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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.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda) Ltd., Pacific West Health Medical Center Inc. Employees Retirement Trust, Harel Insurance Company Ltd., Martin and Shirley Bach Family Trust, Natalia Hatgis, Securities & Investment Company (SICO) Bahrain, Dawson Bypass Trust, St. Stephen's School, Walter M. Noel, Jr., Jeffrey H. Tucker, Andrés Piedrahita, Lourdes Barreneche, Robert Blum, Cornelis Boele, Gregory Bowes, Vianney d'Hendecourt, Yanko della Schiava, Harold Greisman,	Adv. Pro. No. _____

Jacqueline Harary, David Horn, Richard Landsberger, Daniel E. Lipton, Julia Luongo, Mark McKeefry, Charles Murphy, Corina Noel Piedrahita, Maria Teresa Pulido Mendoza, Santiago Reyes, Andrew Smith, Philip Toub, and Amit Vijayvergiya,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF TRUSTEE'S APPLICATION FOR ENFORCEMENT OF AUTOMATIC STAY AND RELATED STAY ORDERS AND ISSUANCE OF PRELIMINARY INJUNCTION

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Irving H. Picard, as trustee (the "Trustee") for the substantively consolidated liquidation of the estate of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"), and the estate of Bernard L. Madoff, individually ("Madoff"), by and through his undersigned counsel, respectfully submits this memorandum of law in support of his application ("Application") pursuant to sections 362(a) and 105(a) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") and SIPA §§ 78eee(a)(3) and 78eee(b)(2)(A) and (B), to: (i) enforce the automatic stay of the Bankruptcy Code, SIPA §§ 78eee(b)(2)(A) and (B), and the related orders of the United States District Court for the Southern District of New York, dated December 15, 2008, December 18, 2008, and February 9, 2009 (the "Stay Orders"); (ii) declare the matter of *Anwar v. Fairfield Greenwich Ltd.*, No. 09-00118 (S.D.N.Y. filed Jan. 7 2009) (as subsequently consolidated, the "Anwar Action") void *ab initio* as against the defendants in the Trustee's action (the "Trustee's Action") against various Fairfield Greenwich Group ("FGG") entities and individuals (the "Trustee's FGG Defendants")[1] and that the settlement of those claims in the Anwar Action (the "Settlement") is thus void; and (iii) preliminarily enjoin the defendants captioned above (the "Injunction Defendants") from consummating the Settlement, including transferring any money or property in connection with the Settlement, executing any judgments,

[1] The Trustee's FGG Defendants are: Fairfield Sentry Limited, Greenwich Sentry, L.P., Greenwich Sentry Partners, L.P., Fairfield Sigma Limited, Fairfield Lambda Limited, Chester Global Strategy Fund Limited, Chester Global Strategy Fund, Irongate Global Strategy Fund Limited, Fairfield Greenwich Fund (Luxembourg), Fairfield Investment Fund Limited, Fairfield Investors (Euro) Limited, Fairfield Investors (Swiss Franc) Limited, Fairfield Investors (Yen) Limited, Fairfield Investment Trust, FIF Advanced, Ltd., Sentry Select Limited, Stable Fund, Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda), Ltd., Fairfield Greenwich Advisors LLC, Fairfield Greenwich GP, LLC, Fairfield Greenwich Partners, LLC, Fairfield Heathcliff Capital LLC, Fairfield International Managers, Inc., Fairfield Greenwich (UK) Limited, Greenwich Bermuda Limited, Chester Management Cayman Limited, Walter Noel, Jeffrey Tucker, Andrés Piedrahita, Mark McKeefry, Daniel Lipton, Amit Vijayvergiya, Gordon McKenzie, Richard Landsberger, Philip Toub, Charles Murphy, Robert Blum, Andrew Smith, Harold Greisman, Gregory Bowes, Corina Noel Piedrahita, Lourdes Barreneche, Cornelis Boele, Santiago Reyes, and Jacqueline Harary (the individuals herein are later defined as the "FG Individual Defendants").

making or receiving any settlement payments, or otherwise distributing assets in connection with the Settlement or the Anwar Action or any other action brought against the Trustee's FGG Defendants as a result of or relating to the BLMIS fraud, or litigating any action as against any of the Trustee's FGG Defendants brought as a result of or relating to the BLMIS fraud, until the completion of the Trustee's Action, including the satisfaction by the Trustee's FGG Defendants of any settlement or judgment obtained by the Trustee.

PRELIMINARY STATEMENT

Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma"), Fairfield Lambda Limited ("Lambda"), Greenwich Sentry, L.P. ("GS"), and Greenwich Sentry Partners, L.P. ("GSP") (collectively, the "FGG Funds") were investment funds or limited partnerships founded by Walter Noel, Jeffrey Tucker, and Andres Piedrahita (the "Founders"), and managed by the Founders and a group of individuals and entities associated with FGG. FGG served as one of Madoff's largest marketing and investor relations arms, significantly helping to grow and sustain the Ponzi scheme. Collectively, the FGG Funds and individuals and entities related to the FGG Funds withdrew more than $3.2 billion from BLMIS during the six years prior to the Filing Date of December 11, 2008. On May 18, 2009, the Trustee sued the FGG Funds for the return of this money in the Trustee's Action, *Picard v. Fairfield Sentry Limited*, No. 09-01239 (Bankr. S.D.N.Y. filed May 18, 2009), and later filed an amended complaint adding as defendants various FGG-related entities and individuals that managed the FGG Funds ("Amended Complaint").[2] Certain of the Trustee's FGG Defendants filed claims against the BLMIS estate.

[2] A copy of the Amended Complaint is annexed to the Declaration of Jessie Morgan Gabriel, dated November 29, 2012 (the "Gabriel Dec.") as Ex. 1.

In July 2011, the Trustee finalized a settlement of his claims against Sentry, Sigma, and Lambda and later, in a separate agreement, finalized the settlement of his claims against GS and GSP. (Gabriel Dec., Exs. 2-4.) Notably, however, the vast majority of the money transferred by BLMIS to the FGG Funds was no longer in their possession. They had transferred large sums of that money in the form of payments of fees and redemptions to FGG related entities and individuals which managed and marketed the FGG Funds. (Gabriel Dec., Ex. 1 ¶¶ 23, 326-32.) The Trustee's Action accordingly continues against the Trustee's FGG Defendants that remain, including the principals and entities responsible for managing the FGG Funds.

As part of the Trustee's settlements, the FGG Funds assigned to the Trustee all of their claims against the FGG management entities and principals. (Gabriel Dec., Ex. 2 at 6-7.) In addition, the Trustee and the FGG Funds entered into sharing agreements with respect to different types of claims, including claims against the FGG management entities and individuals, and subsequent transferees. Under the sharing agreements, the Trustee is entitled to the first $200 million recovered from the FGG management entities and individuals. In addition, as part of the Trustee's settlements with the FGG Funds, Sentry, GS, and GSP have allowed BLMIS Customer claims totaling nearly $270 million. (Gabriel Dec., Ex. 2 at 4, Ex. 3 at 6, Ex. 4 at 6.) With those allowed customer claims, the Trustee has already distributed approximately $100 million to Sentry, GS, and GSP (Affidavit of Matthew Cohen, sworn to November 29, 2012 ("Cohen Aff.") ¶ 6) and will share in the Trustee's recoveries in ongoing litigations, *including* specifically claims against the Trustee's FGG Defendants. (Gabriel Dec., Ex. 2 at 6-7.)

Former investors in certain FGG Funds brought putative class actions against a number of FGG entities and principals, which were consolidated in a single putative class action. *Anwar v. Fairfield Greenwich Ltd.*, No. 09-00118 (S.D.N.Y. filed Jan. 7, 2009) (as subsequently

consolidated). On November 6, 2012, the "Representative Plaintiffs" in the Anwar Action[3] filed a motion to approve the Settlement with Fairfield Greenwich Limited and Fairfield Greenwich (Bermuda) Ltd.,[4] for themselves and on behalf of a proposed "Settlement Class."[5] The Settlement contemplates an initial settlement amount of more than $50 million—money that comes from the same limited pool of funds sought by the Trustee in his action and which was largely obtained from initial and subsequent transfers from BLMIS. (Gabriel Dec., Ex. 6 ¶ 3.) Indeed, the Settlement documents themselves expressly and repeatedly refer to the limited resources of the Anwar Released Defendants, strongly suggesting that any money paid to the proposed Settlement Class—consisting of investors in the FGG Funds, not BLMIS customers—will substantially deplete the amount of money available to the Trustee for distribution to customers. (Gabriel Dec., Ex. 7 at 9.)

In addition, the Trustee holds not only the claims of the BLMIS estate and its customers and other creditors, and all claims that are duplicative and derivative of those claims, but also holds, as an assignee, the FGG Funds' direct claims against the Anwar Released Defendants, including for duties owed only to the FGG Funds. As such, not only does the Trustee have

[3] The Representative Plaintiffs are the following Injunction Defendants herein: Pacific West Health Medical Center Inc. Employees Retirement Trust, Harel Insurance Company Ltd., Martin and Shirley Bach Family Trust, Natalia Hatgis, Securities & Investment Company (SICO) Bahrain, Dawson Bypass Trust, and St. Stephen's School.

[4] Under the Settlement, the settling defendants are defined only as Fairfield Greenwich (Bermuda) Ltd. and Fairfield Greenwich Limited (hereinafter the "Settling Defendants"). Walter M. Noel, Jr., Jeffrey H. Tucker, Andrés Piedrahita, Lourdes Barreneche, Robert Blum, Cornelis Boele, Gregory Bowes, Vianney d'Hendecourt, Yanko della Schiava, Harold Greisman, Jacqueline Harary, David Horn, Richard Landsberger, Daniel E. Lipton, Julia Luongo, Mark McKeefry, Charles Murphy, Corina Noel Piedrahita, Maria Teresa Pulido Mendoza, Santiago Reyes, Andrew Smith, Philip Toub, and Amit Vijayvergiya are defined in the Settlement as FG Individual Defendants (hereinafter the "FG Individual Defendants"). The FG Individual Defendants are funding the Settlement and with the FGG Settling Defendants are receiving full releases (collectively hereinafter, the FG Individual Defendants and FGG Settling Defendants, the "Anwar Released Defendants").

[5] The "Settlement Class" is defined in the settlement agreement entered into by the FGG Settling Defendants, with various exclusions, as "all Persons who were Beneficial Owners of shares or limited partnership interests in the Funds as of December 10, 2008 . . . and who suffered a Net Loss of principal invested in the Funds . . . ." (Gabriel Dec., Ex. 5, at 18, definition "ss").

standing to bring these claims, the interest in these specific claims was part of the bargained-for exchange in the settlements approved by this Court, as well as the court in the British Virgin Islands overseeing the liquidation of Sentry, Sigma, and Lambda (the "BVI Court"). If allowed to proceed, the proposed Settlement will reduce the value of the Trustee's settlements, substantially deplete the limited assets of the Anwar Released Defendants, and thwart the Trustee's efforts to recover funds for equitable distribution to the victims of the Ponzi scheme.

The Representative Plaintiffs and the proposed Settlement Class members, who already stand to benefit from the nearly $270 million in allowed claims stemming from the Trustee's settlements with the FGG Funds as well as the proceeds to be shared from litigation claims as provided for in the Trustee's settlement with the FGG Funds, thus would be permitted to recover outside of the claims process to the detriment of other BLMIS customers, as well as diminish the value of the court-approved settlements with the FGG Funds. Simply put, the Representative Plaintiffs, for themselves and on behalf of the proposed Settlement Class, are attempting to skim the remaining assets from the pool of funds which are the subject of the Trustee's litigations, while simultaneously obtaining the benefit of the FGG Funds' allowed claims and recoveries from the shared litigation claims. They know full well that their Settlement may be subject to the automatic stay and related injunction, having agreed that the Trustee could so move. (Gabriel Dec., Ex. 21.)

Finally, the proposed Settlement as submitted in the Anwar Action appears to set aside a limited amount of funds for the Trustee's and other claims. But such limited funds do not come close to the amount the Trustee seeks to recover. At the same time, the Settlement purports to enjoin *any* person from bringing any claims related to the claims in the Anwar Action against the Anwar Released Defendants. (Gabriel Dec., Ex. 6 at Ex. B ¶ 17.) The Proposed Order thus

would purport to enjoin the Trustee's Action against the Anwar Released Defendants. Such interference with this Court's jurisdiction and its administration of the distribution of BLMIS assets cannot be countenanced by this Court.

The Settlement is scheduled to be heard for preliminary approval on November 30, 2012, with a proposed mailing of notice deadline of December 18, 2012, and a final hearing on March 20, 2013, or thereafter. The Trustee respectfully requests that his Application be granted.

STATEMENT OF FACTS

The facts and procedural history relevant to the Madoff Ponzi scheme have been set forth numerous times and need not be repeated here. *See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC)*, 424 B.R. 122, 125-33 (Bankr. S.D.N.Y. 2010); *Picard v. Fox*, 429 B.R. 423, 426 (Bankr. S.D.N.Y. 2010). Set forth below is a brief summary of the facts pertinent to this motion.

A. The Stay Orders

The Stay Orders were entered by the district court shortly after the commencement of the liquidation. Specifically, in an order entered on December 15, 2008, the district court, on SIPC's Application pursuant to § 78eee(b)(2)(B), declared that "all persons and entities are stayed, enjoined and restrained from directly or indirectly . . . interfering with any assets or property owned, controlled or in the possession of [BLMIS]." (Gabriel Dec., Ex. 8 ¶ IV (reinforcing automatic stay); Ex. 9 ¶ IX ("[N]o creditor or claimant against [BLMIS], or any person acting on behalf of such creditor or claimant, shall take any action to interfere with the control, possession or management of the assets subject to the receivership."); Ex. 10 ¶ IV (incorporating and making the December 18, 2008 stay order permanent)).

B. The Court-Ordered Claims Administration Process[6]

The Trustee sought and obtained approval from this Court to implement a customer claims process in accordance with SIPA (the "Claims Procedure Order"), which required, *inter alia*, that certain notices be given.[7] More than 16,000 potential customer, general creditor, and broker-dealer claimants, including Sentry, GS, and GSP, were included in the mailing of the notice. The Trustee published the notice in all editions of *The New York Times*, *The Wall Street Journal, The Financial Times, USA Today, Jerusalem Post,* and *Ye-diot Achronot* and posted claim forms and claims filing instructions on the Trustee's website, and the website of SIPC.

Under the Claims Procedure Order, claimants were directed to mail their claims to the Trustee. All customers and creditors were notified of the mandatory statutory bar date for the filing of claims under section 78fff-2(a)(3) of SIPA, which was July 2, 2009 (the "Bar Date"). The Trustee also provided several reminder notices. By the Bar Date, the Trustee had received 16,239 customer claims.

Claims were filed by each of the FGG Funds, as well as a number of entities and individuals that are defendants in both the Trustee's action and the Anwar Action, including Fairfield Greenwich (Bermuda) Ltd., Walter Noel, Jeffrey Tucker, Robert Blum, and Jacqueline Harary. (Cohen Aff. ¶¶ 3, 5.)

On June 28, 2011, the Court held that indirect investors in BLMIS, who had invested in investment funds such as the FGG Funds, were not "customers" of BLMIS entitled to SIPA

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[6] The facts in this section are drawn from the Trustee's Third Interim Report. (Gabriel Dec., Ex. 11.)

[7] Pursuant to an application of the Trustee dated December 21, 2008 (Gabriel Dec., Ex 12), this Court entered the Claims Procedure Order (Gabriel Dec., Ex. 13), which directed, among other things, that on or before January 9, 2009: (a) a notice of the commencement of this SIPA proceeding be published; (b) notice of the liquidation proceeding and claims procedure be given to persons who appear to have been customers of BLMIS; and (c) notice of the liquidation proceeding and a claim form be mailed to all known general creditors of the debtors.

protection. *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff)*, 454 B.R. 285 (Bankr. S.D.N.Y. 2011) (the "Customers Decision"). The Court recognized that SIPA § 78*lll*(2) limits the definition of "customers" to parties directly holding an investment account with BLMIS. *Id*. at 294–95. The District Court affirmed this Court's decision, *see Aozora Bank Ltd. v. Securities Investor Protection Corp. (In re Aozora Bank Ltd.)*, 480 B.R. 117 (S.D.N.Y. 2012) (J. Cote), and the district court's decision is currently on appeal to the Second Circuit. (*See, e.g.*, Gabriel Dec., Ex. 14.) The Trustee has issued notices of denial of the SIPA Claims filed by Sigma, Lambda, Fairfield Greenwich (Bermuda) Ltd., Walter Noel, Jeffrey Tucker, Robert Blum, and Jacqueline Harary on the basis that they are not customers of BLMIS within the meaning of 15 U.S.C. § 78*lll*(2). (Cohen Aff. ¶ 6.)

As part of the settlement between Sentry and the Trustee, Sentry received an allowed claim of $230,000,000. (*Id.*, Ex. 2 at 4.) Additionally, under the Trustee's settlement agreements with GS and GSP, GS has an allowed claim of $35,000,000, and GSP has an allowed customer claim in the amount of $2,011,304. (*Id.*, Ex. 3 at 6; Ex. 4 at 6.)

C. The Net Equity Decision

In a SIPA liquidation, customers share *pro rata* in customer property to the extent of their net equity, as defined in section 78*lll*(11) of SIPA. SIPC advances funds to the trustee for a customer with a valid net equity claim, up to the amount of their net equity, if their ratable share of customer property is insufficient to make them whole. Such advances are capped at $500,000 per customer.

The Trustee determined each customer's "net equity" by crediting the amount of cash deposited by the customer into their BLMIS account, less any amounts withdrawn from their BLMIS customer account, otherwise known as the "Net Investment Method." After certain claimants objected to the Trustee's interpretation of net equity, the Trustee moved for a briefing

schedule and hearing on the matter. On March 1, 2010, this Court issued its decision on the net equity issue, approving the Trustee's method of determining net equity (the "Net Equity Decision").

On March 8, 2010, the Court issued an order approving the Trustee's Net Equity calculation ("Net Equity Order") and certified an appeal of the Net Equity Order directly to the United States Court of Appeals for the Second Circuit. (Gabriel Dec., Exs. 15, 16.)

On August 16, 2011, the Second Circuit affirmed the Net Equity Decision. *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229 (2d Cir. 2011). On June 25, 2012, the United States Supreme Court denied *certiorari* review of the Second Circuit's affirmance of the Net Equity Decision. *Velvel v. Picard*, 133 S. Ct. 25 (U.S. 2012); *Ryan v. Picard*, 133 S. Ct. 24 (U.S. 2012).

D. The Trustee's Action

On May 18, 2009, the Trustee commenced the Trustee's Action against Sentry, GS, and GSP. *Picard v. Fairfield Sentry Limited*, No. 09-01239 (Bankr. S.D.N.Y. filed May 18, 2009). On July 20, 2010, the Trustee filed the Amended Complaint and added as defendants Sigma, Lambda, certain FGG principals, and numerous FGG entities affiliated with the funds. (Gabriel Dec., Ex. 1.) Through the Amended Complaint, the Trustee seeks to recover, for equitable distribution to BLMIS customers with allowed claims, property of the BLMIS estate in excess of $3.6 billion. This figure includes claims against Fairfield Greenwich (Bermuda) Ltd. ("FGB") for over $950 million, against Fairfield Greenwich Limited ("FGL") for over $500 million, and claims against the Founders for over $500 million. (*Id.* ¶¶ 121-47, 198-201, 207-08, 215-16.)

1. Claims Against the Trustee's FGG Defendants

The Trustee's FGG Defendants served as one of Madoff's "largest marketing and investor relations arms" and actively participated in and "substantially aided, enabled and helped sustain" the Ponzi scheme. (*Id.* ¶ 2.) As asserted in the Trustee's Action, the Trustee's FGG

Defendants "had actual or constructive knowledge of Madoff's fraud," (*Id.* ¶ 3), and reaped hundreds of millions of dollars in as a result of that relationship. Further, the Trustee asserts all of the money purportedly "earned" as management and performance fees based on the fictitious returns of the FGG Funds is stolen money which must be returned to the Trustee for equitable distribution. (*Id.* ¶ 2.)

The Trustee is still in the process of investigating the transactions between the Trustee's FGG Defendants and BLMIS. However, based on his investigation to date, the Trustee has alleged that a significant portion, if not all, of the distributions and other payments made to the Trustee's FGG Defendants were made with funds originally withdrawn from Sentry's, GS's, and GSP's accounts at BLMIS and, therefore, constitute property of the estate.[8] (*See, e.g., id.* ¶¶ 200, 209, 217, 223, 229, 235, 241, 246, 252, 258, 264, 270, 276.)

The Trustee is seeking from the Trustee's FGG Defendants the return of BLMIS estate property under SIPA §§ 78fff(b) and 78fff-2(c)(3), sections 105(a), 502(d), 542, 544, 548(a), 550(a), and 551 of the Bankruptcy Code, the New York Fraudulent Conveyance Act (N.Y. Debt. & Cred. § 270 *et seq*.), and other applicable law. (*Id.* ¶¶ 557–798.) The Trustee's Action raises claims for turnover,[9] accounting, preferences, fraudulent conveyances, unjust enrichment, conversion, money had and received, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, consequential and punitive damages, and objection to customer claims filed by certain defendants.

[8] By December 11, 2008, the Founders (who are among those individuals funding the Settlement) had only a few million dollars still invested with Madoff—the defendants retained all other money they had unjustly collected and have kept millions of dollars in stolen property that belongs to the estate. (*Id.* ¶ 491.)

[9] The Trustee intends to drop his claim for turnover when he seeks leave to amend his complaint against the Trustee's FGG Defendants. *See Picard v. Merkin (In re Bernard L. Madoff Inv. Sec., LLC)*, 440 B.R. 243, 271-73 (Bankr. S.D.N.Y. 2010).

2. The Trustee's Settlement with the FGG Funds

The Trustee reached a partial resolution of the Trustee's Action through settlements of his claims against each of the FGG Funds. On May 9, 2011, the Trustee moved this Court to approve a settlement with Sentry, Sigma, and Lambda (Gabriel Dec., Ex. 17), followed by a motion seeking a similar order with regard to a settlement with GS and GSP on May 18, 2011. (*Id.*, Ex. 18).

In general, these settlements consisted of: (i) cash payments to the Trustee; (ii) allowed claims in the BLMIS liquidation proceeding for Sentry, GS, and GSP; (iii) an assignment to the Trustee of Sentry's, GS's and GSP's claims against the FGG management entities and principals; and (iv) a sharing agreement for the division of future recoveries by the Trustee and/or Sentry, GS, and GSP resulting from actions against subsequent transferees, the funds' service providers, as well as the assigned claims against the FGG management entities and principals.

In particular, the Sentry, Sigma, and Lambda settlement approved by this Court provides that the Trustee shall be entitled to the first $200 million of any recoveries against the FGG management individuals and entities. (*Id.*, Ex. 2 at 7.) Any recovery in excess of $200 million is shared with the Sentry liquidator for the benefit of the Sentry shareholders on an 85% - 15% basis. (*Id.*) Similarly, the Sentry liquidator is entitled to the first $300 million of any recoveries against the FGG Funds' administrators and/or auditors, with any excess shared with the Trustee on an 85% - 15% basis. (*Id.*) The GS and GSP settlements approved by this Court also used a threshold of the first $200 million of recoveries from claims against the FGG management entities and individuals. (*Id.*, Ex. 3 at 4, Ex. 4 at 4.)

Consequently, if the proposed Settlement Class members, who are the ultimate beneficiaries of the Trustee's settlement with Sentry, GS, and GSP, are permitted to proceed with the Settlement, they will be able to keep their benefits from the Trustee's settlement but, at the

same time, in view of the Anwar Released Defendants' limited assets—decrease the consideration paid to the Trustee in the Sentry, GS, and GSP settlement by preventing him from recovering the first $200 million in recoveries from the FGG management entities and individuals.

The Trustee's settlements with the FGG Funds account for only a fraction of the $3.6 billion the Trustee is seeking in his adversary proceeding. Thus, a material part of the consideration paid to the Trustee in settlement of his claims against the FGG Funds was the assignment of all the FGG Funds' claims against the FGG management entities and individuals.[10] Like the claims in the Anwar Action, the assigned claims seek to reclaim the fees and profits earned by certain of the Trustee's FGG Defendants as a result of their relationship with BLMIS. They include causes of action for, *inter alia*, breach of fiduciary duty, unjust enrichment, constructive trust, and mutual mistake—all of which are also claims in the Anwar Action. As a result, the Trustee now holds claims that mirror the claims brought in the Anwar Action.

This Court entered an order approving the settlement with Sentry, Sigma, and Lambda and overruling the few objections filed by entities not related to these proceedings on June 7, 2011. (Gabriel Dec., Ex. 19.) The BVI Court overseeing the Sentry, Sigma, and Lambda liquidation proceedings then approved the settlements. (*Id.*, Ex. 20.)

Thereafter, on July 8, 2011, this Court entered an order approving the settlement agreement between the Trustee and GS and GSP. (*Id.*, Ex. 21.) The order acknowledged that objections filed by eight Anwar Action plaintiffs, including three of the Representative Plaintiffs,

[10] All of the Defendants in the Trustee's Action are also defendants in the Anwar Action, with two exceptions—Fairfield Investment Managers, Inc. and Brian Francouer, who are not defendants in the Anwar Action.

were withdrawn after an amendment to the settlement agreement that addressed their concern regarding the prosecution of claims owned by the debtor funds. (*Id.*) The final, approved settlement agreements with GS and GSP state explicitly that the settlements are:

> without prejudice to the right of the Trustee to seek an injunction against prosecution by [the fund's] present and former limited partners and holders of any limited partner interest in [the fund] of Direct LP Claims against Management in connection with any future settlement of claims against Management and without prejudice to the right of such [fund] limited partners to oppose any such injunction that may be sought by the Trustee.

(*Id.*, Ex. 3 at 10, Ex. 4 at 9-10.) The orders approving the settlements contain similar language and indicates that the Bankruptcy Court "retain[s] jurisdiction to hear and determine all matters arising from or related to this Order." (*Id.*, Ex. 21.)

As a result of the settlements, Sentry has an allowed claim for $230 million, GS has an allowed claim for $35 million, and GSP has an allowed claim for $2 million. (*Id.*, Ex. 2 at 4, Ex. 3 at 6, Ex. 4 at 6.) In connection with these allowed claims, the FGG Funds have already participated in and received distributions totaling approximately $100 million from the Trustee in the SIPA Proceeding. (Cohen Aff. ¶ 6.) As this Court noted in approving the settlements, the investors in the Trustee's FGG Funds are the beneficiaries of these distributions. The Trustee is continuing with his litigation against the remaining Trustee's FGG Defendants to recover property for equitable distribution in accordance with SIPA.[11]

[11] On April 2, 2012, certain of the remaining non-settling defendants moved to withdraw the reference to the bankruptcy court. (Gabriel Dec., Exs. 22, 23.) Judge Rakoff partially granted the motions only as they related to certain legal issues common to a majority of adversary proceedings commenced by the Trustee. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. Inc. (In re Bernard L. Madoff Inv. Sec. Inc.)*, No. 12-0115 (S.D.N.Y. filed Apr. 13, 2012). Those common issues are still pending before Judge Rakoff. The rest of the case remains before this Court. Under the current schedule, the remaining FGG Defendants' deadline to respond to the complaint in Bankruptcy Court is January 18, 2013, and the pretrial conference is set for February 26, 2013.

E. The Anwar Action and Settlement

Shortly before the Trustee's action was initiated, former investors in the FGG Funds brought actions against the Anwar Released Defendants, as well as other third parties that provided services to the FGG Funds. With a few exceptions, the Anwar Released Defendants are the same defendants as in the Trustee's Action.[12] The Anwar Released Defendants have recently reached the Settlement with the Representative Plaintiffs. However, the Anwar court has not certified any class, nor has it approved the Settlement. Under the Representative Plaintiffs' motion, a preliminary approval hearing is set for November 30, 2012 (Gabriel Dec., Ex. 24) and class notice's to be issued by December 18, 2012, with a final fairness hearing set for March 20, 2013. (*Id.*, Ex. 7 at 25.)

1. Allegations and Procedural History

On April 29, 2009, the Anwar Named Plaintiffs[13] filed the first Consolidated Amended Complaint, followed by a Second Consolidated Amended Complaint (the "SCAC") on September 29, 2009. (Gabriel Dec, Ex. 26.) The allegations in the SCAC mirror those in the Trustee's Amended Complaint. The Anwar Named Plaintiffs allege that the Anwar Released Defendants and the other named defendants knew or should have known of Madoff's fraud and are, therefore, responsible for investor's losses. (SCAC ¶¶ 182-83, 192-93, 398-400, 408-09.)

As against the Anwar Released Defendants, the Anwar Named Plaintiffs allege fraud, violations of section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"); and Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R., § 240, 10b-5; and Section

[12] The only Anwar Released Defendants that are *not* also Trustee's FGG Defendants are: Fairfield Greenwich Group (a non-entity trade name), Fairfield Risk Services Ltd., Vianney d'Hendecourt, Yanko della Schiava, David Horn, Julia Luongo, and Maria Teresa Pulido Mendoza.

[13] The Anwar Named Plaintiffs are set forth in the SCAC. (Gabriel Dec., Ex. 26, ¶ 1-116.)

20(a) of the Exchange Act; negligent misrepresentation, gross negligence, breach of fiduciary duty, third-party beneficiary breach of contract, mutual mistake, and unjust enrichment. (*Id.*, ¶¶ 354-425, 558-572.) Among other relief, the Anwar Named Plaintiffs seek the imposition of a constructive trust, damages, disgorgement and restitution of all earnings, profits, compensation and benefits. (*Id.* at Prayer for Relief.)

The defendants in the Anwar Action filed motions to dismiss the SCAC on or about December 22, 2009. (*See, e.g.*, Gabriel Dec., Exs. 27-29.) On July 29, 2010, the District Court issued its first decision related to the motions to dismiss, which it referred to as "*Anwar I*," and rejected the Anwar defendants' argument that all of the Anwar Named Plaintiffs' common law claims, except fraud, were preempted by New York State's Martin Act. *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 354, 371 (S.D.N.Y. 2010). On August 18, 2010, the District Court issued an opinion, entitled "*Anwar II*," granting in part and denying in part the Anwar defendants' remaining arguments to dismiss the SCAC. *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 462 (S.D.N.Y. 2010). Following the court's decision, on or about October 1, 2010, the Anwar defendants answered the SCAC. (*See, e.g.*, Gabriel Dec., Ex. 30.) The Representative Plaintiffs then moved the court on January 11, 2012, to certify a class pursuant to Rule 23. (*Id.*, Ex. 31.) The motion to certify remains pending.

2. The Settlement

On November 6, 2012, the Representative Plaintiffs filed a motion to approve the Settlement. (Gabriel Dec., Ex. 5.) The Settlement seeks to resolve all claims by the proposed Settlement Class in exchange for a payment to the Anwar Released Plaintiffs of up to $80,250,000. (*Id.*, Ex. 6 ¶¶ 3-8.)

In particular, the Settlement provides that two FGG management entities—FGL and FGB—will pay an initial settlement amount of $50,250,000 using funds provided to them by FG

Individual Defendants. (*Id.* ¶ 3.) FGL and FGB will place an additional $30,000,000 in escrow. (*Id.* ¶ 5.) The escrow amount will also be paid to the class less any amounts the Anwar Released Defendants pay in settlement of other claims against them. (*Id.* ¶ 1.ii.) Any net funds from the Settlement payment and the remaining amount will be distributed to class members in proportion to the amount of their net loss from investing in Sentry, Sigma, GS, and GSP. (*Id.* ¶¶ 28–33.) The Settlement funds, which should otherwise be available to satisfy the Trustee's claims, are also being used to pay the administrative costs of the Settlement and fees and expenses of the Representative Plaintiffs' counsel up to 25% of the total Settlement amount. (*Id.*, Ex. 6 at Ex. A-1, p. 10.)

The Trustee believes that the monies used by the FG Individual Defendants to fund the Settlements are coming from the same limited pool of funds that would be used to pay the Trustee—funds which largely, if not solely, originated from BLMIS. (*Id.*, Ex. 7 at 9.)[14] As the Representative Plaintiffs admits, the Anwar Released Defendants "lack assets to fund a judgment in excess of the Settlement—indeed, they essentially are out-of-business and could not be a source of substantial recovery by judgment or settlement." (*Id.*) In addition, the FG Individual Defendants "have limited financial resources and are being sued by other parties with respect to the same or similar claims as those asserted in this Action; they are incurring substantial legal expenses to defend the Action and such other proceedings; and they could well be unable to pay a substantially greater judgment or settlement to the putative class at a later time." (*Id.*) The Anwar Released Defendants have also admitted that certain of them have "transferred assets to trusts and retirement accounts," and, for this reason, it may be difficult to enforce judgments

[14] To the extent the Anwar Released Defendants herein contest these or other facts, the Trustee reserves his right to seek expedited discovery herein.

against them. (*Id.*) Furthermore, in an unrelated hearing before Judge Rakoff, counsel for some of the Anwar Released Defendants acknowledged there are only limited funds remaining. (Gabriel Dec., Ex. 32 at 3:6-19, 4:13-25.)

In essence, in direct violation of the settlements approved by this Court, the Representative Plaintiffs seek to improperly advance class members' position in the creditors' line, at the expense of those BLMIS customers and creditors who have priority under the settlements.

Moreover, the Settlement as filed with the district court purports to enjoin any person from bringing any claims against the Anwar Released Defendants. The proposed order states that any person that seeks any funds from the escrow fund is enjoined from bringing any claims related to the claims in the Anwar Action against the Anwar Released Defendants: (Gabriel Dec., Ex. 6 at Ex. B ¶ 17.)

Specifically, the Proposed Order states: While on the one hand it would appear that the escrow fund will be used to settle claims that are pending against the Anwar Released Defendants in other actions, which would include the Trustee's action (*Id.*, Ex. 7 at 3), the proposed order, if entered, would purportedly enjoin the Trustee's adversary proceeding against the Trustee's FGG Settling Defendants. In any event, the proposed escrow amount is insufficient to satisfy the Trustee's claims.

> "To the fullest extent permitted by law, all Persons, including without limitation the Non-Dismissed Defendants, shall be permanently enjoined, barred and restrained from bringing, commencing, prosecuting or asserting any claims, actions, or causes of action for contribution, indemnity or otherwise against any of the Released Parties seeking as damages or otherwise the recovery of all or any part of any liability, judgment or settlement which they pay or are obligated to pay or agree to pay to the Settlement Class or any Settlement Class Member arising out of, relating to or concerning such Persons' participation in any acts, facts, statements or omissions that were or could have been alleged in the Action, whether arising under state, federal or foreign law as claims, cross-claims,

> counterclaims, third-party claims or otherwise, in the Court or any other federal, state, or foreign court, or in any arbitration proceeding, administrative agency proceeding, tribunal, or any other proceeding or forum."

(Gabriel Dec., Ex. 6 at Ex. B.)

ARGUMENT

THE AUTOMATIC STAY AND STAY ORDERS SHOULD BE ENFORCED AND THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION

Through the Settlement, the Representative Plaintiffs, on behalf of the proposed Settlement class, seek to: (1) obtain the FGG Settling Defendants' assets to the detriment of the BLMIS estate; (2) which are fraudulently transferred assets consisting of other people's money; (3) for distribution to select investors; (3) to the detriment of all other BLMIS customers; and (4) outside the jurisdiction of this Court. The Settlement offends this Court's jurisdiction over the BLMIS estate and the equitable distribution scheme put into place by this Court and affirmed by the Second Circuit in the Net Equity Decision.

I. THIS COURT HAS SUBJECT MATTER AND PERSONAL JURISDICTION

The district court has three times, in decisions by three different judges, affirmed decisions by this Court holding that conduct similar to that of the Representative Plaintiffs violated the automatic stay and was properly enjoined under section 105(a). *See In re Bernard L. Madoff Inv. Sec. LLC*, No. 11 Civ. 2135, 2011 WL 7981599 (S.D.N.Y. Dec. 5, 2011); *Fox v. Picard (In re Madoff)*, 848 F. Supp. 2d 469 (S.D.N.Y. 2012); *Picard v. Maxam Absolute Return Fund L.P. (In re Bernard L. Madoff Inv. Sec. LLC)*, 474 B.R. 76 (S.D.N.Y. 2012). As in those cases, this Court has subject matter jurisdiction to enjoin the Settlement and the Anwar Action pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b), and the Amended Standing Order of Reference of the United States District Court for the Southern District of New York, dated January 31, 2012 (Preska, C.J.) ("Amended Standing Order"). *See Gowan v. HSBC Mortg. Corp. (USA) (In re*

Dreier LLP), No. 08-15051, 2012 WL 4867376, at *2 (Bankr. S.D.N.Y. Oct. 12, 2012) (district court has referred its bankruptcy jurisdiction under 28 U.S.C. § 157(a) pursuant to the Amended Standing Order).

Pursuant to 28 U.S.C. § 1334(b), district courts (and hence bankruptcy courts) have original jurisdiction of civil proceedings "arising under" and "arising in" and "related to" cases under Title 11. *See Adelphia Commc'ns Corp. v. Am. Channel, LLC (In re Adelphia Commc'ns Corp.)*, No. 06-01528, 2006 WL 1529357, at *6 (Bankr. S.D.N.Y. June 5, 2006). Furthermore, bankruptcy courts have jurisdiction to "hear and determine . . . all core proceedings arising under Title 11, or arising in a case under Title 11 . . . ." 28 U.S.C. § 157(b)(1). *See also* SIPA § 78eee(b)(4). Title 28 U.S.C. §§ 157(b)(2)(A) and (B) provide that core proceedings include, but are not limited to, "matters concerning the administration of the estate . . ." and the "allowance or disallowance of claims against the estate."

Because the Settlement undermines the orderly administration of the liquidation of BLMIS and the Trustee's efforts to recover the same limited funds as the settling parties, this Court has "arising under," "arising in," and "related to" jurisdiction. *See, e.g.*, *Picard v. Stahl*, 443 B.R. 295 (Bankr. S.D.N.Y. 2011) (bankruptcy court had jurisdiction to enjoin third party claims that "would be satisfied from the finite pool of funds sought by the Trustee, threatening the Trustee's ability to recover large potential judgments at the expense of the BLMIS estate."); *see also AP Indus., Inc. v. SN Phelps & Co. (In re AP Indus., Inc.)*, 117 B.R. 789, 798 (Bankr. S.D.N.Y. 1990) (an adversary proceeding involving matters impacting both the administration and property of the estate is a core proceeding); *Pfizer Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co.)*, 676 F.3d 45, 57–58 (2d Cir. 2012) (bankruptcy court has jurisdiction over

third party claims that "pose[] the specter of direct impact on the *res* of the bankruptcy estate," even if such claims allege liability not derivative of the debtor's conduct).

This Court likewise has personal jurisdiction over the Injunction Defendants. First, to the extent that the Injunction Defendants have, in commencing the Anwar Action and finalizing the Settlement, availed themselves of the courts in New York, this is sufficient to establish personal jurisdiction. *In re Sayeh R.*, 693 N.E.2d 724, 727–28 (N.Y. 1997) ("[u]se of the New York courts is a traditional justification for the exercise of personal jurisdiction over a nonresident.") Second, the bankruptcy court has personal jurisdiction over the Injunction Defendants to the extent necessary to protect its own jurisdiction over the property of the estate and to enforce the automatic stay. *See* 11 U.S.C. § 362(a) ("[A]n application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [. . .] operates as a stay, *applicable to all entities* . . . " (emphasis added)); § 101(15) ("The term 'entity' includes person, estate, trust, governmental unit, and United States trustee."). Finally, certain of the Injunction Defendants, including Fairfield Greenwich (Bermuda) Ltd., Walter Noel, Jeffrey Tucker, Robert Blum and Jacqueline Harary, filed customer claims in the BLMIS liquidation, thereby providing personal jurisdiction over those entities and individuals as well. (*See* Cohen Aff. ¶ 5.) *Stahl*, 443 B.R. at 310 (*citing Langenkamp v. Culp*, 498 U.S. 42, 44 (1990)); *Keller v. Blinder (In re Blinder Robinson & Co.)*, 135 B.R. 892, 896–97 (D. Col. 1991).

II. THE SETTLEMENT VIOLATES THE AUTOMATIC STAY, THE STAY ORDERS, AND SIPA

A. The Automatic Stay, SIPA, and the Stay Orders Apply

Section 362(a)(3) of the Bankruptcy Code provides that the filing of an application for the entry of a protective decree under section 5(a)(3) of SIPA (15 U.S.C. § 78eee(a)(3)) operates as a stay, applicable to all persons and entities of, *inter alia*, any act to exercise control over

property of the estate. *See* 11 U.S.C. § 362(a)(3). Similarly, section 362(a)(1) bars "the commencement or continuation . . . of a judicial . . . or other action or proceeding against the debtor . . . or to recover a claim against the debtor . . . ." 11 U.S.C. § 362(a)(1). A "claim against the debtor" encompasses claims against third parties, such as claims for fraudulently transferred funds, that are tantamount to claims against the debtor. *See FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 132 (2d Cir. 1992). Finally, section 362(a)(6) bars "any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6). Because the Settlement seeks recovery of (or recovery from) the same limited funds sought by the Trustee, the Settlement seeks to collect on (or out of) the Trustee's fraudulent transfer claims and is in violation of the automatic stay.

In addition to the automatic stay, the December 15 Stay Order, which implements SIPA § 78eee(b)(2)(A) and (B), is applicable here. SIPA § 78eee(b)(2)(A) gives exclusive jurisdiction to this Court over the debtor's property wherever located and SIPA § 78eee(b)(2)(B) provides for stay protection as to, *inter alia*, any suit against the debtor's property. To the extent the Anwar Action seeks to assert disguised fraudulent transfer claims by attempting to recover funds received by the Anwar Released Defendants in connection with their involvement with BLMIS, it violates these sections of SIPA. The December 15 Stay Order thus serves to stop the Anwar Named Plaintiffs from interfering with potential estate assets. *See Fox*, 429 B.R. at 433; *Stahl*, 443 B.R. at 315; *Maxam*, 474 B.R. at 87.

Each of the provisions of section 362(a) is designed to prevent the dismemberment of the bankruptcy estate through interference, either directly or indirectly, with the trustee's control over estate property. *See*, *e.g.*, *AP Indus., Inc. v. SN Phelps & Co. (In re AP Indus., Inc.)*, 117 B.R. 789, 798 (S.D.N.Y. 1990); *Liberty Mut. Ins. Co. v. Off. Unsecured Creditors' Comm. of*

Spaulding Composites Co. (In re Spaulding Composites Co.), 207 B.R. 899, 908 (B.A.P. 9th Cir. 1997); *In re Burgess*, 234 B.R. 793, 799 (D. Nev. 1999); *In re HSM Kennewick, L.P.*, 347 B.R. 569, 572 (Bankr. N.D. Tex. 2006). The Settlement and the underlying Anwar Action are derivative of the Trustee's claims, and the claims assigned to the Trustee by Sentry, GS, and GSP, to the extent they are based on the same facts, seek the same funds from the same defendants, for example, through the imposition of a constructive trust, and are inextricably intertwined with the Trustee's claims. Even to the extent certain of the claims in the Anwar Action are not derivative of the Trustee's claims, "[a] suit against a third party alleging liability not derivative of the debtor's conduct but that nevertheless poses the specter of direct impact on the *res* of the bankrupt estate may just as surely impair the bankruptcy court's ability to make a fair distribution of the bankrupt's assets as a third-party suit alleging derivative liability." *Quigley*, 676 F.3d at 58. Here, where the limited assets of the Anwar Released Defendants means that any assets used to fund the Settlement will reduce the Trustee's potential recovery, the impact on the *res* is direct and significant.

"The automatic stay is one of the most fundamental bankruptcy protections . . . ." *Fox*, 429 B.R. at 430. The stay provision is broad, and "prevents creditors from reaching the assets of the debtor's estate piecemeal and preserves the debtor's estate so that all creditors and their claims can be assembled in the bankruptcy court for a single organized proceeding." *In re AP Indus., Inc.*, 117 B.R. at 798 (citations omitted). Similarly, in this SIPA action, the automatic stay "protects customers of BLMIS by fostering fair, uniform, and efficient distribution of customer property." *Fox*, 429 B.R. at 430. The automatic stay is intended precisely to prevent those creditors who are able to act first from obtaining payment "in preference to and to the detriment of other creditors." *See In re AP Indus., Inc.*, 117 B.R. at 799 (quoting H.R. Rep. No.

95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97; S. Rep. No. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835); *Keene Corp. v. Coleman (In re Keene Corp.)*, 164 B.R. 844, 849 (Bankr. S.D.N.Y. 1994); *Fox v. Picard*, 848 F. Supp. 2d 469, 478 (S.D.N.Y. 2012). This would be the exact result if settlement funds were paid in the Anwar Action before the conclusion of the Trustee's Action.

B. The Settlement Seeks to Recover Fraudulently Transferred Funds in Violation of Section 362(a)(1)

The Settlement (as well as the litigation that underlies it) seeks to recover the same funds from the Anwar Released Defendants that are sought by the Trustee in his Action as well as in the claims assigned to the Trustee. To the extent the underlying Anwar Action asserts claims for unjust enrichment and seeks a constructive trust over "benefits derived" by the Anwar Released Defendants in connection with their "unjust enrichment and inequitable conduct," the actions are—on their face—for the same fraudulent transfers received from BLMIS. (Gabriel Dec., Ex. 26 ¶¶ 571–72.) Moreover, the Anwar Action seeks the recovery of fees paid to certain of the Trustee's FGG Defendants. (*Id.* ¶¶ 4, 236–49.) As the Trustee has alleged, these fees and commissions were paid to these Anwar Released Defendants through transfers from BLMIS—the same transfers sought by the Trustee in his subsequent transferee claims against certain of the Anwar Released Defendants. (Gabriel Dec., Ex. 1, ¶¶ 23-26, 543, 557-727.)

The automatic stay, reinforced by the Stay Orders, prohibits third parties from seeking to recover fraudulently transferred funds: "a third-party action to recover fraudulently transferred property is properly regarded as undertaken 'to recover a claim against the debtor' and subject to the automatic stay pursuant to § 362(a)(1)." *In re Colonial Realty Co*., 980 F.2d at 131–32; *Fox*, 848 F. Supp. 2d at 478; *see also In re Keene Corp*., 164 B.R. at 850 ("Where a [debtor's] creditor seeks to recover his or her claim from a transferee of [the debtor's] property, the

creditor's action is stayed by Section 362(a)(1)."); *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1103 (2d Cir. 1990) (unsecured creditor should not be able to obtain priority over other unsecured creditors, and action by such creditor to recover its claim against third party defendant found to be in violation of stay).

C. The Settlement Seeks to Collect or Recover on the Trustee's Claims in Violation of Section 362(a)(6)

In any event, no matter how they characterize their damages, in the Settlement and underlying action, the Representative Plaintiffs seek to recover for the loss of funds ultimately invested in BLMIS and the damages sought consist of funds wrongly transferred from BLMIS. They, therefore, additionally violate section 362(a)(6), which prohibits acts to collect or recover a claim against the debtor.

The transfers that Sentry, GS, and GSP received in connection with BLMIS included, as the Trustee has alleged in his Amended Complaint, more than $3.2 billion of customer funds. (Gabriel Dec., Ex. 1, ¶ 536.) The FGG Funds were either entirely, or almost entirely, invested in BLMIS. Hundreds of millions of the dollars redeemed by the FGG Funds were transferred to related FGG entities in the form of fees and redemptions, and to the FG Individual Defendants who received salaries and distributions of profit (Gabriel Dec., Ex. 1, ¶¶ 23-26, 543; *see also id.* ¶¶ 127, 133, 139, 150-55, 170, 185, 200, 209, 217, 223, 229, 235, 241, 246, 252, 258, 264, 270, 276, 281, 287, 292, 297, 303, 311.) The FG Individual Defendants are now funding the Settlement. (Gabriel Dec., Ex. 7.) The Representative Plaintiffs, after conducting due diligence, determined that the FG Individual Defendants "have limited financial resources and are being sued by other parties with respect to the same or similar claims as those asserted in this Action; they are incurring substantial legal expenses to defend the Action and such other proceedings;

and they could well be unable to pay a substantially greater judgment or settlement." The Representative Plaintiffs' concern regarding the limited assets available to the FG Individual Defendants are reflected in the fact that the Settlement provides for the revocation of releases should the FG Individual Defendants' net worth exceed amounts disclosed to the Anwar Plaintiffs. (Gabriel Dec., Ex. 6 ¶ 12.) Specifically, the Settlement provides:

> Plaintiff's Lead Counsel acknowledge that they received certain confidential information regarding each of the FG Individual Defendants' finances prior to executing this Stipulation. If, prior to the earlier of the Effective Date of July 1, 2013 it is determined that any FG individual Defendant's net worth was materially greater than disclosed to Plaintiffs' Lead Counsel as of the applicable date of such representations, then the Representative Plaintiffs may, at their sole and absolute discretion, revoke the release provided for in ¶¶ 24 and 26 of this Stipulation (the "Net Worth Option") with respect to any such FG Individual Defendant (the "Excluded Defendant").

By seeking recovery of (or recovery out of) the same transfers sought by the Trustee, the Settlement and the Anwar Action seek to collect on the Trustee's claims, thus prejudicing the Trustee's ability to pursue his claims. *See Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Sys., Inc.)*, 108 F.3d 881, 884 (8th Cir. 1997) (creditor's collection on a pre-petition judgment out of property that the Trustee was pursuing in his fraudulent transfer claim violated § 362(a)(6) because it "prejudiced the Trustee's ability to litigate a competing avoidance claim on behalf of all creditors and was therefore inconsistent with the basic purpose of the automatic stay"); *see also In re Bernard L. Madoff Inv. Sec. LLC*, No. 11-2392, 2011 WL 7975167, at *14 (S.D.N.Y. Dec. 15, 2011)(hereafter, the "*Stahl* Ruling") (citing *Just Brakes* 108 F.3d at 884); 3 COLLIER ON BANKRUPTCY ¶ 362.03[8][c] (16th ed. 2010) ("The stay does apply, however, to an attempt to collect a prepetition claim out of property that was fraudulently transferred by the debtor before the commencement of the case;" although the property is not itself property of the estate, "[t]he fraudulent transfer action belongs to the estate, and a creditor's attempt to recover out of fraudulently conveyed property is stayed").

The Representative Plaintiffs' attempt to recover on those claims to the exclusion of the Trustee is an additional interference with his claims. The Representative Plaintiffs' efforts through the Settlement to recover, or recover from, the proceeds of fraudulent transfers received by the Anwar Released Defendants is an improper attempt to collect on the Trustee's claims against these defendants and is thus precluded by section 362(a)(6).

D. The Representative Plaintiffs Seek to Exercise Control Over Property of the Estate and Implicate BLMIS' Property Interests in Violation of Section 362(a)(3)

Section 362(a)(3) applies the automatic stay to any act to exercise control over property of the estate or customer property. "Indeed, every *conceivable* interest of the debtor, future, nonpossessory, *contingent*, speculative, and derivative, is within the reach of the term 'property of the estate.'" *Fox*, 848 F. Supp. 2d at 478 (emphasis added). Actions that have the effect of exercising control over property of the estate or customer property, or where the actions "necessarily implicate" a debtor's property interests, violate Bankruptcy Code § 362(a)(3), regardless of whether the debtor is named in the action. *Adelphia*, 2006 WL 1529357, at *3 (granting TRO because third party suit threatened to interfere with debtor's realization of value of its assets and its reorganization); *In re MCEG Prods., Inc.*, 133 B.R. 232, 235 (Bankr. C.D. Cal. 1991) (third party suit to enjoin sale by debtor violated automatic stay because it affected debtor's rights in sale agreement). Section 362(a)(3) protects the *in rem* jurisdiction of the Court, and prohibits interference with the disposition of the assets that are under the Court's wing, whether or not the debtor is named as a defendant as part of that effort. And this is so regardless of the form the interference takes. *See Adelphia*, 2006 WL 1529357, at *3. Critically, courts look to the substance and not the form of the purported action. *See 48th St. Steakhouse, Inc. v. Rockefeller Grp., Inc. (In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987)

("If action taken against the non-bankrupt party would inevitably have an adverse impact on property of the bankrupt estate, then such action should be barred by the automatic stay.").

The Settlement and the Anwar Action seek to recover from the Anwar Released Defendants for claims arising out of the BLMIS fraud and based on substantially the same operative facts as those alleged by the Trustee. By settling the Anwar Action, the Representative Plaintiffs are attempting to exercise control over causes of action that belong to the Trustee, which are property of the estate. *See Jackson v. Novak (In re Jackson)*, 593 F.3d 171, 176 (2d Cir. 2010). Moreover, the Representative Plaintiffs seek to recover from property that was improperly transferred to the Anwar Released Defendants—funds that the Trustee seeks to recover in connection with the Trustee's Action. The Settlement will "inevitably have an adverse impact on the property of the estate," *see 48th St. Steakhouse*, 835 F.2d at 431, and constitutes a clear violation of the automatic stay. *See Quigley*, 676 F.3d at 57–58 (bankruptcy court has jurisdiction over third party claims that even "pose[] the specter of direct impact on the *res* of the bankrupt estate . . .").

III. THE INJUNCTION DEFENDANTS SHOULD BE PRELIMINARILY ENJOINED PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE TO ALLOW FOR THE FAIR AND EQUITABLE ADMINISTRATION OF THE BLMIS ESTATE

The automatic stay should be extended and the Injunction Defendants should be enjoined under section 105(a) of the Bankruptcy Code from effectuating the Settlement given, among other things, the adverse economic impact on the estate if the Settlement and underlying action are allowed to go forward. *See, e.g.*, *Quigley*, 676 F. 3d at 53; *Fox*, 429 B.R. at 434–37; *Stahl*, 443 B.R. at 315–16. As the Trustee set forth in his Amended Complaint, the Trustee's FGG Defendants possess fraudulently transferred BLMIS estate property that must be marshaled and

equitably distributed by the Trustee. (Gabriel Dec., Ex. 1 ¶¶ 51-312, 543-48.) The Settlement would deplete assets that ultimately belong to the estate.

The Representative Plaintiffs also apparently seek to enjoin the Trustee from prosecuting his Action. The Representative Plaintiffs' proposed order filed with the district court seems to provides that any person seeking funds from the escrow fund (established as part of the Settlement to settle claims against the Anwar Released Defendants, including those of the Trustee) is enjoined from bringing any claims related to the claims asserted in the Anwar Action against the Anwar Released Defendants. (Gabriel Dec., Ex. 6 at Ex. B ¶ 17.) This interference with the Trustee's ability to pursue his claims for the benefit of defrauded BLMIS customers surely would impair this Court's jurisdiction and threatens the administration of the BLMIS estate.

A. Standard for a Section 105(a) Injunction

Section 105(a) of the Bankruptcy Code, applicable here pursuant to section 78fff(b) of SIPA, grants bankruptcy courts broad discretion to "issue any order 'necessary or appropriate to carry out the provisions of [the Bankruptcy Code]' . . . ." 11 U.S.C. § 105(a); *see also U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc. (In re U.S. Lines, Inc.)*, 197 F.3d 631, 640 (2d Cir. 1999). Courts in this Circuit have held that section 105(a) authorizes bankruptcy courts to issue injunctions, and because the injunctions are authorized by statute, the standard for Rule 7065 injunctions is inapplicable. *See Fox*, 429 B.R. at 436 ("Because injunctions under section 105(a) are authorized by statute, they need not comply with traditional requirements of Rule 65"); *LaMonica v. N. of Eng. Protecting & Indemn. Ass'n (In re Probulk Inc.)*, 407 B.R. 56, 63 (Bankr. S.D.N.Y. 2009). The Court may enjoin suits if: (i) a third party suit would impair the court's jurisdiction with respect to a case before it, or (ii) the third party suits threaten to thwart or frustrate the debtor's reorganization efforts and the stay is necessary to

preserve or protect the debtor's estate.[15] *See Fox*, 429 B.R. at 436; *Stahl,* 443 B.R. at 318; *Calpine Corp. v. Nev. Power Co. (In re Calpine Corp.)*, 354 B.R. 45, 58 (Bankr. S.D.N.Y. 2006) *aff'd*, 365 B.R. 401 (S.D.N.Y. 2007); *Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998).[16]

Courts have routinely used section 105(a) to extend section 362 to third party actions against non-debtor entities "when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." *Fox*, 429 B.R. at 434 (quoting *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287 (2d Cir. 2003). For example, the district court, in affirming a bankruptcy court decision enjoining certain third party litigation, held that an injunction was properly granted pursuant to section 105(a) and the court accordingly did not need to consider whether section 362 was also applicable. *Nev. Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 409 n.20 (S.D.N.Y. 2007); *see also Kagan v. Saint Vincents Catholic Med. Ctrs. of N.Y. (In re Saint Vincents Catholic Med. Ctrs. of N.Y.)*, 449 B.R. 209, 217 (S.D.N.Y. 2011) (the bankruptcy court has authority under section 105 broader than the automatic stay provisions of section 362); *In re Lyondell Chem. Co.*, 402 B.R. at 587 n.33) (court, in granting a limited injunction to stay non-debtor litigation, noted that section 105(a) could be used to enjoin acts against non-debtor entities even when section 362 protection was not available); *In re Wingspread Corp*., 92 B.R. at 94 ("The basic purpose of [section 105(a)] is to enable the court to

[15] Notwithstanding that the Rule 7065 standard need not be satisfied here, it easily is. There is no question that an infringement on this Court's jurisdiction constitutes "irreparable harm." *Adelphia,* 2006 WL 1529357, at *5. Moreover, the Trustee is likely to succeed on the merits of his Amended Complaint and demonstrate that the Injunction Defendants have violated the automatic stay, as demonstrated herein. *See id.* at *4–5; *see Fox*, 429 B.R. at 436 n.14; *Stahl*, 443 B.R. at 318 n.24.

[16] *See also In re Adelphia Commc'ns Corp*., 298 B.R. 49, 54 (S.D.N.Y. 2003); *Lyondell Chem. Co. v. CenterPoint Energy Gas Servs. Inc. (In re Lyondell Chem. Co.)*, 402 B.R. 571, 588 n.37 (Bankr. S.D.N.Y. 2009); *Keene Corp. v. Acstar Ins. Co. (In re Keene Corp.)*, 162 B.R. 935, 944 (Bankr. S.D.N.Y. 1994); *E. Air Lines, Inc. v. Rolleston (In re Ionosphere Clubs, Inc.)*, 111 B.R. 423, 431 (Bankr. S.D.N.Y. 1990), *aff'd in part*, 124 B.R. 635 (S.D.N.Y. 1991); *Garrity v. Leffler (In re Neuman)*, 71 B.R. 567, 571–72 (S.D.N.Y. 1987); *C & J Clark Am., Inc. v. Carol Ruth, Inc. (In re Wingspread Corp.)*, 92 B.R. 87, 92 (Bankr. S.D.N.Y. 1988); *LTV Steel Co. v. Bd. of Educ*. *(In re Chateaugay Corp.)*, 93 B.R. 26, 29 (S.D.N.Y. 1988).

do whatever is necessary to aid its jurisdiction . . . ."); *In re Neuman*, 71 B.R. at 571 (under section 105 the bankruptcy court has broad powers to issue injunctions notwithstanding the inapplicability of the automatic stay provisions).

B. The Settlement and Underlying Action Threaten This Court's Jurisdiction and the Administration of the Estate and an Injunction Is Necessary to Preserve and Protect the Estate

As described above, the Settlement purports to resolve claims that are inextricably intertwined with the Trustee's claims, and threatens to allow certain indirect investors of BLMIS to recover estate property. Such an outcome would compromise the equitable distribution of customer property under SIPA and circumvent the orders entered by this and other Courts related to the claims process and the calculation of net equity. *See, e.g.,* Net Equity Decision, 424 B.R. 122. Further, such a result would run afoul of the general principle that stakeholders of a bankruptcy estate should not be permitted to race to the courthouse to recover preferentially to the detriment of other stakeholders. *See, e.g., In re Keene Corp.*, 164 B.R. at 849–54; *In re AP Indus., Inc*. 117 B.R. at 799; *Johns-Manville Corp. v. Colo. Ins. Guar. Ass'n (In re Johns-Manville Corp.)*, 91 B.R. 225, 228–29 (Bankr. S.D.N.Y. 1988); *McHale v. Alvarez (In re 1031 Tax Grp., LLC)*, 397 B.R. 670, 686 (Bankr. S.D.N.Y. 2008). It would also frustrate the goals of SIPA, pursuant to which customers with allowed claims who held investment accounts with BLMIS have preferential claims to the BLMIS customer property fund. *See* SIPA § 78*lll*(2). The Injunction Defendants' conduct is just the sort of behavior that courts in this and other jurisdictions have prohibited time after time. *See, e.g., In re Keene Corp.*, 164 B.R. at 849, 854; *In re AP Indus., Inc*., 117 B.R. at 801–02; *In re Johns-Manville Corp*., 91 B.R. at 228; *In re 1031 Tax Grp., LLC*, 397 B.R. at 684–85; *Singer Co. B.V. v. Groz Beckert KG (In re Singer Co. N.V.)*, No. 99–10578, 2000 WL 33716976, at *5–7 (Bankr. S.D.N.Y. Nov. 3, 2000); *Apostolou*, 155 F.3d 876.

In addition, if permitted to be consummated, the Settlement would unfairly devalue the Trustee's settlements with the FGG Funds. Under those court-approved FGG Fund settlements, in view of the FGG Funds' limited cash assets, the Trustee received limited payments from the FGG Funds but also was assigned the FGG Funds' claims against the FGG management entities and principals. As part of the settlements, the Trustee agreed to share with the FGG Funds any recoveries after certain thresholds were met. Of course, any of the shared recoveries paid to the FGG Funds would ultimately be for the benefit of the FGG Funds' shareholders or limited partners which comprise the proposed class in the Anwar Action.

By attempting to jump ahead of the Trustee, the Representative Plaintiffs and proposed Settlement Class are attempting to abrogate the value of the FGG Funds settlements by collecting from the FG Individual Defendants their limited assets before the threshold has been met and without sharing with the Trustee. The Representative Plaintiffs and their counsel were fully aware of the FGG Funds' settlement terms through their active participation in the Sentry, Sigma and Lambda liquidation proceedings in the British Virgin Islands as well as the GS and GSP proceedings in this Court. In none of those proceedings did any of the Representative Plaintiffs, other proposed Settlement Class members or their counsel maintain objections to the Trustee's settlements with the FGG Funds. They should not be permitted to rewrite the Trustee's settlements by making an end run of the assets of the Trustee's FGG Defendants.

The district court already has three times affirmed this Court's decision that a section 105(a) injunction was necessary to protect the court's jurisdiction and the administration of the liquidation. In *Fox*, *Stahl*, and *Maxam*, this Court enjoined the defendants therein from prosecuting actions against parties being sued by the Trustee. In addition to finding that the defendants in those actions had usurped causes of actions belonging to the Trustee, the Court

found that the third party actions at issue in those cases would have "an immediate adverse economic consequence for the debtor's estate." *Stahl,* 443 B.R. at 316 (quoting *Queenie*, 321 F.3d at 287). Further, as the district court held in affirming *Fox*, a section 105(a) injunction is warranted even if the claims asserted are not property of the estate, where, as here, the overlap between the claims asserted in the Trustee's Action and the Anwar Action are "so closely related that allowing the Injunction Defendants to convert the bankruptcy proceedings into a race to the courthouse would derail the bankruptcy proceedings." *See Fox*, 848 F. Supp. 2d at 487 (quoting *Apostolou*, 155 F.3d at 883); *Maxam*, 474 B.R. at 87 (action against Trustee in Cayman Islands threatened Bankruptcy Court's exclusive *in rem* jurisdiction over estate, and enforcement of automatic stay and injunction under section 105 was warranted).

In affirming the *Stahl* decision, the district court held that the third party actions at issue there "substantially interfere[d] with the ability of the trustee to move in his cases to recover assets for the estate as a whole," and had an adverse impact on property of the estate because the money recovered by the third party plaintiffs in any judgment "would inevitably be the money that the trustee sought to recover." *See Stahl* Ruling, 2011 WL 7975167, at *12, *15. Like the third party actions in *Stahl*, the Settlement will necessarily interfere with the Trustee's ability to recover in the Trustee's Action, particularly against the FGG principals, and should likewise be enjoined pursuant to section 105(a).

While the Representative Plaintiffs may argue that they possess some independent claims against the Trustee's FGG Defendants, when seeking to recover from the same limited pool of funds for claims arising out of the same common nucleus of operative facts, the Trustee must be able to effectively prosecute his action. As the district court held in another Madoff-related stay action:

> rather than have a profusion of claims, **it's the rationale behind Section 362 and Section 105 to favor the trustee**. It doesn't have to be for all time, but it has to allow the trustee the ability to pursue his actions and obtain rulings and finality on those rulings because the trustee is acting for the benefit of all creditors and not just a few.

Stahl Ruling, 2011 WL 7975167, at *13 (emphasis added); *see also Apostolou*, 155 F.3d at 881.

As this Court discussed in *Fox* and *Stahl*, and as the district court recognized in affirming *Fox* and *Stahl*, the Seventh Circuit, faced with a similar scenario, also found the use of a section 105(a) injunction appropriate. *Fox*, 429 B.R. at 434–35; *Stahl*, 443 B.R. at 316–17; *see also Stahl* Ruling, 2011 WL 7975167, at *14 (finding *Apostolou* "instructive"); *Fox*, 848 F. Supp. 2d at 487. In *Apostolou*, which was a liquidation proceeding, the Seventh Circuit upheld the bankruptcy court's issuance of an injunction under section 105(a) to protect the trustee's ability to marshal assets on behalf of the debtor's estate, even when the enjoined action did not directly seek property of the estate. 155 F.3d at 877–88. The bankruptcy court issued an injunction pursuant to section 105(a), which the district court reversed. The Seventh Circuit reversed the district court's determination that the bankruptcy court had exceeded its authority in issuing the injunction, stating that:

> While the [investor plaintiffs'] claims are not "property of" the Lakes States estate, it is difficult to imagine how those claims could be more closely "related to" it. They are claims to the same limited pool of money, in the possession of the same defendants, as a result of the same acts, performed by the same individuals, as part of the same conspiracy. We can think of no hypothetical change to this case which would bring it closer to a "property of" case without converting it into one. Even if the "related to" jurisdiction is not as broad under Chapter 7 cases as it is in Chapter 11 cases, it reaches at least this far, for to conclude that the "related to" jurisdiction under Chapter 7 does not extend to the circumstances of this case would be to amend the Bankruptcy Code to eliminate § 105 from Chapter 7 proceedings.

Id. at 882 (internal citations omitted).

Notably, some of the plaintiffs in *Apostolou* may have had claims against the defendants based on a "separate and distinct injury" to the individual plaintiff that could not be fully

measured by the debts owed to the estate. *Id*. at 881. The court nevertheless held that the investors who were the plaintiffs in those actions "must wait their turn behind the trustee, who has the responsibility to recover assets for the estate on behalf of the creditors as a whole . . . ." *Id.* Accordingly, the court stayed the underlying actions pending the outcome of the bankruptcy proceeding: "At that point, the degree to which the Apostolou Plaintiffs have been compensated for their injuries through their share of the assets in the debtors' estates will be settled, and it will be possible for the district court to proceed with this action against the nondebtor defendants for whatever individualized damages may be proper." *Id.* at 883.

Similarly, in *In re AP Industries, Inc.*, this Court stated that a bankruptcy court has "authority under § 105 broader than the automatic stay provisions of § 362 and may use its equitable powers to assure the orderly conduct of the reorganization proceedings." 117 B.R. at 801 (citations omitted). There, the debtor sought to stay or enjoin actions commenced by a creditor against the debtor's directors and other third parties that were brought because the creditor objected to a transaction entered into by the debtor. The court found that it was appropriate to use section 105(a) to enjoin the creditor's action, stating:

> this Court finds that it is also appropriate to issue an injunction pursuant to § 105 of the Code to stay the [creditor's] Actions in order to preserve and protect the Debtor's estate and reorganization prospects. Not only may the outcome of the [creditors'] Actions affect the administration of this case, but the possibility of inconsistent judgments warrants the issuance of an injunction . . . .

Id. at 802; *see also In re Singer Co. N.V.*, 2000 WL 33716976, at *7.

Akin to the claims the debtor's investors asserted in *Fox*, *Stahl*, *Apostolou*, and *AP Industries*, the claims at issue in the Settlement are so inextricably intertwined and related to the underlying SIPA proceeding and the Trustee's Action that it is clear that the Settlement will impair this Court's jurisdiction over this proceeding and the Trustee's ability to marshal assets on behalf of the estate. As in the foregoing cases, the Settlement will result in a "greater

distribution on a first come, first serve basis from assets which the trustee has standing to recover." *In re Keene Corp.*, 164 B.R. at 854. The investors in the FGG Funds must "wait their turn behind the trustee." *Apostolou*, 155 F.3d at 881.

Moreover, allowing the Settlement to go forward could create confusion among other BLMIS investors and creditors who may feel compelled to initiate their own self-help proceedings and which could create a more widespread "race to the courthouse" environment, threatening the orderly administration of the estate. The statutory schemes created by SIPA and the Bankruptcy Code are specifically aimed at avoiding such a result. *See Sec. Investor Prot. Corp. v. Blinder, Robinson & Co.*, 962 F.2d 960, 965 (10th Cir. 1992) (SIPA "establishes procedures for the prompt and orderly liquidation of SIPC members") (internal citations and quotations omitted); *see also In re Shea & Gould*, 214 B.R. 739, 750 (Bankr. S.D.N.Y. 1993) (Bankruptcy Code seeks to prevent "race to the courthouse"); *In re Rubin*, 160 B.R. 269, 281 (Bankr. S.D.N.Y. 1993) (same); *Gross v. Russo (In re Russo)*, 18 B.R. 257, 265 (Bankr. E.D.N.Y. 1982) (same). The proposed Settlement appears to set aside a limited amount of funds for claims asserted by the Trustee and others. However, these limited funds are not ready sufficient to satisfy the Trustee's claims. At the same time, the proposed settlement seems to seek to enjoin the Trustee from bringing any claims related to the claims asserted in the Anwar Action against the Anwar Released Defendants. (Gabriel Dec., Ex. 6 at Ex. B ¶ 17.)

In such circumstances, where there is a clear, "immediate adverse economic consequence for the debtor's estate," section 105(a) should be used to enjoin litigants to the settlement and protect potential estate property. *Fox*, 429 B.R. at 434 (quoting *Queenie*, 321 F.3d at 287). To allow otherwise would not only disrupt the Trustee's efforts to maximize recovery for the estate

but would also threaten this Court's jurisdiction over the Trustee's Action and the *res* of the BLMIS estate.

C. The Settlement Threatens to Undermine the Claims Administration Process and This Court's Jurisdiction Under SIPA and the Bankruptcy Code

This Court already has approved a claims process and determined how customers' and other creditors' claims are to be valued and administered. The Settlement creates a parallel claims process as it involves the payment of funds to investors in the FGG Funds in proportion to the investors' net loss from investing in the FGG Funds. (Gabriel Dec., Ex. 6 ¶¶ 28-33.) Unlike the BLMIS claims process approved by this Court, amounts will be deducted from the Settlement to pay administrative costs, including the cost of providing notice of the Settlement, and fees and expenses of the Representative Plaintiffs' counsel, which, per the terms of the Settlement, can be up to 25% of the total settlement amount. (*Id.*, ¶¶ 29, 34, 35; Ex. A-1 at 10.)

The duplicative process contemplated by the Settlement circumvents the claims determination and allowance process authorized by this Court, in which all of the beneficiaries of the Settlement are direct or indirect participants. The beneficiaries of the Settlement would thus leapfrog over customers and take for themselves funds that otherwise would be recoverable by the Trustee and distributed to customers and creditors of BLMIS in accordance with this Court's Net Equity Decision and Customers Decision. Net Equity Decision, 424 B.R. 122; Customers Decision, 454 B.R. 285. In this regard, the Settlement would accomplish indirectly what is directly prohibited—indirect investors who are not customers will recover on their claims stemming from their investments with the FGG Funds out of property fraudulently transferred from BLMIS to the Anwar Released Defendants, all to the exclusion of judicially recognized customers and claimants. Both this Court and the district court have, in granting and affirming the injunction at issue in *Fox*, stated that the potential for distributions outside of "the plan that

was determined by the Net Equity Decision" is "particularly alarming." *See Fox*, 848 F. Supp. 2d at 486–87; *Fox*, 429 B.R. at 437.

The FGG Funds, FGB, Walter Noel, Jeffrey Tucker, Robert Blum, and Jacqueline Harary have all filed claims in the liquidation. (*See* Cohen Aff. ¶ 5.) As part of the Settlement with Sentry, GS and GSP, the Trustee has allowed BLMIS customer claims for the funds. The claims filed by the FGG Funds have been allowed and Sentry, GS and GSP have received distributions totaling approximately $100 million. (*Id.* ¶ 6.) Nevertheless, the Settlement purports, among other things, to provide a recovery for the losses of investors in the FGG Funds, indirect investors in BLMIS. By seeking to tap into the same pool of money as the Trustee before the conclusion of the Trustee's Action, the Settlement and the Anwar Action threaten the administration of the BLMIS estate and should be enjoined.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court enforce the automatic stay, SIPA, and Stay Orders of the District Court, otherwise preliminarily enjoin the Injunction Defendants from substantially depleting the assets of the Trustee's FGG Defendants pending the completion of the Trustee's Action, by issuing an order in the form submitted simultaneously herewith.

Date: New York, New York
November 29, 2012

/s/ David J. Sheehan

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