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12-3422-bk(CON), 12-3440-bk(CON), 12-3582-bk(CON), 12-3585-bk(CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

In Re: Bernard L. Madoff Investment Securities LLC,
Debtor.

IRVING H. PICARD, Trustee for the Liquidation of
Bernard L. Madoff Investment Securities LLC,
Plaintiff - Appellant,

SECURITIES INVESTOR PROTECTION CORPORATION,
Statutory Intervenor pursuant to the Securities Investor Protection Act,
15 U.S.C. § 78eee(d),
Intervenor - Appellant,

-against-

IDA FISHMAN REVOCABLE TRUST, PAUL S. SHURMAN, in his capacity as co-trustee of the Ida
Fishman Revocable Trust, WILLIAM SHURMAN, in his capacity as co-trustee of the
Ida Fishman Revocable Trust and as Executor of the Estate of Ida Fishman,
Defendants - Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF APPELLANT
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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1(a) of the Federal Rules of Appellate Procedure, the Securities Investor Protection Corporation hereby states that it has no parent corporation and there is no publicly held corporation owning 10% or more of stock in the Securities Investor Protection Corporation.

Dated: May 15, 2013
Washington, D. C.

/s/ Josephine Wang
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STATEMENT OF JURISDICTION

These appeals are by the Securities Investor Protection Corporation (“SIPC”),¹ and Irving H. Picard, as Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act, 15 U.S.C. §78aaa et seq. (“SIPA”).² The liquidation proceeding of BLMIS is pending before the United States Bankruptcy Court for the Southern District of New York (“Bankruptcy Court”). The Trustee initiated a number of avoidance actions within the liquidation. The United States District Court for the Southern District of New York (“District Court”) granted motions to withdraw the reference with respect to many of those actions and subsequently, on motion, dismissed the complaints or counts in them, remanding the cases that had remaining counts to the Bankruptcy Court for further proceedings. The District Court had jurisdiction over the actions under 28 U.S.C. §1334(b) and SIPA §78eee(b)(2)(A).

The District Court certified its dismissals as final under Fed. R. Civ. P. 54(b) in orders filed on May 23, 2012 and July 27, 2012. On June 21, 2012, and August

¹ SIPC is a party in interest as to all matters in a SIPA proceeding and has the right to be heard as if it had filed a petition to intervene and the petition had been granted. 15 U.S.C. §78eee(d).

² For convenience, references to provisions of SIPA shall omit “15 U.S.C.”

13, 2012, SIPC and the Trustee timely filed notices of appeal. This Court of Appeals has jurisdiction over these appeals under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

Customers of BLMIS entered into one or more of three agreements with BLMIS. Under the first agreement, upon demand, the customer was entitled to receive physical delivery of fully paid securities in the customer's account. In pertinent part, the agreement also provided that transactions in the account would be subject to the Securities Exchange Act of 1934 ("1934 Act"). Under the second agreement, the customer represented that he was aware of the risks of options trading. Under the third agreement, the customer authorized the broker-dealer to act on his behalf in buying and selling securities for his account. In the cases at hand, the broker-dealer bought no securities for the customer, and paid the customer fictitious profits, in amounts invented by the principal of the firm, on non-existent trades. The monies paid actually belonged to other investors.

Against this background and assuming, arguendo, the aforementioned agreements are "securities contracts," the issues are:

Under section 546(e) of the Bankruptcy Code (Title 11), where the broker has placed no orders for the purchase or sale of securities for the investor under the securities contracts, the customer has no fully-paid securities in his account, the cash that the customer receives is not money owed to him under the securities contracts but fictitious profit that consists of money belonging to other investors, and the securities contracts do not provide for or

authorize the payment of fictitious profits to the investor, whether the payments of fictitious profit are in connection with the securities contracts or whether they only purport to be in connection with the securities contracts but, in reality, are in connection with a scheme to defraud.

Whether under section 546(e) of the Bankruptcy Code, transfers of funds made by a securities broker to investors are “settlement payments” under section 101 or 741 of the Code where no securities transactions occur and no securities transactions exist to settle.

Where 28 U.S.C. §157(d) authorizes a district court to withdraw the reference to the bankruptcy court for cause shown and requires it to withdraw the reference when consideration of both Title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce is required, whether withdrawal is appropriate if the only applicable laws are Title 11 and SIPA; SIPA provides, under the facts presented, that the proceeding is to be conducted like a Title 11 liquidation proceeding; and the applicability of section 546(e) as a defense is a “core” matter, within the basic competence of the bankruptcy court.

SIPC respectfully submits that the transfers are in connection with a scheme to defraud investors and not in connection with a securities contract, that the transfers are not settlement payments, and that the District Court committed error in withdrawing the reference to the Bankruptcy Court of these cases.

STATEMENT OF THE CASE

On December 15, 2008, upon an application by SIPC, the District Court placed BLMIS in liquidation under SIPA, appointed Irving H. Picard as trustee for BLMIS, and removed the liquidation proceeding to the Bankruptcy Court consistent with SIPA section 78eee(b)(4). As is now widely known, Bernard L. Madoff (“Madoff”), the principal of the firm, used BLMIS to engage in a Ponzi scheme. With respect to the investors in question, no trades were placed. Instead, payments were made to the investors under the guise of profits which were not market-generated, but simply the monies of other investors. The result of this scheme is that some investors profited from it while others lost.

In the course of administering the liquidation, the Trustee sued a number of investors, the so-called “net winners” who not only had received back the amounts that they had paid to the broker, but more, in the form of fictitious profits. The Trustee sued under various avoidance provisions of the Code, made applicable under SIPA, seeking to recover the fictitious profits paid to those investors.

Defendants in the within actions filed motions asking the District Court to withdraw the reference to the Bankruptcy Court. The District Court largely granted the motions to withdraw, at least in part. (SPA-5).³ The defendants in

³ Documents in the Joint Appendix are referred to herein as “A-__” and in the Special Appendix, as “SPA-__.”

some of the cases thereafter moved to dismiss the complaints or amended complaints on the grounds, among others, that section 546(e) prevented the Trustee from avoiding the transfers under sections 544 and 548(a)(1)(B) of the Bankruptcy Code. (SPA-33).

The District Court ruled on the question in an Order filed on April 30, 2012 (SPA-30) and explained the reasons for its decision in an Opinion filed on May 1, 2012. (SPA-32). In relevant part, section 546(e) creates a safe harbor against certain avoidance actions with respect, among others, to transfers made by a broker in connection with a securities contract as defined in section 741(7) of the Bankruptcy Code, or transfers that are settlement payments under section 101 or 741 of the Code. Noting that the BLMIS investors had signed documents labelled “Customer Agreement,” “Option Agreement,” and/or “Trading Authorization Limited to Purchases and Sales of Securities and Options” (“Trading Authorization”) (A-1257—A-1264), the Court found the documents to be “securities contracts” under a few subsections of the Code. Thus, the documents were securities contracts because each was “a contract for the purchase, sale, or loan of a security” (11 U.S.C. §741(7)(A)(i)), or a “security agreement ... related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker” (11 U.S.C. §741(7)(A)(xi)), or “a master agreement that provides for” the purchase or sale of a

security (11 U.S.C. §741(7)(A)(x)). (SPA-34, 39, 40). In the view of the Court, the transfers by BLMIS of fictitious profit were made in connection with a securities contract or were settlement payments under the aforementioned agreements. Thus, section 546(e) was a bar to the Trustee's avoidance of 1) preferences under section 547 of the Code; 2) constructive fraudulent transfers under section 548(a)(1)(B) of the Code; and 3) actual and constructive fraudulent transfers or fraudulent conveyances under New York state law made applicable under section 544(b) of the Code.

On May 16, 2012, the Court filed a consent order which identified the adversary proceedings to which the Court's decision applied, consolidated them under one caption (Picard v. Ida Fishman Revocable Trust), and granted a motion for certification under Fed. R. Civ. P. 54(b) for entry of a final judgment. (SPA-65). On May 23, 2012, the Court filed the Final Judgment pursuant to Fed. R. Civ. P. 54(b), thereafter issuing two orders which made the May 16 order applicable to additional parties. (SPA-164). The ruling was extended again when the Court filed the same consent order and Final Judgment on July 27, 2012, with respect to another set of defendants in avoidance actions consolidated under the single caption of Picard v. BlueStar Investors, LLC. (SPA-166, SPA-187, SPA-189). On June 21, 2012, and on August 13, 2012, the Trustee and SIPC each filed separate

notices of appeal, correspondingly from the May 23, 2012 and the July 27, 2012, orders and all prior related adverse orders and opinions.

On April 15, 2013, the District Court issued a decision related to the appeals at hand. In that decision, the Court discussed the applicability of section 546(e) to the Trustee's avoidance suits against defendants who, allegedly in bad faith, received transfers from BLMIS. (SPA-191). In order for the Trustee to prevail in the latter actions, the District Court held that the transferee would had to have had actual knowledge that no real securities trading was occurring. That decision is not presently before this Court of Appeals.

STATEMENT OF FACTS

A. The Blumenthal Amended Complaint

In reviewing the facts of the cases before it, the District Court held the facts of the amended complaint (A-1606) in the Blumenthal adversary proceeding to be representative of the facts in the other adversary proceedings at issue.⁴ (SPA-33--SPA-34). The facts of Blumenthal are discussed below.

Through BLMIS, Bernard Madoff purported to invest client money under a few different strategies. These included buying low and selling high; short-selling at high prices and buying the securities at low prices; and a "split-strike conversion" strategy which involved investing in a basket of common stocks that

⁴ Picard v. Blumenthal, Adv. Proc. No. 10-04582 (BRL) (Bankr. S.D.N.Y.) ("Blumenthal").

tracked the S&P 100 Index, and then hedging the positions with purchases of option contracts. In connection with this alleged trading, the firm issued account statements to customers reflecting the supposed investments. In reality, in the cases at hand, no purchases or sales ever occurred and the reported profits were entirely fictitious. Instead of being invested, client money was used to pay other clients in order to perpetuate the scheme. (A-1613—A-1614).

Gerald Blumenthal was the beneficial owner of an account established at BLMIS. In connection with the opening of the account, one or more documents were executed: a Customer Agreement, an Options Agreement, and/or a Trading Authorization. In the course of his dealings with BLMIS, Mr. Blumenthal received periodic customer statements, confirmations, and other communications from BLMIS or Madoff. (A-1608, A-1616--A-1617).

After BLMIS was placed in liquidation, Mr. Blumenthal filed a claim in the proceeding. The Trustee issued a written determination of the claim which notified Mr. Blumenthal that his claim had been denied because no securities had been purchased for his account and because between 1997 and 2008, Mr. Blumenthal had withdrawn \$2,376,385.33 even though he only had deposited a total of \$150,000 into the account. The Trustee advised in the claim determination that amounts that were withdrawn by Mr. Blumenthal, exceeding the \$150,000 that he had deposited, consisted of other investors' money. (A-1664—A-1666).

The Trustee's review of the activity in the Blumenthal account revealed that in the six years preceding the firm being placed in liquidation, Mr. Blumenthal received \$1,634,839 of fictitious profits for his account which were other investors' money. In the two years preceding the liquidation, he received \$521,667 of other investors' funds. (A-1618). The Trustee sued to avoid the transfers of these amounts under Section 548 of the Bankruptcy Code and under New York State law avoidance provisions made applicable under the Bankruptcy Code. In addition, because BLMIS records revealed that \$1,743,664 of fictitious profit had been transferred from a different customer account into Mr. Blumenthal's account, the Trustee sued Mr. Blumenthal to avoid a portion of those transfers to him, as a subsequent transferee, under section 550 of the Bankruptcy Code. The reach-back period under sections 548 and 550 of the Code is two years, and under New York state law, is six years, from the dates of transfer. See 11 U.S.C. §§546(a)(1)(A) and 549(d); New York Debt. and Cred. Law §§273-279 and N.Y. C.P.L.R. 213(8). Accordingly, the Trustee sought to avoid the transferred amounts by which Mr. Blumenthal benefitted during those periods of time.

B. The Agreements

In deciding that section 546(e) applied to these cases, the District Court relied upon three BLMIS documents. Relevant portions of those documents are discussed briefly below:

i. The Customer Agreement (A-1257—A-1259)

The Customer Agreement contained the following salient terms:

- a) The customer agrees to be bound by the terms and conditions of the agreement.
- b) All transactions in the customer's account are subject to the provisions of the 1934 Act.
- c) The customer is entitled to receive, upon demand, physical delivery of fully paid securities in his account.
- d) With respect to sales of securities, the customer agrees to deliver the securities to be sold on or before the settlement date.
- e) The customer designates the broker as his agent.
- f) If the customer disagrees with a transaction in his account, he must object to the transaction, in writing, within ten days after receipt of a confirmation or statement evidencing the transaction.

ii. The Option Agreement (A-1261—A-1262)

Under this Agreement, in order to induce BLMIS to carry option accounts for the customer, the customer represented that he understood options trading to be highly speculative, that he agreed to hold BLMIS and others harmless for trading loss, that options transactions for his account were subject to the rules of The Options Clearing Corporation and those of other specified authorities, and that the

customer authorized BLMIS to take certain action if the customer failed timely to satisfy money or security calls.

iii. The Trading Authorization (A-1264)

Under this Agreement, the customer authorized Madoff to trade on his behalf and agreed to hold him harmless with respect to losses in the customer's account provided that the losses did not exceed the amount of the customer's investment. The Trading Authorization was limited to the purchase and sale of securities.

SUMMARY OF THE ARGUMENT

Bernard Madoff's perfidy created two kinds of innocent victims: those who benefitted from his actions, colloquially referred to as "net winners," and those who lost money, referred to as the "net losers." The amounts by which the net winners benefitted did not come from trades. No trades were placed and therefore, no profits could have been generated. Instead, because Madoff ran a Ponzi scheme, the money received by the net winners came from other investors. Madoff robbed Peter to pay Paul meaning that, in these cases, he robbed the net losers to pay the net winners.

A provision of law enacted to stem the adverse systemic market consequences of the failure of a financial firm has been relied upon by the lower Court, at least in part, to validate this outcome. Under the ruling of the District

Court, provisions of bankruptcy law that prior to the ruling could have been used by a trustee to recapture the amounts paid to the net winners are no longer available to him. Instead, the SIPA trustee's power has been severely circumscribed; his arsenal of tools has been limited; net winners who received the money of others and who benefitted to the tune of at least \$2 billion from the use of that money, get to keep it. Yet, this outcome differs markedly from the one in another case, analogous to this one, where the District Court took a different approach. There, guided by considerations grounded in the fact that ultimately, the SIPA proceeding is a bankruptcy proceeding and in bankruptcy, the law discourages some from profiting at the expense of others, the District Court stated:

Vigorously and indignantly, [the Appellants] portray themselves as "innocent public investors" whose only role in the events here at issue was their mistaken choice of unethical or dishonest brokers with whom they dealt at arms length and in good faith and for whose frauds and other misdeeds Appellants contend they should not be held responsible. ... By their account, Appellants are faultless victims of the bankruptcy Trustee's zealous pursuit of the proceeds of certain allegedly tainted securities transactions that are the subject of this appeal. Appellants seek to retain the benefits of bargains they struck with their corrupt brokers in connection with those trades [B]eyond a person's own actions, whether the given conduct is individually or externally controlled, circumstances may prevail under which the law, in disregard of the innocent's protestations, and indeed at times even conceding whatever validity due them, may still impose liability, not on account of anything the person may have done or omitted to do, but, for reasons of equity or policy, by imputing to the apparent bystander

the misconduct of a sufficiently related wrongdoer. By these means, the law recognizes that even innocent association with scoundrels has its limitations, and its costs. Occasions arise when the villain chooses to exploit the relationship and betray the trust, and then the supposed “innocent” may be obligated to pay a price.

Jackson v. Mishkin (In re Adler Coleman Clearing Corp.), 263 B. R. 406, 416-417 (S.D.N.Y. 2001).

However innocent victims may be, the law requires that they be treated the same. The Trustee should have access to the full range of tools available to a trustee to ensure that some investors are not favored at the expense of others. By its plain terms, under the facts of these cases, section 546(e) does not apply. The payments of fictitious profits were not provided for under any securities contract and, as such, were not made “in connection with” any securities contract. Moreover, the payments were not made to settle securities transactions because there never were any securities transactions and therefore none to settle. To conclude otherwise is to undermine the purposes of section 546(e), and to rob the liquidation proceeding of its essence, which is equal treatment. The decision of the District Court to dismiss should be reversed. The decision of the District Court to withdraw the reference of the cases also should be reversed because no substantial and material consideration of non-Title 11 law was required and because section 546(e) presented a core matter.

STANDARD OF REVIEW

This Court exercises plenary review over the decisions of the District Court, and reviews the District Court's findings of fact for clear error and its conclusions of law de novo. In re Metromedia Fiber Network, Inc., 416 F.3d 136, 139 (2d Cir. 2005). Questions of statutory construction are questions of law. Enron Creditors Recovery Corp v. Alfa, S.A.B. de C.V., 651 F.3d 329, 334 (2d Cir. 2011) (“Enron”). A District Court's granting of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is reviewed de novo, with the allegations in the complaint accepted as true and all inferences drawn in favor of the plaintiff. ICOM Holding, Inc. v. MCI Worldcom, Inc., 238 F.3d 219, 221 (2d Cir. 2001).

ARGUMENT

I. THE PURPOSES OF SECTION 546(e) REINFORCE THAT SECTION 546(e) DOES NOT APPLY

The District Court relied upon the three BLMIS agreements in concluding that section 546(e) applied. Whether the agreements in question are “securities contracts” within the meaning of section 546(e) is not the issue addressed in this brief. The issue examined here is that even assuming, arguendo, that the agreements are securities contracts, whether the transfers in question were made “in connection with” those agreements or were “settlement payments.” They were not. While the transfers may have purported to be, the payments were not made in connection with any securities contract. The fictitious profits were in amounts

invented by the fraudster and therefore, were not owed to the customer under the Customer Agreement, and were not paid in connection with that agreement. The Option Agreement has no bearing. In that agreement, the customer merely acknowledged the risks of options trading and agreed to hold the broker harmless in connection with option trades for his account. The agreement does not provide for, or authorize, the payment of fictitious profits to the investor. Finally, the Trading Authorization simply allowed Madoff to trade on the customer's behalf. But no securities transactions having been undertaken for the customers, the fictitious profit amounts transferred could not have been made in connection with securities transactions or in connection with the Trading Authorization.

For that matter, no trades having been placed, the payments could not be "settlement payments." A settlement completes a securities transaction. But no securities were purchased or sold in these cases; there were no securities transactions; and therefore, there were no securities transactions to complete or any settlement payments to be made.

That the transfers were not in connection with securities contracts and were not settlement payments is plain from the face of the agreements and the facts of these cases. While a court ordinarily does not consider the legislative history of a statutory provision in the absence of ambiguity, "it has also been noted that there should not be a slavish adherence to this principle where it is obvious that the

result reached will be a clear distortion of legislative purpose.” 2A Norman J. Singer, Statutes and Statutory Construction §48:1, at 541 (7th ed. 2007). See Lehman Brothers Holdings Inc. v. JP Morgan Chase Bank (In re Lehman Bros. Holdings Inc.), 469 B.R. 415, 422 (Bankr. S.D.N.Y. 2012) (“[T]hese are systemically significant transactions between sophisticated financial players at a time of financial distress in the markets – in other words, the precise setting for which the safe harbors were intended. It is for that very reason that the Motion is being granted The safe harbors apply to these transactions and were designed to protect transfers from avoidance....” [emphasis added]).

How section 546(e) came to be enacted is examined below not because the meaning of section 546(e) necessarily is unclear, but because a consideration of the history of the provision and the circumstances under which it evolved is key to understanding the purposes of the provision. The purposes of section 546(e) in turn reinforce that in the context of these cases, section 546(e) does not apply, and if applied, would yield a result inconsistent with section 546(e) and with the objectives of SIPA and bankruptcy in general. See Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 109 (2d Cir. 2012) (where statute shows at least some ambiguity, consideration of the history of the statute and legislative purpose in enacting it reinforce the Court’s view of the law); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956) (“In expounding a statute, we must not be guided by a

single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”)

A. The Interdependency of Participants In The Securities Industry

Section 546(e) grew out of the realization that because securities trading involved increasingly interdependent participants and transactions, and increasingly vast sums of money, the failure of one significant player could have severe consequences for all. The need to protect the securities clearing system and markets created the impetus to the enactment of section 546(e). At the heart of the reasons for section 546(e) is the centralized clearing and settlement system that exists today and that differs markedly from the system in use some fifty years ago.

i. The Paper Crunch

Couriers on Wall Street holding bags of securities and checks for delivery were a common sight in the 1960s. While quaint by today’s practices, securities transfers at the time involved paper certificates and paper checks. Investors were issued paper certificates which, in order to be sold, had to be endorsed by the investor or be otherwise negotiable. The process of “settling” or completing the purchase or sale of the securities was a manual and cumbersome one, done in the “back offices” of brokerage firms. The paperwork for a single purchase or sale could require the preparation of at least 30 different documents. Exchange Act Release No. 13163, 1977 WL 173551, at *6 (Jan. 13, 1977).

To complete the sale of a security, the seller's broker delivered the security, by courier, to the buyer's broker. The buyer's broker would have the security re-registered in the name of its client on the books of the transfer agent,⁵ and deliver the certificate to its client, the new owner of record. Payment for the security would happen in a like manner. Through this paper and labor intensive process, repeated many times over, the ownership of securities changed hands. See Samir D. Parikh, *Saving Fraudulent Transfer Law*, 86 Am. Bankr. L.J. 305, 327-328 (Spring 2012) ("Parikh").

Against this background, the volume of securities trading exploded in the late 1960s, in part, due to the growth in the economy, an increase in the number of public investors, and heightened investment activity by institutions. By 1967, this state of affairs, coupled with a lack of back-office automation, led to a severe inability of back-offices to keep up with the resulting paperwork. In some instances, stock certificates and related documents were "piled 'halfway to the ceiling[,]" with personnel working around the clock and trading hours curtailed to address the problem. Study of Unsafe and Unsound Practices of Brokers and Dealers: Report and Recommendations of the Securities and Exchange Commission, H. R. Doc. No. 92-231, at 219 (1971) ("1971 SEC Study"). What

⁵ Transfer agents keep records of the names and addresses of registered securities owners and reregisters securities, when sold, in the names of new owners. N. Y. Institute of Finance, Introduction to Brokerage Operations Department Procedures 233 (1988).

seemed to be a short-term situation that easily could be redressed clerically was actually much more dire. Sloppy recordkeeping led to the inability of brokerage firms to account for customer assets, mistakes in account statements, delayed or wrong deliveries of funds or securities, and in some cases, the misuse of customer assets.

The situation came to a head with an abrupt market reversal in 1969-1970 which shrank brokerage commissions and the value of brokers' proprietary accounts. Broker-dealers ceased doing business in record numbers, as only the most well-managed or substantial firms survived. As firms shuttered, investor confidence plummeted. Congress responded by enacting SIPA which, among other things, created, through SIPC, a limited protection for customers whose broker-dealers fail holding customer cash and/or securities.

By means of SIPA, Congress also mandated that the Securities and Exchange Commission ("SEC" or "Commission") identify and study any unsafe and unsound practices of broker-dealers and make recommendations to remedy the practices. SIPA §78kkk(h) (1970). Among the recommendations of the Commission would be the elimination of paper stock certificates, as well as the development of an effective central clearing and settlement system that would guarantee the timely delivery of securities and payment. With regard to the latter, inconsistent methods of doing business and a lack of coordination among the

central players, that is, the clearing corporations, the securities depositories, transfer agents, and corporate issuers, had contributed to the paperwork crisis. The Commission stressed the need for a “single, integrated and nationwide system of securities clearance, settlement and delivery.” 1971 SEC Study, at 13-14, 35-36, 219-220.

ii. **Clearing and Settlement**⁶

In response to the concerns expressed by the SEC and others, in 1973, the Depository Trust Company (“DTC”) was created as a member of the Federal Reserve System and as a central depository for securities, with deliveries of securities and payments to be accomplished by book entry within a computerized system. The need for physical deliveries of securities and payments was thereby substantially eliminated. DTC, Annual Report (1973), at 3, 7.⁷ In 1976, clearing organizations were combined into the National Securities Clearing Corporation (“NSCC”), its main purpose being to protect the soundness of the financial system by processing trades through a multilateral netting system, and by offering certain guarantees. The netting system typically required that trades among brokers, each of whom was an NSCC member, be “netted out” so that at the end of a trading day,

⁶ Clearing and settlement is “a process that finalizes a trade by transferring ownership of the traded asset and the cash to pay for it.” Virginia B. Morris and Stuart Z. Goldstein, Guide to Clearance & Settlement 3 (2009) (“Morris”).

⁷ See http://www.sechistorical.org/collection/papers/1970/1973_0101_DTCAR.pdf.

the broker would deliver to the clearing firm only any excess amount owed in cash or securities. For example, if a broker sold 100 shares of a stock for one customer but purchased the same stock for another customer, the delivery of the shares to the buying customer only to receive the same stock back from the selling customer would be inefficient. Instead, the broker would offset his sales against his purchases of securities and deliver to the clearing house only any excess amounts owed. Leo M. Loll, Jr. and Julian G. Buckley, The Over-the-Counter Securities Market 211 (3d ed. 1973). Under the clearing process, NSCC would notify the financial firms of their final cash and securities obligations, and simultaneously, notify DTC of securities and cash positions to be settled. On settlement date, DTC would transfer stock ownership electronically by moving securities positions from the selling broker's account at DTC to the account of NSCC and then moving the securities from the NSCC account to the buying broker's account at DTC. Money likewise would be moved between accounts with the final step in the process requiring the broker-dealer's settling bank to send money to or receive money from the DTC, as NSCC's agent, in order to complete the transaction. Parikh at 330-331. In this manner, the amount of physical deliveries and settlement payments required in a day would be substantially reduced.

The establishment of a centralized clearing and depository system also addressed another concern: counterparty risk. A brokerage firm that was the

counterparty to millions of trades and that failed to pay for securities its clients had bought or to deliver securities sold, could place the financial system at risk. These risks were reduced by NSCC becoming the central counterparty to all trades, effectively making it the buyer to every seller and the seller to every buyer and guaranteeing that even if a firm went out of business, NSCC would guarantee the completion of the trade. The monies used for any shortfall would come from the NSCC Clearing Fund, comprised of deposits paid by its members. Parikh at 331.

The magnitude today of the business of DTC and NSCC, which are subsidiaries of the Depository Trust & Clearing Corporation (“DTCC”), cannot be overstated. Through its subsidiaries, DTCC processes more than 30 billion transactions a year, settling trades in stocks, exchange traded funds, mutual funds, corporate and municipal bonds, and U. S. Treasury issues that in 2008, had a value of \$1.88 quadrillion. The smooth functioning of the securities clearing system, of course, has implications for more than just the market participants, generating “pools of capital that fund many kinds of business and government activities, including expansion of existing companies and creation of new ones.” Morris at 2.

iii. The Enactment of Section 546(e)

The soundness of the clearing process can be severely compromised by the failure of a member. In anticipation of that possibility, protective measures were

taken with respect to trading in the futures industry. In 1982, the securities industry followed suit.

In executing a trade through a clearing agency, both the buyer's broker and the seller's broker guarantee to the clearing agency that they will stand behind the trade: the seller's broker guarantees delivery of the security and the buyer's broker guarantees payment. Each broker also guarantees to their respective customers delivery of the security and the payment of cash. The clearing agency likewise guarantees payment or delivery to the brokers. Because in each instance, the guarantees are unconditional, the failure of one party to perform does not excuse performance by the guarantor.

Against this system of guarantees, the potential volatility of security prices can have a harmful impact. Because the failure to perform by one party in the chain does not relieve the guarantor of its obligation to do so, if a party fails to deliver stock, as promised, and the price of the stock increases, the guarantor must fulfill the obligation at the higher price. To guard against this situation and limit its losses, the clearing agency institutes a couple of measures: one, it requires the posting of margin in various forms as collateral to secure obligations, as well as a clearing deposit. Two, it takes immediate action to close out open positions in the event of a failure to perform. Bankruptcy of Commodity and Securities Brokers Hearings Before the Subcomm. on Monopolies and Commercial Law of the House

Comm. on the Judiciary, 97th Cong. 244-245, 247, 249-253 (1981) (“1981 Hearings”).

In light of these protective measures, changes to the Bankruptcy Code created concern that margin payments, clearing fund deposits and similar payments made within 90 days of bankruptcy could be recaptured by the trustee as preferences, or if made within one year before the bankruptcy, could be recaptured as fraudulent conveyances. By the same token, the imposition of the automatic stay under section 362 of the Bankruptcy Code would impede the clearing firm from promptly closing out open securities positions in order to mitigate its losses. In the view of the SEC, which supported the proposed extension of the safe harbors that were then available to payments between commodity brokers and clearing organizations, the losses in such an event could run into the millions on any given day and could set off a chain reaction. As the Commission testified:

The importance of the national clearing and settlement system for securities transactions arises from the need of modern securities markets to effect efficient and timely transfers of ownership between widely-disp[er]sed participants in various trading environments. A failure to perform by any participant in the chain of transactions can have serious adverse consequences for the remaining participants. Thus, the liquidity of the system is dependent upon the assumption by each participant that all of the others will perform. The development, over a period of time, of commercial practices such as requiring margin, mark-to-market payments, clearing fund deposits and the like – which are designed to assure the performance of the participants – enables the system to

function effectively, predictably and securely. These practices were designed to deal with the fact that all outstanding transactions are subject to the risks of market movement away from the contract price in the period between a transaction and its settlement. This process requires, in the event of a participant's failure, that the validity of all payments made to assure performance be preserved. Thus, such payments should not be subject to collateral attack as preferences or as fraudulent transfers. Moreover, entities holding such payments should not be stayed from utilizing them promptly to limit their potential losses in the face of the insolvency of others.

1981 Hearings at 259-60. See id. at 253-259.

The proposed amendments also were supported by SIPC which noted that while SIPC provided protection for customers of a failing stockbroker, there was no such protection for securities clearing corporations or with respect to open commitments between and among broker-dealers and the clearing corporation. See id. at 266-291.

Section 546(e) was enacted in 1982 as section 546(d), Pub. L. No. 97-222, 96 Stat 235, section 4 (1982), shielding from avoidance margin payments and settlement payments. This was done in recognition of the fact that:

The commodities and securities markets operate through a complex system of accounts and guarantees. Because of the structure of the clearing systems in these industries and the sometimes volatile nature [of] the markets, certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market.

H. R. Rep. No. 97-420 at 1 (1982), reprinted in 1982 U.S.C.C.A.N. 583.

In 1984, the section was redesignated to section 546(e), Pub. L. 98-353, §351(2), 98 Stat. 333, 358 (1984), and in 1990, the safe harbors provided under section 546(e) were extended through cross-references to expanded definitions of “margin” and “settlement payment.” The purpose of the expanded relief was “to ensure that the swap and forward contract financial markets are not destabilized by uncertainties regarding the treatment of their financial instruments under the Bankruptcy Code.” H. R. Rep. No. 101-484, at 1 (1990), reprinted in 1990 U.S.C.C.A.N. 223 (“1990 H. R. Rep.”). It was noted that U. S. bankruptcy law had “long accorded special treatment to transactions involving financial markets, to minimize volatility” which could engender heavy losses unless the transactions were resolved “promptly and with finality.” Accordingly, “[a]s new financial instruments have been developed, Congress has amended the 1978 Bankruptcy Code to keep pace in promoting speed and certainty in resolving complex financial transactions.” 1990 H. R. Rep., at 2, reprinted in 1990 U.S.C.C.A.N. 224. The same theme was sounded in 2005 when Congress made changes to provisions of the Bankruptcy Code in order “to reduce systemic risk in the financial marketplace....” H. R. Rep. No. 109-31, at 3 (2005), reprinted in 2005 U.S.C.C.A.N. 89. Under those amendments, the term “financial participant” was added to section 546(e), Pub. L. No. 109-8, 119 Stat. 23, 182 (2005), and various

definitions cross-referenced in section 546(e) were modified. Finally, in 2006, Congress amended section 546(e) to its current form. The 2006 amendments which “would amend banking, bankruptcy, and securities laws related to the disposition of financial contracts in the event of insolvency” were designed to make “technical changes to the netting and financial contract provisions” of the Code, “update the language to reflect current market and regulatory practices, and help reduce systemic risk in the financial markets by clarifying the treatment of certain financial products in cases of bankruptcy or insolvency.” H. R. Rep. No. 109-648 (Part 1) at 1-3 (2006), reprinted in 2006 U.S.C.C.A.N. 1585-1587.

**II. THE PAYMENTS TO INVESTORS OF
OTHER INVESTORS’ MONEY HAD NOTHING
TO DO WITH THE SECURITIES CONTRACTS AND
WERE ANTITHETICAL TO THE CONTRACTS**

In pertinent part, section 546(e) prevents a trustee from avoiding under specified provisions of the Bankruptcy Code any transfer made by a stockbroker in connection with a “securities contract” as the latter term is defined in section 741(7) of the Code. The District Court held the Customer Agreement, the Option Agreement, and the Trading Authorization, which it referred to collectively as the “account agreements,” to be “securities contracts” under various subsections of section 741(7). Having concluded that the agreements were securities contracts, the Court assumed, without analysis, that the transfers were made “in connection” with the contracts. (SPA-34, 38-40). Yet, in order for the payments to have been

made “in connection with” the contracts, there must necessarily have been some relation or connection between the payment and the contract. At its most basic, “connection” signifies “a relationship in which a person, thing, or idea is linked or associated with something else.” “In connection with” means “with reference to.” The New Oxford American Dictionary 361 (2d ed. 2005). Here, although they purported to be, the payments were not “in connection with” the agreements. Virtually all of the investors in these cases from whom the Trustee sought recovery already had received the amounts that they had deposited with the brokerage. There were no securities owed to them for which they had paid and no cash being held for them by the broker. None of the agreements that they entered into provided for or authorized the payments to them of other investors’ money in amounts invented by Madoff. Indeed, such payments not only were not provided for under the agreements but they were antithetical to the agreements. For example, the Customer Agreement specified that all transactions under that agreement were subject to the 1934 Act. First of all, there were no transactions for the account. Second, even assuming, arguendo, that such transactions existed, the transactions would had to have conformed to the 1934 Act to be within the scope of the Customer Agreement. But, as alleged by the SEC, Madoff and BLMIS ran a Ponzi scheme which, among other things, violated section 10(b) of the 1934 Act, 15 U.S.C. §78j(b). See SEC v. Madoff, No. 08 Civ. 10791 (LLS) (S.D.N.Y.),

Complaint at 9, available at <http://www.sec.gov/litigation/complaints/2008/comp-madoff121108.pdf>. Payments of fictitious profits by Madoff and BLMIS, made in furtherance of their fraudulent scheme, could not have conformed to the 1934 Act. Instead of being made in connection with the agreement, the payments were made outside of the agreement.

The same can be said of such payments with respect to the Option Agreement. Under the Option Agreement, option transactions for the investor's account were subject to the rules of various securities associations and securities exchanges. However, for example, under rules of the Financial Industry Regulatory Authority, Inc. ("FINRA"), the successor to the National Association of Securities Dealers, Inc., or rules of the exchanges, the payment of fictitious profits would not have conformed to the rules of such institutions. *See, e.g.*, FINRA Rule 2020 (prohibiting manipulation, deception and fraud in the purchase or sale of securities); Chicago Board Options Exchange, Inc. Rule 4.2, and Boston Options Exchange LLC Rule 3010 (both prohibiting conduct in violation of the 1934 Act).

Finally, the Trading Authorization was unrelated to the transfers. The latter agreement merely designated Madoff to "buy, sell and trade in stocks, bonds, and any other securities" for the investor's account. But no stocks, bonds or other securities were ever bought or sold for the investors' accounts, and therefore, any

fictitious profits paid could not have been in connection with the Trading Authorization.

In sum, although the payment of fictitious profits may have purported to have been made in connection with the agreements, they were not made in connection with the agreements because the agreements either were irrelevant or the payments were ultra vires the agreements.⁸

III. THE TRANSFERS OF FICTITIOUS PROFITS WERE NOT SETTLEMENT PAYMENTS

Alternatively, while stating that the question of whether the payments to the investors were settlement payments was a “closer question,” the District Court concluded that the investors’ withdrawals from their accounts of monies actually belonging to other investors were “settlement payments” from a broker, and therefore, subject to the protection of section 546(e). (SPA-40). Section 546(e) provides a safe harbor for settlement payments as defined in section 101 or 741 of the Bankruptcy Code. Section 101(51A) of the Code defines the term for purposes of forward contracts. Section 741(8) enumerates specific types of settlement

⁸ The District Court correctly noted that “in connection with” is “frequently interpreted, in the securities laws, though its interpretation often varies with context.” (SPA-13). Definitions in SIPA do not necessarily track those of the 1934 Act because they serve different purposes. As one example, the term “security” under the 1934 Act is defined broadly, for enforcement and regulatory purposes. In contrast, the definition of “security” under SIPA section 78111(14) is more narrow, being tailored to its purposes. See In re Chicago Partnership Board, Inc., 237 B. R. 726, 734 (Bankr. N.D. Ill. 1999).

payments and concludes with the catch-all phrase of “any other similar payment commonly used in the securities trade.”

This Court considered the question of what constitutes a settlement payment in Enron. In that case, holders of notes issued by Enron transferred the notes to broker-dealers in exchange for the redemption price which was at the accrued par value, meaning the purchase price plus accrued interest, and which was higher than the market value. The sales were reflected on the books of DTC which debited the redemption price from each broker-dealer’s account at DTC and credited the corresponding amount to the note holder’s account. The broker-dealers proceeded to request payment from Enron by transferring the notes to Enron’s issuing and paying agent which caused DTC to pay the redemption amounts to the broker-dealers. Confirmation statements that were issued described the transactions as “securities trades,” and “purchases” from the note holders, and referred to a “trade date” and “settlement date.” Upon payment to the broker-dealers, the Enron notes were extinguished off of the DTC system. Enron, 651 F.3d at 331.

Two years after it filed for bankruptcy, Enron sued the note holders seeking to avoid and recover the redemption payments. The note holders moved to dismiss on the ground that the redemption payments were “settlement payments,” shielded from avoidance under section 546(e) of the Bankruptcy Code. Id. at 332. In upholding the decision of the district court, which had reversed the decision of the

bankruptcy court, this Court of Appeals agreed that a settlement payment was “any transfer that concludes or consummates a securities transaction” and that Enron’s redemption of the notes was a securities transaction because “the redemption involved ‘the delivery and receipt of funds and securities.’” Id. at 333, 336. The Court found significant that the payments were to redeem notes which were “securities” under section 101(49)(A)(i) of the Bankruptcy Code. The payments therefore were settlement payments because they “completed a transaction in securities.” Id. at 336.

The District Court in this case correctly observed that in Enron, this Court of Appeals decided that no purchase or sale of a security was necessary in order for a transfer to be subject to section 546(e). However, the District Court overlooked that in Enron, as discussed above, the Court concluded that the note in question was a “security” under the Bankruptcy Code and that the payment of the proceeds to redeem the security completed the transaction. In the case at hand, however, where no securities transactions ever occurred, it is unclear what constitutes the security and how the definition of settlement payment therefore can be met.

Preliminarily, it bears mention that in Enron, this Court rejected the attempt by a party to substitute the definition of “security” under the Bankruptcy Code, with the definition of the term under the 1934 Act. Enron, 651 F.3d at 339 n.4. In contrast, in the instant appeals, to the extent of any inconsistency between SIPA

and the Code, the definition of security under SIPA section 7811(14) must control because the provisions of the Code made applicable by SIPA, including chapter 1 of the Code which contains the definition of “security,” apply only to the extent consistent with SIPA. See SIPA §78fff(b). In any event, whether “security” is considered under the Bankruptcy Code or the SIPA definition ultimately is irrelevant. Under either, there were no securities and no securities transactions to complete.

What the District Court perceived as the “security” in these appeals is somewhat opaque. In its opinion, the District Court stated that

what clients had contracted for was Madoff Securities’ implementation of its investment strategy and that the clients’ withdrawals therefore constituted partial settlement of these securities contracts. Under those contracts, the clients exchanged money for access to an investment strategy that would be implemented over time, creating, if the strategy was successful, an obligation that was settled when payment was made, in whole or part, from Madoff Securities to the defendants.

* * * *

...[A] broker that executes a discretionary strategy on behalf of a customer does not complete its transaction until the customer has regained control over whatever funds result from the implementation of the strategy. This approach comports with Enron, where the Second Circuit found that an issuer’s retirement of debt completed a transaction in securities even though it did not involve the purchase or sale of a security. ... Accordingly, the defendants’ withdrawals completed securities transactions and constituted settlement payments under §741(8) and Enron.

(SPA-41-42).

While it is far from clear, it appears that the District Court considered the account agreements whereby the investor opened an account with BLMIS and gave Madoff discretion to trade on the investor's behalf as the "security." There are at least a few reasons why the account agreements are not a "security." First, nowhere in the definition of "security" under SIPA section 78III(14) or under Code section 101(49) do account agreements appear. Second, although there is no part of the definition in which the BLMIS investment strategy squarely fits, at the very most, one might attempt to argue that the BLMIS investment strategy is an investment contract and therefore, a "security." Under the 1934 Act, an investment contract is:

a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.

SEC v. W. J. Howey Co., 328 U.S. 293, 298-299 (1946). See SEC v. Edwards, 540 U.S. 389, 394 (2004); Revak v. SEC Realty Corp., 18 F.3d 81, 87 (2d Cir. 1994). Under SIPA section 78III(14), however, the investment contract is a "security" only if it "is the subject of a registration statement with the Commission pursuant to the provisions of the Securities Act of 1933." See SIPC v. Pepperdine Univ. (In re Brentwood Sec., Inc.), 925 F.2d 325, 329 (9th Cir. 1991); In re Lehman Bros. Inc., 462 B.R. 53, 64 (Bankr. S.D.N.Y. 2011); Mitchell v. Chicago Partnership Bd., Inc., 246 B.R. 854, 857 (N.D. Ill. 2000) (important distinction

between the definition of “security” in SIPA and the definitions in the Securities Act of 1933 and the 1934 Act is that SIPA requires the investment contract to be registered with the SEC in order to be a “security.”). See also 11 U.S.C. §101(49)(A)(xii). There is no requirement that account agreements be registered with the SEC and the District Court adduced no evidence establishing that the BLMIS investment strategy was registered with the Commission as an investment contract. Third, the facts of this case do not comport with the District Court’s holding. Contrary to the Court’s decision, BLMIS executed no discretionary strategy or trades on behalf of any of the investors in these cases; virtually all of the customers had regained control over the money that they deposited with the firm inasmuch as the Trustee was seeking mainly the recovery of fictitious profit; and the investors’ withdrawals did not complete securities transactions because there were no securities and no securities transactions to complete. Thus, the payments of fictitious profit were not settlement payments.

**IV. THE APPLICATION OF SECTION 546(e)
TO THESE CASES IS INCONSISTENT
WITH THE PURPOSES OF SECTION 546(e)**

Citing the magnitude of the Madoff fraud, the District Court concluded that a failure to apply section 546(e) “would likely cause the very ‘displacement’ that Congress hoped to minimize” under section 546(e). (SPA-44). In reaching this conclusion, the Court adduced no evidence. Cf., American Tissue v. Donaldson,

Lufkin & Jenrette, 351 F.Supp.2d 79, 107-108 (S.D.N.Y. 2004) (resolution of whether 546(e) applies must await taking of evidence, inter alia, on market impact). In the absence of such support, a different conclusion is easily reached.

As observed in Enron, the purposes of section 546(e) are to provide certainty and predictability. Enron, 651 F.3d at 336. Yet, uncertainty and unpredictability must result if the wrongdoer, instead of market forces, is allowed to decide what investors receive. As previously discussed, section 546(e) grew out of a concern for market displacement where clearing and settlement were compromised. If such displacement can be caused by an undermining of investor confidence, then that confidence surely is undermined if a trustee is deprived of the tools that he needs to ensure that some investors do not benefit to the detriment of other investors. In this regard, the comments of a different District Court in a recently issued decision offer useful guidance.

In Grede v. FCStone, LLC, 485 B.R. 854 (N. D. Ill. 2013) (“Grede”), which involved the reorganization of a registered advisor and futures commission merchant (“FCM”), the court declined to apply section 546(e) because applying it would create the systemic market risks that Congress sought to prevent under section 546(e) and because even if the section was not applied, there would be no unwinding of the transactions that Congress sought to protect. In Grede, the court stated:

But a different set of ripple effects arise where Debtor is a financial institution that sells securities on behalf of third party customers, and § 546(e) is invoked not to shield the actual exchange between Debtor and Buyer but to uphold the manner in which Debtor distributes exchange proceeds to its customers. If Debtor distributes proceeds in an uneven and arbitrary manner (i.e. favoring certain customers over others with an equally forceful legal claim to the funds), extending § 546(e) safe harbors to uphold the distribution would destabilize the financial system by making it utterly unpredictable how losses will be apportioned in the event that an FCM or investment advisor goes bankrupt.

Consider the following hypothetical. If [section 546(e) applied], then an insolvent investment advisor, in the eleventh hour prior to filing for bankruptcy, could drain its accounts to pay out all customers with names beginning with letters in the first half of the alphabet, while shifting all losses to customers with names in the latter half, and § 546(e) would render courts powerless to do anything about it.

485 B. R. at 885. In the above hypothetical, the arbitrary payment of amounts that favors some at the expense of others would be subject to avoidance as preferences under section 547 of the Bankruptcy Code, except for being barred by section 546(e). Moreover, although avoidance suits under section 548(a)(1)(A) are not subject to section 546(e), such a suit could be met with the defense that the transferee who did not know that the debtor had favored it, took for value and in good faith. See 11 U.S.C. §548(c). If the latter defense were held to be valid, the trustee would be without recourse. In that event, instead of protecting the markets, the application of section 546(e) undermines them, validates violations of the

securities laws, and promotes unfairness. Yet, a key objective of bankruptcy and of SIPA, furthered by avoidance actions, is equal treatment of all creditors. See In re Maxwell Commc'n Corp. plc by Homan, 93 F.3d 1036, 1052 (2d Cir. 1996) (“The principal policies underlying the Code’s avoidance provisions are equal distribution to creditors....”). See also Cunningham v. Brown, 265 U.S. 1, 13 (1924) (In Charles Ponzi case, “[i]t is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankrupt law.”)

In other Ponzi schemes, transfers benefitting some creditors at the expense of others have been held avoidable. For example, in a case involving a Ponzi scheme masked as a hedge fund, the court held that transfers of fictional profits to investors were avoidable under the Bankruptcy Code. Thus, in In re Bayou Group, LLC, 439 B.R. 284, 338-39 (S.D.N.Y. 2010), the debtor brought claims against transferees under section 548(a)(1)(A) of the Bankruptcy Code (actual fraudulent conveyance), section 548(a)(1)(B) of the Code (constructive fraudulent transfers), and New York State debtor and creditor law. The Bankruptcy Court dismissed the state law claims without prejudice because in that case, they were duplicative of the claims brought under the Bankruptcy Code. The District Court affirmed, inter alia, the Bankruptcy Court’s finding that the transfers of fictional profits were avoidable as constructive fraudulent transfers. See also Goldman

Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Group, LLC, 491 F. App'x 201, 207 (2d Cir. 2012) (affirming an arbitration finding that Goldman Sachs had received avoidable transfers from the Bayou Ponzi scheme under New York law). Similarly, in a case involving a limited partnership scheme that purported to trade commodities but in fact was a Ponzi scheme, the Seventh Circuit held that a receiver had standing to assert fraudulent transfer claims against Ponzi scheme investors under Illinois law. Scholes v. Lehmann, 56 F.3d 750, 755 (7th Cir.), cert. den. sub nom., African Enterprise, Inc. v. Scholes, 516 U.S. 1028 (1995). With respect to the Ponzi scheme in In re Dreier LLP, 462 B.R. 474, 488, 493 (Bankr. S.D.N.Y. 2011), actual and constructive fraudulent transfer claims under New York state law survived a motion to dismiss, and the claim for the return of fictitious profits under 548(a)(1)(B) (constructive fraudulent transfer claims) also survived a motion to dismiss. In Dreier, the state law claims went back 6 years. 462 B.R. at 482.

There is no valid reason why the Trustee in the cases at hand should not be allowed to pursue avoidance actions under all applicable authorities. Congress has evinced a clear intent that a SIPA trustee be able to do so. Thus, under SIPA section 78fff-1, the SIPA trustee has the same powers and title as a Title 11 trustee with respect to the debtor and its property, “including the same rights to avoid preferences.” See also SIPA §78fff-2(c)(3) (authorizing the recovery of transfers

to the extent void or voidable under Title 11). The Bankruptcy Code, made applicable by SIPA, provides the means for the Trustee to recapture funds for the benefit of all customers in one fell swoop. The alternative is to invite a multiplicity of suits by net losers suing net winners to recapture the funds that rightfully belong to them. Cf., Newbro v. Freed, 409 F. Supp.2d 386 (S.D.N.Y. 2006), aff'd, 2007 WL 642941 (2d Cir. Feb. 27, 2007) (In case arising out of SIPA proceeding, suit by Investor no. 1 whose funds had been improperly transferred by broker into the account of Investor no. 2 held entitled to recover against Investor no. 2 for conversion and unjust enrichment).

When asked to decide whether BLMIS customers were owed, in the BLMIS liquidation proceeding, the fictitious amounts invented by Madoff reflected on account statement issued to the investors, this Court concluded that to give effect to the fictitious statements “would have the absurd effect of treating fictitious and arbitrarily assigned paper profits as real and would give legal effect to Madoff’s machinations.” In re Bernard L. Madoff Investment Securities LLC, 654 F.3d 229, 235 (2d Cir. 2011), reh’g and reh’g en banc den. (2d Cir. Nov. 08, 2011), cert. dismissed, 132 S. Ct. 2712 (2012), and cert. den., 133 S. Ct. 24 and 133 S. Ct. 25 (2012) (“In re BLMIS”). If section 546(e) is held to apply here, the outcome is no less absurd.

V. WITHDRAWAL OF THE REFERENCE WAS IMPROPER IN THESE CASES

A SIPA proceeding effectively is a liquidation proceeding to be conducted, under the circumstances of these cases, no differently than a Title 11 bankruptcy liquidation. In light of that fact and because of its experience in interpreting bankruptcy law, the Bankruptcy Court should have decided, as indeed it already had in other matters, the applicability of section 546(e). The District Court erred in concluding that because the instant proceeding was a SIPA proceeding, withdrawal was mandated.

A. Standards Governing Withdrawal

28 U.S.C. section 157(d) governs withdrawal of the reference to the bankruptcy court, and provides for both mandatory and discretionary withdrawal. A district court must withdraw a reference where “[t]he court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” *Id.* The purpose of this provision is to reserve to the federal district courts those issues that Congress “intended to have decided by a district judge rather than a bankruptcy judge.” In re Johns-Manville Corp., 63 B.R. 600, 602 (S.D.N.Y. 1986).

Because the language of section 157(d)’s mandatory withdrawal provision, if read literally, would eliminate much of the work of the bankruptcy courts, the

district courts must construe the provision “narrowly.” In re Adelphi Institute, Inc., 112 B.R. 534, 536 (S.D.N.Y. 1990) (“Adelphi”). Withdrawal is mandatory only if resolution of the matter requires “substantial and material consideration” of the non-Title 11 federal statutes. See In re Ionosphere Clubs, Inc., 922 F.2d 984, 995 (2d Cir. 1990), cert. den. sub nom., Air Line Pilots Ass’n Intern., AFL-CIO v. Shugrue, 502 U.S. 808 (1991); Adelphi, 112 B.R. at 536. This ensures that the mandatory withdrawal provisions of section 157(d) do not become “an escape hatch for matters properly before [the bankruptcy] court.” Adelphi, 112 B.R. at 536 (quoting In re Johns-Manville Corp., 63 B.R. at 603).

Section 157(d) also permits a district court to withdraw the reference, inter alia, “[o]n timely motion of any party, for cause shown.” This Court of Appeals has emphasized that the threshold question is whether a claim is core or non-core. See In re Orion Pictures Corp., 4 F.3d 1095, 1100-02 (2d Cir. 1993), cert. dismissed, 511 U.S. 1026 (1994) (“Orion”). Once a court decides the latter question, it can then consider other factors such as whether judicial efficiency is best served by withdrawal of the reference. Orion, 4 F.3d at 1101 (explaining that “questions of efficiency and uniformity will turn” on whether a claim is core or non-core). Neither mandatory nor permissive withdrawal was warranted in these cases.

B. The SIPA Case As A Bankruptcy Case

In deciding to withdraw these cases on the issue of section 546(e), the District Court concluded that resolution of whether section 546(e) applied depended “on how a Court resolves numerous questions of securities law.” (SPA-12). In fact, resolution of the questions presented required the Court to consider only bankruptcy law and SIPA. However, because there is no inconsistency between the applicable provisions of SIPA and the Bankruptcy Code, the SIPA proceeding is to be conducted no differently than if the case were a liquidation under Title 11. As discussed below, at least four sections of SIPA make that clear.

i. Section 78eee(b)(4)

Section 78eee(b)(4) is headed “Removal to Bankruptcy Court” and specifies that upon the issuance of the customer protective decree and appointment of a trustee, the district court “shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11.” The relevant case law under, and history of, SIPA illustrate that Congress intended SIPA proceedings to be considered by the bankruptcy courts.

Although the original version of SIPA did not expressly include a removal or referral provision, this Court concluded in Exchange National Bank of Chicago v. Wyatt, 517 F.2d 453 (2d Cir. 1975) (“Wyatt”), that referral of the proceedings to

the bankruptcy courts carried out the purposes of SIPA. In doing so, the Court examined provisions of SIPA: 1) giving to the district courts exclusive jurisdiction over the debtor and its property and the powers of a bankruptcy court and of a court in a proceeding under chapter X of the Bankruptcy Act (15 U.S.C. § 78eee(b)(2) (1970));⁹ 2) providing that the SIPA proceeding would be conducted “in accordance with, and as though it were being conducted under,” specified provisions of the Bankruptcy Act (15 U.S.C. § 78fff(c)(1) (1970)); and 3) setting forth provisions that were unique to a SIPA liquidation (15 U.S.C. § 78fff(c)(2) (1970)). The Second Circuit observed that since section 22 of the Bankruptcy Act, providing for a general reference of cases to referees in bankruptcy, was contained in a chapter of the Bankruptcy Act that applied to a SIPA proceeding, reference of the SIPA proceeding would be proper. 517 F.2d at 456. The power of the district court to refer SIPA proceedings to referees in bankruptcy was not only “consistent with the purposes of SIPA but essential.” *Id.* at 457. Thus, there was no difference in the processing of customer claims, at issue in that case, as performed in a SIPA

⁹ In 1970, while specifying that a debtor under SIPA would not be reorganized, SIPA incorporated provisions of the Bankruptcy Act applicable to reorganization proceedings. See S. Rep. No. 91-1218, at 13 (1970), and Redington v. Touche Ross & Co., 612 F.2d 68, 71-72 (2d Cir. 1979). In 1978, Congress removed the reference to the reorganization provisions and expressly made the liquidation provisions applicable. Pub. L. No. 95-283, 92 Stat. 249, 259 (1978), and Pub. L. No. 95-598, 92 Stat. 2549, 2675 (1978). See Hearings on H.R. 8331 Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce, 95th Cong., 175-76 (1977).

liquidation and as performed in an ordinary bankruptcy liquidation. Indeed, the conduct of such proceedings, for practical reasons, was best left to the bankruptcy courts.¹⁰ As the Court observed:

This is the kind of business for which bankruptcy judges have developed special expertness and administrative skills and which Congress did not intend to dump on already overburdened district courts without needed clerical and other facilities.

Id. at 457-58.

Congress's intent that SIPA matters be heard by bankruptcy courts was made clear twice in 1978, first when it amended SIPA to include section 78eee(b)(4), and second when, several months later, it revised that section to its current form. The provision initially authorized the district court "at any stage of the [SIPA] proceeding, [to] refer the proceeding to a referee in bankruptcy to hear and determine any or all matters, or to a referee in bankruptcy as special master to hear

¹⁰ That the bankruptcy court is better-equipped to handle the liquidation of financially failing securities broker-dealers finds support in SEC v. American Bd. of Trade, Inc., 830 F.2d 431, 436-438 (2d Cir. 1987), cert. den. sub nom., Economou v. SEC, 485 U.S. 938 (1988). See also Anthony Michael Sabino, The Role of Bankruptcy Courts in Stockbrokerage Liquidations, 16 Sec. Reg. L. J. 227 (Fall 1988). In American Board of Trade, this Court criticized the use of a district court equity receivership to effect the liquidation of insolvent entities, stating that the district court had undertaken to oversee routine bankruptcy matters, "without the aid of either the experience of a bankruptcy judge or the guidance of the bankruptcy code." 830 F.2d at 438. This Court has admonished that in the future, such receiverships were not to be continued "beyond the point necessary to get the estate into the proper forum for liquidation – the bankruptcy court." *Id.* at 437.

and report generally or upon specified matters.” Pub. L. No. 95-283, 92 Stat. 249, 257 (1978). In adding the section, Congress explained that “[a]uthority for the existing practice of referring all or part of a liquidation proceeding to a referee in bankruptcy, thereby in many cases expediting liquidation proceedings, is clarified. See, e.g., [Wyatt].” S. Rep. No. 95-763, at 10 (1978). See also H.R. Rep. No. 95-746, at 27 (1977).

Subsequently, section 308 of Title III of the Bankruptcy Reform Act of 1978 amended SIPA to conform it to the Bankruptcy Code. See S. Rep. No. 95-989, at 19 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5805. Section 78eee(b)(4) was modified to its present form, providing for removal to the “court of the United States in the same judicial district having jurisdiction over cases under title 11.” Pub. L. No. 95-598, 92 Stat. 2549, 2674 (1978). The intended court was the bankruptcy courts because under 28 U.S.C. § 1471(c), Pub. L. No. 95-598, 92 Stat. 2549, 2668 (1978), the bankruptcy courts would exercise all of the jurisdiction of the district courts including jurisdiction over Title 11 cases.¹¹

Although SIPA was thereby brought in line with the broader jurisdiction and powers which the 1978 Bankruptcy Reform Act conferred upon bankruptcy courts,

¹¹ Ultimately, section 1471(c) did not become effective pursuant to section 402(b) of Pub. L. No. 95-598, as amended. It is noteworthy that the broader powers conferred upon the bankruptcy courts nevertheless remained unchanged in SIPA section 78eee(b)(4).

Congress already independently had demonstrated its intent that SIPA liquidation proceedings be considered by the bankruptcy courts. Thus, in section 78eee(b)(4), as originally enacted, Congress expressly provided for referral of all or part of the proceedings to bankruptcy referees to make clear its intent, because such referrals would “expedite” the liquidations. When considered with SIPA section 78fff(b) making Title 11 provisions applicable to a SIPA proceeding, the intent of section 78eee(b)(4) is plain that except for the special protection afforded customers,¹² SIPA liquidation proceedings are to be administered no differently than ordinary Title 11 bankruptcies.

ii. Section 78fff(b)

Under 28 U.S.C. section 157(b)(1), the bankruptcy court exercises the district court’s jurisdiction with respect to all cases under Title 11 and all “core” proceedings arising under Title 11, or arising in a case under Title 11, referred by the district courts. SIPA section 78fff(b) supplies an additional basis for the exercise of jurisdiction by the bankruptcy courts.

¹² In a SIPA proceeding, “customers” share on a priority basis and pro rata in “customer property,” that is, property received, acquired or held for them by the broker. To the extent such property is insufficient to satisfy a customer claim, the customer is eligible to have his claim satisfied through an advance of funds by SIPC – up to \$500,000 of which up to \$100,000 (raised to \$250,000 in 2010) may be used to satisfy the portion of a claim that is for cash only. If the customer’s claim is still unsatisfied, the customer shares in any general estate, pro rata, with unsecured general creditors. See SIPA §§78lll(2) and (4); 78fff-2(c)(1); and 78fff-3(a).

There are two operative requirements under section 78fff(b). To the extent consistent with SIPA, the SIPA liquidation proceeding is to be conducted 1) “in accordance with” and 2) “as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11.” The provisions of Title 11 referred to in section 78fff(b) are the bankruptcy liquidation provisions of the Code, except for the stockbroker and commodity broker provisions. In order for the SIPA liquidation to be conducted “in accordance with” Title 11, those provisions must be held to apply in a SIPA liquidation. Cf., National Union Fire Insurance Co. of Pittsburgh, Pa. v. Camp (In re Government Securities Corp.), 972 F.2d 328, 330-331 (11th Cir. 1992), cert. den., 507 U.S. 952 (1993).

Furthermore, because the SIPA liquidation must be conducted “as though it were being conducted” under the liquidation provisions of Title 11, the procedures that apply to Title 11 actions also must be deemed to apply to actions in SIPA liquidations.

In the context of an ordinary bankruptcy case, the cases at hand raise “core” matters under 28 U.S.C. sections 157(b)(2)(A), (F), (H), and (O), which automatically would be referred to the Bankruptcy Court under the Amended Standing Order of Reference issued by the District Court on February 1, 2012, and would have been heard and considered by the Bankruptcy Court under 28 U.S.C. § 157(b)(1). If the second requirement of section 78fff(b) is to be implemented,

there can be no different outcome here merely because the adversary proceedings are brought within a SIPA liquidation. Indeed, the fact that a SIPA liquidation is simply an outright bankruptcy proceeding for all practical purposes has been consistently recognized. See SIPA § 78fff(a). See also Wyatt, 517 F.2d at 457-459; In re Lloyd Secs., Inc., 75 F.3d 853, 857 (3d Cir. 1996); SIPC v. Ambassador Church Finance/Development Group, Inc., 788 F.2d 1208, 1210 (6th Cir.), cert. den. sub nom., Pine Street Baptist Church v. SIPC, 479 U.S. 850 (1986); SEC v. Albert & Maguire Sec. Co., 378 F. Supp. 906, 909, 911 (E.D. Pa. 1974) (SIPA's predecessor was section 60e of the Bankruptcy Act). An adversary proceeding involving "core" matters brought in the context of a SIPA liquidation therefore should be adjudicated no differently than the same proceeding in a bankruptcy case. See, e.g., Turner v. Davis Gillenwater & Lynch (In re Investment Bankers Inc.), 4 F.3d 1556, 1558, 1563 (10th Cir. 1993) (holding that the bankruptcy court had jurisdiction to determine avoidance actions under Bankruptcy Code sections 547 and 548 in a SIPA liquidation), cert. den., 510 U.S. 1114 (1994); In re Blinder, Robinson & Co., 135 B.R. 899, 901 (D. Colo. 1992); Jackson v. Mishkin (In re Adler, Coleman Clearing Corp.), 263 B.R. 406, 479, 496 (S.D.N.Y. 2001) (affirming bankruptcy court's judgment that fraudulent transfers to customers were avoidable in a SIPA liquidation).

iii. **Section 78fff-1(a)**

That the SIPA trustee has the same authority as a trustee in bankruptcy to recover property through the avoidance provisions also is supported by SIPA section 78fff-1(a) which gives to the SIPA Trustee “the same powers and title with respect to the debtor and the property of the debtor... as a trustee in a case under title 11.” See Executive Securities Corp. v. Doe, 702 F.2d 406, 407 (2d Cir.), cert. den., 464 U.S. 818 (1983); SIPC v. Christian-Paine & Co., 755 F.2d 359, 361 (3d Cir. 1985); SEC v. Albert & Maguire Sec. Co., 560 F.2d 569, 574 (3d Cir. 1977); Gold v. Hyman, [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,043 at 97,657-58 (S.D.N.Y. 1975). Because the Trustee’s responsibilities extend not only to stockbroker customers but to the entire bankruptcy estate, In the Matter of Lewellyn, 26 B.R. 246, 253-254 (Bankr. S.D. Iowa 1982), the Trustee may sue to recover assets to satisfy unpaid customers, SIPC, as subrogee, and even, general creditors. See Gold v. Hyman, *supra*, at 97,657; Bondy v. Chemical Bank, [1975-76 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,360 at 98,784, 98,785-86 (S.D.N.Y. 1975). The avoidance powers provide the trustee with a means of recovery. As stated in 3 Collier on Bankruptcy ¶ 60.85 at 1246 (14th ed. 1977):

The trustee, therefore, has all the powers conferred by the Bankruptcy Act upon an ordinary bankruptcy trustee to avoid or set aside transfers of property or other transactions occurring prior to institution of the proceedings, to recover property and collect the assets of the estate or to assert any right or defenses the debtor

might have against the claims of others In short, whenever an ordinary bankruptcy trustee could under the Bankruptcy Act invalidate a transaction or transfer, the SIPA trustee can do the same, and the fact that he was appointed under SIPA does not suggest a different rule.

See 1 Collier on Bankruptcy ¶12.14[3] at 12-70.1 (16th ed. 2013). See also Mishkin v. Ensminger (In re Adler Coleman Clearing Corp.), 218 B.R. 689, 702 (Bankr. S.D.N.Y. 1998) (holding that a SIPA trustee may bring fraudulent transfer claims under the Bankruptcy Code); Klein v. Tabatchnick, 418 F.Supp. 1368 (S.D.N.Y. 1976), aff'd in part and rev'd in part, 610 F.2d 1043 (2d Cir. 1979) (unresolved factual questions making summary judgment improper); Bondy v. Chemical Bank, supra, at 98,786; SEC v. North American Planning Corp., [1975-76 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,326 at 98,640 (S.D.N.Y. 1975) (“[SIPA] Trustee alone has the power to recover property which has been fraudulently, preferentially or otherwise voidably transferred.”); SIPC v. S. J. Salmon, 1973 U.S. Dist. LEXIS 15606, at *31 (S.D.N.Y. Aug. 8, 1973) (“But SIPA was not intended to make the fraudulent transfer provisions of the Bankruptcy Act inoperative as to stockbroker-debtors in SIPA proceedings.”)

iv. Section 78fff-2(c)(3)

Finally, section 78fff-2(c)(3) expressly permits the Trustee to avoid and recover transfers of customer property to a customer where (i) “customer property is not sufficient to pay in full” all customer claims as set forth in SIPA section

78fff-2(c)(1)(A)-(D), and (ii) to the extent that the transfers are “voidable or void under the provisions of title 11.” The section mandates that recovered property is treated as customer property under SIPA section 78lll(4). For purposes of determining whether a transfer is void or voidable under Title 11, the section treats the cash or securities so transferred as if they were owned by the debtor prior to transfer, and, if the transfer was for the benefit of a customer, treats the customer as if he was a creditor. These legal fictions permit the Trustee to fit the transfers into the provisions of the avoidance and recovery sections of Title 11. See Hill v. Spencer Sav. & Loan Ass’n (In re Bevill, Bresler & Schulman, Inc.), 83 B.R. 880, 893 (D.N.J. 1988) (“To promote equality of distribution to similarly situated claimants, the trustee is permitted, under 15 U.S.C. sec. 78fff-2(c)(3), to recover securities that would have been part of the fund of customer property but for a prior transfer to a customer.”)

The concept of “customer property” in SIPA section 78lll(4) is expansive and is designed to ensure that customer property is funded for priority distribution to customers. See Ferris, Baker Watts, Inc. v. Stephenson (In re MJK Clearing, Inc.), 286 B.R. 109, 132-133 (Bankr. D. Minn. 2002), aff’d, 2003 WL 1824937 (D. Minn. Apr. 07, 2003), aff’d, 371 F.3d 397 (8th Cir. 2004); Horwitz v. Sheldon (In re Donald Sheldon & Co.), 148 B.R. 385, 388-390 (Bankr. S.D.N.Y. 1992).

Taken together, the SIPA provisions discussed above make clear that a SIPA trustee has, at a minimum, all of the avoidance powers of an ordinary bankruptcy trustee to seek to avoid transfers. Because the SIPA proceeding, in this regard, proceeds as a Title 11 case would, there is no substantial and material consideration of non-Title 11 law making withdrawal either necessary or appropriate.

C. Section 546(e) Presented No Issue of Law Outside of Title 11

The fact that SIPA is not only a securities law, but also a bankruptcy law that expressly makes applicable to the proceeding provisions of Title 11, reinforces that these cases were squarely within the power of the Bankruptcy Court to decide and that withdrawal was unnecessary. While SIPA is a securities law, it also is a bankruptcy law. See In re BLMIS, 654 F.3d at 242 n.10 (“A SIPA liquidation is a hybrid proceeding.”). SIPA is supported “by both the bankruptcy provision in the United States Constitution and also by the commerce clause.” SEC v. Albert & Maguire Sec. Co., 378 F. Supp. 906, 911 (E.D. Pa. 1974). Although the provisions of the 1934 Act apply as if SIPA were a part of the 1934 Act, they apply only “except as otherwise provided in [SIPA].” SIPA §78bbb. The “except as otherwise provided in SIPA” refers to the incorporation of Title 11 provisions into the SIPA proceeding under SIPA section 78fff(b).

The issue before the District Court thus presented no basis for withdrawal.

The availability of section 546(e) as a defense is one that the Bankruptcy Court decided in SIPA cases, beginning as long as 15 years ago, and hence, presented no novel or unduly complex questions. See, e.g., Mishkin v. Ensminger (In re Adler, Coleman Clearing Corp.), 218 B.R. 689, 703-707 (Bankr. S.D.N.Y. 1998); Jackson v. Mishkin, 263 B.R. at 471-84 (holding that certain trades did not constitute “settlement payments” under the Bankruptcy Code and section 546(e)); Picard v. Merkin (In re BLMIS), 2011 WL 3897970, at *12 (S.D.N.Y. Aug. 31, 2011) (declining to dismiss, at the pleading stage, a fraudulent transfer action on the grounds of a section 546(e) defense); Picard v. Madoff (In re BLMIS), 458 B. R. 87, 115-117 (Bankr. S.D.N.Y.), appeal den., 464 B.R. 578 (S.D.N.Y. 2011).

Moreover, the same District Court has declined to withdraw on the basis of section 546(e) in other cases. See, e.g., In re Extended Stay, Inc., 466 B.R. 188, 203 (S.D.N.Y. 2011) (“Plaintiffs have not offered any explanation as to why the resolution of these claims will require ‘significant interpretation of federal laws,’” rather than the “application of a federal statute to a particular set of facts” such that they may overcome the “narrow” scope this Circuit gives to mandatory withdrawal under section 157(d).”); Enron Corp. v. JP Morgan Secs., Inc., 2008 WL 281972, at *6 (S.D.N.Y. Jan. 25, 2008) (“Mere speculation that the bankruptcy court may have to determine, at some future time, a securities law issue is an insufficient basis for withdrawing the reference.”).

In the cases at hand, the decision to withdraw was based on the Court's belief that "'significant interpretation' of securities law" would be required. (SPA-13). Yet, other than a passing reference to an SEC rule, the Court based its entire analysis of the issue on provisions of Title 11. (See SPA-37 – SPA-44). The mere fact that the issue arose in a SIPA proceeding was not grounds for "substantial and material consideration" of non-Title 11 law. If that were the case, every issue in a SIPA case would require removal. That clearly would contravene SIPA under which, as discussed above, Congress vested jurisdiction in the bankruptcy courts notwithstanding that the liquidation was of a securities broker-dealer.

Mandatory withdrawal was not required. Nor was permissive withdrawal appropriate. Avoidance actions, as alleged in these cases, are core proceedings under 28 U.S.C. section 157(b)(2)(F) and (H). That the matters should have remained before the Bankruptcy Court which had presided over the proceeding since 2008, and was well-grounded in the facts of the liquidation proceeding and the applicable law under Title 11 and SIPA, made eminent good sense. Leaving the matters with the Bankruptcy Court would have furthered judicial efficiency and avoided the groundswell of motions for withdrawal by forum-shopping movants seeking a favorable venue and disrupting the orderly conduct of the liquidation.

CONCLUSION

For all of the aforementioned reasons, the orders of the District Court granting withdrawal of the reference and granting the motions to dismiss in these cases should be reversed.

Respectfully submitted,

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Date: May 15, 2013
Washington, D. C.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 13,636 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

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Washington, D. C.

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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

In Re: Bernard L. Madoff Investment Securities LLC,
Debtor.

IRVING H. PICARD, Trustee for the Liquidation of
Bernard L. Madoff Investment Securities LLC,
Plaintiff - Appellant,

SECURITIES INVESTOR PROTECTION CORPORATION,
Statutory Intervenor pursuant to the Securities Investor Protection Act,
15 U.S.C. § 78eee(d),
Intervenor - Appellant,

-against-

IDA FISHMAN REVOCABLE TRUST, PAUL S. SHURMAN, in his capacity as co-trustee of the Ida
Fishman Revocable Trust, WILLIAM SHURMAN, in his capacity as co-trustee of the
Ida Fishman Revocable Trust and as Executor of the Estate of Ida Fishman,
Defendants - Appellees.

On Appeal from the United States District Court for the Southern District of New York

CERTIFICATE OF SERVICE AND CM/ECF FILING

I, Josephine Wang, hereby certify that on May 15, 2013, I caused the
foregoing Brief of Appellant Securities Investor Protection Corporation to be

served upon All Counsel via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.

I further certify that on May 15, 2013, I mailed a true and correct copy of the aforementioned Brief, by prepaid United States First Class Mail, to the following non-CM/ECF participant:

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I further certify that on May 15, 2013, an electronic copy of the aforementioned Brief was uploaded to the Court's electronic filing system, and that six copies of the Brief were sent to the Clerk's office, by prepaid Federal Express, to:

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