UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-mc-00115 (JSR)
In re: MADOFF SECURITIES	(Relates to consolidated proceedings on 11 U.S.C. § 550(a))

MEMORANDUM OF LAW OF THE
SECURITIES INVESTOR PROTECTION CORPORATION
IN OPPOSITION TO THE MOTION FOR
CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

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TABLE OF CONTENTS **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

TABLE OF AUTHORITIES
(cont.)

CASES: **PAGE**

STATUTES AND RULES:

Securities Investor Protection Act, as amended, 15 U.S.C. §

United States Bankruptcy Code, as amended, 11 U.S.C. §

United States Code, as amended, 28 U.S.C. §

OTHER AUTHORITY:

Federal Rule of Civil Procedure

The Securities Investor Protection Corporation ("SIPC") submits this opposition to the Motion for Certification Pursuant to 28 U.S.C. § 1292(b) ("Motion") (Docket No. 500). SIPC joins in the brief in opposition to the Motion submitted by 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"), and provides this supplemental brief in opposition to the Defendants' memorandum of law accompanying the Motion (Docket No. 501) ("Memo").

PRELIMINARY STATEMENT

In its Order, signed on October 28, 2013 (Docket No. 494) ("Order"), this Court addressed the following questions submitted for consolidated briefing in connection with motions to dismiss filed by the Defendants:

> (1) whether, as a precondition for pursuing a recovery action against a subsequent transferee under 11 U.S.C. § 550(a), the Trustee must first obtain a fully-litigated, final judgment of avoidance against the relevant initial transferee under 11 U.S.C. §§ 544, 547 or 548 ["Issue 1"] or (2) whether the Trustee's recovery action against a subsequent transferee under 11 U.S.C. § 550(a) must be dismissed unless the Trustee has obtained a judgment against the relevant subsequent transferee avoiding the initial transfer or he asserts a claim against the subsequent transferee to avoid the initial transfer within the period prescribed by 11 U.S.C. § 546(a) ["Issue 2"].

See Order 4–5. The Court answered both questions with an unequivocal "no." Centrally, the Court held that, while the Trustee does not need to obtain a fully-litigated judgment of avoidance prior to recovery, "Section 550(a) requires that the Trustee show that the transfer he seeks to recover is avoidable in each recovery action, and the subsequent transferee in possession of that transfer may raise any defenses to avoidance available to the initial transferee, as well as any defenses to recovery it may have." Order 5.

Regarding Issue 2, the Defendants had argued that the Trustee cannot recover against subsequent transferees unless he avoids the transfer as against each subsequent transferee

through an avoidance claim brought within the section 546(a) statute of limitations for avoidance actions. Order 16–17. In other words, the Defendants believed that the Trustee's *recovery* claims were time-barred unless he had commenced *avoidance* actions against them within the two-year statute of limitations for *avoidance* actions. This Court rejected that argument, finding, as it did with regards to Issue 1, that section 550(a)'s language which limited recovery "to the extent that a transfer is avoided" did not require separate avoidance actions against the subsequent transferee in order to recover transferred property. Order 16.

By their Motion, Defendants seek immediate review of the Order's holding on Issue 2.[1] The Defendants, however, fail to meet a basic requirement of 28 U.S.C. § 1292(b): they cannot show a substantial ground for a difference of opinion. In their Memorandum, Defendants attempt to create a substantial difference of opinion where none exists. Using a two-pronged approach: (1) they misconstrue the relevant case law and statutory authority, and (2) they misconstrue the Court's Order. In the first instance, addressed by the Trustee in his brief, the Defendants misinterpret the same cases and statutory provisions relied upon in their earlier motion to dismiss to advance the same arguments previously distinguished or rejected by this Court.[2] As explained by the Trustee, these cases and statutory provisions do not provide any significant grounds for a difference of opinion.

In the second instance, addressed below, the Defendants misconstrue the import of the Order and find holdings in it which do not exist. While these supposed holdings might be

[1] The Issue 1 Defendants have not sought certification for an appeal of the Court's holding as to Issue 1.

[2] As explained in the Trustee's brief, the Defendants also inappropriately introduce entirely new arguments, which should not be considered by the Court on a motion for certification. *In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*, 2010 WL 4237304 at *3 (S.D.N.Y. Oct. 8, 2010); *In re S. African Apartheid Litig.*, 624 F. Supp. 2d 336, 342 n.27 (S.D.N.Y. 2009).

grounds for a difference of opinion with case law and statutory authority, they are nowhere to be found in the Order. Instead, the Order is entirely consistent with and supported by case law and the Bankruptcy Code's statutory scheme. In short, Defendants' Motion merely amounts to disagreement with the position of this Court and the Trustee and SIPC. Such disagreement cannot rise to the level of a "substantial ground for difference of opinion" worthy of certification.

STANDARD UNDER 28 U.S.C. § 1292(b)

Under 28 U.S.C. § 1292(b), the Court of Appeals may entertain an appeal of an interlocutory order if the district court certifies that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Certification "is a rare exception to the final judgment rule that generally prohibits piecemeal appeals." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996). Accordingly, the Second Circuit has "urge[d] the district courts to exercise great care in making a § 1292(b) certification." *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Dist. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992). "[Certification] is not intended as a vehicle to provide early review of difficult rulings in hard cases." *German by German v. Fed. Home Loan Mortgage Corp.*, 896 F. Supp. 1385, 1398 (S.D.N.Y. 1995) (finding no substantial ground for difference of opinion). In fact, "a district judge has unfettered discretion to deny certification of an order for interlocutory appeal even when a party has demonstrated that the criteria of 28 U.S.C. § 1292(b) are met." *See Picard v. Katz*, 466 B.R. 208, 210 (S.D.N.Y. 2012) (internal quotations omitted).

For certification to be appropriate, Defendants must present a "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). "[T]he fact that the parties themselves disagree as to the interpretation of persuasive authority [does not] constitute 'a difference of opinion' sufficient

to warrant certification." *Williston v. Eggleston*, 410 F. Supp. 2d 274, 277 (S.D.N.Y. 2006); *Wausau Bus. Ins. Co. v. Turner Const. Co.*, 151 F. Supp. 2d 488, 491 (S.D.N.Y. 2001) ("A mere claim that the district court's ruling was incorrect does not demonstrate a substantial ground for difference of opinion under the second element."). A "substantial conflict" does not exist simply because a party's position has not been "authoritatively addressed" or explicitly rejected. *Id.*; *see also Am. Tel. & Tel. Co. v. N. Am. Indus. of New York, Inc.*, 783 F. Supp. 810, 814 (S.D.N.Y. 1992).

The Defendants bear "the stringent 'burden of persuading the court . . . that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *Sussman v. I.C. Sys., Inc.*, 2013 WL 5863664, at *4 (S.D.N.Y. Oct. 30, 2013) (quoting *DiCola v. Am. Steamship Owners Mut. Protection & Indem. Assoc., Inc. (In re Prudential Lines, Inc.)*, 59 F.3d 327, 332 (2d Cir. 1995)); *see also SIPC v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Secs.)*, No. 12-MC-00115 (JSR), slip op. at 3 (S.D.N.Y. Dec. 6, 2013) (ECF. No. 508) ("The Second Circuit cautions that in applying these criteria, only exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of judgment." (internal quotation marks deleted)).

ARGUMENT

To carry their burden of proof for certification of the Order for interlocutory appeal, the Defendants must show that a controlling issue of law has substantial grounds for difference of opinion. They cannot do so, because no case supports the position advocated by the Defendants: that a bankruptcy trustee must bring avoidance actions against each and every initial and subsequent transferee within the two-year statute of limitations under section 546(a) in order to recover transferred property. Instead, the Defendants return to the same arguments this Court

rejected in the aforementioned consolidated briefing, once again misinterpreting the case law and statutory provisions to an attempt to support their arguments. Moreover, as described below, the Defendants have plainly misconstrued the Order itself in their attempt to construct clearly incorrect holdings to form the basis for a substantial conflict. These supposed holdings, however, are not found in the Order and thus cannot serve as grounds for a difference of opinion. Indeed, the Order comports with relevant case law and the Bankruptcy Code.

I. Defendants Incorrectly Assert that the Order Does Not Require a Timely Avoidance Action

The Defendants' Motion centers on the argument that "under the Court's ruling, a trustee seeking to recover property would never have a reason to avoid transfers under the Avoidance Provisions, and instead could simply seek to recover the transferred property under section 550(a)." Memo 2. The Defendants elaborate that "the Court's holding that a trustee does not need to assert a claim under the Avoidance Provisions against a subsequent transferee in order to recover property means that the trustee need not assert such a claim against the initial transferee either." Memo 8. The Defendants thus conclude that the Order "is contrary to decades of decisions holding that a trustee may not recover *property* from an initial transferee . . . unless he asserts a claim under one of the Avoidance Provisions within the limitations period applicable to proceedings under that provision." *Id.*

This interpretation of the Court's holding clearly misstates the Order. Contrary to the Defendants' claim, the Order reaffirms the importance and necessity of avoidance actions. Indeed, the Order explicitly states that "a Trustee must bring claims for avoidance in conjunction with recovery proceedings within the statute of limitations, without which defendants would not

be on notice that their transfers could be subject to recovery by the Trustee." Order 17, n.5.[3] The Order further states that "a subsequent-transferee defendant is entitled to bring a statute-of-limitations defense to avoidance only if the Trustee failed to bring any avoidance action with respect to the initial transferee (against either the initial or subsequent transferee) within section 546(a)'s two-year limitations period." Order 17–18. Thus, in any recovery action, whether brought simultaneously with an avoidance action within the two-year statute of limitations or brought within the one-year period following the conclusion of an avoidance action, the Trustee must have commenced a related action to avoid the initial transfer within the two-year statute of limitations, or else any transferee from whom recovery is sought may move to dismiss the action as untimely.

The Defendants' reading of the Order deliberately takes it out of the context of the present case. No one in this case has suggested that a timely avoidance action is not necessary for recovery of transferred property. The Trustee and SIPC do not contest that the Defendants should have the opportunity to defend a recovery action on all grounds available, including whether or not the Trustee brought a timely avoidance action. *See Woods & Erickson, LLP v. Leonard (In re AVI, Inc.)*, 389 B.R. 721, 733 (B.A.P. 9th Cir. 2008) ("*In re AVI*") (recognizing that "transferees had a constitutional right to defend the preference claim before they could be deprived of their property"); *Dye v. Sachs (In re Flashcom, Inc.)*, 361 B.R. 519, 525 (Bankr. C.D. Cal. 2007), *aff'd*, 2013 WL 6254921 (C.D. Cal. Dec. 4, 2013).

Rather than eliminating the requirement of a timely avoidance action, the Order's holding comports with the legislative history and case law interpreting Section 550, which clearly state

[3] In the same footnote, the Court remarks that avoidance actions are also necessary to avoid obligations, where no recovery is possible. Order 17, n.5.

that recovery and avoidance actions are separate concepts and procedures and, in fact, separate causes of action. *Silverman v. K.E.R.U. Realty Corp.* (*In re Allou Distribs., Inc.)*, 379 B.R. 5, 19 (Bankr. E.D.N.Y. 2007). The Bankruptcy Code separates the concepts of avoidance of transfers and recovery from transferees and allows a trustee to seek to avoid transfers as part of a recovery action against a subsequent transferee, thereby providing the trustee with flexibility in recovering the estate's assets while still preserving a transferee's right to challenge the avoidability of a transfer.

Importantly, as part of this separation between avoidance and recovery, an avoidance action targets the initial transfer, not the transferee. Order 6; *In re AVI*, 389 B.R. at 733. Thus, where a transfer of property is at issue, a trustee first brings an action to avoid the transfer under the Bankruptcy Code's avoidance provisions in a suit against either the initial or subsequent transferees, and then, either in the same or a separate action, recovers the transfers. Because of this focus on the avoidability of the transfer, "the distinction between initial transferee and mediate transferee for avoidance purposes is irrelevant. The Defendants need only be transferees." *IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs., Inc.)*, 408 F.3d 689, 707 (11th Cir. 2005). Indeed, "the Bankruptcy Code, and specifically §§ 544(b) and 548, does not identify the proper, necessary or indispensable parties to a fraudulent transfer action, and does not state that the initial transferee is necessary." *The Official Comm. of Unsecured, Creditors of M. Fabrikant & Sons, Inc. v. J.P. Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.)*, 394 B.R. 721, 743 (Bankr. S.D.N.Y. 2008). Accordingly, a timely action to avoid the transfer must be commenced against a transferee (none of whom are necessary and indispensable) but is not needed against every transferee.

The transferees' due process rights, however, are well protected, as recognized in the Order. A recovery action is limited to the extent that the transfer is avoided under Title 11, invoking the defenses available to avoidance of the transfer. *See Official Unsecured Creditors Comm. of Sufolla, Inc. v. U.S. Nat'l Bank of Or. (In re Sufolla, Inc.)*, 2 F.3d 977, 982 (9th Cir. 1993). Thus, the Defendants will have the same opportunity to contest the avoidability of the transfer afforded to the initial transferees. The Defendants may raise the same defenses as the initial transferee, including the statute of limitations defense under either Section 546(a) or 550(f), where appropriate. But where, as here, the Trustee brought a suit to avoid the initial transfer within the time limits provided by Section 546(a), neither the initial transferee nor the subsequent transferee can raise a statute of limitations defense under Section 546(a), and an avoidance action need not be brought against every transferee from whom recovery is sought.

II. Defendants Misconstrue the Order's Impact on the Avoidance and Recovery Statutes of Limitations

The Defendants also mistakenly claim that the Order undermines the statute of limitations provisions for avoidance and recovery actions. The Defendants believe that the Order, by "[e]liminating the requirement of a timely avoidance claim as a prerequisite for a recovery under section 550(a)," nullifies subsections 550(f)(1) and 546(a).[4] Memo 11.

The Order does no such thing. Rather, the Order affirms the importance of both statutes of limitations. In addressing this very same argument as to section 550(f), the Court states that "the fact that avoidance against an initial transferee may not be *required* does not mean that bringing avoidance and recovery actions sequentially is not permissible." Order 11. The Court

[4] Section 550(f)(1) limits recovery actions to "one year after the avoidance of the transfer on account of which recovery under this section is sought." 11 U.S.C. § 550(f)(1). Separately, section 546(a) states that an avoidance action under section 544, 545, 547, 548, or 553 must be commenced within two years after entry of the order for relief. 11 U.S.C. § 546(a).

further quotes the Bankruptcy Court's decision in this liquidation proceeding that addresses the statute of limitations for recovery actions in the same context. That decision held that "[a]lthough the Settlement does not constitute a formal avoidance of the initial transfer from [Madoff Securities] to Fairfield, it presents the Court with finality with respect to Fairfield Sentry. This finality triggers the relevant one-year statute of limitations under section 550(f) of the Code." *Picard v. Bureau of Labor Ins.*, 480 B.R. 501, 522 (Bankr. S.D.N.Y. 2012). *See* Order 11–12. The Order thus explicitly concludes that section 550(f) is not meaningless.

As to section 546(a), as stated above, the Order specifically states that a timely avoidance action is necessary and that "a subsequent-transferee defendant is entitled to bring a statute-of-limitations defense to avoidance only if the Trustee failed to bring any avoidance action with respect to the initial transfer (against either the initial or subsequent transferee) within section 546(a)'s two-year limitations period." Order 17–18. In response, the Defendants hedge their prior nullification argument by countering that if section 546(a) is not nullified, then the Order makes "section 546(a) unlike any other statute of limitations by allowing the commencement of an avoidance proceeding against one defendant to satisfy the limitations period for other proceedings against other defendants." Memo 12. The Defendants believe that such a result "completely undermines" Federal Rule of Civil Procedure 15(c)(1)(C) which governs whether the addition of a defendant to a complaint relates back to the date of the original pleading. *Id.* The Defendants further complain that the Order's implication that a timely filed and settled avoidance action against a single transferee would free the Trustee "of the section 546(a) statute of limitations in commencing proceedings against the initial transferee and all the other subsequent transferees." Memo 13.

As a preliminary matter, the Defendants' argument that the Order undermines Federal Rule of Civil Procedure 15(c)(1)(C) is directly at odds with case law and cannot be grounds for a substantial difference of opinion. In *Picard v. Madoff (In re Bernard L. Madoff Inv. Sec. LLC)*, 468 B.R. 620 (Bankr. S.D.N.Y. 2012), the Bankruptcy Court held that because a transfer had not been avoided under the Bankruptcy Code's avoidance provisions, the time period for bringing a Section 550(a) recovery claim against subsequent transferees had not yet lapsed. *Id.* at 632. Accordingly, the Bankruptcy Court allowed the Trustee to add defendants to his recovery claims, even while denying the Trustee's request to add those same defendants to his avoidance action under Rule 15(c). *Id.* In other words, while the statute of limitations for avoidance had lapsed, the statute of limitations for recovery had not even begun, and thus Rule 15(c) was not implicated.

This conclusion leads to the key issue, which the Defendants inadvertently highlight when they state that under the Order a Trustee bringing a recovery action "need only satisfy the statute of limitations applicable to the fundamentally distinct claim to recover property under section 550(a)." Memo 2. Exactly what the Defendants fail to recognize is that a "fundamentally distinct claim to recover property under section 550(a)" has a fundamentally distinct statute of limitations under section 550(f).

As this Court recognized in the Order, an action to avoid a transfer must be commenced within the statute of limitations for avoidance actions—Section 546(a)—while recovery actions must be commenced within the statute of limitations for recovery actions—Section 550(f). Order 6–7; *see In re AVI*, 389 B.R. at 734 ("[W]e perceive no impediment to giving effect to the different statutes of limitations for avoidance under § 549 and recovery under § 550. Each statute of limitation has meaning depending upon which remedy the trustee seeks."). Thus, while the

Defendants bemoan that an action to avoid the initial transfer against one transferee frees the Trustee of the section 546(a) statute of limitations, they forget that it binds him to the section 550(f) statute of limitations for recovery actions. With these separate concepts of avoidance and recovery, it would be counterintuitive and burdensome to require a trustee to bring separate avoidance actions for the same transfer against the initial transferee and every subsequent transferee, all within the statute of limitations for avoidance actions.

Ironically, by conflating the actions of avoidance and recovery, it is the Defendants who attempt to nullify section 550(f). Under their view, the Section 550(f) statute of limitations would be essentially meaningless since a trustee would have no occasion to bring avoidance and recovery actions seriatim. Section 546(a) and Section 550(f), taken together, should rather provide flexibility to trustees, recognizing that it is not always practical or possible to sue every subsequent transferee within two years of the start of the case. *Cf. In re AVI*, 389 B.R. at 735 ("Simply put, [section 550] should be interpreted to provide flexibility and avoid an absurd result, especially in cases that involve multiple transfers or settlements as in this case.").

CONCLUSION

Contrary to the Defendants' assertions, the Order does not vitiate avoidance actions, nor does it give a trustee a limitless time period in which to bring recovery actions in a liquidation. Rather, the Order comports with prevailing case law and the Bankruptcy Code in holding that avoidance and recovery are separate causes of action and that a trustee, having brought a timely action to avoid a transfer, may, within one year of the conclusion of that avoidance action, bring a recovery action against subsequent transferees who subsequently received the property.

Thus, Defendants have failed to present the requisite "conflicting authority" component of the section 1292(b) certification standard. For the aforementioned reasons, the Court should deny Defendants' Motion.

Dated: Washington, D.C.
December 10, 2013

Respectfully submitted,

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In re: MADOFF SECURITIES	(Relates to consolidated proceedings on 11 U.S.C. § 550(a))

CERTIFICATE OF SERVICE

I, Nathanael S. Kelley, hereby certify that on December 10, 2013 I caused true and correct copies of the Memorandum of Law of the Securities Investor Protection Corporation in Opposition to the Motion for Certification Pursuant to 28 U.S.C. § 550(a) to be served upon counsel for those parties who receive electronic service through ECF and by electronic mail to those parties as set forth on the attached Schedule A.

/s/ Nathanael S. Kelley
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Schedule A

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