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

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In re: : **SIPA LIQUIDATION**
:
: **No. 08-01789 (BRL)**
:
:
: **Debtor. : Adv. Pro. No. 09-01272(BRL)**
:
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DIANE and ROGER PESKIN, and :
MAUREEN EBEL, :
:
: **Plaintiffs,** :
:
v. :
:
IRVING H. PICARD, as Trustee for the :
Liquidation of Bernard L. Madoff :
Investment Securities LLC, :
:
: **Defendant.** :
-----X

**MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE
SETTING FORTH MATTERS NOT PREVIOUSLY PUT BEFORE THE COURT
(OR PUT BEFORE IT ONLY CURSORILY), AND STATEMENT
OF THE INTEREST OF AMICUS**

Amicus moves for leave to file a short accompanying brief amicus curiae.

The accompanying amicus brief is submitted to bring three matters to the Court's attention. These matters, insofar as amicus is aware, either have not been brought to the Court's attention at all by the parties, or have been mentioned by them only cursorily and in passing. (Amicus does not know whether the parties intend to bring these matters before the Court for the first time, or more extensively, in future.)

The accompanying amicus brief does *not* discuss points which have been extensively briefed to this Court by the highly knowledgeable lawyers for the parties or by other highly knowledgeable lawyers (such as Brian Neville and Jonathan Landers) for persons who are parties to related proceedings.

The points that amicus wishes to briefly set before the Court are these:

- The cash-in/cash-out basis for determining net equity will of course deny many Madoff victims any recovery from SIPC. *But it will also deny them any subsequent share of monies recovered for the estate, and distributed, by the Trustee.* For if one has a negative net equity, as many will under the cash-in/cash-out method, then one cannot obtain any share of the monies recovered for the estate, and distributed, by the Trustee.
- Discovery from the files of the Trustee and SIPC, and depositions of the major players for those entities (e.g., Messrs. Harbeck and Picard), would shed extensive light on the reasons why SIPC and the Trustee adopted the cash-in/cash-out method. The reasons, and their legitimacy, are a matter of serious public controversy, including dispute between the parties to this case, and discovery should be had to establish the truth.

- The Sixth Circuit recently issued a ruling relevant to the propriety of using the cash-in/cash-out method. *Visconsi v. Lehman Bros.*, 244 Fed. App. 708, 2007, WL 225887 (C.A. 6, 2007) (Ex., *infra.*). In a case involving a notorious securities fraud that was defacto a Ponzi scheme in which the perpetrator paid victims with monies obtained from other victims, the Sixth Circuit rejected the claim that one’s harm, and damages, are limited to “the out-of-pocket theory,” which would give the plaintiff “only the \$21 million they originally invested less their subsequent withdrawals.” (Ex., p. 5.) The rejected measure of harm and damages was identical to the cash-in/cash-out theory being used by SIPC and the Trustee. It was ruled to be “an improper-and wholly inadequate measure of damages,” because the plaintiffs had given the fraudster their money “not to hide under a rock or lock in a safe, but for the express purpose of investment, with a hope -- indeed a reasonable expectation -- that it would grow.” (*Id.*)

Amicus has an interest in this proceeding. Amicus, a law school Dean and former practicing lawyer, has written extensively about the Madoff matter since January 2009, is the author of a forthcoming collection of essays entitled *Madoff: The First Six Months*, and is himself a victim of Madoff.

For the foregoing reasons, amicus moves for leave to file the short accompanying brief amicus curiae.

Respectfully submitted,

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as

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