

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

10-2378-bk(L)

10-2676-bk-(con); 10-2677-bk (con); 10-2679-bk (con); 10-2684-bk (con);
10-2685-bk (con); 10-2687-bk (con); 10-2691-bk(con); 10-2693-bk (con);
10-2694-bk(con); 10-2718-bk (con); 10-2737-bk (con); 10-3188-bk (con);
10-3579-bk (con); 10-3675-bk (con)

SECURITIES INVESTOR
PROTECTION CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF
INVESTMENT SECURITIES LLC,

Debtor.

PETITION FOR REHEARING EN BANC

The petitioners (the “Petitioners”) are customers of Bernard L. Madoff Investment Securities, LLC. (“BLMIS”) who respectfully petition the Court as follows:

1. Each Petitioner listed on pages 22 through 24 of this petition was an appellant in the above referenced appeal and each seeks rehearing *en banc* of this

Court's August 16, 2011 decision (the "Decision"), annexed hereto as Exhibit B.

2. Reconsideration of the Decision by the full Court is necessary to maintain uniformity of the Court's decisions. The Decision is in direct conflict with *In re New Times Securities Services, Inc.*, 371 F. 3d 68 (2nd Cir. 2004) ("*New Times*"), wherein this Court accepted the position of both the Securities and Exchange Commission (the "SEC") and the Securities Investor Protection Corporation ("SIPC") that, under the Securities Investor Protection Act ("SIPA"), customers are entitled to SIPC insurance based upon the value of their accounts as reflected on their statements, including appreciation in the value of securities **never** actually purchased for them. *New Times* involved a Ponzi scheme where the broker never purchased any securities for his customers; the customer statements were pure fiction; and the customer statements showed appreciation in the securities allegedly purchased. Moreover, like BLMIS, it appears that New Times customers delegated to their broker discretion to purchase securities.¹ Yet this Court held that SIPA and SIPC's Series 500 Rules, 17 C.F.R. § 300.502, provide for the classification of claims in accordance with the "legitimate expectations" of a customer based upon the written confirmations sent by the broker to the

¹ Although there is no discussion of this issue in either of the Court's *New Times* decisions, no customer would have directed the broker to purchase non-existent securities.

customer. Thus, the type of fraud perpetrated by a broker is irrelevant to a customer's entitlement to SIPC insurance. Were this not so, despite the assurances given by SIPC's members to customers that their accounts are insured up to \$500,000 by SIPC, an investor would never know whether his account was insured unless and until he was defrauded and SIPC decided if it wanted to insure the customer accounts in that particular case.

3. The Decision is of exceptional importance because it is the only decision of any court which has interpreted SIPA to allow a SIPC trustee (chosen and compensated by SIPC) to determine, after a loss, the extent (if at all) to which SIPC shall be required to provide the promised SIPC insurance to each injured investor. Thus, the Decision eviscerates SIPA's fundamental protection of investors despite a specific provision of SIPA prohibiting SIPC from changing the basis on which investors are insured (the definition of "net equity"). The Decision will have a devastating impact upon investor confidence in our capital markets, just as would a decision holding that the FDIC insures bank deposits only in those situations where the FDIC decides, after a bank liquidation, that the depositors are entitled to insurance based upon the particular circumstances leading up to the collapse of that particular bank.

4. The Decision ignores the fundamental precepts of legislative interpretation by abrogating the insurance protection mandated by the statute

despite an explicit prohibition in SIPA against changing the definition of “net equity.” Congress’ intent could not have been more clearly stated. In 40 years of SIPC’s history, it had never before argued that the “books and records” provision of SIPA trumps the definition of “net equity.” Yet, the Decision not only accepts SIPC’s argument but goes further and substitutes a subjective standard for entitlement to SIPC insurance in lieu of a Congressionally-mandated objective standard. The Decision converts a SIPA liquidation, governed by strict statutory standards, to an equitable proceeding in which each SIPC trustee is free to distribute SIPC insurance in any way **he** deems equitable. In this case, the Trustee chose – and the Court blessed -- a method that saves SIPC the maximum amount of money. There is no way that this result can be equitable when it deprives innocent investors of SIPC insurance, the promise of which enriched SIPC’s members over a period of 40 years.

5. The Decision further destroys the entire SIPA statutory scheme because, by judicial decree, it abrogates the Congressional mandate that SIPC insurance be paid “promptly” to each investor. By holding that every SIPC trustee can determine whether it is “equitable” for innocent investors to receive SIPC insurance, the Court has imposed subjective criteria for the payment of SIPC insurance. This will undoubtedly, in each case, create years of delay in paying investors because of the inevitable litigation.

6. The Decision makes factual findings that are flatly contradicted by the undisputed record before the Court. For example:

- The Decision states that the returns the investors received “varied significantly and arbitrarily” (Decision at 8) despite the fact that every single Petitioner received about the same rate of returns, which fluctuated over time. Indeed, the only investors whose returns were different were a handful of co-conspirators of Bernard L. Madoff or certain Madoff family members and employees.

- The Decision states that BLMIS was a Ponzi scheme from inception despite the fact that BLMIS operated from the 1960’s on and the Trustee’s own expert admitted that the fraud began in the early 1990’s.

- The Decision states that no transactions in securities were ever executed by BLMIS with customers’ money despite the fact that the Trustee’s own expert, whose untested, hearsay certification was the only “factual record” before the Court, admitted that customers’ money was deposited directly and indirectly into BLMIS trading accounts and despite the fact that BLMIS was a market maker whose real trades, from the early 1990’s on, were equal to 5-10% of the daily volume on the New York Stock Exchange.

PROCEEDINGS BELOW

7. The question of the proper definition of “net equity” under SIPA was

submitted to the bankruptcy court through a motion by the Trustee seeking approval for his Net Investment Method as a pure question of law, before the customers were permitted any discovery of BLMIS' records.

8. The bankruptcy court agreed to decide the net equity issue by order dated September 21, 2009, which provided in pertinent part:

The briefing to be submitted to the Court pursuant to the Order shall be limited to discussing the proper interpretation of Net Equity, specifically the following two issues:

1. Whether a customer's Net Equity under SIPA is equal to 'cash in/cash out; or
2. Whether a customer's Net Equity under SIPA is equal to the value of the securities positions and credit balances reflected in the customer's last statement.

Order approving amended notice of adjudication of "Net Equity" issue signed on 9/21/2009, Adv. Pro. No. 08-01789 (BRL), Doc. # 442, Exhibit A, at 3. All other "rights, claims and defenses" were expressly reserved by that order. *See id.*

9. To this day, the bankruptcy court has not permitted any discovery of the Debtor's records. Virtually every Petitioner in this Court specifically noted that he had been denied any discovery and disputed the Trustee's rendition of the

facts.² On March 8, 2010, the bankruptcy court rendered its decision sustaining the Trustee's net equity definition. In recognition of the importance of the issue, the bankruptcy court agreed to certify the issue for an immediate appeal to this Court, which agreed to accept the appeal.

10. On August 16, 2011, this Court affirmed the bankruptcy court's decision.

ARGUMENT

I. The Decision is Inconsistent with *New Times*

11. The Decision directly conflicts with this Court's holding in *New Times*. There, this Court, SIPC, and the SEC agreed that a customer's "net equity" was determined by the customer's last statement so long as the statement showed ownership of real securities that SIPC could go into the market and purchase, even though the broker engaged in a Ponzi scheme in which no securities were actually purchased. SIPC, with concurrence of the SEC, paid the net equity claims based on final account statements to those customers whose statements reflected investments in real securities (the "Existent Securities Claimants"). *New Times*, 371 F.3d at 71-72, 74.

12. Some *New Times* customers received account statements reflecting

² See, e.g., Becker & Poliakoff, LLP Opening Brief, Case No. 10-2378 (2d Cir.), Doc. # 202, at 6.

imaginary securities (the “Fake Securities Claimants”). *Id.* at 75, 87-88. This Court held that their net equity claims should be valued on a “cash-in-/cash-out” basis because it would be impossible for SIPC to go into the market and purchase those securities. The crucial distinction for this Court was that the securities in which the Fake Securities Claimants invested *never existed* and, therefore, there was no basis on which to value the securities. *Id.* at 74.

13. The Court held that, under SIPA, the sole issue determining a customer’s claim is whether the customer had a legitimate expectation – based on written confirmations and account statements – that he owned the securities in his account. The Court held that a customer’s legitimate expectations ought to be protected. *Id.* at 87. Because the Existent Securities Claimants could verify the existence and the price of the Existent Securities, they had legitimate expectations that their securities were valued as reflected on their last statement; thus, their net equity claims were based on their final account statements, which showed appreciation in the value of the securities. On the contrary, the Fake Securities Claimants did not have the same legitimate expectations because their securities were non-existent and could not be verified.

14. In a later decision, *In re New Times Securities*, 463 F. 3d 125 (2d Cir. 2006), another panel of this Court concluded that “a customer’s legitimate expectations on the filing date . . . [governs the] extent of customer relief under

SIPA.” *Id.* at 128.

15. The *New Times* decisions were consistent with SIPA’s remedial purpose. As remedial legislation, SIPA must be construed broadly to effectuate its purpose of protecting customers of SEC-regulated broker/dealers. *See In re First State Securities Corp.*, 34 B.R. 492, 496 (B.S.D. Fla 1983) (citing *Tcherepnin v. Knight*, 389 U.S. 332 (1967)); *In re Bell & Beckwith*, 1986 U.S. Dist. LEXIS 29804 at *5-6 (N.D. Ohio Jan. 31, 1986).

16. This Court recognized that the Petitioners were like the Existing Securities Claimants in *New Times* in the “critical fact” that Petitioners’ “customer statements reflected investments in real stocks” (Decision at 32). Thus, the Court should have held that the Petitioners are entitled to SIPC insurance based upon the value of their accounts as reflected on their account statements because, only by doing so, could the Petitioners’ legitimate expectations be honored.

17. Yet, the Court abandoned its prior holding and ignored the mandate of SIPA and SIPC’s Series 500 Rules, 17 C.F.R. § 300.502, which require that SIPC insurance be based upon the “legitimate expectations” of the customer. The Court analogized the Petitioners to the Fake Securities Claimants because “assessing ‘net equity’ based on their customer statements would require the Trustee to establish each claimant’s ‘net equity’ based on fiction created by the perpetrator of the fraud.” (Decision 32.) Thus, instead of focusing on the legitimate expectations of

the customers, the Court implicitly focused on the financial burden on SIPC to fund the insurance, despite the fact that SIPC's ability to fund the insurance was never raised by any party and, of course, is not a permissible consideration under the statute.

18. The Decision ignores the fact that SIPA was intended to protect investors by honoring **their** legitimate expectations. The BLMIS investors legitimately believed that they owned real securities, based upon the trade confirmations they received from BLMIS showing ownership in Fortune 100 company stocks. The Fake Securities Claimants in *New Times* received statements showing that they owned non-existent securities which could not possibly be verified or priced because they did not exist.

19. As SIPA and *New Times* make clear, if customers' account statements reflect securities positions in real securities that can be "liquidated by sale or purchase on the filing date," the Trustee must either purchase the securities or pay customers the market value of those securities on the filing date. 15 U.S.C. § 78lll(11). While this Court in *New Times* was obligated to consider an alternative methodology for the Fake Securities Net Equity claims because SIPC could not go into the market and purchase those securities, in this case there is no basis to disregard the clear statutory mandate.

II. The Decision Eviscerates SIPA's Statutory Scheme

a. SIPA's Plain Meaning Governs the Definition of Net Equity

20. SIPA mandates that the Trustee satisfy net equity claims of customers of a failed broker. *See* 15 U.S.C. § 78fff(a)(1)(A)-(B). SIPA defines net equity in unambiguous terms. *See* 15 U.S.C. § 78lll(11). Net equity is calculated by determining the dollar amount that would be owed by the broker to a customer if the debtor had liquidated the customer's securities positions by sale or purchase on the filing date. *Id.*

21. Congress was clearly concerned that SIPC, as the insurer, would seek to limit its liability to investors. To prevent that, Congress prohibited SIPC from changing the definition of net equity. *See* 15 U.S.C. § 78ccc(b)(4)(A).

22. The Decision ignores that prohibition and bases its holding upon another provision of SIPA, 15 U.S.C. § 78fff-2(b), which simply allows a trustee to confirm securities positions through the debtor's "books and records." If this provision could abrogate SIPC insurance whenever a broker stole a customer's money and did not purchase the securities shown on the customer's statement, then *New Times* would have denied SIPC insurance to all customers, regardless of whether their statements showed Existent Securities.

23. Such an interpretation is contradicted by SIPA's legislative history which demonstrates Congressional intent to protect investors whose brokers never

purchased the securities shown on their statements:

Under present law, **because securities belonging to customers may have been lost, improperly hypothecated, misappropriated, never purchased** or even stolen, it is not always possible to provide to customers that which they expect to receive, that is, securities which they maintained in their brokerage account. . . . **By seeking to make customer accounts whole and returning them to customers in the form they existed on the filing date, the amendments . . . would satisfy the customers' legitimate expectations. . . .**" S. Rep. No. 95-763, at 2 (1978) (emphasis added).

A customer generally expects to receive what he believes is in his account at the time the stockbroker ceases business. But because securities may have been lost, improperly hypothecated, misappropriated, **never purchased**, or even stolen, this is not always possible. Accordingly, [when this is not possible, **customers**] **will receive cash based on the market value as of the filing date.**" H.R. Rep. No. 95-746, at 21 (1978) (emphasis added).

24. Disregarding the clear statutory mandate, the Decision eviscerates SIPA and allows a SIPC trustee to vary the definition of net equity to suit the "unique facts" of any case, thereby converting SIPA from a remedial statute designed to protect investors into one that focuses primarily on protecting the financial interests of SIPC and its members at the expense of victims of a dishonest broker.

b. The Decision Ignores the Court’s Mandates on Statutory Construction

25. The Decision ignores the basic principle of statutory construction that a specific provision controls over a general provision. *See U.S. v. Moran*, 236 F.2d 361, 363 (2d Cir. 1956) (holding that, where general and specific statute prohibit same conduct, specific statute controls); *American Land Title Ass’n v. Clarke*, 968 F.2d 150, 157 (2d Cir. 1992) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (recognizing that, “where two statutes conflict, the statute that addresses the matter under consideration in specific terms controls over the one that does so in a general matter, unless of course Congress has manifested a clear intent to the contrary.”))

26. This Court erred in holding that net equity claims must be calculated pursuant to the definition of net equity set forth in 15 U.S.C. § 78lll(11) in conjunction with 15 U.S.C. § 78fff-2(b), requiring a Trustee to pay customers’ net equity claims to the extent the amount owed is “ascertainable from books and records of the debtor.” (Decision at 20-21.)

27. Clearly, the BLMIS records included the statements upon which appellants relied. The Trustee has never asserted that appellants’ statements do not match BLMIS’ records. Rather, the Trustee argued that the two provisions were in conflict, *i.e.*, that the “net equity” definition never applies where a broker did not

purchase the customer's securities.

28. The "net equity" definition, however, is specific and detailed. Congress prohibited SIPC from changing the definition. *See* SIPA § 78ccc(b)(4)(A). Thus, clearly, the net equity definition established in 15 U.S.C. § 78lll(11) that requires payment based upon securities positions reflected on the final account statement is the specific provision that "addresses the matter under consideration in specific terms," namely the calculation of customers' net equity. *See American Land Title Ass'n*, 968 F.2d at 157. As such, it controls.

29. The "books and records" provision, 15 U.S.C. § 78fff-2(b), simply provides that, before a trustee is required to make payment to a claimant, the claimant must demonstrate – by reference to account statements, or, if there are none, to the trustee's satisfaction – that the claimant is a customer and has a preferred claim under SIPA to either cash or securities. *See* 15 U.S.C. § 78fff-2(b), however, does not govern the question of *how* a customer's net equity claim is to be calculated.

30. Hence, 15 U.S.C. § 78lll(11) trumps 15 U.S.C. § 78fff-2(b), a general provision that does not specifically address how net equity is to be calculated but rather simply enables a trustee to verify the accuracy of the statements that a customer presents. Again, there is no dispute in this case that the statements received by appellants match BLMIS' records.

31. Again, if the “books and records” provision controls, then *New Times* was incorrectly decided because the broker in *New Times* had never purchased the securities and his “books and records” proved that.

c. **The Decision Ignores SIPA’s Mandate of Prompt Payment of Net Equity Claims**

32. A crucial part of SIPA’s carefully structured statutory scheme was Congress’ mandate that SIPC minimize the devastation to customers of an insolvent broker/dealer through **prompt payment** of SIPC insurance.

- SIPA requires that SIPC **promptly** pay SIPC insurance to investors of a liquidated brokerage firm. *See* 15 U.S.C. §78fff (a)(1)(B) (recognizing that the purpose of the liquidation proceeding is to “as promptly as possible satisfy net equity claims of customers”).

- 15 U.S.C. §78fff-4(c) (“SIPC shall **promptly** satisfy all obligations of the member to each of its customers relating to, or net equity claims based upon, securities or cash by the delivery of securities or the effecting of payments to such customer.”) (emphasis added)

- 15 U.S.C. § 78fff-3(a) (“In order to provide for **prompt payment** and satisfaction of net equity claims of customers of the debtor, SIPC shall advance to the trustee such moneys ... as may be required to pay or otherwise satisfy claims”).

- SIPA § 78fff-2(b) (“[T]he trustee shall **promptly discharge**” all

obligations relating to net equity claims.) (emphasis added).

33. Despite this mandate, the Decision creates a new process for defining net equity that will vary from case to case and will nullify the statutory requirement that SIPC relief be provided to customers promptly. The new methodology virtually assures that there will be extensive litigation over the definition of net equity in every case because, as here, a SIPC trustee will act to conserve SIPC's resources while customers will seek the maximum protection guaranteed by the statute. That, in turn will necessarily require discovery and evidentiary hearings as well as appeals since each case will need to be reviewed by a district and/or circuit court to rule on the trustee's methodology. As a result, customers of a broker/dealer will not receive payments until years after the liquidation as opposed to the "prompt" advances that they are entitled to under SIPA.

III. The Court Erroneously Relied on a False Premise

34. When this matter was argued on March 3, 2011 before Judges Level, Jacobs, and Raggi, the Panel expressed particular concern with the impact upon other customers of an advance made by SIPC to a customer based on the customer's last statement. *See* 3/3/11 Transcript of Oral Argument ("Trans.") at 39-42.

35. Josephine Wang, counsel for SIPC, responded to a question by Judge

Level that SIPC's payment to one customer based upon the customer's last statement will necessarily reduce funds available for payment to other customers because of SIPC's subrogation rights. *See* Trans. at 41-42. This is flatly incorrect.

36. Nevertheless, the Court seems to have based its Decision, in large part, on this erroneous view of the law:

[S]o if customers receive SIPC advances based on property that is a fiction, **those advances will necessarily diminish the amount of customer property available to other investors, including those who have not recouped even their initial investment.**

(Decision at 29) (emphasis added.)

37. In fact, SIPC advances are paid by SIPC out of a fund established through assessments on broker/dealers; SIPC advances are not paid out of the fund of customer property. SIPA provides that, to the extent SIPC advances funds to a trustee to pay a customer claim, SIPC is subrogated to the customer and will be paid, after that customer is paid, out of distributions from the fund of customer property. *See* 15 U.S.C. § 78fff-3(a). However, the priority scheme set out in SIPA for allocation of customer property requires that SIPC's claims "as subrogee for the claims of customers" be satisfied **after** payments in satisfaction of customers' net equity are satisfied. *See* 15 U.S.C. §78fff-2(c)(1) (listing SIPC's claim as subrogee third in priority, while customer claims are second in priority) (emphasis added). Thus, SIPC insurance does not reduce the payments to other customers.

IV. The Decision Is Based Upon “Facts” that Are Not in the Record

38. The issue on appeal was submitted to the bankruptcy court and to this Court as a pure question of law and statutory construction. No discovery was allowed and the motion was submitted to the Court solely upon the untested, hearsay certification of the Trustee’s expert, Joseph Looby. (A501 (V. I)) (“Looby”). Indeed, both in the Court below and in this Court, Petitioners made clear that the Trustee’s rendition of the facts was in sharp dispute.³

39. Nevertheless, the Decision makes factual findings that are flatly contradicted, or not supported, by Looby. To give just a few examples:

40. The Court found that BLMIS “engaged in no trading activity whatsoever.” (Decision at 6-7). The Decision ignores the fact that BLMIS operated from the early 1960’s on and that, during the period from the early 1990’s on, BLMIS conducted trades for major firms like Bear Stearns, Fidelity, and Schwab, which equaled in volume 5 – 10% of the daily volume on the New York Stock Exchange.⁴ This totally legitimate business was carried on by BLMIS in the

³ See, e.g., Becker & Poliakoff, LLP Opening Brief, Case No. 10-2378 (2d Cir.), Doc. # 202, at 6.

⁴ See Randall Smith, *Wall Street Mystery Features a Big Board Rival*, THE WALL STREET JOURNAL, Dec. 16, 1992; see also Greg N. Gregoriou and Francois-Serge Lhabitant, *Madoff: A Riot of Red Flags*, Jan. 2009, at 7, available at http://faculty-research.edhec.com/jsp/fiche_document.jsp?CODE=1234770344525&LANGUE=1.

same building and through the same limited liability company that operated the fraudulent investment scheme.

41. The Court found that Madoff never invested customer funds. (Decision at 6). However, many Petitioners opened their BLMIS accounts in the 1960's, 1970's, and 1980's before the fraud began. Looby himself dated the fraud "on or around 1993" when BLMIS installed its AS/400 computer system. Looby ¶¶ 15, 40, 41. Madoff and Frank DiPascali both pled guilty to a fraud beginning in the early 1990's. Chaitman Exhs. W at A292 (V. II) and X at A304-305 (V. II). There was no evidence before the Court that the fraud began prior to the early 1990's. Yet, the Court approved a valuation of customer claims netting out deposits and withdrawals going back to the 1960's.

42. The Court found that Madoff "did not actually execute trades with investor funds." (Decision at 7.) However, Looby himself admitted that customer funds were deposited directly and indirectly into BLMIS' trading accounts. Looby ¶¶ 9, 17, 18, 19, 26, 27.

43. The Court found that no income or profits were ever generated from the customer funds deposited with Madoff. (Decision at 6-7.) However, aside from the profits that must have been generated by the trading BLMIS did with customers' money, Looby admitted that customers' funds were held in an interest-bearing account at J.P. Morgan Chase Bank, N.A. Looby ¶¶ 17-19, 56.

44. The Court found that customers' returns "varied significantly." (Decision at 8.) Yet, there was no evidence before the Court of such variation. Indeed, Looby admitted that the initial customer statements reflected the purchase of securities and options "comparable to the amount of principal invested with BLMIS." *Id.* ¶ 68. Thereafter, each statement showed the purchase or sale of real securities at accurate prices. The fraud was simply that BLMIS did not execute the trades shown. Instead, the statements were prepared after the fact.

45. The Court erroneously relied upon the bankruptcy court's finding that "the Trustee's investigation revealed many occurrences where purported trades were outside the exchange price range for the trade date." (Decision at 7.) In fact, there was no such evidence. Of the thousands of securities transactions listed on the BLMIS account statements, Looby cited only one discrepancy: According to Looby, as late as 2008, customer statements reflected investment in the Fidelity Brokerage Services LLC's "Fidelity Spartan U.S. Treasury Money Market Fund." However, according to Looby, "Fidelity has acknowledged that, from 2005 onwards, Fidelity did not offer participation in any such money market fund for investment." Looby ¶ 57.

46. In fact, Looby is incorrect. In August 2005, the name of the fund was changed slightly, but it remained open to new investors. On August 15, 2005, Fidelity Hereford Trust filed a Form 197 with the Securities & Exchange

Commission (“SEC”) (SEC File No. 33-52577) announcing that the fund would be renamed the Fidelity U.S. Treasury Money Market Fund. The Court may take judicial notice of the filing with the SEC. *See Lindsay v. Morgan Stanley (In re Morgan Stanley Info. Fund Sec. Litig.)*, 592 F.3d 347, 355 (2d Cir. 2010); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).⁵

47. While the Decision is premised upon BLMIS being a Ponzi scheme, the Trustee’s counsel has recently admitted that, whether BLMIS was a Ponzi scheme has not yet been determined:

With regard to whether or not it's a Ponzi or whether the market making platform somehow obviates that or undercuts it in any way, that's an issue. It's in the case; we understand that.

6/21/2011 Hearing Transcript annexed hereto as Exhibit C, Adv. Pro. No. 08-01789 (BRL), Doc. # 4201, at 10:25-11:1-2.

⁵ Furthermore, the argument that a few of the thousands of transactions reported in monthly account statements were outside the range for the security on that day or that one of the securities listed used a similar but incorrect name assumes that customers check each transaction against the published listings each month. There is no duty to do so or expectation that customers will do so. Nor could customers possibly have known how much money BLMIS was handling, for how many customers or how many options would have been needed to effectuate BLMIS’ claimed strategy. If the trustee is able to base a determination of net equity on such after-the-fact analyses, no customer will have confidence in the promise of SIPC insurance.

{N0001552} {N0001552}

CONCLUSION

For the foregoing reasons, Petitioners respectfully request rehearing *en banc* of the Decision.

August 30, 2011

BECKER & POLIAKOFF, LLP

/s/ Helen Davis Chaitman

45 Broadway

New York, NY 10006

(212) 599-3322

*Attorneys for Petitioners Marsha Peskin and
BLMIS Customers Listed on Exhibit A*

BERNFELD, DeMATTEO & BERNFELD LLP

By: /s/ David B. Bernfeld

600 Third Avenue, 15th Floor

New York, New York 10016

(212) 661-1661

Attorneys for Petitioner, Edith Schur

GOODWIN PROCTER LLP

By: /s/ Daniel M. Glosband

53 State Street

Boston, Massachusetts 02109

(617) 570-1000

Larkin M. Morton
The New York Times Building
620 Eighth Avenue
New York, New York 10018
(212) 813-8800
*Attorneys for Petitioners Jeffrey A. Berman,
Russell deLucia, Norman I. Lesser 11/97
Rev. Trust, and Paula E. Lesser 11/97 Rev.
Trust*

**KLEINBERG, KAPLAN,
WOLFF & COHEN, P.C.**

By: /s/ David Parker
551 Fifth Avenue, 18th Floor
New York, New York 10176
(212) 986-6000
*Attorneys for Petitioners Lawrence Elins
and Malibu Trading and Investing, L.P.*

LAX & NEVILLE, LLP

By: /s/ Brian J. Neville
By: /s/ Barry R. Lax
1412 Broadway, Suite 1407
New York, NY 10018
(212) 696-1999
*Attorneys for Petitioners Mary Albanese, the
Brow Family Partnership, Allen Goldstein,
Laurence Kaye, Suzanne Kaye, Rose Less,
and Gordon Bennett*

PHILLIPS NIZER LLP

By: /s/ Chryssa V. Valletta
666 Fifth Avenue
New York, New York 10103
(212) 977-9700
*Attorneys for Petitioners Herbert Barbanel
and Alice Barbanel*

SNR DENTON US LLP

By: /s/ Carole Neville
1221 Avenue of the Americas
New York, New York 10020
212 768-6700
*Attorneys for Marsha Peshkin and the group
represented by SNR Denton US LLP (the
"SNR Appellants", formerly known as
the "Sonnenshein Appellants")*

STANLEY COHEN

By: /s/ Stanley Cohen
41 Park Avenue
Suite 4-F
New York, NY 10016
*Attorney for Petitioners Lee Mellis, Jean
Pomerantz, Bonnie Savitt, Lee Mellis, IRA*