UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. A&G GOLDMAN PARTNERSHIP AND PAMELA GOLDMAN, Defendants.	14 Civ. 09545 (JGK) Adv. Pro. No. 14-02407 (SMB) **Oral Argument Requested**

TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO WITHDRAW THE REFERENCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation of the estate of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"), and the estate of Bernard L. Madoff, individually ("Madoff"), by and through his undersigned counsel, respectfully submits this memorandum of law in opposition to the motion to withdraw the reference filed by Pamela Goldman and A&G Goldman Partnership ("Goldmans") with respect to the Trustee's action filed in bankruptcy court to enforce that court's permanent injunction ("Permanent Injunction") issued in connection with the Trustee's multi-billion dollar settlement ("Settlement") with the estate of Jeffry M. Picower and related parties ("Picower Parties").

PRELIMINARY STATEMENT

This is the Goldmans' third attempt to bring a class action complaint against the Picower Parties that falls outside the purview of the Permanent Injunction. Every prior attempt, as well as every prior attempt by another set of putative class action plaintiffs asserting substantially similar claims, was heard in the first instance by the bankruptcy court. No doubt unhappy with the prior results, the Goldmans now seek to bypass the bankruptcy court's assessment of the reach of its own injunction. But there is no reason to do so, and consistency of interpretation militates in favor of bankruptcy court scrutiny.

As an initial matter, in 2011, the bankruptcy court approved the Settlement and issued the Permanent Injunction at issue here. The Trustee's Settlement with the Picower Parties, together with the Picower Parties' contemporaneous settlement with the Department of Justice, resulted in the Picowers' paying $7.2 billion to victims of Madoff's Ponzi scheme. The amount accounted for every transfer of fictitious profits from BLMIS to the Picower Parties. In connection with the Settlement, the Picower Parties bargained for a Permanent Injunction to preclude copycat suits. The bankruptcy court accordingly issued the Permanent Injunction, barring claims that are

duplicative or derivative of those that the Trustee brought, or could have brought, against the Picower Parties. The Settlement and the Permanent Injunction were affirmed by both this Court and the Second Circuit.

The Goldmans thereafter sought to sue the Picower Parties. Significantly, in their first attempt to sue the Picower Parties in 2011, the Goldmans affirmatively sought permission to do so from the bankruptcy court. They asked the bankruptcy court to find that the Goldmans' two class action complaints—one brought by Pamela Goldman and the other by A&G Goldman, both of which attempted to allege a control person claim under the securities laws—fell outside the scope of the Permanent Injunction. The late Judge Lifland of the bankruptcy court held that the Goldmans' claims were duplicative and derivative of the Trustee's fraudulent transfer claims and were thus precluded by the Permanent Injunction. The Goldmans appealed to the district court, which affirmed the holding of the bankruptcy court.

Although the Goldmans had affirmatively sought permission to proceed from the bankruptcy court on their first attempt to plead claims that fell outside the scope of the Permanent Injunction, by 2014, with a loss already under their belt, their tactics changed. Now the Goldmans sought to bypass the bankruptcy court completely. They filed suit in the United States District Court for the Southern District of Florida ("Florida District Court"), asking that court to decide if the second iteration of their complaint, now brought jointly by both Goldmans, attempting yet again to a allege control person claim under the federal securities laws, could escape the reach of the Permanent Injunction. In response, the Trustee brought suit in the bankruptcy court here to enforce the Permanent Injunction against the Goldmans. The Florida District Court was apprised of the Trustee's suit and did not rule on the Goldmans' request. In 2014, Judge Bernstein of the bankruptcy court ultimately held that the alleged securities claims

were derivative of the Trustee's fraudulent transfer claims. The Goldmans initially appealed the bankruptcy court's order again to this Court, but withdrew their appeal and instead filed the third version of their securities control person complaint—"Goldman III"—in Florida District Court. Knowing that an action to enforce the Permanent Injunction would be filed, they agreed to stay the Florida District Court action pending final resolution of any challenges to the Complaint brought by the Trustee and/or the Picower Parties in the *bankruptcy court* for the Southern District of New York. Despite deferring to the bankruptcy court on the issue of the applicability of the Permanent Injunction to Goldman III, and despite the fact that the bankruptcy court had twice decided the applicability of the Permanent Injunction to their prior actions—the first time at their request—the Goldmans moved to withdraw the reference from the bankruptcy court.

The Goldmans assert that withdrawal is mandatory because the bankruptcy court will be called upon to decide whether they have pled a viable securities law claim. But as their prior conduct and the history of this case shows, the question before the bankruptcy court is whether the claims pled violate the bankruptcy court's Permanent Injunction by asserting only disguised fraudulent transfer claims or other claims that the Trustee could have brought against the Picower Parties. The Goldman III Complaint is nearly identical to the previous complaints ruled on by the bankruptcy court, and there is nothing different now that demands withdrawal of the reference.

With respect to permissive withdrawal, the Goldmans contend that it would be inefficient for the bankruptcy court to hear the Trustee's action in the first instance because the district court would have to conduct a *de novo* review on appeal. That, of course, is simply the appellate process, and any litigant could make that argument to avoid bankruptcy court scrutiny. Notably,

on the last round, the Goldmans did not even complete their appeal to the district court, making their argument for permissive withdrawal all the less compelling. And here, the bankruptcy court is well-positioned to interpret the reach of its own injunction, especially on a complaint that is nearly identical to the one upon which it just ruled.

In view of the history of the Goldmans' previous efforts and their clear attempt to avoid the bankruptcy court's uniform interpretation of its own injunction, the Trustee respectfully requests that the Court decline to withdraw the reference.

FACTS

A. The Net Equity Decision and the Goldmans' Customer Claims

One of the fundamental issues in the BLMIS liquidation proceeding was how a customer's claim should be calculated. Many customers (including A&G Goldman Partnership) who received transfers in excess of their principal argued that they should be entitled to their fictitious profits from the Ponzi scheme, as reflected on their last BLMIS customer statement. But the Trustee determined that, rather than perpetuate the fraud, a customer's "net equity" should be calculated by crediting the amount of cash the customer deposited into its BLMIS account, less any amounts withdrawn from the customer's BLMIS account, referred to as the "net investment method." The bankruptcy court approved the Trustee's use of the net investment method to calculate net equity ("Net Equity Decision"). (*See* Order dated March 8, 2010, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, Adv. Pro. No. 08-01789 (Bankr. S.D.N.Y. Mar. 8, 2010), ECF No. 2020.) The Second Circuit affirmed. *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 242 (2d Cir. 2011).

As BLMIS customers, the Goldmans have participated in the bankruptcy court's claims procedure process. *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L.*

Madoff), Adv. Pro. No. 08-01789 (Bankr. S.D.N.Y. Dec. 23, 2008). A&G Goldman Partnership submitted a customer claim for its BLMIS account, which was denied by the Trustee because it had withdrawn more funds than it deposited. (Affidavit of Vineet Sehgal, sworn to on Nov. 13, 2014, ECF No. 5 ("Sehgal Aff.") Ex. F.)[1] Pamela Goldman submitted two customer claims for BLMIS accounts with which she was associated, which the Trustee allowed. (Sehgal Aff. Exs. A–D.) Through SIPC advances and an interim distribution from the fund of customer property, Pamela Goldman's allowed claims have been fully satisfied. (Sehgal Aff. ¶ 3.)

B. The Trustee's Avoidance Action, Settlement with the Picower Parties and the Issuance of the Permanent Injunction

1. The Trustee's Avoidance Action

The Trustee filed a complaint against Jeffry M. Picower (since deceased) and the other Picower Parties on May 12, 2009. (Declaration of Keith R. Murphy, dated Nov. 17, 2014, ECF No. 4 (the "Murphy Decl.") Ex. A.)[2] The complaint identified more than $6.7 billion in net withdrawals that the Trustee alleged the Picower Parties had received from BLMIS. (*Id.* ¶¶ 63(b), 67.) The complaint alleged that the Picower Parties knew or should have known that BLMIS was engaged in fraud and sought recovery of the entire amount known at the time of filing to have been transferred from BLMIS to the Picower Parties throughout the history of the Picower Parties' BLMIS accounts. (*Id.* ¶¶ 3, 4, 28, 57, 65–67.) After filing the complaint, the Trustee identified additional transfers from BLMIS to the Picower Parties, bringing the total amount of net withdrawals sought by the Trustee to $7.2 billion. (*See* Murphy Decl. Ex. B at 2.)

[1]The Sehgal Aff. is attached as Ex. F to the Declaration of Ferve E. Ozturk in Support of Trustee's Opposition to Motion to Withdraw the Reference, dated Dec. 16, 2014 ("Ozturk Decl.").

[2]The Murphy Decl. is attached as Ex. E to the Ozturk Decl.

The Trustee's complaint contained numerous allegations that the Picower Parties directed backdating in their BLMIS accounts, had actual knowledge of the Ponzi scheme, were "complicit[] in the fraud," and were compensated for propping up the Ponzi scheme. (Murphy Decl. Ex. A ¶ 63(a); ¶ 63(i); *see* Ex. B at 4–5.)

2. The Picower Settlement and Issuance of the Permanent Injunction

While the Trustee was pursuing his action against the Picower Parties, he was also pursuing settlement, as was the government. (Murphy Decl. Ex. C at 3.) After extensive negotiations, the Trustee and the Picower Parties reached an agreement under which the Picower estate agreed to return $5 billion to the BLMIS estate. (*Id.*) Simultaneously, the Picower estate agreed to forfeit the $5 billion and an additional amount of approximately $2.2 billion to the government. (*Id.*) When these amounts were combined in this global settlement, 100% of the net withdrawals received by the Picower Parties over the lifetime of their investments with BLMIS were received and became available for eventual distribution to BLMIS victims, without the need for continued litigation. (*Id.*)

The Settlement contains a release of all claims that the Trustee brought or could have brought against the Picower Parties in connection with BLMIS. (*Id.* at 15.) Because of the importance to the Picower Parties of precluding suits on claims they were settling, the Trustee agreed to use his reasonable best efforts to seek a narrowly tailored Permanent Injunction from the bankruptcy court. (*Id.*) The Permanent Injunction would exclude from its scope actions where there is an independent basis on which to bring suit against the Picower Parties. (*Id.*) The Permanent Injunction was identified by the Picower Parties as an essential part of the Settlement. (*Id.* at 25–28.)

The bankruptcy court found that the Permanent Injunction was necessary and appropriate to carry out the provisions of the Bankruptcy Code and to avoid relitigation or litigation of

claims that were or could have been asserted by the Trustee on behalf of all customers and creditors. (*Id.* at 6–7.) Judge Lifland stated at the hearing that: "[t]he injunction is narrow. It deals with duplicative and parallel claims of the trustee. . . . And you cannot expect any settlor to make a settlement with a potential possibility of being sued twice over the same causes of action and claims." (Transcript of Settlement Hearing, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC.*, Adv. Pro. No. 08-01789, (Bankr. S.D.N.Y. Jan. 14, 2011), ECF No. 3815, at 40–41.) Accordingly, Judge Lifland overruled the few objections made and approved the Settlement, issuing the following Permanent Injunction:

> [A]ny BLMIS customer or creditor of the BLMIS estate . . . is hereby permanently enjoined from asserting any claim against the Picower BLMIS Accounts or the Picower Releasees that is duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower Releasees . . . .

(Murphy Decl. Ex. D at 7.)

C. The Goldmans' Repeated Attempts to Plead a Claim that Falls Outside the Scope of the Permanent Injunction

1. Before the Goldmans: Some of the Same Counsel Sought to Bring Claims Against the Picower Parties

The Goldmans are one of two BLMIS customer groups that have repeatedly sought to recover BLMIS fictitious profits by suing the Picowers. On February 16 and 17, 2010, before the Goldmans first attempted to bring an action against the Picower Parties, Adele Fox ("Fox") and Susanne Stone Marshall ("Marshall") each filed a putative class action against the Picower Parties in the Florida District Court seeking to circumvent the then anticipated net equity decision. (Murphy Decl. Exs. E–F.) Similar to the Goldmans' complaints, the Fox and Marshall complaints alleged that BLMIS and the Picower Parties engaged in a conspiracy to "steal the funds" of other customers. (Murphy Decl. Ex. E ¶ 9; Murphy Decl. Ex. F ¶ 9.)

Upon application by the Trustee in New York, the bankruptcy court held that Fox's and Marshall's complaints violated the automatic stay and at least one stay order of this Court, and also issued a preliminary injunction. *Picard v. Fox (In re Bernard L. Madoff)*, 429 B.R. 423, 437 (Bankr. S.D.N.Y. 2010). This Court heard the appeal, which was consolidated with Fox's and Marshall's appeal of the issuance of the Permanent Injunction. This Court not only affirmed the issuance of the Permanent Injunction, but also affirmed the enforcement of the automatic stay, the issuance of the preliminary injunction and the enforcement of the Permanent Injunction as to Fox and Marshall, holding that the actions were a "transparent effort" to pursue claims that "were duplicative of claims brought by the Trustee and that belonged to the Trustee on behalf of all creditors of BLMIS." *Fox v. Picard (In re Bernard L. Madoff)*, 848 F. Supp. 2d 469, 473 (S.D.N.Y. 2012) (Koeltl, J.).

On January 13, 2014, the Second Circuit affirmed this Court's ruling and upheld the Permanent Injunction and its application as against Fox and Marshall. *See Marshall v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 740 F.3d 81, 84 (2d Cir. 2014). The Second Circuit held that the Fox and Marshall complaints impermissibly attempted to plead around the Permanent Injunction and did not contain particularized claims because the "alleged injuries are inseparable from, and predicated upon, a legal injury to the estate namely, the Picower Parties' fraudulent withdrawals from their BLMIS accounts of what turned out to be other BLMIS customers' funds." *Id.*

2. The Goldman Complaints: Round One and the Goldmans Go to Bankruptcy Court

During the pendency of the Fox/Marshall injunction litigation, in 2011, the Goldmans sought permission from the bankruptcy court to file two putative class actions in Florida District Court ("Goldman I"). (Murphy Decl. Ex. H.) While Pamela Goldman sought to represent so-

called "net losers" (customers who withdrew less than they deposited), A&G Goldman Partnership sought to represent "net winners" (customers who withdrew more than they deposited). (*See id.*) Together, they sought to represent customers and creditors already before the bankruptcy court, and for whom the bankruptcy court had already determined equitable distributions in accordance with the net equity method approved by the Second Circuit.

The Goldman I Complaints alleged that the Picower Parties received billions of dollars of transfers from BLMIS under circumstances that suggested Picower knew that BLMIS was engaged in fraud. (*See, e.g.*, Murphy Decl. Ex. H, Ex. A thereto ¶¶ 40–51.) As demonstrated in Exhibit A annexed to the bankruptcy court's order in *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, 477 B.R. 351 (Bankr. S.D.N.Y. 2012), the Goldman I Complaints were virtual carbon copies of the Fox and Marshall Complaints, which themselves parroted the Trustee's Picower complaint.

Among other allegations, the Goldmans alleged that Picower was a "control person" under § 20(a) of the Exchange Act with respect to BLMIS and was jointly and severally liable with BLMIS for BLMIS's violations of Rule 10b-5 of the Exchange Act. (*See, e.g.*, Murphy Decl. Ex. H, Ex. A thereto ¶¶ 89–96.) The purported federal securities laws violations were based on the Picower Parties' withdrawals from BLMIS: "The volume, pattern and practice of the Defendants' fraudulent withdrawals from BLMIS and their control over fraudulent documentation of underlying transactions at BLMIS establishes the Defendants' 'control person' liability under the federal securities laws." (*Id.* ¶ 41.)

On June 20, 2012, the bankruptcy court held that Goldman I violated the Permanent Injunction and the automatic stay. *In re Bernard L. Madoff*, 477 B.R. at 352–53. The court noted the similarity to the Fox and Marshall complaints: "It's *déjà vu* all over again. The Class

Action Plaintiffs are attempting to use inventive pleading to sidestep the automatic stay and the [Permanent] Injunction." *Id.* at 354 (internal quotations omitted). The bankruptcy court emphasized that the Goldmans "have simply repeated, repackaged, and relabeled the wrongs alleged by the Trustee [against the Picower Parties] in an attempt to create independent claims where none exist." *Id.* Moreover, the court found that the alleged harms are "limited to 'general direction and control and action to the detriment of all [BLMIS's] creditors,'" also making them derivative of the Trustee's claims. *Id.* at 357. Finally, the bankruptcy court held that Goldman I, like the Fox and Marshall complaints, were simply "yet another attempt by the same counsel to re-litigate [the] Net Equity Decision." *Id.*

Judge Sullivan affirmed the bankruptcy court's ruling. *A&G Goldman P'ship v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, No. 12-6109, 2013 WL 5511027, at *1 (S.D.N.Y. Sept. 30, 2013). The Court held that the Goldmans' claims were derivative of the Trustee's fraudulent transfer claims. *Id.* at *6–11. Rejecting "a purely formalistic approach" that looks only at the nominal title of a cause of action, the Court determined that the Goldmans' claims "are not *bona fide* securities fraud claims," because aside from allegations listing the elements of a securities fraud claim, "all of the allegations in the Complaint refer exclusively to the Picower Parties' fraudulent withdrawals." *Id.* at *6–7. Judge Sullivan recited the standard for determining the legal sufficiency of a control person claim to determine if the claims were merely disguised fraudulent transfer claims, and not because the court was determining if the allegations were adequately pled for purposes of a Rule 12(b)(6) motion. *See id.* at *6. The Court recognized that the Goldman I Complaints pled "nothing more than that the Picower Parties fraudulently withdrew money from BLMIS." *Id.* at *7.

The Court further held that "the parts of the Complaints that do discuss aspects of the BLMIS fraud unconnected to the Picower Parties' accounts noticeably lack any allegation that the Picower Parties were involved in such fraud . . ." and that "with respect to the clearest examples of BLMIS's fraud to other customers, the Goldman Complaints are completely silent about the Picower Parties' involvement." *Id.* at *8. Hence, the Court found that "[r]egardless of what Class Action Plaintiffs call their claims, the Goldman Complaints plead fraudulent conveyance claims. Accordingly, they are clearly derivative of the Trustee's already-settled claims." *Id.* at *9. As a result, the Court found that the Goldmans had brought "simply deceptively labeled fraudulent conveyance claims." *Id.* at *10. The Court therefore held that the claims came "within the plain scope of the [Permanent] Injunction" and that the bankruptcy court had jurisdiction to enjoin them. *Id.* at *10–11. The Goldmans did not appeal the Court's order.

3. The Goldman Complaints: Round Two and the Goldmans Go to Florida District Court

On January 6, 2014, the Goldmans commenced a new action, this time in the Florida District Court, seeking a declaration that neither the Permanent Injunction nor the automatic stay barred the Goldmans from filing a "new" class action complaint against the Picower Parties. (Murphy Decl. Ex. K.) The declaratory judgment action attached a class action complaint—"Goldman II." (*See* Murphy Decl. Exs. K–L.)

In substance, the Goldman II Complaint was identical to the Goldman I Complaint that the bankruptcy court held to be barred under the Permanent Injunction. The Goldmans again attempted to assert a claim under § 20(a) of the Exchange Act against the Picower Parties for loss in the value of their investment in the "BLMIS Discretionary Trading Program" (*i.e.*, BLMIS's Investment Advisory business). (*Id.* ¶¶ 62, 83–94.) But again, the complaint did not contain any factual allegations that Picower took any specific action with respect to other

customers' accounts, or indeed took any action at BLMIS outside of his own accounts. Instead, trying to get around the deficiencies in their prior pleading, the Goldmans more clearly spelled out their theory that Picower knew that the false trading in his own BLMIS accounts would result in false asset values in other BLMIS customers' accounts because those other accounts did not reflect cash transfers from their accounts to Picower's accounts. (*See id.* ¶¶ 65–66.)

The Trustee filed an adversary proceeding in the bankruptcy court to enforce the Permanent Injunction as to the Goldmans. In the same motion, the Trustee sought to enforce the Permanent Injunction against Fox, Marshall, and two additional named plaintiffs (collectively, "Fox Plaintiffs") in yet another action against the Picower Parties. Notably, the Goldmans did not move to withdraw the reference with respect to Goldman II, although Goldman II mirrors Goldman III in substantial part. (*See* Ozturk Decl. Ex. D at 20–21.) On June 23, 2014, the bankruptcy court held that Goldman II violated the Permanent Injunction. ("June 23 Decision") *See Picard v. Marshall (In re Bernard L. Madoff Inv. Sec. LLC)*, 511 B.R. 375, 394 (Bankr. S.D.N.Y. 2014).

After determining it had the authority to interpret its own Permanent Injunction order and recognizing its jurisdiction to decide if the Goldman II Complaint violated that order, it found that the "conclusory statements" that the Goldmans cobbled together in an attempt to again subvert the Permanent Injunction could not pass muster. *Id.* at 392–93. Disregarding the Goldmans' conclusory allegations, the bankruptcy court held that Goldman II violated the Permanent Injunction because Goldman II, "like its predecessors, relie[d] on the Picower Parties' fraudulent withdrawals and fictitious entries in their own accounts, and if these allegations are ignored, there is nothing left." *Id.* at 393. Because Goldman II only restated the legal standard for control person liability under § 20(a) without alleging that Picower "was an officer of

BLMIS" or including any "particularized allegations that Picower Parties did anything besides fraudulently withdraw money from BLMIS and cause BLMIS to make phony entries in the records *of their accounts*," the bankruptcy court found their claim to be derivative of the Trustee's claims. *Id.* (emphasis added). The Goldmans appealed, the appeal was assigned to this Court, and then the Goldmans voluntarily dismissed their appeal of that decision, although the Fox Plaintiffs' appeal of the June 23 Decision remains before this Court.

4. The Goldman Complaints: Round Three and the Goldmans Move to Withdraw the Reference on Essentially the Same Complaint as Before

On August 28, 2014, after the Second Circuit ruled on the Fox Plaintiffs' action and the bankruptcy court ruled on the Goldman II Complaint, the Goldmans made their third attempt to bring a securities class action against the Picower Parties. After seeking refuge by filing their new complaint in the Florida District Court, the Goldmans and the Picower Parties subsequently entered into a joint stipulation and motion for stay in that court. (Murphy Decl. Ex. O–P.) In the stipulation, the parties agreed to request a stay of the action in Florida pending the Trustee's and/or the Picower Parties' challenge in the *bankruptcy court*, and further agreed to a briefing schedule in the bankruptcy court.[3] (*Id.* Ex. O ¶ 3–4.) Thus, they essentially conceded that the bankruptcy court was the proper court to determine the reach of the Permanent Injunction.

As before, the Goldman III Complaint alleges that Jeffry Picower was a control person under § 20(a) of the Exchange Act. (Murphy Decl. Ex. N ¶ 1.) The Third Goldman Complaint

[3]The Picower Parties filed a separate action against the Goldmans seeking to enforce the Permanent Injunction. *Capital Growth Co. v. Goldman*, Adv. Pro. No. 14-02408 (SMB). They are seeking consolidation of their action and the Trustee's action in the bankruptcy court, to which the Trustee consents. Notably, the Goldmans have not moved to withdraw the reference for the Picower Parties' action in bankruptcy court.

alleges that Picower: (1) backdated trades (*id.* ¶¶ 82–87); (2) took out margin loans (*id.* ¶¶ 88–90); (3) knew that there was false information in BLMIS' financial disclosures (*id.* ¶¶ 91–96); (4) referred clients to BLMIS (*id.* ¶ 64); (5) made loans to BLMIS (*id.* ¶¶ 10, 67–70); and (6) agreed to be listed as an options counterparty and further agreed to notify Madoff if a regulator or anyone else asked him about his counterparty status (*id.* ¶¶ 11, 79–81.).

Of all the allegations, only two appear to be any different from Goldman II: that Picower made loans to BLMIS and that Picower agreed to be listed as an options counterparty. The issue before the bankruptcy court is whether these additional allegations state claims that are not duplicative or derivative of the Trustee's. As the Trustee has argued in his injunction complaint and memorandum, they are not.

On November 17, 2014, the Trustee moved before the bankruptcy court for enforcement of the Permanent Injunction and automatic stay provisions of the Bankruptcy Code ("Enforcement Action"), and the motion to withdraw the reference followed.

ARGUMENT

I. THERE IS NO BASIS FOR MANDATORY WITHDRAWAL

A. The Standard for Mandatory Withdrawal of the Reference Is High

As the Goldmans concede, to prevail on their request for mandatory withdrawal of the reference, they must demonstrate that the bankruptcy court's determination of the Enforcement Action requires "substantial and material" consideration of federal non-bankruptcy law, such that the bankruptcy judge would need to engage in significant interpretation, as opposed to simple application, of federal laws other than bankruptcy law. *See Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 995 (2d Cir. 1990); *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991); (Def.'s Mem. of Law in Supp. of Mot. to Withdraw the Reference ("Goldman Mem.") at 8–9.)

The scope of mandatory withdrawal under 28 U.S.C. § 157(d) has been narrowly construed in this Circuit given the breadth of bankruptcy court jurisdiction. *See In re Ionosphere Clubs*, 922 F.2d at 994 (bankruptcy court jurisdiction is broadly construed); *In re Extended Stay, Inc.*, 466 B.R. 188 (S.D.N.Y. 2011) (same). All cases and proceedings arising under, arising in, or related to a bankruptcy case, including SIPA liquidations, are automatically referred to the bankruptcy court. *See* 28 U.S.C. § 157(a). For the bankruptcy court to proceed efficiently and within the bounds of its broad grant of jurisdiction, the reference to the bankruptcy court may be withdrawn only in limited circumstances. *In re Ionosphere Clubs*, 922 F.2d at 994. Thus, the Second Circuit has held that § 157(d) is not to be used as an "escape hatch through which most bankruptcy matters [could] be removed to a district court." *Gredd v. Bear, Stearns Sec. Corp. (In re Manhattan Inv. Fund Ltd.)*, 343 B.R. 63, 66 (S.D.N.Y. 2006) (quoting *Carter Day Indus., Inc. v. U.S. Env't Prot. Agency (In re Combustion Equip. Assoc.)*, 67 B.R. 709, 711 (S.D.N.Y. 1986)) (internal quotation omitted).

Mandatory withdrawal "is not available merely because non-Bankruptcy Code federal statutes will be considered in the bankruptcy court proceeding." *In re Ionosphere Clubs*, 922 F.2d at 995. Rather, as the Second Circuit has held, mandatory withdrawal "is reserved for cases where substantial and material consideration of non-Bankruptcy Code federal statutes is necessary for the resolution of the proceeding." *Id.* "Substantial and material consideration" requires a bankruptcy judge to "engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes." *Exxon Corp.*, 932 F.2d at 1026; *Enron Corp. v. J.P. Morgan Sec. (In re Enron Corp.)*, 388 B.R. 131, 136 (S.D.N.Y. 2008). Indeed, the "substantial and material consideration" standard excludes from mandatory

withdrawal those cases that involve only the routine application of non-title 11 federal statutes to a particular set of facts. *See In re Johns-Manville Corp.*, 63 B.R. 600, 602 (S.D.N.Y. 1986).

B. The Enforcement Action Does Not Require Substantial and Material Consideration of Non-Bankruptcy Federal Law

After two prior failed complaints before the bankruptcy court that involved a § 20(a) control person claim, the Goldmans now argue that consideration of the reach of the Permanent Injunction and automatic stay requires the bankruptcy court to interpret the securities law to determine the sufficiency of the Goldmans' § 20(a) control person claims from a Rule 12(b)(6) perspective. (Goldman Mem. at 9–10.) They are incorrect. As Judge Sullivan commented when reviewing the reach of the Permanent Injunction to Goldman II: "Trying to figure out what 'derivative' means and how it applies sort of feels like assessing the merits of the pleading for a securities claim under 12(b)(6). Feels like it. But they are distinct analyses." (Hearing Transcript, No. 12-CV-6109 (S.D.N.Y.), ECF No. 34 (Sept. 26, 2013) at 38:21–25.)

The question is not whether the allegations were adequately pled for purposes of a Rule 12(b)(6) motion, as the Goldmans contend, but rather, whether the Goldmans' claims are merely disguised fraudulent transfer claims or other claims that could have been brought by the Trustee, and thus would be precluded by the bankruptcy court's Permanent Injunction. *See Marshall*, 511 B.R. at 390. As Judge Lifland explained when examining Goldman I, the Goldmans' claim was "inadequately particularized," and thus derivative of the Trustee's, "as the harms alleged are limited to 'general direction and control and action to the detriment of all [BLMIS] customers." *In re Bernard L. Madoff*, 477 B.R. at 357. And as Judge Bernstein recently explained when reviewing Goldman II: "a claim based on the Picower Parties' fraudulent withdrawals and fraudulent entries in their accounts, without any particularized allegations that the Picower Parties directly participated in any misrepresentation to customers, is derivative of the Trustee's

fraudulent conveyance claims . . . ." *Marshall*, 511 B.R. at 390. Indeed, as set forth in the Trustee's brief in support of the Enforcement Action, the bankruptcy court needs only to determine that all of the Goldmans' allegations are based on activity in the Picower Parties' own accounts, and that they fail to set forth any claim of harm directed toward them, to rule that the Goldman III Complaint cannot proceed in the face of the Permanent Injunction and automatic stay. (*See* Ozturk Decl. Ex. D at 26.)

The Goldmans contend that the bankruptcy court would have to interpret the meaning of "control" under § 20(a) to determine the Trustee's Enforcement Action. (Goldman Mem. at 9.) But the bankruptcy court and other courts have considered the applicability of this Permanent Injunction to purported securities claims and, in each instance, the court declined to rule on the viability of the securities law claims. Instead, these courts limited their inquiry to whether the complaints, when stripped of bare legal conclusions, made allegations that did not derive from the Trustee's fraudulent transfer claims. *In re Bernard L. Madoff*, 477 B.R. at 356–57; *Marshall*, 511 B.R. at 394–95; *see also Picard v. Stahl*, 443 B.R. 295, 318–19 (Bankr. S.D.N.Y. 2010) (holding that § 20(a) claims were duplicative and derivative of the Trustee's claims and hence were barred by the automatic stay and should be enjoined under § 105(a) of the Bankruptcy Code), *aff'd*, No. 11-cv-2392, 2011 WL 7975167 (S.D.N.Y. Dec. 15, 2011), *aff'd*, 512 F. App'x 18 (2d Cir. Feb. 20, 2013). The Goldmans admit as much when they state that "Judge Sullivan . . . held the allegations of 'control' were duplicative of the Trustee's fraudulent conveyance claims." (Goldman Mem. at 9.)

That the bankruptcy court will not consider conclusory allegations in determining whether the Goldmans have pled themselves outside of fraudulent transfer claims does not somehow transform the exercise into a Rule 12(b)(6) examination. *A&G Goldman P'ship*, 2013

WL 5511027, at *6. The question of whether a third-party plaintiff has pled a *bona fide* claim outside of the Permanent Injunction has to do with the differences between the pled claim and the Trustee's pled or potential claims, not with whether the elements of a securities or other claim has been met. *Id.* at *6–8.[4]

The lack of merit to the motion to withdraw the reference is evident in that the bankruptcy court has *already* evaluated the vast majority of the Goldman III Complaint in holding that the Goldman II Complaint violated the Permanent Injunction. *Marshall*, 511 B.R. at 393; *see* Memorandum of Law in Support of Application for Enforcement of the Permanent Injunction and Automatic Stay at 22, *Picard v. A&G Goldman P'ship*, Adv. Pro. No. 14-02407 (Bankr. S.D.N.Y. Nov. 17, 2014), ECF No. 3. (Ozturk Decl. Ex. D.) The Goldmans' decision to withdraw their appeal of that order cannot now be remedied by seeking an alternative review directly by the district court of the third iteration of the complaint.

The Goldmans themselves have admitted that the Third Goldman Complaint is substantially similar to Goldman I, held by the bankruptcy court to violate the Permanent Injunction. (*See* Goldman Mem. at 13; Trustee's Related Case Statement, ECF No. 6 (Dec. 4,

[4]The Goldmans also seem to argue that the bankruptcy court has no interest in the merits of the litigation between the Goldmans and the Picower Parties, and that there is only a legal issue that remains: whether the Goldmans have adequately pled a control person claim under the securities laws. This argument is flawed because it incorrectly assumes that the bankruptcy court is determining whether a control person claim has been pled when instead, it is determining whether the Goldmans have impinged upon the Trustee's claims.

2014).) There is nothing different in their third attempt that calls for bypassing bankruptcy court scrutiny now.[5]

Nor is the Trustee's standing to bring a § 20(a) claim at issue, as the Goldmans contend. Whether the Trustee could hypothetically bring the Goldmans' causes of action is not pertinent to the enforcement of the Permanent Injunction and automatic stay. As this Court held with respect to Fox's and Marshall's arguments on this point: "Appellants cite no case that holds that the mere possibility that a claim might be barred or subjected to a meritorious defense if it were asserted by the trustee renders the claim independent and not the property of the estate for the purposes of an action by the trustee to enforce the § 362 automatic stay when a creditor brings that claim." *Fox*, 848 F. Supp. 2d at 484; *see also Marshall*, 740 F.3d at 93; *Marshall*, 511 B.R. at 391–92.

In sum, the sole issue in the Enforcement Action is whether the claims in the Third Goldman Complaint are duplicative and derivative of the Trustee's settled claims and thus barred by the Permanent Injunction. This is a pure issue of bankruptcy law and has been decided numerous times by the bankruptcy court, notably with respect to the two previous iterations of the Goldmans' complaints. *See, e.g.*, *In re Bernard L. Madoff*, 477 B.R. 351; *Marshall*, 511 B.R. 375. The fact that the claim the Goldmans wish to plead is a securities law claim does not change the fact that no "substantial and material consideration" of the securities laws is required here, as is blatantly apparent from past decisions. There is no mandatory basis to withdraw the reference.

[5]The Goldmans inappropriately rely on an injunction action filed by the Picower Parties to argue that the *Trustee's* action belongs in district court. (Goldman Mem. at 11–12.) Because the Picower Parties' action is not before the Court on this motion, the argument, though incorrect, is beside the point.

II. THERE IS NO BASIS FOR PERMISSIVE WITHDRAWAL

The permissive withdrawal provision states, in relevant part, that "[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section . . . for cause shown." 28 U.S.C. § 157(d). As the Goldmans agree, to determine whether there is "cause" to withdraw the reference, this Court must evaluate whether the claim is core or non-core, and then "weigh questions of efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors." *Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1101 (2d Cir. 1993); *In re Lehman Bros. Holdings Inc.*, 18 F. Supp. 3d 553, 556–57 (S.D.N.Y. 2014) (Koeltl, J.); *see* Goldman Mem. at 12. These factors make clear that this Court should not withdraw the reference on a discretionary basis.

A. The Enforcement Action is a Core Proceeding

Contrary to the Goldmans' arguments, the Enforcement Action is a core proceeding because it seeks to enforce the Permanent Injunction order issued by the bankruptcy court. Bankruptcy courts have core jurisdiction to interpret and enforce their own orders. *See In re Petrie Retail, Inc.*, 304 F.3d 223 (2d Cir. 2002) (bankruptcy court had core jurisdiction to enforce sale and confirmation orders barring lessor claims against the assignee of commercial lease). The Enforcement Action also involves the enforcement of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a), against a non-debtor. Section 362(a) is "one of the fundamental debtor protections provided by the bankruptcy law." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (citing S. Rep. No. 95-989, p. 54 (1978); H.R. Rep. No. 95-595, p. 340 (1977)); *see In re Dominguez*, 312 B.R. 499, 505 (Bankr. S.D.N.Y. 2004).

The Goldmans argue that because their claim is a securities law claim, "the remaining relevant question, whether a viable Section 20(a) claim is pled by the Goldman Complaint, is a pure question of substantive federal securities law having nothing to do with Title 11 bankruptcy jurisdiction."[6] (Goldman Mem. at 13.) As discussed at length above, however, the true issue before the bankruptcy court is whether the Goldmans' current complaint pleads claims that are independent of the Trustee's fraudulent transfer claims, or claims that merely duplicate or derive from those claims. The analysis by the bankruptcy court is the same no matter what sort of claim the third party is trying to plead, or what label the third party attempts to attach to that claim.

In addition, the Goldmans appear to argue that the bankruptcy court cannot finally adjudicate the Enforcement Action under the U.S. Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), and that the district court must thus review any bankruptcy court decision *de novo*. (*See* Goldman Mem. at 13–14). Subsequent to the issuance of *Stern*, however, the Second Circuit has determined, as has this Court, that a bankruptcy court has jurisdiction to issue final orders enforcing the Permanent Injunction and automatic stay. *See Marshall*, 740 F.3d at 84. Finally, that the district court applies a *de novo* review with respect to enforcement of the Permanent Injunction has to do with the standard of review for such injunctions, not with a limitation to the bankruptcy court's power. *See A&G Goldman P'ship*,

[6]Defendants' cases for the proposition that the bankruptcy court's enforcement of its own injunction and the automatic stay somehow is unconnected to the bankruptcy proceeding are inapposite and actually support the Trustee's position. *See MBNA Am. Bank N.A. v. Hill*, 436 F.3d 104, 108–09 (2d Cir. 2006) (holding that chapter 7 trustee's action to enforce the automatic stay was a core proceeding); *Baker v. Simpson*, 613 F.3d 346, 350 (2d Cir. 2010) (action for professional malpractice under state law was a core proceeding).

2013 WL 5511027, at *3. *De novo* review is not an invitation to bypass bankruptcy court review in the first instance. If it were, any case involving a question of law could be withdrawn on this basis, undermining the Second Circuit's stated intent to narrowly construe mandatory withdrawal of the reference through the permissive section of the statute.

Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP, 462 B.R. 457 (S.D.N.Y. 2011), which Defendants rely on to argue that permissive withdrawal is warranted, is inapposite. There, the district court withdrew the reference on adversary proceedings by the chapter 11 estate of a former law partnership, holding that the bankruptcy court lacked constitutional authority under *Stern* to finally adjudicate those claims. Here, as discussed, it is settled that a bankruptcy court has constitutional authority to enforce its own Permanent Injunction order and the automatic stay.

B. Judicial Efficiency and Uniformity of Decision Favor Initial Adjudication by the Bankruptcy Court

The bankruptcy court is best suited to determine whether its own Permanent Injunction order and the automatic stay of the Bankruptcy Code apply. Indeed, in addition to its previous rulings on Goldman I and II, it has considered and issued decisions in similar circumstances numerous times within these very proceedings. *See, e.g.*, *Fox*, 429 B.R. 423; *Stahl*, 443 B.R. 295; *Picard v. Maxam Absolute Return Fund, L.P.*, 460 B.R. 106 (Bankr. S.D.N.Y. 2011); *In re Bernard L. Madoff*, 477 B.R. 351.

Faced with the fact that the bankruptcy court should interpret, and has interpreted, its own Permanent Injunction order and the scope of the automatic stay several times, Defendants argue that there is no need for uniformity of decision before the bankruptcy court because there are only issues of law at play. Uniformity of decision, however, is precisely what is called for by

Orion. And as the bankruptcy court recognized in exercising its discretion to review the Goldman II Complaint:

> [C]entralization of the question in this Court will promote uniformity of interpretation and equal treatment among creditors, not to mention judicial efficiency. The *Marshall* Court had only the one case before it. However, over 16,500 customer claims have been filed in the BLMIS case. Every customer could file the same lawsuit against the Picower Parties as the Fox Plaintiffs and the Defendants did. Moreover, requiring the Trustee to defend the same Permanent Injunction and automatic stay in myriad courts at the risk of inconsistent results will impact the Trustee's ability to settle similar disputes.

Marshall, 511 B.R. at 388 (internal citation omitted). This reasoning pertains with equal force to the Goldman III Complaint. Moreover, the Goldmans neglect the fact that the Goldman III Complaint is substantially the same as the Goldman II Complaint ruled on by Judge Bernstein as he applied the law to the pled facts.

Additionally, the Goldmans' divisive strategy in separately responding to the Trustee's and the Picower Parties' enforcement actions cuts against any argument the Goldmans make about efficiency and the appropriate use of judicial resources. Like the Trustee, the Picower Parties assert that the Goldman III Complaint violates the Permanent Injunction. But the Goldmans have not sought to withdraw the reference as to the Picower Parties' action, belying their arguments here that the Trustee's application cannot be heard in bankruptcy court.

Moreover, the Picower Parties' motion to consolidate their action with the Trustee's action is currently being briefed. *See* Picower Parties' Motion to Consolidate Adversary Proceedings, *Capital Growth Co. v. Goldman*, Adv. Pro. No. 14-02408 (SMB), ECF No. 7. Keeping the Trustee's Enforcement Action before the bankruptcy court where it can be consolidated with the Picower Parties' action is efficient, given the substantial similarity between the two actions.

Finally, the Goldmans complain about the delay of having to go to bankruptcy court first. But the Goldmans did not pursue an appeal of the last bankruptcy court ruling, and it is not at all clear that they would do so in the event of a defeat in bankruptcy court on Goldman III. Thus, their argument about the delay of having to go through an appeals process to district court is speculative at best.

C. The Goldmans Should Not Be Permitted to Forum Shop

The Goldmans have been attempting to avoid the jurisdiction of the bankruptcy court since their loss in Goldman I. They initially asked the bankruptcy court to adjudicate whether their claims fell outside the scope of the Permanent Injunction and automatic stay in Goldman I. (Murphy Decl. Ex. H.) After their loss there, they then asked the Florida District Court to determine whether the claims in Goldman II fell beyond the reach of the Permanent Injunction. (Murphy Decl. Ex. K.) But the Florida District Court did not rule, and the bankruptcy court wound up deciding that one too, again against the Goldmans.

On their third attempt, the Goldmans stipulated to a stay of the action in Florida pending the Trustee's and Picower Parties' challenge in the *bankruptcy court*: "The Parties agree and jointly request the entry of a stay of the Action pending final resolution of any challenge to the Complaint . . . in the Bankruptcy Court for the Southern District of New York." (Murphy Decl. Ex. O ¶ 3.) They thereby conceded that the action should be decided by that court. Apparently reconsidering, they then brought the instant motion, even though there is no difference between what the bankruptcy court did previously and what it must do now—determine the application of its own Permanent Injunction and the automatic stay. This Court should reject the Goldmans' attempts to sidestep the bankruptcy court's determinations.

CONCLUSION

For the reasons set forth above, the motion to withdraw the reference should be denied.

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