 at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 765 (emphasis added).

Thus, in most instances SIPA requires that securities that actually exist but are not in the broker-dealer's possession be purchased for customers using SIPC's funds if necessary.[13] It is for this reason that the limit on advances on securities is higher than for claims involving return of cash while SIPA advances for cash are subject to the same limitations as FDIC protection for cash.[14]

---

13. This intent is clearly evidenced in the following statement:

> In broad terms, there are three problems for which the present Act does not provide adequate solutions. The First is that customers generally expect to receive what is in their accounts when the member stops doing business. If John Q. Investor has 100 fully-paid shares of IBM and a credit balance of $200 in his account, he expects to receive from the trustee a stock certificate for 100 shares of IBM and a check for $200. But in many instances that has not always been possible because securities have been lost, improperly hypothecated, misappropriated, never purchased, or even stolen. When there are valid claims for more IBM stock than is on hand, under the present status John Q. will receive only a pro rata share of his 100 shares. For the remainder of the shares due him, he will receive cash in lieu of stock based on the market price on the date the liquidation proceeding is initiated. Naturally, if IBM stock goes up in price while John Q. is waiting to have his claim settled, he will be decidedly unhappy with the check he receives from the trustee. On the other hand, if IBM declines in price, we may receive no complaints from John Q.

Statement by Hugh F. Owens, Chairman, SIPC Before the Subcommittee on Consumer Protection and Fin. Comm. on Interstate and Foreign Comm., House of Representatives, Aug. 1, 1977, 95th Cong. 1st Sess. on H.R. 8331 at 82.

14. SIPA allows a Trustee to satisfy a customer claim for securities by paying the customer the filing date value of the securities in question in instances where the purchase of the securities would be detrimental to the estate. The 1978 Amendments' legislative history provides:

> Our expectation is that, in almost all cases, a customer's claim for securities would be satisfied by the delivery of securities, and, where necessary, to accomplish this the trustee would go into the open market

In enacting SIPA, Congress provided the exclusive framework under which qualified customer claims are satisfied. The District Court ignored the interlocking provisions of SIPA that provide for the calculation and satisfaction of "securities" claims discussed above and substituted its own. According to the District Court, the Trustee should treat Claimants' claims as securities claims and satisfy them by paying cash equal to the fictitious value of the bogus mutual funds as shown on the Claimants' final account statements, amounts that include interest and dividends never in fact earned or received by the Debtor. Goren, 206 F. Supp. 2d at 350. As the case law cited above recognizes, however, the option to satisfy claims for securities with cash in lieu of securities does not apply where the security in question is nonexistent.

As recognized in Aberdeen Securities, accepting a contrary interpretation would not benefit Claimants. In view of the net equity definition and section 78fff-2(b) which, in relevant part, provides that for "purposes of distributing securities to customers, all securities shall be valued as of the close of business on the filing date," the amount remitted to the customer for the non-existent shares would be the filing date market value of the non-existent fund. SIPA § 78fff-2(b) (emphasis added). The filing date market value of the non-existent fund is not the fraudulent

---

> and purchase securities. We believe, however, that it is advisable to provide that the trustee would not be required to purchase securities where that could not be done in a fair and orderly market. One chief concern is that the trustee not be required to make purchases in a market which is being improperly controlled or manipulated. This may be of particular significance where the member being liquidated was a market maker. Under those circumstances, the trustee would decline to purchase the needed securities and would instead satisfy the claim by paying cash in lieu of the securities based on the market value of the securities on the filing date.

1977 H. Rep. at 41-42.

value assigned to it by Goren on fictitious account statements as the District Court held. Rather, it is the amount that would have been owed to Claimants had the Debtor liquidated "by sale or purchase on the filing date, all [of their] securities positions" less any net indebtedness owed by them. SIPA § 78lll(11). Under this calculation the amount owed to Claimants for non-existent securities with no market value would be zero. Thus, although classifying the Claimants' net equity claims as claims for securities would allow for the higher upper limit on SIPA protection to apply, it would also result in the Claimants having net equity claims of zero. As the Third Circuit held in Aberdeen Securities, treatment of such claims as for cash rather than securities is the more equitable result and the only result consistent with the statutes. See Aberdeen Secs., Co., 480 F.2d at 1127.

The Trustee and SIPC closely followed the statute and relevant case law and in fact have gone as far as possible to treat these and other claimants not only fairly but as generously as the statute can possibly allow. For example, had the Trustee with SIPC's consent not moved for substantive consolidation, these and other claimants would have no claims against New Times alone and would have recovered nothing for their losses.

The distinction between cash being held in an account and securities being held in an account as of the filing date of a SIPA proceeding is an integral part of the statute that courts cannot ignore. From its inception, Congress distinguished between cash claims and securities claims by providing for a greater SIPC advance in the event of the broker-dealer's collapse for securities claims than for cash claims. The distinction between the protection afforded to cash claimants and securities claimants in the context of a SIPA liquidation came about because Congress decided that the protection SIPA afforded to the cash component of an investor's claim should not be greater than what was provided by the FDIC to cash held in bank accounts. See SIPA Amendments: Hearing Before the Subcomm. on

Securities of the Comm. on Banking, Housing, and Urban Affairs, H.R. 8331, 95th Cong. 2d Sess. 2 (1978) (opening statement of Senator Williams) (noting that increase in coverage for cash to $100,000 from $40,000 would guarantee investors the "same insurance protection for their cash under SIPC as bank and savings depositors receive under FDIC coverage"); SIPA Amendments: Hearings on H.R. 6831 Before the Subcomm. on Consumer Protection and Fin. of the Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 17, 19 (1980) (statement of Hugh F. Owens, Chairman Securities Investor Protection Corporation) (noting that cash coverage for cash claims has historically been on a level with the coverage for the FDIC and FSLIC programs and that "one of the purposes of increasing the insurance on securities maintained by customers and member brokers is to accomplish immobilization of the stock certificate"); SIPA: Hearings on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109, and 18458 Before the Subcomm. on Commerce and Fin. of the House Comm. and Interstate and Foreign Commerce, 91st Cong., 2d Sess. 149 (1970) (letter from Roy T. Englert, Acting General Counsel of Department of the Treasury). The distinction has been maintained every time that SIPA has been amended and coverage increased. SIPA coverage for cash claims is always equal to what the FDIC provides to cash held in bank accounts. Currently claims for cash are entitled to $100,000 SIPC advance and claims for securities are entitled to $500,000 SIPC advance. These kinds of distinctions are inherent under the statute. Courts cannot obliterate them by creating legal fictions to provide more protection to cash claimants by classifying them as securities claimants where no security was or could have been held in the account.

2. Following the Statutory Definitions and Case Law is Consistent with the Policies of the Nation's Securities Laws of which SIPA is a Part.

The entire federal securities regulatory scheme of which SIPA is a part supports the basic principle that non-existent securities cannot be treated as if they were real. To protect mutual fund investors, the federal securities laws impose several layers of regulation. While the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act") regulate the sale of mutual funds, because mutual funds are investment companies, the Investment Company Act of 1940 (the "1940 Act") is the primary federal securities law regulating them. See David E. Riggs, Securities Regulation of Mutual Funds: A Banker's Primer, 113 Banking L. J. 864, 865 (Oct. 1996) (hereinafter "Securities Regulation"). Pursuant to the 1940 Act and the 1933 Act, mutual funds must be registered with the SEC and must issue a prospectus that has gone through the 1933 Act registration procedures administered by the SEC in selling its shares. Under the 1940 Act, a mutual fund prospectus must set forth the fund's investment objective and investment policies. See Investment Company Act §§ 8(b)(2), (b)(3), & 13(a)(3). The requirements imposed by the Acts are intended to facilitate informed investment decisions and protect investors by providing them with material information concerning initial public offerings of securities. See Securities Regulation, 113 Bank. L. J. at 865-66. Information regarding the market value of money market funds that are organized as mutual funds and comport to the requirements of the Securities Acts is publicly available. Treating the bogus mutual funds at issue here as bona fide securities in order to gain higher coverage for Claimants undermines SIPA, the 1933 and 1940 Acts.

By ignoring these requirements, the District Court's decision, if upheld, would lead to absurd and self-defeating results. Under the District Court's holding

a broker can promise anything in terms of returns, call it a security, confirm its purchase, and claimants would have a claim for the fraudulent cash value of the non-existent security, together with any promised returns. Under the District Court's holding there is absolutely no incentive for investors to check or insist on receiving documents such as prospectuses, quarterly reports, etc., which are the hallmarks of bona fide securities and the foundation for investor protection. It becomes easy for brokers to commit fraud and even easier for those who are promised better than normal returns to suppress their suspicions. The District Court's holding invites fraud and imprudence, encourages a lack of investor vigilance and circumvents the entire regulatory scheme, which requires that mutual funds be registered with the SEC and use a prospectus that has gone through the 1933 Act registration procedures administered by the SEC in selling its shares. Contrary to its belief, the District Court's holding does not promote investor confidence in the public securities market, but rather encourages investors to invest in risky, oftentimes fraudulent securities. Clearly, encouraging fraud and reckless investing is contrary to the aims of SIPA.

As this Court has recognized, SIPA does not provide general insurance against investment risk or even investment fraud, and does not provide special protection for general creditors of the broker, however meritorious their claims. See SEC v. F.O. Baroff Co., 497 F.2d 280, 283 (2d Cir. 1974) (citing assurances in legislative history that SIPA "is not to be a bailout operation; it is to protect the public customers"); accord SIPC v. Wise (In re Stalvey & Assocs.), 750 F.2d 464, 472-73 (5th Cir. 1985) (stating that "[t]he statutory scheme envisioned by the drafters of the statute was to protect persons buying and selling securities through a stockbroker" and that "there is evidence in the legislative history that Congress believed that the SIPA was only an 'interim step' that would not provide complete protection for losses occasioned by the failure of broker-dealer firms"). Given

SIPA's limited protections, it is unavoidable that all claimants will not be fully satisfied for their losses by SIPA.[15] Even claims based upon a Debtor's most egregious acts which result in significant monetary losses to the investor will not be compensable under SIPA. In explaining this limited protection under SIPA, this Court stated in SEC v. Packer, Wilbur & Co., that:

> [A]rguments based solely on the equities are not, standing alone, persuasive. If equity were the [sole] criterion, most customers and creditors of . . . [the debtor] would be entitled to reimbursement for their losses. Experience, on the other hand, counsels that they will have to settle for much less. SIPA was not designed to provide full protection to all victims of a brokerage collapse.

498 F.2d at 983. In short, customers under SIPA are only entitled to the specific relief afforded under SIPA—the return of their filing date "net equity." See SIPA §§ 78fff(a)(1), 78fff-2(b). Here, there are not and never have been any securities covered by SIPA that could be returned to Claimants and Claimants' net equities were correctly determined by the Trustee to consist of monies deposited by the Claimants for the purchase of non-existent securities.

---

15. The fact that Claimants' allowable customer claims are greater than amounts SIPC can advance in satisfaction of such claims does not mean that they will never be fully satisfied for their losses. Simply because Claimants will not be fully satisfied for losses they incurred as a result of Goren's fraudulent scheme from SIPC or the fund of customer property does not mean that they will never be made whole. These claimants are entitled to share in the general estate of the Debtor. See SIPA § 78fff-2(c)(1). Whether Claimants will ultimately recover for the losses they incurred depends in large part on the Trustee's success in marshalling assets for the estate and in pending class action filed by Claimants counsel here on behalf of all defendant New Times/New Age investors. See Gervis v. Berg, No. 00-CV-3362 (E.D.N.Y. filed June 9, 2000).

C. THE SERIES 500 RULES DO NOT APPLY TO TRANSACTIONS IN BOGUS SECURITIES.

The District Court ignored the only case law directly on point, as well as the wording of SIPA and its relevant legislative history, when it applied the Series 500 Rules to the facts of this case. The Series 500 Rules apply in determining whether a "securities transaction gives rise to a 'claim for cash' or a 'claim for securities'." 17 C.F.R. § 300.500 (emphasis added). See In re A.R. Baron & Co., 226 B.R. 790, 796 (Bankr. S.D.N.Y. 1998). By definition, in order for the Series 500 Rules to apply, a "securities transaction" must exist. See 53 Fed. Reg. 10368 (Mar. 31, 1998) (a review of the cases giving rise to the Series 500 Rules reveals that in no instance was the security in question fictitious). The limited purpose for which the Series 500 Rules were adopted reinforces this basic point.

Prior to the enactment of the Series 500 Rules, SIPC and SIPA trustees frequently litigated whether SIPA customer claims were claims for cash or claims for securities where a security transaction (i.e. purchase or sale of a security) straddled the filing date. 53 Fed. Reg. 10368 (Mar. 31, 1988).[16] See Murray v.

---

16. Prior to the Series 500 Rules, customers sometimes objected to having their claim deemed a claim for cash for a securities purchase ordered but not completed by the filing date when their claim exceeded the maximum amount SIPC could advance to satisfy a cash claim. See, e.g., Murray v. McGraw (In re Bell & Beckwith), 821 F.2d 333, 335 (6th Cir. 1987); In re Investors Sec. Corp., 6 B.R. 415 (Bankr. W.D. Pa. 1980); SIPC Proposed Rule, 1988 WL 236666 at *1 (1988). Conversely, customers would object to having their claims treated as claims for securities when the underlying value of the security in question had declined. See, e.g., In re June S. Jones Co., 52 B.R. at 813 (claimants argued they had claim for cash, not securities, where securities were not purchased by the filing date, and securities had declined in value); SIPC Proposed Rule, 1988 WL 236666 at *2. Customers wishing to disavow securities purchased for their account in order to have a "claim for cash" argued that a purchase of securities did not occur because their broker never *actually* purchased the securities in question. See id. (emphasis added).

McGraw (In re Bell & Beckwith), 821 F.2d 333 (6th Cir. 1987); SIPC v. Morgan, Kennedy & Co., 3 B.C.D. 15 (S.D.N.Y. 1977); Gans v. Reddington (In re Weis Secs, Inc.), [1974-1975 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 94,780 (S.D.N.Y. 1974); In re June S. Jones Co., 52 B.R. 810 (Bankr. D. Or. 1985). The Series 500 Rules were promulgated to make the treatment of customers' claims where trades straddled the filing date consistent and to make the delivery of a confirmation (which completes a contract for statute of fraud purposes) usually controlling.

As SIPC stated in proposing the Series 500 Rules:

> The proposed rules . . . give full effect to the Congressional intent to "satisfy the customers' legitimate expectations" and "restore the customer to his position prior to the broker-dealer's financial difficulties." S. Rep. No. 763, 95th Cong., 2d Sess. 2, [reprinted in], 3 U.S. Code Cong. & Admin. News, 95th Cong., 2d Sess., at 765 (1987). Indeed, the results reached under the proposed rules will affirmatively effectuate the Commission's previously stated view on this subject. . . . [T]hat "[w]hen a customer sells securities, his claim from that time until settlement and delivery of the funds is a claim for cash."
>
> * * * *
>
> [T]he Proposed Rules . . . will provide both nationwide uniformity and reasonable certainty for customers as to how their claims will be treated in the event of the failure of a SIPC member, and will provide an objective standard for determining each claimant's legitimate expectations. . . .[T]he proposed rules are in complete accord with all final judicial decisions on this subject, including cases decided prior to SIPA's enactment.

Similarly, customers wishing to disavow a sale of securities in order to have a "claim for securities" argued that the securities were not *actually* sold by the broker-dealer so that they were still in their account. See id. (emphasis added).

See Rules of the Securities Investor Protection Corp., 53 Fed. Reg. 1793, 1988 WL 236666, at *2-3 (1988) (hereinafter "SIPC Proposed Rules") (emphasis added). Thus, the District Court was correct that under the Series 500 Rules it is the receipt of a confirmation of the purchase or sale of a security, rather than the execution of a trade, that determines whether the customer's net equity claim is one for cash or securities. In this case, however, Claimants did not receive written confirmation of the purchase or sale of an actual security and thus do not fall under the rubric of the Series 500 Rules. See, e.g., Plumbers & Steamfitters Local 490 Severance & Ret. Fund, No. 92CV0349, at 3 (finding that the rules and legislative history cited by claimants on legitimate expectations is "determinative of a security of such type being in existence").

In In re June S. Jones Co., 52 B.R. 810 (Bankr. D. Or. 1985), a case decided prior to SIPC's adoption of the Series 500 Rules but noted in SIPC's Proposed Rules as being in accord with them, 1988 WL 236666, at *3, the court specifically addressed whether customers were entitled to receive either cash or securities in satisfaction of their SIPA claims in a situation where the security existed but had not been purchased prior to the filing date. The claimants relied on Aberdeen Securities and Investors Security Corp. to argue that they had net equity claims for cash. The court rejected their argument noting the distinction between real and non-existent securities:

> In Aberdeen Securities and Investors Security, unlike this case, the securities either never could be purchased, or, if purchased, would have matured into cash prior to the filing date.

In re June S. Jones, 52 B.R. at 813 (emphasis added). When the securities actually existed, the return of the securities, rather than treating the claims for cash, to the customers furthered the express purpose of SIPA. Id. at 814.

The two cases relied on by the District Court do not support the application of the Series 500 Rules to the facts of this case. The first of these cases, SIPC v. Oberweis Secs., Inc. (In re Oberweis Secs., Inc.) 135 B.R. 842 (Bankr. N.D. Ill. 1991), concerned whether a broker-dealer's failure to execute claimants' orders to purchase bona fide money market funds entitled the claimants to interest and dividends that would have been earned had their instructions been followed, in addition to the money they deposited to purchase the bona fide funds. The court held that the claimants' claims for interest and dividends that would have been earned had the purchases been made were not "customer" claims protected by SIPA, but rather, breach of contract or fraud claims. Id. at 846-47. The court relied on the Aberdeen Securities case discussed earlier and relied on by the Trustee, but disregarded by the District Court, in reaching its decision.

In the second case relied on by the District Court, In re Investors Center, Inc., 129 B.R. 339 (Bankr. E.D.N.Y. 1991), the issue did not concern fictitious securities, but rather, whether the confirmation of the sale of a bona fide security gave rise to a claim for cash or a claim for securities. The court held that the confirmation of the sale of bona fide securities gave rise to a claim for cash under the Series 500 Rules, a proposition with which the Trustee had no issue and applied many times in his determination of claims in this liquidation. Neither Oberweis Securities nor Investors Center purported to answer or even address the question that is at issue here.

In addition to its reliance on wholly irrelevant case law, the District Court misinterpreted the basis of the Trustee's determinations. The District Court stated that the Trustee found that the Claimants did not have claims for securities because the Debtor "embezzled" their assets instead of investing them in an existing money market fund. The Trustee's determination that Claimants had claims for cash did not hinge on the Debtor's embezzlement of funds, but in what the Claimants

intended to purchase. Indeed, the Trustee allowed the claims here as customer claims for all of the cash deposited by Claimants, less any withdrawals or redemptions. He also allowed claims for confirmed purchases of bona fide mutual funds that could be identified and purchased on the open market, but were never in fact purchased because Goren embezzled the funds, as claims for securities. Here, Claimants intended to purchase a fund that in fact did not exist. The Debtor, even if it had not embezzled their funds, could never have purchased the bogus mutual funds for them. The only expectation that Claimants objectively could have had, that SIPA is designed to address, was that their money would be available for return to them. In short, it is not the fact that funds were "embezzled" that dictates the result here. It is the wording of the SIPA statute.

Finally, the Series 500 Rules were not enacted to circumvent SIPA's prohibition against allowance of fraud claims as "customer" claims. See SIPC v. Barbour, 421 U.S. 412 (1975) (SIPA was not designed to achieve restitution for fraud). As discussed above and recognized by the district court in In re Adler, Coleman Clearing Corp., the Series 500 Rules were enacted to meet customers "legitimate expectations" in terms of restoring their pre-liquidation position vis a vis the debtor with regard to claims treatment where confirmation of a bona fide securities transaction had occurred. See In re Adler, Coleman Clearing Corp., 263 B.R. 406 (S.D.N.Y. 2001).

In Adler Coleman, claimants contested the bankruptcy court's ruling that they failed to establish that they had claims for securities under the Series 500 Rules on the grounds that they lacked funds to purchase the securities. Id. at 424-26. In that case, fraudulent credits were posted into the claimants' accounts, on the eve of the broker's liquidation filing, from the purported sale of securities that the bankruptcy court had found were practically worthless. Id. at 434. The cash shown in the accounts supposedly derived from these sales was then shown on

confirmations to support purchases of blue chip securities that could never in fact be purchased because their market value far exceeded the fair value of the proceeds in claimants' accounts. Id. at 434. Claimants argued that they had securities claims under the Series 500 Rules because of the confirmations of fictitious purchases and were entitled to the return of the blue chip securities. The Trustee denied their claims.

On appeal, Claimants argued that the bankruptcy court erred because the cash was shown to be in their accounts and the Series 500 Rules did not require immediately available cash. Id. at 430. The claimants relied on Murray v. McGraw (In re Bell & Beckwith), 821 F.2d 333 (6th Cir. 1987) (a case which the Series 500 Rules codified) extensively for the proposition that they had a legitimate expectation that their accounts held securities where they received purchase confirmations. The Adler Coleman court distinguished the facts of the claimants' case from that of Bell & Beckwith by noting that the Bell & Beckwith holding was premised "on the existence of fully performed and enforceable obligations on the trade date." Id. at 432. The court noted that "in holding that trades ordered by customers of a debtor before filing date should be treated vis-à-vis those customers as if subsequently completed by the debtor, the Bell & Beckwith court impliedly assumed that the debtor-broker would be able satisfactorily to complete the transactions in relation to other brokers with which the customers dealt." Id. at 432-33. The court noted that there was nothing in Bell & Beckwith, as there was in Adler Coleman, that remotely resembled the "fraudulent and criminal misconduct which actuated and accompanied the trades" at issue and of which the claimants wished to seek to avail themselves. Id. at 433. The district court properly noted that the Series 500 Rules "safeguard securities customers' legitimate claims to cash and securities held by the debtor in their

accounts prior to the filing date, and also manifest a design to deny protection to transactions tainted by fraud." Id. at 435.

Like the claimants in Adler Coleman, Claimants here seek to "retain the benefits of bargains they struck with their corrupt brokers." Id. at 416. Claimants cannot do so. There are and never have been securities of any class and series that the broker or the Trustee could ever have purchased or held for Claimants. Pre-liquidation, Claimants never have had or could have had anything but a claim for the return of the cash they deposited with a potential claim for damages for fraud or breach of contract. The claim for cash deposited is a net equity claim against the fund of customer property for cash subject to the SIPA limit, and the claim for damages is a general creditor claim.[17]

II. CLAIMANTS' CLAIMS FOR FICTITIOUS DIVIDENDS OR INTEREST EARNED ARE NOT ALLOWABLE CUSTOMER CLAIMS.

The District Court incorrectly held that Claimants are entitled to return of cash equivalent of interest/dividends that were purportedly earned by the bogus mutual funds. Goren, 206 F. Supp. 2d at 352. The law is clear that non-existent dividends or interest supposedly "earned" on non-existent shares are not customer claims protected by SIPA, although they may be allowable general creditor claims. See Focht v. Athens (In re Old Naples Secs., Inc.), No. 2:00-cv-181-FTM-29D, slip. op. at 16 (M.D. Fla. Sept. 30, 2002) (hereinafter "Old Naples II")[18] (rejecting claimants' argument that their net equity included non-existent interest payments);

17. Moreover, Rule 503 makes clear that nothing in the Series 500 Rules "shall be construed as limiting the rights of a trustee in a liquidation proceeding . . . to avoid any securities transactions as fraudulent . . . or otherwise voidable under applicable law." 17 C.F.R. § 300.503(a).

18. A copy of the Old Naples II opinion is contained in the addendum to the brief.

In re Old Naples Securities, Inc., 218 B.R. at 987 ("[t]he Claimants are entitled to no more than a return of principal. Each claim must be reduced by the amount that the claimant received in 'interest' payments."); SIPC v. C.J. Wright & Co. (In re C.J. Wright & Co.), 162 B.R. 597, 610 (Bankr. M.D. Fla. 1993) ("Because debtor misappropriated these funds, claimants have a claim for that which they entrusted to debtor as customer property: the principal amount that was to be invested. Debtor did not convert the interest promised because it was never earned. Debtor only misused claimants' initial investment. Likewise, net equity as defined in SIPA does not contain any reference to providing interest on claims to customers. Thus the most claimants are entitled to receive is the return of the principal invested."); In re Oberweis Secs., Inc., 135 B.R. 842 (Bankr. N.D. Ill. 1991) (rejecting claim for dividends in failure to execute purchase case and stating that claim for dividends is more properly characterized as one for "damages" and is not part of the Claimants' net equity but may be recovered from the general estate).

The cases relied upon by the Court and Claimants below are distinguishable in that they concern the payment of interest/dividends on bona fide mutual funds. In those cases the claimants had an objectively legitimate expectation of receiving interest/dividends because the security in question had actually earned them. Here, the bogus mutual fund was never organized as a mutual fund and had no assets or investments. As noted recently by the Old Naples II court, "where the payments to claimants will be made out of the quasi-public SIPA fund, permitting claimants to recover not only their initial capital investment but also the phony 'interest' payments they received and rolled into another transaction is illogical." Old Naples II, slip. op. at 15. Here, as in Old Naples II, no one disputes that the interest payments were not in fact interest at all. To order the Trustee to pay Claimants the heightened interest promised by a fraudster compounds the fraud and invites even more egregious fraud in the future. (Id. at 16 (noting that

allowing non-existent interest as part of a claimant's "net equity" claim is "inconsistent with the goals of SIPA, which does not purport to make all victimized investors whole but only to partially ameliorate the losses of certain classes of investors").) The Trustee properly determined that the portion of Claimants' claims that sought return of fictitious dividends or interest added to the value of the bogus mutual fund on fictitious customer account statements are not allowable customer claims.

CONCLUSION

For the foregoing reasons, the Trustee and SIPC respectfully request that this Court reverse the District Court's order and uphold the Trustee's determinations treating claims filed for the value of shares in bogus mutual funds as net equity claims for cash in the amount deposited by the Claimants and expunge Claimants' objections with respect to those determinations.

Dated: New York, New York
October 17, 2002

Respectfully submitted,

HUGHES HUBBARD & REED LLP

By: _____
James B. Kobak, Jr. (JK-1218)
One Battery Park Plaza
New York, New York 10004
Tel: (212) 837-6000

Attorneys for James W. Giddens as Trustee for the liquidation of the businesses of New Times Securities Services, Inc., and New Age Financial Services, Inc.

SECURITIES INVESTOR PROTECTION CORPORATION

By: _____
Stephen P. Harbeck (SH-7734)
General Counsel
805 Fifteenth Street, N.W., Suite 800
Washington, D.C. 20005-2207
Tel: (202) 371-8300

OF COUNSEL

Karen A. Caplan
Assistant General Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), Appellants James W. Giddens, as Trustee for the liquidation of the businesses of New Times Securities Services, Inc., and New Age Financial Services, Inc., and the Securities Investor Protection Corporation hereby certify that the foregoing brief is in 14-point New Times Roman font and contains 12,461 words (as counted by this firm's word processing system) and thus is in compliance

with the type-volume limitation set forth in Rule 32(a)(7)(C).

Dated: New York, New York
October 17, 2002

Respectfully submitted,

HUGHES HUBBARD & REED LLP

By: _____

James B. Kobak, Jr. (JK-1218)
One Battery Park Plaza
New York, New York 10004
Tel: (212) 837-6000

Attorneys for James W. Giddens as Trustee for the liquidation of the businesses of New Times Securities Services, Inc., and New Age Financial Services

SECURITIES INVESTOR PROTECTION CORP.
Stephen P. Harbeck (SH-7734)
General Counsel
805 Fifteenth Street, N.W., Suite 800
Washington, D.C. 20005-2207
Tel: (202) 371-8300

1994 U.S. App. LE. , 31347 printed in FULL format.

IN RE: FIRST OHIO SECURITIES COMPANY, Debtor; PLUMBERS and STEAMFITTERS LOCAL 490 SEVERANCE AND RETIREMENT FUND, et al., Plaintiffs-Appellants, and INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN LOCAL NO. 55 HEALTH AND WELFARE FUND, Plaintiff, v. WILLIAM APPLETON, TRUSTEE FOR LIQUIDATION OF THE FIRST OHIO SECURITIES COMPANY, et al., Defendants-Appellees.

No. 93-3313

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1994 U.S. App. LEXIS 31347

November 1, 1994, Filed

NOTICE: [*1]

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 39 F.3d 1181, 1994 U.S. App. LEXIS 37514.

Certiorari Denied March 20, 1995, Reported at: 1995 U.S. LEXIS 2043.

PRIOR HISTORY: United States District Court for the Northern District of Ohio. District No. 92-00349. Lambros, District Judge.

CORE TERMS: investor, broker-dealer, liquidation, certificates of deposit, customers, pooled

JUDGES: BEFORE: MARTIN, NORRIS, and DAUGHTREY, Circuit Judges.

OPINIONBY: PER CURIAM

OPINION: PER CURIAM. This appeal stems from a liquidation action brought under the auspices of the Security Investor Protection Act of 1970 (SIPA), as amended in 1978, 15 U.S.C. @@ 78 aaa et seq. The two issues before us concern the proper characterization of certain claims filed in the proceedings and the status of some of the parties who seek recovery of their losses. We find no error in the district court's ruling on these two issues and affirm.

The plaintiffs are trustees of the two union pension funds involved in this litigation, the funds' participants, and two named individual investors. Based

on an agreement with a securities broker-dealer named[*2] Thomas Gilmartin, they thought they had purchased, collectively, over $ 3 million worth of "pooled certificates of deposit" offered by First Ohio Securities Company. But, because of fraudulent activities carried on by Gilmartin -- the founder, chairman, and sole common stockholder of First Ohio Securities -- the certificates were never actually purchased. Instead, Gilmartin comingled the plaintiffs' funds with his own personal assets. He then sent bogus purchase-confirmation notices and fictitious account statements to the various investors to cover his tracks.

When the Security Investor Protection Corporation initiated liquidation proceedings against First Ohio and the case was removed to bankruptcy court, the plaintiffs filed simultaneous claims with the trustee for approximately $ 3 million in securities and for the same amount in cash. The trustee determined that the securities in which the plaintiffs believed they had invested never existed and, therefore, treated their claims as ones for cash, rather than for securities. The trustee also determined that the fund participants were not individual "customers" within the meaning of SIPA and wholly denied their claims. The[*3] bankruptcy court ruled in accordance with the trustee's determination on both these issues, over objections by the plaintiffs, and the district court affirmed.

The distinction between a claim for securities and a claim for cash is significant, because under SIPA, recovery for cash loss is limited to $ 100,000, while protection for loss of securities increases to a maximum of $ 500,000. 15 U.S.C. @ 78 fff-3(a). Unfortunately for the plaintiffs here, the record fully supports the finding by the trustee and by both the bankruptcy and district courts that the "pooled certificates of deposit" which were the subject of the agreement between the plaintiffs and the broker-dealer not only were not purchased by Gilmartin but, indeed, never even existed. Given this fact, the only legal conclusion possible is that the claims against First Ohio were ones "for cash" and not "for securities." As the district judge noted, SIPA is intended to protect investors against a broker-dealer's insolvency; it is not designed to achieve restitution for fraud. We find no error in the district court's ruling on this issue.

The district court was equally correct[*4] in determining that the pension fund participants were not individual "customers," as that term is defined by 15 U.S.C. @ 78 III(2). See SIPC v. Morgan, Kennedy & Co., 533 F.2d 1314, 1317-21 (2d Cir. 1976). Moreover, the plaintiffs' argument that Morgan, Kennedy is inapplicable because of subsequent amendments to SIPA is, simply, not persuasive.

For the reasons given in the district court's order in this case, we AFFIRM the judgment entered by that court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

In re:	NO. 92CV0349
FIRST OHIO SECURITIES CO.,	
PLUMBERS & STEAMFITTERS LOCAL NO. 490 SEVERANCE AND RETIREMENT FUND, et al.,	On Appeal from Case No. 590-0027 (SIPA)
Appellants,	ORDER
v.	
WILLIAM APPLETON, TRUSTEE FOR THE LIQUIDATION OF FIRST OHIO SECURITIES CO.,	
Appellee.	

FILED
93 FEB 18 P 3:27

THOMAS D. LAMBROS, CHIEF JUDGE

This appeal arises out of the Bankruptcy Court's findings and order issued on the 23rd of December, 1991, regarding the Trustee's determination of claims in a proceeding involving the liquidation of a securities broker-dealer pursuant to the Securities Investor Protection Act of 1970 (SIPA). This bankruptcy appeal is taken as a matter of right pursuant to 28 U.S.C. § 158(a) and Bankruptcy Rule 8001(a).

Pursuant to Bankruptcy Rule 8013, the Bankruptcy Court's "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . ." Accord, Stevens Industries, Inc. v. McClung, 789 F.2d 386, 389 (6th Cir. 1986); In re Dixon, 85 B.R. 745 (Bankr. N.D. Ohio 1988). The Bankruptcy Court's

conclusions of law, on the other hand, are subject to de novo review. In re Caldwell, 851 F.2d 852, 857 (6th Cir. 1988).

First Ohio Securities Corporation (FOSC) was a securities broker-dealer that bought and sold securities for the public. On June 22, 1990, Judge David D. Dowd, Jr., entered an order finding that the customers of FOSC were in need of protection, and the liquidation proceedings of FOSC commenced pursuant to SIPA. Customers filed claims with the trustee, and the trustee determined the validity of the claims. Subsequently, customers objected to the trustees determination and hearings were held before Judge Harold F. White. In the instant action, the trustee determined that 540 fund claim, the 490 fund claim, the 55 fund claim, and the Stansberrys' claim should be allowed as claims for cash, and consequently, the trustee paid the claimants $100,000 each. Further, the trustee determined that the claims of the individual participants in the 540 and 490 funds should be denied because they were not "customers" of FOSC as defined by the SIPA. The trustee also denied one of the Stansberrys' claim due to the fact that their account was held as joint tenants with right of survivorship. On December 23, 1991, Judge White issued his findings and order which upheld the trustee's determinations of appellants' claims.

Appellants' first eight statement of issues all contend that the Bankruptcy Court erred when it held that the 540 fund, the 490 fund, the 55 fund, and the Stansberrys each had one claim for cash. Appellants maintain that their claims should have been valid claims for securities. If claims are for cash, the protection under the SIPA is limited to $100,000, but if the claim is for securities, the protection increases to $500,000.

Appellants' assertion that the claims should have been allowed as claims for securities is not supported by the law. The Bankruptcy Court correctly determined that in order to have a claim for a "security" the security must in fact exist. SEC v. Aberdeen Securities Co., 480 F.2d 1121, 1126-27 (3d Cir. 1973); See also In re Brentwood Securities, Inc., 925 F.2d 325, 328-29 (9th Cir. 1991).

The Securities Investor Protection Corporation (SIPC), created under the SIPA, was formed to establish a fund which would act as a limited insurance policy for customers who lose money as a result of broker-dealer insolvencies. SIPC is a non-profit corporation whose members contribute assessments which form the basis for the protection fund. The SIPA was not designed to protect customers from fraud or breach of contract, but was specifically enacted for the purpose of providing limited restitution to customers whose loss is the result of insolvent broker-dealers. In re E.M.S. Government Securities Corp., 90 B.R. 539, 540-41 (Bankr. S.D. Fla. 1988); In re Bell & Beckwith, 124 B.R. 35, 36 (Bankr. N.D. Ohio 1990). Thereby, the appellants' claims for securities are not denied because of the fraud perpetrated, rather they are satisfied as claims for cash to the extent allowed under the SIPA. All of the rules and legislative history cited by appellants on the legitimate expectations and satisfaction of claims for securities is determinative of a security of such type being in existence. Not only were these "securities" never purchased, they never existed. Therefore, with no evidence presented that would enable this Court to find the non-existence of the securities clearly erroneous, the conclusion of law that 490 fund, the 540 fund, the 55 fund, and the Stansberrys were each entitled to one cash claim was correct as a matter of law.

In their ninth statement of issue, appellants maintain that the Bankruptcy Court erred when it denied the claims of the individual participants in the 540 and 490 funds. SIPA defines a "customer" as,

> [A]ny person . . . who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities account of such person. . . . The term "customers" included . . . any person who has deposited cash with the debtor for the purchase of securities. 15 U.S.C. § 78 lll(2).

In SIPC v. Morgan, Kennedy & Co., 533 F.2d 1314 (2d Cir. 1976), the court directly addressed the issue of whether individual participants in a pension fund were "customers" of a failed broker. The individual participants did not qualify as customers because they had no direct dealings with the broker-dealers, nor did they entrust cash or securities directly to the broker-dealers. The court held that the actual customers of the broker-dealer were the funds themselves and not the individual participants in the funds. Morgan, Kennedy & Co., 533 F.2d at 1317-21. Therefore, the Bankruptcy Court was correct in denying the claims of the individual participants in the 490 and 540 funds.

In the tenth statement of issue, appellants contend that the Bankruptcy Court erred in finding and concluding that the Stansberrys held one joint account with right of survivorship and not two separate accounts, thus only entitling them to one claim for cash instead of two claims for securities. The Bankruptcy Court's finding that the Stansberry account was held as joint tenants was not clearly erroneous. Evidence indicated that the confirmation statements sent to the Stansberrys were directed to David E. Stansberry and Violet M. Stansberry JTWROS (joint tenants with right of survivorship), and further, the account application form completed by Mr. Stansberry reflected that a

single account was opened in the name of Mr. & Mrs. David E. Stansberry (Violet M.) JTWROS. Therefore, the Bankruptcy Court's finding that only one account existed was not clearly erroneous, nor was the conclusion that such an account entitled the holders to one cash claim against the SIPC fund in an amount not to exceed $100,000 contrary to the law. See Morgan, Kennedy & Co., 533 F.2d at 1319-20; In re Investors Security Corp., 6 B.R. 415, 419 (Bankr. W.D. Pa. 1980).

Therefore, after a complete review of the record, and upon full consideration of the parties' objections thereto, this Court finds that the Bankruptcy Court's findings of fact were not clearly erroneous. Additionally, after a de novo review of the Bankruptcy Court's conclusions of law, this Court finds that the Bankruptcy Court applied the relevant legal standards. Therefore, the Bankruptcy Court's Order Re: Objections to the Trustee's Determination of Claims and the Findings Re: Objections to the Trustee's Determination of Claims are fully adopted and incorporated herein and, thus, affirmed. Accordingly, this case is dismissed and terminated.

IT IS SO ORDERED.

Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO

DATED: 2/18/93

FILED
93 FEB 18 P3:21

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

In re:	NO. 92CV0349
FIRST OHIO SECURITIES CO.,	
PLUMBERS & STEAMFITTERS LOCAL NO. 490 SEVERANCE AND RETIREMENT FUND, et al.,	On Appeal from Case No. 590-0027 (SIPA)
Appellants,	JUDGMENT
v.	
WILLIAM APPLETON, TRUSTEE FOR THE LIQUIDATION OF FIRST OHIO SECURITIES CO.,	
Appellee.	

THOMAS D. LAMBROS, CHIEF JUDGE

In accordance with the Order of this date, the findings and orders of the Bankruptcy Court are fully adopted and incorporated herein, and thus, affirmed. Accordingly, this action is hereby terminated and dismissed.

IT IS SO ORDERED.

Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO

DATED: 2/18/93

#843

FILED

92 DEC -1 AM 10:37

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
AKRON

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN THE MATTER OF

CASE NO. 590-0072 (SIPA)
ADV. NO. 92-5085

FIRST OHIO SECURITIES COMPANY

Debtor

ORDER

* * * * * * * * * * * * * * * *

WILLIAM APPLETON, TRUSTEE for The Liquidation of First Ohio Securities Company

Plaintiff

vs.

HARRY W. HARDY, et al.,

Defendants

This matter is before the court on the motion to dismiss filed by defendants Harry W. Hardy and Mary C. Hardy ("the Hardys") pursuant to Federal Bankruptcy Rule 7012 and Fed. R. Civ. P. 12(b)(6).

BACKGROUND AND DISCUSSION OF LAW

Debtor, First Ohio Securities Company ("FOSC"), was a securities broker/dealer. On June 22, 1990, pursuant to an application by the Securities Investor Protection Corporation, ("SIPC"), the United States District Court for the Northern District of Ohio entered an order placing FOSC in a liquidation proceeding under the Securities Investor Protection Act ("SIPA"), appointing Joseph Patchan, Esq., as Trustee for the liquidation

proceeding and removing the proceeding to the bankruptcy court. On April 19, 1991, William Appleton succeeded Joseph Patchan as Trustee ("Trustee").

Prior to the commencement of this case, the Hardys paid FOSC $140,000 for the purchase of securities. The Hardys made three payments to FOSC totalling $130,000 for the purchase of three certificates of deposit as follows:

a. $10,000.00 paid to FOSC on December 5, 1989;

b. $50,000.00 paid to FOSC on December 13, 1989;

c. $70,000 paid to FOSC on June 8, 1989.

The Hardys made a fourth payment of $10,000 to FOSC on January 18, 1990 which was to be invested in the All America Fund ("AAF"). The AAF was purported to be a mutual fund investing in Northeastern Ohio manufacturing businesses. It was later determined that the AAF never existed.

SIPA was enacted to protect individual investors from financial hardship resulting from broker/dealer failures. SIPC is a non-profit corporation which comprises most registered brokers-dealers. Members of SIPC are assessed in order to create a fund which is used to satisfy customer claims resulting from broker-dealer insolvencies. (See 15 U.S.C. §§ 78aaa et seq. and In re First Ohio Securities Co., Case No. 590-0072, slip op. at 2, N. D. Ohio Dec. 23, 1991.) SIPC is a non-profit organization with funds available for the satisfaction of customer claims resulting from broker-dealer insolvencies. Id. at 9.

The Hardys filed a claim in this case for $140,000. Pursuant to the provisions of SIPA, the Trustee makes a determination of

customer claims. (See 15 U.S.C. §§ 78fff et seq.) In August 1990, the Trustee paid the Hardys $141,203.58 on the certificate of deposit portion of the Hardys claim ($130,000 and interest). The Trustee asserts that he made this payment based on the belief that the certificates of deposit were in existence. However, the Trustee later determined that neither the certificates of deposit nor the AAF investment actually existed.

The Trustee asserts that because their investments never existed, the Hardys' claim is not for securities, but instead is one for cash. Payment of cash claims is limited to $100,000. [See 15 U.S.C. §§ 78fff-3(a)(1).] Therefore, the Trustee argues that the Hardys are not entitled to receive more than $100,000 for payment of their claims and has filed this turnover proceeding pursuant to Title 11 U.S.C. § 542(a) to recover the $41,203.58 allegedly paid in excess on the Hardys' claim.

In their motion to dismiss filed May 15, 1992, the Hardys assert that the Trustee should be prevented from recovering the $41,203.58 because a SIPA proceeding does not create an "estate" as that term is defined in § 541, and § 542 limits recovery to "property of the estate." The Hardys further argue that even if an estate is created, SIPC advances are not property of the estate but instead are distinct from the "general estate."

When considering a motion to dismiss for failure to state a claim, a court must assume that all of the facts alleged in the complaint are true; and dismissal is inappropriate unless the plaintiff can prove no set of facts entitling him to relief. In re Edmonds, 924 F. 2d 176, 180 (10th Cir. 1991).

After reviewing the parties' briefs and the law in this matter, the court concludes that the defendants' arguments are specious and therefore their motion to dismiss should be denied.

The court finds that pursuant to § 78fff(b), liquidations under SIPA proceed in accordance with the provisions of Title 11, including the creation of an estate pursuant to Title 11 U.S.C. § 541. In re Bell & Beckwith, 112 B. R. 863, 866 (Bankr. N. D. Ohio 1990). See also In re Investment Bankers, Inc., 135 B. R. 659 (Bankr. D. Colo. 1991). The court further finds that the Trustee has the power to recover overpayments. See In re Bell & Beckwith, 937 F. 2d 1104 (6th Cir. 1991).

The defendants shall have 10 days from the date of this order within which to file an answer in this adversary proceeding.

IT IS SO ORDERED.

H. F. White
Bankruptcy Judge

I certify that on the 1st day of Dec, 1992, I sent a copy of this Order to:

David J. Naftzinger
Dean D. Gamin
1100 National City Bank Bldg.
629 Euclid Avenue
Cleveland, Ohio 44114

Thomas R. Lucchesi
Hilary W. Rule
3200 National City Center
Cleveland, Ohio 44114

Eileen Sears

FILED

2002 SEP 30 PM 4:30

CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT MYERS DIVISION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re: Old Naples Securities, Inc.,

Debtor.

Theodore H. Focht, as Trustee, and Securities Investor Protection Corp.,

Appellants,

v.

Tessie C. Athens, Stephen and Linda Compos, Charles and Holly Conroy, Patricia Fotopoulos, John and Margaret Heist, Theodore and Katina Kourpas, David and Anita Linden, and Peter and Deborah Loupos,

Appellees.

Dean P. McDermott, and Compos-McDermott Securities, Inc.,

Appellants,

v.

Theodore H. Focht, as Trustee, and Securities Investor Protection Corp.,

Appellees.

Theodore H. Focht, as Trustee, and Securities Investor Protection Corp.,

Appellants,

v.

Kathleen Kovacs,

Appellee.

MEMORANDUM AND ORDER

Case No. 2:00-cv-181-FTM-29D

Case No. 2:00-cv-182-FTM-29D

Case No. 2:00-cv-327-FTM-29D

This matter is before the Court[1] on consolidated appeals from three orders of the United States Bankruptcy Court for the Middle District of Florida.

BACKGROUND

This case arises out of the insolvency of Old Naples Securities, Inc. ("ONSI"). ONSI was a securities broker-dealer with offices in Naples, Florida and Bethlehem and Wyomissing, Pennsylvania. The President and sole shareholder of ONSI, James Zimmerman, operated out of the Naples office. The Bethlehem branch office was owned and operated by Stephen Compos and Dean McDermott, who are brothers-in-law and who are also both claimants in these proceedings. Together, Compos and McDermott also owned Compos-McDermott Securities, Inc. ("CMSI"), an insurance agency and another claimant herein. The Wyomissing branch was operated by Daniel Shaffer.

ONSI was never profitable. To sustain operations, Zimmerman continually borrowed money. Eventually, when the substantial loans became due, he hatched a Ponzi scheme. He convinced Compos, McDermott, and Shaffer to persuade their clients to send him money for the alleged purchase of bonds. The clients were promised a risk-free investment with a 30- to 45-day return of the principal plus a guaranteed percentage return on the principal, usually 7%. The branch office operators earned an additional 9% commission on each "investment." Compos, McDermott, CMSI, and Shaffer also provided their own money to Zimmerman,

[1] These appeals were originally assigned to the Hon. Patricia C. Fawsett. They were subsequently reassigned to the Hon. John E. Steele. Pursuant to an inter-circuit assignment under 28 U.S.C. § 294(d), the undersigned is now the Judge of record in this case.

with the same promise that they would receive a risk-free return on their principal of 16% (7% plus the 9% commission) within 45 days.[3]

In reality, Zimmerman was not buying any bonds but was using the funds from one group of clients to pay the principal and return of the other group of clients. The scheme eventually collapsed in August 1996, after McDermott confronted Zimmerman about his failure to pay some of the clients and Zimmerman confessed the scheme. McDermott and his attorney then notified the FBI.

On August 28, 1996, the District Court entered an order finding that the customers of ONSI were in need of the protections of the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa et seq., and appointing Theodore H. Focht as Trustee. The Bankruptcy Court then established a procedure for filing and resolving customer claims. Under the relevant provisions of SIPA, only "customers" of ONSI are entitled to SIPA's protections and may recover under SIPA's reimbursement provisions. "Customer" is defined in pertinent part as "any person who has deposited cash with [ONSI] for the purpose of purchasing securities." Id. § 78*lll*(2). The Trustee eventually denied many of the claims, finding that the claimants were not "customers" of ONSI because the transactions were loans, not the purchase of securities as required by SIPA § 78*lll*(2) and (14). Four groups of claimants appealed the Trustee's decision to the Bankruptcy Court, and three of those cases are now before this

[3] The Trustee points out that McDermott, Compos, and CMSI were thus all promised an annualized rate of return of 128% to 192%.

Court.

The claims of one group of claimants have been completely disposed of. This group, referred to as the Hoebner and Brown claimants, was initially denied customer status by the Trustee. The Bankruptcy Court reversed the decision of the Trustee, finding that the three claimants were customers of ONSI and were entitled to the protections of SIPA. The District Court and Eleventh Circuit affirmed. In re Old Naples Sec., Inc., 230 B.R. 441 (M.D. Fla. 1999); In re Old Naples Sec., Inc., 223 F.3d 1296 (11th Cir. 2000). The parties disagree about the import of that case to the instant appeals.

The Bankruptcy Court similarly overturned the Trustee's decision with respect to another group of claimants (the "Athens claimants"). This group is made up of Tassie Athens, Charles and Holly Conroy, Patricia Fotopoulos, John and Margaret Heist, Theodore and Katina Kourpas, David and Anita Linden, Peter and Debra Loupos, and Stephen and Linda Compos. As mentioned above, Stephen Compos is one of the owners of CMSI and, together with McDermott, operated ONSI's branch office in Bethlehem, PA. The Trustee[3] has appealed the Bankruptcy Court's decision on customer status only as to Compos. The Trustee also contends that the Bankruptcy Court erred in determining the payment amounts due to the other Athens claimants.

In a separate opinion, the Bankruptcy Court held that another claimant, Kathleen

[3] The Trustee and the Securities Investor Protection Corporation ("SIPC") are joint appellants/appellees in these consolidated matters. The Court will refer to them collectively as the "Trustee."

Kovacs, was a customer of ONSI. The Trustee appeals that order. The briefing for the Kovacs and Athena appeals has been consolidated.

Finally, the Bankruptcy Court denied customer status for the last group of claimants, made up of McDermott and CMSI. They have appealed that decision, and the briefing on that appeal is separate from the Athena/Kovacs briefing.

DISCUSSION

A. Standard of Review

One of the key issues to be decided in these cases is whether Compos, McDermott, and CMSI are entitled to customer status under SIPA. There is no dispute that this issue is a question of law that receives de novo review in this Court. See, Investor Prot. Corp. v. Wise (In re Stalvey & Assocs.), 750 F.2d 464, 468 (5th Cir. 1985). The Bankruptcy Court's factual findings, however, are reviewed only for clear error. Green Tree Acceptance, Inc. v. Calvert (In re Calvert), 907 F.2d 1069, 1071 (11th Cir. 1990).

B. McDermott and CMSI's Appeal

McDermott and CMSI contend that the Bankruptcy Court erred in determining that they were not "customers" of ONSI and thus are not entitled to the protections of SIPA. According to McDermott and CMSI, the Bankruptcy Court's findings as to the other claimants mandate a finding that they, too, were customers of ONSI. Further, McDermott argues that the Bankruptcy Court erred in applying the doctrine of judicial estoppel to preclude McDermott from contending in this proceeding that the money he provided to ONSI

was anything other than a loan. The Trustee opposes the appeal. He asserts as an alternative ground for affirmance that the Bankruptcy Court could have determined as a matter of law that McDermott was not entitled to the protections of SIPA because the SEC found that McDermott violated the securities laws with respect to the transactions at issue.

1. Law of the case

McDermott and CMSI's claim that because the Bankruptcy Court found that the other claimants were customers of ONSI necessarily means that McDermott and CMSI were customers as well is without merit. There are distinct differences between the other claimants (aside from Compos, whose claim will be discussed in more detail below) and McDermott and CMSI. First, McDermott and CMSI are not the "unsophisticated participant[s] in securities transactions" that SIPA was designed to protect. In re Old Naples Sec., 223 F.3d at 1305 (quoting In re Gilbraltar, Inc., 53 B.R. 324, 329 (Bankr. C.D. Cal. 1985)). McDermott is an experienced securities broker and has a doctorate degree in finance with a concentration in municipal finance. McDermott's high level of knowledge about securities transactions in general and about ONSI in particular sets him apart from the other claimants and itself justifies the differential treatment he received from the Bankruptcy Court.

Further, as the Bankruptcy Court found, McDermott (and through McDermott,

CMSI") has failed to show that he entrusted money to ONSI "for the purpose of purchasing securities." 15 U.S.C. § 78*lll*(2). "When a claimant entrusts cash with a brokerage, and the broker misappropriates the money, courts must determine whether the intended investment as understood by the claimant would have been in a 'security' as defined by SIPA." In re Old Naples, 223 F.3d at 1304 (emphasis added).

In this situation it is clear that the transactions as understood by McDermott were not purchases of securities. First, McDermott testified that he understood the transactions as loans, or as payments to escrow to allow Zimmerman to purchase the unspecified bonds. Whether or not McDermott should be judicially estopped from disavowing this testimony, the Bankruptcy Court was within its discretion to consider this testimony when determining what McDermott knew or did not know about the transactions in question. McDermott's previous testimony, even in light of his later testimony to the contrary, gives ample support to the Bankruptcy Court's conclusions regarding his status as a customer of ONSI.

Moreover, it stretches credulity that McDermott would have believed that these supposedly "risk-free" transactions with extraordinary guaranteed rates of return were in fact legitimate transactions in securities. Although bonds are certainly one of the safest securities investments, the Court is aware of no bonds that pay the astronomical rates of return that were promised to the claimants in this case. An unsophisticated investor might be forgiven

---

[4] The Bankruptcy Court correctly found that the majority of CMSI's claim was for unpaid commissions, for which CMSI is not entitled to customer status. (See Feb. 9, 2000, Order at 11.)

for believing that the transactions actually involved bonds. McDermott must have known differently, and he cannot now claim that he, too, was duped. As the Eleventh Circuit noted in the case involving the Heebner and Brown claimants, "willful ignorance on the claimant's part in the face of clear indications that an investment scheme is suspect may preclude a finding that the claimant intended to purchase 'securities' covered by the Act." Id. at 1505. McDermott's profession of ignorance in this case is tantamount to willful ignorance. His claim and the claim of CMSI were properly disallowed by the Bankruptcy Court.

2. Judicial estoppel

Alternatively, the Bankruptcy Court did not err in applying the doctrine of judicial estoppel to preclude McDermott from claiming that the transactions were not loans. "Judicial estoppel is applied to the calculated assertion of divergent sworn positions." Am. Nat'l Bank of Jacksonville v. Fed. Deposit Ins. Corp., 710 F.2d 1528, 1536 (11th Cir. 1983). The policy underlying judicial estoppel "is directed against those who would attempt to manipulate the court system" through asserting divergent positions in judicial proceedings. Johnson Serv. Co. v. Transam. Ins. Co., 485 F.2d 164, 174 (5th Cir. 1973). This Court should review the Bankruptcy Court's application of the doctrine simply to determine whether that application is consistent with the policy underlying the doctrine. Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1261 (11th Cir. 1988), abrogated on other grounds, Grogan v. Garner, 498 U.S. 279 (1991).

McDermott presses a different standard for the application of judicial estoppel, citing

cases from the First Circuit Court of Appeals as "informative" on the subject, and as requiring a more searching inquiry than the cases cited above. He offers no reason why this Court should disregard on-point precedent from the Eleventh Circuit in favor of non-binding precedent from another Court of Appeals. Moreover, no court in this Circuit has followed the reasoning of the cases cited by McDermott, nor has the Eleventh Circuit retreated from the description of the doctrine of judicial estoppel in American National Bank of Jacksonville. Indeed, the court very recently relied on that description. Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002). This Court is bound to follow Eleventh Circuit precedent and will do so here.

In his testimony before the SEC, McDermott repeatedly refers to the transactions at issue as "loans." He now contends that such terminology was a shorthand reference chosen by the SEC attorneys and McDermott's attorney to refer to the transactions. McDermott misrepresents the record. In fact, the term "loan" was a shorthand chosen by McDermott and his attorney because, as the attorney and McDermott both insisted, loans were how McDermott understood the transactions. (See Focht Ex. 46 [McDermott dep.] at: 24 (McDermott's attorney: " . . . for these purposes we can call them loans because this is [McDermott's] understanding of what was occurring"); 24-25 (McDermott: "[Loan] is how they were described to me"); 28 (McDermott's attorney: "[McDermott] believes these were loans and Mr. McDermott will testify that he always believed these were loans").)

Given this evidence and McDermott's attempt at the evidentiary hearing before the

Bankruptcy Court to assert a completely divergent position, the Bankruptcy Court was well within its discretion to apply judicial estoppel and preclude McDermott from claiming that he understood the transactions as anything other than loans. It is in precisely this situation that courts must apply the doctrine of judicial estoppel. Before the SEC, McDermott thought that characterizing the transactions as loans would help his position and lead the SEC to conclude that it had no jurisdiction. Before the Bankruptcy Court, however, he realized that characterizing the transactions as loans would preclude any recovery under SIPA, so he changed his story. The policy behind the doctrine of judicial estoppel requires the court to step in in such a situation and protect the integrity of its proceedings. The Court affirms the Bankruptcy Court's determination on judicial estoppel.

3. The *Packer, Wilbur* Doctrine

The Trustee presses an alternative ground on which to affirm the Bankruptcy Court. He contends that because the SEC found that McDermott and Compos violated securities laws with respect to the transactions at issue, they are not entitled to the protections of SIPA. See SEC v. Packer, Wilbur & Co., 498 F.2d 978, 984-85 (2d Cir. 1974) (finding that "one who engages in a fraudulent transaction cannot reap the benefits of the Act's intended protection"). McDermott asserts that the doctrine espoused in Packer, Wilbur is limited to those who engage in a willful and/or knowing violation of the securities laws. According to McDermott, the SEC at most found that McDermott and Compos failed to conduct a sufficient investigation and ignored "red flags" that should have alerted them to the

fraudulent nature of the transactions.

The holding of Packer, Wilbur and its progeny are not as restricted as McDermott argues. In March of this year, the Bankruptcy Court for the Southern District of New York specifically found that the Packer, Wilbur doctrine was not limited to cases of knowing or active participation in the securities law violations. In re Adler, Coleman Clearing Corp., 277 B.R. 520, 558-59 (Bankr. S.D.N.Y. 2002). The court held that a claimant could be denied customer status under SIPA for merely "clos[ing] his eyes" to the wrongful nature of the transactions or for even less egregious behavior. Id. at 559. Under this reading of the Packer, Wilbur doctrine, McDermott and Compos are undoubtedly barred from obtaining customer status in this matter.

However, as McDermott points out, neither the Eleventh Circuit nor any Florida court has adopted, applied, or even cited the Packer, Wilbur doctrine. Thus, it is not clear that the doctrine applies in this case. The Court is reluctant to impose a bar on SIPA recovery based entirely on cases which are not binding precedent. Because the Court has already determined that other factors preclude McDermott and CMSI from obtaining customer status in this matter, it is not necessary to conclusively determine the applicability of the Packer, Wilbur doctrine to this case and in this court. The Court believes that the policies behind the Packer, Wilbur doctrine are sound, namely precluding customer status to those who are claimants only by virtue of their violations of the securities laws. However, the Court will leave to another day the question of whether the doctrine should be the law in this District.

C. Kovacs and the Athens Claimants

The Trustee does not take issue with the Bankruptcy Court's findings that Ms. Kovacs and the majority of the Athens claimants were customers of ONSI and are entitled to the protections of SIPA. He asserts, however, that the Bankruptcy Court erred in finding that Stephen Compos was a customer of ONSI. He also argues that the Bankruptcy Court's calculation of the amounts due the claimants was erroneous because it did not offset any amounts that the claimants received as interest or return of principal from ONSI or CM3I.[5]

1. Compos' claim

The only ground on which the Trustee relies for his argument that Compos' claim should be denied is the Packer, Wilbur doctrine, discussed in detail above. As noted, however, that doctrine has not been adopted by the courts of this District or of this Circuit. The Court will not apply Packer, Wilbur to preclude Compos from obtaining customer status.

However, as with McDermott, there are other grounds on which to deny Compos customer status in this matter. Although Compos does not have a graduate degree in finance, he is a registered securities broker with fairly significant experience in bonds. (See Poole Ex. 57 [Compos Dep.] at 14.) Thus, like McDermott, Compos knew or should have known that

[5] With respect to Ms. Kovacs' claim, the Bankruptcy Court applied the offset requested by the Trustee. Thus, it is not clear what portion of the Bankruptcy Court's decision regarding Ms. Kovacs the Trustee is appealing. Ms. Kovacs did not take a cross-appeal, although her counsel urges the Court to reverse the offset applied against her claim "for fairness and consistency's sake." (Appellees' Opp'n Mem. at 25.) As the Trustee notes, however, failure to take an appeal deprives this Court of jurisdiction over any claim Ms. Kovacs might have regarding the offset.

the extraordinarily high rates of return promised by Zimmerman could not have arisen from legitimate bond transactions. Indeed, Compos testified that he did not do any bond work at CMSI after 1992 because the rates were so low. (Id. at 17.) The same standard applied above to McDermott should apply to Compos: "willful ignorance on the claimant's part in the face of clear indications that an investment scheme is suspect may preclude a finding that the claimant intended to purchase 'securities' covered by the Act." In re Old Naples, 223 F.3d at 1305. Compos' willful ignorance prevents him from obtaining the protections of SIPA.[4] The Bankruptcy Court should have disallowed his claim.

2. Amounts due to claimants

The dispute over what amount is due to the remaining claimants arises, in part, because of the inconsistent recoveries allowed by the Bankruptcy Court in this case. In the Heebner and Brown case, the court allowed the Trustee to subtract from the final recovery any principal amount and/or interest each claimant received from ONSI or CMSI. Similarly, in sustaining Ms. Kovacs' objections to the Trustee's denial of her claim, the Bankruptcy Court determined that the amount due Ms. Kovacs would be set off by any amounts she received from ONSI or CMSI. However, in granting the Athens claimants' Motion to Alter or Amend the Judgment, the Bankruptcy Court simply allowed the claims and did not

[4] Compos urges the Court to allow his wife's claim, contending that she at least is an innocent investor. The record shows, however, that Mrs. Compos played absolutely no role in these transactions other than as joint holder of the account from which the money was drawn. Thus, her claim rises and falls with her husband's claim. See SEC v. Provident Sec., Inc., 452 F. Supp. 477, 478 n.3 (S.D.N.Y. 1978).

address whether those claims should be offset by any amounts the claimants received from ONSI or CMSL.

SIPA provides that a customer of a defunct brokerage house is entitled to receive his or her "net equity" from the SIPA fund, up to defined statutory limits. 15 U.S.C. § 78fff-2(b). The relevant statutory limit in this case is $100,000 per claimant. Id. § 78fff-3(a). To the extent a customer's claim exceeds the statutory limit, he or she may participate in the general bankruptcy estate as an unsecured creditor. Id. § 78fff-2(c). The Trustee contends that the Bankruptcy Court's failure to offset the claims was erroneous because net equity does not include interest or other payments received. According to the Trustee, participants in a Ponzi scheme such as that involved here are entitled only to receive their net loss, or the amount invested less any payments received.

In support of his argument, the Trustee cites In re C.J. Wright & Co., 162 B.R. 597 (Bankr. M.D. Fla. 1993). In that case, Bankruptcy Judge Proctor found that claimants, who believed they were investing in certificates of deposit but were in fact victims of a Ponzi scheme not unlike the scheme in this case, were not entitled to recover any more than what each entrusted to the broker, less any "interest" or other payments received by the claimant. Id. at 610. As the court noted, under SIPA, claimants only have a claim to that which they entrusted to the broker, which is only the principal amount invested. Id. Because SIPA's definition of net equity does not include interest, the court overruled the claimants' claim that they were entitled to recover the interest they expected to receive from the certificates of

deposit. Id. In that case, however, all claimants agreed that the amount payable out of the SIPA fund should be reduced by any distribution the claimants received from the broker.

The Athens claimants argue that C.J. Wright is distinguishable, but offer no concrete reason for distinguishing it. Nor do the Athens claimants point to any other case that supports their position. Their only argument is that equity requires that all claimants be allowed whatever "interest" payments they might have rolled into a subsequent transaction. They contend that a person who received an interest payment but chose to keep that payment rather than roll it into another transaction cannot now be forced to disgorge that interest payment, and thus that it would be inequitable to force the claimants to disgorge those payments. The Athens claimants also urge the Court to ignore the disposition of the claims of the Hoebner and Brown claimants because those claimants did not contest the offset applied by the Trustee.

There is very little caselaw on point for determining what constitutes a customer's net equity in a situation such as this. Indeed, C.J. Wright is one of the only cases involving a Ponzi scheme scenario that addressed the applicability of an offset for payments received. The Court is convinced, however, that the reasoning of C.J. Wright is sound and, moreover, is fully applicable to the instant matter. Especially where the payments to claimants will be made out of the quasi-public SIPA fund, permitting claimants to recover not only their initial capital investment but also the phony "interest" payments they received and rolled into another transaction is illogical. No one disputes that the interest payments were not in fact

interest at all, but were merely portions of other victims' capital investments. If the Court were to agree with the Athens claimants, the fund would likely end up paying out more money than was invested in Zimmerman's Ponzi scheme. This result is not consistent with the goals of SIPA, which does not purport to make all victimized investors whole but only to partially ameliorate the losses of certain classes of investors. See Packer, Wilbur, 498 F.2d at 983.

Moreover, to allow the Athens claimants to keep the "interest" payments they received would create inconsistent results within the same case. The Heebner and Brown claimants' claims have been fully litigated, and those claims were offset by payments those claimants received from ONSI. Similarly, Ms. Kovacs' claim is offset by the payments she received. The Athens claimants offer no reason why they should reap the benefit of the payments they received when none of the other claimants reaped such benefit.

The Court is convinced that the Trustee correctly calculated the amounts due the Athens claimants, other than Stephen and Linda Compos, whose claim is denied in its entirety. Each claimants' claim must be reduced by any amounts the claimant received from ONSI or from CMSI, whether as "interest," return of principal, or any other payment. To the extent the Bankruptcy Court's order failed to address this issue or failed to apply the offsets requested by the Trustee, that order is reversed.

3. Costs and fees

On the last page of their opposition memorandum, the Athens claimants ask the Court

to give them pre- and post-judgment interest and taxable costs of litigation, or to remand that issue to the Bankruptcy Court for determination. They offer absolutely no argument or caselaw support for this request. There is nothing in the record to indicate that the Athens claimants have ever filed a formal claim for such interest or costs.

SIPA does not provide for the payment of any interest to customer/claimants. C.J. Wright, 162 B.R. at 610. Nor is there any provision for the payment of costs or attorney's fees. Moreover, as the Trustee notes, the Athens claimants' failure to file a bill of costs in compliance with the Local Rules precludes any claim for recovery of litigation costs. See M.D. Fla. Bankr. L.R. 7054-1. The Athens claimants are not entitled to recover any interest, costs, or attorney's fees from the Trustee in this matter.

CONCLUSION

Based on the files, record, and proceedings herein, the Court determines that the Trustee's decision to deny customer status to Compos, McDermott, and CMSI is correct, and that the Trustee correctly calculated the amounts due the Athens claimants. Accordingly, IT **IS HEREBY ORDERED** that:

1. The Order Granting Motion to Alter/Amend Judgment (Bankr. Doc. No. 278) is **AFFIRMED** in part and **REVERSED** in part as follows:
   a. Claimants Stephen and Linda Compos' objections to Trustee's determination are **OVERRULED**;
   b. The remaining claimants' claims shall be limited to their actual

investments less any payment received as interest, return of principal, or otherwise, as set forth more fully above;

2. The Order Overruling Objections to Trustee's Determination of Claim Nos. 137 and 138 of Dean McDermott and Compos-McDermott Securities, Inc. (Bankr. Doc. No. 305) is AFFIRMED;

3. The Order Sustaining Objections to Trustee's Determination of Claim No. 136 of Kathleen Kovacs (Bankr. Doc. No. 312) is AFFIRMED; and

4. The Clerk is DIRECTED to transmit a Certified Copy of this Order to the Clerk of the United States Bankruptcy Court.

Dated: September 30, 2002

Paul A. Magnuson
United States District Court Judge