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

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In re:	)	Chapter 15 Case
	)	
FAIRFIELD SENTRY LIMITED, <u>et al.</u> ,	)	Case No: 10-13164 (SMB)
	)	
Debtors in Foreign Proceedings.	)	Jointly Administered
	)	
	)	

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**FOREIGN REPRESENTATIVES' MOTION PURSUANT TO  
11 U.S.C. §§ 363(B)(1) AND 1520(A)(2) FOR AN ORDER APPROVING  
THE ASSIGNMENT OF THE DEBTORS' CLAIMS AGAINST FAIRFIELD  
GREENWICH GROUP AND RELATED PARTIES TO THE TRUSTEE FOR  
THE LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES  
LLC IN CONNECTION WITH THE GLOBAL SETTLEMENT AGREEMENT**

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Kenneth Krys and Charlotte Caulfield, in their capacities as duly appointed joint liquidators and foreign representatives of Fairfield Sentry Limited (“Sentry”), Fairfield Sigma Limited (“Sigma”) and Fairfield Lambda Limited (“Lambda” and, together with Sentry and Sigma, the “Debtors”), debtors in the above-captioned Chapter 15 cases, through their United States counsel, Brown Rudnick LLP, hereby submit this motion (the “Motion”) pursuant to 11 U.S.C. §§ 363(b)(1) and 1520(a)(2), for an order, substantially in the form attached hereto as Exhibit A, approving the Foreign Representatives’ assignment of the Management Claims (as defined herein) to the trustee for the liquidation of Bernard L. Madoff Investment Securities LLC (the “BLMIS Trustee”) as a principal component of the consideration provided under the global settlement agreement, dated May 9, 2011, by and between the BLMIS Trustee and the Foreign Representatives (the “Settlement Agreement”), previously approved by this Court (in the BLMIS proceedings) and the BVI Court (as defined below) in the Debtors’ BVI liquidation proceedings.<sup>1</sup> In support of this Motion, the Foreign Representatives submit the Declaration of Kenneth Krys filed contemporaneously herewith (the “Krys Decl.”), and respectfully represent as follows:

### **PRELIMINARY STATEMENT**

1. In May 2011, the Foreign Representatives (as defined herein) and the BLMIS Trustee entered into the Settlement Agreement, a global settlement that resolves, in a comprehensive manner, the claims and disputes between the Debtors and the BLMIS Trustee.

2. One of the principal components of the consideration provided under the Settlement Agreement is the Foreign Representatives’ assignment to the BLMIS Trustee (for prosecution by the BLMIS Trustee) of the Debtors’ claims and causes of against their former investment managers – individuals and entities comprising the Fairfield Greenwich Group

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<sup>1</sup> A true and accurate copy of the Settlement Agreement is attached to the Krys Decl. as Exhibit A.

(“FGG”) – and related parties (the “Management Claims”) asserted in an action commenced by Sentry in New York prior to the Foreign Representatives’ appointment by the Eastern Caribbean Supreme Court, in the High Court of Justice, Commercial Division, of the British Virgin Islands (the “BVI Court”) as liquidators of the Debtors.

3. The Second Circuit’s ruling in *Krys v. Farnum Place, LLC (In re Fairfield Sentry Ltd.)*, 768 F.3d 239 (2d Cir. 2014), holds that, pursuant to Section 1520(a)(2) of the Bankruptcy Code, Section 363 automatically applies in Chapter 15 cases with respect to the transfer of an asset of the debtor located within the territorial jurisdiction of the United States.<sup>2</sup> Therefore, the Foreign Representatives have filed the instant Motion seeking Section 363 approval by this Court of the assignment of the Management Claims to the BLMIS Trustee.

4. The Settlement Agreement has provided, and will continue to provide, substantial benefits to the Debtors’ estates. Indeed, in the nearly five years that the parties have been operating under the terms of the Settlement Agreement, the Debtors have received, *inter alia*, an allowed \$230 million SIPA Claim (as defined herein), on account of which approximately \$133 million in interim distributions have been authorized, and a significant portion of proceeds obtained by the BLMIS Trustee in certain litigation settlements aggregating approximately \$52 million. Because the terms of the Settlement Agreement are and remain today beneficial to the Debtors’ estates, the assignment of the Management Claims – an integral component of the Settlement Agreement, and part of the consideration given to secure the substantial benefits to the Debtors’ estates under that agreement – should be approved.

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<sup>2</sup> See *Krys v. Farnum Place, LLC (In re Fairfield Sentry Ltd.)*, 768 F.3d 239, 244-45 (2d Cir. 2014), *on remand In re Fairfield Sentry Ltd.*, 539 B.R. 658 (Bankr. S.D.N.Y. 2015), *aff’d*, Order Affirming Decision of Bankruptcy Court, *Farnum Place, LLC v. Krys (In re Fairfield Sentry Ltd.)*, No. 15 Civ. 9474 (AKH) (S.D.N.Y. June 2, 2016) (ECF No. 15).

5. For these reasons, as set forth more fully herein, the assignment of Management Claims to the BLMIS Trustee, pursuant to the terms of the Settlement Agreement, should be approved in accordance with the applicable standards under Section 363 of the Bankruptcy Code, to ensure that the Debtors continue to receive the benefits of the Settlement Agreement.

## **BACKGROUND**

### **A. General Case Background.**

6. On or about February 27, 2009 (in the case of Lambda), and on or about April 21, 2009 and April 23, 2009 (in the case of Sentry and Sigma, respectively), insolvency proceedings were commenced in the BVI Court seeking the appointment of a liquidator in respect of each Debtor. In April 2009, the BVI Court appointed Christopher Stride as liquidator of Lambda and, in July 2009, the BVI Court appointed Kenneth Kryz and Mr. Stride as the joint liquidators of Sentry and Sigma. Presently, Mr. Kryz and Charlotte Caulfield serve as joint liquidators and Foreign Representatives of each of the Debtors.<sup>3</sup> The Foreign Representatives are responsible for all aspects of the Debtors' business and affairs and have been empowered by the BVI Court to perform any acts, compromise claims, commence litigation, dispose of property, and execute any deeds, receipts or other documents in the name and on behalf of the Debtors.

7. On June 14, 2010, the Foreign Representatives filed petitions before this Court seeking recognition of the Debtors' insolvency proceedings pending before the BVI Court (the "BVI Proceedings") as "foreign main proceedings" under Chapter 15. On July 22, 2010, this Court entered an order recognizing the Debtors' BVI Proceedings as foreign main proceedings and granting other relief pursuant to Chapter 15, which was affirmed in its entirety by the

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<sup>3</sup> In September 2010, Mr. Stride resigned from his liquidator positions, after which Joanna Lau was appointed a joint liquidator of the Debtors and Mr. Kryz was appointed a joint liquidator of Lambda. Ms. Lau resigned in November 2011. In June 2014, Charlotte Caulfield was appointed as a joint liquidator of the Debtors. All references in this Motion to the "Foreign Representatives" shall refer collectively to Kenneth Kryz and either Mr. Stride, Ms. Lau, or Ms. Caulfield, as applicable, based on the relevant time period.

District Court for the Southern District of New York and again by the Court of Appeals for the Second Circuit. See *In re Fairfield Sentry Ltd.*, 440 B.R. 60 (Bankr. S.D.N.Y. 2010), *aff'd*, No. 10 Civ. 7311 (GBD), 2011 WL 4357421 (S.D.N.Y. Sept. 16, 2011), *aff'd sub nom. Morning Mist Holdings Ltd v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2013) (the “Recognition Order”). The Recognition Order remains in full force and effect.

**B. The Settlement Agreement.**

8. Prior to the appointment of the Foreign Representatives, Sentry timely filed customer claims (the “SIPA Claim”) pursuant to the Securities Investor Protection Act (“SIPA”) in the BLMIS liquidation proceedings (the “BLMIS Proceedings”). The SIPA Claim at the time of filing, if allowed in full, amounted to approximately \$960 million under the “net equity” method for determining customer claims.<sup>4</sup>

9. On May 18, 2009, the BLMIS Trustee commenced an adversary proceeding against the Debtors seeking, *inter alia*, to avoid and recover approximately \$3 billion in withdrawals that Sentry made from its accounts maintained with BLMIS in the years prior to BLMIS’s liquidation. See *Picard v. Fairfield Sentry Ltd.*, Adv. Pro. No. 09-01239 (SMB) (Bankr. S.D.N.Y.) (the “BLMIS Adversary Proceeding”). In the BLMIS Adversary Proceeding, the BLMIS Trustee asserted, *inter alia*, that Sentry’s SIPA Claim should be disallowed in full unless and until it satisfies its entire liability to the BLMIS estate pursuant to Section 502(d) of the Bankruptcy Code. See Am. Compl., *Picard v. Fairfield Sentry Ltd.*, Adv. Pro. No. 09-01239 (SMB) (Bankr. S.D.N.Y. July 20, 2010) (Dkt. No. 23). The BLMIS Trustee also threatened to seek equitable subordination of the SIPA Claim pursuant to Section 510(c) of the Bankruptcy Code. See *Krys Decl.* ¶ 8.

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<sup>4</sup> The “net equity” method for calculating customer claims is employed by the BLMIS Trustee and has been approved by the Second Circuit. See *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229 (2d Cir. 2011).



10. On May 9, 2011, following months of complex and often difficult negotiations commencing in 2010 and continuing into 2011, the Foreign Representatives and the BLMIS Trustee entered into the Settlement Agreement, which globally resolved the matters in dispute between the parties. *See id.* ¶ 9. Under the terms of the Settlement Agreement, the Foreign Representatives agreed to pay \$70 million of Sentry’s cash to the BLMIS Trustee and assign the Management Claims to the BLMIS Trustee, and in exchange, Sentry received an allowed customer claim against the BLMIS estate in the amount of \$230 million. *See* Settlement Agreement ¶¶ 2, 13. The parties also agreed to share in litigation recoveries from certain claims that have been or are being pursued by the Foreign Representatives and the BLMIS Trustee. *See id.* ¶¶ 4-12.

11. As required by the terms of the Settlement Agreement, in May 2011, the BLMIS Trustee filed a motion with this Court seeking approval of the Settlement Agreement on behalf of the BLMIS estate, and the Foreign Representatives filed an application with the BVI Court seeking its approval on behalf of the Debtors. On June 7, 2011, this Court entered an order approving the Settlement Agreement on behalf of the BLMIS estate.<sup>5</sup> Thereafter, on June 24, 2011, the BVI Court entered orders approving the Settlement Agreement on behalf of each Debtor and providing the Foreign Representatives with the authority to “take any and all actions to comply with and carry out the terms of” the Settlement Agreement.<sup>6</sup> The orders of this Court

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<sup>5</sup> *See* Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002 and 9019(a) of the Federal Rules of Bankruptcy Procedure Approving An Agreement By and Among the Trustee And Kenneth Krys and Joanna Lau, Solely In Their Respective Capacities As The Foreign Representatives For and Joint Liquidators of Fairfield Sentry Limited, Fairfield Sigma Limited, and Fairfield Lambda Limited, *Picard v. Fairfield Sentry Ltd. (In re Bernard L. Madoff)*, Adv. Pro. No. 09-01239 (SMB) (Bankr. S.D.N.Y. June 10, 2011) (ECF No. 95).

<sup>6</sup> *See* Notice of Entry of Orders by the Commercial Division of the High Court of Justice, British Virgin Islands, Approving the Agreement by and among Kenneth Krys and Joanna Lau, solely in their Respective Capacities as the Foreign Representatives for and Joint Liquidators of Fairfield Sentry Limited, Fairfield Sigma Limited, and Fairfield Lambda Limited, and Irving Picard, as Trustee for the Substantively Consolidated Liquidations of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, *In re Fairfield Sentry Ltd.*, Case No. 10-13164 (SMB) (Bankr. S.D.N.Y. June 27, 2011) (ECF No. 452).

and the BVI Court approving the Settlement Agreement are final and now non-appealable. On or about July 8, 2011, the Settlement Agreement became effective in accordance with its terms.

12. In the approximately five years during which the Settlement Agreement has been operative, the Debtors have received substantial benefits. As of the date of this pleading, this Court in the BLMIS Proceedings has authorized distributions by the BLMIS Trustee of 58% of the face amount of allowed claims, amounting to approximately \$133 million in interim distributions to date on account of Sentry's allowed SIPA Claim (in the amount of \$230 million).<sup>7</sup>

13. In addition, the Foreign Representatives have received over \$50 million from settlements reached by the BLMIS Trustee in his "subsequent transferee" claims under 11 U.S.C. § 550, including from recoveries in connection with the BLMIS Trustee's settlement with JPMorgan Chase & Co. *See* Krys Decl. ¶ 13.

**C. Related Litigation.**

14. Following approval of the Settlement Agreement by this Court and the BVI Court, the Foreign Representatives indicated that they intended to seek this Court's approval,

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<sup>7</sup> As explained in the Declaration of Kenneth Krys, under the Settlement Agreement, the Foreign Representatives agreed to pay \$70 million of Sentry's cash to the BLMIS Trustee as a condition to obtaining an allowed SIPA Claim in the amount of \$230 million. Shortly after executing the Settlement Agreement, the Foreign Representatives paid an initial \$24 million to the BLMIS Trustee, leaving a balance of \$46 million to be paid at a future date. In November 2012, in connection with the second interim customer property distribution made by the BLMIS Trustee, the BLMIS Trustee informed the Foreign Representatives that he would be crediting \$46 million of Sentry's share of those distributions against the remaining amounts due under the Settlement Agreement, resulting in the allowance of Sentry's SIPA Claim in the full amount of \$230 million. Therefore, while the total interim distributions that have been authorized on account of the SIPA Claim to date are approximately 58% of the allowed claim amount, or approximately \$133 million (plus the \$500,000 SIPC advance), the net amount received by the Foreign Representatives to date is approximately \$87 million, after taking into account the \$46 million credit described above. *See* Krys Decl. ¶ 13 & n.5; Order Approving A Seventh Allocation of Property to the Fund of Customer Property and Authorizing Seventh Interim Distribution to Customers, *Secs. Inv. Pro. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, Adv. Proc. No. 08-01789 (SMB) (Bankr. S.D.N.Y. June 15, 2016) (ECF No. 13512).

pursuant to Section 363 of the Bankruptcy Code, of the assignment of the Management Claims to the BLMIS Trustee under the terms of the Settlement Agreement.<sup>8</sup>

15. But before the Foreign Representatives could file a motion requesting Section 363 approval, Morning Mist Holdings Limited and Miguel Lomeli (plaintiffs in a stayed derivative action asserting claims on behalf of Sentry against its former management) (the “Derivative Plaintiffs”) filed a motion on August 23, 2011 in the U.S. District Court for the Southern District of New York seeking withdrawal of the reference of Sentry’s Chapter 15 proceedings to consider whether the provisions of SIPA precluded the assignment of the Management Claims to the BLMIS Trustee under the Settlement Agreement.<sup>9</sup> On January 8, 2014, the District Court granted the Derivative Plaintiffs’ motion and withdrew the reference.<sup>10</sup> Later that year, on July 31, 2014, the District Court granted the BLMIS Trustee’s motion to intervene in the matter.<sup>11</sup> Subsequently, on September 30, 2014, the District Court entered an order in favor of the Foreign Representatives, finding that SIPA did not preclude the BLMIS Trustee from taking the assignment.<sup>12</sup>

16. While the proceedings involving the Derivative Plaintiffs were ongoing, the Foreign Representatives were also engaged in litigation over the application of Section 363 to the

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<sup>8</sup> In a filing with the U.S. District Court opposing the Derivative Plaintiffs’ motion to stay approval of the Settlement Agreement pending the outcome of their appeal of the Chapter 15 Recognition Order, the Foreign Representatives stated that they “will be moving before the Bankruptcy Court for approval of the assignment of the management claims to the BLMIS Trustee under the terms of the Settlement Agreement.” *See* Foreign Representatives’ Memorandum of Law in Opposition to Appellants’ Motion to Stay Bankruptcy Court’s Orders Approving Settlement Agreement Between Appellees and Related Debtors and Irving H. Picard, Trustee, *In re Fairfield Sentry, Ltd.*, No. 10-CIV-7311 (GBD) (S.D.N.Y. June 28, 2011) (ECF No. 32, at 21 n.23).

<sup>9</sup> *See* Derivative Plaintiffs’ Notice of Motion for Mandatory Withdrawal of the Reference, *In re Fairfield Sentry Ltd.*, Case No. 11-cv-05905 (S.D.N.Y. Aug. 23, 2011) (ECF No. 1).

<sup>10</sup> *See In re Fairfield Sentry Ltd.*, Case No. 11-cv-05905, 2014 WL 112329 (S.D.N.Y. Jan. 8, 2014).

<sup>11</sup> *See* Order, *In re Fairfield Sentry Ltd.*, Case No. 11-cv-05905 (S.D.N.Y. July 31, 2014) (ECF No. 35).

<sup>12</sup> *See* Order, *In re Fairfield Sentry Ltd.*, Case No. 11-cv-05905 (S.D.N.Y. Sept. 30, 2014) (ECF No. 40).

transfer of the Debtors' SIPA Claim to Farnum Place, LLC. Prior to that litigation, issues relating to the situs of intangible causes of action owned by the foreign debtor for Chapter 15 purposes and the application of Section 363 to transfers of the Debtors' U.S. property were not settled. These issues were clarified by the Second Circuit's September 2014 decision in *Krys v. Farnum Place, LLC (In re Fairfield Sentry Ltd.)*, 768 F.3d 239 (2d Cir. 2014). In that decision, the Second Circuit held that independent Section 363 review, under the same standards applicable in a Chapter 11 or Chapter 7 case, is required for transfers of a Chapter 15 debtor's property within the territorial jurisdiction of the United States. *See id.* at 245-46. The Second Circuit also held that, because Sentry's SIPA Claim is an intangible asset "subject to attachment or garnishment and may be properly seized by an action in a Federal or State court in the United States," the sale of the SIPA Claim, pursuant to 11 U.S.C. § 1502(8), is the "transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States," and therefore, "pursuant to section 1520(a)(2) the bankruptcy court must apply section 363" to the sale. *Id.* at 244-45.

### **JURISDICTION AND VENUE**

17. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. § 1409. This matter is a core proceeding under 28 U.S.C. § 157(b)(2).

### **RELIEF REQUESTED**

18. Pursuant to Section 363(b)(1) of the Bankruptcy Code, as made applicable by Section 1520(a)(2) of the Bankruptcy Code, the Foreign Representatives respectfully request that this Court enter an order substantially in the form attached hereto as Exhibit A, approving the assignment of the Management Claims to the BLMIS Trustee pursuant to the terms of the Settlement Agreement.

**BASIS FOR RELIEF REQUESTED**

**I. Bankruptcy Code Section 363 Applies to the Assignment of the Management Claims.**

19. Section 1520(a)(2) of Chapter 15 provides, in pertinent part, that: “upon recognition of a foreign proceeding that is a foreign main proceeding – sections 363, 549, and 552 apply to the transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate.” 11 U.S.C. § 1520(a)(2).

20. The Management Claims are intangible property. Under Section 1502(8) of Chapter 15, “within the territorial jurisdiction of the United States,” when used in reference to intangible property, includes all “intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may be seized or garnished by an action in a Federal or State court in the United States.” 11 U.S.C. § 1502(8). Here, the Management Claims are located within the territorial jurisdiction of the United States because (i) they are deemed under New York law (the applicable nonbankruptcy law) to be located in New York; and (ii) they are subject to attachment or garnishment in a New York court.

21. First, the Management Claims are deemed to be located in the U.S. under New York law. In determining the situs of an intangible asset, New York courts have long followed the guidance of *Severnore*, in which New York’s Court of Appeals (Cardozo, J.) explains:

The locality selected [for the situs of intangibles] is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found. At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions.

*Severnoe Secs. Corp. v. London & Lancashire Ins. Co.*, 255 N.Y. 120, 123-24 (1931).

22. Where the interest at issue is a claim or a debt, application of the *Severnoe* rule in New York generally results in the location of the defendant or the obligor on the debt being identified as the situs of intangible property. See *In re Bd. of Dir. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 48 (Bankr. S.D.N.Y. 1999) (location of intangible personal property interests such as accounts receivable is the situs of the account debtor or the party whose obligation it is to perform under the contract), *aff'd*, 275 B.R. 699 (S.D.N.Y. 2002); *ABKCO Indus., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 675 (1976) (situs of intangible contract interest was “the location of the party of whom performance is required by the terms of the contract”).

23. Here, the Management Claims are pending in an action before the Bankruptcy Court of the Southern District of New York seeking recoveries against defendants who reside, conduct business, or conducted business in New York. See First Am. Compl. ¶¶ 5-29, 32, *Fairfield Sentry Ltd. v. Fairfield Greenwich Grp. (In re Fairfield Sentry Ltd.)*, Adv. Pro. No. 10-03800 (Bankr. S.D.N.Y. Oct. 27, 2011) (ECF No. 12). Therefore, under the “common sense appraisal” of *Severnoe*, the Management Claims are property located within the territorial jurisdiction of the United States.

24. Second, the Management Claims satisfy Section 1502(8)'s definition of intangible property in the United States as property subject to attachment or garnishment by an action in the United States courts. Under New York law, “any debt, which is past due or which is yet to become due, certainly or upon demand” or “any property which could be assigned or transferred” is properly subject to attachment and garnishment, including causes of action which could be assigned or transferred. See NY CPLR 6202, 5201; *cf. JPMorgan Chase Bank, N.A. v. Motorola, Inc.*, 47 A.D. 3d 293, 302-303 (1st Dep't 2007) (explaining that potential liability as a

result of a pending lawsuit is subject to levy if the potential liability could be assigned or transferred).

25. The Management Claims are assignable.<sup>13</sup> Thus, an action could be commenced in New York to attach and garnish the Management Claims under CPLR 5202 and 6202 against the defendants who all reside, conduct business, or conducted business in New York. *See* NY CPLR 5221.

26. Accordingly, under applicable nonbankruptcy law, including with respect to the law on attachment and garnishment, the Management Claims are property within the territorial jurisdiction of the United States, making the assignment of those claims subject to the requirements of Section 363 of the Bankruptcy Code “to the same extent that the sections would apply to property of an estate.” 11 U.S.C. § 1520(a)(2); *see In re Fairfield Sentry Ltd.*, 768 F.3d at 244-45.

## **II. The Assignment Should be Approved Under Section 363(b)(1).**

### **A. The Applicable Section 363 Standards.**

27. As the Second Circuit held in its ruling concerning the applicability of Section 363 to Sentry’s transfer of its SIPA Claim, the Bankruptcy Court cannot defer to a foreign court’s approval of a transfer of property within the territorial jurisdiction of the U.S. and must engage in an independent Section 363 review, under the same standards applicable in a Chapter 11 or Chapter 7 case. *See In re Fairfield Sentry Ltd.*, 768 F.3d at 245. Accordingly, as a transfer outside the ordinary course of business, pursuant to Section 363(b)(1), this Court’s independent

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<sup>13</sup> The assignability of the Management Claims was not challenged when this Court approved the Settlement Agreement, *see* Order, *Picard v. Fairfield Sentry Ltd. (In re Bernard L. Madoff)*, Adv. Pro. No. 09-01239 (SMB) (Bankr. S.D.N.Y. June 10, 2011) (ECF No. 95), and the Southern District of New York ruled that the BLMIS Trustee has the authority to accept the assignment of the Management Claims, *see* Order, *In re Fairfield Sentry Ltd.*, Case No. 11-cv-05905 (S.D.N.Y. Sept. 30, 2014) (ECF No. 40).

review and approval of the assignment of the Management Claims under Section 363(b) is necessary for consummation. *See* 11 U.S.C. § 363(b)(1).

28. While Section 363 does not establish a standard for determining when it is appropriate for a court to approve the sale or disposition of a debtor's assets, the Second Circuit held in the seminal case *In re Lionel Corp.* that “[a] sale of a substantial part of a Chapter 11 estate may be conducted if a good business reason exists to support it.” *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *see also Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 387 (2d Cir. 1997) (same). Courts in the Second Circuit follow *Lionel's* requirement that the decision to transfer assets outside the ordinary course of business be based upon a debtor's or trustee's sound business judgment. *See Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. LTV Corp. (In re Chateaugay Corp.)*, 973 F.2d 141, 144-45 (2d Cir. 1992) (affirming approval of sale of assets under Section 363(b) because sound business judgment supported the sale); *In re MF Glob. Inc.*, 535 B.R. 596, 605 (Bankr. S.D.N.Y. 2015) (“In approving a transaction conducted pursuant to section 363(b)(1), courts consider whether the trustee exercised sound business judgment.”) (citations omitted). In the Section 363 sale context, “[t]he business judgment of a trustee is entitled to great deference.” *In re MF Glob. Inc.*, 535 B.R. at 605.

29. Additional considerations are whether (i) interested parties have been provided with fair and reasonable notice; (ii) the sale price is fair and reasonable; and (iii) the purchaser is proceeding in good faith absent fraud or collusion. *See In re Gen. Motors Corp.*, 407 B.R. 463, 494-95 (Bankr. S.D.N.Y. 2009), *abrogated on other grounds*, 429 B.R. 510 (Bankr. S.D.N.Y. 2015).



30. Finally, where certain asset transfers within a broader agreement are subject to Section 363, the court considers the benefits of the agreement as a whole in determining whether a sound business reason exists for the transfer of property under Section 363. For example, in *Genco Shipping & Trading*, the debtors sought approval of a termination fee embodied in a restructuring support agreement (“RSA”) under Section 363(b). *See In re Genco Shipping & Trading Ltd.*, 509 B.R. 455, 460-61, 464 (Bankr. S.D.N.Y. 2014). The court considered “all of the provisions of the RSA,” finding that the RSA “create[d] tremendous value for the estate,” including by consensually resolving disputes over recoveries to various creditors. *See id.* at 465-67. Thus, the termination fee, as one component of the RSA, “clearly satisfie[d] the business judgment test” under Section 363(b). *See id.* at 465.

**B. There is a Good Business Reason for the Assignment of the Management Claims.**

31. The Foreign Representatives submit that the assignment of the Management Claims to the BLMIS Trustee readily satisfies the requirements of Section 363. The assignment is part and parcel of the global Settlement Agreement that has provided, and will continue to provide in the future, substantial benefits to the Debtors’ estates. *See* Krys Decl. ¶¶ 9-13. Because there is a good business reason for the Foreign Representatives to continue to operate under, and receive the substantial benefits of, the Settlement Agreement, the assignment of the Management Claims (as a component of the Settlement Agreement) should be approved under Section 363.

32. The Foreign Representatives’ position that there is a good business reason supporting the Settlement Agreement is amply supported by the record. In the course of the nearly five years during which the Settlement Agreement has been operative, the Debtors’ estates have already reaped significant value from the Settlement Agreement.

33. First, the Settlement Agreement provides Sentry with an allowed SIPA Claim in the amount of \$230 million. *See* Settlement Agreement ¶ 13. As of the date of this pleading, this Court in the BLMIS Proceedings has authorized interim distributions by the BLMIS Trustee amounting to over \$133 million to the Foreign Representatives on account of that SIPA Claim, and there will likely be additional distributions. *See* Krys Decl. ¶ 13.

34. The Settlement Agreement also provides the Debtors with meaningful portions of the proceeds recovered by the BLMIS Trustee in Subsequent Transferee Claims (as defined in the Settlement Agreement). *See* Settlement Agreement ¶¶ 7, 10. Already, the Foreign Representatives have received over \$50 million from settlements in certain of the BLMIS Trustee’s “subsequent transferee” actions under 11 U.S.C. § 550, including from recoveries in connection with the BLMIS Trustee’s settlement with JPMorgan Chase & Co. *See* Krys Decl. ¶ 13.

35. Numerous additional benefits are provided by the Settlement Agreement, including, but not limited to, a release of the claims asserted by the BLMIS Trustee against the Debtors in the BLMIS Adversary Proceeding, including the approximately \$3 billion in alleged clawback liability. In addition, the Settlement Agreement provides a mechanism for the BLMIS Trustee and the Foreign Representatives to work cooperatively with, instead of against, each other, enhancing the value of their respective claims and causes of action against parties with clawback liabilities and/or who bear liability for the massive losses resulting from the Madoff Ponzi scheme. *See* Settlement Agreement ¶¶ 8, 14.

36. In sum, and as Judge Lifland acknowledged when approving the Settlement Agreement on behalf of the BLMIS estate, “there are very substantial benefits [from the Settlement Agreement] likewise accruing to the Fairfield Sentry BVI proceeding and the

creditors that are involved there.” See Hr’g Tr. at 37:24-38:2, *Picard v. Fairfield Sentry Ltd.* (*In re Bernard L. Madoff*), Adv. Pro. No. 09-1239 (Bankr. S.D.N.Y. June 7, 2011) (ECF No. 93).

37. Therefore, in light of the substantial benefits realized and to be realized by the Debtors’ estates under the Settlement Agreement, the assignment of the Management Claims to the BLMIS Trustee amply satisfies the Section 363 standards. See *In re Genco Shipping*, 509 B.R. at 464-67; *In re MF Glob. Inc.*, 535 B.R. at 608.<sup>14</sup>

### NOTICE

38. The Foreign Representatives have provided notice of this Motion to (a) the Office of the United States Trustee; (b) counsel to the trustee for the liquidation of Bernard L. Madoff Investment Securities LLC; (c) all parties to the FGG Action; and (d) all parties that have filed a notice of appearance in these Chapter 15 cases. The Foreign Representatives respectfully submit that no other or further notice need be given.

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<sup>14</sup> The Foreign Representatives note that the Section 363 approval of the assignment of the Management Claims here is unlike Section 363 approval of a proposed sale of an asset that has a readily discernable value, in which case the court will generally approve the highest and best offer for the asset, taking into account the value that could be obtained even after a proposed agreement is signed by the trustee. Cf. *In re Fairfield Sentry Ltd.*, 768 F.3d at 246-47 (instructing this Court, in determining whether a good business reason exists to approve the Foreign Representatives’ proposed sale of SIPA Claim, to consider the known and undisputed increase in value of claim following signing of trade confirmation (citing *In re Myers v. Martin (In re Martin)*, 91 F.3d 389 (3d Cir. 1996) and *G-K Dev. Co. v. Broadmoor Place Invs., L.P. (In re Broadmoor Place Invs., L.P.)*, 994 F.2d 744 (10th Cir. 1993))); *In re Martin*, 91 F.3d at 391-93 (disapproving agreement settling state court lawsuit where, following entry into the agreement, the lawsuit resulted in a verdict in favor of the debtors that would provide an additional \$150,500 for the debtors’ estates); *In re Broadmoor Place Invs., L.P.*, 994 F.2d at 745-46 (disapproving proposed sale of estate property in light of the bankruptcy court’s awareness that the debtor had a better proposal from another bidder in hand). Here, of course, there is no other deal on the table or known distributions that would otherwise be received by the Debtors apart from the existing Settlement Agreement. Indeed, the determination of any purported value that the Debtors would receive absent approval of the assignment (as a component of the Settlement Agreement) would be an inherently speculative exercise, such as considering what actions the BLMIS Trustee would take if the assignment was not approved and how the SIPA Claim would fare absent allowance under the Settlement Agreement.

**NO PRIOR REQUEST**

39. No previous request for the relief requested herein has been made to this or any other Court.

**CONCLUSION**

**WHEREFORE**, the Foreign Representatives respectfully request that the Court grant the relief requested herein and enter an Order, substantially in the form annexed hereto as Exhibit A, approving the assignment of the Management Claims to the BLMIS Trustee pursuant to the Settlement Agreement, and grant such other and further relief as the Court deems appropriate.

Dated: New York, New York  
June 20, 2016

**BROWN RUDNICK LLP**

By: /s/ David J. Molton  
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**Exhibit A**

**Proposed Order**

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

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In re:	)	
	)	Chapter 15 Case
	)	
FAIRFIELD SENTRY LIMITED, <u>et al.</u> ,	)	Case No: 10-13164 (SMB)
	)	
Debtors in Foreign Proceedings.	)	Jointly Administered
	)	
	)	

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**ORDER PURSUANT TO 11 U.S.C. §§ 363(B)(1) AND 1520(A)(2) APPROVING THE ASSIGNMENT OF THE DEBTORS’ CLAIMS AGAINST FAIRFIELD GREENWICH GROUP AND RELATED PARTIES TO THE TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC IN CONNECTION WITH THE GLOBAL SETTLEMENT AGREEMENT**

Upon consideration of the Foreign Representatives’ Motion Pursuant to 11 U.S.C. §§ 363(b) and 1520(a)(2) for entry of an order approving the assignment of the claims of Fairfield Sentry Limited, Fairfield Lambda Limited and Fairfield Sigma Limited (collectively, the “Debtors”) against Fairfield Greenwich Group and related parties to the BLMIS Trustee,<sup>1</sup> as part of the global Settlement Agreement between the Foreign Representatives and the BLMIS Trustee (the “Motion”), all as more fully set forth in the Motion; and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and venue being proper in this Court pursuant to 28 U.S.C. § 1409(a); and due and timely notice of the Motion having been given to all parties required to receive notice thereof such that no other or further notice need be provided; and after due deliberation and sufficient cause appearing therefore, it is hereby:

ORDERED that the relief sought in the Motion is granted; and it is further

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<sup>1</sup> Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Motion.

ORDERED that the Foreign Representatives' assignment, on behalf of the Debtors, of the Management Claims to the BLMIS Trustee pursuant to the Settlement Agreement is approved; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

Dated: \_\_\_\_\_, 2016  
New York, New York

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United States Bankruptcy Judge  
The Honorable Stuart M. Bernstein