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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	**Chapter 15**
FAIRFIELD SENTRY LIMITED,	:	**Case No. 10-**
Debtor in a Foreign Proceeding.	:	
In re:	:	**Chapter 15**
FAIRFIELD SIGMA LIMITED,	:	**Case No. 10-**
Debtor in a Foreign Proceeding.	:	
In re:	:	**Chapter 15**
FAIRFIELD LAMBDA LIMITED,	:	**Case No. 10-**
Debtor in a Foreign Proceeding.	:	

MEMORANDUM OF LAW IN SUPPORT OF CHAPTER 15 PETITIONS OF FAIRFIELD SENTRY LIMITED, FAIRFIELD SIGMA LIMITED AND FAIRFIELD LAMBDA LIMITED FOR RECOGNITION OF FOREIGN PROCEEDINGS

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Kenneth Krys and Christopher Stride (the "Petitioners"), through their attorneys Brown Rudnick LLP, submit this memorandum of law in support of the Verified Petitions in Support of Application for Recognition of Foreign Main Proceedings Pursuant to Section 1517 of the Bankruptcy Code and Seeking Related Relief (collectively, the "Verified Petitions"), filed by the Petitioners on behalf of Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma") and Fairfield Lambda Limited ("Lambda" and, together with Sentry and Sigma, the "Debtors") under chapter 15 of title 11 of the United States Code (as amended, the "Bankruptcy Code").

PRELIMINARY STATEMENT

The Petitioners are the duly authorized foreign representatives of liquidation proceedings pending before the Commercial Division of the High Court of Justice, British Virgin Islands (the "BVI Court") in relation to the Debtors.[1] By virtue of the Orders appointing them the liquidators of the Debtors, the Petitioners are required to take possession of, protect and realize upon the assets of the Debtors and to distribute those assets in accordance with the insolvency laws of the British Virgin Islands (the "BVI"). In furtherance of these duties, the Petitioners, as the joint appointed liquidators of the Debtors Sentry and Sigma, and Petitioner Stride, as the sole liquidator of Debtor Lambda (Stride and Krys, in their respective capacities as liquidators of the Debtors, the "Liquidators"), seek Orders of this Court granting recognition of the liquidation proceedings of each of Sentry, Sigma and Lambda pending before the BVI Court

[1] The facts pertinent to the Verified Petitions are set forth in the Declaration of Kenneth Krys (the "Krys Decl."), the Declaration of Christopher Stride (the "Stride Decl.") and the Declaration of William Hare (the "Hare Decl.") submitted contemporaneously herewith in support of the Verified Petitions.

(collectively, the "BVI Proceedings") as "foreign proceedings" under section 1517 of the Bankruptcy Code.

Each of the Debtors is an investment fund that was established as a vehicle for non-U.S. persons and, in the case of Sentry, also for a limited number of tax exempt U.S. entities, to invest with Bernard L. Madoff Investment Securities LLC ("BLMIS"). See Krys Decl. ¶ 3. Sentry was the largest of all the feeder funds to BLMIS; its account statements with BLMIS as of the end of October 2008 showed in excess of $7 billion of assets supposedly held by BLMIS. Sigma and Lambda were feeder funds to Sentry established for foreign currency (Euro and Swiss franc) investment in BLMIS solely by non-U.S. persons. Id. ¶¶ 3-4.

Shortly after the revelations that BLMIS had been operated by Bernard L. Madoff ("Madoff") for many years, if not many decades, as a Ponzi scheme, the Debtors discontinued calculations of net asset values and share redemptions. Id. ¶ 20. Following the revelations, the Debtors ceased their heretofore routine operations and the business purpose of the Debtors was permanently altered. Whereas prior to December 2008, the stated and apparent purpose of the Debtors was to achieve capital appreciation through investment, following the exposure of the Madoff scheme the Debtors' business and purpose has become the preservation and realization of the Debtors' assets for purposes of ultimate, orderly and equitable distribution, in compliance with the BVI insolvency law, to creditors and other lawful claimants.

On February 27, 2009, a secured creditor of Lambda commenced proceedings in the BVI Court seeking the appointment of a liquidator over Lambda. Id. ¶ 26. On April 21, 2009, ten shareholders applied to the BVI Court for the appointment of a liquidator

over Sentry and, on April 23, 2009, a shareholder applied to the BVI Court for the appointment of a liquidator over Sigma. Id. ¶¶ 27-28. Petitioner Stride was appointed the liquidator of Lambda pursuant to an Order of the BVI Court issued on April 23, 2009 (the ("Lambda Order"). Id. ¶ 28. Petitioners, both of whom are licensed by the BVI Financial Services Commission to act as Insolvency Practitioners, were appointed joint liquidators of Sentry and Sigma pursuant to Orders issued on July 21, 2009 by the BVI Court (the "Sentry Order" and the "Sigma Order" and, collectively with the Lambda Order, the "Appointment Orders"). Id. ¶ 29. By virtue of the Order of the BVI Court dated May 7, 2010 and entered on May 11, 2010, the Petitioners were expressly authorized by the BVI Court to seek recognition of the BVI Proceedings by such Court.[2]

As explained herein, no persons other than the Liquidators currently purport to administer the Debtors anywhere or manage or control their affairs with the sanction of the BVI Court.[3] The Debtors' present and former contract counterparties, including administrative agents, payment agents and depositories, deal exclusively with the

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[2] Section 472 of the BVI Act (as defined below) provides: "The Court may, on the application of an insolvency officer, authorise him to act in a foreign country on behalf of a Virgin Islands insolvency proceeding as permitted by the applicable foreign law." Hare Decl. ¶ 13. A certified copy of the Order of the BVI Court, dated May 7, 2010 and entered May 11, 2010, authorizing the Liquidators to seek recognition of the BVI Proceedings in the United States in accordance with chapter 15, is attached to each of the Verified Petitions as Exhibit B thereto.

[3] As discussed herein, in an action styled Morning Mist Holdings Limited, et al. v. Fairfield Greenwich Group, et al., 09-CV-5012 (N.Y. Sup. Ct.), certain purported shareholders of Sentry are improperly prosecuting a putative derivative action on behalf of Sentry (i.e. they are asserting claims belonging to Sentry), in violation of BVI business and insolvency law, without having first obtained authorization of the BVI Court. See Bruhl v. Kingate Global Fund Ltd., Index No. 601526/2009 (N.Y. Sup. Ct. Jan. 25, 2010) (dismissing derivative case in almost identical situation based on the absence of court authorization of the derivative action), attached as Exhibit B to the Krys Decl. Sentry has fully reserved its rights regarding the impropriety of the Morning Mist plaintiffs' actions and their lack of standing to assert claims on behalf of and belonging to Sentry. See Morning Mist Holdings Ltd. et al. v. Fairfield Sentry Limited, Stipulation and Order Re Voluntary Discontinuance (N.Y. Sup. Ct. Mar. 1, 2010) (voluntarily dismissing application of Morning Mist plaintiffs for order authorizing them to file derivative suit), attached as Exhibit C to the Krys Decl.

Liquidators as representatives of the Debtors. As discussed below, contractual relations between the Debtors and their former investment manager, an affiliate of Fairfield Greenwich Group, have all been formally terminated. Certain non-Madoff assets of the Debtors have been or are in the process of being turned over to the Liquidators by the custodians of such assets pursuant to and under the direction and management of the Liquidators. Moreover, since the appointment of the Liquidators, third parties, including Irving H. Picard, in his capacity as Trustee for the liquidation of BLMIS (the "Madoff Trustee"), have, with regard to the affairs of the Debtors, consistently dealt solely with the Liquidators as to the business affairs of Sentry, Sigma and Lambda, including with respect to matters arising out of the claims asserted by the Madoff Trustee against Sentry on behalf of the estate in liquidation of BLMIS (the "BLMIS Estate"). As discussed in more detail below, the Madoff Trustee has expressed that he does not intend to oppose or interfere with the Petitioners' requested recognition of the BVI Proceedings under chapter 15.

BLMIS is currently in liquidation proceedings in this district, Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC, SIPA Liquidation No. 08-1789 (BRL) (the "BLMIS SIPA Proceeding"). Pursuant to an adversary proceeding, Irving H. Picard, Trustee for the Liquidation of BLMIS v. Fairfield Sentry Limited, et al., Adv. Pro. No. 09-1239 (BRL) (the "BLMIS Adversary Proceeding"), the Madoff Trustee seeks to recover approximately $3.5 billion from Sentry and others on account of transfers allegedly made to Sentry by BLMIS during the six year period preceding the filing of the BLMIS SIPA Proceeding. Sentry has asserted a timely filed customer claim in the BLMIS SIPA Proceeding in the amount of

$6,284,321,581; the Madoff Trustee has sought disallowance of Sentry's customer claim as part of the relief sought in the BLMIS Adversary Proceeding.[4] Krys Decl. ¶ 41. While fully preserving all rights, the Petitioners and the Madoff Trustee are engaging in good faith, bilateral discussions towards a consensual resolution of the issues between them that would, *inter alia*, avoid resource-draining litigation between the Petitioners and the Madoff Trustee and facilitate enhanced returns to their respective stakeholders.

In a letter dated April 20, 2010, the Madoff Trustee indicated he did not intend to oppose the Liquidators' efforts herein to obtain recognition of the BVI Proceedings in the United States. Counsel for the Madoff Trustee wrote to counsel for the Debtors:

> It is our understanding from our prior discussions with you, Kenneth Krys and Christopher Stride, the Joint Liquidators of Fairfield Sentry Limited, are considering filing proceedings in furtherance of their duties as Liquidators in the United States Bankruptcy Court in the Southern District of New York. It is further our understanding the Liquidators will not be seeking to stay any actions filed by the Trustee against Fairfield Sentry.
>
> The purpose of this letter is to inform you the Trustee has no intention of opposing or interfering with any such filing by the Liquidators as you have described at this time. Obviously the Trustee reserves the right to contest actions in any such proceeding in the future if he deems it in the best interests of the BLMIS Estate and the claimants thereto.
>
> As we have indicated from the outset, we encourage the Liquidators to take the steps necessary to recover funds in order to pay any judgment or settlement of the Trustee's claims against Fairfield Sentry.

See Krys Decl., Ex. D.

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[4] SIPA customer claims for Sigma and Lambda were timely filed in the summer of 2009 respectively for $773,635,188 and $36,676,205.92. By notices dated December 8, 2009, the Madoff Trustee denied the Lambda and Sigma claims on the ground that neither fund was a statutory "customer" of BLMIS under SIPA. Timely objections to the Sigma and Lambda denial of claims were filed by the Liquidators on January 7, 2010. The omnibus issue of customer status regarding indirect investors like Sigma and Lambda has been set for hearing on October 19, 2010 before the Court in accordance with a court-ordered schedule. Submissions on that issue by Sigma and Lambda are due on July 12, 2010. See Krys Decl. ¶ 41.

The Petitioners seek recognition of the BVI Proceedings in aid of their efforts to manage, administer and realize upon and collect the assets of the Debtors, chiefly through pursuit of litigation, for ultimate distribution to the investors and other claimants entitled thereto in accordance with BVI insolvency law. Chapter 15 recognition will allow the Liquidators to gain and exercise control over the Debtors' contingent assets in the United States, consisting of certain claims and causes of action, and will assist the Liquidators in protecting recoveries obtained in the United States from piecemeal attack, thereby ensuring their orderly and equitable distribution through the BVI Proceedings in accordance with the British Virgin Island insolvency law. More specifically, chapter 15 recognition will provide to the Liquidators, or allow the Liquidators to seek, relief that includes the following: (i) providing the Liquidators with unchallengeable standing in the United States courts to facilitate their pursuit of claims on behalf of the Debtors; (ii) staying and preventing third parties from asserting such claims, including efforts by certain purported derivative plaintiffs to assert claims belonging to Sentry in an action styled Morning Mist Holdings Limited, et al. v. Fairfield Greenwich Group, et al., 09-CV-5012 (N.Y. Sup. Ct.), pursuant to which purported shareholders of Sentry are improperly prosecuting a putative derivative action on behalf of Sentry, in violation of BVI business and insolvency law, without having obtained prior authorization of the BVI courts; (iii) staying creditors from seeking attachments of litigation recoveries realized in the United States and ensuring that those recoveries are distributed in an orderly and equitable basis in the BVI Proceedings; and (iv) affording the Liquidators the right to seek discovery concerning, inter alia, the Debtors' assets (e.g. causes of action against third parties), affairs, rights, obligations or liabilities, including identifying parties that

bear liability for the Debtors' massive losses in value and the potential claims against those parties.[5]

Absent recognition, the Liquidators' ability to pursue and realize recoveries on the Debtors' litigation claims may be materially compromised. Among other things, a denial of recognition may invite a challenge to the Liquidators' standing to prosecute the Debtors' claims in United States courts,[6] asserted by litigation targets or parties seeking to interfere with a proper distribution of the Debtors' assets.[7] Such a result would substantially interfere with the Liquidators' ability to maximize the assets available for orderly and equitable distribution to the Debtors' creditors, since the Liquidators are presently the only parties with recognized authority to act on the Debtors' behalf.

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[5] See Krys Decl. ¶ 39 as to these litigations.

[6] Section 1509(d) of the Bankruptcy Code provides: "If the court denies recognition under this chapter, the court may issues any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States." Based on this statutory provision, some courts have held that foreign representative may not avail themselves of U.S. courts on certain matters in aid of a foreign insolvency proceeding. See United States v. J.A. Jones Constr. Group, LLC, 333 B.R. 637, 639 (E.D.N.Y. 2005) (concluding that the court had "no authority" to consider stay request made by an interim receiver appointed by a Canadian court "in the absence of recognition under [C]hapter 15"); Reserve Int'l Liquidity Fund Ltd. v. Caxton Int'l Ltd., No. 09 Civ. 9021, 2010 WL 1779282 (S.D.N.Y. April 29, 2010) (denying request of BVI-appointed liquidators to stay interpleader action for distribution of insolvent fund's assets where the liquidators had not sought chapter 15 recognition). An exception to the recognition requirement is found in Section 1509(f), which provides that a foreign representative's failure to obtain chapter 15 recognition "does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor." It has been noted, however, that "[t]he legislative history of [chapter 15] indicates that this exception is to be narrowly applied." In re Loy, 380 B.R. 154, 165 (Bankr. E.D. Va. 2007). Although the Petitioners are not aware of any case holding that a foreign representative must obtain chapter 15 recognition in order to enable the debtor itself to prosecute an affirmative claim belonging to it in the United States, and while the Petitioners do not believe such a result follows from the aforementioned chapter 15 provisions (or other Bankruptcy Code provisions) and cases, a denial of these chapter 15 petitions could give rise to wasteful, disruptive and dilatory litigation on the issue.

[7] See Note 4, supra (discussing improper prosecution of putative derivative action styled Morning Mist Holdings Limited, et al. v. Fairfield Greenwich Group, et al., 09-CV-5012 (N.Y. Sup. Ct.) on behalf of Sentry).

Moreover, because resolution of the BLMIS Adversary Proceeding is likely contingent on the ability of the Liquidators to pursue meaningful litigation recoveries, denial of chapter 15 recognition may also adversely affect potential recoveries by the Madoff Trustee for the benefit of stakeholders of the BLMIS Estate.

As explained herein, all of the requirements for chapter 15 recognition of the BVI Proceedings as "foreign proceedings" have been satisfied: (1) the BVI Proceedings are "foreign proceedings" within the meaning of section 101(23) of the Bankruptcy Code; (2) the Petitioners are "foreign representatives" and "persons" within the meaning of sections 101(24) and (41) of the Bankruptcy Code; (3) the Verified Petition meets the filing requirements of section 1515 of the Bankruptcy Code and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and (4) recognition of the BVI Proceedings would not be contrary to U.S. public policy. Furthermore, as explained below, the BVI Proceedings should be accorded recognition as "foreign main proceedings" under section 1517 of the Bankruptcy Code because the "center of main interests" ("COMI") of each of the Debtors is in the British Virgin Islands, where their pending liquidation proceedings were commenced by various stakeholders.

I. Jurisdiction and Venue

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and section 1501 of the Bankruptcy Code. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(P).

Venue with respect to the Debtors' Verified Petitions is proper pursuant to 28 U.S.C. § 1410(1), because the Debtors' principal assets in the United States – their SIPA claims asserted against BLMIS – are located in this district. Alternatively, venue with respect to the chapter 15 case brought by Sentry is proper in this district pursuant to 28

U.S.C. § 1410(2) because Sentry is a defendant in the BLMIS Adversary Proceeding,[8] and, with respect to the Verified Petitions of all of the Debtors, venue is proper pursuant to 28 U.S.C. § 1410(3).

The statutory predicates for relief requested herein are sections 1504, 1509, 1515, 1516, 1517, 1520 and 1521 of the Bankruptcy Code and Bankruptcy Rule 1007.

II. The Requirements For Recognition Have Been Met.

The requirements for recognition of a foreign proceeding are set forth in section 1517(a) of the Bankruptcy Code. Section 1517(a) states:

> (a) Subject to section 1506,[9] after notice and hearing, an order recognizing a foreign proceeding shall be entered if –
>
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
>
> (2) the foreign representative applying for recognition is a person or body; and
>
> (3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a).

As set forth in greater detail below, each of the requirements for recognition prescribed by section 1517(a) of the Bankruptcy Code, as well as the Bankruptcy Rules, has been satisfied in respect of the Debtors' Verified Petitions and the BVI Proceedings.

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[8] Sentry is also a nominal defendant in the Morning Mist derivative action purportedly brought on Sentry's behalf.

[9] Section 1506 of the Bankruptcy Code provides for a public policy exception. It states: "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506.

A. The BVI Proceedings Are Foreign Proceedings.

The threshold requirement for recognition of a proceeding under section 1517(a) of the Bankruptcy Code is that it must constitute a "foreign proceeding." See 11 U.S.C. 1517(a)(1); see also In re Betcorp Ltd., 400 B.R. 266, 275 (Bankr. D. Nev. 2009) ("As a preliminary matter...the court must determine whether [the debtor's] winding up is a 'foreign proceeding' within the meaning of 11 U.S.C. § 101(23).").

"Foreign proceeding" is defined in section 101(23) of the Bankruptcy Code to mean:

> a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23).

The BVI liquidation proceeding of each of the Debtors was commenced pursuant to Part VI, titled "Liquidation," of the Insolvency Act, 2003 of the British Virgin Islands (the "BVI Act"). Declaration of William Hare, submitted contemporaneously herewith ("Hare Decl."). The BVI Act is the governing law of corporate insolvency in the British Virgin Islands.[10] Id. ¶ 16. Key insolvency procedures provided for in the BVI Act include liquidation, creditor arrangement, receiverships and administrative receivership. Id. "A collective proceeding is one that considers the rights and obligations of all creditors. This is in contrast, for example, to a receivership remedy instigated at the request, and for the benefit, of a single secured creditor." In re Betcorp Ltd., 400 B.R. at

[10] The enacting legislation describes the BVI Act as "[a]n Act to reform the law relating to the insolvency of companies and foreign companies ... and to provide, in particular, for a mechanism for insolvent persons to enter into arrangement with their creditors, an administration procedure for companies, the receivership of companies, the liquidation of companies... ." See Hare Decl. ¶ 16 & Ex. A (BVI Insolvency Act, 2003 (Enacting Statement)).

281. Liquidation under the BVI Act is a "collective judicial or administrative proceeding" within the meaning of section 101(23) of the Bankruptcy Code as such proceedings are not for the benefit of any single creditor, but rather operate to resolve and determine the rights of all claimants and stakeholders, i.e., the creditor body as a whole, vis-à-vis each debtor. See Hare Decl. ¶ 19; BVI Act §§ 11(2) (defining admissible claims to include, subject to limited statutory exceptions, all lawful liabilities of the company) & § 207 (providing for the payment of classes of admitted claims and expenses in accordance with statutory priorities, and if the amount available for such claims is insufficient to pay claims in full, directing their ratable payment by class).

The BVI Proceedings also satisfy the requirement that the assets of the Debtors be subject to the control or supervision of a foreign court. Hare Decl. ¶ 18. In performing the functions and undertaking of his or her duties, a liquidator in a BVI liquidation proceeding acts as an officer of the BVI Court. Id. ¶ 17; BVI Act, §184. The BVI Act, and the Orders of the BVI Court appointing the liquidators, provide that certain of the powers of a liquidator, including the power to compromise claims, may be exercised only with the sanction of the BVI Court. Hare Decl. ¶¶ 14-15; BVI Act, § 186(3).

Bankruptcy courts have repeatedly recognized that collective insolvency proceedings under the supervision of the courts of the Eastern Caribbean Supreme Courts,[11] including the BVI Court, are "foreign proceedings" within the meaning of section 101(23) of the Bankruptcy Code. See In re Grand Prix Assocs. Inc., 2009 WL 1410519, *8 (Bankr. D.N.J. May 18, 2009) (recognizing as a "foreign proceeding" a

[11] The Eastern Caribbean Supreme Court was established under the provisions of the West Indies Associated States Supreme Court Order of 1967 and comprises the courts of Antigua and Barbuda, The Commonwealth of Dominica, Grenada, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Anguilla, Montserrat and the British Virgin Islands. See http://www.eccourts.org/.

creditors' arrangement under the control of a corporate entity for the purpose of adjusting debt with supervision by the BVI Court pursuant to the BVI Business Companies Act); In re British Am. Ins. Co. Ltd., 425 B.R. 884, 889 (Bankr. S.D. Fla. 2010) (recognizing debtor's insolvency proceeding as a "foreign proceeding" where it was pending before the High Court of Justice for the Saint Vincent and the Grenadines circuit); In re Condor Ins. Ltd., 2008 WL 2858943, *1 (Bankr. S.D. Miss. July 17, 2008) (recognizing debtor's insolvency proceeding as a "foreign proceeding" where they were pending before the High Court of Justice in Nevis circuit); In re Tri-Continental Exch. Ltd., 349 B.R. 627, 629 (Bankr. E.D. Cal. 2006) (recognizing debtor's insolvency proceedings pending before the Eastern Caribbean Supreme Court, under the laws of St. Vincent and the Grenadines).

Therefore, the Petitioners respectfully submit that the BVI Proceedings constitute "foreign proceedings" within the meaning of section 101(23) of the Bankruptcy Code.

B. The Petitioners Are Foreign Representatives.

A case under chapter 15 must be commenced by a duly appointed and authorized "foreign representative" within the meaning of section 101(24) of the Bankruptcy Code. That section provides as follows:

> The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

11 U.S.C. §101(24).

Pursuant to the Appointment Orders, the Petitioners were appointed by the BVI Court and are duly authorized to act as liquidators of the Debtors. Hare Decl. ¶ 24. The powers of an liquidator under the BVI Act are extensive. Id. ¶¶ 14-15. Upon

appointment, the liquidator becomes conterminous with the company being wound up in the sense that s/he obtains custody and control of the company's assets and has the power to compromise claims, commence litigation and to dispose of property. Hare Decl. ¶ 17; BVI Act, §§ 175, 186. From the evidence submitted on behalf of the Petitioners, including the Appointment Orders, the Petitioners are duly authorized to act as the foreign representatives of the Debtors, as defined under section 101(24), in these chapter 15 cases. Hare Decl. ¶¶ 23-25. Bankruptcy courts have held that persons appointed as liquidators by the BVI Court are "foreign representatives" entitled to petition the U.S. bankruptcy court for an order recognizing a foreign proceeding. See, e.g., Grand Prix, 2009 WL 1410519 at *5.

Moreover, as "person" is defined in section 101(41) of the Bankruptcy Code to include, *inter alia,* individuals, the Petitioners each satisfy the "person or body" requirement of section 1517(a)(2) of the Bankruptcy Code. See 11 U.S.C. § 101(41). As such, the Petitioners respectfully submit that this requirement for recognition set forth in section 1517(a)(2) of the Bankruptcy Code has been satisfied in these cases.

C. The BVI Proceedings Are Foreign Main Proceedings.

A foreign proceeding within the meaning of section 101(23) of the Bankruptcy Code may be recognized under section 1517 of the Bankruptcy Code as either (1) a "foreign main proceeding" or (2) a "foreign nonmain proceeding," within the meaning of section 1502 of the Bankruptcy Code. See 11 U.S.C. §1517(a)(1).

Section 1502(4) defines "foreign main proceeding" as "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4). Section 1517(b)(1) of the Bankruptcy Code provides that a foreign proceeding "shall be recognized as a foreign main proceeding if it is pending in the country where

the debtor has the center of its main interests." 11 U.S.C. § 1517(b)(1). Thus, where, as is the case here, a foreign proceeding is pending in the country in which the debtor has its center of main interests, then such proceeding shall be recognized as a foreign main proceeding.

1. **Factors Applicable to COMI Determination.** The Bankruptcy Code does not include a definition of COMI. However, section 1516(c) of the Bankruptcy Code states that, in the absence of evidence to the contrary, COMI is presumed to be the location of the debtor's registered office. See 11 U.S.C. § 1516(c). See Tri-Continental, 349 B.R. at 635 ("In effect, the registered office ... is evidence that is probative of, and that may in the absence of other evidence be accepted as proxy for, 'center of main interests.'"); see also In re Betcorp Ltd., 400 B.R. at 291-93. Section 1516(c) thus creates a rebuttable presumption in favor of the location of the debtor's registered office as the debtor's center of main interests. In this case, from the formation of the Debtors in 1990 to the present, the Debtors' registered offices have at all times been located in the British Virgin Islands. See Krys Decl. ¶ 11. As such, there is a statutory presumption in favor of the British Virgin Islands as the Debtors' COMI.

The statutory presumption is consistent with stakeholder expectations that they were dealing with funds that were registered in the BVI and, accordingly, were subject to liquidation proceedings in that jurisdiction. That expectation would have come from materials including the Debtors' Private Placement Memoranda and their subscription agreements, which identified the BVI as the location of the Debtors' incorporation. See Krys Decl., Ex. A, Private Placement Memoranda for Sentry, at (iv) and Private Placement Memorandum for Sigma, at (iii); Stride Decl., Ex. A, at (i). The expectation

that the funds were subject to liquidation proceedings in the BVI is demonstrated by the stakeholder submissions to the BVI Court that initiated each of the Debtors' BVI-based insolvency proceedings.[12]

Bankruptcy courts have explained however that "[t]he registered office ... does not otherwise have special evidentiary value and does not shift the risk of nonpersuasion, i.e., the burden of proof, away from the foreign representative seeking recognition as a main proceeding." In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 128 (Bankr. S.D.N.Y 2007), aff'd, 389 B.R. 325 (S.D.N.Y. 2008). The Bankruptcy Code does not specify the kind or amount of evidence that rebuts the presumption that COMI is the debtor's place of registration or supports a finding of COMI elsewhere. In applying Section 1517(b)(1), however, bankruptcy courts have identified factors that point to the location of the debtor's COMI and have provided guidance as to the weight to be given to them. These factors, identified in Bear Stearns, supra (the "Bear Stearns factors") include: (1) the location of the debtor's headquarters; (2) the location of those who actually manage the debtor; (3) the location of the debtor's primary assets; (4) the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or (5) the jurisdiction whose law would apply to most disputes. Bear Stearns, 374 B.R. at 128 (citing In re SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)). While these factors are not exhaustive or necessarily applicable in all cases, they are indicative of the facts a court may consider

[12] As detailed in the Stride and Krys Decls., a liquidator was appointed with respect to the winding up of Lambda following an application by a German secured creditor; the Liquidators were jointly appointed with respect to the winding up of Sigma following an application by a Belgian shareholders; and the Liquidators were jointly appointed with respect to the winding up of Sentry following an application by ten shareholders, including shareholders from the Middle East, and Central and South America. See Stride Decl., Ex. D; Krys Decl. ¶¶ 27-29.

relevant. See In re Basis Yield Alpha Fund (Master), 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008) (citing the Bear Stearns factors and further noting that the court may also look to other factors); see also Transcript of Proceedings at 15-16, In re Saad Investments Finance Co. (No. 5) Ltd., Case No. 09-13985 (Bankr. D. Del. 2009) (D.I. 43) (considering factors other than those listed in Bear Stearns in making determination that debtor's COMI was in the Cayman Islands). Bankruptcy courts have also observed that the COMI concept "generally equates with the concept of a 'principal place of business' in United States law." In re Tri- Continental, 349 B.R. at 634.

Section 1502 defines "foreign main proceeding" as "a foreign proceeding pending in the country where the debtor *has* the center of its main interests." 11 U.S.C. § 1502(4) (emphasis supplied). Similarly, section 1517(b)(1) provides that a foreign proceeding "shall be recognized as a foreign main proceeding if it *is pending* in the country where the debtor *has* the center of its main interests." 11 U.S.C. § 1517(b)(1) (emphasis supplied). Both of these Bankruptcy Code provisions use the *present tense.*

In keeping with the use of the present tense in these provisions, the Bankruptcy Code has been interpreted to require that the factors that bear on COMI be viewed from a time perspective that is no earlier than the date of the filing of the chapter 15 petition. See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 338 (S.D.N.Y. 2008) ("Appellants argue that most of the Funds' remaining liquid assets are in bank accounts in the Cayman Islands. However, *prior to filing the Chapter 15 Petition*, all of the Funds' funds were maintained in [their] accounts with [their] prime broker in the United States. . . . *Post-[chapter 15] filing*, some millions of dollars in cash were directed to accounts in the Cayman Islands instead of their usual

destination in the United States. . . . *[A]t the time of the [chapter 15] petition there were no assets of the Funds in the Cayman Islands.")* (emphasis supplied); see also Lavie v. Ran, 406 B.R. 277, 283 (S.D. Tex. 2009) ("Chapter 15 requires the U.S. court to make an independent finding [regarding COMI] *at the time the petition for recognition is filed* in the U.S. court, rather than hindsight... .") (emphasis in original); In re British Am. Ins. Co. Ltd., 425 B.R. 884, 910 (Bankr. S.D. Fla. 2010) (explaining that the language of sections 1517 and 1518 of the Code requires that the temporal focus "for purposes of a court making a determination under section 1517(b)(1), can be *no earlier than the date the chapter 15 petition was filed.*") (emphasis supplied); Tr. of Proceedings at 15-16, In re Saad Invs. Fin. Co. (No. 5) Ltd., Case No. 09-13985 (Bankr. D. Del. 2009) (D.I. 43) (same); Mark Lightner, Determining the Center of Main Interests Under Chapter 15, 18 Norton J. Bankr. L. & Prac. 5, Art. 2 pp. 3, 6 (October 2009) ("Congress' choice to use the present tense necessarily requires bankruptcy courts to view the COMI determination as instructed: in the present. If Congress had, in fact, intended bankruptcy courts to view the COMI determination through a lookback period . . . or on a specific past date . . . it could have easily said so"). Compare 28 U.S.C. §1408(1) (where Congress provided an explicit 180 day lookback period for establishing proper venue of a case other than a chapter 15 case based on the location of the principal assets of the debtor), with 28 U.S.C. § 1410(1) (authorizing a chapter 15 filing in the district "in which the debtor *has* its principal place of business or principal assets in the United States") (emphasis supplied), and 28 U.S.C. § 1410(2) ("if the debtor does not *have* a place of business or assets in the United States, in which there *is pending* against the debtor an action or proceeding in a Federal or State court[.]") (emphasis supplied).

It has been also observed that, in addition to being statutorily mandated, determining COMI based on the present facts and circumstances, and without reference to the debtor's prior operational history, promotes consistency in COMI determination. As stated by the court in Betcorp:

> [A]n inquiry into the debtor's past interests could lead to a denial of recognition in a country where a debtor's interests are truly centered, merely because of past activities. This frustrates two of the purposes of the COMI inquiry -- it decreases the effectiveness of the insolvency proceeding for which recognition is sought, and it may lead to a sub-optimal distribution of the debtor's assets, inasmuch as non-recognition where recognition is due may forestall needed inter-nation cooperation.

400 B.R. at 291 (internal citations and footnotes omitted).

Another significant principle applied to COMI determination is due consideration of those factors that are objectively "ascertainable, and perceived, by third parties." See Betcorp, 400 B.R. at 290 ("[C]ourts analyze a variety of factors to discern, objectively, where a particular debtor has its principal place of business. This inquiry examines the debtor's administration, management, and operations along with whether reasonable and ordinary third parties can discern or perceive where the debtor is conducting these various functions"); see also In re Ran, 390 B.R. at 266 (noting that a debtor's center of main interests is determined by reference to criteria that are objective and ascertainable by third parties) (internal quotations and citations omitted); In re SphinX, Ltd., 351 B.R. at 119 (basing COMI determination on objective factors); accord Bear Stearns, 389 B.R. 325, 336 (S.D.N.Y. 2008) ("The regulation adopting the [European Union Convention on Insolvency Proceedings] explains that 'center of main interests' means 'the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.'") (citing Council Reg. (EC) No. 1346/2000 ¶ 13).

A debtor may have only one center of main interests. "Although it may seem obvious it is perhaps worth saying that the concept of a centre of main interests means that there can only be one such centre." In Cross Constr. Sussex Ltd v. Tseliki, [2006] EWHC 1056 (High Court of Justice Chancery Division 2006), quoted in In re Ran, 390 B.R. at 263;[13] see also Manfred Balz, The European Union Convention on Insolvency Proceedings, 70 Am. Bankr. 485 (Fall, 1996) ("[l]ogically, there can be only one center of main interests).[14]

A corollary of this principle is that each debtor has a COMI that can be ascertained even where some of the factors bearing on a COMI determination point to different jurisdictions. Courts have accordingly been mindful, in denying foreign main recognition, not to leave debtors without recourse to a jurisdiction where proceedings will be recognized as "main." Thus, bankruptcy courts that have denied foreign main recognition have concurrently indicated the actual or probable location of the debtor's COMI as within a jurisdiction *other than where the foreign proceeding is pending*. See, e.g., Bear Stearns, 374 B.R. at 129-30 (concluding that the debtors' COMI was not in the Cayman Islands, the place of their registration, because evidence to the contrary, including, the location of the debtors' current investment manager and the debtors'

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[13] Unique to the interpretation of chapter 15 is the directive found in section 1508 of the Bankruptcy Code requiring the court to consider "its international origin, and the need to promote an application of [chapter 15] that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508. As such, Courts have consistently relied on statutes, cases and instructional materials from foreign jurisdictions that have adopted similar statutes. See Lavie v. Ran, 406 B.R. 277, 281 (S.D. Tex. 2009) ("Likewise, statutes, cases, and interpretative materials of the European Union are also instructive."); Bear Stearns, 374 B.R. at 129 (interpreting chapter 15 by relying on the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency and the materials cited therein, including Council Regulations and case law from the European Union).

[14] The article is commenting on the European Union Convention on Insolvency Proceedings, a prime source of UNCITRAL Model Law and, accordingly, also of chapter 15.

current administrative agent in New York and the absence of debtor management in the Cayman Islands, pointed to the United States as the debtors' COMI); In re British Am., 425 B.R. at 911-12 (concluding that the debtor's COMI was not in the Bahamas, the place of its registration, because "overwhelming evidence" demonstrated virtually every aspect of the debtor's administration and management of ongoing business operations was located in Trinidad); In re Ran, 390 B.R. at 301 (concluding that individual debtor's COMI was not in Israel because it was in the United States). As explained below, significant COMI factors point to the Debtors' real seat in the British Virgin Islands and, because no alternative jurisdiction has a plausible claim as the Debtors' present COMI, the presumption of Section 1516(c) of the Bankruptcy Code is not rebutted and COMI should be deemed to lie in the British Virgin Islands.

2. Factors Determinative of the Debtors' COMI in the BVI. Proper application in these cases of the factors identified by bankruptcy courts as bearing upon COMI compels a determination that the Debtors' COMI or "real seat" is in the British Virgin Islands. As noted above, each of the Debtors was incorporated in the British Virgin Islands and, since inception has maintained its registered offices there and has been subject to the regulatory authority of the British Virgin Islands Financial Services Commission. See Krys Decl. ¶ 11; Hare Decl. ¶¶ 29-30.

Looking beyond place of registration to other evidence of the Debtors' current COMI, it is apparent that while the Debtors have multi-national contacts, none of these contacts point to a single COMI outside of the British Virgin Islands. When the relevant COMI factors are considered from the perspective of the present, as they must be pursuant to the provisions of chapter 15, and when appropriate weight is given to factors

that are presently objectively ascertainable by third parties (and not mere prior artifacts of the fraud perpetrated by Madoff), factors that point to COMI in the British Virgin Islands are overwhelming predominant.

The current status of the Debtors must be emphasized. The Debtors currently have, to the best of the Liquidator's knowledge, no tangible assets in the United States, no contractual relationships with their former New York-based advisors or managers, no headquarters, operations or place of business outside of the BVI, and no management other than the Petitioners and their staff. Krys Decl. ¶¶ 24, 33, 45-46; see also British Am., 425 B.R. at 914 (noting the possibility that a foreign representative's extended activities may cause the debtor's creditors and third parties to look to the objective activity of the foreign representative in his location as to the debtor's COMI). It should be furthermore noted that the Debtors were organized as a vehicle primarily for non-U.S. persons to invest through BLMIS and that, as a consequence, the parties most directly affected by these cases are for the most part non-U.S. persons. See Krys Dec. ¶ 3.

Moreover, while prior to December 2008, it *appeared* that substantially all of the Debtors' assets were held by BLMIS as custodian or subcustodian of Sentry, it is now well-established that assets purportedly held in New York by BLMIS on behalf of the Sentry (and derivatively therefore on behalf of Sigma and Lambda) were in fact non-existent and, indeed, never existed, as monies fed to BLMIS were not invested but were immediately misappropriated by Madoff pursuant to his scheme. Cf. Bear Stearns, 374 B.R. at 130 (the fact that the debtor, through the petition date, had maintained all of its liquid assets, which were real, rather than fictitious, in New York, considered an indication of COMI). Similarly, the previously rendered investment management and

related services purportedly being provided to the Debtors by Fairfield Greenwich (Bermuda) Limited and other affiliates of the New York-based Fairfield Greenwich Group ("FGG"), which might otherwise be weighed as a significant COMI factor had the Verified Petitions been filed at the time when such services were continuing to be performed by the FGG entities for the Debtors, were in reality, and at best, illusory in the sunshine of the disclosure of the Madoff fraud.[15]

Additionally, all apparent tangible property and contractual relationships that formerly existed connecting the Debtors to New York, either never existed or, in any case, are no longer operative or were formally terminated in 2009. By letters dated May 29, 2009, Sentry and Sigma separated themselves from Fairfield Greenwich (Bermuda) Limited, by notifying it of the termination of the investment manager agreement as of June 30, 2009.[16] The Debtors' prior relationship with Citco is in effect only to the very limited extent that certain sums that were uninvested after the Madoff-related disclosures of December 2008, and which were held in an account with Citco Bank Nederland B.V. (Dublin Branch), remain in that account solely to the extent that they are subject to pre-judgment attachments effectuated by shareholders. See Krys Decl. ¶ 34; Cf. British Am., 425 B.R. at 911-912 (the fact that the debtor's primary management functions were being outsourced to subsidiaries in different jurisdictions pursuant to a Services Agreement *still in effect* at the time the chapter 15 petition for recognition was filed

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[15] The degree of knowledge by FGG affiliates, their directors, officers and agents with respect to the Madoff scheme is not yet known and is and will continue to be a subject of inquiry by the Debtors and the Liquidators, whose efforts in this regard will be enhanced and facilitated by recognition.

[16] These letters are attached as Exhibit I to the Krys Decl. The investment manager terminated its investment manager agreement with Lambda, effective as of September 30, 2009, by letter dated September 15, 2009, and attached as Exhibit C to the Stride Decl.

considered an indication of COMI). The Debtors' previous and now discredited New York contractual relationships with FGG and the nonexistent "assets" of BLMIS can lend no support to a finding that the Debtors currently carry on any business activities within the United States, and accordingly, are not relevant to the COMI analysis required by Section 1517 of the Bankruptcy Code.[17] See In Stanford Int'l Bank Ltd., [2010] EWCA Civ 137, ¶ 48 (in determining COMI under the European Union Convention, refusing to base a COMI determination on the perpetration by principals of the company of fraudulent activities in the U.S. and concluding COMI lay in Antigua, the jurisdiction of registration); see also In re Tri-Continental, 349 B.R. at 629 (even though the chapter 15 debtor was used to perpetrate an insurance scam "primarily in the United States and Canada," concluding that the conduct of regular business operations at the registered offices in St. Vincent, qualified St. Vincent as the debtor's COMI).

Although, as explained in the Declaration of Kenneth Krys, the Debtors continue to have certain contacts in The Netherlands (the location of the Debtors' administrative agent),[18] Ireland (the location of certain non-Madoff assets and the attached Sentry funds) and as well as other non-BVI locations, discussed below, the evidence presented demonstrates that no single non-BVI jurisdiction comes close to approaching the BVI with respect to the presence there of the Debtors' material interests. Set forth below is a

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[17] Following the formal separation of Sentry and Sigma from their investment manager in June 2009 and prior to the appointment of the Petitioners as liquidators, the Debtors' affairs were managed in the BVI out of the offices of Conyers, Dill & Pearman, then the Debtors' primary counsel.

[18] While the Liquidators continue to deal with the Debtors' administrative agent, Citco Bank Nederland B.V. ("Citco"), to obtain information in aid of their liquidation activities, Citco is no longer providing any active functions in administrating the Debtors' assets. See Krys Decl. ¶ 17 n. 11. Indeed, as discussed herein, certain funds in the Debtors' account with Citco in Ireland are currently subject to attachment in favor of two Sentry investors.

discussion of the Debtors' BVI and non-BVI interests, addressed within the framework of the Bear Stearns factors:

(a) Location of Debtors' Headquarters: Indisputably, the Debtors' only "nerve center" or "headquarters" is the BVI, from which location the Petitioners, in their capacity as liquidators, direct the administration and management of the interests of the Debtors. Krys Decl. ¶ 46. The BVI Court has overseen the administration of Lambda since April 2009, and Sentry and Sigma since July 2009. Pursuant to the BVI Act, the Debtors are under the actual management of the Liquidators, who are officers of the BVI Court and whose base of operations is the BVI. Id.; Hare Decl. ¶ 17. Importantly, the location of the Debtors' headquarters in BVI is a fact known, relied upon and objectively ascertainable by third persons. Promotional materials, financial statements and reports and other written materials have identified the BVI as location of the Debtors' business. Krys Decl. ¶ 13 & Ex. A. The stakeholders who applied to the BVI Court for the Liquidators' appointment identified the BVI as the appropriate jurisdiction in which to commence proceedings against the Debtors. In addition, stakeholders and/or creditors have received notice regarding the BVI Proceedings, apprising them that the management of the Debtors' affairs is occurring in the BVI.

(b) Location of Management: Under the BVI Act, upon commencement of a liquidation proceeding, "the directors and other officers of the company remain in office, but they cease to have any powers, functions or duties other than those required or permitted by [Part VI of the BVI Act]." BVI Act, § 175(1)(b); see also Hare Decl. ¶ 28. By operation of this provision and the appointment of liquidators, the location of management of the Debtors, i.e., the Liquidators and their staff, is centered in the BVI.

BVI Act, § 175(1)(b); Krys Decl. ¶ 46; Hare Decl. ¶ 28. The Liquidators are Managing Directors of the British Virgins Islands office of Krys & Associates, and each of Messrs. Krys and Stride is a resident of the BVI and licensed by the Financial Services Commission as an insolvency practitioner. Stride Decl. ¶ 1; Krys Decl. ¶ 1. The majority of the activities in respect of winding up the Debtors is taking place by Krys & Associates' professionals located in the British Virgins Islands. The BVI Court, as a practical matter, is also involved in the management of the Debtors, as the Liquidators are not permitted to take any material action without prior approval of that court. Hare Decl. ¶ 18; see also BVI Act § 186(3) (providing that the BVI Court may provide that certain powers may only be exercised with the sanction of the Court).

While prior to the Madoff disclosures and the resulting resignation of board representatives of the Debtors' former New York based investment managers, affiliates of FGG were contractually retained to provide managerial services, these arrangements are no longer in place and the Debtors' investment management agreements were terminated in 2009. Krys Decl. ¶ 24 & Ex. I; Stride Decl., Ex. C. In fact, as described in detail in the Declaration of Kenneth Krys, the Debtors' affairs were managed out of the BVI for some time prior to the appointment of the Liquidators. Since December 2008 and until the appointment of the Liquidators, substantially all meetings of the Debtors' Boards were either held in person at the BVI offices of Conyers, Dill & Pearman ("Conyers"), the Debtors' BVI-based primary counsel at the time, or were originated telephonically by Conyers. Krys Decl. ¶ 22. Moreover, in parallel with the separation of the Debtors from their investment managers, Sentry's Board appointed a Litigation Committee in February 2009, composed of Sentry's non-FGG (i.e., unconflicted)

directors, Jan Naess and Peter Schmid – to handle all matters concerning litigation by or against Sentry. Id. Sentry's Board minutes reflect that Walter Noel, the third Sentry director, who was also a director of FGG, participated in only two of Sentry's Board meetings following the appointment of the Litigation Committee. Id. ¶ 22 & Ex. H. That the Debtors were being managed in the BVI during this period was a fact reasonably ascertainable by third parties because, among other things, (i) the Boards of Sentry and Sigma sent letters in May 2009 to their respective shareholders advising them that they should contact the Conyers firm in the BVI if they wished to communicate with Sentry or Sigma, and (ii) in those letters, the Sentry and Sigma Boards informed Sentry's and Sigma's shareholders that "[t]he independent directors, *who are independent of the Fairfield Greenwich Group and Fairfield Greenwich (Bermuda) Limited*, continue to act in the best interest of the Company, and its shareholders." Id. at Ex. G (letters dated May 8, 2009 from the Sentry and Sigma Boards to their respective shareholders) (emphasis supplied).

(c) Location of Creditors: For the purposes of COMI analysis, the primarily non-U.S. shareholders of the Debtors should be recognized as persons with claims against the Debtors who would be most affected by the liquidations. The offering memoranda of Sigma and Lambda reflect that direct or indirect sales of shares of those Debtors to U.S. nationals, citizens or entities organized under U.S. law was prohibited. Krys Decl., Ex. A; Stride Decl., Ex. A. Direct or indirect sales of shares of Sentry to U.S. persons were likewise prohibited except for sales "to a limited number" of United States investors consisting of "pension and profit sharing trusts, charities and other tax exempt entities." Krys Decl., Ex. A. Thus, and importantly, the location of persons having a possible

interest, as stakeholders and/or creditors, in recoveries attainable by the Debtors' from assertion of the Debtors' claims weighs against a U.S. COMI. Although the Madoff Trustee may be considered a creditor of Sentry based on claims asserted against the Debtors in the BLMIS Adversary Proceeding, his claims are currently contingent, unliquidated and disputed by the Liquidators.

(d) Location of Tangible Assets: The only materials tangible assets of the Debtors are cash funds held on account. Sentry and Sigma currently hold approximately $17 million and $3.3 million in cash, respectively, in BVI bank accounts. Id. ¶¶ 36-37. An escrow account in the UK presently holds approximately $22.1 million attributable to Sentry and $59.6 million attributable to Sigma. Id. ¶ 37. Sentry also has approximately $71 million in an account with Citco Bank Nederland B.V., Dublin Branch, its custodian. Id. The funds in the Citco account are presently subject to attachment as a result of proceedings commenced by two investors in a Dutch court. Id. ¶ 34. No tangible assets of the Debtors are known to exist in any jurisdiction in the U.S. Id. ¶ 33.

(e) Location of Claims and Contingent Assets: Important assets of the Debtors include claims and causes of action. These fall into three major groups: (1) the Debtors' customer claims in the BLMIS SIPA Proceeding; (2) claims against the Debtors' former investment managers, auditors, custodians and other service providers for breach of contract, malpractice, breach of fiduciary duty or possible other misfeasance resulting in the Debtors' losses; and (3) claims against subscribers and/or beneficial owners of shares for recovery of fictitious profits and other transfers to such persons. Id. ¶¶ 39-41. The Debtors' SIPA customer claims are pending in this District. In the British Virgin Islands, six writs against 160 parties have been issued by the BVI Court in respect

of actions to be commenced in the BVI Court representing claims for the recovery of redemptions in amounts exceeding $151 million (the "BVI Actions"). Id. ¶ 39. Additional actions against subscribers have been commenced in New York state court. Id. Reflecting the global nature of the Debtors' pre-December 2008 operations, the defendants and potential defendants in causes of action under consideration are domiciled in several jurisdictions including Canada (auditors); The Netherlands (auditors, administrators); investment advisors (New York); fictitious profit redeemers (the BVI, Europe, the Middle East, Latin America). Id. at ¶¶ 17, 27. It may be necessary for actions to be brought in several jurisdictions to recover on the Debtors' claims and to enforce judgments.

(f) Jurisdiction Whose Law Would Apply To Disputes: Choice of law issues with respect to some of the Debtors' claims are complex. The BVI Actions and matters relating to the internal affairs of the Debtors, each of which in incorporated in the BVI, will be governed by BVI law. BVI law provides that: "For the purposes of determining matters relating to title and jurisdiction but not for purposes of taxation, the situs of the ownership of shares, debt obligations or other securities of a company is in the Virgin Islands." BVI Business Companies Act 2004 § 245; Hare Decl. ¶ 27. Certain of the Debtors' contracts with subscribers, service providers and professionals, such as their former Canadian and Dutch auditors, include contractual choice of law provisions. The law governing actions for the recovery of fictitious profits may depend on the nature of the cause of action alleged, i.e., whether contractual or quasi-contractual, equitable, tort-based or statutory (such as a creditor's remedy for fraudulent conveyance). Choice of law issues may also turn on the various contacts between the defendants (who are

geographically dispersed) and the relevant transactions. The Debtors' customer claims in the BLMIS SIPA Proceeding and their causes of action against redeemers based on subscription agreements will be governed by U.S. law.

(g) Other factors: In addition to consideration of the facts that are applicable to the Bear Stearns factors, the record reflects a number of other objective facts that strongly point to the BVI as the Debtors' COMI. First, the Debtors' books and records are located in the BVI, and the Debtors have leased office space in the BVI for the purpose of storing those books and records, as well as other documents produced to the Liquidators, in an organized manner. Krys Decl. ¶ 38.[19] Second, the Debtors currently contract for ongoing services from several providers that are organized under the laws of the BVI, have offices in the BVI and employ residents of the BVI: Forbes Hare, the Debtors' BVI legal counsel; Codan Trust Company (B.V.I.) Ltd., registered agent for the Debtors; and Codan Management (B.V.I.) Ltd., registered secretary for the Debtors. Id. ¶ 46.[20] Third, correspondence sent to the Debtors' stakeholders following the December 2008 revelations concerning BLMIS advised such parties to direct communications concerning the Debtors to the BVI offices of Conyers and then, following the Liquidators' appointment, to the BVI offices of Krys & Associates. Id., Exs. G & N. Fourth, all of the Debtors' liquidation proceedings in the BVI were commenced by

[19] See In re Basis Yield Alpha Fund (Master), Case No. 07-12762 (REG), Order Re Upcoming Hearing on Motion for Recognition dated September 12, 2007 ("Basis Yield Order"), ¶¶ 2(q) (as part of COMI determination, requesting evidence regarding "the extent, if any, to which Basis Yield is required to keep books or records in the Cayman Islands; the extent to which Basis Yield does so; and the extent to which books or records not required to be kept in the Cayman Islands are nevertheless maintained there"), 2(j) (requesting evidence regarding "the extent, if any, to which real property is leased or owned by Basis Yield, and, if so, its location").

[20] See Basis Yield Order, ¶ 2(o) (requesting evidence regarding "the extent to which Basis Yield had or now has contractual agreements with entities that are (i) organized under the laws of the Cayman Islands; (ii) have offices in the Cayman Islands; or (iii) employ residents of the Cayman Islands").

creditors and investors (and not the Debtors themselves) that necessarily identified the BVI as the appropriate forum for the liquidation of the Debtors. Id. ¶¶ 26-28.

The Petitioners note that, while the Memorandum of Association for each of the Debtors incorporated certain restrictions on the ability of the Debtors to carry out business in the BVI, which were based on BVI law,[21] Hare Decl. ¶ 31, these restrictions

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[21] The Memorandum of Association of each of the Debtors contains the following provisions:

(2) The Company may not:

> (a) carry on business with persons resident in the British Virgin Islands;
> (b) own an interest in real property situated in the British Virgin Islands, other than a lease referred to in paragraph (e) of sub clause (3);
> (c) carry on banking or trust business, unless it is licensed under the Banks and Trust Companies Act, 1990;
> (d) carry on business as an insurance or reinsurance company, insurance agent or insurance broker, unless it is licensed under an enactment authorising it to carry on that business;
> (e) carry on the business of company management unless it is licensed under the Company Management Act, 1990; and
> (f) carry on the business of providing the registered office or the registered agent for companies incorporated in the British Virgin Islands.

(3) For purposes of paragraph (a) of subclause (2), the Company shall not be treated as carrying on business with persons resident in the British Virgin Islands if:

> (a) it makes or maintains deposits with a person carrying on banking business within the British Virgin Islands;
> (b) it makes or maintains professional contact with solicitors, barristers, accountants, bookkeepers, trust companies, administration companies, investment advisers or other similar persons carrying on business within the British Virgin Islands;
> (c) it prepares or maintains books and records within the British Virgin Islands;
> (d) it holds, within the British Virgin Islands, meetings of its Directors or members;
> (e) it holds a lease of property for use as an office from which to communicate with members or where books and records of the Company are prepared or maintained;
> (f) it holds shares, debt obligations or other securities in a company incorporated under The International Business Companies Ordinance or under The Companies Act; or
> (g) shares, debt obligations or other securities in the Company are owned by any person resident in the British Virgin Islands or by any company incorporated under The International Business Companies Ordinance or under the Companies Act."

The Memoranda of Association of Sentry and Sigma are attached as Exhibit E to the Krys Decl. The Memorandum of Association of Lambda is attached to the Stride Decl. as Exhibit B thereto. The language in the Memoranda of Association quoted above tracks Part II, *Constitution of*

are irrelevant to a COMI analysis because they did not impact the ability of an investment fund to have a principal place of business in the BVI and to administer all of its interests there. Id.[22] For example, an investment fund could, in compliance with the restrictions, hire local service providers to provide all of the services associated with the operation of a fund, including a local investment manager or advisor and lease space for use as an office. It could maintain all of its assets with a local trust company or custodian. Its back office functions could be handled by a local administration company. Id. Because it could do all of these things, the restrictions are irrelevant to a COMI (or establishment) analysis. In any event, the Debtors' businesses are no longer a going concern, and the restrictions in the Debtors' Memoranda of Association do not limit the winding up of the Debtors' affairs in the BVI. See Hare Decl. ¶ 14 (setting forth powers granted the Liquidators upon their appointment).

Viewing the totality of the relevant contacts between the Debtors and the various jurisdictions with which they have contacts and interests, it is clear that no jurisdiction other than the British Virgin Islands has a plausible claim as the Debtors' COMI. None of the Debtors has a place of business in the U.S., much less a "principal place of business." Petitioners' research has identified no cases in which recognition of

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Companies, of the International Business Companies Act (Cap. 291), BVI. This Act was repealed in full by the Business Companies Act 2004, BVI effective January 1, 2007. See Hare Decl. ¶ 31.

[22] The restrictions were included to trace the statutory restrictions in Part II of the BVI International Business Companies Act (Cap. 291), which then applied. This statute was repealed by the BVI Business Companies Act 2004, effective (at the latest) January 1, 2007. A key feature of the revised statute was the removal of the "ring fencing" provisions of the previous statute, such that the previous restrictions on operations of a BVI international business company in the BVI were removed, as was the distinction between international business companies and "local" companies (which were previously incorporated under a separate, and similarly repealed, statute). Thus, after the statutory changes, there were no statutory restrictions on the ability of the Debtors to do business in the BVI. See Hare Decl. ¶ 31.

proceedings commenced in a corporate petitioner's jurisdiction of registration was denied where the debtor had no headquarters, place of business or business operations outside of that jurisdiction. Petitioners respectfully request that, on the basis of the foregoing identified factors and the other BVI contacts and interests identified in the Declarations of Kenneth Krys, Christopher Stride and William Hare filed contemporaneously herewith, this Court (i) conclude that the Debtors' COMI is situated in the British Virgin Islands, and (ii) recognize the BVI Proceedings as "foreign main proceedings" within the meaning of section 1502(4) of the Bankruptcy Code.

D. In The Event The BVI Proceedings Are Not Recognized As Foreign Main Proceedings, They Should Be Recognized As Foreign Nonmain Proceedings.

As discussed in detail above, the evidentiary record clearly does not rebut the statutory presumption that each of the Debtor's COMI is in the BVI; to the contrary, the record clearly establishes COMI in the BVI. However, in the event Court concludes that the BVI Proceedings are not "foreign main proceedings," then the Petitioners submit that the BVI Proceedings should be recognized as "foreign nonmain proceedings" within the meaning of section 1502(5) of the Bankruptcy Code. As stated above, section 1517(a) of the Bankruptcy Code provides that "an order recognizing a foreign proceeding shall be entered if (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502." 11 U.S.C. § 1517(a)(1). Section 1502(5) of the Bankruptcy Code defines "foreign nonmain proceeding" to mean a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment. 11 U.S.C. § 1502(5).

To qualify as a foreign nonmain proceeding, a debtor must have an establishment in the country in which the foreign proceeding is pending. Id. "Establishment" is defined

in section 1502(2) to mean "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2). "Nontransitory economic activity" is not defined in the Bankruptcy Code, but the place in which such activity is conducted has been interpreted to mean "a local place of business." See Bear Stearns, 374 B.R. at 131. Similar to the time of evaluating a debtor's COMI, whether the debtor has an "establishment" in a country is also determined at the time of the filing of the chapter 15 petition. In re British Am., 425 B.R. at 915; Lavie v. Ran, 406 B.R. at 284-85.

Here, nontransitory economic activity in respect of the Debtors is being carried out in the British Virgin Islands. Following their appointment in April 2009 (in the case of Lambda) and July 2009 (in the case of Sentry and Sigma), the Liquidators have actively managed the Debtors' business and assets from the BVI offices of Krys & Associates Ltd. See Krys Decl. ¶ 46. As discussed above, since December 2008, the Debtors' businesses have been the winding up of their affairs and the realization of assets for the benefit of their investors. Those activities are principally being carried out in the BVI offices of Krys & Associates and in the BVI Court, which is overseeing the winding up of the Debtors.

The Petitioners submit that the each of the Debtors has a "local place of business" in the British Virgin Islands because their winding up activities are based in that jurisdiction. Thus, each of the Debtors has an "establishment" in the BVI. A conclusion that the Debtor has an establishment in the BVI necessarily leads to a conclusion that the BVI Proceedings are a "foreign nonmain proceeding." See 11 U.S.C. § 1502(5).

The Petitioners therefore respectfully submit that, if the Court denies recognition of the BVI Proceedings as foreign main proceedings, it should conclude that the BVI

Proceedings constitute "foreign nonmain proceedings" within the meaning of section 1502(5) of the Bankruptcy Code.

E. The Petitions Meet The Filing Requirements Of Section 1515 Of The Bankruptcy Code And Of Rule 1007(a)(4) Of The Bankruptcy Rules.

Recognition of a foreign proceeding under section 1517(a) of the Bankruptcy Code requires that the petition meet the filing requirements of section 1515 of the Bankruptcy Code. See 11 U.S.C. § 1517(a)(3). Sections 1515(b) and (c) of the Bankruptcy Code require that the foreign representative file with the petition for recognition a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative and a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative. See 11 U.S.C. § 1515(b)-(c).

The Petitioners have met these requirements. See Exhibit A to Verified Petitions (certified copies of Orders commencing the BVI Proceedings); Exhibit B to Verified Petitions (certified copies of Order authorizing the Liquidators to seek recognition; and Exhibit C to Verified Petitions (11 U.S.C. § 1515(c) Statement of Foreign Representatives Kenneth Krys and Christopher Stride).

In addition to the filing requirements of section 1515 of the Bankruptcy Code, the Petitioners have also satisfied the following additional filing requirements set forth in Bankruptcy Rule 1007(a)(4):

(a) List containing the names and addresses of all person or bodies authorized to administer the foreign proceedings of the Debtors and all parties to litigation pending in the United States in which any Debtor is a party at the time of the filing of the Verified Petitions, as required by Rule 1007(a)(4)(B). See Verified Petitions, Exhibit D; and

(b) Corporate ownership statement containing the information described in rule 7007.1 of the Bankruptcy Rules, as required by Rule 1007(a)(4)(A). See Verified Petitions, Exhibit E.

F. Recognition Of The BVI Proceedings Would Not Be Manifestly Contrary To U.S. Public Policy.

The final requirement for recognition under section 1517(a) of the Bankruptcy Code is that the relief sought not be "manifestly contrary to the public policy of the United States." See 11 U.S.C. § 1517(a) (providing that the entry of an order recognizing a foreign proceeding is "subject to section 1506" of the Bankruptcy Code). Section 1506 of the Bankruptcy Code provides as follows:

> Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.

11 U.S.C. § 1506.

Although section 1506, which permits the courts to refuse to take an action governed by chapter 15 if such action would be manifestly contrary to the public policy of the United States, has been held to be additional protection, it is an exception that Congress intended to be narrowly construed. See Tri-Continental, 349 B.R. at 638 ("The word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States ... [Its purpose] ... is to emphasize that public policy exception should be interpreted restrictively and that [provision] is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.") (citing the Guide to Enactment to the UNCITRAL Model Law on Cross-Border Insolvency, U.N. Gen. Ass., UNCITRAL 30th Sess., U.N. Doc. A/CN.9/442 (1997)).

There is no U.S. public policy that would be contravened through the granting of any of the relief sought. It is a narrow exception that has no application in the present cases. Indeed, and to the contrary, recognizing the BVI Proceedings as foreign main proceedings would advance one of the express objectives of chapter 15 – the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the Debtors, and the protection and maximization of the Debtor's assets. See 11 U.S.C. § 1501(a). As noted above, the Madoff Trustee has expressly stated that he does not intend to object to these chapter 15 petitions, as presented. Chapter 15 will materially aid the Liquidators' efforts to realize recoveries in the United States for the benefit of stakeholders of both the Debtors and the BLMIS estate. As such, the Petitioners respectfully submit that the final requirement for recognition of the BVI Proceedings as a foreign main proceeding under section 1517(a) of the Bankruptcy Code has been satisfied.

III. Upon The Recognition Of The BVI Proceedings As Foreign Main Proceedings, The Automatic Stay Under Section 362(a) Of The Bankruptcy Code Applies Pursuant To Section 1520(a) of the Bankruptcy Code.

Upon the recognition of a foreign proceeding as a "foreign main proceeding," a foreign representative is automatically entitled to the benefit of the relief conferred under section 1520(a) of the Bankruptcy Code, including, without limitation, the automatic stay provided for in section 362 of the Bankruptcy Code. See 11 U.S.C. § 1520(a)(1); see also 11 U.S.C. 362(a) (providing for an automatic stay of proceedings against the debtor and property of the estate). Section 1520(a)(1) of the Bankruptcy Code provides:

> (a) Upon the recognition of a foreign proceeding that is a foreign main proceeding, (1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States...

Id.

As such, upon the recognition by this Court of the BVI Proceedings as "foreign main proceedings" has the immediate effect of implementing the automatic stay provided under section 362(a) of the Bankruptcy Code in respect of all actions and proceedings against the Debtors and their property in the United States. See In re Spansion, Inc., 2009 Bankr. LEXIS 3077, *11 (Bankr. D. Del. Oct. 1, 2009) (upon recognition of a foreign proceeding, the stay automatically comes into effect) (citation omitted). Importantly, application of the automatic stay in this case is critical for the Liquidators to effectively and properly administer the Debtors' assets in the United States because it will prevent third parties from prosecuting claims on behalf of the Debtors, including claims belonging to Sentry which have been improperly asserted against Sentry's former managers and service providers by purported Sentry's shareholders in Morning Mist Holdings Ltd., et al. v. Fairfield Greenwich Group, et al., 09-CV-5012, pending before the Supreme Court of the State of New York, County of New York (the "Morning Mist Action"). See Krys Decl. ¶ 39.[23] Moreover, as mentioned above, the Petitioners, while reserving all rights, have agreed with the Madoff Trustee that the BLMIS Adversary Proceeding shall not be subject to the automatic stay pending the continuation of good faith discussions between the Madoff Trustee and the Debtors with respect to the claims asserted against Sentry in the BLMIS Adversary Proceeding. See Krys Decl., Ex. D.

[23] Notably, a shareholder of another BVI-incorporated entity in insolvency proceedings before the BVI Court, Kingate Global Fund Limited ("Kingate"), was recently denied standing to assert a derivative action on behalf of Kingate, on the grounds that the shareholder had not obtained the approval of the BVI Court to commence the action and had not made a demand on the joint liquidators for Kingate. See Bruhl v. Kingate Global Fund Limited, Index. No. 601526/09, Memorandum Decision dated January 25, 2010, a copy of which is attached to the Krys Decl. as Exhibit B thereto.

IV. The Petitioners Request Necessary And Appropriate Relief Pursuant To Section 1521(a) Of The Bankruptcy Code.

Upon recognition of the BVI Proceedings, whether as foreign main or foreign nonmain proceedings, this Court is empowered to grant "any appropriate relief" pursuant to section 1521(a) of the Bankruptcy Code where such relief is necessary to effectuate the purpose of chapter 15 and to protect the Debtor's assets or the interests of the Debtor's creditors. See 11 U.S.C. § 1521(a). However, relief under § 1521(a) is available only if the interests of the creditors and other interested entities, including the debtor and interested parties located outside of the United States, are sufficiently protected. See 11 U.S.C. § 1522(a); see also In re SPhinX, 351 B.R. at 113 (noting that in enacting § 1522(a), "Congress directed the court to focus on the interests of all creditors and other interested parties, not just those of U.S. parties.") (emphasis in original). Moreover, if the Court recognizes the BVI Proceedings as foreign nonmain proceedings, relief under § 1521 is available where the Court is satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding. 11 U.S.C. § 1521(c).

Pursuant to § 1521(a),[24] the Petitioners request that this Court enter an Order granting additional necessary relief including, without limitation: (i) staying the commencement or continuation of proceedings concerning the Debtors' assets, rights,

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[24] 11 U.S.C. § 1521(a) provides, in relevant part, that upon recognition of a foreign proceeding as a main or nonmain proceeding, the Court may issue an order staying the commencement or continuation of proceedings concerning, the execution against, and disposition of the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a), provide for the examination of witnesses and taking of evidence concerning the debtor's affairs, entrust the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative, and grant any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 548, 550 and 724(a) of the Bankruptcy Code.

obligations or liabilities, including the prosecution of Sentry's claims by purported derivative plaintiffs in Morning Mist Action, to the extent not stayed automatically under § 1520(a); (ii) staying all parties from executing against, interfering with or otherwise disposing of the funds assets, including the Debtors' customer claims asserted in the BLMIS SIPA Proceeding, as well as the causes of action that the Debtors may assert against third parties to the extent not stayed automatically under § 1520; and (iii) granting the Petitioners the right, post-recognition, to seek leave to conduct discovery pursuant to applicable provisions of the Bankruptcy Code and/or Bankruptcy Rules concerning, inter alia, the Debtors' assets, affairs, rights, obligations or liabilities, including identifying parties who may bear liability for the Debtors' massive losses in value, and the claims against those parties, as well as entrust the Petitioners with the administration or realization of all of the Debtors' assets that are located within the territorial jurisdiction of the United States, including prosecution of any causes of action belonging to the Debtors. 11 U.S.C. § 1521(a).

The relief requested by the Petitioners under § 1521(a) is necessary to assist the BVI Court and the Petitioners in carrying out the effective administration of the BVI Proceedings, particularly if the Court recognizes the BVI Proceedings as foreign nonmain proceedings. Without the relief provided for in § 1521(a), the BVI Court would not be able to ensure the fair and efficient administration of the BVI Proceedings in a manner that protects the interests of all of the Debtors' creditors, nor would the Petitioners be able to protect and maximize, without interference, the value of the Debtors' assets in the United States for the benefit of the Debtors' creditors. Moreover, such relief is necessary to effectuate the purpose of chapter 15.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court enter an Order: (i) recognizing the BVI Proceedings as foreign main proceedings or, if not so recognized, as foreign nonmain proceedings; (ii) recognizing the Petitioners as foreign representatives of the BVI Proceedings; (iii) recognizing the application of the automatic stay provided in section 362(a) of the Bankruptcy Code pursuant to section 1520(a) of the Bankruptcy Code; and (iv) granting such other relief as may be just and proper.

Dated: June 14, 2010
New York, New York

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