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

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In re: :
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:
BERNARD L. MADOFF INVESTMENT :
SECURITIES, LLC :
:
Debtor. :
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Adv. Pro. No. 09-1272 (BRL)
:
DIANE AND ROGER PESKIN AND :
MAUREEN EBEL, :
:
Plaintiffs, :
:
vs. :
:
IRVING H. PICARD, as Trustee for the :
Liquidation of Bernard L. Madoff Investment :
Securities LLC :
:
Defendant. :
:
----- X

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE
ALLEGATIONS FROM THE COMPLAINT**

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

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: :
In re: : :
: : SIPA LIQUIDATION
BERNARD L. MADOFF INVESTMENT : :
SECURITIES, LLC : : No. 08-01789 (BRL)
: :
Debtor. : :
: :
----- : : Adv. Pro. No. 09-1272 (BRL)
: :
DIANE AND ROGER PESKIN AND : :
MAUREEN EBEL, : :
: :
Plaintiffs, : :
: :
vs. : :
: :
IRVING H. PICARD, as Trustee for the : :
Liquidation of Bernard L. Madoff Investment : :
Securities LLC : :
: :
Defendant. : :
: :
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**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE
ALLEGATIONS FROM THE COMPLAINT**

Plaintiffs Diane Peskin, Roger Peskin and Maureen Ebel (“plaintiffs”) respectfully submit this memorandum of law in opposition to the motion of Defendant Irving H. Picard,

Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC (“Madoff”) to dismiss the Complaint or, in the alternative, to strike certain portions of the Complaint.¹

PRELIMINARY STATEMENT

The Trustee’s motion to dismiss is nothing more than an attempt to forestall the inevitable: a judicial holding that the Trustee has no authority to invent his own definition of “net equity” for purposes of determining (a) the amount SIPC must pay in insurance to each customer and (b) the amount of a customer’s claim for purposes of distribution of customer property. The Trustee’s defiance of the definition of “net equity” in the Securities Investor Protection Act (SIPA¹) has caused and is continuing to cause devastating injury to the plaintiffs and to all of the other customers in this case (the “Customers”). If the Trustee had a good faith belief that he was acting within the law, he would have sought a judicial determination of the propriety of his actions in January 2009. Instead, he has steadfastly delayed determination of this issue.

The Trustee argues that plaintiffs have no standing to seek a determination of “net equity” because they will benefit financially from his *ultra vires* invention of a new definition when, in five or ten years, they receive some paltry distribution from the estate. However, the Trustee ignores the substantial economic injury he has already caused the plaintiffs by deliberating withholding from them the SIPC insurance to which they are indisputably entitled. By breaching his statutory obligation to “promptly” pay customer claims based upon their last statements, the Trustee has caused the plaintiffs to lose substantial assets – precisely the loss Congress sought to avoid when it enacted SIPA.

¹ The Securities Investor Protection Corporation (“SIPC”) submitted a memorandum of law and declaration of Hemant Sharma in support of the Trustee’s motion, to which this submission also responds.

Moreover, the Trustee's purported mathematical support for his argument that plaintiffs will realize a larger ultimate distribution from the estate on his invented definition of "net equity" is based upon suppositions which have no demonstrated reliability. In fact, the Trustee has utterly ignored the time value of money to Customers – as clearly understood by Congress since the command of prompt payment pervades SIPA. In order to protect the Securities Investor Protection Corporation ("SIPC"), the Trustee has devised a time-consuming and expensive payment process which requires the employment of teams of forensic accountants to go on an irrelevant fishing expedition to document a Customer's net investment, in some cases going back 20 – 30 years. The Trustee justifies this utter waste of tens of millions of dollars of SIPC money (which should be paid to Customers) by arguing that he cannot let the thief [Madoff] determine the amount of a customer's claim. This argument is self-serving and specious. Congress enacted SIPA for the specific purpose of protecting customers against brokers who turn out to be thieves and it was precisely for this reason that Congress mandated that the legitimate expectations of the customer be honored – as reflected on the customer's last statement.

The Trustee argues that the Complaint is barred by this Court's December 23, 2008 Claims Procedure Order (the "Order") but he cannot point to any provision of the Order which bars this suit. In fact, the plain language of the Order reveals that it is completely inapplicable to plaintiffs' complaint although it is clear that the Trustee himself has violated the Order in several respects.

The Trustee argues that the plaintiffs' breach of fiduciary duty claim should be dismissed because it is within his discretion to invent his own definition of "net equity." There is, in fact, no provision of SIPA which grants the Trustee the discretion to treat SIPA like a Chinese menu, selecting one section from Column A and one Section from Column B, and rejecting the other

provisions of the statutory scheme. Indeed, Congress specifically barred SIPC from amending the definition of “net equity.” Moreover, the Trustee cannot obtain dismissal based on his argument that he did not breach his fiduciary duty. The standard is whether the complaint states a claim for breach of fiduciary duty and it clearly does.

The attempt to dismiss the preference claim is similarly frivolous. The Trustee has already acknowledged that he had no basis for withholding a portion of the Peskins’ SIPC insurance on the ground that it was a “preferential payment.” Unfortunately, the Peskins had to file suit before the Trustee would admit he had no legal support for his actions. Now, the Trustee argues that he properly withheld a portion of Ms. Ebel’s SIPC insurance on the ground that she received a preferential payment. Yet, there is no provision of SIPA which allows the Trustee to offset an alleged preference against a customer’s SIPC insurance payment. The plaintiffs are entitled to their full SIPC insurance payments without offset. If the Trustee believes he has a preference claim against Ms. Ebel, he is free to assert it at a later time. Ms. Ebel clearly has a legal right to litigate the Trustee’s right to enrich SIPC at her expense by deducting from her SIPC payment the amount of an alleged preference.

Lastly, the Trustee’s motion to strike is frivolous. He fails to meet even one prong of the three-prong test for striking an allegation of a complaint. The allegations of the complaint are perfectly appropriate and the Trustee cannot blue pencil the complaint any more than he can blue pencil the provisions of SIPA. He moves to strike relevant allegations that relate directly to the claims alleged, although he has completely failed to carry his burden of demonstrating that the allegations prejudice him. The Court cannot dismiss the allegations simply because the Trustee does not like them where, as here, they are material to the claims alleged.

STATEMENT OF FACTS

The Peskins' Investment in Madoff

Roger Peskin began publishing the Art Now Gallery Guide (the "Guide") in 1970, working out of his Volkswagen bus. He began with one editorial assistant and he personally delivered to his customers a one-page listing of gallery and museum exhibitions on Madison Avenue and on 57th Street. Mr. Peskin built up the Guide to become the most comprehensive source of information on gallery and museum exhibitions in major cities across the United States and, at times, it was published in Europe, South America and Japan. Complaint ¶¶ 25-26.

By 2004, Mr. Peskin employed approximately 20 people and published a 300+ page magazine which included art reproductions, gallery, museum and art fair information, and area maps of all the major cities in the world. The Guide was sold in August 2004 and Mr. and Mrs. Peskin invested the after-tax proceeds of the sale, along with the proceeds of two properties they sold, into Madoff. At the time of the Peskins' investment in Madoff, (a) Madoff had been in business for over 40 years; (b) Madoff's trading strategy was known to be diversified and conservative; and (c) the SEC had investigated Madoff seven times over an 11-year period and had publicly vouched for his honesty. On or about October 18, 2005, the Peskins invested \$2,586,412.99 into Madoff. In early May 2008, the Peskins invested \$181,000 into Madoff. On or about November 12, 2008, the Peskins invested \$470,265.98 into Madoff. *Id.* ¶¶ 27 - 32.

After the Peskins established their Madoff account, Mr. Peskin retired and looked forward to living off the income from his Madoff investment. Every month the Peskins received from Madoff trade confirmations indicating the purchase and sale of Fortune 100 company stocks; the purchase and sale of Treasury securities; and the purchase and sale of options to hedge the securities positions. In addition, the Peskins received monthly account statements

showing their securities positions. In each instance, the trade confirmations and account statements reflected the purchase and sale of securities of Fortune 100 companies at prices consistent with those reported in the media. *Id.* ¶¶ 33-35.

During the years of their investment in Madoff, the Peskins earned 9 – 11% each year, in short term capital gains, subject to the highest tax rate. In the ordinary course, the Peskins regularly withdrew funds from the Madoff account to fund family living expenses, to pay taxes on their Madoff income, and for special expenditures. *Id.* ¶¶ 36-37.

On September 15, 2008, the Peskins received a check from Madoff for \$50,000 which cleared their account on September 17, 2008. On October 1, 2008, the Peskins received a check from Madoff for \$33,000. On November 6, 2008, the Peskins received a check from Madoff for \$30,000. On November 12, 2008 the Peskins invested \$470,265.98, proceeds from the sale of real estate, with Madoff. At no time did the Peskins have any reason to believe that Madoff was dishonest. *Id.* ¶¶ 38-41.

As of November 30, 2008, the last month for which the Peskins received a Madoff account statement, the value of their account was \$3,247,367.40. The Peskins filed a SIPC claim on February 19, 2009. They received no response to their claim until June 3, 2009 when they were contacted by one of the Trustee's attorneys who informed them that they were entitled to receive \$387,000 as their full SIPC payment because the Trustee was entitled to deduct from their SIPC payment the \$113,000 that they withdrew from their Madoff account in the three months preceding December 15, 2008. *Id.* ¶¶ 42 – 45.

The Peskins pointed out to the attorney that, although they had withdrawn \$113,000 from Madoff within the 90 days before December 15, 2008, they had also invested \$470,265.98, with Madoff on November 12, 2008. Thus, their net position in the last 90 days before the SIPC

liquidation was positive \$357,265.98. They asked the attorney if they weren't entitled to the full \$500,000 in SIPC insurance since they had invested more than they withdrew in the last 90 days. They were told that the law was absolutely clear that they were not entitled to a credit for the money they deposited. *Id.* ¶¶ 45.

Maureen Ebel's Investment in Madoff

Maureen Ebel was widowed in 2000 when her husband, Dr. Marc Ebel, died as a result of medical malpractice at the age of 53. The Ebels had been married 27 years. Mrs. Ebel worked as a nurse for the first fifteen years of their marriage, but she stopped working in 1989. *Id.* ¶¶ 47-48.

In 2003, a relative recommended that Mrs. Ebel invest all of her funds with Madoff. The relative told her that Madoff had been in existence for more than 25 years; that he had been approved by the SEC; and that he had a very conservative investment strategy. Mrs. Ebel opened two accounts with Madoff. The first account she opened was a direct IRA account in which she invested \$1,348,877.12 on February 24, 2003. Mrs. Ebel never withdrew any funds from this account and it had a balance on November 30, 2008 of \$2,532,140.66. Mrs. Ebel also opened a direct investment account with Madoff in which she invested a total of \$3,831,387.49 beginning on March 17, 2003 and ending on July 23, 2004. The balance in this account as of November 30, 2008 was \$4,729,125.04. *Id.* ¶¶ 49-51.

With respect to each account, every month Mrs. Ebel received from Madoff trade confirmations indicating the purchase and sale of Fortune 100 company stocks; the purchase and sale of Treasury securities; and the purchase and sale of options to hedge the securities positions. In addition, she received monthly account statements showing the securities positions. In each instance, the trade confirmations and account statements reflected the purchase and sale of

securities of Fortune 100 companies at prices consistent with those reported in the media. ¶¶ *Id.* ¶¶ 52–53.

Mrs. Ebel withdrew funds from her direct investment account on a regular basis and utilized the funds to provide support for herself and her family, to pay for the educational expenses of family members, and to fund charitable donations. This was her sole source of income. As part of her normal withdrawal of funds from her account, on September 15, 2008 Mrs. Ebel received a \$102,000 check from Madoff dated September 11, 2008. She deposited the check in her account on September 15, 2008. *Id.* ¶¶ 54–55.

After December 11, 2008, Mrs. Ebel found herself with no source of income and was forced to return to the workforce in order to support herself. She worked as a house maid; she worked as a caretaker for an elderly patient; she worked as a driver; she worked at a cash register; she worked in a ladies' clothing store. In short, she did anything she could to earn money to pay her living expenses. However, having been out of the workforce for nearly twenty years, she could not find work that could sustain her standard of living. She has been forced to sell a car, jewelry, household items, and a condominium in Florida she had owned since 1984, all at greatly depressed prices because she needed money to live on. Had she promptly received her SIPC insurance, she would have been able to avoid such losses. *Id.* ¶ 56.

Mrs. Ebel filed her SIPC claim for both accounts on February 14, 2008. She heard nothing from the Trustee until May 20, 2009 when she received a determination letter requiring that she acknowledge that her claim with respect to the IRA account was for only \$1,348,877.12, the amount of her original investment. She was informed that it was a pre-condition to her receiving SIPC insurance on this account for her to acknowledge that she was not entitled to a claim for any appreciation in that account. Because Mrs. Ebel was financially desperate, she had

no alternative but to accede to the Trustee's demand. She signed the required acknowledgments and, on June 6, 2009, she received a check from SIPC for \$500,000 with respect to this account. *Id.* ¶ 58.

With respect to the direct investment account, the determination letter indicated that she was only entitled to \$398,000 in SIPC insurance because the Trustee was entitled to deduct the \$102,000 payment she received in September 2008. Thereafter, she had several communications with one of the Trustee's attorneys. She was told that the Trustee was obligated under the law to withhold \$102,000 from her SIPC payment. She was also told that this money would simply reduce SIPC's obligations. The money would not be used to pay other investors. *Id.* ¶ 59–60.

Mrs. Ebel asked if she could accept the \$398,000 check and yet reserve her right to claim the \$102,000 that the Trustee was going to withhold. She was told that she would not be able to do that and, if she wanted the check for \$398,000, she would have to relinquish her claim to the \$102,000. She explained that she was uncertain whether she should waive her claim to the \$102,000. *Id.* ¶ 61.

On May 29, 2009, Mrs. Ebel received another phone call from the attorney for the Trustee with whom she had been speaking. He told her that there had been a change in strategy by the Trustee and that she would not have to relinquish her claim to the \$102,000 if she accepted the \$398,000. She was told that she would be sent a revised determination letter and accompanying documents. To date, however, she has not received the check for \$398,000. *Id.* 62.

ARGUMENT

I. DEFENDANT’S MOTION TO DISMISS THE “NET EQUITY” CLAIM SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE SUSTAINED INJURY IN FACT

The court may dismiss a complaint for lack of subject-matter jurisdiction only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 343 (D.C.Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Standing is “the threshold question in every federal case, determining the power of the court to entertain the suit.” *Ross v. Bank of America, N.A.(USA)*, 524 F.3d 217, 222 (2d Cir. 2008) (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)). To establish constitutional standing under Article III “a plaintiff must have suffered an ‘injury in fact’ that is ‘distinct and palpable’; the injury must be fairly traceable to the challenged action; and the injury must be likely redressable by a favorable decision.” *Ross*, 524 F.3d at 222 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

However, as the Second Circuit has held, establishing injury in fact has a low threshold. The injury “need not be capable of sustaining a valid cause of action,” but “may simply be the fear or anxiety of future harm.” *Id.* (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)). “Moreover, the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing.” *Id.* (quoting *Denney*, 443 F.3d at 265). As Justice Alito wrote: “[i]njury-in-fact is not Mount Everest.” *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005) (citing *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982) (“The contours of the injury-in-fact requirement, while not precisely defined, are very generous,” requiring only that claimant “allege [] some specific, ‘identifiable trifle’ of injury”)).

Plaintiffs’ allegations satisfy the injury in fact standard. In ¶ 79, the complaint alleges:

If Picard had complied with his statutory obligations and “promptly” paid all customer claims based upon their November 30, 2008 statements, all the Madoff investors’ SIPC claims could have been paid in full within three months. Instead, plaintiffs have suffered substantial damages as a result of their inability to recover their SIPC insurance payment in a timely manner.

Similarly, in ¶ 105 of the complaint, plaintiffs have alleged:

Plaintiffs have suffered substantial damages by virtue of Picard’s breach of his statutory obligations and fiduciary duties. They have been forced, *inter alia*, to sell assets at depressed prices because they had no source of funds for their living expenses and they have incurred other damages as well as egregious and unnecessary pain and suffering.

The Trustee has failed entirely to address the damages that the plaintiffs have pled, *i.e.*, the unjustifiable delay in receiving their SIPC insurance. Instead, he has focused solely on his theory that his invented definition of “net equity” will ultimately yield a greater return to the plaintiffs. But, in order to assert a plausible argument on this point, the Trustee has totally skewed his calculations in what he calls the “Trustee Methodology.” In fact, plaintiffs can demonstrate that the use of the *ultra vires* Trustee Methodology (instead of the lawful “Peskin Methodology”) will result in their receiving smaller returns on their investment than if the Trustee complied with the law as he is bound to do.

As a preliminary matter, the Court cannot accept the Trustee Methodology because, as admitted in the Trustee’s brief and the Declaration of Matthew B. Greenblatt, the \$20 billion figure for Total Claims using the Trustee’s definition of “net equity” is a speculative assumption.

Moreover, in presenting his calculations, the Trustee makes three errors which create the impression that the plaintiffs will ultimately receive a greater distribution from the estate with his definition of “net equity.” Once these errors are corrected, aside from the damages the plaintiffs have already suffered because of the delay in payment of their SIPC insurance, the plaintiffs are also economically injured in terms of their ultimate recovery from the estate.

The Trustee provides the following calculations for the Plaintiffs' claims:

<u>Ebel Account</u> <u>1ZB318</u>	
Using Peskin Methodology (Trustee's Version)	Amounts Recovered x \$2,546,022 \$64.8 billion
For each \$1 billion	$\$1 \text{ billion} \times \$2,546,022 = \$39,290.46$ \$64.8 billion
Using Trustee's Methodology	Amounts Recovered x \$1,348,877 \$20 billion
For each \$1 billion	$\$1 \text{ billion} \times \$1,348,877 = \$67,443.86$ \$20 billion
Result:	According to the Trustee, his Methodology provides Ebel Account 1ZB318 <u>172%</u> of the amount provided under the Peskin Methodology

<u>Ebel Account</u> <u>1ZB463</u>	
Using Peskin Methodology (Trustee's Version)	Amounts Recovered x \$4,729,125 \$64.8 billion
For each \$1 billion	$\$1 \text{ billion} \times \$4,729,125 = \$72,890.32$ \$64.8 billion
Using Trustee's Methodology	Amounts Recovered x \$2,290,387 \$20 billion
For each \$1 billion	$\$1 \text{ billion} \times \$2,290,387 = \$114,519.37$ \$20 billion
Result:	According to the Trustee, his Methodology provides Ebel Account 1ZB463 <u>157%</u> of the amount provided under the Peskin Methodology

<u>Peskin Account</u> <u>1CM948</u>	
Using Peskin Methodology (Trustee's Version)	Amounts Recovered x \$3,247,368 \$64.8 billion
For each \$1 billion	\$1 billion x \$3,247,368 = \$50,113.70 \$64.8 billion
Using Trustee's Methodology	Amounts Recovered x \$2,310,191 \$20 billion
For each \$1 billion	\$1 billion x \$2,310,191 = \$115,509.56 \$20 billion
Result:	According to the Trustee, his Methodology provides Peskin Account 1CM948 <u>230%</u> of the amount provided under the Peskin Methodology.

Error No. 1: The Trustee omits from his calculations the \$500,000 in SIPC insurance to which each of the plaintiffs is entitled.²

The Trustee grossly overstates the benefit to the plaintiffs of his methodology because he deliberately omits the most substantial recovery the plaintiffs will have in this case: the \$1 million in SIPC insurance to which Ms. Ebel and the Peskins are entitled. The Trustee certainly took the SIPC insurance payments into consideration in his determination of the plaintiffs' claims. See Decl. of Matthew B. Greenblatt, Exhs. B, D, E, & H. According to the Trustee's Notices of Determination, Ms. Ebel's claims against the Debtor's Estate are \$1,892,387.49 for account # 1ZB463 and \$848,877.12 for account # 1ZB318 (not \$2,290,387 and \$1,348,877 as claimed in his brief); and the Peskins' claim against the Debtor's Estate is \$1,810,191.25 (not \$2,310,191 as claimed in his brief). Once the SIPC insurance is taken into account (the first of the Trustee's errors), the alleged difference in what plaintiffs will receive using the Trustee

² Each of the Peskins is a "customer" under SIPA, entitled to \$500,000 of SIPC insurance because each of them deposited funds with Madoff for the purpose of purchasing securities. 15 U.S.C. § 7811(2).

Methodology all but disappears. Even if the Trustee's other assumptions were correct, which they are not, the calculations change radically when the SIPC insurance is included:

<u>Ebel Account</u> <u>1ZB318</u>	<u>Taking SIPC insurance into account</u>
<u>Using Peskin Methodology</u>	<u>Amounts Recovered</u> x \$2,046,022 \$64.8 billion
For each \$1 billion	<u>\$1 billion</u> x \$2,046,022 = \$31,574.41 \$64.8 billion The Peskin Methodology provides Ebel Account 1ZB318 a total recovery of \$531,574.41 including SIPC insurance
<u>Using Trustee's Methodology</u>	<u>Amounts Recovered</u> x \$848,877 \$20 billion
For each \$1 billion	<u>\$1 billion</u> x \$848,877 = \$42,443.85 \$20 billion
<u>Result:</u>	The Trustee's Methodology provides Ebel Account 1ZB318 a total recovery of \$42,443.85 or <u>102%</u> of the amount provided under the Trustee's Peskin Methodology

<u>Ebel Account</u> <u>1ZB463</u>	<u>Taking SIPC insurance into account</u>
<u>Using Peskin Methodology</u>	<u>Amounts Recovered</u> x \$4,229,125 \$64.8 billion
For each \$1 billion	<u>\$1 billion</u> x \$4,229,125 = \$65,264.27 \$64.8 billion The Peskin Methodology provides Ebel Account 1ZB463 a total recovery of \$565,264.27 including SIPC insurance
<u>Using Trustee's Methodology</u>	<u>Amounts Recovered</u> x \$1,790,387 \$20 billion
For each \$1 billion	<u>\$1 billion</u> x \$1,790,387 = \$89,519.35 \$20 billion
<u>Result:</u>	The Trustee's Methodology provides Ebel Account 1ZB463 a total recovery of \$89,519.35 or <u>104.3%</u> of the amount provided under the Trustee's Peskin Methodology

<u>Peskin Account</u> <u>1CM848</u>	<u>Taking SIPC insurance into account</u>
Using Peskin Methodology	Amounts Recovered x \$2,247,368 \$64.8 billion
For each \$1 billion	\$1 billion x \$2,247,368 = \$34,628.16 \$64.8 billion The Peskin Methodology provides Peskin Account 1CM848 a total recovery of \$1,034,628.16
Using Trustee's Methodology	Amounts Recovered x \$1,310,191 \$20 billion
For each \$1 billion	<u>\$1 billion</u> x \$1,310,191 = \$65,509.55 \$20 billion
Result:	The Trustee's Methodology provides Peskin Account 1CM848 a total recovery of \$1,065,509.55 or 102.9% of the amount provided under the Trustee's Peskin Methodology

Error No. 2: The Trustee has inflated the total Customer claims against the estate

The Trustee has not only misrepresented his own methodology for determining Customer claims, he has also misrepresented the correct calculations under the Peskin Methodology. Under the Trustee's version of the Peskin Methodology, the Total Claims of Customers is \$64.8 billion. However, this number is grossly inflated because the Trustee himself has alleged in complaints filed in this Court that some of Madoff's major customers knew or should have known of Madoff's fraud. The Trustee seeks to disallow the claims of these customers. Therefore, a deduction must be made from the \$64.8 billion in total claims to account for such disallowance. When the claims of the Fairfield Greenwich entities (approximately \$14 billion), the Kingate entities (approximately \$3.5 billion), the entities controlled by J. Ezra Merkin (approximately \$2.4 billion), the entities controlled by Stanley Chais (approximately \$1 billion) and the entities controlled by Jeffrey M. Picower (approximately \$1 billion) are deducted from the \$64.8 billion, the correct number for the total claims under the Peskin Methodology is reduced from \$64.8 billion to \$42.9 billion. Once this error is corrected, it is clear that the

Peskins will receive larger awards under the Peskin Methodology than under the Trustee Methodology.

<u>Ebel Account 1ZB318</u>	<u>Using realistic estimate of total claims</u>
Using Peskin Methodology	Amounts Recovered x \$2,046,022 \$42.9 billion
For each \$1 billion	\$1 billion x \$2,046,022 = \$47,692.82 \$42.9 billion The Peskin Methodology provides Ebel Account 1ZB318 a total recovery of \$547,692.82
Using Trustee's Methodology	Amounts Recovered x \$848,877 \$20 billion
For each \$1 billion	\$1 billion x \$848,877 = \$42,443.85 \$20 billion
Result:	The Trustee's Methodology provides Ebel Account 1ZB318 a total recovery of \$42,443.85, or <u>99%</u> of the amount provided under the Trustee's Peskin Methodology

<u>Ebel Account 1ZB463</u>	<u>Using realistic estimate of total claims</u>
Using Peskin Methodology	Amounts Recovered x \$4,229,125 \$42.9 billion
For each \$1 billion	\$1 billion x \$4,229,125 = \$98,581.00 \$42.9 billion The Peskin Methodology provides Ebel Account 1ZB463 a total recovery of \$598,581.00
Using Trustee's Methodology	Amounts Recovered x \$1,790,387 \$20 billion
For each \$1 billion	\$1 billion x \$1,790,387 = \$89,519.35 \$20 billion
Result:	The Trustee's Methodology provides Ebel Account 1ZB463 a total recovery of \$89,519.35 or <u>98.5%</u> of the amount provided under the Trustee's Peskin Methodology

<u>Peskin Account</u> <u>1CM848</u>	<u>Using realistic estimate of total claims</u>
Using Peskin Methodology	Amounts Recovered x \$2,247,368 \$42.9 billion
For each \$1 billion	\$1 billion x \$2,247,368 = \$52,386.20 \$42.9 billion The Peskin Methodology provides Peskin Account 1CM848 a total recovery of \$1,052,386.20
Using Trustee's Methodology	Amounts Recovered x \$1,310,191 \$20 billion
For each \$1 billion	\$1 billion x \$1,310,191 = \$65,509.55 \$20 billion
Result:	The Trustee's Methodology provides Peskin Account 1CM848 a recover of \$1,065,509.55 or 101.2% of the amount provided under the Trustee's Peskin Methodology

When a realistic estimate is used for the number of Total Claims, Ms. Ebel realizes a higher dollar amount in her distribution from the estate using a fair valuation methodology and the Peskins realize a mere 1.2% less, which differential is eliminated once the time value of money is taken into account.

Error No. 3: The Trustee has ignored the time value of money

The Trustee estimates that he will not distribute customer property for five years at least. Given his refusal to expedite judicial consideration of the “net equity” issue, the distribution of customer property will probably be delayed much longer. In any event, the Trustee’s tactic of delaying judicial determination of his invention of “net equity” has undoubtedly caused economic injury to plaintiffs and all other Customers in a greater amount than they can possibly benefit from his invented definition.

But, even if the Trustee’s calculations are correct as to the distributions of customer property the plaintiffs will receive five to ten years from now (which they are not), plaintiffs have suffered and are still suffering injury in fact due to the Trustee’s improper and inordinate

delay in payment of SIPC insurance to them. Ms. Ebel filed her claims on February 14, 2008. The Peskins filed their claim on February 19, 2009. The Peskins received their \$500,000 check on August 7, 2009 after being forced to retain their own counsel because the Trustee's counsel misrepresented the law to them. Ms. Ebel has not yet received her check although the Trustee apparently has mailed it out.

This six month delay is precisely what Congress intended to avoid. The delay in payment caused solely by the Trustee's defiance of SIPA's mandate that customers be paid SIPC insurance based upon their last statements forced the plaintiffs to dispose of assets at fire-sale prices – a loss they could have avoided if the Trustee had complied with the statute. The failure to “promptly” pay SIPC insurance is the denial to plaintiffs of a benefit to which they are statutorily entitled. This constitutes injury in fact, as a matter of law. *See Veterans for Common Sense v. Peake*, 563 F.Supp.2d 1049, 1077 (N.D. Cal. 2008) (delay in receiving disability benefits constitutes injury for standing purposes); *Weaver's Cove Energy, LLC v. Rhode Island Dept. of Environmental Mgmt.*, 524 F.3d 1330, 1333 (D.C. Cir. 2008) (“an agency's delay in processing an application may constitute a legally cognizable injury”); *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 501 F.Supp.2d at 42 (D.D.C. 2007) (citing *Salt Lake City Corp. v. Property Tax Div. of Utah State Tax Comm'n*, 979 P.2d 346, 351 (Utah 1999) (continuing denial of a benefit to which a party is entitled provides a basis for standing to obtain judicial review of an administrative rule)).

This is not a situation where the delay is the inevitable result of the Trustee complying with statutorily mandated procedures. *Compare Zevalkink v. Brown*, 102 F.3d 1236, 1244 (Fed. Cir. 1996) (holding that delay resulting from following procedure as established by statute does not constitute the kind of actual or threatened injury that confers standing). Here, we have the

direct opposite: the delay is the result of the Trustee's inexcusable contempt of SIPA's mandate that he "promptly" pay customer claims based upon the customers' last statements. The delay thus is caused by the Trustee's defiance of statutorily mandated procedures.

The delay has also caused, and continues to cause, plaintiffs economic injury in fact by depriving plaintiffs of the use and time value of money. *See Ontario Forest Industries Assoc. v. U.S.*, 444 F.Supp.2d 1309, 1323-24 (CIT 2006) (unauthorized delay which deprives plaintiff of time value of money constitutes a judicially cognizable injury for standing purposes). Had the Trustee promptly and completely paid plaintiffs the SIPC payments they were owed, \$1,000,000 to Ms. Ebel and \$1,000,000 to the Peskins, plaintiffs would have had the opportunity to preserve assets which have now been lost. In Ms. Ebel's case, she has been forced to sell her car, jewelry, and a piece of real estate in Florida at the worst possible time economically to have to liquidate assets. Similarly, the Peskins have lost a substantial asset because their SIPC insurance was withheld.

Moreover, the plaintiffs have lost the opportunity to collect interest on their SIPC funds. Applying the New York State statutory rate of pre-judgment interest (9%), the six month delay has cost Ms. Ebel and the Peskins each a minimum of **\$22,500**. Even using the Trustee's Methodology, the purported increase in the value of plaintiffs' claims is negated by the delay.

Furthermore, the Trustee's *ultra vires* defiance of SIPA's definition of "net equity" is in itself sufficient to constitute injury in fact. *See In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 501 F.Supp.2d 34, 42 (D.D.C. 2007) ("as long as the procedural requirement is designed to protect a threatened, concrete interest of the plaintiff, the violation is sufficient to grant the plaintiff standing.") (*citing City of Waukesha v. Env'tl. Prot. Agency*, 320 F.3d 228, 234 (D.C.Cir.2003)). The plaintiff must show "that it is substantially probable that the procedural

breach will cause the essential injury to the plaintiff's own interest." *In re Long-Distance Tel. Serv.*, 501 F.Supp.2d at 42 (quoting *City of Waukesha*, 320 F.3d at 234). Here, the very purpose of SIPA is to provide customers with a rapid source of replacement funds should their investment accounts disappear due to the dishonesty of their broker. SIPA requires that claims be paid promptly in order to insulate customers from the financial devastation that can accompany the loss of an investment and the statute provides a clear and simple method for calculating customer claims. The Trustee's defiance of SIPA directly exacerbated the injury caused by Madoff's fraud -- the precise injury SIPA was enacted to avoid.

II. THERE IS NO BASIS TO DISMISS THE COMPLAINT

A. THE STANDARD ON A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

In determining a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6), the Court must accept the facts alleged in the complaint as true, even if doubtful, and draw all reasonable inferences in favor of the non-moving party. *See Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008); *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989). The Supreme Court has held that a plaintiff need allege "only enough facts to state a claim to relief that is plausible on its face" for the claim to survive a motion to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Because "a Rule 12(b)(6) motion challenges the facts alleged on the face of the complaint . . . or, more accurately, the sufficiency of the statements in the complaint," *see Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (internal citations omitted), the court "is normally required to look only to the allegations on the face of the complaint." *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). As set forth below, dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is inappropriate because the Complaint properly alleges plaintiffs' claims.

B. THE ORDER DOES NOT BAR PLAINTIFFS' CLAIMS

1. Plaintiffs' Claims Cannot Be Adjudicated In the Claims Procedure Process

The Trustee argues that the Order bars plaintiffs' claims and that plaintiffs "should be required to adhere to the claims determination process approved by the Court." Def. Mem. at 16-17. The Trustee is incorrect. The Complaint is not a mere "attempt to obtain preferential treatment" *Id.* at 13. In fact, the plaintiffs could only adjudicate their claim for breach of fiduciary duty against the Trustee by filing the Complaint. Such a claim cannot be resolved through the Order, which only sets forth a procedure for adjudicating claims against Madoff. Indeed, the Trustee concedes, "[t]he claims procedure process is generally not used to assert claims for breach of fiduciary duty against the Trustee." *Id.* at 14. Moreover, SIPA expressly provides for suits against a trustee:

Exclusive jurisdiction. Upon the filing of an application with a court for a protective decree with respect to a debtor, such court . . . shall have exclusive jurisdiction of any suit against the trustee with respect to a liquidation proceeding.

15 U.S.C. § 78eee(b)(2)(A)(ii)

Thus, the Complaint complies with the statutory procedure because it was brought in this Court, the same court that is resolving the liquidation proceeding. It was also proper to bring plaintiffs' declaratory judgment claim against the Trustee in this Court, pursuant to 15 U.S.C. § 78eee(b)(2)(A)(ii). In fact, the Trustee has implicitly recognized that the filing of an adversary proceeding seeking a declaratory judgment action against him does not violate the Order. On July 17, 2009, he filed an Answer and Counterclaims to Amended Class Action Complaint for Declaratory Judgment in *Albanese, et al v. Picard*, Adv. Pro. No. 09-01265 (BRL), without moving to dismiss the complaint. Surely, if the Trustee believed that the Albanese complaint

violated the Order, he would not have acknowledged the complaint's validity by filing a counterclaim against the named plaintiffs in that action.³

The case cited by SIPC to support its point that the filing of the Complaint was improper, *SIPC v. S.J. Salmon & Co.*, No. 72 Civ. 560 (S.D.N.Y. 1972), is entirely distinguishable. See Decl. of Hemant Sharma, Exh. A. In *S.J. Salmon & Co.*, the trustee had paid approximately 75 percent of customer claims within months of the filing of the liquidation proceeding. Slip Op. at 3 (“This action was instituted early this year . . . Approximately 2,000 claims have been filed; securities and cash have been returned to some 1,500 customers. . . .”). Here, on the other hand, the Trustee has determined approximately 5% of claims as of August 3, 2009, approximately 10 months after filing, and has paid only a portion of those claims. Thus, this liquidation, unlike the liquidation in *S.J. Salmon & Co.*, is not proceeding by means of a “patently well-planned procedural sequence.” Slip Op. at 3.

Moreover, the complaint in *S.J. Salmon & Co.* merely alleged that plaintiffs' claims had not been determined quickly enough and that the trustee should be compelled to turn over specific securities and cash to them. Slip Op. at 2. That claim related entirely to the plaintiffs' claims against the debtor and thus could have been decided through the claims procedure mechanism in that case. Here, on the other hand, plaintiffs have asserted a breach of fiduciary duty claim and a claim for a declaratory judgment against the Trustee that cannot be resolved through the claims procedure process but must be resolved through an adversary proceeding.

In re Bevill, Bresler & Schulman, Inc., No. 85-1728 (D.N.J. 1989), is a perfect example of SIPA's violation of its statutory duty to pay claims promptly. See Decl. of David Sheehan,

³ We note that on August 6, 2009, the Trustee's counsel represented to the Court that the Trustee has not sued “little people.” Yet, according to the allegations of the *Albanese* complaint, the plaintiffs whom the Trustee has sued are virtually destitute.

Exh. A. The opinion is dated approximately four years after the plaintiff had initially filed his Proofs of Claims. See Slip Op. at 2 (“On July 8, 1985, Calvert filed three Proofs of Claims against the BBS estate”). Moreover, although the Trustee cites this case in support of his argument that the Complaint should be dismissed for purportedly violating the Order, it is distinguishable because, as in *S.J. Salmon & Co.*, it contains no claims against the Trustee alleging that he was violating his statutory duties or breaching his fiduciary duty. Instead, the plaintiff in *In re Bevill, Bresler & Schulman, Inc* merely sought a declaration that he was a “customer” of the debtor, which could properly be resolved in the objection process.

2. The Plain Language of the Order Does Not Bar Plaintiffs’ Claims

Not only was an adversary proceeding necessary due to the nature of plaintiffs’ claims, but the Order, by its unambiguous terms, **does not** bar the assertion of plaintiffs’ claims in this adversary proceeding. The Order states that “all claims **against the Debtor** shall be filed with the Trustee.” (Order at 3; emphasis added. The Complaint is not a claim against the Debtor, but rather a claim **against the Trustee**. The Order also sets up a claim resolution procedure for “customer claims which disagree with the Debtor’s books and records and which are not resolved by settlement.” Order at 6. The claims set forth in the Complaint in no way “disagree with the Debtor’s books and records.” On the contrary, the plaintiffs are asserting claims **based upon** the Debtor’s books and records, as expressly required by SIPA. 15 U.S.C. § 78fff-4(c); 15 U.S.C. § 78lll(11). That is, plaintiffs’ claims are based upon their November 30, 2008 statements, which they received from the Debtor in the ordinary course of business. Thus, the resolution procedure in the Order is inapplicable and the filing of the Complaint in no way violates the Order.

