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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (SMB) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.), Defendant.	Adv. Pro. No. 11-02760 (SMB)

TRUSTEE'S STATEMENT OF ISSUES TO BE PRESENTED
AND DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD ON APPEAL

Irving H. Picard (the "Trustee"), as trustee of the substantively consolidated estate of Bernard L. Madoff Investment Securities LLC under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa, *et seq*., and Bernard L. Madoff, individually, hereby submits, pursuant to Rule 8009 of the Federal Rules of Bankruptcy Procedure and Rule 8009-1 of the Local Bankruptcy Rules for the Southern District of New York, this statement of issues to be presented and designation of items to be included in the record on appeal with respect to the Trustee's appeal in the above captioned adversary proceeding (the "Adversary Proceeding") of the Stipulated Final Order Granting Motion to Dismiss Complaint (the "Final Judgment," a copy of which is annexed hereto as Exhibit 1)[1] before the United States Court of Appeals for the Second Circuit.[2]

I. Statement of Issues to be Presented

1. Whether and in what circumstances SIPA and the Bankruptcy Code permit the recovery of property fraudulently transferred by the debtor when it has been subsequently transferred in transactions with allegedly extraterritorial components.

2. Whether the comity of nations independently bars recovery of such property as otherwise authorized by SIPA and the Bankruptcy Code.

II. Designation of Items to be Included in the Record on Appeal

The Trustee designates for inclusion in the record on appeal the items listed in Appendix A, the pertinent docket entries filed in this Adversary Proceeding, including parallel citations to

[1] Memorandum Decision Regarding Claims to Recover Foreign Subsequent Transfers of the Bankruptcy Court (Bernstein, J.), dated November 22, 2016 (attached as Exhibit A to the Final Judgment and annexed hereto as Exhibit 1). *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re BLMIS)*, Adv. Pro. No. 08-01789 (SMB) (Bankr. S.D.N.Y. Nov. 22, 2016), ECF No. 14495.

[2] On March 14, 2017, the Trustee filed a Request for Certification of Judgment for Direct Appeal to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 158(d)(2) and Fed. R. Bankr. P. 8006(f) in this Court. *Picard v. ABN AMRO Bank N.V.*, Adv. Pro. No. 11-02760 (SMB) (Bankr. S.D.N.Y.), ECF Nos. 77, 78. Defendant ABN AMRO Bank N.V. is the only defendant with dismissed claims pursuant to the Memorandum Decision that did not agree to joint certification for direct appeal to the Second Circuit. The Trustee's Request for Certification is currently pending before this Court.

the main docket, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re BLMIS)*, Adv. Pro. No. 08-01789 (SMB) (Bankr. S.D.N.Y.).

The Trustee designates for inclusion in the record on appeal the items listed in Appendix B, the pertinent docket entries filed in *Picard v. Harley Int'l (Cayman) Ltd.*, Adv. Pro. No. 09-01187 (SMB) (Bankr. S.D.N.Y.), which are incorporated by reference in the various pleadings filed in this Adversary Proceeding or are otherwise pertinent to the appeal of the Final Judgment.

The Trustee designates for inclusion in the record on appeal the items listed in Appendix C, the pertinent docket entries filed in the United States District Court for the Southern District of New York, *Picard v. ABN AMRO Bank N.V.*, No. 12-cv-01939 (JSR) (S.D.N.Y.) and *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y.), in connection with and following withdrawal of the automatic bankruptcy reference of this Adversary Proceeding pursuant to 28 U.S.C. § 157 (the "District Court Designations"). Copies of the District Court Designations listed on Appendix C are annexed hereto as Exhibits 2–26.

Each designated item on Appendices A through C shall also include any and all exhibits and documents annexed to or referenced within such items.

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Dated: March 27, 2017
New York, New York

By: /s/ Torello H. Calvani

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Appendix A
***Picard v. ABN AMRO Bank N.V.*, No. 11-02760**
Bankruptcy Court Designations

Designation Number	Date	ECF Number (APN 11-02760)	ECF Number (APN 08-01789)	Docket Text
1	3/14/2017	78	15230	Petition Requesting Direct Appeal to Circuit Court */Memorandum of Law in Support of Trustee's Request for Certification of Judgment for Direct Appeal to the United States Court of Appeals for the Second Circuit Pursuant to 28 U.S.C. 158(d) 2 and Fed.R. Bank. P. 8006(f)* (related document(s)77) filed by David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Attachments: # 1 Exhibit 1 - Final Judgment of Bankruptcy Court # 2 Exhibit 2 - Proposed Order)(Sheehan, David) (Entered: 03/14/2017)
2	3/14/2017	77	15229	Petition Requesting Direct Appeal to Circuit Court */Notice of Trustee's Request for Certification of Judgment for Direct Appeal to the United States Court of Appeals for the Second Circuit Pursuant to 28 U.S.C. 158(d) 2 and Fed.R. Bank. P. 8006(f)* (related document(s)75, 74) filed by David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Sheehan, David) (Entered: 03/14/2017)
3	3/14/2017	75	15228	Notice of Appeal (related document(s)74) filed by Torello H. Calvani on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. Appellant Designation due by 3/30/2017, (Attachments: # 1 Exhibit 1 Final Judgement of Bankruptcy Court # 2 Exhibit 2 7/6/2014 Opinion and Order of District Court # 3 Exhibit 3 5/11/2013 Order of District Court # 4 Exhibit 4 6/6/2012 Order of District Court)(Calvani, Torello) (Entered: 03/16/2017)
4	3/3/2017	74	15138	So Ordered Stipulation Signed On 3/3/2017. Re: Final Order Granting Motion To Dismiss Complaint (Barrett, Chantel) (Entered: 03/03/2017)
5	4/7/2016	–	13051	Letter to Judge Bernstein regarding Extraterritoriality Briefing Supplemental Authority Filed by David J. Sheehan on behalf of Irving H. Picard. (Sheehan, David) (Entered: 04/07/2016)
6	2/17/2016	–	12798	Transcript regarding Hearing Held on 12/16/2015 10:33 AM RE: Motion to Allow - Trustees Fourth Omnibus Motion to Overrule Objections of Claimants Who Invested More than They Withdrew; Motion to Allow - Trustees Fifth Omnibus Motion to Disallow Claims and Overrule Objections of Claimants Who Have No Net Equity;Omnibus Extraterritoriality Motion. Remote electronic access to the transcript is restricted until 5/31/2016. The transcript may be viewed at the Bankruptcy Court Clerks Office. [Transcription Service Agency: Veritext Legal Solutions.]. (See the Courts Website for contact information for the Transcription Service Agency.). Notice of Intent to Request Redaction Deadline Due By 3/8/2016. Statement of Redaction Request Due By 3/22/2016. Redacted Transcript Submission Due By 4/1/2016. Transcript access will be restricted through 5/31/2016. (Ortiz, Carmen) Modified on 3/14/2016 to correct hearing date(Acosta, Annya). (Entered: 03/09/2016)
7	12/15/2015	–	12270	Letter / December 15, 2015 Letter to Judge Bernstein Regarding Extraterritoriality Proceedings Filed by Thomas L. Long on behalf of Irving H. Picard. (Long, Thomas) (Entered: 12/15/2015)
8	12/15/2015	–	12259	Letter to Judge Stuart M. Bernstein Re: Order Concerning Further Proceedings on Extraterritorialty Motion and Trustee's Onmibus Motion for Leave to Replead and for Limited Discovery, As Amended Filed by Robinson B. Lacy on behalf of Banque J. Safra (Suisse) S.A.. (Lacy, Robinson) (Entered: 12/15/2015)
9	11/20/2015	64	12081	Notice of Hearing on Defendants' Motion to Dismiss Based on Extraterritoriality and Trustee's Omnibus Motion For Leave to Replead filed by David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. with hearing to be held on 12/16/2015 at 11:00 AM at Courtroom 723 (SMB) (Attachments: # 1 Exhibit 1)(Sheehan, David) (Entered: 11/20/2015)
10	10/7/2015	–	11696	Letter Re: Extraterritoriality Motion Filed by Robinson B. Lacy on behalf of Banque J. Safra (Suisse) S.A.. (Lacy, Robinson) (Entered: 10/07/2015)
11	9/30/2015	63	11542	Reply to Motion Consolidated Supplemental Memorandum of Law in Support of Transferee Defendants' Motion to Dismiss Based on Extraterritoriality filed by Michael S. Feldberg on behalf of ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.). (Feldberg, Michael) (Entered: 09/30/2015)
12	9/30/2015	62	11568	Reply to Motion Supplemental Memorandum of Law in Support of ABN AMRO N.V.'s Motion to Dismiss Based on Extraterritoriality filed by Michael S. Feldberg on behalf of ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.). (Feldberg, Michael) (Entered: 09/30/2015)
13	6/27/2015	58	10351	Statement /Trustee's Proffered Allegations Pertaining to the Extraterritoriality Issue as to ABN AMRO Bank N.V. (Presently Known as the Royal Bank of Scotland, N.V.) (related document(s)56) filed by David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Sheehan, David) (Entered: 06/27/2015)

Appendix A
***Picard v. ABN AMRO Bank N.V.*, No. 11-02760**
Bankruptcy Court Designations

Designation Number	Date	ECF Number (APN 11-02760)	ECF Number (APN 08-01789)	Docket Text
14	6/27/2015	57	10350	Response /Addendum to the Trustee's Opposition on the Extraterritoriality Issue for ABN AMRO Bank N.V. (Presently Known as the Royal Bank of Scotland, N.V.) (related document(s)56) filed by David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Sheehan, David) (Entered: 06/27/2015)
15	6/27/2015	56	10287	Opposition Brief /Trustee's Memorandum of Law in Opposition to the Transferee Defendants' Motion to Dismiss Based on Extraterritoriality and in Further Support of Trustee's Motion for Leave to Amend Complaints (related document(s)26) filed by David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Attachments: # 1 Exhibit 1 # 2 Exhibit 2) (Sheehan, David) (Entered: 06/27/2015)
16	4/1/2015	–	9720	So Ordered Third Stipulation Signed On 3/31/2015. Re: Modifying The Order Concerning Further Proceedings OnExtraterritoriality Motion And Trustees Omnibus Motion For Leave To Replead And For Limited Discovery (Greene, Chantel) (Entered: 04/01/2015)
17	3/19/2015	–	9706	Transcript regarding Hearing Held on 3/18/2015 2:05PM RE: Conference re Confidentiality Issues Related to Extraterritoriality Submission. Remote electronic access to the transcript is restricted until 6/17/2015. The transcript may be viewed at the Bankruptcy Court Clerks Office. [Transcription Service Agency: Veritext Legal Solutions.]. (See the Courts Website for contact information for the Transcription Service Agency.). Notice of Intent to Request Redaction Deadline Due By 3/26/2015. Statement of Redaction Request Due By 4/9/2015. Redacted Transcript Submission Due By 4/20/2015. Transcript access will be restricted through 6/17/2015. (Ortiz, Carmen) (Entered: 03/31/2015)
18	3/17/2015	54	9504	Letter /Trustee's Supplemental Letter Regarding Confidentiality Designations Affecting The Trustees Extraterritoriality Submission (related document(s)50) Filed by Karin Scholz Jenson on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Scholz Jenson, Karin) (Entered: 03/17/2015)
19	3/10/2015	52	9449	Notice of Hearing /Notice of Conference On Trustee's Letter Regarding Confidentiality Designations Affecting the Trustee's Extraterritoriality Submission (related document(s)50) filed by Karin Scholz Jenson on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. with hearing to be held on 3/18/2015 at 02:00 PM at Courtroom 723 (SMB) (Scholz Jenson, Karin) (Entered: 03/10/2015)
20	3/4/2015	50	9413	Letter Regarding Confidentiality Designations Affecting The Trustees Extraterritoriality Submission Filed by Regina Griffin on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Griffin, Regina) (Entered: 03/04/2015)
21	3/2/2015	–	9542	Transcript regarding Hearing Held on 11/19/2014 9:59AM RE: Hearing on presentment of order concerning further proceedings on extraterritorality motion and trustee's omnibus motion for leave to replead and for limited discovery. Remote electronic access to the transcript is restricted until 6/1/2015. The transcript may be viewed at the Bankruptcy Court Clerks Office. [Transcription Service Agency: VERITEXT REPORTING COMPANY.]. (See the Courts Website for contact information for the Transcription Service Agency.). Notice of Intent to Request Redaction Deadline Due By 3/9/2015. Statement of Redaction Request Due By 3/23/2015. Redacted Transcript Submission Due By 4/2/2015. Transcript access will be restricted through 6/1/2015. (Ortiz, Carmen) (Entered: 03/20/2015)
22	2/24/2015	–	9350	Second Stipulation And Order Signed On 2/24/2015 Re: Modifying The Order Concerning Further Proceedings OnExtraterritoriality Motion And Trustees Omnibus Motion For Leave To Replead And For Limited Discovery . (Greene, Chantel) (Entered: 02/24/2015)
23	1/14/2015	–	8990	So Ordered Stipulation Signed On 1/13/2015. Re: Modifying TheOrder Concerning Further Proceedings OnExtraterritoriality Motion And Trustees Omnibus Motion For Leave To Replead And For Limited Discovery (Greene, Chantel) (Entered: 01/14/2015)
24	12/31/2014	47	8903	Memorandum of Law Supplemental Memorandum of Law in Further Support of Extraterritoriality Motion filed by Michael S. Feldberg on behalf of ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.). (Feldberg, Michael) (Entered: 12/31/2014)

Appendix A
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Bankruptcy Court Designations

Designation Number	Date	ECF Number (APN 11-02760)	ECF Number (APN 08-01789)	Docket Text
25	12/18/2014	46	8800	So Ordered Order Signed On 12/10/2014, Re: Concerning Further Proceedings On Extraterritoriality Motion And Trustees Omnibus Motion For Leave To Replead And For Limited Discovery (Richards, Beverly). (Entered: 12/18/2014)
26	12/2/2014	44	8630	Notice of Presentment of Order Concerning Further Proceedings on Extraterritoriality Motion and Trustee's Omnibus Motion for Leave to Replead and for Limited Discovery and Opportunity for Hearing (related document(s)35) filed by Regina Griffin on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. with presentment to be held on 12/10/2014 at 12:00 PM at Courtroom 723 (SMB) Objections due by 12/5/2014, (Attachments: # 1 Exhibit A # 2 Exhibit B)(Griffin, Regina) (Entered: 12/02/2014)
27	11/18/2014	42	8500	Statement /Trustee's Statement regarding Amendments to Exhibits to Proposed Order Concerning Further Proceedings on Extraterritoriality Motion and Trustee's Omnibus Motion for Leave to Replead and for Limited Discovery (related document(s)35) filed by Regina Griffin on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. with hearing to be held on 11/19/2014 at 10:00 AM at Courtroom 723 (SMB) (Attachments: # 1 Exhibits 1-4) (Griffin, Regina) (Entered: 11/18/2014)
28	11/12/2014	40	8440	Response /Trustee's Response to Limited Objections to Proposed Order Concerning Further Proceedings on Extraterritoriality Motion and Trustees Omnibus Motion for Leave to Replead and for Limited Discovery (related document(s)35) filed by Regina Griffin on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. with hearing to be held on 11/19/2014 at 10:00 AM at Courtroom 723 (SMB) (Griffin, Regina) (Entered: 11/12/2014)
29	11/11/2014	–	8636	Transcript regarding Hearing Held on 9/17/2014 1:32PM RE: Status Conference re Affect Dist. Ct. Extraterritoriality Order; Becker & Poliakoff LLP Motions to Dismiss and Motions to Dismiss Listed on Appendix A to the Trustees February 20 Letter to the Court, as amended. Remote electronic access to the transcript is restricted until 2/9/2015. The transcript may be viewed at the Bankruptcy Court Clerks Office. [Transcription Service Agency: VERITEXT REPORTING COMPANY.]. (See the Courts Website for contact information for the Transcription Service Agency.). Notice of Intent to Request Redaction Deadline Due By 11/18/2014. Statement of Redaction Request Due By 12/2/2014. Redacted Transcript Submission Due By 12/12/2014. Transcript access will be restricted through 2/9/2015. (Ortiz, Carmen) (Entered: 12/02/2014)
30	11/7/2014	37	8390	Notice of Hearing on Order Concerning Further Proceedings on Extraterritoriality Motion and Trustee's Omnibus Motion for Leave to Replead and for Limited Discovery and Opportunity for Hearing (related document(s)35) filed by David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. with hearing to be held on 11/19/2014 at 10:00 AM at Courtroom 723 (SMB) (Sheehan, David) (Entered: 11/07/2014)
31	11/3/2014	–	8345	Statement of Defendants Legacy Capital Ltd., Isaac Jimmy Mayer, Rafael Mayer, David Mayer, Khronos LLC, Khronos Capital Research LLC and Montpellier Resources Ltd. in Response to Proposed Order Concerning Further Proceedings on Extraterritoriality Motion and Trustee's Omnibus Motion for Leave to Replead and for Limited Discovery (related document(s)8249) filed by Eric Fisher on behalf of Khronos Capital Research LLC, Khronos LLC, David Mayer, Rafael Mayer. (Fisher, Eric) (Entered: 11/03/2014)
32	11/3/2014	–	8343	Objection to Motion LIMITED OBJECTION OF MERRILL LYNCH INTERNATIONAL TO THE TRUSTEES PRESENTMENT OF ORDER CONCERNING FURTHER PROCEEDINGS ON EXTRATERRITORIALITY MOTION AND TRUSTEES OMNIBUS MOTION FOR LEAVE TO REPLEAD AND FOR LIMITED DISCOVERY (related document(s)7834) filed by Anthony D. Boccanfuso on behalf of Merrill Lynch International. (Boccanfuso, Anthony) (Entered: 11/03/2014)

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Designation Number	Date	ECF Number (APN 11-02760)	ECF Number (APN 08-01789)	Docket Text
33	11/3/2014	–	8342	Objection / Limited Objection of UBS Defendants to the Trustee's Presentment of Order Concerning Further Proceedings on Extraterritoriality Motion and Trustee's Omnibus Motion for Leave to Replead and for Limited Discovery (related document(s)8249) filed by Marshall R. King on behalf of UBS Third Party Management Company SA, UBS Fund Services (Luxembourg) SA, UBS (Luxembourg) S.A., UBS AG. (King, Marshall) (Entered: 11/03/2014)
34	10/23/2014	35	8249	Notice of Presentment of Order Concerning Further Proceedings on Extraterritoriality Motion and Trustee's Omnibus Motion for Leave to Replead and for Limited Discovery and Opportunity for Hearing filed by David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Attachments: # 1 Exhibit A)(Sheehan, David) (Entered: 10/23/2014)
35	10/21/2014	33	8229	Notice of Adjournment of Hearing on Trustee's Omnibus Motion for Leave to Replead and for Limited Discovery filed by Regina Griffin on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Griffin, Regina) (Entered: 10/21/2014)
36	10/2/2014	30	8060	Letter / October 2, 2014 Letter to Judge Bernstein regarding Trustee's Omnibus Motion for Leave to Replead and Defendants Request for Further Proceedings on Extraterritoriality Motion (related document(s)26) filed by Regina Griffin on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Griffin, Regina) (Entered: 10/02/2014)
37	8/28/2014	28	7828	Declaration of Regina Griffin in Support of the Trustee's Omnibus Motion for Leave to Replead Pursuant to Fed. R. Civ. P. 15(a) and Court Order Authorizing Limited Discovery Pursuant to Fed. R. Civ. P. 26(d)(1) (related document(s)26, 27) filed by Regina Griffin on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. with hearing to be held on 10/22/2014 (check with court for location) Objections due by 10/10/2014, (Attachments: # 1 Exhibit 1 # 2 Exhibit A # 3 Exhibit B # 4 Exhibit C # 5 Exhibit D # 6 Exhibit E) (Griffin, Regina) (Entered: 08/28/2014)
38	8/28/2014	27	7827	Memorandum of Law /Trustee's Memorandum of Law in Support of Omnibus Motion for Leave to Replead Pursuant to Fed. R. Civ. P. 15(a) and Court Order Authorizing Limited Discovery Pursuant to Fed. R. Civ. P. 26(d)(1) (related document(s)26) filed by Regina Griffin on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Attachments: # 1 Exhibit 1) (Griffin, Regina) (Entered: 08/28/2014)
39	8/28/2014	26	7826	Motion to Allow/Notice of Motion for Leave to Replead Pursuant to Fed. R. Civ. P. 15(a) and Court Order Authorizing Limited Discovery Pursuant to Fed. R. Civ. P. 26(d)(1) filed by Regina Griffin on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC with hearing to be held on 10/22/2014 (check with court for location) Objections due by 10/10/2014,. (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3) (Griffin, Regina) (Entered: 08/28/2014)
40	8/22/2014	–	7766	Letter Requesting Conference filed by Robinson B. Lacy on behalf of Banque J. Safra (Suisse) S.A.. (Lacy, Robinson) (Entered: 08/22/2014)
41	7/30/2014	24	–	Motion to Withdraw the Reference Returned to Bankruptcy Court, See Case No. 08-1789 Doc #7546 (White, Greg) (Entered: 07/30/2014)
42	7/29/2014	–	7547	Order of U.S. District Court Judge Jed S. Rakoff signed on 7/7/2014. In sum, the Court finds that section 550(a) does not apply extraterritorially to allow for the recovery of subsequent transfers received abroad by a foreign transferee from a foreign transferor. Therefore, the Trustee's recovery claims are dismissed to the extent that they seek to recover purely foreign transfers. Except to the extent provided in other orders, the Court directs that the following adversary proceedings be returned to the Bankruptcy Court for further proceedings consistent with this Opinion and Order: (1) those cases listed in Exhibit A of item number 167 on the docket of 12-mc-115; and (2) those cases listed in the schedule attached to item number 468 on the docket of 12-mc-115 that were designated as having been added to the "extraterritoriality" consolidated briefing. SO ORDERED. (Savinon, Tiffany) (Entered: 07/29/2014)
43	5/13/2013	14	–	Notice of Dismissal / Notice of Voluntary Dismissal of ABN AMRO Bank (Switzerland) AG Without Prejudice from Adversary Proceeding filed by David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Sheehan, David) (Entered: 05/13/2013)

Appendix A
***Picard v. ABN AMRO Bank N.V.*, No. 11-02760**
Bankruptcy Court Designations

Designation Number	Date	ECF Number (APN 11-02760)	ECF Number (APN 08-01789)	Docket Text
44	6/8/2012	–	4883	[PART 1] Order of U.S. District Court Judge Jed S. Rakoff signed on 6/6/2012. The reference of the Adversary Proceedings listed in Exhibit A is withdrawn, in part, from the Bankruptcy Court to this Court solely with respect to the Extraterritoriality Defendants for the limited purpose of hearing and determining whether SIP A and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate or mediate foreign transferees. Except as otherwise provided herein or in other orders of this Court, the reference to the Bankruptcy Court is otherwise maintained for all other purposes. The Trustee and SIPC are deemed to have raised, in response to all pending motions for withdrawal of the reference based on the Extraterritoriality Issue, all arguments previously raised by either or both of them in opposition to all such motions granted by the Extraterritoriality Withdrawal Ruling, and such objections or arguments are deemed to be overruled, solely with respect to the Extraterritoriality Issue, for the reasons stated in the Extraterritoriality Withdrawal Ruling. All objections that could be raised by the Trustee and/or SIPC to the pending motions to withdraw the reference in the Adversary Proceedings, and the defenses and responses thereto that may be raised by the affected defendants, are deemed preserved on all matters. On or before July 13, 2012, the Extraterritoriality Defendants shall file a single consolidated motion to dismiss pursuant to Fed. R. Civ. P. 12 (made applicable to the Adversary Proceeding by Fed. R. Bankr. P. 7012) and a single consolidated supporting memorandum of law, not to exceed forty (40) pages (together, the "Extraterritoriality Motion to Dismiss"). The Trustee and SIPC shall each file a memorandum of law in opposition to the Extraterritoriality Motion to Dismiss, not to exceed forty (40) pages each, addressing the Extraterritoriality Withdrawal Ruling Issue (the "Trustee's Opposition") on or before August 17, 2012. Young Conaway Stargatt & Taylor, LLP, which is conflicts counsel for the Trustee, and Windels Marx Lane & Mittendorf, LLP, which is special counsel to the Trustee, each may file a joinder, not to exceed two (2) pages (excluding exhibits identifying the relevant adversary proceedings), to the Trustee's Opposition, on behalf of the Trustee in certain of the adversary proceedings listed on Exhibit A hereto on or before August 17, 2012. In either case, the respective joinders may only specify what portions of the Trustee's Opposition are joined and shall not make or offer any additional substantive argument. The Extraterritoriality Defendants shall file one consolidated reply brief, not to exceed twenty (20) pages, on or before August 31, 2012 (the "Reply Brier'). [PART 2] In the event the Trustee files an amended complaint (the "Amended Complaint") in any of the Adversary Proceedings after the Extraterritoriality Motion to Dismiss is filed, the Reply Brief shall include a reference (by civil action number and docket number only) to a representative Amended Complaint filed by the Trustee against Extraterritoriality Defendants. Any further requirement that the Amended Complaints subject to the Extraterritoriality Motion to Dismiss be identified or filed is deemed waived and satisfied. In the event the Trustee files an Amended Complaint, he shall, at the time the Amended Complaint is filed, provide the Extraterritoriality Defendants a blackline reflecting the changes made in the Amended Complaint from the then operative complaint. The Court will hold oral argument on the Extraterritoriality Motion to Dismiss on September 21, 2012, at 4:00 p.m. (the "Hearing Date"). On or before August 31, 2012, the Extraterritoriality Defendants shall designate one lead counsel to advocate their position at oral argument on the Hearing Date, but any other attorney who wishes to be heard may appear and so request. The caption displayed on this Order shall be used as the caption for all pleadings, notices and briefs to be filed pursuant to this Order. All communications and documents (including drafts) exchanged between and among any of the defendants in any of the adversary proceedings, and/or their respective attorneys, shall be deemed to be privileged communications and/or work product, as the case may be, subject to a joint interest privilege. This Order is without prejudice to any and all grounds for withdrawal of the reference (other than the Extraterritoriality Issue) raised in the Adversary Proceedings by the Extraterritoriality Defendants and any matter that cannot properly be raised or resolved on a Rule 12 motion, all of which are preserved. Nothing in this Order shall: (a) waive or resolve any issue not specifically raised in the Extraterritoriality Motion to Dismiss; (b) waive or resolve any issue raised or that could be raised by any party other than with respect to the Extraterritoriality Issue, including related issues that cannot be resolved on a motion under Fed. R. Civ. P. 12; or (c) notwithstanding Fed. R. Civ. P. 12(g)(2) or Fed. R. Bankr. P. 7012(g)(2), except as specifically raised in the Extraterritoriality Motion to Dismiss, limit, restrict or impair any defense or argument that has been raised or could be raised by any Extraterritoriality Defendant in a motion to dismiss under Fed. R. Civ. P. 12 or Fed. R. Bankr. P. 7012, or any other defense or right of any nature available to any Extraterritoriality Defendant (including, without limitation, all defenses based on lack of personal jurisdiction or insufficient service of process), or any argument or defense that could be raised by the Trustee or SIPC in response thereto. Nothing in this Order shall constitute an agreement or consent by any Extraterritoriality Defendant to pay the fees and expenses of any attorney other than such defendant's own retained attorney. This paragraph shall not affect or compromise any rights of the Trustee or SIPC. [PART 3] This Order is without prejudice to and preserves all objections of the Trustee and SIPC to timely-filed motions for withdrawal of the reference currently pending before this Court (other than the withdrawal of the reference solely with respect to the Extraterritoriality Issue) 'AJjth respect to the Adversary Proceedings, and the defenses and responses thereto that may be raised by the affected defendants, are deemed preserved on all matters. The procedures established by this Order, or by further Order of this Court, shall constitute the sole and exclusive procedures for determination of the Extraterritoriality Issue in the Adversary Proceedings (except for any appellate practice resulting from such determination), and this Court shall be the forum for such determination. To the extent that briefing or argument schedules were previously established with respect to the Extraterritoriality Issue in any of the Adversary Proceedings, this Order supersedes all such schedules solely with respect to the Extraterritoriality Issue. To the extent that briefing or argument schedules are prospectively established with respect to motions to withdraw the reference or motions to dismiss in any of the Adversary Proceedings, the Extraterritoriality Issue shall be excluded from such briefing or argument and such order is vacated. For the avoidance of doubt, to the extent any of the Extraterritoriality Defendants have issues other than the Extraterritoriality Issue or issues set forth in the Common Briefing Order that were withdrawn, those issues will continue to be briefed on the schedule previously ordered by the Court. Except as stated in this paragraph, this Order shall not be deemed or construed to modify, withdraw or reverse any prior Order of the Court that granted withdrawal of the reference in any Adversary Proceeding for any reason.(Savinon, Tiffany) (Entered: 06/08/2012)

Appendix A
***Picard v. ABN AMRO Bank N.V.*, No. 11-02760**
Bankruptcy Court Designations

Designation Number	Date	ECF Number (APN 11-02760)	ECF Number (APN 08-01789)	Docket Text
45	3/14/2012	8	–	Declaration of Michael S. Feldberg in Support of ABN AMRO BANK N.V.'s Motion to Withdraw the Bankruptcy Court Reference (related document(s)6) filed by Michael S. Feldberg on behalf of ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.). (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F) (Feldberg, Michael) (Entered: 03/14/2012)
46	3/14/2012	7	–	Memorandum of Law of ABN AMRO BANK N.V. in Support of its Motion to Withdraw the Bankruptcy Court Reference (related document(s)6) filed by Michael S. Feldberg on behalf of ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.). (Feldberg, Michael) (Entered: 03/14/2012)
47	3/14/2012	6	–	Motion to Withdraw the Reference filed by Michael S. Feldberg on behalf of ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.). (Feldberg, Michael) (Entered: 03/14/2012)
48	10/6/2011	1	–	Adversary case 11-02760. Complaint against ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.), ABN AMRO BANK (SWITZERLAND) AG (f/k/a ABN AMRO BANK (SCHWEIZ)) . Nature(s) of Suit: (14 (Recovery of money/property - other)) Filed by David J. Sheehan, David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H) (Sheehan, David) (Filing fee $250.00, Receipt # 635 CHARGE TO THE ESTATE) Modified on 10/6/2011 (Slinger, Kathy). (Entered: 10/06/2011)

Appendix B
***Picard v. Harley Int'l (Cayman) Ltd.*, Adv. Pro. No. 09-01187**
Bankruptcy Court Designations

Designation Number	Date	Adv. Pro. No.	ECF Number	Docket Text
49	11/10/2010	09-01187	15	Order signed on 11/10/2010 Granting Entry of Summary and Default Judgments Against Harley International (Cayman) Limited (Related Doc # 8). (Saenz De Viteri, Monica) (Entered: 11/10/2010)
50	10/26/2010	09-01187	12	Statement Of Facts As To Which There Is No Genuine Issue To Be Tried (Local Bankruptcy Rule 7056-1) (related document(s) 8) filed by Marc E. Hirschfield on behalf of Irving H. Picard. with hearing to be held on 11/10/2010 at 10:00 AM at Courtroom 623 (BRL) Objections due by 11/3/2010, (Hirschfield, Marc) (Entered: 10/26/2010)
51	10/26/2010	09-01187	11	Memorandum of Law In Support Of The Trustee"s Motion For Default And Summary Judgments Against Harley International (Cayman) Limited (related document(s) 8) filed by Marc E. Hirschfield on behalf of Irving H. Picard. Objections due by 11/3/2010, (Hirschfield, Marc) (Entered: 10/26/2010)
52	10/26/2010	09-01187	10	Affidavit Of Joseph Looby In Support Of The Trustee"s Motion For Default And Summary Judgments Against Harley International (Cayman) Limited (related document(s) 8) filed by Marc E. Hirschfield on behalf of Irving H. Picard. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5)(Hirschfield, Marc) (Entered: 10/26/2010)
53	10/26/2010	09-01187	9	Affidavit Of Elizabeth A. Scully In Support Of The Trustee"s Motion For Default And Summary Judgments Against Harley International (Cayman) Limited (related document(s) 8) filed by Marc E. Hirschfield on behalf of Irving H. Picard. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D)(Hirschfield, Marc) (Entered: 10/26/2010)
54	10/26/2010	09-01187	8	Motion for Default Judgment And Summary Judgments Against Harley International (Cayman) Limited filed by Marc E. Hirschfield on behalf of Irving H. Picard. with hearing to be held on 11/10/2010 at 10:00 AM at Courtroom 623 (BRL) Responses due by 11/3/2010, (Attachments: # 1 Notice of Motion# 2 Proposed Order) (Hirschfield, Marc) (Entered: 10/26/2010)
55	7/8/2009	09-01187	6	Clerk"s Entry of Default against Harley International (Cayman) Limited (related document(s) 5) (Chou, Rosalyn) (Entered: 07/08/2009)
56	7/2/2009	09-01187	5	Motion for Default Judgment /Request to Enter Default filed by Marc E. Hirschfield on behalf of Irving H. Picard. (Attachments: # 1 Affidavit Supporting Entry of Default# 2 Appendix Certificate of Service) (Hirschfield, Marc) (Entered: 07/02/2009)
57	5/12/2009	09-01187	1	Complaint against Harley International (Cayman) Limited . Nature(s) of Suit: (13 (Recovery of money/property - 548 fraudulent transfer)), (12 (Recovery of money/property - 547 preference)), (11 (Recovery of money/property - 542 turnover of property)) Filed by Irving H. Picard. (Attachments: # 1 Exhibit A) (Sheehan, David) (Entered: 05/12/2009)

Appendix C

***Picard v. ABN AMRO Bank N.V.*, No. 12-cv-01939 and *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115**

District Court Designations

Designation Number	Exhibit Number	Date	District Court Case Number	ECF Number	Docket Text
75	2	7/7/2014	12-cv-01939	22	OPINION AND ORDER: In sum, the Court finds that section 550(a) does not apply extraterritorially to allow for the recovery of subsequent transfers received abroad by a foreign transferee from a foreign transferor. Therefore, the Trustee's recovery claims are dismissed to the extent that they seek to recover purely foreign transfers. Except to the extent provided in other orders, the Court directs that the following adversary proceedings be returned to the Bankruptcy Court for further proceedings consistent with this Opinion and Order: (1) those cases listed in Exhibit A of item number 167 on the docket of 12-mc-115; and (2) those cases listed in the schedule attached to item number 468 on the docket of 12-mc-115 that were designated as having been added to the "extraterritoriality" consolidated briefing. SO ORDERED. (Signed by Judge Jed S. Rakoff on 7/6/2014) (kgo) (Entered: 07/07/2014)
76	3*	7/12/2012	12-cv-01939	17	ORDER: BASED ON THE FOREGOING, IT IS HEREBY ORDERED AS FOLLOWS: The Prior Administrative Order is hereby amended and superseded by this Order and the Adversary Proceedings listed on Exhibit A are incorporated by reference herein: The motions to withdraw the reference in the Adversary Proceedings identified on Exhibit B hereto are governed by the Consolidated Briefing Orders and Permissive Withdrawal Orders and shall be resolved through the common briefing ordered therein; The motions to withdraw the reference in the Adversary Proceedings identified on Exhibit C hereto, which raised permissive withdrawal arguments that were previously deferred by prior orders of this Court, are governed by the Permissive Withdrawal Orders and, for the reasons stated therein, the Court regards the permissive withdrawal arguments made in such motions as subsumed by the consolidated briefing on the issues presented by the Stern Order; Accordingly, the Court will resolve the permissive withdrawal issues raised in the motions to withdraw the reference in the Adversary Proceedings identified on Exhibit C when the Court decides the motion described in the Stern Order; The prior consent orders entered by this Court with respect to the Adversary Proceedings identified on Exhibit C hereto are hereby vacated and superseded by this Order; The resolution of the issues covered by Consolidated Briefing Orders and Permissive Withdrawal Orders shall govern the motions to withdraw the reference pending in the Adversary Proceedings and no further action is required with respect to such motions; Any individual briefing schedules previously established with respect to motions to withdraw the reference pending in the Adversary Proceedings are hereby vacated. (Signed by Judge Jed S. Rakoff on 7/11/2012) (cd) (Entered: 07/27/2012)

* (12-cv-01939) ECF No. 17 was entered on both district court dockets for the individual defendant and main proceedings. It is marked "not available" on (12-cv-01939) individual case docket; please see this document duplicate at (12-MC-00115) ECF No. 244, Ex. 23.

Appendix C
***Picard v. ABN AMRO Bank N.V.*, No. 12-cv-01939 and *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115**
District Court Designations

Designation Number	Exhibit Number	Date	District Court Case Number	ECF Number	Docket Text
77	4	6/7/2012	12-cv-01939	15	[PART 1] ORDER: The reference of the Adversary Proceedings listed in Exhibit A is withdrawn, in part, from the Bankruptcy Court to this Court solely with respect to the Extraterritoriality Defendants for the limited purpose of hearing and determining whether SIP A and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate or mediate foreign transferees. Except as otherwise provided herein or in other orders of this Court, the reference to the Bankruptcy Court is otherwise maintained for all other purposes. The Trustee and SIPC are deemed to have raised, in response to all pending motions for withdrawal of the reference based on the Extraterritoriality Issue, all arguments previously raised by either or both of them in opposition to all such motions granted by the Extraterritoriality Withdrawal Ruling, and such objections or arguments are deemed to be overruled, solely with respect to the Extraterritoriality Issue, for the reasons stated in the Extraterritoriality Withdrawal Ruling. All objections that could be raised by the Trustee and/or SIPC to the pending motions to withdraw the reference in the Adversary Proceedings, and the defenses and responses thereto that may be raised by the affected defendants, are deemed preserved on all matters. On or before July 13, 2012, the Extraterritoriality Defendants shall file a single consolidated motion to dismiss pursuant to Fed. R. Civ. P. 12 (made applicable to the Adversary Proceeding by Fed. R. Bankr. P. 7012) and a single consolidated supporting memorandum of law, not to exceed forty (40) pages (together, the "Extraterritoriality Motion to Dismiss"). The Trustee and SIPC shall each file a memorandum of law in opposition to the Extraterritoriality Motion to Dismiss, not to exceed forty (40) pages each, addressing the Extraterritoriality Withdrawal Ruling Issue (the "Trustee's Opposition") on or before August 17, 2012. Young Conaway Stargatt & Taylor, LLP, which is conflicts counsel for the Trustee, and Windels Marx Lane & Mittendorf, LLP, which is special counsel to the Trustee, each may file a joinder, not to exceed two (2) pages (excluding exhibits identifying the relevant adversary proceedings), to the Trustee's Opposition, on behalf of the Trustee in certain of the adversary proceedings listed on Exhibit A hereto on or before August 17, 2012. In either case, the respective joinders may only specify what portions of the Trustee's Opposition are joined and shall not make or offer any additional substantive argument. [PART 2] The Extraterritoriality Defendants shall file one consolidated reply brief, not to exceed twenty (20) pages, on or before August 31, 2012 (the "Reply Brier'). In the event the Trustee files an amended complaint (the "Amended Complaint") in any of the Adversary Proceedings after the Extraterritoriality Motion to Dismiss is filed, the Reply Brief shall include a reference (by civil action number and docket number only) to a representative Amended Complaint filed by the Trustee against Extraterritoriality Defendants. Any further requirement that the Amended Complaints subject to the Extraterritoriality Motion to Dismiss be identified or filed is deemed waived and satisfied. In the event the Trustee files an Amended Complaint, he shall, at the time the Amended Complaint is filed, provide the Extraterritoriality Defendants a blackline reflecting the changes made in the Amended Complaint from the then operative complaint. The Court will hold oral argument on the Extraterritoriality Motion to Dismiss on September 21, 2012, at 4:00 p.m. (the "Hearing Date"). On or before August 31, 2012, the Extraterritoriality Defendants shall designate one lead counsel to advocate their position at oral argument on the Hearing Date, but any other attorney who wishes to be heard may appear and so request. The caption displayed on this Order shall be used as the caption for all pleadings, notices and briefs to be filed pursuant to this Order. All communications and documents (including drafts) exchanged between and among any of the defendants in any of the adversary proceedings, and/or their respective attorneys, shall be deemed to be privileged communications and/or work product, as the case may be, subject to a joint interest privilege. This Order is without prejudice to any and all grounds for withdrawal of the reference (other than the Extraterritoriality Issue) raised in the Adversary Proceedings by the Extraterritoriality Defendants and any matter that cannot properly be raised or resolved on a Rule 12 motion, all of which are preserved. Nothing in this Order shall: (a) waive or resolve any issue not specifically raised in the Extraterritoriality Motion to Dismiss; (b) waive or resolve any issue raised or that could be raised by any party other than with respect to the Extraterritoriality Issue, including related issues that cannot be resolved on a motion under Fed. R. Civ. P. 12; or (c) notwithstanding Fed. R. Civ. P. 12(g)(2) or Fed. R. Bankr. P. 7012(g)(2), except as specifically raised in the Extraterritoriality Motion to Dismiss, limit, restrict or impair any defense or argument that has been raised or could be raised by any Extraterritoriality Defendant in a motion to dismiss under Fed. R. Civ. P. 12 or Fed. R. Bankr. P. 7012, [PART 3] or any other defense or right of any nature available to any Extraterritoriality Defendant (including, without limitation, all defenses based on lack of personal jurisdiction or insufficient service of process), or any argument or defense that could be raised by the Trustee or SIPC in response thereto. Nothing in this Order shall constitute an agreement or consent by any Extraterritoriality Defendant to pay the fees and expenses of any attorney other than such defendant's own retained attorney. This paragraph shall not affect or compromise any rights of the Trustee or SIPC. This Order is without prejudice to and preserves all objections of the Trustee and SIPC to timely-filed motions for withdrawal of the reference currently pending before this Court (other than the withdrawal of the reference solely with respect to the Extraterritoriality Issue) 'AJjth respect to the Adversary Proceedings, and the defenses and responses thereto that may be raised by the affected defendants, are deemed preserved on all matters. The procedures established by this Order, or by further Order of this Court, shall constitute the sole and exclusive procedures for determination of the Extraterritoriality Issue in the Adversary Proceedings (except for any appellate practice resulting from such determination), and this Court shall be the forum for such determination. To the extent that briefing or argument schedules were previously established with respect to the Extraterritoriality Issue in any of the Adversary Proceedings, this Order supersedes all such schedules solely with respect to the Extraterritoriality Issue. To the extent that briefing or argument schedules are prospectively established with respect to motions to withdraw the reference or motions to dismiss in any of the Adversary Proceedings, the Extraterritoriality Issue shall be excluded from such briefing or argument and such order is vacated. For the avoidance of doubt, to the extent any of the Extraterritoriality Defendants have issues other than the Extraterritoriality Issue or issues set forth in the Common Briefing Order that were withdrawn, those issues will continue to be briefed on the schedule previously ordered by the Court. Except as stated in this paragraph, this Order shall not be deemed or construed to modify, withdraw or reverse any prior Order of the Court that granted withdrawal of the reference in any Adversary Proceeding for any reason. (Motions due by 7/13/2012., Responses due by 8/17/2012, Replies due by 8/31/2012., Oral Argument set for 9/21/2012 at 04:00 PM before Judge Jed S. Rakoff.) (Signed by Judge Jed S. Rakoff on 6/6/2012) (jfe) (Entered: 06/07/2012)

Appendix C
***Picard v. ABN AMRO Bank N.V.*, No. 12-cv-01939 and *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115**
District Court Designations

Designation Number	Exhibit Number	Date	District Court Case Number	ECF Number	Docket Text
78	5	3/16/2012	12-cv-01939	3	DECLARATION of Michael S. Feldberg in Support re: 1 MOTION TO WITHDRAW THE BANKRUPTCY REFERENCE. Bankruptcy Court Case Numbers: 11-2760A, 08-1789 (BRL). Document filed by ABN AMRO Bank N.V. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(bkar) (Entered: 03/16/2012)
79	6	3/16/2012	12-cv-01939	2	MEMORANDUM OF LAW in Support re: 1 MOTION TO WITHDRAW THE BANKRUPTCY REFERENCE. Bankruptcy Court Case Numbers: 11-2760A, 08-1789 (BRL). Document filed by ABN AMRO Bank N.V. (bkar) (Entered: 03/16/2012)
80	7	3/16/2012	12-cv-01939	1	MOTION TO WITHDRAW THE BANKRUPTCY REFERENCE. Bankruptcy Court Case Numbers: 11-2760A, 08-1789 (BRL).Document filed by ABN AMRO Bank N.V.(bkar) (Entered: 03/16/2012)
81	8	8/4/2014	12-mc-00115	557	ORDER: On July 10, 2014, the Court issued an Order directing counsel to parties with individual issues not addressed by the Court's decisions in the consolidated withdrawals to inform the Court by letter by July 18, 2014. See ECF No. 552. The Court received several such letters and addressed the issues they raised in separate Orders. Any remaining motions to withdraw the reference are hereby denied and all the adversary proceedings are returned to the Bankruptcy Court. The Clerk of Court is directed to close all the civil cases seeking to withdraw the reference related to this matter. (Signed by Judge Jed S. Rakoff on 8/1/2014) (kgo) (Entered: 08/04/2014)
82	9	7/7/2014	12-mc-00115	551	OPINION AND ORDER: In sum, the Court finds that section 550(a) does not apply extraterritorially to allow for the recovery of subsequent transfers received abroad by a foreign transferee from a foreign transferor. Therefore, the Trustee's recovery claims are dismissed to the extent that they seek to recover purely foreign transfers. Except to the extent provided in other orders, the Court directs that the following adversary proceedings be returned to the Bankruptcy Court for further proceedings consistent with this Opinion and Order: (1) those cases listed in Exhibit A of item number 167 on the docket of 12-mc-115; and (2) those cases listed in the schedule attached to item number 468 on the docket of 12-mc-115 that were designated as having been added to the "extraterritoriality" consolidated briefing. SO ORDERED. (Signed by Judge Jed S. Rakoff on 7/6/2014) (kgo) (Entered: 07/07/2014)
83	10	6/11/2013	12-mc-00115	473	ORDER: Accordingly, the clerk is hereby directed to docket the below-listed orders and/or decisions issued by the Court in connection with the consolidated proceedings as described below. The following orders shall be docketed in cases with respect to which "Stern v. Marshall"is listed in the final column of the schedules included as Exhibit B hereto: Order, No. 12 MC 115, ECF No. 4 (S.D.N.Y. Apr. 13, 2012); and Opinion and Order, No. 12 MC 115, ECF No. 427 (S.D.N.Y. Jan. 4, 2013). The following orders shall be docketed in cases with respect to which "Section 546(e)" is listed in the final column of the schedules included as Exhibit B hereto: Order, No. 12 MC 115, ECF No. 119 (S.D.N.Y. May 16, 2012); Order, No. 12 MC 115, ECF No. 439 (S.D.N.Y. Feb. 13, 2013); and Opinion and Order, No. 12 MC 115, ECF No. 460 (S.D.N.Y. Apr. 15, 2013).The following order shall be docketed in cases with respect to which "Extraterritoriality"is listed in the final column of the schedules included as Exhibit B hereto: Order Regarding Extraterritoriality Issues, No. 12 MC 115, ECF No. 167(S.D.N.Y. June 7, 2012). The following order shall be docketed in cases with respect to which "Good Faith" is listed in the final column of the schedules included as Exhibit B hereto: Order Regarding the "Good Faith" Standard, No. 12 MC 115, ECF No. 197(S.D.N.Y. June 25, 2012).The following orders shall be docketed in cases with respect to which "Section 550(a)" is listed in the final column of the schedules included as Exhibit B hereto: Order Regarding 11 U.S.C. § 550(a), No. 12 MC 115, ECF No. 314 (S.D.N.Y. Aug. 22, 2012); and Order Regarding 11 U.S.C. § 550(a), No. 12 MC 115, ECF No. 422 (S.D.N.Y.Dec. 12, 2012). The following orders shall be docketed in cases with respect to which "Section 502(d)" is listed in the final column of the schedules included as Exhibit B hereto: Order Regarding 11 U.S.C. § 502(d), No. 12 MC 115, ECF No. 155 (S.D.N.Y. June 1, 2012); and Order Regarding 11 U.S.C. § 502(d), No. 12 MC 115, ECF No. 435 (S.D.N.Y. Feb. 13, 2013). The following order shall be docketed in cases with respect to which "[Standing andSLUSA]"is listed in the final column of the schedules included as Exhibit B hereto: Order Regarding Standing and SLUSA Issues, No. 12 MC 115, ECF No. 114(S.D.N.Y. May 18, 2012). The following order shall be docketed in cases with respect to which "Antecedent Debt"is listed in the final column of the schedules included as Exhibit B hereto: Order Regarding Antecedent Debt Issues, No. 12 MC 115, ECF No. 107 (S.D.N.Y. May 16, 2012). (Signed by Judge Jed S. Rakoff on 6/5/2013) (js) Modified on 6/11/2013 (js). (Entered: 06/11/2013)
84	11	5/13/2013	12-mc-00115	468	ORDER: Accordingly, when future the Court issues future orders in any of the consolidated proceedings, the Court hereby directs the Clerk of the Court to docket the orders: (1) on the docket of 12-MC-115; (2) on the docket of the cases listed in the original schedule appended to the relevant consolidation order; and (3) on the docket of cases listed in the schedule appended to this order, to the extent that a given case was added to the relevant consolidated proceeding (as reflected in the final column for each case). (Signed by Judge Jed S. Rakoff on 5/11/2013) (js) (Entered: 05/13/2013)

Appendix C

***Picard v. ABN AMRO Bank N.V.* , No. 12-cv-01939 and *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)* , No. 12-mc-00115**

District Court Designations

Designation Number	Exhibit Number	Date	District Court Case Number	ECF Number	Docket Text
85	12	9/28/2012	12-mc-00115	358	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a ARGUMENT proceeding held on 9/21/12 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(McGuirk, Kelly) (Entered: 09/28/2012)
86	13	9/28/2012	12-mc-00115	357	TRANSCRIPT of Proceedings re: ARGUMENT held on 9/21/2012 before Judge Jed S. Rakoff. Court Reporter/Transcriber: Vincent Bologna, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 10/22/2012. Redacted Transcript Deadline set for 11/1/2012. Release of Transcript Restriction set for 1/2/2013.(McGuirk, Kelly) (Entered: 09/28/2012)
87	14	8/31/2012	12-mc-00115	323	NOTICE of Designation of Lead Counsel re: 167 Order, Set Deadlines/Hearings,,, ,. Document filed by Extraterritoriality Defendants Defined in the Consolidated Memorandum of Law in Support of the Extraterritoriality Defendants' Motion to Dismiss as Ordered by the Court on June 6, 2012. (Velie, Franklin) (Entered: 08/31/2012)
88	15	8/31/2012	12-mc-00115	322	REPLY MEMORANDUM OF LAW in Support re: 234 MOTION to Dismiss by Extraterritorial Defendants.. Document filed by Bank J. Safra (Gibraltar) Limited, Banque J. Safra (Suisse) SA f/k/a Banque Jacob Safra (Suisse) SA. (Fritsch, Joshua) (Entered: 08/31/2012)
89	16	8/17/2012	12-mc-00115	312	JOINDER to join re: 310 Memorandum of Law in Opposition to Motion to Dismiss Concerning Extraterritoriality as Ordered by the Court on June 6, 2012. Document filed by Irving H. Picard. (Attachments: # 1 Exhibit A, # 2 Certificate of Service)(Lunn, Matthew) (Entered: 08/17/2012)
90	17	8/17/2012	12-mc-00115	311	JOINDER to join re: 310 Memorandum of Law in Opposition to Motion. Document filed by Irving H. Picard. (Attachments: # 1 Exhibit A, # 2 Affidavit of Service)(Simon, Howard) (Entered: 08/17/2012)
91	18	8/17/2012	12-mc-00115	310	MEMORANDUM OF LAW in Opposition re: 234 MOTION to Dismiss by Extraterritorial Defendants.. Document filed by Irving H. Picard. (Attachments: # 1 Affidavit of Service)(Griffin, Regina) (Entered: 08/17/2012)
92	19	8/17/2012	12-mc-00115	309	MEMORANDUM OF LAW in Opposition re: 234 MOTION to Dismiss by Extraterritorial Defendants.. Document filed by Securities Investor Protection Corporation. (Attachments: # 1 Certificate of Service)(Bell, Kevin) (Entered: 08/17/2012)
93	20	7/13/2012	12-mc-00115	236	DECLARATION of Marco E. Schnabl in Support re: 234 MOTION to Dismiss by Extraterritorial Defendants.. Document filed by Pioneer Alternative Investment Management Ltd., Pioneer Global Asset Management S.p.A., UniCredit S.p.A.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Schnabl, Marco) (Entered: 07/13/2012)
94	21	7/13/2012	12-mc-00115	235	MEMORANDUM OF LAW in Support re: 234 MOTION to Dismiss by Extraterritorial Defendants.. Document filed by Pioneer Alternative Investment Management Ltd., Pioneer Global Asset Management S.p.A., UniCredit S.p.A.. (Schnabl, Marco) (Entered: 07/13/2012)
95	22	7/13/2012	12-mc-00115	234	MOTION to Dismiss by Extraterritorial Defendants. Document filed by Pioneer Alternative Investment Management Ltd., Pioneer Global Asset Management S.p.A., UniCredit S.p.A.. Responses due by 7/13/2012 Return Date set for 9/21/2012 at 04:00 PM.(Schnabl, Marco) (Entered: 07/13/2012)
96	23	7/12/2012	12-mc-00115	244	ORDER: The Prior Administrative Order is hereby amended and superseded by this Order and the Adversary Proceedings listed on Exhibit A are incorporated by reference herein. The motions to withdraw the reference in the Adversary Proceedings identified on Exhibit B hereto are governed by the Consolidated Briefing Orders and Permissive Withdrawal Orders and shall be resolved through the common briefing ordered therein, and as further set forth in this document. (Signed by Judge Jed S. Rakoff on 7/11/2012) (cd) (Entered: 07/24/2012)

Appendix C
***Picard v. ABN AMRO Bank N.V.*, No. 12-cv-01939 and *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115**
District Court Designations

Designation Number	Exhibit Number	Date	District Court Case Number	ECF Number	Docket Text
97	24	6/7/2012	12-mc-00115	167	[PART 1] ORDER: The reference of the Adversary Proceedings listed in Exhibit A is withdrawn, in part, from the Bankruptcy Court to this Court solely with respect to the Extraterritoriality Defendants for the limited purpose of hearing and determining whether SIP A and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate or mediate foreign transferees. Except as otherwise provided herein or in other orders of this Court, the reference to the Bankruptcy Court is otherwise maintained for all other purposes. The Trustee and SIPC are deemed to have raised, in response to all pending motions for withdrawal of the reference based on the Extraterritoriality Issue, all arguments previously raised by either or both of them in opposition to all such motions granted by the Extraterritoriality Withdrawal Ruling, and such objections or arguments are deemed to be overruled, solely with respect to the Extraterritoriality Issue, for the reasons stated in the Extraterritoriality Withdrawal Ruling. All objections that could be raised by the Trustee and/or SIPC to the pending motions to withdraw the reference in the Adversary Proceedings, and the defenses and responses thereto that may be raised by the affected defendants, are deemed preserved on all matters. On or before July 13, 2012, the Extraterritoriality Defendants shall file a single consolidated motion to dismiss pursuant to Fed. R. Civ. P. 12 (made applicable to the Adversary Proceeding by Fed. R. Bankr. P. 7012) and a single consolidated supporting memorandum of law, not to exceed forty (40) pages (together, the "Extraterritoriality Motion to Dismiss"). The Trustee and SIPC shall each file a memorandum of law in opposition to the Extraterritoriality Motion to Dismiss, not to exceed forty (40) pages each, addressing the Extraterritoriality Withdrawal Ruling Issue (the "Trustee's Opposition") on or before August 17, 2012. Young Conaway Stargatt & Taylor, LLP, which is conflicts counsel for the Trustee, and Windels Marx Lane & Mittendorf, LLP, which is special counsel to the Trustee, each may file a joinder, not to exceed two (2) pages (excluding exhibits identifying the relevant adversary proceedings), to the Trustee's Opposition, on behalf of the Trustee in certain of the adversary proceedings listed on Exhibit A hereto on or before August 17, 2012. In either case, the respective joinders may only specify what portions of the Trustee's Opposition are joined and shall not make or offer any additional substantive argument. [PART 2] The Extraterritoriality Defendants shall file one consolidated reply brief, not to exceed twenty (20) pages, on or before August 31, 2012 (the "Reply Brier'). In the event the Trustee files an amended complaint (the "Amended Complaint") in any of the Adversary Proceedings after the Extraterritoriality Motion to Dismiss is filed, the Reply Brief shall include a reference (by civil action number and docket number only) to a representative Amended Complaint filed by the Trustee against Extraterritoriality Defendants. Any further requirement that the Amended Complaints subject to the Extraterritoriality Motion to Dismiss be identified or filed is deemed waived and satisfied. In the event the Trustee files an Amended Complaint, he shall, at the time the Amended Complaint is filed, provide the Extraterritoriality Defendants a blackline reflecting the changes made in the Amended Complaint from the then operative complaint. The Court will hold oral argument on the Extraterritoriality Motion to Dismiss on September 21, 2012, at 4:00 p.m. (the "Hearing Date"). On or before August 31, 2012, the Extraterritoriality Defendants shall designate one lead counsel to advocate their position at oral argument on the Hearing Date, but any other attorney who wishes to be heard may appear and so request. The caption displayed on this Order shall be used as the caption for all pleadings, notices and briefs to be filed pursuant to this Order. All communications and documents (including drafts) exchanged between and among any of the defendants in any of the adversary proceedings, and/or their respective attorneys, shall be deemed to be privileged communications and/or work product, as the case may be, subject to a joint interest privilege. This Order is without prejudice to any and all grounds for withdrawal of the reference (other than the Extraterritoriality Issue) raised in the Adversary Proceedings by the Extraterritoriality Defendants and any matter that cannot properly be raised or resolved on a Rule 12 motion, all of which are preserved. Nothing in this Order shall: (a) waive or resolve any issue not specifically raised in the Extraterritoriality Motion to Dismiss; (b) waive or resolve any issue raised or that could be raised by any party other than with respect to the Extraterritoriality Issue, including related issues that cannot be resolved on a motion under Fed. R. Civ. P. 12; or (c) notwithstanding Fed. R. Civ. P. 12(g)(2) or Fed. R. Bankr. P. 7012(g)(2), except as specifically raised in the Extraterritoriality Motion to Dismiss, limit, restrict or impair any defense or argument that has been raised or could be raised by any Extraterritoriality Defendant in a motion to dismiss under Fed. R. Civ. P. 12 or Fed. R. Bankr. P. 7012, [PART 3] or any other defense or right of any nature available to any Extraterritoriality Defendant (including, without limitation, all defenses based on lack of personal jurisdiction or insufficient service of process), or any argument or defense that could be raised by the Trustee or SIPC in response thereto. Nothing in this Order shall constitute an agreement or consent by any Extraterritoriality Defendant to pay the fees and expenses of any attorney other than such defendant's own retained attorney. This paragraph shall not affect or compromise any rights of the Trustee or SIPC. This Order is without prejudice to and preserves all objections of the Trustee and SIPC to timely-filed motions for withdrawal of the reference currently pending before this Court (other than the withdrawal of the reference solely with respect to the Extraterritoriality Issue) 'AJjth respect to the Adversary Proceedings, and the defenses and responses thereto that may be raised by the affected defendants, are deemed preserved on all matters. The procedures established by this Order, or by further Order of this Court, shall constitute the sole and exclusive procedures for determination of the Extraterritoriality Issue in the Adversary Proceedings (except for any appellate practice resulting from such determination), and this Court shall be the forum for such determination. To the extent that briefing or argument schedules were previously established with respect to the Extraterritoriality Issue in any of the Adversary Proceedings, this Order supersedes all such schedules solely with respect to the Extraterritoriality Issue. To the extent that briefing or argument schedules are prospectively established with respect to motions to withdraw the reference or motions to dismiss in any of the Adversary Proceedings, the Extraterritoriality Issue shall be excluded from such briefing or argument and such order is vacated. For the avoidance of doubt, to the extent any of the Extraterritoriality Defendants have issues other than the Extraterritoriality Issue or issues set forth in the Common Briefing Order that were withdrawn, those issues will continue to be briefed on the schedule previously ordered by the Court. Except as stated in this paragraph, this Order shall not be deemed or construed to modify, withdraw or reverse any prior Order of the Court that granted withdrawal of the reference in any Adversary Proceeding for any reason. (Motions due by 7/13/2012., Responses due by 8/17/2012, Replies due by 8/31/2012., Oral Argument set for 9/21/2012 at 04:00 PM before Judge Jed S. Rakoff.) (Signed by Judge Jed S. Rakoff on 6/6/2012) (jfe) (Entered: 06/07/2012)

Appendix C
***Picard v. ABN AMRO Bank N.V.*, No. 12-cv-01939 and *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115**
District Court Designations

Designation Number	Exhibit Number	Date	District Court Case Number	ECF Number	Docket Text
98	25	5/15/2012	12-mc-00115	97	ORDER. For the foregoing reasons, the Court withdraws the reference of these cases to the bankruptcy court for the limited purposes of deciding as further set forth. The Court directs counsel for the Trustee to convene a conference call with the defendants who have raised this issue no later than May 23, 2012 so that the parties can schedule consolidated proceedings. With respect to issues that are not subject to consolidated proceedings -- specifically, whether relevant defendants received transfers in good faith and whether they may invoke the safe harbor created by § 546(g) -- the parties should convene a separate conference call for each case no later than May 18, 2011 to schedule further proceedings. The Clerk of the Court is hereby ordered to close document number 1 on the docket of each case. (Signed by Judge Jed S. Rakoff on 6/15/2012) (rjm) Modified on 5/15/2012 (rjm). (Entered: 05/15/2012)
99	26	4/13/2012	12-mc-00115	1	ORDER: 1. All matters relating to Bernard L. Madoff Investment Securities LLC ("Madoff Securities") previously assigned to the undersigned, or assigned to the undersigned in the future, shall henceforth bear the caption and docket number set forth above, and the parties shall make sure that all filings are filed under the docket number set forth above. In addition, any filings filed under this docket number shall bear either the subheading "PERTAINS TO ALL CASES," the subheading "PERTAINS TO CASE(S) ___ Civ.___," or the subheading "PERTAINS TO CASE(S) LISTED IN APPENDIX_." Any filing fees associated with opening the master case file docket are waived. 2.The Clerk is directed to make sure that this Order and all subsequent docket entries under this docket number are also docketed simultaneously in the bankruptcy court under No. 08-1789 (BRL). (Signed by Judge Jed S. Rakoff on 4/13/2012) (laq) (laq). (Entered: 04/13/2012)

Exhibit 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (SMB) SIPA LIQUIDATION (Substantively Consolidated) **FINAL DOCUMENT CLOSING ADVERSARY PROCEEDING**
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.), Defendant.	Adv. Pro. No. 11-02760 (SMB)

STIPULATED FINAL ORDER
GRANTING MOTION TO DISMISS COMPLAINT

Plaintiff Irving H. Picard (the "Trustee"), as trustee of the substantively consolidated liquidation proceeding of Bernard L. Madoff Investment Securities LLC ("BLMIS"), under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.*, and the estate of Bernard L. Madoff, individually, and ABN AMRO Bank N.V. (presently known as The Royal Bank of Scotland, N.V.) ("Defendant," and together with the Trustee, the "Parties"), by and through their respective undersigned counsel, state as follows:

WHEREAS, on October 6, 2011, the Trustee initiated the above-captioned adversary proceeding in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") by filing a Complaint against Defendant and ABN AMRO Bank (Switzerland) AG (formerly known as ABN AMRO Bank (Schweiz)). *See Picard v. ABN AMRO Bank N.V. (presently known as The Royal Bank of Scotland, N.V.),* Adv. Pro. No. 11-02760 (SMB), ECF No. 1;

WHEREAS, on May 13, 2013, the Trustee voluntarily dismissed ABN AMRO Bank (Switzerland) AG without prejudice from the above-captioned adversary proceeding. *See id.*, ECF No. 14;

WHEREAS, on May 15, 2012 and June 7, 2012, respectively, the United States District Court for the Southern District of New York, the Honorable Jed S. Rakoff, entered Orders in which he withdrew the reference in certain adversary proceedings pursuant to 28 U.S.C. § 157(d) to determine whether SIPA and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid initial transfers that were received abroad or to recover from initial, immediate, or mediate foreign transferees (the "Extraterritoriality Issue"). *See Securities Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 12-mc-0115 (JSR), ECF Nos. 97 and 167;

WHEREAS, after consolidated briefing and oral argument on the Extraterritoriality Issue, *see id.*, ECF Nos. 234, 309, 310, 322, and 357, on July 7, 2014, Judge Rakoff entered an Opinion and Order (the "Extraterritoriality Order") and returned the withdrawn adversary proceedings to the Bankruptcy Court for further proceedings consistent with the Extraterritoriality Order. *See Securities Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC,* 513 B.R. 222 (S.D.N.Y. 2014);

WHEREAS, on July 28, 2014, Judge Rakoff entered a Stipulation and Supplemental Opinion and Order in which he supplemented the Extraterritoriality Order to direct that certain additional adversary proceedings should "also be returned the Bankruptcy Court for further proceedings consistent with" the Extraterritoriality Order. *See Securities Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 12-mc-0115 (JSR), ECF No. 556;

WHEREAS, on December 10, 2014, the Bankruptcy Court entered an Order concerning further proceedings on Extraterritoriality Issue that directed Defendant, the Trustee, and the Securities Investor Protection Corporation to submit supplemental briefing to address (a) which counts asserted in the adversary proceeding against Defendant should be dismissed pursuant to the Extraterritoriality Order or the legal standards announced therein and (b) whether the Trustee shall be permitted to file an amended complaint containing allegations relevant to the Extraterritoriality Issue as proffered by the Trustee (together, the "Extraterritoriality Motion to Dismiss"). *See Securities Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Adv. Pro. No. 08-01789 (SMB), ECF No. 8800;

WHEREAS, on December 31, 2014, Defendant filed a consolidated memorandum of law in support of the Extraterritoriality Motion to Dismiss. *See Picard v. ABN AMRO Bank N.V. (presently known as The Royal Bank of Scotland, N.V.)*, Adv. Pro. No. 11-02760 (SMB), ECF No. 47;

WHEREAS, pursuant to further scheduling Orders, *see Securities Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Adv. Pro. No. 08-01789 (SMB), ECF Nos. 8990, 9350, and 9720, on June 26, 2015, the Trustee filed (a) a consolidated memorandum of law in opposition to the Extraterritoriality Motion to Dismiss, (b) a supplemental memorandum in opposition to the Extraterritoriality Motion to Dismiss, and (c) proffered allegations as to the Extraterritoriality

Issue that the Trustee would include in a proposed amended complaint. *See Picard v. ABN AMRO Bank N.V. (presently known as The Royal Bank of Scotland, N.V.),* Adv. Pro. No. 11-02760 (SMB), ECF Nos. 56–58;

WHEREAS, on September 30, 2015, Defendant filed (a) a consolidated reply memorandum of law in support of the Extraterritoriality Motion to Dismiss and (b) a supplemental reply memorandum in support of the Extraterritoriality Motion to Dismiss. *See id*., ECF Nos. 62 and 63;

WHEREAS, on December 16, 2015, the Bankruptcy Court heard oral argument on the Extraterritoriality Motion to Dismiss. *See Securities Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Adv. Pro. No. 08-01789 (SMB), ECF No. 12081;

WHEREAS, on November 22, 2016, the Bankruptcy Court issued a Memorandum Decision Regarding Claims to Recover Foreign Subsequent Transfers (the "Memorandum Decision") that granted the Extraterritoriality Motion to Dismiss as to Defendant. *See Securities Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Adv. Pro. No. 08-01789 (SMB), ECF No. 14495;

WHEREAS, the Memorandum Decision directed that all of the Trustee's claims in this adversary proceeding against the Defendant should be dismissed;

WHEREAS, the Parties have agreed to consent to the Bankruptcy Court's entry of final orders and judgments consistent with the Memorandum Decision in this adversary proceeding;

NOW, for the reasons set forth in the Memorandum Decision, which is incorporated herein and attached hereto as Exhibit A, the Parties agree and stipulate and the Bankruptcy Court hereby orders:

1. The Bankruptcy Court has subject matter jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and (e)(1) and 15 U.S.C. § 78eee (b)(2)(A) and (b)(4).

2. The Parties expressly and knowingly grant their consent solely for the Bankruptcy Court to enter final orders and judgments with respect to the Extraterritoriality Motion to Dismiss, whether the underlying claims are core under 28 U.S.C. § 157(b)(2) or non-core under 28 U.S.C. § 157(c)(2), subject to appellate review, including under 28 U.S.C. § 158. Notwithstanding the above grant of consent, Defendant reserves all other jurisdictional, substantive, or procedural rights and remedies in connection with this adversary proceeding, including with respect to the Bankruptcy Court's power to finally determine any other matters in this adversary proceeding.

3. The Extraterritoriality Motion to Dismiss is **GRANTED.**

Dated: January 20, 2017
New York, New York

By: */s/ David J. Sheehan*
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Attorneys for Defendant ABN AMRO Bank N.V. (presently known as The Royal Bank of Scotland, N.V.)

SO ORDERED

Dated: March 3rd, 2017
New York, New York

/s/ STUART M. BERNSTEIN
HONORABLE STUART M. BERNSTEIN
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION,	:	Adv. P. No. 08-01789 (SMB)
Plaintiff,	:	SIPA LIQUIDATION
– against –	:	(Substantively Consolidated)
BERNARD L. MADOFF INVESTMENT SECURITIES LLC,	:	
Defendant.	:	
In re:	:	
BERNARD L. MADOFF,	:	
Debtor.	:	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff,	:	Adv. P. No. 11-02732 (SMB)
Plaintiff,	:	
– against –	:	
BUREAU OF LABOR INSURANCE,	:	
Defendant.	:	

MEMORANDUM DECISION REGARDING CLAIMS TO RECOVER FOREIGN SUBSEQUENT TRANSFERS

A P P E A R A N C E S:

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Liaison Counsel for All Subsequent Transferee Defendants[1]

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Of Counsel

Attorneys for Bureau of Labor Insurance

STUART M. BERNSTEIN
United States Bankruptcy Judge:

Bankruptcy Code § 550(a)(2) permits a trustee to recover an avoided fraudulent transfer or its value from "any immediate or mediate transferee," *e.g.*, a subsequent

[1] Other Defense Counsel listed on attached Appendix.

transferee of the initial transferee or prior subsequent transferee. Relying on this provision, Irving H. Picard (the "Trustee"), the trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa, *et seq*. ("SIPA"), sued numerous subsequent transferees to recover the value of fraudulent transfers made by BLMIS in connection with the Ponzi scheme conducted by Bernard L. Madoff. In many cases, the initial transferee was a foreign feeder fund and the subsequent transferee was also a foreign entity. The proceedings before the Court primarily concern the application of section 550(a)(2) to subsequent transfers between foreign parties.

I do not write on a clean slate. Judge Rakoff of the United States District Court previously withdrew the reference and laid down some basic ground rules for determining whether the subsequent transfer claims should be dismissed. The parties to the proceedings before Judge Rakoff are referred to as the "Participating Subsequent Transferees." Judge Rakoff held that the Trustee could not pursue recovery of "purely foreign subsequent transfers" due to the application of the presumption against extraterritoriality. *SIPC v. BLMIS* (*In re BLMIS*), 513 B.R. 222, 231 (S.D.N.Y. 2014) ("*ET Decision*"), *supplemented by*, No. 12- mc- 1151 (JSR), 2014 WL 3778155 (S.D.N.Y. July 28, 2014). Alternatively, considerations of international comity supported dismissal. *Id*. at 231-32. The District Court did not dismiss any of the claims, and instead, returned the adversary proceedings to this Court for further proceedings consistent with its decision. *Id*. at 232.

The Participating Subsequent Transferees now seek dismissal of Trustee's claims. In addition, many similarly-situated subsequent transferees that did not participate in

the proceedings before Judge Rakoff (the "Non-Participating Subsequent Transferees") also seek dismissal under the *ET Decision*. In total, motions to dismiss are pending in eighty-eight adversary proceedings. The Trustee, in turn, seeks leave to amend many of his complaints to add allegations of domestic connections relating to the subsequent transfers. Finally, the Bureau of Labor Insurance (the "BLI"), a defendant in a separate adversary proceeding styled *Picard v. Bureau of Labor Insurance*, Adv. P. No. 11-02732, moves for judgment on the pleadings pursuant to Federal Civil Rule 12(c) relying on the *ET Decision*. The Participating Subsequent Transferees, the Non-Participating Subsequent Transferees and BLI are sometimes collectively referred to as the "Subsequent Transferees."

A majority of the Trustee's claims against Subsequent Transferees were made by and/or originated from the Fairfield Funds or the Kingate Funds (both defined below), the initial transferees of BLMIS. These funds are debtors in foreign insolvency proceedings and their liquidators have sought or could have sought to recover substantially the same transfers from the same transferees under the powers granted by the foreign insolvency courts. These subsequent transfer claims are dismissed on grounds of international comity without reaching the issue of extraterritoriality. As to the balance, where the Trustee is seeking to recover subsequent transfers between two foreign entities using foreign bank accounts (without consideration of a U.S. correspondent bank account), those claims are dismissed. Furthermore, because the Court has reviewed the Trustee's proffers regarding these transfers and found them wanting, the Trustee's motions for leave to amend his pleadings to incorporate the facts

alleged in the proffers are denied as futile. The remaining motions to dismiss and for leave to amend are resolved in accordance with the discussion that follows.

BACKGROUND

A. Introduction

The facts underlying the infamous Ponzi scheme perpetrated by Bernard L. Madoff are well-known and have been recounted in many reported decisions. *See, e.g.*, *Picard v. Ida Fishman Revocable Trust* (*In re BLMIS*), 773 F.3d 411, 414-15 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 2859 (2015); *Picard v. JPMorgan Chase & Co.* (*In re BLMIS*), 721 F.3d 54, 58-59 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2895 (2014); *SIPC v. BLMIS* (*In re BLMIS*), 424 B.R. 122, 125-32 (Bankr. S.D.N.Y. 2010), *aff'd*, 654 F.3d 229 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 25 (2012). Prior to his arrest in December 2008, Madoff perpetrated the largest Ponzi scheme ever discovered through the investment advisory side of BLMIS. He did not engage in any securities transactions on behalf of his customers, and sent them bogus customer statements and trade confirmations showing fictitious trading activity and profits. When customers requested redemptions from their accounts, BLMIS distributed cash from a commingled bank account that included other customers' investments.

While many individuals and entities invested with BLMIS directly, others did so through "feeder funds," which, in turn, invested with BLMIS. The feeder funds were often organized as foreign entities. The largest network of foreign feeder funds was operated by two entities: Fairfield Greenwich Group ("FGG") and Tremont Group Holdings, Inc. ("Tremont"). Even though they operated out of New York, FGG and

Tremont created multiple feeder funds organized in the British Virgin Islands ("BVI") and the Cayman Islands, respectively.

Following the commencement of BLMIS' liquidation, the Trustee sued the feeder funds to avoid and recover as fraudulent transfers distributions they received from BLMIS as initial transferees. He also sued the subsequent transferees, including feeder fund investors, management and service providers. Like the feeder funds, the subsequent transferees were often foreign individuals or entities.

B. The Presumption Against Extraterritoriality

Although the majority of claims are being dismissed on the ground of comity, the parties have focused most of their attention on the issue of extraterritoriality. In addition, the District Court focused on extraterritoriality, and a discussion of that issue first will assist the reader. The "presumption against extraterritoriality" is a "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (internal quotation marks and citations omitted); *accord RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) ("*Nabisco*"); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 248 (2010) ("*Morrison*"). The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248.

In *Morrison*, the Supreme Court clarified the presumption in a dispute involving the extraterritorial reach of 10(b) of the Securities and Exchange Act of 1934 ("Exchange

Act"). There, Australian investors sued National Australia Bank Limited ("National") for violations of the Exchange Act in connection with their investment in National stock traded on the Australian Stock Exchange. Although National was an Australian bank, it owned HomeSide Lending, Inc. ("HomeSide"), a mortgage service provider based in Florida. *Morrison*, 561 U.S. at 251. The complaint alleged that HomeSide and its executives manipulated HomeSide's financials to cause it to appear more valuable than it really was, and that National was aware of the deception but failed to act. *Id*. at 252. In other words, the wrongful conduct occurred in the United States. The United States District Court for the Southern District of New York dismissed the complaint for lack of subject matter jurisdiction because the acts that occurred in the United States were only a link in a securities fraud scheme that culminated abroad, and the Second Circuit affirmed on similar grounds. *Id*. at 253.

The Supreme Court affirmed, but on different grounds. It criticized the Second Circuit's use of the "conduct" and "effects" tests (sometimes referred to as a single test, the "conduct and effects test") to determine the applicability of § 10(b) claims.[2] The "effects" test asked "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens," and the "conduct" test asked "whether the wrongful conduct occurred in the United States." *Id*. at 257 (quoting *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003)). Justice Scalia described these standards as "complex in formulation and unpredictable in application." *Id*. at 248.

[2] The Court also explained that the presumption against extraterritoriality implicated dismissal based upon the failure to state a claim, FED. R. CIV. P. 12(b)(6), rather than dismissal for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1). *Morrison*, 561 U.S. at 253-54.

Instead, the presumption against extraterritoriality involves an exercise in statutory interpretation and a two-step analysis which can be examined in either order. "At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Nabisco*, 136 S. Ct. at 2101; *accord Morrison*, 561 U.S. at 255 ("When a statute gives no clear indication of an extraterritorial application, it has none."). The first step does not impose a "clear statement rule," because even absent a "clear statement," the context of the statute can be consulted to give the most faithful reading. *Morrison*, 561 U.S. at 265. If the first step yields the conclusion that the statute applies extraterritorially, the inquiry ends.

If it does not, the court must turn to the second step to determine if the litigation involves an extraterritorial application of the statute:

> If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

Nabisco, 136 S. Ct. at 2101; *accord Morrison*, 561 U.S. at 266-67 (court must look to the "'focus' of congressional concern," *i.e.*, the "objects of the statute's solicitude"). Courts however, must be wary in concluding too quickly that some minimal domestic conduct means the statute is being applied domestically:

> [I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.

Morrison, 561 U.S. at 266 (emphasis in original).

The *Morrison* Court first concluded that the plaintiffs had failed to rebut the presumption against the extraterritorial application of section 10(b) of the Exchange Act. *See id*. at 265. Having then held that the focus of Section 10(b) was upon the purchase and sales of securities in the United States, *id*. at 266, the Court concluded that the plaintiffs had failed to state a claim on which relief could be granted and affirmed the dismissal of the complaint on this ground. *Id*. at 273.

C. Extraterritoriality and the Trustee's Recovery Efforts

After *Morrison*, the issue of whether the Bankruptcy Code's avoidance and recovery provisions reached foreign transfers was first addressed in these cases in *Picard v. Bureau of Labor Ins.* (*In re BLMIS*), 480 B.R. 501 (Bankr. S.D.N.Y. 2012) ("*BLI*"). BLI, a Taiwanese entity, invested in Fairfield Sentry, a large BLMIS feeder fund organized in the BVI. BLI submitted a redemption request to Fairfield Sentry and provided wire instructions. Pursuant to those instructions, Fairfield Sentry sent $42,123,406 from a Dublin bank account to a New York JP Morgan Account specified by BLI, and the redemption payment was then sent on to BLI's JP Morgan account in London. *Id*. at 509. Following his appointment, the Trustee sought to recover the subsequent transfers made by Fairfield Sentry to BLI pursuant to section 550 of the Bankruptcy Code. BLI moved to dismiss arguing, *inter alia*, that the Trustee's claims were barred by the presumption against extraterritoriality.[3]

[3] BLI did not argue that comity barred the claim and the Court did not address it. *BLI*, 480 B.R. at 526 n. 24.

Denying the motion, the Bankruptcy Court began with *Morrison*'s second step. Judge Lifland held that the "focus" of "the avoidance and recovery sections [of the Bankruptcy Code] is on the initial transfers that deplete the bankruptcy estate and not on the recipient of the transfers or the subsequent transfers." *Id.* at 524; *accord Begier v. Internal Revenue Serv.*, 496 U.S. 53, 58 (1990) (stating that "the purpose of the [preference] avoidance provision is to preserve the property includable within the bankruptcy estate – the property available for distribution to creditors"); *French v. Liebmann (In re French)*, 440 F.3d 145, 154 (4th Cir.) ("[T]he Code's avoidance provisions protect creditors by preserving the bankruptcy estate against illegitimate depletions."), *cert. denied*, 549 U.S. 815 (2006). The depletion of the BLMIS estate occurred domestically because the transfers at issue originated from BLMIS' JPMorgan account in New York and went to Fairfield Sentry's New York account at HSBC. *BLI*, 480 B.R. at 525. "As the focus of Section 550 occurred domestically, the fact that BLI received BLMIS's fraudulently transferred property in a foreign country does not make the Trustee's application of this section extraterritorial." *Id.*[4]

While this conclusion was dispositive, Judge Lifland also addressed the first step in the inquiry and concluded that Congress expressed a clear intention that § 550 should apply extraterritorially. *Id.* at 526. A statute does not require a "clear statement" that it applies abroad, and the court may consider the statutory context "in searching for a

[4] The Court added that pragmatic considerations supported its conclusion. "In particular if the avoidance and recovery provisions ceased to be effective at the borders of the United States, a debtor could end run the Code by 'simply arrang[ing] to have the transfer made overseas,' thereby shielding them from United States law and recovery by creditors." *BLI*, 480 B.R. at 525 (quoting *Maxwell Commc'n Corp. plc v. Societe General plc* (*In re Maxwell Commc'n Corp. plc*), 186 B.R. 807, 816 (S.D.N.Y.1995) ("*Maxwell I*"), *aff'd on other grounds*, 93 F.3d 1036 (2d Cir.1996) ("*Maxwell II*")).

clear indication of statutory meaning." *Id.* at 526 (quoting *United States v. Weingarten*, 632 F.3d 60, 65 (2d Cir.2011)). "Congress demonstrated its clear intent for the extraterritorial application of Section 550 through interweaving terminology and cross-references to relevant Code provisions." *Id.* at 527. Specifically, the term "property of the estate" includes property "wherever located, and by whomever held" that was property of the debtor at the commencement of the case." 11 U.S.C. § 541(a)(1). Thus, "property of the estate" extends to property located worldwide. *Id.*; *accord* 28 U.S.C. § 1334(e)(1) (granting the District Court exclusive jurisdiction "of all the property, wherever located, of the debtor as of the commencement of [the bankruptcy] case, and of property of the estate").

The avoidance provisions of the Bankruptcy Code grant a trustee the power to avoid certain prepetition transfers "of an interest of the debtor in property," *e.g.*, 11 U.S.C. § 548(a)(1), the same term used in Bankruptcy Code § 541 to define the scope of "property of the estate." *BLI*, 480 B.R. at 527. For this reason, the concepts of "property of the estate" and "property of the debtor" are the same, separated only by time. As the Supreme Court explained in *Begier*, § 541 "delineates the scope of 'property of the estate' and serves as the postpetition analog to § 547(b)'s 'property of the debtor.'" *Id.* (quoting *Begier*, 496 U.S. at 58–59) (internal quotation marks omitted). Accordingly, "(i) 'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings" and (ii) "the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate." *Id.* (quoting *Begier*, 496 U.S. at 58); *accord French*, 440 F.3d at 151

("Section 541 defines 'property of the estate' as, *inter alia,* all 'interests of the debtor in property.' 11 U.S.C. § 541(a)(1). In turn, § 548 allows the avoidance of certain transfers of such 'interest[s] of the debtor in property.' 11 U.S.C. § 548(a)(1). By incorporating the language of § 541 to define what property a trustee may recover under his avoidance powers, § 548 plainly allows a trustee to avoid any transfer of property that *would have been* 'property of the estate' prior to the transfer in question—as defined by § 541—even if that property is not 'property of the estate' *now*.") (emphasis in original); *contra Maxwell I,* 186 B.R. at 820-21 (concluding that Congress did not clearly express its desire that Bankruptcy Code § 547 applies to foreign transfers of the debtor's property); *Barclay v. Swiss Fin. Corp. Ltd.* (*In re Midland Euro Exch. Inc.*), 347 B.R. 708, 718 (Bankr. C.D. Cal. 2006) (concluding that Congress did not intend for § 548 to apply extraterritorially).

Section 550, in turn, allows the trustee to recover the avoided transfer from the initial transferee, the person for whose benefit the transfer was made or the subsequent transferee:

> [B]y incorporating the avoidance provisions by reference, Section 550 expresses the same congressional intent regarding extraterritorial application. Thus, Congress expressed intent for the application of Section 550 to fraudulently transferred assets located outside the United States and the presumption against extraterritoriality does not apply.

BLI, 480 B.R. at 528.

D. The *ET Decision*

1. Extraterritoriality

Less than two years after the issuance of the *BLI* decision, District Judge Rakoff reached the opposite conclusion in the *ET Decision*.[5] As mentioned above, the *ET Decision* was issued in connection with consolidated motions to dismiss filed by the Participating Subsequent Transferees. Since the District Court was looking at multiple cases, it described the complaint in *Picard v. CACEIS Bank Luxembourg*, Adv. P. No. 11-02758 ("*CACEIS Complaint*") as an example. There, the two CACEIS defendants (collectively, "CACEIS") were organized and operating in Luxembourg or France. *ET Decision*, 513 B.R. at 225. They invested in two foreign feeder funds, Fairfield Sentry Limited ("Fairfield Sentry"), a BVI company in liquidation in the BVI, and Harley International (Cayman) Limited ("Harley"), a Cayman Islands company in liquidation in the Cayman Islands. (*CACEIS Complaint* at ¶¶ 2, 24-25.) Fairfield Sentry and Harley invested substantially all of their assets with BLMIS, received initial transfers from BLMIS and subsequently transferred some or all of those funds directly or indirectly to CACEIS. (*Id.* at ¶¶ 2, 37, 44, 46, 49, 58.) The Trustee sued the feeder funds to avoid and recover the initial transfers they had received from BLMIS. He settled with one of the feeder funds, obtained a default judgment against the other, and pursued CACEIS to recover subsequent transfers in the amount of $50 million received from the feeder funds. *ET Decision*, 513 B.R. at 225-26.

[5] The motions to dismiss before Judge Rakoff were briefed before Judge Lifland issued the *BLI* decision, and the *ET Decision* did not mention it.

Judge Rakoff first considered whether the Trustee was attempting to apply § 550 extraterritorially. He initially cautioned that "a mere connection to a U.S. debtor, be it tangential or remote, is insufficient on its own to make every application of the Bankruptcy Code domestic." *Id.* at 227. He then looked to the "regulatory focus" of the Bankruptcy Code's avoidance and recovery provisions, and concluded that both § 548 and § 550(a) focused on the property transferred and the fact of the transfer, not the debtor. *Id.*; *but see French*, 440 F.3d at 150 ("§ 548 focuses not on the property itself, but on the fraud of transferring it."). "Accordingly, under *Morrison*, the transaction being regulated by section 550(a)(2) is the transfer of property to a subsequent transferee, not the relationship of that property to a perhaps-distant debtor." *ET Decision*, 513 B.R. at 227.

To determine whether the subsequent transfers occurred extraterritorially, "the court considers the location of the transfers as well as the component events of those transactions." *Id.* (quoting *Maxwell I*, 186 B.R. at 817). Returning to the *CACEIS Complaint*, Judge Rakoff observed that "the relevant transfers and transferees are predominately foreign: foreign feeder funds transferring assets abroad to their foreign customers and other foreign transferees." *Id.* Under similar factual circumstances, the *Maxwell* and *Midland* courts had found transfers between foreign entities "to implicate extraterritorial applications of the Bankruptcy Code's avoidance provisions." *Id.* at 227-28. Finally, the fact that the chain of transfers originated with BLMIS in New York or that the subsequent transferees allegedly used correspondent banks in the United States to process the dollar-denominated transfers was insufficient "to make the recovery of these otherwise thoroughly foreign subsequent transfers into a domestic application of

section 550(a)." *Id.* at 228 & n. 1. Accordingly, the Trustee was seeking to recover foreign transfers that required the extraterritorial application of § 550(a). *Id.* at 228.

The District Court then turned to the question of whether Congress intended the extraterritorial application of section 550(a). Here too, the *ET Decision* disagreed with *BLI*. First, "[n]othing in [the language of section 550(a)] suggests that Congress intended for this section to apply to foreign transfers. . . ." *Id.* at 228. Judge Rakoff next looked to context and surrounding Bankruptcy Code provisions. *Id.* The Trustee had argued that § 541's definition of "property of the estate," which included property held worldwide, indicated Congress' intent to allow the Trustee to recover "property of the debtor" that, but for the fraudulent transfer, would have been "property of the estate" as of the commencement of the bankruptcy case. *Id.* at 228-29. Judge Rakoff rejected the Trustee's argument for the same reason the District Court rejected a similar argument in *Maxwell I;* fraudulently transferred "property of the debtor" only becomes "property of the estate" *after* recovery, *ET Decision*, 513 B.R. at 229 (citing *Fed. Deposit Ins. Corp. v. Hirsch* (*In re Colonial Realty Co.*), 980 F.2d 125, 131 (2d Cir.1992)), "so section 541 cannot supply any extraterritorial authority that the avoidance and recovery provisions lack on their own." *Id.*; *accord Maxwell I*, 186 B.R. at 820; *Midland,* 347 B.R. at 718.[6] Furthermore, the use of the phrase "wherever located" in § 541 indicating Congress' intent to apply that section extraterritorially, undercut the conclusion that § 548 or SIPA

[6] The District Court also rejected Trustee's argument that provisions of SIPA and policy concerns support extraterritorial application of section 550(a). *ET Decision*, 513 B.R. at 230-31.

§ 78fff-2(c)(3),[7] which did not include similar language, also applied extraterritorially. *ET Decision*, 513 B.R. at 230.

Based on those observations, the District Court "conclude[d] that the presumption against extraterritorial application of federal statutes ha[d] not been rebutted [and] the Trustee therefore may not use section 550(a) to pursue recovery of purely foreign subsequent transfers." *Id*. at 231.

2. Comity

In the alternative, the District Court ruled that "the Trustee's use of section 550(a) to reach these foreign transfers would be precluded by concerns of international comity." *Id*. at 231. Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id*. (quoting *Maxwell II*, 93 F.3d at 1046 (in turn quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895))). A comity inquiry requires a "choice-of-law analysis to determine whether the application of U.S.

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[7] SIPA § 78fff-2(c)(3) authorizes the SIPA trustee to recover pre-filing transfers of customer property even though customer property was not property of the SIPA debtor at the time of the transfer under applicable non-bankruptcy law. It provides:

> Whenever customer property is not sufficient to pay in full the claims set forth in subparagraphs (A) through (D) of paragraph (1), the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of Title 11. Such recovered property shall be treated as customer property. For purposes of such recovery, the property so transferred shall be deemed to have been the property of the debtor and, if such transfer was made to a customer or for his benefit, such customer shall be deemed to have been a creditor, the laws of any State to the contrary notwithstanding.

law would be reasonable under the circumstances, comparing the interests of the United States and the relevant foreign state." *ET Decision*, 513 B.R. at 231 (citing *Maxwell II*, 91 F.3d at 1047-48).

Judge Rakoff observed that many feeder funds, such as Fairfield Sentry Limited and Harley International (Cayman) Limited, the two initial transferees in *CACEIS*, were also in liquidation proceedings abroad, and had their own rules governing the recovery of transfers. *Id*. at 232. The BVI courts in Fairfield Sentry had already rejected the liquidators' common law claims to reclaim the transfers made to its own investors, and the "Trustee [wa]s seeking to use SIPA to reach around such foreign liquidations in order to make claims to assets on behalf of the SIPA customer-property estate — a specialized estate created solely by a U.S. statute, with which the defendants here have no direct relationship." *Id*. These investors had no reason to expect that U.S. law would govern their relationships with their feeder funds, and "[g]iven the indirect relationship between [BLMIS] and the transfers at issue here, these foreign jurisdictions have a greater interest in applying their own laws than does the United States." *Id*. Accordingly, as the Second Circuit found in *Maxwell II*, "the interests of the affected forums and the mutual interest of all nations in smoothly functioning international law counsel against the application of United States law in the present case." *Id*. (quoting *Maxwell II*, 93 F.3d at 1053).

Although the District Court ultimately ruled that the "Trustee's recovery claims are dismissed to the extent that they seek to recover purely foreign transfers," *id.*, the District Court did not actually dismiss any of the complaints. Instead, the District Court concluded:

> Here, to the extent that the Trustee's complaints allege that both the transferor and the transferee reside outside of the United States, there is no plausible inference that the transfer occurred domestically. Therefore, unless the Trustee can put forth specific facts suggesting a domestic transfer, his recovery actions seeking foreign transfers should be dismissed.

ET Decision, 513 B.R. at 232 n. 4.

The District Court returned the cases to this Court "for further proceedings consistent with this Opinion and Order." *Id*. at 232. Accordingly, I view my task as entailing the review of the subsequent transfer allegations to determine whether they survive dismissal under the extraterritoriality or comity principles enunciated in the *ET Decision*.

E. Post-*ET Decision* Proceedings

After the adversary proceedings were returned to this Court, the parties stipulated to the *Scheduling Order*.[8] Exhibit A to the *Scheduling Order* listed those defendants that were parties to the proceedings before Judge Rakoff and to the *ET Decision*, *i.e.*, the Participating Subsequent Transferees. Exhibit B listed defendants who were not parties to the *ET Decision* but contended that they were similarly situated, *i.e.*, the Non-Participating Subsequent Transferees. The *Scheduling Order* set forth a briefing schedule to address whether the Trustee's existing claims against the Subsequent Transferees should be dismissed and whether the Trustee should be permitted to amend the complaints. The Trustee and the Participating and Non-Participating Subsequent Transferees were also permitted to file pleadings relevant to each individual adversary proceeding, including short supplemental briefs and, in the

[8] *Order Concerning Further Proceedings on Extraterritoriality Motion and Trustee's Omnibus Motion for Leave to Replead and for Limited Discovery* which the Court so ordered on December 10, 2014 (as amended, the "*Scheduling Order*") (ECF Doc. # 8800).

case of the Trustee, either a proposed amended complaint or proffered allegations supporting an amended complaint. (*See Scheduling Order* at ¶¶ 3-5, 8.) To facilitate the Court's and the Defendant's review and analysis, the Trustee was required to include a chart (the "Chart") summarizing the Trustee's position as to why the motions should be denied. (*Id*. at ¶ 6.) [9]

Importantly, the *Scheduling Order* included certain stipulations relating to the place of formation or citizenship of the subsequent transferors and Subsequent Transferees. (*Scheduling Order* at ¶ M ("Exhibits A and B list as the party's 'Location' the jurisdiction under whose laws the transferors and transferees that are not natural persons are organized, and the citizenship of the transferors and transferees that are natural persons, in each case as of the time of the transfers, as alleged in the complaints or as agreed by the Trustee and the respective transferees.").)[10] According to Exhibits A and B, none of the subsequent transferors were "located" in the United States, but some of the Subsequent Transferees were.

The Subsequent Transferees filed their supplemental motion to dismiss on December 31, 2014. (*See Consolidated Supplemental Memorandum of Law In Support of the Transferee Defendants' Motion to Dismiss Based on Extraterritoriality* on

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9 The first adversary proceeding listed on the Chart was dismissed after briefing. (*Stipulation and Order for Voluntary Dismissal of Adversary Proceeding with Prejudice*, dated Feb. 12, 2016 (Adv. Pro. No. 09-01154 ECF # 132).) The motion to dismiss the subsequent transfer claim asserted in that proceeding against Vizcaya Partners Limited and the Trustee's motion to amend the complaint are denied as moot.

10 No party was precluded from arguing that the stipulated "Location" was or was not preclusive in determining whether the transferor or transferee was "foreign" for purpose of the motions or otherwise. (*Scheduling Order* at ¶ M.)

December 31, 2014 ("*Subsequent Transferees Brief*") (ECF Doc. # 8903).) The parties seeking dismissal were listed in Appendix A. (*See Subsequent Transferees Brief* at 1.) The Trustee filed his response on June 26, 2015. (*Trustee's Memorandum of Law In Opposition to the Transferee Defendants' Motion to Dismiss Based on Extraterritoriality and in Further Support of Trustee's Motion for Leave to Amend Complaints* ("*Trustee Brief*") (ECF Doc. # 10287).) The response was limited to the defendants listed in Exhibit 1 to the *Trustee Brief*.

Meanwhile, BLI, whose dismissal motion had been denied by the Bankruptcy Court in *BLI*, asked to be included as a Non-Participating Subsequent Transferee in the returned proceedings. The Trustee opposed the request, and the Court denied it explaining that unlike the Subsequent Transferees, BLI had "litigated the extraterritoriality [issue] and . . . lost it." (Transcript of 11/19/2014 Hr'g at 31:10-15 (ECF Doc # 9542).) BLI subsequently moved for judgment on the pleadings pursuant to Federal Civil Rule 12(c) based on the holdings of the *ET Decision*.[11] After extended colloquy with the Trustee's counsel who argued, among other things, that the complaint in *BLI* should not be dismissed under the *ET Decision*, counsel expressed the willingness that I decide the BLI motion on the merits as part of the omnibus motion raising the same issues. (Transcript of 7/29/2015 Hr'g at 20:7-18 (ECF Doc # 11158).)

[11] *See Memorandum of Law In Support of Defendant Bureau of Labor Insurance's Motion for Judgment on the Pleadings*, dated Apr. 9, 2015 (ECF Adv. P. No. 11-02732 Doc. # 86).

D. Parties' Legal Arguments

The Subsequent Transferees and the Trustee disagree about the scope of the *ET Decision*. Initially, the Trustee argues that the *ET Decision* was limited to resolving the "purely legal" issue of whether SIPA and the Bankruptcy Code apply extraterritorially to allow the Trustee to recover purely foreign transfers. (*Trustee Brief* at 14-16.) The Subsequent Transferees responds that the *ET Decision* was not limited to an abstract legal issue and was issued upon consideration of both factual and legal arguments. Thus, the *ET Decision* was binding on the Participating Subsequent Transferees and persuasive as to the Non-Participating Subsequent Transferees. (*Reply Consolidated Supplemental Memorandum of Law In Support of Transferee Defendants' Motion to Dismiss Based on Extraterritoriality*, dated Sept. 30, 2015, at 6-7 ("*Subsequent Transferees Reply*") (ECF Doc. # 11542).)

Next, the Subsequent Transferees assert that their motions to dismiss the *existing* claims should be granted because the Trustee failed to respond to those arguments and relied solely on new allegations in his proposed amended complaints. Accordingly, the Court should grant the branch seeking dismissal. (*Subsequent Transferees Reply* at 4.) The Trustee, however, sought leave to amend many of the complaints to avoid dismissal under the *ET Decision* by adding allegations that implied domestic "components" to the subsequent transfers. He broke these allegations down into nineteen categories (the "Chart Factors"), summarized them in the Chart annexed to the *Trustee Brief* as Ex. 2, and the Chart showed which factors applied to specific Subsequent Transferees. The Trustee argues that all of these factors were relevant to determining whether the subsequent transfers were extraterritorial because the *ET*

Decision instructed the Court to consider the location of the transfers as well as the "component events of those transactions." (*Trustee Brief* at 18.) The Subsequent Transferees respond that none of the Trustee's nineteen factors say anything about the location of the transfers which comprised the crux of the *ET Decision*. (*Subsequent Transferee Reply* at 8, 18-33.) They also add that the holistic approach endorsed by the Trustee was rejected by the Supreme Court in *Morrison*. (*Id*. at 17-18.)

Lastly, the Trustee argues that the branch of the *ET Decision* that addressed comity applied only to the extent the subsequent transfers were foreign transfers, and Judge Rakoff's decision was limited to comity's "potential application" to the cases. (*Trustee Brief* at 33-34.) The Trustee also attacks the comity ruling on the merits arguing that the cases fail the applicable two-prong test requiring a parallel proceeding and a true conflict of law and facts sufficient to justify abstention. (*Id*. at 34-37.) The Subsequent Transferees respond that the comity ruling provides an alternative basis for dismissal to the presumption against extraterritoriality. Moreover, the Trustee's merits attack on Judge Rakoff's comity holding confuse two separate doctrines — "comity of courts" and "comity of nations." (*Subsequent Transferee Reply* at 36-40.)

DISCUSSION

A. Effect of the *ET Decision*

The parties offer dramatically different interpretations of the scope and effect of the *ET Decision*. The Subsequent Transferees view the *ET Decision* as a "mandate" that requires the dismissal of the Trustee's claims to the extent subsequent transfers were made between two parties residing outside of the United States. (*Subsequent Transferees Reply* at 1.) The Trustee, on the other hand, argues that the *ET Decision*

decided a "purely legal" issue and "recognized that the inquiry is whether the *conduct* alleged in the complaints is extraterritorial." (*Trustee Brief* at 2 (emphasis in original).)

The truth lies somewhere between. The *ET Decision* did not simply decide that § 550(a)(2) did not apply extraterritorially, one prong of the two prong test. Judge Rakoff also considered the second prong, concluding that the "focus" of the statute was the subsequent transfer. Using the *CACEIS Complaint* as an example, he held that a complaint required extraterritorial application of § 550(a)(2) if "the relevant transfers and transferees are predominantly foreign: foreign feeder funds transferring assets abroad to their foreign customers and other foreign transferees." *ET Decision*, 513 B.R. at 227.

He did not, however, dismiss any complaints, including the *CACEIS Complaint*. Instead, he returned the cases involving the Participating Subsequent Transferees to this Court "for further proceedings consistent with this Opinion and Order." *Id.* at 232. Consequently, the Court must examine the allegations in the complaints or the proposed amendments involving the Participating Subsequent Transferees to determine if the alleged transfers require the extraterritorial application of § 550(a)(2), or, as the *Nabisco* Court explained, whether "the conduct relevant to the statute's focus occurred in the United States," *Nabisco*, 136 S. Ct. at 2101, bearing in mind that "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Morrison*, 561 U.S. at 266 (emphasis in original). Moreover, the Court must decide whether any particular subsequent transfer claim should be dismissed on the ground of international comity.

The District Court's re-referral did not involve the Non-Participating Subsequent Transferees, and the Court is not similarly bound. The Non-Participating Subsequent Transferees nevertheless argue that the *ET Decision* should govern the outcome of their motions to dismiss under the law of the case doctrine. The *ET Decision* was decided in the context of the BLMIS SIPA liquidation, and "different adversary proceedings in a bankruptcy case do not constitute different 'cases.'" (*Subsequent Transferees Brief* at 7-8 (quoting *Bourdeau Bros. v. Montagne* (*In re Montagne*), No. 08-1024 (CAB), 2010 WL 271347, at *6 (Bankr. D. Vt. Jan. 22, 2010)).)

The Court considers the *ET Decision* highly persuasive in the Non-Participating Subsequent Transfer cases, and notes that the parties have approached the disposition of the motions by applying the dictates of the *ET Decision* to the Participating and Non-Participating Subsequent Transferees in the same manner. Furthermore, even if I would reach a conclusion different from Judge Rakoff, applying different rules would lead to conflicting decisions on the same facts. Finally, although the Trustee successfully opposed BLI's efforts to be included with the other Non-Participating Subsequent Transferees, he effectively conceded its inclusion when his counsel stated that the Court should decide BLI's motion for judgment on the pleadings in accordance with the *ET Decision*. Accordingly, all of the motions to dismiss the complaints, and BLI's motion for judgment on the pleadings, will be governed by the *ET Decision*.

B. International Comity

Although the District Court relied on international comity as an alternative basis to dismiss the subsequent transfer claims, I begin there because it presents a more straightforward analysis. The District Court held that "even if the presumption against

extraterritoriality were rebutted, the Trustee's use of section 550(a) to reach these foreign transfers would be precluded by concerns of international comity." *ET Decision*, 513 B.R. at 231. Dismissing an action based on comity is a form of abstention, *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 422 (2d Cir. 2005), by which "states normally refrain from prescribing laws that govern activities connected with another state 'when the exercise of such jurisdiction is unreasonable.'" *Maxwell II*, 93 F.3d at 1047-48 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(1)).

> Whether so legislating would be "unreasonable" is determined "by evaluating all relevant factors, including, where appropriate," such factors as the link between the regulating state and the relevant activity, the connection between that state and the person responsible for the activity (or protected by the regulation), the nature of the regulated activity and its importance to the regulating state, the effect of the regulation on justified expectations, the significance of the regulation to the international system, the extent of other states' interests, and the likelihood of conflict with other states' regulations.

Id. at 1048 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2)). When considering a motion to abstain, a "court is not restricted to the face of the pleadings, but may review affidavits and other evidence to resolve factual disputes concerning its jurisdiction to hear the action." *Kingsway Fin. Servs., Inc. v. Pricewaterhousecoopers, LLP*, 420 F. Supp. 2d 228, 233 n.5 (S.D.N.Y. 2005) (quoting *DeLoreto v. Ment*, 944 F. Supp. 1023, 1028 (D. Conn. 1996)).

International comity is especially important in the context of the Bankruptcy Code. *Maxwell II*, 93 F.3d at 1048. First, deference to foreign insolvency proceedings promotes the goals of fair, equitable and orderly distribution of the debtor's assets. *Id.*; *accord Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir.1987)

("American courts have long recognized the particular need to extend comity to foreign bankruptcy proceedings."); *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir.1985) ("American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities."). Second, Congress has explicitly recognized the central concept of comity under chapter 15 of the Bankruptcy Code when providing additional assistance to foreign representatives under 11 U.S.C. § 1507(b).[12] *Cf. Maxwell II*, 93 F.3d at 1048 ("Congress explicitly recognized the importance of the principles of international comity in transnational insolvency situations when it revised the bankruptcy laws. *See* 11 U.S.C. § 304.").

In reaching the conclusion that claims based on foreign transfers should be dismissed out of concern for international comity, the District Court emphasized that many of the foreign BLMIS feeder funds were in liquidation proceedings in their home

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[12] Section 1507(b) provides:

> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure-
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> (1) just treatment of all holders of claims against or interests in the debtor's property;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Comity was one of six factors under former Bankruptcy Code § 304, but under § 1507(b), "comity [has been] raised to the introductory language to make it clear that it is the central concept to be addressed." H.R. REP. No. 109-31, at 1507 (2005).

countries subject to their own rules relating to the disgorgement of transfers, the BVI court had already decided in the case of the "Fairfield Funds" – Fairfield Sentry Limited ("Fairfield Sentry"), Fairfield Sigma Limited ("Fairfield Sigma") and Fairfield Lambda Limited ("Fairfield Lambda") – that the liquidators could not reclaim transfers to the feeder fund investors under certain common law theories. The Trustee was attempting to reach around the foreign liquidations to make claims on behalf of a SIPA estate with whom the feeder fund investors – here, the Subsequent Transferees – had no reason to expect that U.S. law would apply to their relationships with the debtor feeder funds. *ET Decision*, 513 B.R. at 232.

The Trustee argues that the District Court did not decide this issue "beyond its potential application to purely foreign subsequent transfers," and its decision is not implicated at all if this Court finds that the transfers were "sufficiently domestic to apply United States law." (*Trustee Brief* at 33 ("[I]f this Court determines after analyzing the component events and transactions that the transfers are not foreign but sufficiently domestic to apply United States law, then the District Court's alternative rationale of comity is not implicated.").) However, the *ET Decision* plainly stated the opposite, holding that comity considerations required dismissal "even if the presumption against extraterritoriality were rebutted." *ET Decision*, 513 B.R. at 231; *accord Maxwell II*, 93 F.3d at 1047 (international comity is separate from the presumption against extraterritoriality, and may be applied to preclude the application of a U.S. statute to conduct clearly subject to that statute).

The Trustee next implies that Judge Rakoff got it wrong. He argues that for comity to apply, the defendants must demonstrate that "(i) parallel proceedings in the

United States and overseas constitute a true conflict between American law and that of a foreign jurisdiction and (ii) the specific facts . . . are sufficiently *exceptional* to justify abstention' to outweigh the district court's general obligation to exercise its jurisdiction." (*Trustee Brief* at 34 (citations and quotation marks omitted) (emphasis in original).) According to the Trustee, BLMIS is not the subject of a parallel liquidation proceeding overseas and no exceptional circumstances support the application of comity. (*Id.* at 34-37.)

Judge Rakoff plainly ruled that comity applies at least where the feeder fund that was the initial transferee was the subject of a foreign liquidation proceeding with its own rules of disgorgement. Moreover, the Trustee misapprehends the branch of the comity doctrine invoked by Judge Rakoff. The Second Circuit has recognized that "international comity" describes two distinct doctrines: first, "as a canon of construction, it might shorten the reach of a statute; second, it may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state, the so-called comity among courts." *Maxwell II*, 93 F.3d at 1047; *accord Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006) (Rakoff, J., sitting by designation), *cert. denied*, 549 U.S. 1282 (2007).

The Trustee's dual factors (parallel proceedings and exceptional facts) apply to the latter branch of comity – comity among courts. *See, e.g., Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92-97 (2d Cir. 2006). Comity among courts is inapplicable here because there are no parallel foreign avoidance actions in which the Trustee seeks to recover from the Subsequent Transferees. Instead, Judge Rakoff was referring to comity among nations, a canon of construction that limits

the reach of the Bankruptcy Code's avoidance and recovery provisions. *ET Decision*, 513 B.R. at 231 ("Courts conducting a comity analysis must engage in a choice-of-law analysis to determine whether the application of U.S. law would be reasonable under the circumstances . . . .").

Comity among nations does not require parallel proceedings, and Judge Rakoff was not referring to the existence or nonexistence of parallel proceedings involving BLMIS. Instead, the reference to foreign proceedings in which the liquidators asserted claims for similar relief against the feeder fund investors informed his conclusion that those foreign jurisdictions had a greater interest in the application of their own laws than the United States had in the application of U.S. law. *See ET Decision*, 513 B.R. at 232 ("Given the indirect relationship between [BLMIS] and the transfers at issue here, these foreign jurisdictions have a greater interest in applying their own laws than does the United States.").

The District Court illustrated this conclusion with references to the Fairfield Sentry liquidation in the BVI. Fairfield Sentry had invested 95% of its funds with BLMIS, and went into liquidation in the BVI shortly after the disclosure of Madoff's Ponzi scheme. Prior to the disclosure of Madoff's fraud and the Fairfield Sentry liquidation, Fairfield Sentry shareholders who redeemed their shares were paid redemption prices based upon the Net Asset Value ("NAV") of their shares, which, in turn, was based on the assumed total value of Fairfield Sentry's assets. In computing NAVs, Fairfield Sentry assigned substantial value to its investment in BLMIS, but the subsequent revelation of Madoff's Ponzi scheme, and the worthlessness of the BLMIS

investments, meant that the earlier computations of NAV and the redemption prices were wrong and grossly inflated.

Fairfield Sentry, acting at the behest of the BVI liquidators, sued the redeeming shareholders in the BVI (the "BVI Redeemer Actions") to recover the redemption payments. It argued that the shareholders had redeemed their investments at an inflated price based upon an erroneous computation of the NAV that governed the redemption price of their shares. The defendants in the BVI Redeemer Actions are the immediate Subsequent Transferees of Fairfield Sentry, the initial transferee of BLMIS in many of the cases before this Court.

In *Fairfield Sentry Ltd. v. Migani*, [2014] UKPC 9, the Privy Council affirmed the lower courts and dismissed Fairfield Sentry's claims against the redeemers. The Privy Council concluded that the redemption price was determined at the time of the redemption based on the facts then known and not upon information that subsequently became available. *See id.* at ¶¶ 2, 24, 30-31. The court further concluded that although the subscription agreements signed by the redeemers contained a New York choice of law provision, New York law was irrelevant. Fairfield Sentry's right to recover the redemptions depended on the articles of association and was governed by BVI law. *Id.* at ¶ 20.

The Fairfield Sentry liquidators also brought redeemer actions in New York (the "US Redeemer Actions," and with the BVI Redeemer Actions, the "Redeemer Actions"). The background to the US Redeemer Actions is discussed in *In re Fairfield Sentry Ltd.*, 458 B.R. 665 (S.D.N.Y. 2011). In April 2010, the liquidators began filing lawsuits in

New York state court against banks that had purchased shares in Fairfield Sentry and against their customers to whom they had resold the shares – the unknown beneficial owners. *Id.* at 671-72. The liquidators initially asserted only state law claims for money had and received, unjust enrichment, mistaken payment and constructive trust, advancing the same theory of recovery as the BVI Redeemer Actions. *Id.* at 672.

In June 2010, the liquidators filed a chapter 15 proceeding which was recognized by this Court. The liquidators subsequently commenced substantially similar US Redeemer Actions in this Court, and removed the state court actions to this Court. *Id.* As of today, there are 305 US Redeemer Actions pending before the Court, (*see Notice of Status Conference*, dated July 8, 2016 (ECF Adv. Proc. No. 10-03496 Doc. # 898)), involving 747 defendants. (*Transcript of July 28, 2016 Hr'g.* at 8 (ECF Adv. Proc. No. 10-03496 Doc. # 906).)[13] In addition to their original state law claims, the liquidators have amended or propose to amend many of the complaints in the US Redeemer Actions to assert statutory claims under the BVI Insolvency Act (the "BVI Act").

The Amended Complaint in *Fairfield Sentry Ltd. (in Liquidation) v. UBS Fund Servs. (Ireland) Ltd.* (*In re Fairfield Sentry Ltd.*), Adv. Proc. No. 11-01258 (Bankr. S.D.N.Y.) is typical. It asserts claims to recover unfair preferences under section 245 of the BVI Act[14] paid to UBS Ireland and the beneficial shareholders. It also asserts claims

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[13] The defendants in forty-one removed actions moved to remand those actions to state court. The proceedings ordered by the District Court in connection with those motions has been held in abeyance while litigation proceeded in the BVI.

[14] Section 245 of the BVI Insolvency Act provides in pertinent part:

> (1) Subject to subsection (2), a transaction entered into by a company is an unfair preference given by the company to a creditor if the transaction (a) is an insolvency transaction; (b) is entered into within the vulnerability period; and (c) has the effect of putting the creditor into a position which, in the event of the company going into

against the same defendants to recover "undervalue" transactions, which correspond to U.S. constructive fraudulent transfer claims, under section 246 of the BVI Act.[15] If the liquidators prevail on their BVI statutory claims, the court may avoid the transaction in whole or in part, restore the parties to the position they would have been in if they had not entered into the transaction, BVI Act § 249(1)(a), (b), and under certain circumstances, follow the property into the hands of third parties. *See* BVI Act §§ 249, 250. In short, the Fairfield Sentry liquidators have brought substantially the same claims against substantially the same group of defendants to recover substantially the same transfers brought by the Trustee against the Fairfield Sentry Subsequent Transferees.

Although the District Court did not specifically mention the "Kingate Funds" – Kingate Global Fund, Ltd. and Kingate Euro Fund, Ltd. – its liquidators have also brought actions that mirror the Trustee's claims in this Court. The Kingate Funds were BLMIS feeder funds that suffered the same fate as the Fairfield Funds, and wound up in

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insolvent liquidation, will be better than the position he would have been in if the transaction had not been entered into.

(2) A transaction is not an unfair preference if the transaction took place in the ordinary course of business. . . .

[15] Section 246 of the BVI Insolvency Act provides in pertinent part:

(1) Subject to subsection (2), a company enters into an undervalue transaction with a person if (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company; and (c) in either case, the transaction concerned (i) is an insolvency transaction; and (ii) is entered into within the vulnerability period.

(2) A company does not enter into an undervalue transaction with a person if (a) the company enters into the transaction in good faith and for the purposes of its business; and (b) at the time when it enters into the transaction, there were reasonable grounds for believing that the transaction would benefit the company. . . .

liquidation in Bermuda and the BVI. Acting through their liquidators, the Kingate Funds brought suit in Bermuda against several service providers (Kingate Management Limited ("KML")[16] and FIM Limited and FIM Advisors (collectively, "FIM")) and their direct and indirect shareholders and affiliates, as the ultimate recipients, to recover overpaid fees based on erroneous NAVs under both legal and equitable theories. (*See Amended Statement of Claim*, dated Feb. 12, 2012, annexed as Exhibit A to the *Reply Declaration of Anthony M. Gruppuso, Esq.*, dated May 31, 2016 (ECF Adv. Proc. No. 09-01161 Doc. # 273).) The Kingate Funds also asserted tort and breach of contract claims against the service providers and their ultimate owners, Messrs. Carlo Grosso and Federico Ceretti.

In a decision dated September 25, 2015, the Supreme Court of Bermuda rendered its Judgment on Preliminary Issues. *See Kingate Global Fund Ltd.* (*In Liquidation*) *v. Kingate Management Ltd.*, [2015] SC (Bda) 65 Com (Bermuda). Adhering to the Privy Council's decision in *Fairfield Sentry*, the Bermuda court concluded that monthly NAV determinations were binding on the Kingate Funds and their members in the absence of bad faith or manifest error for the purpose of calculating subscription and redemption prices, *id.* at ¶ 81, and were similarly binding with respect the fees paid to KML. *Id.* at ¶ 116. Furthermore, BLMIS' bad faith or manifest error which led to the erroneous calculation of the NAVs did not affect KML's right to fees, *id.* at ¶ 142, but if KML induced the Funds' mistake, KML's contractual entitlement to fees was no defense to the unjust enrichment claim to the extent the payment exceeded the true NAV. *Id.* at ¶ 163.

[16] KML is in liquidation in Bermuda.

The Trustee has sued the same defendants as well as the Kingate Funds and two additional service providers, Citi Hedge Fund Services Limited and HSBC Bank Bermuda Limited. (*See Picard v. Ceretti* (*In re BLMIS*), Adv. Proc. No. 09-01161.) He seeks to avoid the initial transfers to the Kingate Funds, and recover the initial transfers and subsequent transfers from the immediate and mediate transferees of the Kingate Funds. In connection with his efforts, the Trustee sought, *inter alia*, to compel the Bermuda liquidators to produce the discovery that the Bermuda defendants had produced to them. Referring to the Bermuda action during his motion to compel discovery, the Trustee argued that "[i]n this proceeding, the Trustee seeks to recover the same moneys from the same parties." (*Reply Memorandum of Law in Support of the Trustee's Motion to Compel Defendants to Produce Documents and Participate in Discovery*, dated May 31, 2016, at 7 (ECF Adv. Proc. # 09-01161 Doc. # 272).)

The Trustee's subsequent transfer claims arising from initial transfers to the Fairfield Funds and the Kingate Funds (together, sometimes referred to as the "Funds") duplicate the actions brought by the respective liquidators, with limited success, against substantially the same defendants to recover substantially the same transfers. In this respect, the Trustee's claims against the Subsequent Transferees of those funds attempt to reach around the proceedings in those foreign insolvency courts, and subject the common defendants to duplicative claims by different plaintiffs.

As between the United States on the one hand and the BVI and Bermuda on the other, the latter jurisdictions have a greater interest in regulating the activity that gave rise to the common claims asserted by the Trustee and the liquidators. The Funds were formed under foreign law, and their liquidation, including the marshaling of assets and

the payment of claims, is governed by local insolvency law, to which particular deference is due under our own jurisprudence. The United States has no interest in regulating the relationship between the Funds and their investors or the liquidation of the Funds and the payment of their investors' claims. The United States' interest is purely remedial; the Bankruptcy Code allows the Trustee to follow the initial fraudulent transfer into the hands of a subsequent transferee, although the presumption against extraterritoriality, discussed in the next section, may dictate otherwise. In fact, the Trustee has successfully argued that the investors in feeder funds have no recourse under SIPA against the BLMIS customer property estate because they were not customers of BLMIS. *See Kruse v. Bricklayers & Allied Craftsman Local 2 Annuity Fund* (*In re BLMIS*), 708 F.3d 422, 426-28 (2d Cir. 2013); *SIPC v. Jacqueline Green Rollover Account*, 12 Civ. 1039 (DLC), 2012 WL 3042986, at *13 (S.D.N.Y. July 25, 2012), *SIPC v. BLMIS* (*In re BLMIS*), 515 B.R. 161, 169 (Bankr. S.D.N.Y. 2014).

Finally, although the subscription agreements, at least in the case of Fairfield Sentry, were governed by New York law, the Privy Council in *Fairfield Sentry* ruled that the redemptions were governed by the Articles of Association and BVI law. *Migani*, UKPC 9, at ¶ 10. Thus, if the shareholders had any expectations relating to which law governed redemptions, they should have expected BVI law to govern. Furthermore, forum selection and choice of law clauses in agreements do "not preclude a court from deferring on grounds of international comity to a foreign tribunal where deference is otherwise warranted." *Altos Hornos de Mexico*, 412 F.3d at 429. And since the Trustee has not argued that New York law governed any aspect of the relationships between the Kingate Funds and their service providers or their shareholders, there is no basis to

conclude that these transferees should have expected United States or New York law to govern the payments made to them or the recovery of the payments in the event of the Kingate Funds' liquidation.

Accordingly, the recovery of Subsequent Transfers under 11 U.S.C. § 550(a)(2) arising from the avoidance of initial transfers made by BLMIS to the Fairfield Funds or the Kingate Funds is barred under the doctrine of comity as interpreted in the *ET Decision,* and if the initial transfers cannot be avoided, there can be no recovery from subsequent transferees. 11 U.S.C. § 550(a) ("to the extent a transfer is avoided . . . the trustee may recover . . . "). This category includes all of the claims identified in the Chart pertaining to the following adversary proceedings: 09-01161, 09-01239, 10-05346, 10-05348, 10-05351, 10-05355, 11-02149, 11-02493, 11-02537, 11-02538, 11-02539, 11-02540, 11-02541, 11-02542, 11-02553, 11-02554, 11-2568, 11-02569, 11-02570, 11-02571, 11-02572, 11-02573, 11-02730, 11-02731, 11-02762, 11-02763, 11-02910, 11-02922, 11-02923, 11-02925, 11-02929, 12-01002, 12-01004, 12-01005, 12-01019, 12-01021, 12-01022, 12-01023, 12-001025, 12-01046, 12-01047, 12-01194, 12-01195, 12-01202, 12-01205, 12-01207, 12-01209, 12-01210, 12-01211, 12-01216, 12-01512, 12-01513, 12-01565, 12-01566, 12-01577, 12-01669, 12-01676, 12-01677, 12-01680, 12-01690, 12-01693, 12-01694 and 12-01695. In addition, the claims against BLI are based on subsequent transfers from Fairfield Sentry, the initial transferee. *See BLI*, 480 B.R. at 506-07. Furthermore, all of the subsequent transfers alleged in Adv. Proc. Nos. 12-01697 and 12-01700 and identified in the Chart originated with Fairfield Sentry or Fairfield Sigma. These claims are dismissed on comity grounds and leave to amend is denied.

In several multi-defendant, multi-transferor adversary proceedings, the following defendants received subsequent transfers only from the Fairfield Funds or the Kingate Funds:

Table 1

Adv. Proc. No.	Subsequent Transferee
09-01364	HSBC Private Bank (Suisse) S.A.
10-05120	BGL BNP Paribas S.A.
10-05353	Natixis; Tensyr Ltd.
11-02758	Caseis Bank
11-02784	Somers Nominees (Far East) Ltd.
12-01576	BGL BNP Paribas Luxembourg S.A.; BNP Paribas (Suisse); BNP Paribas S.A.
12-01698	Banque Internationale a Luxembourg (Suisse) S.A. (f/k/a Dexia Private Bank (Switzerland) Ltd.); Banque Internationale a Luxembourg S.A. (f/k/a Dexia Banque Internationale a Luxembourg S.A.), individually and as successor in interest to Dexia Nordic Private Bank S.A.; RBC Dexia Investor Services Bank S.A.; RBC Dexia Investors Services España, S.A.
12-01699	Royal Bank of Canada; Royal Bank of Canada Trust Company (Jersey) Ltd.; Royal Bank of Canada (Asia) Ltd.; Royal Bank of Canada (Suisse) S.A.; RBC Dominion Securities Inc.

These subsequent transfer claims are dismissed, and leave to amend is denied.

Finally, the Chart indicates that the following Subsequent Transferees received subsequent transfers from the Kingate Funds and/or the Fairfield Funds as well as another transferor:

Table 2

Adv. Proc. No.	Subsequent Transferee
10-05120	BNP Paribas Securities Services S.A.
11-02758	Caceis Bank Luxembourg
11-02784	Somers Dublin Ltd.
12-01273	Mistral (SPC)
12-01278	Zephyros Ltd.
12-01576	BNP Paribas Arbitrage SNC; BNP Paribas Bank & Trust Cayman Ltd.; BNP Paribas Securities Services, S.A.; BNP Paribas Securities Services Succursale de Luxembourg
12-01699	Guernroy Ltd.; Royal Bank of Canada (Channel Islands) Ltd.
12-01702	Dove Hill Trust

These claims are dismissed (and the Trustee's motions for leave to amend are denied), to the extent the Fairfield Funds or the Kingate Funds received the initial transfers, again for the same reasons.

Judge Rakoff also observed that Harley International ("Harley") was in liquidation in the Cayman Islands, *ET Decision*, 513 B.R. at 225 (citing *CACEIS Complaint*). According to the Chart, Harley made transfers to the following defendant Subsequent Transferees:

Table 3

Adv. Proc. No.	Subsequent Transferee
09-01364	HSBC Bank PLC
10-05353	Bloom Asset Holdings Fund
11-02758	CACEIS Bank Luxembourg
11-02759	Nomura International PLC
11-02760	ABN AMRO Bank N.V.

11-02761	KBC Investments Ltd.
11-02784	Somers Dublin Ltd.
11-02796	BNP Paribas Arbitrage SNC

By order dated Feb. 5, 2010, the Cayman Islands Grand Court, Financial Services Division ("Grand Court"), recognized the Trustee as the sole representative of the BLMIS estate in the Cayman Islands. *In re BLMIS*, 2010 (1) CILR 231, at ¶ 6 (Grand Ct. Cayman Is.). He subsequently issued a summons seeking disclosure, information and documents from the official liquidators relevant to potential causes of action that Harley might have had against any Fortis entity, and in particular, its former administrator, Fortis Prime Fund Solutions (IOM) Ltd. ("Fortis"), now known as ABN AMRO Fund Services (IOM) Ltd. *In re Harley Int'l (Cayman) Ltd.*, 2012(1) CILR 178, at ¶ 5 (Grand Ct. Cayman Is.). The Grand Court dismissed the Trustee's application, because it was "the function of Harley's official liquidators, not the trustee, to investigate whether or not Harley has any cause of action against its former professional service providers." *Id.* After the official liquidators rendered their report and served a copy on the Trustee, the Trustee filed an application to seal it, but the Grand Court denied the sealing application. *Id.* at ¶ 20.

It is not clear whether the Trustee pursued any further relief in the Harley liquidation, but he actively litigated avoidance claims in connection with the Cayman Islands liquidation of two funds operated by the Primeo Fund. One of the Primeo Funds was a feeder fund with its own BLMIS account, but following a restructuring in April 2007, both Primeo Funds operated strictly as sub feeder funds of two BLMIS feeder funds, Alpha Prime Fund Ltd. and Herald Fund SPC. *Picard v. Primeo Fund (In*

Liquidation), 2014(1) CILR 379 ("*Primeo*"), at ¶ 3 (Ct. App. Cayman Is.). The Trustee commenced proceedings against the Primeo Fund as an initial and subsequent transferee to recover preferential and fraudulent transfers under U.S. bankruptcy law and to recover preferences under § 145 of the Cayman Islands Companies Law (or equivalent common law rules). *Id.* at ¶ 5. The Cayman Islands Court of Appeal ultimately ruled that the Trustee was entitled to pursue claims against the Primeo Funds under the avoidance provisions of Cayman Islands law, but not under U.S. law. *Id.* at ¶¶ 55, 57, 59.

As in the case of the Fairfield Funds and the Kingate Funds, the Cayman Islands has a greater interest in regulating the activities that gave rise to the Trustee's subsequent transfer claims, particularly the validity or invalidity of payments by Harley to its investors and service providers. The United States, on the other hand, has no interest in regulating the transfers from a foreign fund to its investors or service providers. The only U.S. connection to those transfers is the Trustee's right under the Bankruptcy Code to follow BLMIS' fraudulent transfers into the hands of third parties who did not deal with BLMIS directly. Moreover, the Trustee has asserted claims against other transferees in Cayman Islands liquidation proceedings, and the Cayman Islands Court of Appeal has acknowledged his right to sue in the Cayman Islands and invoke Cayman Islands avoidance law. Finally, those who invested in Harley and lost their investments have no rights against BLMIS, and must seek to recoup their investments through the Cayman Islands liquidation proceedings.

The Subsequent Transferees have also identified three subsequent transferors that are in liquidation in Luxembourg: Luxalpha SICAV, Oreades SICAV and

Luxembourg Investment Fund U.S. Equity Plus. Although the principles discussed above might suggest that any Subsequent Transfer claims emanating from transfers by these debtors should also be barred, the Court is not prepared to reach this conclusion on the current state of the record. The Court has not been directed to any information regarding those liquidations, whether Luxembourg law allows the liquidator to avoid and recover preferences or fraudulent transfers (regardless of what they are called) and whether the Trustee is attempting to make an end-run around those proceedings. Accordingly, the Court declines to dismiss those claims or deny leave to amend on the basis of comity, without prejudice to any party's right to supplement the record through an appropriate motion.

C. Extraterritoriality

1. Introduction

The Court next considers the balance of the claims under the doctrine of extraterritoriality and whether the allegations supplied in the complaints and/or proffers rebut the presumption against extraterritoriality by alleging, in each case, a domestic transfer. The rules that govern motions to dismiss under Federal Civil Rule 12(b)(6) apply to this branch of the motions to dismiss. To state a legally sufficient claim, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *accord Twombly*, 550 U.S. at 556. Courts do not

decide plausibility in a vacuum. Determining whether a claim is plausible is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

The *ET Decision* was concerned with foreign transfers. It did not, however, define or provide a test to determine when a transfer was "foreign" except that "purely foreign transfers" – transfers between two foreign entities that do not reside in the United States using non-U.S. bank accounts (or correspondent U.S. bank accounts) – are obviously "foreign." The Subsequent Transferees argue that a party is "foreign" if it was formed under foreign law, as all of the non-individual Subsequent Transferees were, or is the citizen of another nation as are the two individual Subsequent Transferees discussed below. (*Subsequent Transferees Brief* at 12.) However, the *ET Decision* never mentioned "citizenship" or "domicile," although it did highlight the place of organization as the *sine qua non* of foreignness. *See ET Decision*, 513 B.R. at 227-28 (discussing the facts in *Midland Euro Exchange*). In addition, the District Court stated that "to the extent that the Trustee's complaints allege that both the transferor and the transferee reside outside of the United States, there is no plausible inference that the transfer occurred domestically." *ET Decision*, 513 B.R. at 232 n. 4. While meant as an admonition directed to the Trustee, the statement suggests that a transfer between two

entities organized under foreign law might nonetheless be domestic if the parties "resided" in the United States.

The District Court did not explain what it meant by "reside," but it meant something more than mere presence. "[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison,* 561 U.S. 247, 130 S. Ct. at 2883–2888. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

In addition, it does not appear that that the District Court equated residence for purposes of extraterritoriality with the test for personal jurisdiction as the Trustee seems to do. First, the tests for personal jurisdiction and extraterritoriality are not the same. *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 69 (2d Cir. 2012) ("Ewing's lack of contact with the United States may provide a basis for dismissing the case against him for lack of personal jurisdiction . . . but the transactional test announced in *Morrison* does not require that each defendant alleged to be involved in a fraudulent scheme engage in conduct in the United States.").

Second, the *CACEIS Complaint* included numerous allegations relating to personal jurisdiction:

> 6. The CACEIS Defendants are subject to personal jurisdiction in this judicial district because they purposely availed themselves of the laws and protections of the United States and the state of New York by, among other things, knowingly directing funds to be invested with New York-based BLMIS through the Feeder Funds. The CACEIS

> Defendants knowingly received subsequent transfers from BLMIS by withdrawing money from the Feeder Funds.
>
> 7. By directing investments through Fairfield Sentry, a Fairfield Greenwich Group ("FGG") managed Madoff feeder fund, the CACEIS Defendants knowingly accepted the rights, benefits, and privileges of conducting business and/or transactions in the United States and New York. Upon information and belief, the CACEIS Defendants entered, or caused their agent to enter, into subscription agreements with Fairfield Sentry under which they submitted to New York jurisdiction, sent copies of the agreements to FGG's New York City office, and wired funds to Fairfield Sentry through a bank in New York. In addition, the CACEIS Defendants are part of the CACEIS Group, which maintains an office in New York City. The CACEIS Defendants thus derived significant revenue from New York and maintained minimum contacts and/or general business contacts with the United States and New York in connection with the claims alleged herein.

(*CACEIS Complaint* at ¶¶ 6-7.) Despite these allegations, the District Court held that the "subsequent transfers that the Trustee seeks to recover are foreign transfers." *ET Decision*, 513 B.R. at 228.[17] The District Court also discounted the allegation that "the

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[17] The Trustee points out that the *ET Decision* did not mention the personal jurisdiction allegations, (*Trustee's Brief* at 21-22), and adds that the District Court erroneously concluded that the *CACEIS Complaint* did not allege a New York choice of law provision. (*Id.*at 22 n. 93.) The text in the *CACEIS Complaint* spanned just nineteen pages. Judge Rakoff undoubtedly read it, and his failure to mention the allegations relating to personal jurisdiction implies that he deemed them to be irrelevant to the issue of extraterritoriality.

In addition, the Trustee is wrong when he says that the *CACEIS Complaint* alleged that the CACEIS subscription agreements contained New York choice of law clauses and that Judge Rakoff wrongly concluded that they did not. Rather, the *CACEIS Complaint* alleged that subscription agreements that the CACEIS defendants signed included a submission to New York jurisdiction. (*CACEIS Complaint* ¶ 7 ("Upon information and belief, the CACEIS Defendants entered, or caused their agent to enter, into subscription agreements with Fairfield Sentry under which they submitted to New York jurisdiction. . . .").) In fact, the Fairfield Sentry liquidators have sued the CACEIS defendants in this Court to recover the same subsequent transfers/redemptions under both New York and BVI law, asserting personal jurisdiction, *inter alia*, under subscription agreements that include a provision containing a submission to jurisdiction in New York without mentioning that New York law governs. *See Fairfield Sentry Ltd. (In Liquidation) v. CACEIS Bank Luxembourg*, Adv. Pro. No. 10-03624 (SMB) (Bankr. S.D.N.Y.) (ECF Adv. Pro. No. 10-03624 Doc. # 31, at ¶ 21); *Fairfield Sentry Ltd. (In Liquidation) v. CACEIS Bank EX IXIS IS*, Adv. Pro. No. 10-03871 (SMB) (Bankr. S.D.N.Y.) (ECF Adv. Pro. No. 10-03871 Doc. # 22, at ¶ 21). Finally, the reference to the absence of a New York choice of law provision and

CACEIS Defendants are part of the CACEIS Group, which maintains an office in New York City."

Rather, it appears that the District Court was concerned with where the parties conducted their operations. Its conclusion that the CACEIS defendants were foreign was based on the fact that they were organized and "operating" in foreign countries. *ET Decision*, 513 B.R. at 225. On the other hand, several of the feeder funds involved in these cases were organized in one country but maintained no operations or office other than a post office box in their home country, did not employ anyone in the home country, and were organized as exempt companies that could not solicit investors in their own countries. Instead, they were run from another location, often New York, by the employees of affiliated entities, and identified the affiliate's address as their own when conducting business. In addition, one subsequent transferor, Fairfield Greenwich Limited (Cayman), was registered to do business in New York. Where the Trustee alleges non-conclusory facts to the effect that the subsequent transferor and Subsequent Transferee conducted their principal and only operations in the United States and maintained their bank accounts in the United States, it is plausible to infer that the subsequent transfer occurred domestically.

This brings me to the critical factor – where the transfer occurred. Judge Rakoff's reference to where the parties resided was secondary. While the U.S. citizenship or residency of the parties may support the inference that the transaction is domestic, the

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creditor expectations appeared in the portion of the *ET Decision* addressing comity, not extraterritoriality. *ET Decision*, 513 B.R. at 232.

focus is the location of the transfer and not the location of the parties to the transfer; and a transfer from one foreign account to another foreign account is still a foreign transfer. *See Absolute*, 677 F.3d at69 ("While it may be more likely for domestic transactions to involve parties residing in the United States, '[a] purchaser's citizenship or residency does not affect where a transaction occurs; a foreign resident can make a purchase within the United States, and a United States resident can make a purchase outside the United States.'") (quoting *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reins. Co.*, 753 F. Supp. 2d 166, 178 (S.D.N.Y.2010)). Furthermore, a mere allegation that the transaction "took place in the United States" is insufficient to allege a domestic transaction, "[a]bsent factual allegations suggesting that the Funds became irrevocably bound within the United States or that title was transferred within the United States, including, but not limited to, facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, *or the exchange of money*." *Id.* at 70 (emphasis added).

In addition, it is necessary to distinguish between the transfer and the steps necessary to carry it out. In *Loginovskaya v. Batrachenko*, 764 F.3d 266 (2d Cir. 2014), decided after the *ET Decision*, the Court dealt with the extraterritorial application of § 22 of the Commodity Exchange Act ("CEA"). There, the plaintiff was a Russian citizen and resident; the defendant was a U.S. citizen residing in Moscow, and the CEO of the Thor Group, an international financial services group based in New York that managed investment programs chiefly in commodities futures and real estate. Investors would invest in Thor United which, in turn, was supposed to invest in one of the Thor programs. The defendant induced the plaintiff to invest in the Thor program, she

transferred $720,000 to Thor United's bank accounts in New York, but eventually lost her investment. *Id*. at 268-69.

The plaintiff sued the defendant alleging that he had engaged in fraudulent conduct in violation of CEA § 40.[18] Applying its holding in *Absolute*, the Court explained that in order for the plaintiff to rebut the presumption against extraterritoriality and demonstrate that her investment was a domestic transaction, she would have to show that "the transfer of title or the point of irrevocable liability for such an interest occurred in the United States." *Id*. at 274. The plaintiff purchased an interest in Thor United, and the investment contracts with Thor United were negotiated and signed in Russia. *Id*. Although Thor United was incorporated in New York, "a party's residency or citizenship is irrelevant to the location of a given transaction." *Id*. (quoting *Absolute*, 677 F.3d at 70) (internal quotation marks omitted). Furthermore, although the plaintiff transferred her funds to Thor United's bank account in New York,

> [t]hese transfers . . . were actions needed to carry out the transactions, and not the transactions themselves — which were previously entered into when the contracts were executed in Russia. The direction to wire transfer money to the United States is insufficient to demonstrate a domestic transaction.

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[18] Section 40 states in pertinent part as follows:

> (1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or
>
> (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

7 U.S.C. § 6*o*(1) (2008).

Id. at 275.

The *ET Decision* imposed additional limitations on the Trustee's ability to allege a domestic transfer. First, a transfer to a correspondent bank located in the United States is not a domestic transfer for purposes of extraterritoriality. *ET Decision*, 513 B.R. at 228 n. 1. "Correspondent accounts are accounts in domestic banks held in the name of foreign financial institutions. Typically, foreign banks are unable to maintain branch offices in the United States and therefore maintain an account at a United States bank to effect dollar transactions." *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 56 n. 3 (2d Cir.2012) (citations and internal quotation marks omitted), *certifying questions to* 984 N.E.2d 893 (N.Y. 2012). In this way, the use of a correspondent bank facilitates the transfer of dollar-denominated payments to a foreign country. The District Court's pronouncement reflects the view that although the purposeful use of a correspondent bank account may support personal jurisdiction, *Official Comm. of Unsecured Creditors v. Bahrain Islamic Bank*, 549 B.R. 56, 68 (S.D.N.Y. 2016), the routing of transfer to a U.S. bank account to facilitate the transfer to a foreign bank account is not a domestic transaction for extraterritoriality purposes. *See Cendeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 472 (S.D.N.Y. 2010) (concluding that RICO did not apply extraterritorially where the scheme's contacts with the United States were limited to the movement of funds into and out of U.S. based bank accounts), *aff'd*, 457 F. App'x. 35 (2d Cir. 2012); *Maxwell I*, 186 B.R. at 817 n. 5 (debtor's payment of overdraft debt owed to U.K. bank, routed through the creditor's U.S. account and

immediately credited to the U.K. overdraft, was not a domestic transfer).[19]

Second, the *ET Decision* implies that an otherwise extraterritorial subsequent transfer beyond the reach of § 550(a)(2) cannot be drawn back as the result of a later, subsequent transfer of the funds to the United States. The Trustee had argued before the District Court that the policy of § 550(a) would be undermined if a U.S. debtor could intentionally transfer its money offshore and retransfer it to the United States to avoid the reach of the Bankruptcy Code. *ET Decision*, 513 B.R. at 231. Judge Rakoff rejected the policy argument, stating that in such a circumstance, "the Trustee here may be able to utilize the laws of the countries where such transfers occurred to avoid such an evasion while at the same time avoiding international discord." *Id.* The statement suggests that once funds have been transferred beyond the territorial reach of the recovery provisions under Bankruptcy Code § 550(a)(2), the re-transfer of those funds back to the United States cannot be recovered as a subsequent transfer under the Bankruptcy Code.

Third, the District Court did not adopt *Maxwell I*'s "component events" test, at least as the Trustee reads it. Trustee advocates for an expanded test to determine that a transfer is domestic, including the following "component events" he derives from *Maxwell I*:

> (i) the debtor's location; (ii) the defendants' location; (iii) where the defendants engaged in business regarding the transaction; (iv) what

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[19] The Court is bound to apply the District Court's ruling on the use of a correspondent bank account. Nevertheless, if title to the cash passed to the Subsequent Transferee when it reached a U.S. correspondent bank account, and the Subsequent Transferee was then free to use the money as it saw fit, the transfer occurred domestically under the Second Circuit case law discussed earlier. Moreover, the transferee may have made subsequent transfers from the U.S. correspondent bank account to other domestic transferees, and consequently, the funds may never have left the United States.

> transaction and agreements the parties entered into that led to the debt that the transfers were used to pay; (v) where the parties' relationship was centered when conducting the transaction underlying the debt that triggered the transfers; (vi) the law governing the parties' transactions; and (vii) how the transaction was concluded.

(*Trustee Brief* at 18.)[20] Initially, the continuing relevance of certain "component events" that the Trustee culls from *Maxwell I* is open to question. *Maxwell I* was decided when the "conduct" and "effect" tests were controlling law in this Circuit, and several of the "component events" identified by the Trustee refer to where conduct "relating to" the transfer occurred rather than where the transfer itself occurred. These include "where the defendants engaged in business regarding the transaction" and "where the parties' relationship was centered when conducting the transaction underlying the debt that triggered the transfers." (*Trustee's Brief* at 18.) *Morrison* subsequently abrogated the "conduct" and "effects" tests because they led to unpredictable results, Morrison, 561 U.S. at 256, 261; *accord Loginovskaya*, 764 F.3d at 274 n. 9 (stating that *Morrison* dispensed with the "conduct and effects" test), and the Trustee's conduct-related "component events" call for the type of analysis that *Morrison* rejected.

Similarly, the *Maxwell I* Court distinguished certain conduct as "preparatory" to the transfers. *Maxwell I*, 186 B.R. at 817 ("Even assuming that the transfers were

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[20] I do not adopt the Trustee's characterization of the "component events" identified by the *Maxwell I* Court. Ruling that the transfers were extraterritorial, the *Maxwell I* Court observed that the debtor's and the transferee banks' relationship was centered in England, the transfers satisfied antecedent debts that arose in England, and the debtor repaid the debts by transferring the funds to the U.K. *Maxwell I*, 186 B.R. at 817. The U.S. sale that was the source of the funds was also a component event, but was "more appropriately characterized as a preparatory step to the transfers," and was "insufficient—in light of the absence of any other domestic connection—to characterize the transfers as occurring within the borders of the U.S." *Id.* Notably, the District Court focused on the location of the recipients. The debtor-transferor was an English holding company but its United States affiliates accounted for most of the debtor's asset pool. *See id.* at 812.

initiated in the U.S. after the U.S. assets were sold, this conduct is more appropriately characterized as a preparatory step to the transfers.") (citing *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1538 (9th Cir.1994) ("[C]onduct occurring within the United States which, standing alone, is merely preparatory or incidental to the proscribed conduct does not confer ... jurisdiction.")). The *Morrison* Court expressly criticized the distinction between "merely preparatory" conduct in the United States and conduct in the United States that rendered the transaction domestic. *Morrison*, 561 F.2d at 258.

In truth, the conduct to which the Trustee points was, at most, those "actions needed to carry out the transactions, and not the transactions themselves." *Loginovskaya*, 764 F.3d at 275.

2. The Nineteen Chart Factors

In furtherance of his argument that the subsequent transfers in these cases were predominately domestic, the Trustee's submission included the Chart that was required by the *Scheduling Order*. (*Trustee's Brief*, Ex. 2-A, 2-B.) The Chart listed and explained nineteen factors he argued were germane to the determination whether to dismiss a complaint on extraterritoriality grounds, and showed which factors applied to each case. Many of the factors are patently irrelevant under the criteria discussed in the *ET Decision* and the Second Circuit cases discussed above. Some relate to the selection of United States governing law or venue in the agreements between the subsequent transferor and transferee (Factors 2, 3). These contract provisions have nothing to do with where the parties exchanged the cash. And alleging that a feeder fund paid a fee to a defendant Subsequent Transferee using BLMIS customer property, (Factor 14), is just another way of saying the feeder fund transferred customer property, an essential

element of a subsequent transfer claim. It says nothing about the domestic nature of the transfer.

Other factors center on the Subsequent Transferee's knowledge that it was entrusting or investing assets with a foreign feeder fund that entrusted or invested the feeder fund's assets with BLMIS for the supposed purpose of investing in U.S. equity and Treasury securities in the United States. (Factors 4-7.) Judge Rakoff considered the U.S. origin of the initial transfer, and rejected it. *ET Decision*, 513 B.R. at 228 ("Although the chain of transfers originated with Madoff Securities in New York, that fact is insufficient to make the recovery of these otherwise thoroughly foreign subsequent transfers into a domestic application of section 550(a)."). In addition, the *CACEIS Complaint* alleged that the defendants had knowingly invested with the New York-based BLMIS through the feeder funds, but that allegation did not affect Judge Rakoff's conclusion that the subsequent transfers were foreign. A Subsequent Transferee's knowledge that it was investing in a foreign feeder fund that it knows will invest or entrust money with BLMIS does not, without more, render the subsequent redemption of that investment domestic.

Two other factors refer to fees received based on BLMIS' performance or fees for investing with a feeder fund or soliciting others to invest in the fund. (Factors 14, 15.) None of these factors or their underlying allegations pertain to the factors on which Judge Rakoff focused: the "foreignness" of the parties and the location of the sending and receiving bank accounts.

The Trustee also places significance on the fact that some Subsequent Transferees filed customer claims in the BLMIS liquidation. (Factor 17.) The Subsequent Transfers have no relevance to the customer claim. The customer's net equity claim is determined under the Net Investment Method approved by the Second Circuit in *In re BLMIS*, 654 F.3d 229 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 24 (2012), and computes the difference between the amount the customer deposited and the amount he withdrew. The relevant withdrawals are the initial transfers the customer received from BLMIS, not the subsequent transfers a third-party received from a BLMIS customer such as a feeder fund. If the Subsequent Transferee was also a BLMIS investor, the third party subsequent transfers are unrelated to his net equity claim. If, on the other hand, the Subsequent Transferee was not a BLMIS investor and is asserting a BLMIS claim to recover his investment in the feeder fund, the Trustee has successfully argued that feeder fund investors were not BLMIS customers under SIPA, and as discussed above in the comity section of this opinion, do not have allowable net equity claims for that reason.

Finally, many of the factors relied on by the Trustee touch on the actions by the Subsequent Transferee in its own right or through a U.S. affiliate or U.S. service provider relating to its investment in the feeder fund and BLMIS. These include allegations that the Subsequent Transferee conducted due diligence in the United States, or used U.S. affiliates or U.S. agents for this and other purposes, in connection with the transfers or transactions at issue. (Factors 8-11.) Other factors relate more generally to a relationship between the feeder fund and the Subsequent Transferee. These include allegations that the parties "had significant U.S. connections by virtue of the Defendant's

communications with specific Feeder Fund offices, sales representatives, agents, employees, and/or other representatives located in the U.S," (Factor 13), or the Subsequent Transferee "participated in Feeder Fund management, and/or is an entity created by, or for the benefit of, Feeder Fund management." (Factor 16.)

The proffers discussed below rely heavily on these U.S. connections and include allegations that the U.S. agents or U.S. affiliates dominated and controlled the Subsequent Transferee, and actually conducted its operations. The Trustee cites *SEC v. Gruss*, No. 11 Civ. 2420, 2012 WL 3306166 (S.D.N.Y. Aug. 13, 2012) ("*Gruss II*") for support. (*See, e.g., Trustee's Supplemental Memorandum of Law in Opposition to the Motion to Dismiss Based on Extraterritoriality Filed by Natixis S.A., Bloom Asset Holdings Fund, and Tensyr Limited, and in Further Support of Trustee's Motion for Leave to Amend*, dated June 26, 2015, at 11 n. 9 (stating that the *Gruss* court found that "issues of fact existed regarding whether an offshore fund was "foreign" for purposes of extraterritoriality where complaint alleged that operational and investment decisions for the offshore fund were made in New York, 'such that for all intents and purposes, the [offshore fund] was based in New York.'") ECF Adv. Pro. No. 10-05353 Doc. # 101).) *Gruss*, however, undercuts rather than supports the Trustee.

In *Gruss*, the defendant was the chief financial officer of DBZCO which managed several, separate hedge funds, including the Onshore Fund and the Offshore Fund, the latter a Cayman Islands fund. *SEC v. Gruss*, 859 F. Supp.2d 653, 655 (S.D.N.Y. 2012) ("*Gruss I*"). The defendant transferred money without authority from the Offshore Fund to the Onshore Fund. The transfers typically occurred between U.S. bank accounts and often involved a transfer to a U.S. entity. *Id.* at 656. The SEC brought an

enforcement action against the defendant alleging that the unauthorized transfers violated the Investment Advisers Act ("IAA").

The defendant moved to dismiss arguing, among other things, that the complaint was barred by the presumption against extraterritoriality. The District Court disagreed. It distinguished the SEC action under the IAA from the private law suit under the Exchange Act in *Morrison*, and concluded that *Morrison* did not apply. In support of its conclusion, the District Court cited section 929P(b) of the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010). Section 929P(b), enacted after *Morrison*, which allows the SEC and U.S. Government to bring certain enforcement actions based on conduct in the United States or conduct outside the United States that has a "foreseeable substantial effect within the United States." *Id.* at 664 & n. 4.[21] The District Court speculated that section 929P(b) restored the "conduct and effects test" for actions brought by the SEC or the Department of Justice. *Id.* at 664 n. 4.

The District Court next concluded that even if *Morrison* applied, the SEC had rebutted the presumption against extraterritoriality because the transactions were domestic. The majority of Offshore Fund investors affected by the unauthorized

[21] Section 929P(b) amended the Securities Act of 1933, the Exchange Act and the IAA by granting the district court jurisdiction over actions or proceedings brought by the SEC or the United States involving "(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States." In *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014), the Court of Appeals questioned the import of the post-*Morrison* amendment. *Morrison* made clear that the already district court had subject matter jurisdiction even if the presumption against extraterritoriality meant it could not reach the merits. *Id.* at 211 n 11.

transfers were located in the United States and the investors in both funds were impacted by the fraud. *Id.* at 665. Moreover, the inter-fund transfers occurred domestically between U.S. bank accounts. *Id.* at 665-66.

The District Court then returned to the "conduct and effects test:" "the Complaint alleges other relevant facts that would have been dispositive under the conduct and effects test, which may have been revived with Section 929P(b) of the Dodd–Frank Act." *Id.* at 666. These allegations included New York-based DBZCO's activities relating to and control of the Offshore Fund. It made all operational and investment decisions, monitored its performance and compliance with all regulatory requirements, negotiated the terms of its contracts, retained and borrowed money on its behalf, distributed offering and subscription documents to potential investors and listed the Offshore Fund's address in care of DBZCO at DBZCO's New York address. In addition, accounting services for the Offshore Fund's investment and other activities were performed primarily in New York, DBZCO's investor relations personnel distributed financial and performance information to individual investors, and the Offshore Fund's cash was held at and paid from U.S. bank and brokerage accounts. *Id.*

The Complaint also included allegations quoting or paraphrasing statements in the offering memoranda and financial statements that showed a relationship between U.S.-based securities and the Offshore Fund's investors and investments. For example, the securities were marketed "to permitted U.S. persons . . . [and] to accredited investors and qualified purchasers, as defined by the U.S. securities laws," the investment objectives included investing in U.S. securities, and investors would be required to pay certain U.S. taxes for dividend income and certain other interest from

domestic investments, the auditors of the Offshore Fund were located in New York, investors were instructed to wire their subscription payments to a Citibank account in New York and DBZCO would send shareholders quarterly unaudited financial information from DBZCO. *Id.* The U.S.-based control, connections and decision-making cited by the District Court read like the Trustee's playbook; the same allegations permeate the Trustee's proffers.

Following the denial of the motion to dismiss, the defendant sought to certify an appeal to the Court of Appeals, arguing, *inter alia*, that the issue for certification presented a controlling question of law regarding extraterritoriality. The District Court denied the motion in *Gruss II*, observing that the controlling question was not purely legal and involved factual questions under the "conducts and effects" test. "For example, while the Offshore Fund's Offering Memoranda stated that it was a foreign entity governed by foreign law, the Complaint alleges that the actual 'operational and investment decisions for the Offshore Fund were all made ... in DBZCO's New York office such that for all intents and purposes, the Offshore Fund was based in New York.'" *Gruss II*, 2012 WL 3306166, at *3. This holding is the portion of the *Gruss II* decision cited by the Trustee to support his contention that the location of the U.S-based management and control are relevant to the question of extraterritoriality.

The Trustee's reliance ignores that the District Court's discussion related to the "conduct and effects" test that, it speculated, had been restored when the SEC or the Government brought the action. As far as the Trustee's subsequent transfer claims are concerned, the "conduct and effects test" was abrogated by *Morrison*, and he cannot rely on the allegations in *Gruss* that the District Court highlighted as relevant to the

extraterritoriality issues raised in that case. While the control or the management of a foreign transferor or transferee by a U.S. affiliate may support the inference that the entity resides in the United States in the limited circumstances discussed earlier, that conduct relating to the transfer occurred in the United States or occurred outside the United States with foreseeable U.S. effects is irrelevant to the extraterritorial analysis.

In the end, the *ET Decision* identifies only four possibly relevant facts to consider in determining whether the Trustee has rebutted the presumption against extraterritoriality: (i) the location of the account from which the transfer was made, (ii) the location of the account to which the transfer was made, (iii) the location or residence of the subsequent transferor and (iv) the location or residence of the Subsequent Transferee. The single most important factor in determining whether the presumption against extraterritoriality has been rebutted is obvious; where did the subsequent transfer – the exchange of cash and passage of title – occur.[22] If the subsequent transfer occurred domestically – from a U.S. account to a U.S. account (excluding a correspondent account) – it is a domestic subsequent transfer. As the Second Circuit explained in *Absolute,* foreign entities can engage in domestic transfers. Conversely, a foreign subsequent transfer between domestic entities is still a foreign subsequent transfer. In addition, where the situs of the subsequent transfer is not alleged, but the Trustee alleges that it occurred between U.S. residents, the *ET Decision* permits the Court to infer that the subsequent transfer was domestic.

[22] The Trustee did not include a factor addressing where the Subsequent Transferor became irrevocably bound to make the transfer to the Subsequent Transferee, presumably because the District Court focused exclusively on the location of the transfer.

Finally, I conclude that a transfer by a U.S. resident from a U.S. account even to a foreign transferee rebuts the presumption against extraterritoriality. The *ET Decision* did not address this possibility. This type of transfer is analogous to the initial transfers by BLMIS to foreign feeder funds. It is true that BLMIS was a U.S. citizen and made initial rather than subsequent transfers, but BLMIS' U.S. citizenship and the subsequent transferor's U.S. residence are analytically the same. No one has suggested that BLMIS' recovery of an avoided transfer from an initial transferee foreign feeder fund is barred by the presumption against extraterritoriality, and there is no reason to treat subsequent transfers by a U.S. resident from a U.S. bank account differently.

The relevant Chart factors are, therefore, few. Only one factor in the Chart, Factor 12, purports to identify instances in which the "Defendant utilized U.S. bank account to receive transfers (includes correspondent accounts maintained by Defendants in their own name at U.S. banks)." As noted, the District Court rejected the notion that the transfer using a U.S. correspondent account made the transfer domestic, and I am bound by that conclusion. The Chart does not include a corresponding factor that the subsequent transferor used a U.S. bank account in connection with the transfer, but the Trustee's proffers include numerous allegations to that effect. Two others touch on the location or residence of the transferor and the Subsequent Transferee. Factor 1 purports to identify the transferors that maintained their principal operations in the United States, suggesting that the United States was their principal place of business. Factor 19 corresponds to those transferees that the Trustee asserts maintained a U.S. office utilized in connection with the transfer. Finally, Factor 18 identifies U.S. citizens that received subsequent transfers.

3. The Disposition of the Motions to Dismiss and Leave to Amend

A substantial number of the Subsequent Transfer claims that were not dismissed on the ground of comity are subject to dismissal based on extraterritoriality and require scant comment. They do not include allegations that the Subsequent Transferee used a U.S. bank in connection with the transactions,[23] that the transferor maintained its principal operations in the United States, that the transferee is a U.S. citizen or that the transferee maintained a U.S. office utilized in connection with the transfer. The following subsequent transfer claims are dismissed on this basis of extraterritoriality:

Table 4

A.P. No.	Defendant-Transferee	Transferor
09-01364	Thema Fund Ltd.	Thema Wise Investments
09-01364	HSBC Securities Services (Luxembourg) S.A.	Alpha Prime Fund Ltd. (Bermuda); Hermes International Fund (BVI); Lagoon Investment Ltd. (BVI); Thema Fund Ltd. (BVI); Lagoon Investment Trust (BVI); Thema Wise Investments (BVI)
09-01364	HSBC Institutional Trust Services (Ireland) Ltd.	Thema International (Ireland)
09-01364	HSBC Securities Services (Ireland) Ltd.	Thema International Fund (Ireland)
09-01364	HSBC Institutional Trust Services (Bermuda) Limited	Alpha Prime Fund Ltd. (Bermuda); Hermes International Fund (BVI); Thema Fund Ltd. (BVI); Thema Wise Investments (BVI); Lagoon Investment Limited (BVI)
09-01364	HSBC Securities Services (Bermuda) Limited	Alpha Prime Fund Ltd. (Bermuda); Thema Fund Ltd. (BVI); Thema Wise Investments (BVI); Lagoon Investment Limited (BVI); Hermes International Fund (BVI);
09-01364	HSBC Fund Services (Luxembourg) S.A.	Hermes International Fund Ltd. (BVI)

[23] Although the Chart indicates in some cases that the defendant used a U.S. bank account in connection with the transaction, the relevant proffer or pleading does not allege that the subsequent transfer was made to a U.S. account.

A.P. No.	Defendant-Transferee	Transferor
09-01364	HSBC Bank Bermuda Limited	Alpha Prime Fund Ltd. (Bermuda); Hermes International Fund (BVI); Thema Fund Ltd. (BVI); Thema Wise Investments (BVI); Lagoon Investment Limited (BVI)
09-01364	Hermes International Fund Limited	Lagoon Investment Ltd. (BVI)
09-01364	Lagoon Investment Trust	Lagoon Investment Ltd. (BVI)
09-01364	Equus Asset Mgmt. Ltd	Thema Fund Ltd. (BVI); Thema International (Ireland); Thema Wise Investments (BVI)
09-01364	Hermes Asset Management Limited	Hermes International Fund (BVI); Lagoon Investment Ltd. (BVI); Lagoon Investment Trust (BVI)
09-01364	Thema Asset Mgmt. (Bermuda)	Thema Fund Ltd. (BVI); Thema Wise Investments (BVI)
09-01364	Thema Asset Management Limited (BVI)	Thema International (Ireland)
10-04285	UBS Third Party Management Company SA	Luxalpha SICAV (Lux.)
10-04285	Access International Advisors Ltd.	Groupement Financier Ltd. (BVI); Luxalpha SICAV (Lux.)
10-04285	Access Management Luxembourg SA (f/k/a Access International Advisors (Luxembourg) SA) as Represented by its Liquidator Maitre Fernand Entringer	Groupement Financier Ltd. (BVI); Luxalpha SICAV (Lux.)
10-04285	Access Partners SA as represented by its Liquidator Maitre Fernand Entringer	Groupement Financier Ltd. (BVI); Luxalpha SICAV (Lux.)
10-05120	Inter Investissements S.A. (f/k/a Inter Conseil S.A.)	Oreades SICAV (Lux.)
10-05311	M&B Capital Advisers Sociedad de Valores, S.A.	Landmark Investment Fund Ireland (Ireland); Luxembourg Investment Fund U.S. Equity Plus (Lux)
10-05311	Reliance Management (Gibraltar)Limited	Luxembourg Investment Fund U.S. Equity Plus (Lux.)
10-05311	UBS Third Party Management Company SA	Luxembourg Investment Fund U.S. Equity Plus (Lux.)

a. *Picard v. UBS AG*, Adv. Pro. No. 10-04285

The Chart identifies the following remaining subsequent transfer claims in this adversary proceeding:

Table 5

A.P. No.	Defendant-Transferee	Transferor
10-04285	UBS AG	Luxalpha SICAV (Lux.); Groupement Financier Ltd. (BVI)
10-04285	UBS (Luxembourg) SA	Groupement Financier Ltd. (BVI); Luxalpha SICAV (Lux.)
10-04285	UBS Fund Services (Luxembourg) SA	Groupement Financier Ltd. (BVI); Luxalpha SICAV (Lux.)
10-04285	Patrick Littaye	Groupement Financier Ltd. (BVI); Luxalpha SICAV (Lux.)
10-04285	Pierre Delandmeter	Groupement Financier Ltd. (BVI); Luxalpha SICAV (Lux.)

Luxalpha and Groupement Financier were BLMIS feeder funds. (*Proffered Second Amended Complaint*, dated June 26, 2015 at ¶2 ("*UBS Proffered SAC*") (ECF Adv. P. No. 10-04285 Doc. # 210).) According to the Chart, the Trustee does not contend that they maintained their principal operations in the United States or were citizens of the United States. (Factors, 1, 18.) Moreover, the *UBS Proffered SAC* alleges that Luxalpha was a Luxembourg fund, (*UBS Proffered SAC* at ¶ 55), and Groupement Financier was a BVI investment fund. (*Id*. at ¶ 61.) In addition, and with three exceptions discussed below, the Chart also indicates that the Subsequent Transferees did not use a U.S. office in connection with the transfers. Hence, the transfers took place between non-U.S. residents. To overcome the presumption against extraterritoriality, the Trustee must therefore allege facts showing that the actual transfer of funds occurred domestically.

The *UBS Proffered SAC* says little about the location of the subsequent transfers. It alleges that "[r]edemptions in U.S. dollars for Groupement Financier, Groupement Levered and Luxalpha were also processed through UBS S.A.'s account at UBS AG in Stamford, Connecticut," (*id*. at ¶ 97), and BLMIS sent Luxalpha redemption payments to UBS SA's account in Stamford, Connecticut and then to Luxalpha's bank account at UBS SA. (*Id*. at ¶ 173.) The proffer does not explain what "processing" a redemption means; either the redemptions were paid from a U.S. account to a U.S. account or they were not. Furthermore, where Luxalpha received its redemption payments from BLMIS relates to the initial transfer, not the subsequent transfer. The Trustee apparently assumes that if the feeder fund received the redemption in a U.S. account, it must have made the subsequent transfer from that U.S. account. The Trustee does not, however, allege that the subsequent transfers were made from the Connecticut account or another U.S. account or received in a U.S. account. Since the Trustee has failed to allege that these subsequent transfers between foreign entities was made domestically, he has failed to rebut the presumption against extraterritoriality and the claims are dismissed.

As to the exceptions, the Chart indicates that UBS AG maintains a U.S. office "utilized in connection with the transaction." The *UBS Proffered SAC* alleges that "UBS AG is a Swiss public company with registered and principal offices at Bahnhofstrasse 45, CH-8001 Zurich, and Aeschenvorstadt 1, CH-4051 Basel, Switzerland. UBS AG is the parent company of the global UBS bank, and is present in New York, with offices at 299 Park Avenue, New York, NY 10171 and 101 Park Avenue, New York, NY 10178. It also conducts daily business activities in Stamford, Connecticut and other locations in the United States." (*Id*. at ¶ 42.) In essence, the Trustee alleges that UBS AG is a foreign

corporation doing business in New York although he does not allege that it is registered to do business in New York or anywhere else in the United States. Furthermore, he does not allege that any subsequent transfer occurred domestically, and as the Subsequent Transferor was plainly foreign, he has failed to overcome the presumption that these transfers were extraterritorial.

The last two defendant Subsequent Transferees identified on the Chart are Pierre Delandmeter and Patrick Littaye. The *UBS Proffered SAC* alleges that Delandmeter is a citizen of Belgium, (*id*. at ¶ 53), a director of defendants Access Management Luxembourg S.A. and Access Partners S.A., each of which is a Luxembourg limited liability company (*id*. at ¶¶ 48, 49), and a director of non-party Access International Advisors Inc. ("AIA Inc."), a New York corporation. (*Id*. at ¶ 50.) He was also a "Legal Advisor" to Groupement and Groupement Levered, both foreign funds, and a "Director and Legal Advisor" to Luxalpha, a Luxembourg fund. (*See id*. at ¶¶ 53, 55.) The Trustee alleges that Delandmeter received legal fees from Luxalpha and Groupement, (*id*. at ¶ 292), and "upon information and belief," also received subsequent transfers from subsequent transferees AIA Ltd., AIA LLC, AP (Lux), and AML (f/k/a AIA (Lux)). (*Id*. at ¶ 292.)

The *UBS Proffered SAC* alleges Littaye is "a citizen of France," (*id*. at ¶ 50), but the parties have stipulated that he is located in Belgium. (*Scheduling Order*, Ex. 2, at 4.) Littaye was a co-founder, Partner, Chairman, and Chief Executive Officer and co-owner of AIA LLC, a director of Luxalpha and Groupement and Groupement Levered and co-owner of AIA Ltd., AML and Access Partners. (*UBS Proffered SAC* at ¶ 50.) According to the Trustee, Littaye "received millions of dollars of Subsequent Transfers, in an

amount to be proven at trial," "[a] significant amount of the Subsequent Transfers received by AIA Ltd., AIA LLC, AP (Lux), and AML (f/k/a AIA (Lux)) were subsequently transferred to Littaye . . . either directly or indirectly, in the form of distributions, payments, or other transfers of value," and "upon information and belief," Littaye received at least $6.5 million in compensation "from bank accounts controlled by Access's New York office." (*Id*. at ¶ 291.)

As with the case of the other subsequent transfers, the *UBS Proffered SAC* does not allege the location of the transferor or transferee accounts or that the subsequent transfers occurred domestically.

Consequently, all of the Subsequent Transfer claims appearing on the Chart that relate to this adversary proceeding are dismissed.

b. Tremont and the Rye Funds

Tremont operated a group of BLMIS feeder funds all of which had some variation of a name that included "Rye Select Broad Market" (collectively, the "Rye Funds"). Certain Rye Funds that included "Portfolio" in their names – Rye Select Broad Market Portfolio Limited ("Rye Portfolio"), Rye Select Broad Market XL Portfolio Limited ("Rye XL Portfolio") and Rye Select Broad Market Insurance Portfolio LDC ("Rye Insurance Portfolio") – were registered in the Cayman Islands, and are sometimes collectively referred to as the "Rye Cayman Funds." Three other Rye funds – Rye Select Broad Market Fund L.P. ("Rye Broad Market"), Rye Select Broad Market XL Fund L.P. ("Rye XL") and Rye Select Broad Market Prime Fund L.P. ("Rye Prime Fund") – were formed in Delaware, and are sometimes collectively referred to as the "Rye Delaware Funds,"

and with the Rye Cayman Funds, the "Rye Funds." (*See Proffered Second Amended Complaint*, dated June 26, 2015 ("*HSBC Proffered SAC*") at ¶¶ 388-90 (ECF Adv. P. No. 09-01364 Doc. # 399).)

The Rye Cayman Funds exemplify feeder funds organized under foreign law that had no connection, from an operational standpoint, with their country of organization. Several proffered pleadings submitted by the Trustee discuss their principal places of operations. The *HSBC Proffered SAC* is typical. According to the Trustee, the Rye Funds were managed from and maintained their principal places of business and headquarters in Rye, New York. (*Id*. at ¶ 392.) Tremont's New York employees, among other things, conducted the Rye Funds' marketing, operations, diligence, and their communications with investors, (*id*. at ¶ 393), and served on their boards. (*Id*. at ¶ 395.) The Rye Cayman Funds had "registered offices" in the Cayman Islands, but had no operating offices or operations there, (*id*. at ¶ 392), and as "exempted" companies, could not solicit or accept investments from Cayman Island investors. (*Id*. at ¶ 394.) Finally, Rye Funds maintained their accounts at the Bank of New York where they received subscriptions and from which they paid redemptions. (*See id*. at ¶ 396; *see also Trustee's Proffered Allegations Pertaining to the Extraterritoriality Issue as to Mistral (SPC)*, dated June 26, 2015 ("*Mistral Proffer*"), at ¶ 46 (alleging that beginning in the fall of 2006 if not earlier, Tremont closed the Rye Cayman Funds' Bermuda-based bank accounts, and thereafter made every redemption payment from the fund's New York-based accounts at the Bank of New York) (ECF Adv. Pro. No. 12-01273 Doc. # 57).)

The Rye Cayman Funds had to operate from somewhere if not the Cayman Islands. Although the Trustee does not allege that the Rye Cayman Funds were

registered to do business in New York, the Court concludes that the Trustee has adequately alleged that they maintained their principal and only operations in New York and that they therefore resided in New York. In addition, they made the subsequent transfers at issue at least since the fall of 2006 if not earlier from an account located in New York.

Furthermore, and with certain exceptions discussed in footnotes 27 and 32, the proffers allege that the subsequent transfers were received in a U.S.-based bank account or support the inference that they were received in a U.S.-based account based on the provisions of the subscription/redemption agreements requiring that redemptions be paid to a U.S.-account. The following table summarizes the latter group of transfers:

Table 6

A.P. No.	Transferee	ECF Doc. No. of Proffer	Proffer Reference

09-01364[24]	HSBC Bank plc	399	¶ 421[25]
10-05120	BNP Paribas Securities Services, S.A.	73	¶ 92[26]
12-01576	BNP Paribas Securities Services, S.A.; BNP Paribas Bank & Trust Cayman Ltd.; BNP Paribas Arbitrage SNC[27]	64	¶ 92
10-05354	ABN AMRO BANK N.V., p/k/a Royal Bank of Scotland, N.V.	101	¶¶ 65-69[28]

[24] According to the Chart, this adversary proceeding also involves a subsequent transfer from Thema International Fund plc ("Thema") to HSBC Bank plc. Although the Chart indicates that Thema International maintained its principal operations in the United States, Thema International is an Irish entity, (*HSBC Proffered SAC* at ¶ 64), and I have been unable to locate a factual allegation in the 141-page *HSBC Proffered SAC* that Thema International maintained its principal operations in New York. Furthermore, the Chart does not indicate that HSBC Bank plc used a U.S. office in connection with the transaction. Accordingly, the subsequent transferor and Subsequent Transferee are foreign entities that did not reside in the United States. According to the *HSBC Proffered SAC*, following a redemption request, Thema received $14,094,388.97 in a N.Y.-based HSBC Bank USA account for the benefit of HSBC Bank plc, (*id.* at ¶¶ 540-41), and subsequently transferred the same amount to HSBC plc. (*Id.* at ¶¶ 542-43.) It is not entirely clear whether the *HSBC Proffered SAC* is alleging that HSBC Bank plc was BLMIS' initial transferee with Thema acting as its agent, or Thema's subsequent transferee. If the latter, the Trustee has failed to rebut the presumption against extraterritoriality and the claim is dismissed. Although the *HSBC Proffered SAC* implies that Thema made the subsequent transfer from a N.Y.-based custodial account, it does not identify the location of the transferee account. Thus, the only U.S. connection is the source of the subsequent transfer, and this is insufficient based on the criteria discussed earlier.

The Chart also lists two transfers from BLMIS to Thema International and Lagoon Investment. These appear to be initial transfers, not Subsequent Transfers, and are beyond the scope of the *ET Decision*, which interpreted 11 U.S.C. § 550(a)(2).

[25] Paragraph 421 states in relevant part: "HSBC Bank plc received at least $53,000,000 from Rye XL Portfolio to HSBC Bank plc's account at HSBC Bank USA."

[26] Paragraph 92, which applies to all of the BNP entities listed in the table, states in relevant part: "Defendants executed subscription agreements for investments in the Tremont Funds that were domestic in nature.. . . . [T]he subscription agreements requested that Tremont direct redemptions to BNP's bank account in New York."

[27] Despite its listing in the Chart, the Complaint does not allege that any Rye Cayman Fund made a subsequent transfer to BNP Paribas Securities Services Succursale de Luxembourg, and it is not mentioned in the Trustee's Proffer. This defendant was included in the motion to dismiss, and accordingly, any claims arising from alleged subsequent transfers by a Rye Cayman Fund to this BNP entity are dismissed.

In addition, Complaint alleges claims arising from subsequent transfers by a Rye Cayman Fund to BNP Paribas Bank & Trust (Canada) ("BNP Canada"), a Canadian entity, which was also included in the motion to dismiss but omitted from the Trustee's opposition and the Proffer. These subsequent transfer claims are also dismissed.

[28] Paragraphs 65-69 state in relevant part:

> 65. ABN/RBS instructed Tremont to make all transfers in connection with the 2006 Transactions to ABN/RBS's bank account in New York. In the 2006 Swap Confirmation, ABN/RBS instructed Tremont to make all payments to ABN/RBS via a bank account that ABN/RBS held at its New York branch; ABN/RBS received all payments from Rye Portfolio Limited XL in its New York account. In connection with ABN/RBS's investment

12-01273	Mistral (SPC)	57	¶¶ 18-19[29]
12-01278	Zephyros Limited	58	¶¶ 20-21[30]
12-01698	RBC Dexia Investor Services Trust	57	¶ 28[31]

in Rye Portfolio Limited, Subscription Agreements provided that redemption payments would be made to ABN/RBS's bank account at its New York branch; ABN/RBS received all payments from Rye Portfolio Limited in its New York account. Accordingly, every one of the subsequent transfers at issue was sent from the Tremont Funds' bank accounts in New York to ABN/RBS's bank account in New York.

66. ABN/RBS maintained a bank account at its ABN AMRO Bank NV New York Branch in New York, which was a "resident of the United States" according to its July 2008 USA Patriot Act Certification. ABN/RBS designated that account . . . in the 2006 Transactions to receive both collateral and redemption payments – the subsequent transfers at issue – from the Tremont Funds.

67. With respect to the 2006 Transactions, Rye Portfolio Limited XL utilized its bank account at the Bank of New York to transfer each of the collateral payments at issue to ABN/RBS's bank account at its New York Branch.

68. Likewise, Rye Portfolio Limited utilized its account at the Bank of New York to transfer each redemption payment to ABN/RBS at its New York bank account.

69. Similarly, with regard to the transfers sent and received in connection with the 2007 Transactions, ABN/RBS designated its bank account at its ABN AMRO Bank NV New York Branch to receive both collateral and redemption payments from the Tremont Funds. Utilizing their bank accounts at the Bank of New York, Rye Broad Market XL and Rye Broad Market – the Tremont Funds involved with the 2007 Transactions – made transfers of collateral and redemption payments to ABN/RBS's bank account at its New York Branch.

[29] Paragraphs 18-19 state in relevant part: "New York or New Jersey was the situs selected by Mistral for making and receiving such transfers. Specifically, Mistral used a bank account at the Northern Trust International Banking Corporation in New York or New Jersey to effect such payments (the "U.S. Account"). . . . With respect to Rye Portfolio Limited, Mistral designated such use of this U.S. Account in subscription and redemption documents. . . ."

[30] Paragraphs 20-21 state in relevant part: "The United States was the situs selected by Zephyros for making and receiving such transfers. Specifically, Zephyros used the bank account of its U.S.-based administrator/custodian SEI at Wachovia National Bank in the United States to effect such payments (the "U.S. Account"). . . . Zephyros designated such use of the U.S. Account in a Fairfield Sentry subscription agreement and in Rye Portfolio Limited redemption documents . . . ."

[31] Paragraph 28 states: "Upon information and belief based on the other RBC-Dexia entities' designations of their own U.S. bank account (by and large at Citibank in New York), RBC-Dexia Trust similarly designated and received its redemptions from Rye Portfolio Limited into a bank account in the United States."

12-01699	Guernroy Limited[32]	54	¶¶ 28-29[33]

Several of the Subsequent Transferees contend that the Trustee failed to allege that the bank accounts used to effect the subsequent transfers were not correspondent accounts, and he therefore failed to allege a domestic transaction.[34] (*See Reply Memorandum in Further Support of the BNP Paribas Defendants' Motion to Dismiss Based on Extraterritoriality*, dated Sept. 30, 2015, at 2, 10, 25 (ECF Adv. Pro. No. 10-04457 No. Doc. # 93).) The *ET Decision* does not suggest that the Trustee must allege

[32] The Chart includes the defendant Royal Bank of Canada (Channel Islands) Limited ("RBC-CI"), and the Complaint, Ex. N, alleges that Rye Portfolio subsequently transferred $4,637,106 to "Guernroy or RBI-CI." (*See also Complaint*, dated June 6, 2012 at ¶ 86 (ECF Adv. P. No. 12-01699 Doc. # 1).) The Proffer alleges that the RBC-CI's New York accounts at Deutsche Bank and JP Morgan Chase Bank received redemptions for other entities, (*Trustee's Proffered Allegations Pertaining to the Extraterritoriality Issue as to Royal Bank of Canada*, dated June 26, 2015 at¶ 29(ECF Adv. P. No. 12-01699 Doc. # 54)), but does not allege that RBC-CI received any redemptions in its own name. The motion to dismiss included claims alleging subsequent transfers from Rye Portfolio to RBC-CI; these claims are dismissed and leave to amend is denied.

[33] Paragraphs 28-29 state in relevant part: "New York was the situs repeatedly selected by Defendants for both receiving redemptions and remitting subscriptions. . . . RBC-Guernroy also used an account in RBC-CI's name at JPMorgan Chase Bank in New York to receive redemptions from . . . Rye Portfolio Limited. . . ."

[34] After briefing, the Trustee apprised the Court of the decision in *Official Comm. of Unsecured Creditors of Arcapita, Bank B.S.C. v. Bahrain Islamic Bank*, 549 B.R. 56 (S.D.N.Y. 2016), and implied that it undercut the *ET Decision*'s conclusion that the use of a correspondent bank account did not support a domestic transfer. (*Letter from David J. Sheehan, Esq. to the Court*, dated Apr. 7, 2016 (ECF Doc. # 13051).) In *Arcapita*, the Official Committee of Unsecured Creditors (the "Committee") brought a preference action, seeking to avoid and recover preferential transfers that had been made to the defendants' New York correspondent bank accounts. The defendants moved to dismiss for lack of personal jurisdiction. The District Court concluded that the use of New York correspondent accounts supported the assertion of personal jurisdiction, *id.* at 68; *accord Licci v. Lebanese Canadian Bank, SAL*, 984 N.E.2d 893, 900 (N.Y. 2012), and added that "if preferential transfers are found to have occurred, they occurred at the time the funds were transferred into the New York correspondent bank accounts." *Arcapita*, 549 B.R. at 70.

As the Second Circuit indicated in *Absolute*, whether sufficient contacts with the United States support the assertion of personal jurisdiction is a different question from whether a transaction is domestic for purposes of extraterritoriality. The use of a U.S. correspondent bank account to process a dollar-denominated transaction may confer personal jurisdiction over the transferee but under the *ET Decision*, does not render an otherwise foreign transfer domestic. *Arcapita* does not modify the District Court's conclusion.

the use of a non-correspondent bank account to survive the dismissal of his subsequent transfer claims. While the claims may not ultimately survive for this reason, that must await future development of the facts which go outside the record and cannot be considered on this motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, the motions to dismiss the claims included in Table 6 are denied and leave to amend is granted to the extent of these claims.

c. Fairfield Greenwich

Two of the adversary proceedings (Nos. 12-01701 and 12-01702) involve subsequent transfers by Fairfield Greenwich (Bermuda) Ltd. ("Fairfield Bermuda") and Fairfield Greenwich Ltd. (Cayman Islands) ("Fairfield Cayman"), both organized under foreign law (Bermuda and the Cayman Islands, respectively). They were part of FGG. They received fees from FGG feeder funds, including Greenwich Sentry, L.P., and Greenwich Sentry Partners, L.P. (collectively, "Greenwich Sentry") and Fairfield Sentry, and distributed the fees to FGG partners. (*Trustee's Proffered Allegations Pertaining to the Extraterritoriality Issue as to Defendants SafeHand Investments, Strongback Holdings Corporation, and PF Trustees limited in its Capacity as Trustee of RD Trust*, dated June 26, 2015 ("*SafeHand Proffer*"), at ¶¶ 2-4 (ECF Adv. Proc. No. 12-01701 Doc. # 62); *see Proffered Allegations Pertaining to the Extraterritoriality Issue as to Defendants Dove Hill Trust and FG Investors Ltd.*, dated June 26, 2015 ("*Dove Hill Proffer*"), at ¶¶ 3-5 (ECF Adv. Proc. No. 12-01702 Doc. # 61).) To the extent they received fees from or originating with the Fairfield Sentry (or Fairfield Lambda or Fairfield Sigma), the subsequent transfer claims are barred under the doctrine of comity. The balance of the discussion concerns the transfers that originated with other

feeder funds, including Greenwich Sentry, that were not the subject of foreign liquidation proceedings.[35]

Fairfield Cayman maintained its principal place of business in New York, (*SafeHand Proffer* at ¶ 13; *Dove Hill Proffer* at ¶¶ 4, 32), and "operated out of FGG's New York headquarters." (*SafeHand Proffer* at ¶ 3, *accord id.* at ¶ 6.) Although "formed under foreign law, it reported its principal place of business as FGG's New York headquarters, *registered to do business in the State of New York*, and listed its principal executive office as FGG's New York headquarters," (*SafeHand Proffer* at ¶ 40 (emphasis added); *accord* (*Dove Hill Proffer* at ¶ 36; *Fairfield Proffered SAC* ¶ 258))[36], and never had employees or an office in the Cayman Islands or in Ireland, where it was initially organized. (*Dove Hill Proffer* at 36.) Fairfield Cayman is similar to the Rye Cayman Funds, and accordingly, the Trustee has alleged that Fairfield Cayman resides in New York.

On the other hand, the Trustee has failed to allege that Fairfield Bermuda maintained its principal operations or principal place of business in New York or the United States. Fairfield Bermuda provided risk management services and acted as placement agent to a number of FGG investment vehicles and feeder funds and also allegedly provided investment advisory services to Fairfield Sentry. (*Fairfield Proffered*

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35 The Greenwich Sentry entities were both Delaware limited partnerships, and debtors in jointly administered chapter 11 proceedings in this Court. (*See In re Greenwich Sentry, L.P.*, Case No. 10-16229 (SMB).)

36 The *Fairfield Proffered SAC* refers to the *Proffered Second Amended Complaint*, dated June 26, 2015 (ECF Adv. P. No. 09-1239 Doc. # 187). The allegations in the *Fairfield Proffered SAC* are incorporated by reference in the *SafeHand Proffer* at ¶ 47 and the *Dove Hill Proffer* at ¶ 60.

SAC at ¶ 56.) Although the Trustee avers that Fairfield Bermuda "operated out of FGG's New York headquarters," (*SafeHand Proffer* at ¶ 3; *accord id.* at ¶ 6; *see id.* at ¶ 42), he also alleges that it had a small number of employees in Bermuda and rented a small office there. (*SafeHand Proffer* at ¶ 42; *Dove Hill Proffer* at ¶ 43; *Fairfield Proffered SAC* at ¶¶ 273-74.) The Bermuda employees performed some risk analysis on the Fairfield Sentry assets but reported to FGG New York personnel. (*Fairfield Proffered SAC* at ¶ 199.) Fairfield Bermuda also maintained a bank account in Bermuda. (*Id.* at ¶ 272.) Unlike Fairfield Cayman, Fairfield Bermuda did not report its principal place of business as New York, and in a marketing publication entitled "The Firm and Its Capabilities," at 7, FGG listed Fairfield Bermuda's office address as Suite 606, 12 Church Street, Hamilton Bermuda HM11.[37] Finally, the Trustee alleged in the Amended Complaint, dated July 20, 2010, at ¶ 121 (Adv. Pro. No. 09-01239 ECF Doc. # 23) filed in *Picard v. Fairfield Sentry Limited*, that Fairfield Bermuda maintained its principal place of business in Hamilton, Bermuda.

i. *Picard v. SafeHand Inv.*, Adv. Pro. No. 12-01701

A. The Parties

The Chart identifies three defendant Subsequent Transferees, SafeHand Investments ("SafeHand"), Strongback Holdings ("Strongback") and PF Trustees Limited in its capacity as trustee of RD Trust ("PF" and collectively with SafeHand and Strongback, the "Piedrahita Entities"). The Piedrahita Entities were formed by Andrés

[37] A copy of "The Firm and Its Capabilities" is attached to the *Declaration of Jeffrey E. Baldwin in Support of FG Foreign Defendant Motion to Dismiss Based on Extraterritoriality*, dated Sept. 30, 2015, as Exhibit 3 (ECF Adv. Proc. No. 12-01701 Doc. # 68). The Trustee quoted from it in the *Fairfield Proffered SAC* at ¶¶ 426-27.

Piedrahita, a founding partner of FGG, to receive his partnership distributions from FGG. (*SafeHand Proffer* at ¶ 1.) The fees charged investors in Fairfield Sentry and Greenwich Sentry were funneled to Fairfield Cayman and Fairfield Bermuda, and then distributed to Piedrahita through SafeHand, Strongback and PF. (*Id.* at ¶¶ 3-5, 7, 14.) To protect the hundreds of millions of distributions he ultimately received, Piedrahita moved his profit distributions into entities like these three defendants created in foreign countries. (*Id.* at ¶ 15.) According to the Trustee, the Piedrahita Entities and Piedrahita received $219,004,944. (*Id.* at ¶ 14.)

Piedrahita was a citizen of the Republic of Colombia and the United Kingdom, but resided in the United States for most of his adult life and obtained permanent resident status. (*SafeHand Proffer* at ¶¶ 9-10.) At all relevant times, the Piedrahita Entities were Cayman Island entities. (*Id.* at ¶¶ 16, 21, 25.)[38] The *SafeHand Proffer* indicates that Piedrahita controlled the Piedrahita Entities. It further alleges that SafeHand maintained a P.O. Box as its registered address in the Cayman Islands, and implies that it did not have any employees or offices other than the post office box. (*Id.* at ¶ 16.) Furthermore, as an exempt company, it could not engage in business in the Cayman Islands except to further its business interests outside of the Cayman Islands, (*id.*), and when Piedrahita formed SafeHand he indicated to the U.S. Government that SafeHand was a "foreign eligible entity with a single owner electing to be disregarded as a separate entity." (*Id.* at ¶ 17 (internal quotation marks omitted).) The Trustee concludes form this election that SafeHand effectively served as Piedrahita's later ego.

[38] Strongback was formed in the Cayman Islands in November 2001, but was subsequently deregistered in December 2011 and reregistered in Malta. All of the subsequent transfers at issue occurred while it was a Cayman Islands entity.

(*Id.*) These allegations imply that SafeHand conducted no operations in the Cayman Islands, and to the extent it conducted any operations, it did so through Piedrahita in the United States.

The *SafeHand Proffer* did not include similar allegations regarding Strongback and PF that would support the conclusion that they reside in the United States. Although it includes the conclusory allegation that Strongback served as Piedrahita's alter ego, (*id.* at ¶ 22), it does not allege where it maintained an office or whether it had any employees. PF was also a Cayman Islands entity with a registered office at the same address as SafeHand, (*id.* at ¶ 26), and is now the sole owner of SafeHand. (*Id.* at ¶ 28.) The *SafeHand Proffer* does not otherwise include allegations pertaining to its operations, offices or employees, if any.

B. The Subsequent Transfers

The allegations regarding the transfers are confusing. Initially, the *SafeHand Proffer* alleges that Fairfield Cayman made the subsequent transfers from a New York account, (*id.* at ¶ 13), but does not identify the location of the account that was the source of the Fairfield Bermuda payments. The Trustee alleges that SafeHand received $212,777,342 in distributions from Fairfield Cayman and $6,227,602 in distributions from Fairfield Bermuda, (*id.* at ¶ 20), and SafeHand received those payments in a New York *correspondent* account in New York. (*Id.* at ¶ 18.) The amount allegedly paid to SafeHand corresponds to the amounts allegedly received by all three Piedrahita

Entities.[39] (*See id.* at ¶ 14.) In addition, although the *SafeHand Proffer* states that subsequent transfers were deposited in Strongbacks' New York account at Wachovia Bank in New York, (*id.* at ¶ 24), the proffer does not allege the amount of those subsequent transfers, and the schedule of subsequent transfers made to Strongback that is attached to the Amended Complaint is blank. (*See Amended Complaint*, App'x III, Ex. B.) Accordingly, the Trustee does not identify any subsequent transfers made to Strongback. The Trustee's failure to allege any domestic subsequent transfers to Strongback fails to rebut the presumption against extraterritoriality, and any such claims are dismissed.

The claims against PF seemed to be based solely on its status as the parent of SafeHand. (*See SafeHand Proffer* at ¶ 28 ("RD Trust is now the sole owner of Safehand. Thus, PF Trustees in its capacity as trustee of RD Trust, owns and is in possession of all transfers that were received by Safehand.").) The *SafeHand Proffer* does not identify any subsequent transfers to PF in its own name, and an exhibit to the Amended Complaint indicates that SafeHand "and/or" PF received $172,631,780 in subsequent transfers. (*Amended Complaint*, App'x III, Ex. A.) The Trustee has not alleged a domestic subsequent transfer to PF, and has not articulated a basis to pierce SafeHand's corporate veil, which is presumably governed by Cayman Islands law, and hold PF liable for the transfers to SafeHand. Accordingly, the Trustee has failed to rebut the

[39] Much of this amount originated from fees paid by Fairfield Sentry. (*See Amended Complaint*, dated May 31, 2013 ("*Amended Complaint*"), App'x II, Ex. C; App'x II, Ex. D (ECF Adv. P. No. 12-01701 Doc. # 13).)

presumption against extraterritoriality, and the subsequent transfer claims asserted against PF are also dismissed.

This leaves SafeHand. As noted, the transfers that originated with the Fairfield Funds are dismissed on grounds of comity. The transfers from Fairfield Cayman were made by a U.S. resident from a U.S. account. Although SafeHand received the subsequent transfers in a correspondent account, the allegations are sufficient under the criteria discussed above to rebut the presumption against extraterritoriality. Hence, the motion to dismiss these claims is denied.

The claims alleging subsequent transfers from Fairfield Bermuda are dismissed. They were made by a foreign entity, the Trustee does not allege that they were made from a U.S. bank account, and they were made to correspondent bank account. SafeHand's residence, the only connection to the United States, is insufficient to rebut the presumption of extraterritoriality.

ii. *Picard v. Barreneche, Inc.*, Adv. Pro. No. 12-01702

A. FG Investors

FG Investors was created by Charles Murphy, an FGG partner, to receive distributions from FGG, (*Dove Hill Proffer* at ¶ 1), and operated in the same manner and for the same purposes as the Piedrahita Entities. (*See id.* at ¶¶ 4-5.) FG Investors was formed under Cayman Islands law but controlled by Murphy, a U.S. citizen and New York resident, from New York. (*Dove Hill Proffer* at ¶¶ 9-12.) The *Dove Hill Proffer* does not allege where or whether it maintained offices or operations, or whether it employed anyone.

According to the *Dove Hill Proffer*, FG Investors received at least $5,941,335 from Fairfield Cayman to FG Investors and at least $675,700 from FG Bermuda. A substantial portion of the transfers originated from Fairfield Sentry, (*Complaint*, dated June 6, 2012, ("*Complaint*") App'x II C (ECF Adv. P. No. 12-01702 Doc. # 1)), and are not recoverable on grounds of comity. As in SafeHand's case, the Fairfield Cayman subsequent transfers were made from its New York account at JP Morgan Chase. (*Dove Hill Proffer* at ¶ 17; *see id*. at ¶ 37.) The *Dove Hill Proffer* does not, however, allege where FG Investors received the subsequent transfers. Nevertheless, the Trustee alleges that the transfers were made by an entity registered to do business in New York from a New York account, and as in the case of SafeHand, the allegations are sufficient to rebut the presumption against extraterritoriality. Hence, the motion to dismiss these claims is denied.

The claims alleging subsequent transfers from Fairfield Bermuda to FG Investors are dismissed for the same reasons discussed in connection with SafeHand. Unlike Fairfield Cayman, *Dove Hill Proffer* does not allege facts showing that Fairfield Bermuda resided in the United States or made the subsequent transfers from a U.S. account, and as noted, does not allege where FG Investors received the transfers.

B. Dove Hill Trust

Dove Hill Trust ("DHT") was created by Yanko della Schiava, a FGG sales employee, to receive salary and bonus payments from FGG. (*Dove Hill Proffer* at ¶¶ 1, 22, 27.) He was also a Fairfield Sentry investor, and DHT received a redemption payment. (*Id*. at ¶ 22.) The proffer does not allege where DHT was formed or maintained its principal place of business. However, the *Complaint* alleged that Asiaciti

Trust Singapore Pte Ltd. acted as DHT's trustee and maintained its location at 163 Penang Road, #02-01 Winsland House II, Singapore, 238463. (*Complaint* at ¶ 76.)

The proffer alleges that Fairfield Cayman transferred at least $400,000 to DHT, (*Dove Hill Proffer* at ¶ 7), although an exhibit annexed to the *Complaint* identifies only one transfer in the amount of $59,039. (*Complaint*, App'x III, Ex. B.) As noted earlier, Fairfield Cayman was registered to do business in New York and made its subsequent transfers from New York-based bank accounts. (*Dove Hill Proffer* at ¶ 30.) The *Dove Hill Proffer* further alleges that DHT used New York bank accounts "in connection with the transfers at issue," (*id.* at ¶ 29), but does not allege, unlike the allegations in many other proffers, that Dove Hill received the transfers in a U.S. Account. Nevertheless, the transfers were made by a U.S. resident from a N.Y. account, the Trustee has rebutted the presumption against extraterritoriality and the motion to dismiss these claims is denied.

d. Remaining Claims

i. *Picard v. Cardinal Mgmt., Inc.*, Adv. Pro. No. 10-04287

The parties have stipulated that Cardinal Management, the subsequent transferor, and Dakota Global Investments, the Subsequent Transferee, are foreign entities, (*Scheduling Order*, Ex. A at 8), and neither the Chart nor the proffer, (*see Trustee's Proffered Allegations Pertaining to the Extraterritoriality Issue as to Dakota Global Investments, Ltd.*, dated June 26, 2015 (ECF Adv. P. No. 10-04287 Doc. # 69)), indicates that either maintained offices in the United States. The only arguably pertinent allegation in the proffer is that "Dakota's agents also had Cardinal on occasion utilize a U.S. branch of Wachovia Bank to facilitate its transfers of money from BLMIS." (*Id.* at ¶ 19.) This statement refers to the initial transfer from BLMIS to Cardinal, not

the subsequent transfers from Cardinal to Dakota. The Trustee has failed to rebut the presumption against extraterritoriality, and the claim is dismissed.

ii. *Picard v. Equity Trading Portfolio, Ltd.*, Adv. Pro. No. 10-04457

The Trustee alleges that Equity Trading Portfolio Ltd. ("Equity Portfolio"), a BVI entity, (*BNP Proffer* at ¶ 147 (ECF Adv. P. No. 10-04457 Doc. # 90)),[40] and a BLMIS customer, subsequently transferred $15 million to BNP Paribas Arbitrage SNC ("BNP Arbitrage"). (*Id.*) The Trustee does not indicate in the Chart that Equity Portfolio maintained its principal operations in the United States (Factor 1), and the *BNP Proffer* does not allege otherwise.

The Trustee alleges that BNP Arbitrage resides in New York with offices located at 787 Seventh Avenue. (*Id.* at ¶ 5.) However, the Trustee alleged in the Complaint, dated Nov. 30, 2010 (ECF Adv. P. No. 10-04457 Doc. # 2), that BNP Arbitrage was organized under the laws of France and maintained an office in Paris with no mention of New York. (Complaint at ¶ 13.) Furthermore, the *BNP Proffer* incorporated the Complaint by reference, (*BNP Proffer* at ¶ 158), and thus, the Trustee has made contradictory allegations on this point without any effort to explain the contradiction.

Nevertheless, even if the transferor and transferee did not reside in the United States, the *BNP Proffer* alleges that the subsequent transfer was wholly domestic. BLMIS wired a $15 million redemption payment to an HSBC account in New York "held in the name of Citco Bank Nederland N.V., Dublin Branch for the benefit of Equity

[40] This is the same *BNP Proffer* referred to earlier. The Trustee submitted this proffer in four adversary proceedings.

Portfolio," and "Equity Portfolio transferred $15 million into an account held by BNP in New York on behalf of BNP Arbitrage." (*Id.* at ¶ 162.) As noted in an earlier citation to their response, BNP Defendants contend that the Trustee did not allege the use of non-correspondent accounts, but I do not read the *ET Decision* to impose that pleading burden on the Trustee. Accordingly, the motion to dismiss this subsequent transfer claim is denied, and leave to amend is granted.

iii. *Picard v. Radcliffe Inv., Ltd.*, Adv. Pro. No. 10-04517

The Trustee contends that Radcliffe Investments Limited made a subsequent transfer to Rothschild Trust Guernsey Limited ("Rothschild Trust"). As alleged in the *Proposed First Amended Complaint*, dated June 26, 2015 ("*Radcliffe Proposed FAC*")(ECF Adv. P. No. 10-04517 Doc. # 46), Radcliffe opened an account number 1FR-100 (the "Account") with BLMIS, but was a "mere passive investment vehicle," (*id.* at ¶ 44), and Rothschild Trust managed, controlled and actually owned the Account. (*Id* at ¶¶ 8-9.) Radcliffe was formed under the laws of the Cayman Islands, and maintained its registered office in Georgetown, Cayman Islands. (*Id.* at ¶ 8.) Rothschild Trust was incorporated under the laws of Guernsey, and maintained its principal place of business in Guernsey. (*Id.* at ¶ 9.) The defendant Robert D. Salem, a London businessman, was the ultimate beneficiary of the transfers at issue. (*Id.* at ¶ 10.) Mr. Salem is in default, (*id.* at ¶ 10 n. 2), and will not be mentioned further. The *Radcliffe Proposed FAC* further alleges, "[u]pon information and belief, that Radcliffe was owned by a Guernsey-based trust, and Rothschild Trust was the trustee of the Guernsey-based trust. (*Id.* at ¶ 8.) The *Radcliffe Proposed FAC* does not allege, and the Chart does not indicate, that either Radcliffe or Rothschild maintained an office or conducted business operations in the

United States other than the ownership of and the activities relating to Radcliffe's BLMIS account.

On or about May 31, 2007, Rothschild Trust directed BLMIS to close the Account and transfer the proceeds to the Rothschild Trust account at JP Morgan Chase Bank. "Upon information and belief, the routing number for the [Rothschild] Trust Account is only used for accounts opened in New York with U.S. banking institutions." (*Id.* at ¶¶ 46-47.) On June 5, 2007, BLMIS wired $7,120,054, of which $2,120,054 represented fictitious profits. (*Id.*, Ex. B, at 7.) The Trustee alleges that a similar letter was sent to BLMIS on or about October 31, 2007, (*id.* at ¶ 46), but the last transfer occurred on September 20, 2007, (*id.*, Ex. B, at 8), and no transfer was made in response to the October letter.

Under Bankruptcy Code § 550(a), the Trustee can recover an avoided transfer from the initial transferee or the entity that benefitted from the initial transfer, *id.* §550(a)(1), or from a subsequent transferee. *Id.*, § 550(a)(2). The Trustee asserts all three theories against Rothschild Trust; the initial transfer was made to the Rothschild Trust, (*Radcliffe Proposed FAC* at ¶ 39), (2) the initial transfer was made for the benefit of the Rothschild Trust, (*id.* at ¶ 39), and (3) upon information and belief, the Rothschild Trust is the subsequent transferee of Radcliffe. (*Id.* at ¶ 41.) The three theories are mutually exclusive, *see Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 895-966 (7th Cir. 1988); *SIPC v. BLMIS* (*In re BLMIS*), 531 B.R. 439, 474 (Bankr. S.D.N.Y. 2015), and Rothschild Trust's possible status as the initial transferee or the entity for whose benefit the initial transfer was made is beyond the scope of the *ET Decision*.

The *Radcliffe Proposed FAC* does not identify a subsequent transfer because it does not identify a transfer from Radcliffe to Rothschild Trust; BLMIS transferred the cash directly to Rothschild Trust. Accordingly, any subsequent transfer claim is dismissed. Since the *ET Decision* did not address the question of extraterritoriality in connection with initial transfers or the entities for whose benefit the initial transfers were made, this disposition does not affect those claims.

iv. *Picard v. UBS AG*, Adv. Pro. 10-05311

According to the Chart, Luxembourg Investment Fund U.S. Equity Plus ("Luxembourg Fund") made subsequent transfers to UBS AG, UBS (Luxembourg) S.A. ("UBS Lux") and UBS Fund Services (Luxembourg) SA ("UBS Fund Services").[41] The Luxembourg Fund is a sub-fund of Luxembourg Investment Fund, a Luxembourg corporation, and both are in liquidation in Luxembourg. (*Amended Complaint*, dated June 26, 2015 ("*UBS Proffered AC*") at ¶¶ 41-42 (ECF Adv. P. No. 10-05311 Doc. # 221).) The Chart does not indicate that the Luxembourg Fund conducted its principal operations in New York (Factor 1), and I infer that it is a foreign entity that did not reside in the United States.

As to the Subsequent Transferees, the Chart does not indicate that either UBS Lux or UBS Fund Services used an office in connection with the transaction (Factor 19), and the *UBS Proffered AC* alleges that both were formed under Luxembourg law and maintained their registered offices there. (*UBS Proffered AC* at ¶¶ 49-50.) The Chart indicates that UBS AG used a U.S. office in connection with the transaction, and the

[41] The Trustee also alleged a subsequent transfer claim against UBS Third Party Management Company SA, but that claim has been dismissed for the reason noted earlier.

UBS Proffered AC alleges that UBS AG is a Swiss public company with its principal offices in Basel, Switzerland. In addition, it also maintains offices at 299 Park Avenue, New York, NY 10171 and 101 Park Avenue, New York, NY 10178 and it conducts daily business activities in Stamford, Connecticut and other locations in the United States. (*Id.* at ¶ 48.) Accordingly, UBS AG resides in the United States, but UBS Lux and UBS Fund Services are foreign transferees without any domestic connection.

Although the Chart indicates that the UBS defendants received the transfers from the Luxembourg Fund, the *UBS Proffered AC* includes slightly different allegations. It avers that UBS Lux received approximately $5.5 million in fees from the Luxembourg Fund, (*id.* at ¶ 303(a)), UBS Fund Services received at least $748,000 from the Luxembourg Fund, (*id.* at ¶ 303(b)), and UBS AG received at least $1.7 million from UBS Lux and UBS Fund Services which was comprised, in part, of amounts they had received from the Luxembourg Fund. (*Id.* at ¶ 303(d).) In other words, UBS AG was an immediate transferee of UBS Lux and UBS Fund Services. It further alleges that UBS Fund Services received the Luxembourg Fund's redemption payments from BLMIS at UBS Fund Services' account at UBS AG's Stamford, Connecticut branch which then went to the Luxembourg Fund's bank account at UBS SA, (*id.* at ¶ 274), but these allegations relate to the initial transfers from BLMIS to the Luxembourg Fund, and not the subsequent transfers.

In fact, the Court is unable to locate any allegations within the four corners of the ninety-seven page *UBS Proffered AC* that identify the location of the subsequent transfers and the *UBS Proffered AC* does not imply that they occurred in the United States. Moreover, if the subsequent transfers to UBS Lux and UBS Fund Services

cannot be recovered on grounds of extraterritoriality, the subsequent transfers from those entities to UBS AG are also beyond the reach of Bankruptcy Code § 550(a)(2). Accordingly, the Trustee has failed to rebut the presumption against extraterritoriality, and these subsequent transfer claims are dismissed.

v. *Picard v. Natixis*, Adv. Pro. No. 10-05353

The Trustee alleges that Bloom Asset Holdings Fund ("Bloom") received subsequent transfers in the sum of $191 million from Groupement and $18 million from Alpha Prime Fund Limited ("Alpha Prime").[42] (*Trustee's Proffered Allegations Pertaining to the Extraterritoriality Issue as to Natixis S.A., Bloom Asset Holdings Fund, and Tensyr Limited*, dated June 26, 2015 ("*Natixis Proffer*"), at ¶ 68 (ECF Adv. P. No. 10-05353 Doc. # 102).) As noted earlier, the Trustee did not take the position that Groupement or Alpha Prime maintained their principal operations in the United States, but the Trustee now contends that they did. In fact, Groupement, Alpha Prime and Bloom are all foreign entities, and the *Natixis Proffer* does not allege that they maintained offices or resided in the United States.

Instead, the Trustee attempts to tie Bloom to the United States through allegations relating to Natixis FP, a domestic corporation. According to the *Natixis Proffer*, Bloom is an indirect subsidiary of Natixis, S.A., a corporate and investment bank created in November 2006 under the laws of France, (*id.* at ¶ 5), and Natixis is the parent of "an international network of financial institutions, service providers, and banks that maintained operations and offices in the United States through numerous

[42] The Trustee also alleges claims in this adversary proceeding relating to subsequent transfers by Fairfield Sentry and Harley that have already been dismissed on comity grounds.

subsidiary entities, including Defendants Natixis FP and Bloom. (*Id.*) Bloom's "corporate function was to act as a non-U.S. taxpayer on behalf of Natixis FP to invest in BLMIS Feeder Funds and other hedge funds that did not permit direct investments by U.S. taxpayers like Natixis FP." (*Id.* at ¶ 14; *accord id* at ¶ 15.) Two affiliates of Natixis, including Natixis FP, operated from the "same principal place of business in New York," (*id.* at ¶ 11), and controlled and directed the transactions on behalf of Bloom with the Subsequent Transferor-feeder funds. (*Id.* at ¶¶ 13-24.) The substance of these allegations is that Natixis F.P., a New York entity, ran Bloom for its own benefit, and utilized Bloom letterhead that listed Bloom's address as 9 West 57th Street in Manhattan. (*Id.* at ¶ 79.)

The underlying Complaint does not identify the subsequent transfers to Bloom or any of the other subsequent transferees. (*See Picard v. Natixis, Complaint*, dated Dec. 8, 2008, at ¶¶ 223-36 (ECF Doc. # 1).) The *Natixis Proffer* refers to only one subsequent transfer to Bloom. Access International Advisors, LLC ("Access"), Groupement's manager, (*Natixis Proffer* at ¶ 44), wired Bloom more than $150 million in Groupement redemption proceeds through a New York correspondent account at State Street Bank & Trust Co., N.A. (*Id.* at ¶ 80.) The proffer does not identify the location of the transferor account, and since the transferee account is a correspondent account, it does not allege a domestic transfer.[43] Furthermore, Groupement does not reside in the United States.

[43] In contrast, the *Natixis Proffer* alleges that Natixis requested that Fairfield Sentry send redemptions to a Deutsche Bank account in New York, (*Natixis Proffer* at ¶ 114), and Harley paid its redemptions to a New York-based Northern Trust bank account. (*Id.* at ¶ 187.)

Accordingly, the Trustee has failed to rebut the presumption against extraterritoriality, and the subsequent transfer claims against Bloom are dismissed.

The parties are directed to confer for the purpose of submitting consensual orders consistent with the dispositions of the motions in each adversary proceeding. If they cannot submit consensual orders, they should settle orders on notice to the other parties in those adversary proceedings.

Dated: New York, New York
November 21, 2016

/s/ *Stuart M. Bernstein*
STUART M. BERNSTEIN
United States Bankruptcy Judge

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Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, -v- BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-mc-115 (JSR) OPINION AND ORDER
In re: MADOFF SECURITIES	
PERTAINS TO: Consolidated proceedings on extraterritoriality issues	

JED S. RAKOFF, U.S.D.J.

The question here presented is whether section 550(a)(2) of the Bankruptcy Code applies extraterritorially in the context of this proceeding. Specifically, Irving H. Picard (the "Trustee"), the trustee appointed under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa-78*lll*, to administer the estate of Bernard L. Madoff Investment Securities LLC ("Madoff Securities"), here seeks to recover funds that, having been transferred from Madoff Securities to certain foreign customers, were then in turn transferred to certain foreign persons and entities that comprise the defendants here at issue. These defendants seek to dismiss the Trustee's claims against them, arguing that 11 U.S.C. § 550(a)(2),

the Bankruptcy Code provision allowing for such recovery, does not apply extraterritorially. The Court assumes familiarity with the underlying facts of the Madoff Securities fraud and ensuing bankruptcy and recounts here only those facts that are relevant to the instant issues.

Central to the question here presented is the role of the so-called "feeder funds," foreign investment funds that pooled their own customers' assets for investment with Madoff Securities. As customers of Madoff Securities, the feeder funds at times withdrew monies from Madoff Securities, which they subsequently transferred to their customers, managers, and the like. When Madoff Securities collapsed in late 2008, many of these funds — which had invested all or nearly all of their assets in Madoff Securities — likewise entered into liquidation in their respective home countries. The Trustee seeks to recover not only the allegedly avoidable transfers made to the feeder funds but also subsequent transfers of alleged Madoff Securities customer property made by those funds to their immediate and mediate transferees. It is the recovery of those subsequent transfers — transfers made abroad between a foreign transferor and a foreign transferee — that is the subject of the instant consolidated proceeding.

For example, in October 2011, the Trustee filed an adversary proceeding against CACEIS Bank Luxembourg and CACEIS Bank (together, "CACEIS"), seeking $50 million in subsequent transfers of alleged Madoff Securities customer property. See Decl. of Jaclyn M.

Metzinger dated Mar. 23, 2013, Ex. A ("CACEIS Compl.") ¶ 2, No. 12 Civ. 2434, ECF No. 2 (S.D.N.Y. filed Apr. 2, 2012). CACEIS Bank Luxembourg is a Luxembourg société anonyme operating there, while CACEIS Bank is a French société anonyme operating in France. Id. ¶¶ 22-23. Both entities serve as custodian banks and engage in asset management for "corporate and institutional clients." Id. ¶¶ 3, 22-23.

The Trustee seeks to recover alleged Madoff Securities customer funds received by CACEIS. However, CACEIS did not invest directly with Madoff Securities; instead, it invested funds with Fairfield Sentry Limited and Harley International (Cayman) Limited, two Madoff Securities feeder funds that in turn invested CACEIS's assets in Madoff Securities. Id. ¶ 2. Fairfield Sentry is a British Virgin Islands ("BVI") company that had invested more than 95% of its assets in Madoff Securities. Id. It is currently in liquidation in the BVI and has settled the Trustee's avoidance and recovery action against it for a fraction of the Trustee's initial claim. See id. ¶¶ 24, 43. Harley is a Cayman Islands company that was also one of Madoff Securities' largest feeder funds, and it is now in liquidation in the Cayman Islands. Id. ¶ 25. The Trustee obtained a default judgment against Harley for more than $1 billion in November 2010. Id. ¶ 53. The Trustee alleges that CACEIS received $50 million in recoverable subsequent transfers as a customer of Fairfield Sentry and Harley, and he asserts a right to reclaim those transfers under 11 U.S.C. § 550(a)(2). See id. ¶¶ 60-69.

CACEIS and the other consolidated defendants have moved to dismiss the Trustee's complaints in their respective adversary proceedings, arguing that section 550(a)(2) of the Bankruptcy Code does not apply extraterritorially and therefore does not reach subsequent transfers made abroad by one foreign entity to another. These defendants previously moved to withdraw the reference to the Bankruptcy Court, and the Court granted that motion on a consolidated basis with respect to the following issue: "whether SIPA and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate, or mediate foreign transferees." See Order at 3, No. 12 Misc. 115, ECF No. 167 (S.D.N.Y. June 7, 2012). The Court received briefing on this issue from the defendants, the Trustee, and the Securities Investor Protection Corporation ("SIPC") and heard oral argument on September 21, 2012. The Court concludes that (1) the application of section 550(a)(2) here would constitute an extraterritorial application of the statute, and (2) Congress did not clearly intend such an application. Moreover, given the factual circumstances at issue in these cases, even if section 550(a)(2) could be applied extraterritorially, such an application would be precluded here by considerations of international comity. This Opinion and Order addresses these issues in turn and directs further proceedings upon return to the Bankruptcy Court.

"It is a 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (quoting EEOC v. Arabian American Oil Co. ("Aramco"), 499 U.S. 244, 248 (1991)). This presumption against extraterritorial application of federal statutes "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Aramco, 499 U.S. at 248.

In determining whether the presumption against extraterritoriality applies, the Court must determine, first, whether the factual circumstances at issue require an extraterritorial application of the relevant statutory provision; and second, if so, whether Congress intended for the statute to apply extraterritorially. See, e.g., Morrison, 130 S. Ct. at 2877-88 (engaging in this analysis with respect to section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)); In re Maxwell Commc'n Corp. ("Maxwell I"), 186 B.R. 807, 816 (S.D.N.Y. 1995) (setting out this two-step inquiry in analyzing section 547 of the Bankruptcy Code).

The Court turns first to the question of whether the Trustee's use of section 550(a) here is in fact an extraterritorial application of the statute. In Morrison, when determining whether an underlying U.S.-based deception was sufficient to make application of section 10(b) of the Exchange Act domestic, rather than

extraterritorial, the Supreme Court looked to "the 'focus' of congressional concern," or, in other words, the "transactions that the statutes seeks to 'regulate.'" 130 S. Ct. at 2884.

The Trustee and SIPC argue that the "focus" of congressional concern in a SIPA liquidation is the regulation of the SIPC-member U.S. broker-dealer, so that the application of any of the incorporated provisions of the Bankruptcy Code is inherently domestic. But this argument proves too much. It cannot be that any connection to a domestic debtor, no matter how remote, automatically transforms every use of the various provisions of the Bankruptcy Code in a SIPA bankruptcy into purely domestic applications of those provisions. On the level of policy, this approach could raise serious issues of international comity, as discussed below. And, as a matter of precedent, Morrison suggests that such a sweeping approach fails to engage in the necessary analysis of the way in which the statutes are utilized, as "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States." 130 S. Ct. at 2884. Accordingly, a mere connection to a U.S. debtor, be it tangential or remote, is insufficient on its own to make every application of the Bankruptcy Code domestic. Cf. Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010) (per curiam) (stating, in the context of a RICO claim, that "simply alleging that some domestic conduct occurred cannot support a claim of domestic application").

The Court therefore looks to the regulatory focus of the Bankruptcy Code's avoidance and recovery provisions specifically. On a straightforward reading of section 550(a), this recovery statute focuses on "the property transferred" and the fact of its transfer, not the debtor. See 11 U.S.C. § 550(a) (allowing a trustee to recover "the property transferred . . . to the extent that a transfer is avoided" under one of the Bankruptcy Code's avoidance provisions). Moreover, section 548, the avoidance provision that is primarily at issue in these proceedings, similarly focuses on the nature of the transaction in which property is transferred, not merely the debtor itself. See, e.g., 11 U.S.C. § 548(c) (allowing a transferee who "takes for value and in good faith . . . [to] retain any interest transferred . . . to the extent that such transferee . . . gave value to the debtor in exchange for such transfer"); cf. In re Maxwell Commc'n Corp. ("Maxwell II"), 93 F.3d 1036, 1051 (2d Cir. 1996) (noting that "scrutiny of the transfer is at the heart of" an avoidance action). Accordingly, under Morrison, the transaction being regulated by section 550(a)(2) is the transfer of property to a subsequent transferee, not the relationship of that property to a perhaps-distant debtor.

To determine whether the transfers at issue in this consolidated proceeding occurred extraterritorially, "the court considers the location of the transfers as well as the component events of those transactions." Maxwell I, 186 B.R. at 817. Here, the relevant transfers and transferees are predominantly foreign:

foreign feeder funds transferring assets abroad to their foreign customers and other foreign transferees. See, e.g., CACEIS Compl. ¶ 2. This scenario is similar to circumstances found to implicate extraterritorial applications of the Bankruptcy Code's avoidance provisions in other cases. See, e.g., Maxwell I, 186 B.R. at 815 (finding application of 11 U.S.C. § 847 to be extraterritorial where "the antecedent debts were incurred overseas, the transfers on account of those debts were made overseas, and the recipients . . . [are] all foreigners"); In re Midland Euro Exch. Inc., 347 B.R. 708, 717 (Bankr. C.D. Cal. 2006) (noting that the parties agreed that the trustee's "claims would result in extraterritorial application of [11 U.S.C.] § 548" where "[t]he transferor was a Barbados corporation, the transferee was an English corporation, the funds originated from a bank account in London and, although transferred through a bank account in New York, eventually ended up in another bank account in England"). Although the chain of transfers originated with Madoff Securities in New York, that fact is insufficient to make the recovery of these otherwise thoroughly foreign subsequent transfers into a domestic application of section 550(a).[1] See Maxwell I, 186 B.R. at 816-17 (rejecting the claim that

[1] Nor is the fact that some of the defendants here allegedly used correspondent banks in the United States to process dollar-denominated transfers sufficient to make these foreign transfers domestic. See, e.g., Cedeno v. Intech Grp., Inc., 733 F. Supp. 2d 471, 472 (S.D.N.Y. 2010) (dismissing a RICO claim as impermissibly extraterritorial where "[t]he scheme's contacts with the United States, however, were limited to the movement of funds into and out of U.S.-based bank accounts").

the alleged preferential transfers were domestic because the funds for the transfers derived from the sale of U.S. assets); cf. Morrison, 130 S. Ct. at 2886 (rejecting the notion that the section 10(b) claim at issue was domestic because a significant portion of the fraudulent conduct occurred in the United States). Accordingly, the Court concludes that the subsequent transfers that the Trustee seeks to recover here are foreign transfers and thus would require an extraterritorial application of section 550(a).

The Court therefore turns to the second prong of the extraterritoriality inquiry: whether such an extraterritorial application was intended by Congress. The Supreme Court has explained that "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" Morrison, 130 S. Ct. at 2877 (quoting Aramco, 499 U.S. at 248). "When a statute gives no clear indication of an extraterritorial application, it has none." Id. In deciding whether Congress has "clearly expressed" such an intent, the Court looks first to the language of section 550(a), which reads:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> > (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a).

Nothing in this language suggests that Congress intended for this section to apply to foreign transfers, and the Trustee does not argue otherwise. Cf. Maxwell I, 186 B.R. at 819 ("[N]othing in the language or legislative history of [11 U.S.C.] § 547 expresses Congress' intent to apply the statute to foreign transfers."); Midland, 347 B.R. at 717 ("Nothing in the text of [11 U.S.C.] § 548 indicates congressional intent to apply it extraterritorially."). The Court therefore looks to "context," Morrison, 130 S. Ct. at 2883, including surrounding provisions of the Bankruptcy Code, to determine whether Congress nevertheless intended that section 550(a) apply extraterritorially.

Attempting to rebut the presumption against extraterritoriality, the Trustee focuses on section 541 of the Bankruptcy Code, which defines "property of the estate" to include certain specified property "wherever located and by whomever held." 11 U.S.C. § 541(a). It is uncontested here that the phrase "wherever located" is intended to give the Trustee title over all of the debtor's property, regardless of whether it is physically present in the United States. See H.R. Rep. No. 82-2320, at 10, reprinted in 1952 U.S.C.C.A.N. 1960, at 1976. According to the Trustee, section 541 is incorporated into the avoidance and recovery provisions of the Bankruptcy Code, which use the phrase "an interest of the debtor in property" to define the transfers that may be avoided, a phrase

that is repeated in section 541 in defining "property of the estate." See, e.g., 11 U.S.C. § 548(a) (allowing a trustee to "avoid any transfer . . . of an interest of the debtor in property"); see also Begier v. I.R.S., 496 U.S. 53, 58-59 (1990) (looking to section 541's definition of "property of the estate" in defining "property of the debtor" under section 547). Under the Trustee's theory, section 541's reference to "wherever located and by whomever held" is thereby indirectly incorporated into the Bankruptcy Code's avoidance and recovery provisions, indicating that Congress intended that those provisions apply extraterritorially as well.

Though clever, the theory is neither logical nor persuasive. That section 541's definition of "property of the estate" may be relevant to interpreting "property of the debtor" does not necessarily imply that transferred property is to be treated as "property of the estate" under section 541 prior to recovery by the Trustee. As the Court of Appeals for the Second Circuit has explained,

> In accordance with 11 U.S.C. § 541(a)(1) (1988), the property of a bankruptcy estate includes (with exceptions not presently pertinent) "all legal or equitable interests of the debtor in property as of the commencement of the case;" and pursuant to 11 U.S.C. § 541(a)(3) (1988), the property of a bankruptcy estate also includes "[a]ny interest in property that the trustee recovers" under specified Bankruptcy Code provisions, including 11 U.S.C. § 550 (1988). . . . "If property that has been fraudulently transferred is included in the § 541(a)(1) definition of property of the estate, then § 541(a)(3) is rendered meaningless with respect to property recovered pursuant to fraudulent transfer actions." Further, "the inclusion of property recovered by the trustee pursuant to his avoidance powers in a separate definitional

> subparagraph clearly reflects the congressional intent that such property is not to be considered property of the estate until it is recovered."

In re Colonial Realty Co., 980 F.2d 125, 131 (2d Cir. 1992) (citation omitted) (quoting In re Saunders, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989)).

Under the logic of Colonial Realty, whether "property of the estate" includes property "wherever located" is irrelevant to the instant inquiry: fraudulently transferred property becomes property of the estate only after it has been recovered by the Trustee, so section 541 cannot supply any extraterritorial authority that the avoidance and recovery provisions lack on their own. See Maxwell I, 186 B.R. at 820 ("Because preferential transfers do not become property of the estate until recovered, § 541 does not indicate the Congress intended § 547 to govern extraterritorial transfers." (citing Colonial Realty, 980 F.2d at 131)); Midland, 347 B.R. at 718 (finding that "neither the plain language of the statute nor its reading in conjunction with other parts of the Code establish[es] congressional intent to apply § 548 extraterritorially," in part because "allegedly fraudulent transfers do not become property of the estate until they are avoided").[2]

[2] The Trustee asks the Court to adopt the Fourth Circuit's decision in In re French, 440 F.3d 145, 152 (4th Cir. 2006), which holds that the presumption against extraterritoriality does not apply to avoidance and recovery actions. However, the logic of French is inconsistent with the Second Circuit's decision in Colonial Realty, as French relies on a notion that the foreign property "would have been property of the debtor's estate" absent a fraudulent transfer, id., whereas Colonial Realty implies that section 541 would not

Indeed, the fact that section 541, by virtue of its "wherever located" language, applies extraterritorially may cut against the Trustee's argument. In Morrison, the Supreme Court similarly contrasted section 10(b) with another provision of the Exchange Act, noting that the other section "contains what [section] 10(b) lacks: a clear statement of extraterritorial effect. . . . [W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." 130 S. Ct. at 2883; see also Norex, 631 F.3d at 33 ("Morrison . . . forecloses Norex's argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.").

Nor does section 78fff-2(c)(3) of SIPA, which empowers a SIPA trustee to utilize the Bankruptcy Code's avoidance and recovery provisions to reclaim customer property, overcome the presumption against extraterritorial application. As with section 550(a) of the Bankruptcy Code, section 78fff-2(c)(3) of SIPA does not expressly provide for extraterritorial application; rather, it primarily incorporates the avoidance and recovery provisions of the Bankruptcy Code, suggesting that whatever limitations apply to an ordinary

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apply until after property has been recovered. In any event, French is also factually distinguishable, as "[m]ost of the activity surrounding [the relevant] transfer took place in the United States . . . [and] almost all of the parties with an interest in this litigation — the debtor, the transferees, and all but one of the creditors — are based in the United States, and have been for years." Id. at 154. Accordingly, the Court declines to adopt either French's reasoning or its ultimate determination.

bankruptcy likewise limit a SIPA liquidation. See 15 U.S.C. § 78fff-2(c)(3) (empowering a SIPA trustee to "recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of Title 11"). As a more general matter, SIPA's predominantly domestic focus suggests a lack of intent by Congress to extend its reach extraterritorially. Cf. Morrison, 130 S. Ct. at 2878 (finding that the Exchange Act's focus is the purchase and sale of securities in the United States). For example, SIPA expressly excludes from SIPC membership brokers whose primary business is conducted outside of the United States, see 15 U.S.C. § 78ccc(a)(2)(A)(i), and likewise excludes as a "customer" any person whose claim arises out of transactions with a foreign subsidiary of a SIPC member, see 15 U.S.C. § 78*lll*(2)(C)(i). Furthermore, although the Trustee points to SIPA section 78eee(b)(2)(A)(i), which provides for "exclusive jurisdiction of such debtor and its property wherever located (including property located outside the territorial limits of such court . . .)," the effect of this provision is no different from that of section 841 of the Bankruptcy Code. See 15 U.S.C. § 78eee(b)(2)(A)(iii) (providing a SIPA trustee with "the jurisdiction, powers, and duties conferred upon a court of the United States having jurisdiction over cases under Title 11"). That is, although section 78eee(b)(2)(A)(i) uses the phrase "wherever located," this phrase relates only to property

of the debtor, which, as discussed above, includes transferred property only after it has been recovered by the Trustee.[3]

Finally, the Trustee contends that policy concerns require that section 550(a) of the Bankruptcy Code apply extraterritorially; that is, the Trustee argues that a contrary result would allow a U.S. debtor to fraudulently transfer all of his assets offshore and then retransfer those assets to avoid the reach of U.S. bankruptcy law. However, as other courts have found, the desire to avoid such loopholes in the law "must be balanced against the presumption against extraterritoriality, which serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Midland, 347 B.R. at 718. Assuming that any such intentional fraud occurred, the Trustee here may be able to utilize the laws of the countries where such transfers occurred to avoid such an evasion while at the same time avoiding international discord. Furthermore, although the Trustee argues that finding no extraterritorial application would undermine the primary policy objective of SIPA — the equitable distribution of customer funds to customers of the debtor — the Trustee has long insisted that indirect customers of Madoff Securities, like many of

[3] To the extent that the district court in In re Bevill, Bresler & Schulman, Inc., 83 B.R. 880 (D.N.J. 1988), found that SIPA applies extraterritorially, that case relied on an analysis that is outdated in light of the Supreme Court's decision in Morrison. See, e.g., id. at 896 (stating that "[e]xtraterritorial application of SIPA is also consistent with the extraterritorial application of other federal securities laws," including section 10(b)).

the defendants here, are not themselves creditors of the customer-property estate. See In re Bernard L. Madoff Inv. Sec. LLC, 708 F.3d 422, 427 (2d Cir. 2013) (adopting this position). Therefore, the Trustee's claim that the defendants here are being treated somehow more favorably than customer-beneficiaries of the SIPA estate — who are not similarly situated to these non-beneficiaries — is disingenuous, especially since the defendants here stand to benefit little, if at all, from the customer-property estate through their now-defunct feeder funds. In sum, the Court concludes that the presumption against extraterritorial application of federal statutes has not been rebutted here; the Trustee therefore may not use section 550(a) to pursue recovery of purely foreign subsequent transfers.

While the foregoing is dispositive, the Court further concludes, in the alternative, that even if the presumption against extraterritoriality were rebutted, the Trustee's use of section 550(a) to reach these foreign transfers would be precluded by concerns of international comity. Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Maxwell II, 93 F.3d at 1046 (quoting Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)); see also id. at 1047 (noting that "international comity is a separate notion from the 'presumption

against extraterritoriality,' and may "preclude the application" of an otherwise extraterritorial statute). Courts conducting a comity analysis must engage in a choice-of-law analysis to determine whether the application of U.S. law would be reasonable under the circumstances, comparing the interests of the United States and the relevant foreign state. See id. at 1047-48.

The Second Circuit has previously stated that "[c]omity is especially important in the context of the Bankruptcy Code." Id. at 1048. The facts underlying the instant proceeding illustrate why this is so. As is the case with Fairfield Sentry and Harley, many of the feeder funds are currently involved in their own liquidation proceedings in their home countries. These foreign jurisdictions have their own rules concerning on what bases the recipient of a transfer from a debtor should be required to disgorge it. See, e.g., In re Fairfield Sentry Ltd. Litig., 458 B.R. 665, 672 (S.D.N.Y. 2011) (noting that the foreign representative of Fairfield Sentry's estate had filed against its investors "statutory claims under BVI law for 'unfair preferences' and 'undervalue transactions'"). Indeed, the BVI courts have already determined that Fairfield Sentry could not reclaim transfers made to its customers under certain common-law theories — a determination in conflict with what the Trustee seeks to accomplish here. See Decl. of Marco E. Schnabl dated July 13, 2012, Ex. C., No. 12 Misc. 115, ECF No. 236 (S.D.N.Y. filed July 13, 2012).

The Trustee is seeking to use SIPA to reach around such foreign liquidations in order to make claims to assets on behalf of the SIPA customer-property estate — a specialized estate created solely by a U.S. statute, with which the defendants here have no direct relationship. Without any agreement to the contrary (which the Trustee does not suggest exists), investors in these foreign funds had no reason to expect that U.S. law would apply to their relationships with the feeder funds. Cf. Maxwell II, 93 F.3d at 1051 (finding that, for purposes of the comity analysis, "England has a much closer connection to these disputes than does the United States" where the transfer occurred in England and "English law applied to the resolution of disputes arising under" the credit agreements under which the relevant transfers were made). Given the indirect relationship between Madoff Securities and the transfers at issue here, these foreign jurisdictions have a greater interest in applying their own laws than does the United States. Accordingly, as the Second Circuit found in Maxwell II, "the interests of the affected forums and the mutual interest of all nations in smoothly functioning international law counsel against the application of United States law in the present case." Id. at 1053.

In sum, the Court finds that section 550(a) does not apply extraterritorially to allow for the recovery of subsequent transfers received abroad by a foreign transferee from a foreign transferor. Therefore, the Trustee's recovery claims are dismissed to the extent

that they seek to recover purely foreign transfers.[4] Except to the extent provided in other orders, the Court directs that the following adversary proceedings be returned to the Bankruptcy Court for further proceedings consistent with this Opinion and Order: (1) those cases listed in Exhibit A of item number 167 on the docket of 12-mc-115; and (2) those cases listed in the schedule attached to item number 468 on the docket of 12-mc-115 that were designated as having been added to the "extraterritoriality" consolidated briefing.

SO ORDERED.

Dated: New York, NY
July 6, 2014

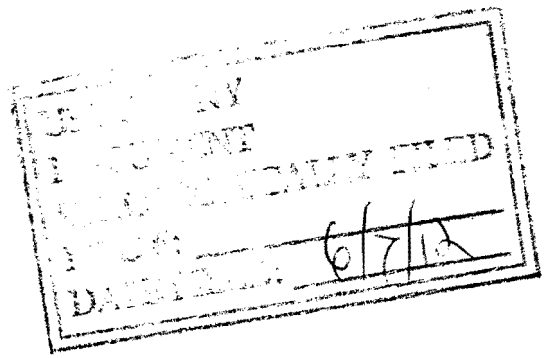
JED S. RAKOFF, U.S.D.J.

[4] The Trustee argues that dismissal at this stage is inappropriate because additional fact-gathering is necessary to determine where the transfers took place. However, it is the Trustee's obligation to allege "facts giving rise to the plausible inference that" the transfer occurred "within the United States." Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 69 (2d Cir. 2012). Here, to the extent that the Trustee's complaints allege that both the transferor and the transferee reside outside of the United States, there is no plausible inference that the transfer occurred domestically. Therefore, unless the Trustee can put forth specific facts suggesting a domestic transfer, his recovery actions seeking foreign transfers should be dismissed.

Exhibit 3

The document is not available.

Exhibit 4



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-MC-0115 **ORDER**
In re: MADOFF SECURITIES	**(Relates to consolidated proceedings on Extraterritoriality Issues)**

PERTAINS TO CASES LISTED IN EXHIBIT A

JED S. RAKOFF, U.S.D.J.:

WHEREAS:

A. Pending before the Court are various adversary proceedings commenced by Irving H. Picard, as trustee ("Trustee"), in connection with the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") and the estate of Bernard L. Madoff under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"), in which the Trustee has sought to avoid or recover certain transfers made by BLMIS in the 90 day, two year, six year and/or longer period(s) preceding December 11, 2008 (the "Transfers"). In these proceedings, certain defendants (the "Extraterritoriality Defendants") have sought withdrawal of the reference from the Bankruptcy Court to this Court, among other grounds, for the Court's determination of the Extraterritoriality Issue as defined below.

B. Exhibit A hereto, prepared by the Trustee's counsel, identifies the single cases or, in certain instances, the lead case of related adversary proceedings where defendants are represented by common counsel, in which Extraterritoriality Defendants have filed motions to withdraw the reference (or joined in such motions, which joinders are deemed included in the scope of this Order unless expressly stated otherwise on Exhibit A) from the Bankruptcy Court to this Court to determine whether SIPA and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate or mediate foreign transferees (the "Extraterritoriality Issue"). Such cases and joinders are referred to herein as the "Adversary Proceedings."

C. The Court, over the objections of the Trustee and the Securities Investor Protection Corporation ("SIPC"), previously withdrew the reference from the Bankruptcy Court to consider issues concerning whether the Trustee may avoid or recover Transfers that BLMIS made to certain defendants abroad. *See* Primeo Fund, et al., No. 12 MC 0115 (S.D.N.Y. Order dated May 15, 2012) [ECF No. 97] (the "Extraterritoriality Withdrawal Ruling").

D. Pursuant to Extraterritoriality Withdrawal Ruling, the Court has decided to consolidate briefing on the merits of the Extraterritoriality Issue, and the resolution of this issue will govern all pending motions to withdraw the reference and those pending motions to dismiss that have not yet been fully briefed and argued. See Extraterritorial Withdrawal Ruling, p. 10-11; SIPC v. Bernard L. Madoff Inv. Secs. LLC (In re Madoff Secs.), No. 12 MC 0115 (S.D.N.Y. Order dated Apr. 19, 2012) [ECF No. 22] (the "Common Briefing Order"). The Court's Extraterritoriality Withdrawal Ruling also directed counsel for the Trustee to convene a

conference among the Extraterritoriality Defendants and to schedule consolidated proceedings no later than May 23, 2012.

E. On May 23, 2012 counsel for the Trustee, SIPC, and the Extraterritoriality Defendants convened a conference call with the Court, and the Court thereafter ordered that the parties submit by no later than June 6, 2012 a proposed order agreed to by the parties for withdrawal and briefing of a consolidated motion to dismiss related to the Extraterritoriality Issue.

BASED ON THE FOREGOING, IT IS HEREBY ORDERED AS FOLLOWS:

1. The reference of the Adversary Proceedings listed in Exhibit A is withdrawn, in part, from the Bankruptcy Court to this Court solely with respect to the Extraterritoriality Defendants for the limited purpose of hearing and determining whether SIPA and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate or mediate foreign transferees. Except as otherwise provided herein or in other orders of this Court, the reference to the Bankruptcy Court is otherwise maintained for all other purposes.

2. The Trustee and SIPC are deemed to have raised, in response to all pending motions for withdrawal of the reference based on the Extraterritoriality Issue, all arguments previously raised by either or both of them in opposition to all such motions granted by the Extraterritoriality Withdrawal Ruling, and such objections or arguments are deemed to be overruled, solely with respect to the Extraterritoriality Issue, for the reasons stated in the Extraterritoriality Withdrawal Ruling.

3. All objections that could be raised by the Trustee and/or SIPC to the pending motions to withdraw the reference in the Adversary Proceedings, and the defenses and

responses thereto that may be raised by the affected defendants, are deemed preserved on all matters.

4. On or before July 13, 2012, the Extraterritoriality Defendants shall file a single consolidated motion to dismiss pursuant to Fed. R. Civ. P. 12 (made applicable to the Adversary Proceeding by Fed. R. Bankr. P. 7012) and a single consolidated supporting memorandum of law, not to exceed forty (40) pages (together, the "Extraterritoriality Motion to Dismiss").

5. The Trustee and SIPC shall each file a memorandum of law in opposition to the Extraterritoriality Motion to Dismiss, not to exceed forty (40) pages each, addressing the Extraterritoriality Withdrawal Ruling Issue (the "Trustee's Opposition") on or before August 17, 2012.

6. Young Conaway Stargatt & Taylor, LLP, which is conflicts counsel for the Trustee, and Windels Marx Lane & Mittendorf, LLP, which is special counsel to the Trustee, each may file a joinder, not to exceed two (2) pages (excluding exhibits identifying the relevant adversary proceedings), to the Trustee's Opposition, on behalf of the Trustee in certain of the adversary proceedings listed on Exhibit A hereto on or before August 17, 2012. In either case, the respective joinders may only specify what portions of the Trustee's Opposition are joined and shall not make or offer any additional substantive argument.

7. The Extraterritoriality Defendants shall file one consolidated reply brief, not to exceed twenty (20) pages, on or before August 31, 2012 (the "Reply Brief"). In the event the Trustee files an amended complaint (the "Amended Complaint") in any of the Adversary Proceedings after the Extraterritoriality Motion to Dismiss is filed, the Reply Brief shall include a reference (by civil action number and docket number only) to a representative Amended Complaint filed by the Trustee against Extraterritoriality Defendants. Any further requirement

that the Amended Complaints subject to the Extraterritoriality Motion to Dismiss be identified or filed is deemed waived and satisfied. In the event the Trustee files an Amended Complaint, he shall, at the time the Amended Complaint is filed, provide the Extraterritoriality Defendants a blackline reflecting the changes made in the Amended Complaint from the then operative complaint.

8. The Court will hold oral argument on the Extraterritoriality Motion to Dismiss on September 21, 2012, at 4:00 p.m. (the "Hearing Date").

9. On or before August 31, 2012, the Extraterritoriality Defendants shall designate one lead counsel to advocate their position at oral argument on the Hearing Date, but any other attorney who wishes to be heard may appear and so request.

10. The caption displayed on this Order shall be used as the caption for all pleadings, notices and briefs to be filed pursuant to this Order.

11. All communications and documents (including drafts) exchanged between and among any of the defendants in any of the adversary proceedings, and/or their respective attorneys, shall be deemed to be privileged communications and/or work product, as the case may be, subject to a joint interest privilege.

12. This Order is without prejudice to any and all grounds for withdrawal of the reference (other than the Extraterritoriality Issue) raised in the Adversary Proceedings by the Extraterritoriality Defendants and any matter that cannot properly be raised or resolved on a Rule 12 motion, all of which are preserved.

13. Nothing in this Order shall: (a) waive or resolve any issue not specifically raised in the Extraterritoriality Motion to Dismiss; (b) waive or resolve any issue raised or that could be raised by any party other than with respect to the Extraterritoriality Issue, including related issues

that cannot be resolved on a motion under Fed. R. Civ. P. 12; or (c) notwithstanding Fed. R. Civ. P. 12(g)(2) or Fed. R. Bankr. P. 7012(g)(2), except as specifically raised in the Extraterritoriality Motion to Dismiss, limit, restrict or impair any defense or argument that has been raised or could be raised by any Extraterritoriality Defendant in a motion to dismiss under Fed. R. Civ. P. 12 or Fed. R. Bankr. P. 7012, or any other defense or right of any nature available to any Extraterritoriality Defendant (including, without limitation, all defenses based on lack of personal jurisdiction or insufficient service of process), or any argument or defense that could be raised by the Trustee or SIPC in response thereto.

14. Nothing in this Order shall constitute an agreement or consent by any Extraterritoriality Defendant to pay the fees and expenses of any attorney other than such defendant's own retained attorney. This paragraph shall not affect or compromise any rights of the Trustee or SIPC.

15. This Order is without prejudice to and preserves all objections of the Trustee and SIPC to timely-filed motions for withdrawal of the reference currently pending before this Court (other than the withdrawal of the reference solely with respect to the Extraterritoriality Issue) with respect to the Adversary Proceedings, and the defenses and responses thereto that may be raised by the affected defendants, are deemed preserved on all matters.

16. The procedures established by this Order, or by further Order of this Court, shall constitute the sole and exclusive procedures for determination of the Extraterritoriality Issue in the Adversary Proceedings (except for any appellate practice resulting from such determination), and this Court shall be the forum for such determination. To the extent that briefing or argument schedules were previously established with respect to the Extraterritoriality Issue in any of the Adversary Proceedings, this Order supersedes all such schedules solely with respect to the

Extraterritoriality Issue. To the extent that briefing or argument schedules are prospectively established with respect to motions to withdraw the reference or motions to dismiss in any of the Adversary Proceedings, the Extraterritoriality Issue shall be excluded from such briefing or argument and such order is vacated. For the avoidance of doubt, to the extent any of the Extraterritoriality Defendants have issues other than the Extraterritoriality Issue or issues set forth in the Common Briefing Order that were withdrawn, those issues will continue to be briefed on the schedule previously ordered by the Court. Except as stated in this paragraph, this Order shall not be deemed or construed to modify, withdraw or reverse any prior Order of the Court that granted withdrawal of the reference in any Adversary Proceeding for any reason.

SO ORDERED.

Dated: New York, New York
June 6, 2012

JED S. RAKOFF, U.S.D.J.

EXHIBIT A

1.	***Picard v. Primeo***	11-cv-06524-JSR	Morrison & Foerster LLP Gary S. Lee (glee@mofo.com) Joel C. Haims (jhaims@mofo.com) LaShann M. DeArcy (ldearcy@mofo.com) Kiersten A. Fletcher (kfletcher@mofo.com)
2.	***Picard v. ABN AMRO Bank N.V. (presently known as the Royal Bank of Scotland, N.V.), et al.*** (as filed by Rye Select Broad Market XL Portfolio Ltd.)	11-cv-06848-JSR	Morrison & Foerster LLP Gary S. Lee (glee@mofo.com) Joel C. Haims (jhaims@mofo.com) LaShann M. DeArcy (ldearcy@mofo.com) Kiersten A. Fletcher (kfletcher@mofo.com)
3.	***Picard v. ABN AMRO Bank N.V. (presently known as the Royal Bank of Scotland, N.V.), et al.*** (as filed by ABN AMRO Incorporated, ABN AMRO Bank, N.V.)	11-cv-06878-JSR	Allen & Overy LLP Michael S. Feldberg (michael.feldberg@allenovery.com) Bethany Kriss (bethany.kriss@allenovery.com)
4.	***Picard v. ABN AMRO (Ireland) Ltd. (F/N/A Fortis Prime Fund Solutions Bank (Ireland) Ltd.,), et al.*** (as filed by Rye Select Broad Market XL Portfolio Ltd.)	11-cv-06849-JSR	Morrison & Foerster LLP Gary S. Lee (glee@mofo.com) Joel C. Haims (jhaims@mofo.com) LaShann M. DeArcy (ldearcy@mofo.com) Kiersten A. Fletcher (kfletcher@mofo.com)

5.	***Picard v. ABN AMRO (Ireland) Ltd. (F/N/A Fortis Prime Fund Solutions Bank (Ireland) Ltd.,), et al.,*** (as filed by ABN AMRO Custodial Services (Ireland) Ltd., ABN AMRO Bank (Ireland), Ltd.)	11-cv-06877-JSR	Latham & Watkins Christopher Harris (christopher.harris@lw.com) Cameron Smith (cameron.smith@lw.com)
6.	***Picard v. Banco Bilbao Vizcaya Argentaria, S.A.***	11-cv-07100-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com)
7.	***Picard v. Federico Ceretti, et al.*** (as filed by Federico Ceretti, Carlo Grosso, FIM Limited and FIM Advisers LLP)	11-cv-07134-JSR	Paul Hastings LLP Jodi Kleinick (jodikleinick@paulhastings.com) Barry Sher (barrysher@paulhastings.com) Mor Wetzler (morwetzler@paulhastings.com)
8.	***Picard v. Oreades Sicav, et al.*** (as filed by BNP Paribas Investment Partners Luxembourg S.A., BGL BNP Paribas S.A. and BNP Paribas Securities Services S.A.)	11-cv-07763-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace (bpeace@cgsh.com)
9.	***Picard v. Equity Trading Portfolio Ltd., et al.*** (as filed by BNP Paribas Arbitrage SNC)	11-cv-07810-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace (bpeace@cgsh.com)
10.	***Picard v. BNP Paribas Arbitrage SNC***	12-cv-00641-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace

			(bpeace@cgsh.com)
11.	***Picard v. Barclays Bank (Suisse) S.A., et al***	12-cv-01882-JSR	Hogan Lovells US LLP Marc J. Gottridge (marc.gottridge@hoganlovells.com) Andrew M. Behrman (andrew.behrman@hoganlovells.com)
12.	***Picard v. ABN AMRO Bank N.V. (presently known as The Royal Bank of Scotland, N.V.), et al***	12-cv-01939-JSR	Allen & Overy LLP Michael S. Feldberg (michael.feldberg@allenovery.com) Bethany Kriss (bethany.kriss@allenovery.com)
13.	**Picard v. Kohn, et al.** (as filed by UniCredit Bank Austria)	12-cv-02161-JSR	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)
14.	***Picard v. HSBC Bank, plc, et al.***(as filed by UniCredit Bank Austria)	12-cv-02162-JSR	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)
15.	***Picard v. HSBC Bank, plc, et al.***(as filed by UniCredit S.p.A. and Pioneer)	12-cv-02239-JSR	Skadden, Arps, Slate, Meagher, & Flom LLP (susan.saltzstein@Skadden.com) Marco E. Schnabl (Marco.Schnabl@Skadden.com)

			Jeremy A. Berman (jeremy.berman@Skadden.com) Jason C. Putter (jason.putter@skadden.com)
16.	***Picard v. Kohn, et al.*** (as filed by UniCredit S.p.A. and Pioneer)	12-cv-02240-JSR	Skadden, Arps, Slate, Meagher, & Flom LLP Susan L. Saltzstein (susan.saltzstein@Skadden.com) Marco E. Schnabl (Marco.Schnabl@Skadden.com) Jeremy A. Berman (jeremy.berman@Skadden.com) Jason C. Putter (jason.putter@skadden.com)
17.	***Picard v. Bank Julius Baer & Co., Ltd.***	12-cv-02311-JSR	McKool Smith P.C. John P. Cooney, Jr. (jcooney@mckoolsmith.com) Eric B. Halper (ehalper@mckoolsmith.com) Virginia I. Weber (vweber@mckoolsmith.com)
18.	***Picard v. Lion Global Investors Limited***	12-cv-02349-JSR	Proskauer Rose LLP Gregg M. Mashberg (gmashberg@proskauer.com) Richard L. Spinogatti (rspinogatti@proskauer.com)
19.	***Picard v. Grosvenor Investment Management Ltd., et al.***	12-cv-02351-JSR	Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)
20.	***Picard v. Inteligo Bank Ltd. Panama Branch f/k/a/ Blubank Ltd. Panama Branch***	12-cv-02364-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com) Jessica Bartlett

			(jessica.bartlett@shearman.com)
21.	***Picard v. Banca Carige, S.P.A.***	12-cv-02408-JSR	Kasowitz, Benson, Torres, & Friedman LLP David J. Mark (dmark@kasowitz.com)
22.	***Picard v. Somers Dublin Limited, et al.***	12-cv-02430-JSR	Cleary Gottlieb Steen & Hamilton LLP Evan A. Davis (edavis@cgsh.com) Thomas J. Moloney (tmoloney @cgsh.com)
23.	***Picard v. HSBC Bank, plc, et al.*** (as filed by the HSBC Defendants)	12-cv-02431-JSR	Cleary Gottlieb Steen & Hamilton LLP Charles J. Keeley (cjkeeley@cgsh.com) Tom Moloney (tmoloney@cgsh.com) Evan Davis (edavis@cgsh.com) David Brodsky (dbrodsky@cgsh.com)
24.	***Picard v. Banco Itau Europa Luxembourg S.A., et al***	12-cv-02432-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com)
25.	***Caceis Bank Luxembourg, et al.***	12-cv-02434-JSR	Kelley Drye & Warren LLP Thomas B. Kinzler (tkinzler@kelleydrye.com) Daniel Schimmel (dschimmel@kelleydrye.com) Jaclyn M. Metzinger (jmetzinger@kelleydrye.com)

26.	***Picard v. Banque Privee Espirito Santo S.A.***	12-cv-02442-JSR	Flemming Zulack Williamson Zauderer LLP Elizabeth A. O'Connor (eoconnor@fzwz.com) John F. Zulack (Jzulack@fzwz.com) Megan Davis (mdavis@fzwz.com)
27.	***Picard v. Nomura International PLC***	12-cv-02443-JSR	Shearman & Sterling LLP Brian H. Polovoy (bpolovoy@shearman.com) Christopher R. Fenton (Cfenton@shearman.com) Andrew Z. Lipson (alipson@shearman.com)
28.	***Picard v. Nomura Bank International PLC***	12-cv-02446-JSR	Shearman & Sterling LLP Brian H. Polovoy (bpolovoy@shearman.com) Christopher R. Fenton (Cfenton@shearman.com) Andrew Z. Lipson (alipson@shearman.com)
29.	***Picard v. The Sumitomo Trust and Banking Co., Ltd.***	12-cv-02481-JSR	Becker, Glynn, Melamed & Muffly LLP Zeb Landsman (zlandsman@beckerglynn.com) Jordan E. Stern (jstern@beckerglynn.com) Michelle Mufich (mmufich@beckerglynn.com)
30.	***Picard v. UBS AG, et al.*** (M&B Capital Advisers Sociedad de Valores, S.A., M&B Capital Advisers Gestion SGIIC, S.A. -	12-cv-02483-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin

	Moving Parties) **[Amended Motion to Withdraw]**		(rlevin@cravath.com)
31.	***Picard v. Unifortune Asset Management SGR SPA, et al.***	12-cv-02485-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
32.	***Picard v. Trincaster Corporation***	12-cv-02486-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
33.	***Picard v. Banque Syz & Co., SA***	12-cv-02489-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
34.	***Picard v. Square One Fund Ltd., et al.***	12-cv-02490-JSR	Tannenbaum Helpern Syracuse & Hirschtritt LLP; Brune & Richard LLP. Tannenbaum Helpern Syracuse & Hirschtritt LLP Tammy P. Bieber (bieber@thsh.com) Brune & Richard LLP David Elbaum (delbaum@bruneandrichard.com) Bernfeld, DeMatteo & Bernfeld, LLP

			David Bernfeld (davidbernfeld@bernfeld-dematteo.com)
35.	***Picard v. Credit Agricole (Suisse) S.A., et al.***	12-cv-02494-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com)
36.	***Picard v. SNS Bank N.V., et al***	12-cv-02509-JSR	Wilmer Cutler Pickering Hale and Dorr LLP Andrea J. Robinson (andrea.robinson@wilmerhale.com) Charles C. Platt (charles.platt@wilmerhale.com) George W. Shuster, Jr. (george.shuster@wilmerhale.com)
37.	***Picard v. Quilvest Finance Ltd.***	12-cv-02580-JSR	Jones Day Thomas E. Lynch (telynch@jonesday.com) Scott J. Friedman (sjfriedman@jonesday.com)
38.	***Picard v. Arden Asset Management, Inc., et al.***	12-cv-02581-JSR	Seward & Kissel LLP M. William Munno (munno@sewkis.com) Mandy DeRoche (deroche@sewkis.com) Michael B. Weitman (weitman@sewkis.com)
39.	***Picard v. Banque J. Safra (Suisse) SA***	12-cv-02587-JSR	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com)

40.	***Picard v. Vizcaya Partners Limited, et al.***	12-cv-02588-JSR	Sullivan & Cromwell LLP (for Bank J. Safra (Gibraltar) Limited) Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com) Katten Muchin Rosenman LLP (for Zeus Partners Ltd) Anthony L. Paccione (anthony.paccione@kattenlaw.com)
41.	***Picard v. Abu Dhabi Investment Authority***	12-cv-02616-JSR	Quinn Emanuel Urquhart & Sullivan, LLP Peter E. Calamari (petercalamari@quinnemanuel.com) Marc L. Greenwald (marcgreenwald@quinnemanuel.com) Eric M. Kay (erickay@quinnemanuel.com) David S. Mader (davidmader@quinnemanuel.com)
42.	***Picard v. Fairfield Sentry Limited, et al.*** (as filed by Chester Global Strategy Fund Limited, Chester Global Strategy Fund, LP, Irongate Global Strategy Fund Limited, Fairfield Greenwich Fund	12-cv-02619-JSR	Simpson Thacher & Barlett LLP Mark G. Cunha (mcunha@stblaw.com) Peter E. Kazanoff (pkazanoff@stblaw.com) Wollmuth Maher & Deutsch LLP

	(Luxembourg), Fairfield Investment Fund Limited, Fairfield Investors (Euro) Ltd., and Stable Fund LP)		Frederick R. Kessler (fkessler@wmd-law.com) Paul R. DeFilippo (pdefilippo@wmd-law.com) Michael P. Burke (mburke@wmd-law.com) Debevoise & Plimpton LLP Mark P. Goodman (mpgoodman@debevoise.com) O'Shea Partners LLP Sean F. O'Shea (soshea@osheapartners.com) Michael E. Petrella (mpetrella@osheapartners.com) White & Case LLP Glenn M. Kurtz (gkurtz@whitecase.com) Andrew W. Hammond (ahammond@whitecase.com) Covington & Burling LLP Bruce A. Baird (bbaird@cov.com) Kasowitz, Benson, Torres & Friedman LLP Daniel J. Fetterman (dfetterman@kasowitz.com) Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C. Edward M. Spiro (espiro@maglaw.com)

			Dechert LLP Andrew J. Levander (andrew.levander@dechert.com) David S. Hoffner (david.hoffner@dechert.com)
43.	***Picard v. Fairfield Sentry Limited, et al.*** *(Joint Memorandum filed by various defendants)*	12-cv-02638-JSR	Simpson Thacher & Bartlett LLP Mark G. Cunha (mcunha@stblaw.com) Peter E. Kazanoff (pkazanoff@stblaw.com) Wollmuth Maher & Deutsch LLP Frederick R. Kessler (fkessler@wmd-law.com) Paul R. DeFilippo (pdefilippo@wmd-law.com) Michael P. Burke (mburke@wmd-law.com) Debevoise & Plimpton LLP Mark P. Goodman (mpgoodman@debevoise.com) O'Shea Partners LLP Sean F. O'Shea (soshea@osheapartners.com) Michael E. Petrella (mpetrella@osheapartners.com) White & Case LLP Glenn M. Kurtz (gkurtz@whitecase.com) Andrew W. Hammond (ahammond@whitecase.com)

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44.	***Picard v. Plaza Investments International Limited, et al.***	12-cv-02646-JSR	Debevoise & Plimpton LLP Joseph P. Moodhe (Jpmoodhe@debevoise.com) Shannon Rose Selden (srselden@debevoise.com)
45.	***Picard v. Defender Limited, et al*** (Defender Limited, Reliance Management (BVI) Limited, Reliance Management (Gibraltar) Limited and Tim Brockmann – Moving Parties)	12-cv-02800-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com)
46.	***Picard v. UBS AG, et al.*** (Reliance Management (BVI) Limited and Reliance Management (Gibraltar) Limited	12-cv-02802-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott

	– Moving Parties)		(bscott@klestadt.com)
47.	***Picard vs. The Estate of Doris Igoin, et al.***	12-cv-02872-JSR	Kelley Drye & Warren LLP Jonathan K. Cooperman (Jcooperman@KelleyDrye.com) Seungwhan Kim (skim@kelleydrye.com)
48.	***Picard v. KBC Investments Limited,***	12-cv-02877-JSR	Sidley Austin LLP Alan M. Unger (aunger@sidley.com) Bryan Krakauer (bkrakauer@sidley.com)
49.	***Picard v. Meritz Fire & Marine Insurance Co. Ltd.***	12-cv-02878-JSR	Steptoe & Johnson LLP Kristin Darr (kdarr@steptoe.com) Seong H. Kim (skim@steptoe.com)
50.	***Picard v. Leon Flax, et al.***	12-cv-02928-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione anthony.paccione@kattenlaw.com Brian L. Muldrew brian.muldrew@kattenlaw.com
51.	***Picard v. Orbita Capital Return Strategy Limited***	12-cv-02934-JSR	Dechert LLP Gary Mennitt (gary.mennitt@dechert.com)
52.	***Picard v. Atlantic Security Bank***	12-cv-02980-JSR	Arnold & Porter LLP Scott B. Schreiber (Scott.Schreiber@aporter.com) Andrew T. Karron (Andrew.Karron@aporter.com)

53.	***Picard v. Cardinal Management Inc., et al***	12-cv-02981-JSR	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)
54.	***Picard v. Radcliff Investments Limited, et al.***	12-cv-02982-JSR	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)
55.	***Picard v. Pictet et Cie***	12-cv-03402-JSR	Debevoise & Plimpton LLP Michael E. Wiles (mewiles@debevoise.com)
56.	***Picard v. Merrill Lynch International***	12-cv-03486-JSR	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)
57.	***Picard v. Merrill Lynch Bank (Suisse) SA***	12-cv-03487-JSR	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)
58.	***Picard v. Fullerton Capital PTE. Ltd.***	12-cv-03488-JSR	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)
59.	***Picard v. Cathay United Bank, et al.***	12-cv-03489-JSR	Baker & McKenzie LLP David W. Parham (david.Parham@bakermckenzie.com)

60.	***Picard v. Standard Chartered Financial Services (Luxembourg) S.A., et al***	12-cv-04328	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Sharon L. Nelles (nelless@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)

Exhibit 5

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff, Plaintiff, v. ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.); and ABN AMRO BANK (SWITZERLAND) AG (f/k/a ABN AMRO BANK (SCHWEIZ)), Defendants.	Adv. Pro. No. 11-02760 (BRL) **ORAL ARGUMENT REQUESTED**

DECLARATION OF MICHAEL S. FELDBERG IN SUPPORT OF THE MOTION OF ABN AMRO BANK N.V. (PRESENTLY KNOWN AS THE ROYAL BANK OF SCOTLAND, N.V.) TO WITHDRAW THE BANKRUPTCY COURT REFERENCE

MICHAEL S. FELDBERG declares under penalty of perjury as follows:

1. I am an attorney admitted to practice before this Court and am a partner with Allen & Overy LLP, counsel for the defendant ABN AMRO Bank N.V., presently known as the Royal Bank of Scotland, N.V. ("RBS/ABN"), in the above-captioned action. I submit this declaration in support of RBS/ABN's Motion to Withdraw the Bankruptcy Court Reference.

2. Attached hereto as "Exhibit A" is a true and correct copy of the Complaint against RBS/ABN filed in this adversary proceeding.

3. Attached hereto as "Exhibit B" is a true and correct copy of the Complaint filed in Picard v. Harley Int'l (Cayman) Ltd., Adv. Pro. No. 09-01187 (BRL) (Bankr. S.D.N.Y. May 12, 2009) (Docket No. 1).

4. Attached hereto as "Exhibit C" is a true and correct copy of the Amended Standing Order of Reference M-431 of the Chief Judge of the United States District Court for the Southern District of New York dated January 31, 2012.

5. Attached hereto as "Exhibit D" is a true and correct copy of the Memorandum Order dated September 6, 2011 in Picard v. Kohn, No. 11 Civ. 1181 (JSR) (S.D.N.Y. Sept. 6, 2011) (Docket No. 55).

6. Attached hereto as "Exhibit E" is a true and correct copy of the Memorandum Order dated February 29, 2012 in Picard v. Avellino, No. 11 Civ. 3882 (JSR) (S.D.N.Y. Feb. 29, 2012) (Docket No. 54).

7. Attached hereto as "Exhibit F" is a true and correct copy of the transcript of the proceedings before the Honorable Jed S. Rakoff on July 1, 2011 in Picard v. Katz, No. 11 Civ. 03605 (JSR) (S.D.N.Y. July 1, 2011) (Docket No. 33).

I declare under penalty of perjury that the foregoing is true and correct.

Executed: March 14, 2012
New York, New York

/s/ Michael S. Feldberg
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and Bernard L. Madoff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff, Plaintiff, v. ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.) and ABN AMRO BANK (SWITZERLAND) AG (f/k/a ABN AMRO BANK (SCHWEIZ)), Defendants.	Adv. Pro. No. _____ (BRL) **COMPLAINT**

Irving H. Picard (the "Trustee"), as trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS"), and the substantively consolidated estate of Bernard L. Madoff, individually, under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.*, for this Complaint against ABN AMRO Bank N.V. ("ABN Bank") (presently known as The Royal Bank of Scotland, N.V.) and ABN AMRO Bank (Switzerland) AG (f/k/a ABN AMRO Bank (Schweiz)) ("ABN Switzerland," and together, the "ABN Defendants"), alleges the following:

I. NATURE OF THE ACTION

1. This adversary proceeding is part of the Trustee's continuing efforts to recover BLMIS Customer Property[1] that was stolen as part of the massive Ponzi scheme perpetrated by Bernard L. Madoff ("Madoff") and others.

2. With this Complaint, the Trustee seeks to recover the equivalent of at least $25,469,129 in subsequent transfers of Customer Property made to the ABN Defendants. The subsequent transfers were derived from investments with BLMIS made by Fairfield Sentry Limited ("Fairfield Sentry") and Harley International (Cayman) Limited ("Harley") (collectively, the "Feeder Funds"). Fairfield Sentry is a British Virgin Islands ("BVI") company that is in liquidation in the BVI. Harley is a Cayman Islands company that is in liquidation in the Cayman Islands. The Feeder Funds had direct customer accounts with BLMIS's investment advisory business ("IA Business") for the purpose of investing assets with BLMIS, and each of the Feeder Funds maintained in excess of 95% of their assets in their BLMIS customer accounts. Some of the subsequent transfers from Fairfield Sentry came through Fairfield Sigma Limited ("Fairfield

[1] SIPA § 78*lll*(4) defines "Customer Property" as cash and securities at any time received, acquired, or held by, or for the account of, a debtor from, or for, the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted.

Sigma"), which invested 100% of its assets in Fairfield Sentry. Fairfield Sigma also is in liquidation in the BVI.

3. When the ABN Defendants received the subsequent transfers of BLMIS Customer Property, ABN Bank serviced retail, private, and commercial banking clients, and ABN Switzerland provided private banking products and services, as well as portfolio management, custody, and investment advice.

II. JURISDICTION AND VENUE

4. The Trustee brings this adversary proceeding pursuant to his statutory authority under SIPA §§ 78fff(b), 78fff-1(a), and 78fff-2(c)(3); sections 105(a), 544, 550(a), and 551 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et. seq.* (the "Bankruptcy Code"); and the New York Fraudulent Conveyance Act (New York Debtor & Creditor Law) ("NYDCL") §§ 273-279 (McKinney 2001), to obtain avoidable and recoverable transfers received by the ABN Defendants as subsequent transferees of funds originating from BLMIS.

5. This is an adversary proceeding brought in this Court, in which the main underlying substantively consolidated SIPA case, Adv. Pro. No. 08-01789 (BRL) (the "SIPA Case"), is pending. The SIPA Case was originally brought in the United States District Court for the Southern District of New York (the "District Court") as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC, et al.*, No. 08 CV 10791 (the "District Court Proceeding"). This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b), and 15 U.S.C. § 78eee(b)(2)(A), (b)(4).

6. The ABN Defendants are subject to personal jurisdiction in this judicial district because they purposely availed themselves of the laws and protections of the United States and the state of New York by, among other things, knowingly directing funds to be invested with

New York-based BLMIS through the Feeder Funds. The ABN Defendants knowingly received subsequent transfers from BLMIS by withdrawing money from the Feeder Funds.

7. By directing investments through Fairfield Sentry, a Fairfield Greenwich Group ("FGG") managed Madoff feeder fund, Defendant ABN Switzerland knowingly accepted the rights, benefits, and privileges of conducting business and/or transactions in the United States and New York. Upon information and belief, Defendant ABN Switzerland entered into a subscription agreement with Fairfield Sentry under which it submitted to New York jurisdiction, sent copies of the agreement to FGG's New York City office, and wired funds to Fairfield Sentry through a bank in New York. In addition, Defendant ABN Switzerland is part of the ABN Group, which maintains an office in New York City. Defendant ABN Bank maintains representative offices in New York City, and also maintains a Chicago, Illinois branch and a Miami, Florida agency. The ABN Defendants thus derived significant revenue from New York and maintained minimum contacts and/or general business contacts with the United States and New York in connection with the claims alleged herein.

8. The ABN Defendants should reasonably expect to be subject to New York jurisdiction and are subject to personal jurisdiction pursuant to New York Civil Practice Law & Rules §§ 301 and 302 (McKinney 2001) and Bankruptcy Rule 7004.

9. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (F), (H), and (O).

10. Venue in this District is proper under 28 U.S.C. § 1409.

III. BACKGROUND

11. On December 11, 2008 (the "Filing Date"), Madoff was arrested by federal agents for violation of the criminal securities laws, including, *inter alia*, securities fraud, investment adviser fraud, and mail and wire fraud. Contemporaneously, the U.S. Securities and Exchange Commission ("SEC") commenced the District Court Proceeding against Madoff and BLMIS.

The SEC complaint alleges that Madoff and BLMIS engaged in fraud through the investment adviser activities of BLMIS. The District Court Proceeding remains pending.

12. On December 12, 2008, The Honorable Louis L. Stanton of the District Court entered an order appointing Lee S. Richards as receiver for the assets of BLMIS.

13. On December 15, 2008, under § 78eee(a)(4)(A), the SEC consented to a combination of its own action with an application of the Securities Investor Protection Corporation ("SIPC"). Thereafter, under § 78eee(a)(4)(B) of SIPA, SIPC filed an application in the District Court alleging, *inter alia*, that BLMIS was not able to meet its obligations to securities customers as they came due and, accordingly, its customers needed the protections afforded by SIPA.

14. Also on December 15, 2008, Judge Stanton granted the SIPC application and entered an order under SIPA (known as the "Protective Decree"), which, in pertinent part:

a. removed the receiver and appointed the Trustee for the liquidation of the business of BLMIS under SIPA § 78eee(b)(3);

b. appointed Baker & Hostetler LLP as counsel to the Trustee under SIPA § 78eee(b)(3); and

c. removed the case to the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") under § 78eee(b)(4) of SIPA.

15. By orders dated December 23, 2008, and February 4, 2009, respectively, the Bankruptcy Court approved the Trustee's bond and found the Trustee was a disinterested person. Accordingly, the Trustee is duly qualified to serve and act on behalf of the estate of BLMIS.

16. At a plea hearing (the "Plea Hearing") on March 12, 2009, in the case captioned *United States v. Madoff*, Case No. 09-CR-213 (DC) (S.D.N.Y. March 12, 2009) (Docket No. 50),

Madoff pled guilty to an eleven-count criminal information filed against him by the United States Attorney's Office for the Southern District of New York. At the Plea Hearing, Madoff admitted that he "operated a Ponzi scheme through the investment advisory side of [BLMIS]." *Id.* at 23. Additionally, Madoff admitted "[a]s I engaged in my fraud, I knew what I was doing [was] wrong, indeed criminal." *Id.* On June 29, 2009, Madoff was sentenced to 150 years in prison.

17. On August 11, 2009, a former BLMIS employee, Frank DiPascali, pled guilty to participating in and conspiring to perpetuate the Ponzi scheme. At a plea hearing on August 11, 2009, in the case entitled *United States v. DiPascali*, Case No. 09-CR-764 (RJS) (S.D.N.Y. Aug. 11, 2009), DiPascali pled guilty to a ten-count criminal information. Among other things, DiPascali admitted that the Ponzi scheme had been ongoing at BLMIS since at least the 1980s. *Id.* at 46.

IV. TRUSTEE'S POWERS AND STANDING

18. As Trustee appointed under SIPA, the Trustee is charged with recovering and paying out Customer Property to BLMIS customers, assessing claims, and liquidating any other assets of BLMIS for the benefit of the estate and its creditors. The Trustee is in the process of marshaling BLMIS's assets, and this liquidation is well underway. However, the estate's present assets will not be sufficient to reimburse BLMIS customers for the billions of dollars they invested with BLMIS over the years. Consequently, the Trustee must use his broad authority under SIPA and the Bankruptcy Code to pursue recoveries, including those from individuals and entities that received preferences and fraudulent transfers to the detriment of defrauded customers whose money was consumed by the Ponzi scheme. Absent this and other recovery actions, the Trustee will be unable to satisfy the claims described in subparagraphs (A) through (D) of SIPA § 78fff-2(c)(1).

19. Under SIPA § 78fff-1(a), the Trustee has the general powers of a bankruptcy trustee in a case under the Bankruptcy Code, in addition to the powers granted by SIPA under § 78fff-1(b). Chapters 1, 3, 5 and subchapters I and II of chapter 7 of the Bankruptcy Code apply to this case to the extent consistent with SIPA.

20. Under SIPA §§ 78fff(b) and 78*lll*(7)(B), the Filing Date is deemed to be the date of the filing of the petition within the meaning of section 548 of the Bankruptcy Code and the date of commencement of the case within the meaning of section 544 of the Bankruptcy Code.

21. The Trustee has standing to bring these claims under § 78fff-1(a) of SIPA and the Bankruptcy Code, including sections 323(b), 544, and 704(a)(1), because the Trustee has the power and authority to avoid and recover transfers under sections 544, 547, 548, 550(a), and 551 of the Bankruptcy Code and SIPA §§ 78fff-1(a) and 78fff-2(c)(3).

V. THE DEFENDANTS AND RELEVANT NON-PARTIES

22. Defendant ABN Bank, now known as The Royal Bank of Scotland, N.V., is a Dutch commercial bank located at Gustav Mahleraan 10, 1082 PP Amsterdam, the Netherlands. Defendant ABN Bank maintains a representative office at 565 Fifth Avenue, 25th floor, New York, New York 10017.

23. Defendant ABN Switzerland, formerly known as ABN Amro Bank (Schweiz) AG, is a Swiss corporation located at Beethovenstrasse 33, 8002 Zurich, Switzerland.

24. Non-party Fairfield Sentry is a BVI company that is currently in liquidation in the BVI. Fairfield Sentry maintained customer accounts at BLMIS and was one of BLMIS's largest feeder funds and sources of investor principal.

25. Non-party Harley is a Cayman Islands company that is currently in liquidation in the Cayman Islands. Harley maintained a customer account at BLMIS and was also one of BLMIS's largest feeder funds and sources of investor principal.

VI. THE PONZI SCHEME

26. BLMIS was founded by Madoff in 1959 and, for most of its existence, operated from its principal place of business at 885 Third Avenue, New York, New York. Madoff, as founder, chairman, chief executive officer, and sole owner, operated BLMIS together with several of his friends and family members. BLMIS was registered with the SEC as a securities broker-dealer under Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b). By virtue of that registration, BLMIS was a member of SIPC. BLMIS had three business units: market making, proprietary trading, and the IA Business.

27. Outwardly, Madoff ascribed the consistent success of the IA Business to the so-called split-strike conversion strategy ("SSC Strategy"). Under that strategy, Madoff purported to invest BLMIS customers' funds in a basket of common stocks within the Standard & Poor's 100 Index ("S&P 100")—a collection of the 100 largest publicly traded companies. Madoff claimed that his basket of stocks would mimic the movement of the S&P 100. He also asserted that he would carefully time purchases and sales to maximize value, and BLMIS customers' funds would, intermittently, be out of the equity markets.

28. The second part of the SSC Strategy was a hedge of Madoff's stock purchases with options contracts. Those option contracts acted as a "collar" to limit both the potential gains and losses on the basket of stocks. Madoff purported to use proceeds from the sale of S&P 100 call options to finance the cost of purchasing S&P 100 put options. Madoff told BLMIS customers that when he exited the market, he would close out all equity and option positions and invest all the resulting cash in United States Treasury bills or in mutual funds holding Treasury bills. Madoff also told customers that he would enter and exit the market between six and ten times each year.

29. BLMIS's IA Business customers received fabricated monthly or quarterly statements showing that securities were held in, or had been traded through, their accounts. The securities purchases and sales shown in the account statements never occurred, and the profits reported were entirely fictitious. At the Plea Hearing, Madoff admitted that he never made the investments he promised clients, who believed they were invested with him in the SSC Strategy. He further admitted that he never purchased any of the securities he claimed to have purchased for the IA Business's customer accounts. In fact, there is no record of BLMIS having cleared a single purchase or sale of securities in connection with the SSC Strategy on any trading platform on which BLMIS reasonably could have traded securities. Instead, investors' funds were principally deposited into the BLMIS account at JPMorgan Chase & Co., Account #xxxxxxxxxxxx703.

30. Prior to his arrest, Madoff assured clients and regulators that he purchased and sold the put and call options on the over-the-counter ("OTC") market after hours, rather than through any listed exchange. Based on the Trustee's investigation to date, there is no evidence that the IA Business ever entered into any OTC options trades on behalf of IA Business account holders.

31. For all periods relevant hereto, the IA Business was operated as a Ponzi scheme. The money received from investors was not invested in stocks and options, but rather used to pay withdrawals and to make other avoidable transfers. Madoff also used his customers' investments to enrich himself, his associates, and his family.

32. The falsified monthly account statements reported that the accounts of the IA Business customers had made substantial gains, but in reality, due to the siphoning and diversion of new investments to fulfill payment requests or withdrawals from other BLMIS

accountholders, BLMIS did not have the funds to pay investors for those new investments. BLMIS only survived as long as it did by using the stolen principal invested by customers to pay other customers.

33. It was essential for BLMIS to honor requests for payments in accordance with the falsely inflated account statements, because failure to do so promptly could have resulted in demand, investigation, the filing of a claim, and disclosure of the fraud.

34. Madoff's scheme continued until December 2008, when the requests for withdrawals overwhelmed the flow of new investments and caused the inevitable collapse of the Ponzi scheme.

35. Based upon the Trustee's ongoing investigation, it now appears there were more than 8,000 customer accounts at BLMIS over the life of the scheme. In early December 2008, BLMIS generated account statements for its approximately 4,900 open customer accounts. When added together, these statements purportedly showed that BLMIS customers had approximately $65 billion invested through BLMIS. In reality, BLMIS had assets on hand worth only a fraction of that amount. Customer accounts had not accrued any real profits because virtually no investments were ever made. By the time the Ponzi scheme came to light on December 11, 2008, with Madoff's arrest, investors had already lost approximately $20 billion in principal.

36. Thus, at all times relevant hereto, the liabilities of BLMIS were billions of dollars greater than its assets. BLMIS was insolvent in that: (i) its assets were worth less than the value of its liabilities; (ii) it could not meet its obligations as they came due; and (iii) at the time of the transfers, BLMIS was left with insufficient capital.

VII. THE TRANSFERS

37. The Feeder Funds received initial transfers of BLMIS Customer Property. Some or all of those initial transfers were subsequently transferred directly or indirectly to the ABN Defendants.

A. FAIRFIELD SENTRY

1. Initial Transfers From BLMIS To Fairfield Sentry

38. The Trustee filed an adversary proceeding against Fairfield Sentry and other defendants in the Bankruptcy Court under the caption *Picard v. Fairfield Sentry Ltd., et al.,* Adv. Pro. No. 09-01239 (BRL), in which, in part, the Trustee sought to avoid and recover initial transfers of Customer Property from BLMIS to Fairfield Sentry in the amount of approximately $3 billion (the "Fairfield Amended Complaint"). The Trustee incorporates by reference the allegations contained in the Fairfield Amended Complaint as if fully set forth herein.

39. During the six years preceding the Filing Date, BLMIS made transfers to Fairfield Sentry of approximately $3 billion (the "Fairfield Sentry Six Year Initial Transfers"). The Fairfield Sentry Six Year Initial Transfers were and continue to be Customer Property within the meaning of SIPA § 78*lll*(4), and are avoidable and recoverable under sections 544, 550, and 551 of the Bankruptcy Code, §§ 273-279 of the NYDCL, and applicable provisions of SIPA, particularly SIPA § 78fff-2(c)(3).

40. The Fairfield Sentry Six Year Initial Transfers include approximately $1.6 billion which BLMIS transferred to Fairfield Sentry during the two years preceding the Filing Date (the "Fairfield Sentry Two Year Initial Transfers"). The Fairfield Sentry Two Year Initial Transfers were and continue to be Customer Property within the meaning of SIPA § 78*lll*(4), and are avoidable and recoverable under sections 548, 550, and 551 of the Bankruptcy Code, §§ 273-279 of the NYDCL, and applicable provisions of SIPA, particularly SIPA § 78fff-2(c)(3).

41. The Fairfield Sentry Two Year Initial Transfers include approximately $1.1 billion which BLMIS transferred to Fairfield Sentry during the 90 days preceding the Filing Date (the "Fairfield Sentry Preference Period Initial Transfers"). The Fairfield Sentry Preference Period Initial Transfers were and continue to be Customer Property within the meaning of SIPA § 78*lll*(4), and are avoidable and recoverable under sections 547, 550, and 551 of the Bankruptcy Code, and applicable provisions of SIPA, particularly SIPA § 78fff-2(c)(3).

42. The Fairfield Sentry Six Year Initial Transfers, the Fairfield Sentry Two Year Initial Transfers, and the Fairfield Sentry Preference Period Initial Transfers are collectively defined as the "Fairfield Sentry Initial Transfers." Charts setting forth these transfers are attached as Exhibits A and B.

43. Pursuant to the Bankruptcy Court's June 7 and June 10, 2011 orders, the Bankruptcy Court approved a settlement among the Trustee, Fairfield Sentry, and others (the "Settlement Agreement"). As part of the Settlement Agreement, on July 13, 2011, the Bankruptcy Court entered a consent judgment granting the Trustee a judgment in the amount of $3,054,000,000. Under the terms of the Settlement Agreement, Fairfield Sentry is obligated to pay $70,000,000 to the Trustee for the benefit of the consolidated BLMIS estate.

2. Subsequent Transfers From Fairfield Sentry To Defendant ABN Switzerland

44. A portion of the Fairfield Sentry Initial Transfers was subsequently transferred either directly or indirectly to, or for the benefit of, Defendant ABN Switzerland and is recoverable from Defendant ABN Switzerland pursuant to section 550 of the Bankruptcy Code and § 278 of the NYDCL. Based on the Trustee's investigation to date, approximately $2,808,105 of the money transferred from BLMIS to Fairfield Sentry was subsequently transferred by Fairfield Sentry to Defendant ABN Switzerland (the "Fairfield Sentry Subsequent

Transfers"). A chart setting forth the presently known Fairfield Sentry Subsequent Transfers is attached as Exhibit C.

45. The Trustee's investigation is on-going and the Trustee reserves the right to: (i) supplement the information on the Fairfield Sentry Initial Transfers, Fairfield Sentry Subsequent Transfers, and any additional transfers, and (ii) seek recovery of such additional transfers.

3. Subsequent Transfers From Fairfield Sentry To Fairfield Sigma And Subsequently To Defendant ABN Switzerland

46. A portion of the Fairfield Initial Transfers was subsequently transferred either directly or indirectly to, or for the benefit of, Defendant ABN Switzerland and is recoverable from Defendant ABN Switzerland pursuant to section 550 of the Bankruptcy Code. Based on the Trustee's investigation to date, approximately $752,273,917 of the money transferred from BLMIS to Fairfield Sentry was subsequently transferred by Fairfield Sentry to Fairfield Sigma. Thereafter, the equivalent of at least $861,104 was transferred by Fairfield Sigma to Defendant ABN Switzerland (the "Fairfield Sigma Subsequent Transfers"). Charts setting forth the presently known Fairfield Sigma Subsequent Transfers are attached as Exhibits D and E.

47. The Trustee's investigation is on-going and the Trustee reserves the right to: (i) supplement the information on the Fairfield Initial Transfers, Fairfield Sigma Subsequent Transfers, and any additional transfers, and (ii) seek recovery of such additional transfers.

48. The Fairfield Sentry Subsequent Transfers and the Fairfield Sigma Subsequent Transfers are collectively defined as the "Fairfield Subsequent Transfers."

B. HARLEY

1. Initial Transfers From BLMIS To Harley

49. The Trustee filed an adversary proceeding against Harley in the Bankruptcy Court under the caption *Picard v. Harley Int'l (Cayman) Ltd.,* Adv. Pro. No. 09-01187 (BRL), in which, in part, the Trustee sought to avoid and recover initial transfers of Customer Property from BLMIS to Harley in the amount of approximately $1,072,800,000 (the "Harley Complaint"). The Trustee incorporates by reference the allegations contained in the Harley Complaint as if fully set forth herein.

50. On November 10, 2010, the Bankruptcy Court entered a default judgment against Harley in the amount of $1,072,820,000. Of this amount, $1,066,800,000 was awarded in a default summary judgment against Harley. The Trustee has not recovered any monies as a result of the November 10, 2010 judgment.

51. During the six years preceding the Filing Date, BLMIS made transfers to Harley of approximately $1,072,800,000 (the "Harley Six Year Initial Transfers"). The Harley Six Year Initial Transfers were and continue to be Customer Property within the meaning of SIPA § 78*lll*(4), and are avoidable and recoverable under sections 544, 550, and 551 of the Bankruptcy Code, §§ 273-279 of the NYDCL, and applicable provisions of SIPA, particularly SIPA § 78fff-2(c)(3).

52. The Harley Six Year Initial Transfers include approximately $1,066,800,000 which BLMIS transferred to Harley during the two years preceding the Filing Date (the "Harley Two Year Initial Transfers"). The Harley Two Year Initial Transfers were and continue to be Customer Property within the meaning of SIPA § 78*lll*(4), and are avoidable and recoverable under sections 548, 550, and 551 of the Bankruptcy Code, §§ 273-279 of the NYDCL, and applicable provisions of SIPA, particularly SIPA § 78fff-2(c)(3).

53. The Harley Two Year Initial Transfers include approximately $425,000,000 which BLMIS transferred to Harley during the 90 days preceding the Filing Date (the "Harley Preference Period Initial Transfers"). The Harley Preference Period Initial Transfers were and continue to be Customer Property within the meaning of SIPA § 78*lll*(4), and are avoidable and recoverable under sections 547, 550, and 551 of the Bankruptcy Code, and applicable provisions of SIPA, particularly SIPA § 78fff-2(c)(3).

54. The Harley Six Year Initial Transfers, Harley Two Year Initial Transfers, and the Harley Preference Period Initial Transfers are collectively defined as the "Harley Initial Transfers." Charts setting forth these transfers are attached as Exhibits F and G.

2. Subsequent Transfers From Harley To Defendant ABN Bank

55. A portion of the Harley Initial Transfers was subsequently transferred either directly or indirectly to, or for the benefit of, Defendant ABN Bank and is recoverable from Defendant ABN Bank (now known as The Royal Bank of Scotland, N.V.) pursuant to section 550 of the Bankruptcy Code and § 278 of the NYDCL. Based on the Trustee's investigation to date, approximately $21,799,920 of the money transferred from BLMIS to Harley was subsequently transferred by Harley to Defendant ABN Bank (the "Harley Subsequent Transfers"). A chart setting forth the presently known Harley Subsequent Transfers is attached as Exhibit H.

56. The Trustee's investigation is on-going and the Trustee reserves the right to: (i) supplement the information on the Harley Initial Transfers, Harley Subsequent Transfers, and any additional transfers, and (ii) seek recovery of such additional transfers.

COUNT ONE
RECOVERY OF FAIRFIELD SUBSEQUENT TRANSFERS–
11 U.S.C. §§ 550 AND 551 AND NYDCL § 278

57. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

58. Defendant ABN Switzerland received the Fairfield Sentry Subsequent Transfers, totaling approximately $2,808,105, and the Fairfield Sigma Subsequent Transfers, totaling the equivalent of approximately $861,104 (collectively, as defined above, the "Fairfield Subsequent Transfers"). The Fairfield Subsequent Transfers, totaling the equivalent of approximately $3,669,209, are recoverable pursuant to section 550(a) of the Bankruptcy Code and § 278 of the NYDCL.

59. Each of the Fairfield Subsequent Transfers was made directly or indirectly to, or for the benefit of, Defendant ABN Switzerland.

60. Defendant ABN Switzerland is an immediate or mediate transferee of the Fairfield Initial Transfers.

61. As a result of the foregoing, pursuant to sections 550(a) and 551 of the Bankruptcy Code, § 278 of the NYDCL, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against Defendant ABN Switzerland recovering the Fairfield Subsequent Transfers, or the value thereof, for the benefit of the estate of BLMIS.

COUNT TWO
RECOVERY OF HARLEY SUBSEQUENT TRANSFERS–
11 U.S.C. §§ 550 AND 551 AND NYDCL § 278

62. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

63. Defendant ABN Bank received the Harley Subsequent Transfers, totaling approximately $21,799,920, which are recoverable pursuant to section 550(a) of the Bankruptcy Code and § 278 of the NYDCL.

64. Each of the Harley Subsequent Transfers was made directly or indirectly to, or for the benefit of, Defendant ABN Bank.

65. Defendant ABN Bank is an immediate or mediate transferee of the Harley Initial Transfers.

66. As a result of the foregoing, pursuant to sections 550(a) and 551 of the Bankruptcy Code, § 278 of the NYDCL, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against Defendant ABN Bank (presently known as The Royal Bank of Scotland, N.V.) recovering the Harley Subsequent Transfers, or the value thereof, for the benefit of the estate of BLMIS.

WHEREFORE, the Trustee respectfully requests that this Court enter judgment in favor of the Trustee and against the ABN Defendants as follows:

(a) On the First Claim for Relief, pursuant to sections 550 and 551 of the Bankruptcy Code, § 278 of the NYDCL, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against Defendant ABN Switzerland recovering the Fairfield Subsequent Transfers, or the value thereof, in an amount to be proven at trial, but no less than $3,669,209, for the benefit of the estate of BLMIS;

(b) On the Second Claim for Relief, pursuant to sections 550 and 551 of the Bankruptcy Code, § 278 of the NYDCL, and SIPA § 78fff-2(c)(3), the Trustee is entitled to a judgment against Defendant ABN Bank (presently known as The Royal Bank of Scotland, N.V.)

recovering the Harley Subsequent Transfers, or the value thereof, in an amount to be proven at trial, but no less than $21,799,920, for the benefit of the estate of BLMIS;

(c) Awarding the Trustee all applicable fees, interest, costs, and disbursements of this action; and

(d) Granting the Trustee such other, further, and different relief as the Court deems just, proper, and equitable.

Dated: October 6, 2011
New York, New York

/s/ David J. Sheehan

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor.	SIPA LIQUIDATION No. 08-01789 (BRL)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. HARLEY INTERNATIONAL (CAYMAN) LIMITED, Defendant.	Adv. Pro. No. _____ (BRL)

COMPLAINT

Irving H. Picard, Esq. (the "Trustee"), as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS"), under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et. seq*. ("SIPA"), by and through his undersigned counsel, for his Complaint, states as follows:

NATURE OF PROCEEDING

1. This adversary proceeding arises from the massive Ponzi scheme perpetrated by Bernard L. Madoff ("Madoff"). In early December 2008, BLMIS generated client account statements for its nearly 7,000 client accounts at BLMIS. When added together, these statements purportedly show that clients of BLMIS had approximately $64.8 billion invested with BLMIS. In reality, BLMIS had assets on hand worth a small fraction of that amount. On March 12, 2009, Madoff admitted to the fraudulent scheme and pled guilty to 11 felony counts. Defendant Harley International (Cayman) Limited ("Defendant Harley" or "Defendant") received avoidable transfers from BLMIS, and the purpose of this proceeding is to recover the avoidable transfers received by the Defendant.

2. Defendant Harley knew or should have known that its account statements at BLMIS did not reflect legitimate trading activity and that Madoff was engaged in fraud. From at least 1996 until 2008, Defendant Harley received unrealistically high and consistent annual returns, approximating 13.5%, in contrast to the vastly larger fluctuations in the S & P 100 Index on which Madoff's trading activity was purportedly based during the time period. Between 1998 and 2008, at least 148 purported trades reflected on Defendant's monthly customer account statements were allegedly exercised at prices outside the daily range for such securities traded in the market on the days in question, a fact that easily could have been confirmed by any investment professional managing the account. In just the 90 days prior to Madoff's public disclosure of the Ponzi scheme, Defendant Harley withdrew $425 million from BLMIS, which it knew or should have known was non-existent principal and other investors' money. Defendant Harley knew or should have known that BLMIS was engaged in fraud based on these facts and the numerous other indicia of fraud described herein.

3. This adversary proceeding is brought pursuant to 15 U.S.C. §§ 78fff(b) and 78fff-2(c)(3) sections 105(a), 542, 544, 547, 548(a), 550(a) and 551 of 11 U.S.C. §§ 101, *et. seq.* (the "Bankruptcy Code"), the New York Fraudulent Conveyance Act (N.Y. Debt & Cred. § 270, *et. seq*. (McKinney 2001)), and other applicable law, for turnover, accounting, preferences, fraudulent conveyances, damages in connection with certain transfers of property by BLMIS to or for the benefit of Defendant. The Trustee seeks to set aside such transfers and preserve the property for the benefit of BLMIS' defrauded customers.

JURISDICTION AND VENUE

4. This is an adversary proceeding brought in this Court, the Court in which the main underlying SIPA proceeding, No. 08-01789 (BRL) (the "SIPA Proceeding") is pending. The SIPA Proceeding was originally brought in the United States District Court for the Southern District of New York as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC, et al.*, No. 08 CV 10791 (the "District Court Proceeding"). This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and 15 U.S.C. §§ 78eee(b)(2)(A), (b)(4).

5. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (E), (F), (H) and (O).

6. Venue in this district is proper under 28 U.S.C. § 1409.

BACKGROUND, THE TRUSTEE AND STANDING

7. On December 11, 2008 (the "Filing Date"), Madoff was arrested by federal agents for violation of the criminal securities laws, including, *inter alia*, securities fraud, investment adviser fraud, and mail and wire fraud. Contemporaneously, the Securities and Exchange

Commission ("SEC") filed a complaint in the District Court which commenced the District Court Proceeding against Madoff and BLMIS. The District Court Proceeding remains pending in the District Court. The SEC complaint alleged that Madoff and BLMIS engaged in fraud through the investment advisor activities of BLMIS.

8. On December 12, 2008, The Honorable Louis L. Stanton of the District Court entered an order, which appointed Lee S. Richards, Esq., as receiver for the assets of BLMIS.

9. On December 15, 2008, pursuant to 15 U.S.C. § 78eee(a)(4)(A), the SEC consented to a combination of its own action with an application of the Securities Investor Protection Corporation ("SIPC"). Thereafter, pursuant to 15 U.S.C. § 78eee(a)(4)(B), SIPC filed an application in the District Court alleging, *inter alia*, that BLMIS was not able to meet its obligations to securities customers as they came due and, accordingly, its customers needed the protections afforded by SIPA.

10. Also on December 15, 2008, Judge Stanton granted the SIPC application and entered an order pursuant to SIPA (the "Protective Decree"), which, in pertinent part:

(a) appointed the Trustee for the liquidation of the business of BLMIS pursuant to 15 U.S.C. § 78eee(b)(3);

(b) appointed Baker & Hostetler LLP as counsel to the Trustee pursuant to 15 U.S.C. § 78eee(b)(3); and

(c) removed the case to this Bankruptcy Court pursuant to 15 U.S.C. § 78eee(b)(4).

11. By orders dated December 23, 2008 and February 4, 2009, respectively, the Bankruptcy Court approved the Trustee's bond and found that the Trustee was a disinterested

person. Accordingly, the Trustee is duly qualified to serve and act on behalf of the estate of BLMIS.

12. At a plea hearing (the "Plea Hearing") on March 12, 2009, in the case captioned *United States v. Madoff,* Case No. 09-CR-213(DC), Madoff pled guilty to an 11-count criminal information filed against him by the United States Attorneys' Office for the Southern District of New York. At the Plea Hearing, Madoff admitted that he "operated a Ponzi scheme through the investment advisory side of [BLMIS]." (Plea Hr'g Tr. at 23: 14-17.) Additionally, Madoff asserted "[a]s I engaged in my fraud, I knew what I was doing [was] wrong, indeed criminal." (*Id.* at 23: 20-21.)

13. As the Trustee appointed under SIPA, the Trustee has the job of recovering and paying out customer property to BLMIS' customers, assessing claims, and liquidating any other assets of the firm for the benefit of the estate and its creditors. The Trustee is in the process of marshalling BLMIS' assets, and the liquidation of BLMIS' assets is well underway. However, such assets will not be sufficient to reimburse the customers of BLMIS for the billions of dollars that they invested with BLMIS over the years. Consequently, the Trustee must use his authority under SIPA and the Bankruptcy Code to pursue recovery from customers who received preferences, non-existent principal and/or payouts of fictitious profits to the detriment of other defrauded customers whose money was consumed by the Ponzi scheme. Absent this or other recovery actions, the Trustee will be unable to satisfy the claims described in subparagraphs (A) through (D) of 15 U.S.C. § 78fff-2(c)(1).

14. Pursuant to 15 U.S.C. § 78fff-1(a), the Trustee has the general powers of a bankruptcy trustee in a case under the Bankruptcy Code in addition to the powers granted by

SIPA pursuant to 15 U.S.C. § 78fff(b). Chapters 1, 3, 5 and Subchapters I and II of Chapter 7 of the Bankruptcy Code are applicable to this case.

15. Pursuant to 15 U.S.C. § 78*lll*(7)(B), the Filing Date is deemed to be the date of the filing of the petition within the meanings of sections 547 and 548 of the Bankruptcy Code and the date of the commencement of the case within the meaning of section 544 of the Bankruptcy Code.

16. The Trustee has standing to bring these claims pursuant to 15 U.S.C. § 78fff-1 and the Bankruptcy Code, including (11 U.S.C. § 101, *et seq*.), including sections 323(b) and 704(a)(1) because, among other reasons:

(a) BLMIS incurred losses as a result of the claims set forth herein;

(b) The Trustee is a bailee of customer funds entrusted to BLMIS for investment purposes; and

(c) The Trustee is the assignee of claims paid, and to be paid, to customers of BLMIS who have filed claims in the liquidation proceeding (such claim-filing customers, collectively, "Accountholders"). As of this date, the Trustee has received multiple express unconditional assignments of the applicable Accountholders' causes of action, which actions could have been asserted against Defendants. As assignee, the Trustee stands in the shoes of persons who have suffered injury, in fact, and a distinct and palpable loss for which the Trustee is entitled to reimbursement in the form of monetary damages.

THE FRAUDULENT PONZI SCHEME

17. BLMIS is a New York limited liability company that is wholly owned by Madoff. Founded in 1960, BLMIS operated from its principal place of business at 885 Third Avenue, New York, New York. Madoff, as founder, chairman, and chief executive officer, ran BLMIS together with several family members and a number of additional employees. BLMIS had three business units: investment advisory (the "IA Business"), market making and proprietary trading.

18. Outwardly, Madoff ascribed the IA Business' consistent investment success to his investment strategy called the "split-strike conversion" strategy. Madoff promised clients that their funds would be invested in a basket of common stocks within the S&P 100 Index, which is a collection of the 100 largest publicly traded companies. The basket of stocks would be intended to mimic the movement of the S&P 100 Index. Madoff asserted that he would carefully time purchases and sales to maximize value, but this meant that the clients' funds would intermittently be out of the market. During these times, Madoff asserted that the funds would be invested in United States issued securities. The second part of the split-strike conversion strategy was the hedge of such purchases with option contracts. Madoff purported to purchase and sell option contracts corresponding to the stocks in the basket, thereby controlling the downside risk of price changes in the basket of stocks.

19. Although clients of the IA Business received monthly or quarterly statements purportedly showing the securities that were held in, or had been traded through, their accounts, and the growth of and profit from those accounts over time, these statements were a complete fabrication. The security purchases and sales depicted in the account statements never occurred and the profits reported were entirely fictitious. At the Plea Hearing, Madoff admitted that he never in fact purchased any of the securities he claimed to have purchased for customer accounts.

Indeed, based on the Trustee's investigation to date, there is no record of BLMIS having cleared a single purchase or sale of securities in connection with the split/strike conversion strategy at the Depository Trust & Clearing Corporation, the clearing house for such transactions, or any other trading platform on which BLMIS could have reasonably traded securities.

20. Prior to his arrest, Madoff assured clients and regulators that he conducted trades on the over-the-counter market, after hours. To bolster that lie, Madoff periodically wired tens of millions of dollars to BLMIS' affiliate, Madoff Securities International Ltd. ("MSIL"), a London based entity wholly owned by Madoff. There are no records that MSIL ever used the wired funds to purchase securities for the accounts of the IA Business clients.

21. Additionally, based on the Trustee's investigation to date, there is no evidence that the IA Business ever purchased or sold any of the options that Madoff claimed on customer statements to have purchased. All traded options related to S&P 100 companies, including options on the index itself, clear through the Options Clearing Corporation ("OCC"). Based on the Trustee's investigation to date, the OCC has no records of the IA Business having transacted in any exchange-listed options.

22. For all periods relevant hereto, the IA Business was operated as a Ponzi scheme and Madoff and BLMIS concealed the ongoing fraud in an effort to hinder and delay other current and prospective customers of BLMIS from discovering the fraud. The money received from investors was not set aside to buy securities as purported, but instead, was primarily used to make the distributions to, or payments on behalf of, other investors. The money sent to BLMIS for investment, in short, was simply used to keep the operation going and to enrich Madoff, his associates and others, including the Defendant, until such time as the requests for redemptions in

December 2008 overwhelmed the flow of new investments and caused the inevitable collapse of the Ponzi scheme.

23. During the scheme, certain investors requested and received distributions of the "profits" listed for their accounts which were nothing more than fictitious profits. Other investors, from time to time, redeemed or closed their accounts, or removed portions of them, and were paid consistently with the statements they had been receiving. Some of those investors later re-invested part or all of those withdrawn payments with BLMIS.

24. When payments were made to or on behalf of these investors, including the Defendant, the falsified monthly statements of accounts reported that the accounts of such investors included substantial gains. In reality, BLMIS had not invested the investors' principal as reflected in customer statements. In an attempt to conceal the ongoing fraud and thereby hinder, delay, and defraud other current and prospective investors, BLMIS paid to or on behalf of certain investors the inflated amount reflected in the falsified financial statements, including non-existent principal and fictitious profits, not such investors' true depleted account balances.

25. BLMIS used the funds deposited from investors or investments to continue operations and pay redemption proceeds to or on behalf of other investors and to make other transfers. Due to the siphoning and diversion of new investments to pay requests for payments or redemptions from other account holders, BLMIS did not have the funds to pay investors on account of their new investments. BLMIS was able to stay afloat only by using the principal invested by some clients to pay other investors or their designees.

26. In an effort to hinder, delay and defraud authorities from detecting the fraud, BLMIS did not register as an Investment Advisor until September 2006.

27. In or about January 2008, BLMIS filed with the SEC a Uniform Application for Investment Adviser Registration. The application represented, *inter alia*, that BLMIS had 23 customer accounts and assets under management of approximately $17.1 billion. In fact, in January 2008, BLMIS had over 4,900 active customer accounts with a purported value of approximately $68 billion under management.

28. Not only did Madoff seek to evade regulators, Madoff also had false audit reports "prepared" by Friehling & Horowitz, a three person accounting firm in Rockland County, New York. Of the three employees at the firm, one employee was an assistant and one was a semi-retired accountant living in Florida.

29. At all times relevant hereto, the liabilities of BLMIS were billions of dollars greater than the assets of BLMIS. At all times relevant hereto, BLMIS was insolvent in that (i) its assets were worth less than the value of its liabilities, (ii) it could not meet its obligations as they came due, and (iii) at the time of the transfers, BLMIS was left with insufficient capital.

30. This and similar complaints are being brought to recapture monies paid to or for the benefit of certain investors so that this customer property can be equitably distributed among all of the victims of BLMIS in accordance with the provisions of SIPA.

THE DEFENDANT AND THE TRANSFERS

31. Defendant Harley International (Cayman) Limited is an international business company organized under the laws of the Cayman Islands, with a principal place of business at P.O. Box 156, North Quay, Douglas, Isle of Man, 1M99 I NR, care of Fortis Prime Fund Solutions (IOM) Limited.

32. At all times relevant hereto, Defendant was a client of the IA Business. According to BLMIS' records, Defendant maintained an account with BLMIS, which was designated account 1FN094 (the "Account"). The Account was opened on or about April 24, 1996 in the name of Harley International Limited, a Bahamian international business company. Thereafter, Harley International Limited ceased to be a Bahamian registered company and changed its place of organization to the Cayman Islands. Defendant executed a Customer Agreement, an Option Agreement, and a Trading Authorization Limited to Purchases and Sales of Securities and Options, (the "Account Agreements") and delivered such papers to BLMIS at BLMIS' headquarters at 885 Third Avenue, New York, New York.

33. By their terms, the Account Agreements were deemed to be entered into in the State of New York, and were to be performed in New York, New York through securities trading activities that would take place in New York, New York. The Accounts were held in New York, New York, and the Defendant consistently wired funds to the BLMIS Bank Account in New York, New York for application to the Account and the conducting of trading activities.

34. Between April 24, 1996 and the Filing Date, the Defendant invested over two billion dollars with BLMIS through 133 separate wire transfers directly into BLMIS' account at JPMorgan Chase & Co., Account #000000140081703 (the "BLMIS Bank Account"). The BLMIS Bank Account was maintained at a JPMorgan Chase & Co. branch in New York, New York. Defendant has intentionally taken advantage of the benefits of conducting transactions in the State of New York and has submitted itself to the jurisdiction of this Court for purposes of this proceeding.

35. Prior to the Filing Date, BLMIS made payments or other transfers (collectively, the "Transfers") to the Defendant. The Transfers were made to or for the benefit of the Defendant and include, but are not limited to, the Transfers listed on Exhibit A.

36. Upon information and belief, Defendant knew or should have known that Madoff's IA Business was predicated on fraud. Hedge funds and fund of funds like the Defendant's were sophisticated investors that accepted fees from their customers based on purported assets under management and/or stock performance in consideration for the diligence they were expected to exercise in selecting and monitoring investment managers like Madoff. The Defendant failed to exercise reasonable due diligence of BLMIS and its auditors in connection with the Ponzi scheme. Among other things, the Defendant was on notice of the following indicia of irregularity and fraud but failed to make sufficient inquiry:

(a) Financial industry press reports, including a May 27, 2001 article in Barron's entitled "Don't Ask, Don't Tell: Bernie Madoff is so secretive, he even asks investors to keep mum," and a May, 2001 article in MAR/Hedge, a semi-monthly newsletter that is widely read by hedge fund industry professionals, entitled "Madoff Tops Charts; Skeptics Ask How," raised serious questions about the legitimacy of BLMIS and Madoff and their ability to achieve the IA Business returns they purportedly had achieved using the split-strike conversion strategy Madoff claimed to employ.

(b) Madoff avoided questions about his IA Business operations, was consistently vague in responding to any such questions, and operated with no transparency.

(c) BLMIS did not provide its customers with electronic real-time online access to their accounts, which was and is customary in the industry for hedge fund and fund of

funds investors. BLMIS also utilized outmoded technology, including paper trading confirmations. The use of paper confirmations created after the fact was critical to Madoff's ability to perpetuate his Ponzi scheme.

(d) BLMIS functioned as both investment manager and custodian of securities. This arrangement eliminated another frequently utilized check and balance in investment management by excluding an independent custodian of securities from the process, and thereby furthering the lack of transparency of BLMIS to investors, regulators, and other outside parties.

(e) BLMIS produced returns that were too good to be true, reflecting a pattern of abnormal profitability, both in terms of consistency and amount that was simply not credible. Specifically, there were only about four months of any negative returns during the 152 months of reported operations in which Defendant was a customer of BLMIS. Returns this good could not be reproduced by other skilled hedge fund managers, and those managers who attempted to employ the split-strike conversion strategy purportedly used by BLMIS consistently failed even to approximate its results.

(f) The Defendant received far higher purported annual rates of return on its investments with BLMIS, approximating 13.5%, as compared to the interest rates BLMIS could have paid to commercial lenders during the relevant time period. Upon information and belief, the Defendant never questioned why Madoff accepted its investment capital in lieu of other available alternatives that would have been more lucrative for BLMIS.

(g) At times the Defendant's monthly account statements reflected trades purchased or sold on behalf of Defendant's account in certain securities that were allegedly

executed at prices outside the daily price range of prices for such securities traded in the market on the days in question. The Defendant received purported trade confirmations from BLMIS matching the securities transactions reported on the monthly account statements which, if verified with the prices in the market on the trade dates in question, would have revealed that the trades could not have been executed at the prices reported. For example, Defendant's October 2003 monthly account statement reported a purchase of 385,693 shares of Intel Corporation (INTC) with the settlement date of October 7, 2003, which was purportedly executed on the trade date of October 2, 2003 at a price of $27.63. The daily price for Intel Corporation stock on October 2, 2003 ranged from a low of $28.41 to a high of $28.95, which made the reported price impossible. Similar impossibilities were reported in connection with purported sales of securities in Defendant's account. Defendant's December 2006 account statement reported a sale of 236,663 shares of Merck & Co. (MRK) at a purported executed price of $44.61on the Trade Date of December 22, 2006 with a Settlement Date of December 28, 2006. However, the daily price range for Merck stock on the purported trade date of December 22, 2006 ranged from a low of $42.78 to a high of $43.42, more than $1 below the price reported on the statement.

(h) The Trustee's investigation to date has revealed at least 148 instances between February 1998 to November 2008 in which Defendant's account statements displayed trades purportedly executed at a price outside the daily price range. This pattern in Defendant's account should have caused a sophisticated hedge fund like Defendant Harley and its managers to independently verify the trades with the public exchanges and demand more transparency into the operations of BLMIS.

(i) BLMIS would have had to execute massive numbers of options trades to implement its purported split-strike conversion strategy. In order to implement this strategy,

BLMIS purportedly purchased options on the S&P 100 index ("OEX") – which are traded on the Chicago Board Options Exchange ("CBOE") – in combination with purchases of select underlying stocks that are components of that index. At times, the option volume BLMIS reported to its customers was simply impossible if those options had been exchange-traded. For example, on January 23, 2008, BLMIS purportedly bought a total of 22,641 OEX put options (with February expiration and a strike price of 600) for Defendant Harley when the total volume traded on the CBOE for such contracts was 8,645. Similarly, BLMIS purportedly bought a total of 22,641 OEX call options (with February expiration and a strike price of 610) for Defendant Harley when the total volume traded on the CBOE for such contracts was 631. In each of these instances, Defendant knew or should have known that the option trading volumes reported by BLMIS were impossible if exchange-traded.

(j) BLMIS had purportedly told its investors that it purchased these options in the over-the-counter ("OTC") market. Trading options in the OTC market would likely have been more expensive than trading over the CBOE, yet those costs did not appear to be passed on to BLMIS' investors. The absence of such costs, together with BLMIS' representation that it was trading in the OTC market, should have prompted a sophisticated hedge fund like Defendant Harley and its managers to request verification of the trades and demand more transparency into the operations of BLMIS.

(k) BLMIS's statements to investors reflected a consistent ability to trade stocks near their monthly highs and lows to generate consistent and unusual profits (or, if requested by customers, to generate losses to do the opposite). No experienced investment professional could have reasonably believed that this could have been accomplished legitimately.

(l) BLMIS, which reputedly ran the world's largest hedge fund, was purportedly audited by Friehling & Horowitz, an accounting firm that had three employees, one of whom was semi-retired, with offices located in a strip mall. No experienced investment professional could have reasonably believed it possible for any such firm to have competently audited an entity the size of BLMIS.

(m) The compensation system utilized by BLMIS was atypical, in that BLMIS, the entity purportedly employing the hugely-successful proprietary trading system, was compensated only for the trades that it executed, while Defendant, whose only role was to funnel money to BLMIS, received administrative fees and a share of the profits that would normally go to the entity in the position of BLMIS. This compensation arrangement, together with the lack of transparency and other factors listed herein, should have caused an experienced investment entity like the Defendant and its managers to question the legitimacy of Madoff's operation.

(n) Despite its immense size, BLMIS was substantially a family-run operation, employing many of Madoff's relatives, and virtually no outside professionals.

(o) On information and belief, at no time did the Defendant conduct a performance audit of BLMIS or match any trade tickets provided by BLMIS with actual trades executed through any domestic or foreign public exchange despite the fact the Defendant fund had hundreds of millions of dollars in assets and easily could have afforded to do this.

(p) BLMIS purported to convert all of its holdings to cash immediately before each quarterly report, a strategy that had no practical benefit but which had the effect of shielding BLMIS's purported trading activities from scrutiny.

(q) Based on all of the foregoing factors, many banks, industry advisors and insiders who made an effort to conduct reasonable due diligence flatly refused to deal with BLMIS and Madoff because they had serious concerns that their IA Business operations were not legitimate. At a minimum, these factors, in combination with the indicia of fraud in Defendant Harley's own customer account statements, should have caused the Defendant to inquire further.

37. The Transfers were and continue to be customer property within the meaning of 15 U.S.C. § 78lll(4), and are subject to turnover pursuant to section 542 of the Bankruptcy Code.

38. The Transfers were, in part, false and fraudulent payments of nonexistent profits supposedly earned in the Accounts ("Fictitious Profits").

39. The Transfers are avoidable and recoverable under sections 544, 550(a)(1) and 551 of the Bankruptcy Code, applicable provisions of SIPA, particularly 15 U.S.C. § 78fff-2(c)(3), and applicable provisions of N.Y. CPRL 203(g) (McKinney 2001) and N.Y. Debt. & Cred. §§ 273 – 276 (McKinney 2001).

40. Of the Transfers, at least fourteen transfers in the collective amount of $1,072,800,000 (the "Six Year Transfers") were made during the six years prior to the Filing Date and are avoidable and recoverable under sections 544, 550(a)(1) and 551 of the Bankruptcy Code, applicable provisions of SIPA, particularly 15 U.S.C. § 78fff-2(c)(3), and applicable provisions of N.Y. Debt. & Cred. §§ 273 – 276.

41. Of the Six Year Transfers, at least thirteen in the collective amount of $1,066,800,000 (the "Two Year Transfers") were made during the two years prior to the Filing

Date, and are additionally recoverable under sections 548(a)(1), 550(a)(1) and 551 of the Bankruptcy Code and applicable provisions of SIPA, particularly 15 U.S.C. § 78fff-2(c)(3).

42. Of the Two Year Transfers, at least six in the collective amount of $425,000,000 (the "90 Day Transfers") were made during the 90 days prior to the Filing Date, and are additionally recoverable under sections 547, 550(a)(1) and 551 of the Bankruptcy Code and applicable provisions of SIPA, particularly 15 U.S.C. § 78fff-2(c)(3).

43. To the extent that any of the recovery counts may be inconsistent with each other, they are to be treated as being pled in the alternative.

44. The Trustee's investigation is on-going and the Trustee reserves the right to (i) supplement the information on the Transfers and any additional transfers, and (ii) seek recovery of such additional transfers.

COUNT ONE
TURNOVER AND ACCOUNTING – 11 U.S.C. § 542

45. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

46. The Transfers constitute property of the estate to be recovered and administered by the Trustee pursuant to section 541 of the Bankruptcy Code and 15 U.S.C. § 78fff-2(c)(3).

47. As a result of the foregoing, pursuant to section 542 of the Bankruptcy Code, the Trustee is entitled to the immediate payment and turnover from the Defendant of any and all Transfers made by BLMIS, directly or indirectly, to Defendant.

48. As a result of the foregoing, pursuant to section 542 of the Bankruptcy Code, the Trustee is also entitled to an accounting of all such Transfers received by Defendant from BLMIS, directly or indirectly.

COUNT TWO
PREFERENTIAL TRANSFER - 11 U.S.C. §§ 547(b), 550, AND 551

49. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

50. At the time of each of the 90 Day Transfers (hereafter, the "Preference Period Transfers"), the Defendant was a "creditor" of BLMIS within the meaning of section 101(10) of the Bankruptcy Code and pursuant to 15 U.S.C. § 78fff-2(c)(3).

51. Each of the Preference Period Transfers constitutes a transfer of an interest of BLMIS in property within the meaning of section 101(54) of the Bankruptcy Code and pursuant to 15 U.S.C. § 78fff-2(c)(3).

52. Each of the Preference Period Transfers was to or for the benefit of the Defendant.

53. Pleading in the alternative, each of the Preference Period Transfers was made on account of an antecedent debt owed by BLMIS before such transfer was made.

54. Each of the Preference Period Transfers was made while BLMIS was insolvent.

55. Each of the Preference Period Transfers was made during the preference period under section 547(b)(4) of the Bankruptcy Code.

56. Each of the Preference Period Transfers enabled Defendant to receive more than the receiving Defendant would receive if (i) this case was a case under chapter 7 of the Bankruptcy Code, (ii) the transfers had not been made, and (iii) the Defendant received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

57. Each of the Preference Period Transfers constitutes a preferential transfer avoidable by the Trustee pursuant to section 547(b) of the Bankruptcy Code and recoverable from the Defendant pursuant to section 550(a).

58. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to sections 547(b), 550, and 551 of the Bankruptcy Code: (a) avoiding and preserving the Preference Period Transfers, (b) directing that the Preference Period Transfers be set aside, and (c) recovering the Preference Period Transfers, or the value thereof, for the benefit of the estate of BLMIS.

COUNT THREE
FRAUDULENT TRANSFER – 11 U.S.C. §§ 548(a)(1)(A), 550, AND 551

59. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

60. The Two Year Transfers were made on or within two years before the filing date of BLMIS' case.

61. The Two Year Transfers were made by BLMIS with the actual intent to hinder, delay, and defraud some or all of BLMIS' then existing or future creditors.

62. The Two Year Transfers constitute a fraudulent transfer avoidable by the Trustee pursuant to section 548(a)(1)(A) of the Bankruptcy Code and recoverable from the Defendant pursuant to section 550(a).

63. As a result of the foregoing, pursuant to sections 548(a)(1)(A), 550(a), and 551 of the Bankruptcy Code, the Trustee is entitled to a judgment: (a) avoiding and preserving the Two Year Transfers, (b) directing that the Two Year Transfers be set aside, and (c) recovering the Two Year Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS.

COUNT FOUR
FRAUDULENT TRANSFER – 11 U.S.C. §§ 548(a)(1)(B), 550, AND 551

64. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

65. The Two Year Transfers were made on or within two years before the Filing Date.

66. BLMIS received less than a reasonably equivalent value in exchange for each of the Two Year Transfers.

67. At the time of each of the Two Year Transfers, BLMIS was insolvent, or became insolvent as a result of the Two Year Transfer in question.

68. At the time of each of the Two Year Transfers, BLMIS was engaged in a business or a transaction, or was about to engage in business or a transaction, for which any property remaining with BLMIS was an unreasonably small capital.

69. At the time of each of the Two Year Transfers, BLMIS intended to incur, or believed that it would incur, debts that would be beyond BLMIS' ability to pay as such debts matured.

70. The Two Year Transfers constitute fraudulent transfers avoidable by the Trustee pursuant to section 548(a)(1)(B) of the Bankruptcy Code and recoverable from the Defendant pursuant to section 550(a).

71. As a result of the foregoing, pursuant to sections 548(a)(1)(B), 550(a), and 551 of the Bankruptcy Code, the Trustee is entitled to a judgment: (a) avoiding and preserving the Two Year Transfers, (b) directing that the Two Year Transfers be set aside, and (c) recovering the Two Year Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS.

COUNT FIVE
FRAUDULENT TRANSFER – NEW YORK DEBTOR AND CREDITOR LAW §§ 276, 276-a, 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(a), AND 551

72. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

73. At all times relevant to the Six Year Transfers, there have been one or more creditors who have held and still hold matured or unmatured unsecured claims against BLMIS that were and are allowable under section 502 of the Bankruptcy Code or that were and are not allowable only under section 502(e).

74. The Six Year Transfers were made by BLMIS with the actual intent to hinder, delay, or defraud the creditors of BLMIS. BLMIS made the Six Year Transfers to or for the benefit of the Defendant in furtherance of a fraudulent investment scheme.

75. As a result of the foregoing, pursuant to sections 276, 276-a, 278 and/or 279 of the New York Debtor and Creditor Law sections 544(b), 550(a), and 551 of the Bankruptcy Code, and 15 U.S.C. § 78fff-2(c)(3), the Trustee is entitled to a judgment: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, (c) recovering the Six Year Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS, and (d) recovering attorneys' fees from the Defendant.

COUNT SIX
FRAUDULENT TRANSFER – NEW YORK DEBTOR AND CREDITOR LAW §§ 273 AND 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(A), 551 AND 1107

76. The Trustee incorporates by reference the allegations contained in the previous paragraphs of the Complaint as if fully rewritten herein.

77. At all relevant times there was and is at least one or more creditors who held and hold matured or unmatured unsecured claims against BLMIS that were and are allowable under section 502 of the Bankruptcy Code or that were and are not allowable only under section 502(e).

78. BLMIS did not receive fair consideration for the Six Year Transfers.

79. BLMIS was insolvent at the time it made each of the Six Year Transfers or, in the alterative, BLMIS became insolvent as a result of each of the Six Year Transfers.

80. As a result of the foregoing, the Trustee is entitled to a judgment pursuant to sections 273, 278 and 279 of the New York Debtor and Creditor Law and sections 544(b), 550, 551 of the Bankruptcy Code: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, for the benefit of the estate of BLMIS.

COUNT SEVEN
FRAUDULENT TRANSFER – NEW YORK DEBTOR AND CREDITOR LAW §§ 274, 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(A), 551, AND 1107

81. The Trustee incorporates by reference the allegations contained in the previous paragraphs of the Complaint as if fully rewritten herein.

82. At all relevant times there was and is at least one or more creditors who held and hold matured or unmatured unsecured claims against BLMIS that were and are allowable under section 502 of the Bankruptcy Code or that were and are not allowable only under section 502(e).

83. BLMIS did not receive fair consideration for the Six Year Transfers.

84. At the time BLMIS made each of the Six Year Transfers, BLMIS was engaged or was about to engage in a business or transaction for which the property remaining in its hands after each of the Six Year Transfers was an unreasonably small capital.

85. As a result of the foregoing, pursuant to sections 274, 278 and/or 279 of the New York Debtor and Creditor Law and sections 544(b) and 550(a) of the Bankruptcy Code, the Trustee is entitled to a judgment: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS.

COUNT EIGHT
FRAUDULENT TRANSFER – NEW YORK DEBTOR AND CREDITOR LAW §§ 275, 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(A), AND 551

86. The Trustee incorporates by reference the allegations contained in the previous paragraphs of the Complaint as if fully rewritten herein.

87. At all relevant times there was and is at least one or more creditors who held and hold matured or unmatured unsecured claims against BLMIS that were and are allowable under section 502 of the Bankruptcy Code, or that were and are not allowable only under section 502(e).

88. BLMIS did not receive fair consideration for the Six Year Transfers.

89. At the time BLMIS made each of the Six Year Transfers, BLMIS had incurred, was intending to incur, or believed that it would incur debts beyond its ability to pay them as the debts matured.

90. As a result of the foregoing, pursuant to sections 275, 278 and/or 279 of the New York Debtor and Creditor Law sections 544(b), 550(a), and 551 of the Bankruptcy Code, the Trustee is entitled to a judgment: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS.

COUNT NINE
UNDISCOVERED FRAUDULENT TRANSFER – NEW YORK CIVIL PROCEDURE LAW AND RULES 203(g) AND NEW YORK DEBTOR AND CREDITOR LAW §§ 276, 276-a, 278 AND/OR 279, AND 11 U.S.C. §§ 544, 550(a), AND 551

91. The Trustee incorporates by reference the allegations contained in the previous paragraphs of this Complaint as if fully rewritten herein.

92. At all times relevant to Transfers, the fraudulent scheme perpetrated by BLMIS was not reasonably discoverable by at least one unsecured creditor of BLMIS.

93. At all times relevant to the Transfers, there have been one or more creditors who have held and still hold matured or unmatured unsecured claims against BLMIS that were and

are allowable under section 502 of the Bankruptcy Code, or that were and are not allowable only under section 502(e).

94. The Transfers were made by BLMIS with the actual intent to hinder, delay, or defraud the creditors of BLMIS. BLMIS made the Transfers to or for the benefit of the Defendant in furtherance of a fraudulent investment scheme.

95. As a result of the foregoing, pursuant to NY CPLR 203(g) sections 276, 276-a, 278 and/or 279 of the and New York Debtor and Creditor Law sections 544(b), 550(a), and 551 of the Bankruptcy Code, and 15 U.S.C. § 78fff-2(c)(3), the Trustee is entitled to a judgment: (a) avoiding and preserving the Transfers, (b) directing that the Transfers be set aside, (c) recovering the Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS, and (d) recovering attorneys' fees from the Defendant.

WHEREFORE, the Trustee respectfully requests that this Court enter judgment in favor of the Trustee and against the Defendant as follows:

i. On the First Claim for Relief, pursuant to sections 542, 550(a), and 551 of the Bankruptcy Code: (a) that the property that was the subject of the Transfers be immediately delivered and turned over to the Trustee, and (b) for an accounting by the Defendant of the property that was the subject of the Transfers or the value of such property;

ii. On the Second Claim for Relief, pursuant to sections 547, 550(a), and 551 of the Bankruptcy Code: (a) avoiding and preserving the Preference Period Transfers, (b) directing that the Preference Period Transfers be set aside, and (c) recovering the Preference Period Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS;

iii. On the Third Claim for Relief, pursuant to sections 548(a)(1)(A), 550(a), and 551 of the Bankruptcy Code: (a) avoiding and preserving the Two Year Transfers, (b) directing that the Two Year Transfers be set aside, and (c) recovering the Two Year Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS;

iv. On the Fourth Claim for Relief, pursuant to sections 548(a)(1)(B), 550(a), and 551 of the Bankruptcy Code: (a) avoiding and preserving the Two Year Transfers, (b) directing that the Two Year Transfers be set aside, and (c) recovering the Two Year Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS;

v. On the Fifth Claim for Relief, pursuant to sections 276, 276-a, 278 and/or 279 of the New York Debtor & Creditor Law and sections 544(b), 550(a), and 551 of the Bankruptcy Code: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, (c) recovering the Six Year Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS, and (d) recovering attorneys' fees from the Defendant;

vi. On the Sixth Claim for Relief, pursuant to sections 273, 278 and/or 279 of the New York Debtor and Creditor Law and sections 544(b), 550, and 551 of the Bankruptcy Code: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS;

vii. On the Seventh Claim for Relief, pursuant to sections 274, 278 and/or 279 of the New York Debtor and Creditor Law and sections 544(b), 550, 551, and 1107 of the Bankruptcy Code: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be

set aside, and (c) recovering the Six Year Transfers, or the value thereof, from the Defendant for the benefit of the state of BLMIS;

viii. On the Eighth Claim for Relief, pursuant to New York Debtor and Creditor Law sections 275, 278 and/or 279 and Bankruptcy Code sections 544(b), 550, 551, and 1107: (a) avoiding and preserving the Six Year Transfers, (b) directing that the Six Year Transfers be set aside, and (c) recovering the Six Year Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS;

ix. On the Ninth Claim for Relief, pursuant to NY CPLR 203(g) and sections 276, 276-a, 278 and/or 279 of the New York Debtor & Creditor Law and section 544(b), 550(a), and 551 of the Bankruptcy Code: (a) avoiding and preserving the Transfers, (b) directing that the Transfers be set aside, (c) recovering the Transfers, or the value thereof, from the Defendant for the benefit of the estate of BLMIS, and (d) recovering attorneys' fees from the Defendant;

x. On all Claims for Relief, pursuant to federal common law and N.Y. C.P.L.R. 5001, 5004 awarding the Trustee prejudgment interest from the date on which the Transfers were received;

xi. On all Claims for Relief, establishment of a constructive trust over the proceeds of the transfers in favor of the Trustee for the benefit of BLMIS's estate;

xii. On all Claims for Relief, assignment of Defendant's rights to seek refunds from the government for federal, state, and local taxes paid on Fictitious Profits during the course of the scheme;

xiii. Awarding the Trustee all applicable interest, costs, and disbursements of this action; and

xiv. Granting Plaintiff such other, further, and different relief as the Court deems just, proper, and equitable.

Date: New York, New York
May 12, 2009

s/David J. Sheehan

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M-431

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

12 MISC 00032

In the Matter of:

Standing Order of Reference
Re: Title 11

AMENDED
STANDING ORDER
OF REFERENCE

M10-468

Pursuant to 28 U.S.C. Section 157(a) any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 are referred to the bankruptcy judges for this district.

If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.

SO ORDERED.

/s/ Loretta A. Preska
Loretta A. Preska
Chief Judge

Dated: New York, New York
January 31, 2012

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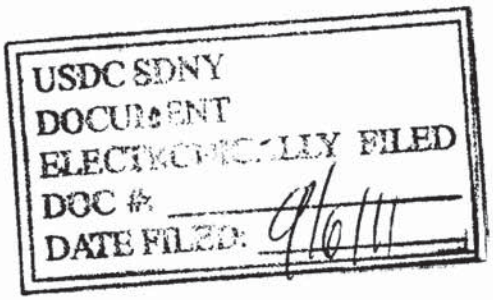
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



IRVING H. PICARD,

Plaintiff,

-v-

SONJA KOHN, ERWIN KOHN, ROBERT KOHN, RINA HARTSTEIN, MOISHE HARTSTEIN, MORDECHAI LANDAU, ERKO, INC., EUROVALEUR, INC., INFOVALEUR, INC., TECNO DEVELOPMENT & RESEARCH S.R.L., TECNO DEVELOPMENT & RESEARCH LTD., SHLOMO AMSELEM, HASSANS INTERNATIONAL LAW FIRM, HERALD ASSET MANAGEMENT LTD., 20:20 MEDICI AG, PETER SCHEITHAUER, ROBERT REUSS, UNICREDIT BANK AUSTRIA AG, GERHARD RANDA, STEFAN ZAPOTOCKY, BANK AUSTRIA WORLDWIDE FUND MANAGEMENT LTD., URSULA RADEL-LESZCZYNSKI, UNICREDIT S.p.A., ALESSANDRO PROFUMO, PIONEER GLOBAL ASSET MANAGEMENT, S.P.A., et al., PALLADIUM CAPITAL ADVISORS LLC, WINDSOR IBC, Inc., MARIADELMAR RAULE, FRANCO MUGNAI, PAUL de SURY, DANIELE COSULICH, ABSOLUTE PORTFOLIO MANAGEMENT LTD., MEDICIFINANZ CONSULTING GmbH, MEDICI S.R.L., MEDICI CAYMAN ISLAND LTD., BANK MEDICI AG (GIBRALTAR), REVITRUST SERVICES EST., HELMUTH FREY, MANFRED KASTNER, JOSEF DUREGGER, ANDREAS PIRKNER, WERNER TRIPOLT, ANDREAS SCHINDLER, FRIEDRICH KADRNOSKA, WERNER KRETSCHMER, WILHELM HEMETSBERGER, HARALD NOGRASEK, BANK AUSTRIA CAYMAN ISLANDS LTD., GIANFRANCO GUTTY, SOFIPO AUSTRIA GmbH, M-Tech SERVICES GmbH, BRERA SERVIZI AZIENDIALE S.R.L., REDCREST INVESTMENTS, INC., LINE GROUP LTD., LINE MANAGEMENT SERVICES LTD., LINE HOLDINGS LTD., HERALD CONSULT LTD., JOHN AND JANE DOES 1-100,

Defendants.

11 Civ. 1181 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

On May 31, 2011, the Court, after receiving full briefing from the parties, heard oral argument on the motion by defendant UniCredit S.p.A. ("UniCredit") to withdraw the bankruptcy reference of adversary proceeding No. 10-5411 (BRL) (the "Kohn Action") filed by Irving Picard (the "Trustee"), the trustee appointed pursuant to the Securities Investment Protection Act of 1970 ("SIPA") for the liquidation of Bernard L. Madoff Investment Securities LLC ("Madoff Securities"). On June 3, 2011, the Court issued a "bottom-line" Order granting the motion to withdraw the bankruptcy reference for the purpose of resolving the following issues: (1) whether the Trustee has standing to bring the Kohn Action against UniCredit; (2) whether the Trustee's common law claims brought against UniCredit are preempted by the Securities Litigation Uniform Standards Act ("SLUSA"); and (3) whether the Trustee's RICO claims against UniCredit are barred because those claims are extraterritorial in nature, are barred by the Private Securities Litigation Reform Act ("PSLRA"), are barred by proximate causation principles, or fail to plausibly allege the elements of a RICO claim. As stated in open court on May 31, 2011, see Tr., the Court granted UniCredit's motion to withdraw the reference to the Bankruptcy Court in order to address the issues of standing and SLUSA preemption for the same reasons enumerated in Picard v. HSBC Bank PLC,

450 B.R. 406 (S.D.N.Y. 2011).[1] This Memorandum Order explains the reasons for withdrawing the reference in order to address the threshold issues concerning the Trustee's RICO claims against UniCredit.

By way of background, on December 10, 2010, the Trustee filed a complaint which named UniCredit in claims alleging, inter alia, RICO violations, Am. Compl. ¶¶ 413-33, as well as common law claims, including unjust enrichment, id. ¶¶ 573-77, and conversion, id. ¶¶ 578-581. The Trustee alleges that UniCredit and the other defendants named in the complaint were all part of an international "Illegal Scheme" masterminded by Sonja Kohn - dubbed the "Medici Enterprise" -- to feed $9.1 billion of "other people's money into Madoff's Ponzi scheme." See id. ¶¶ 1-6. The complaint alleges that by providing Madoff with a "constant influx of fresh capital," the defendants caused the entirety of the $19.6 billion in damages caused by Madoff's scheme. See id. ¶ 8. The Trustee alleges that these losses should be tripled pursuant to RICO and thus seeks approximately $59 billion. Id.

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[1] While the Opinion and Order issued in Picard v. HSBC Bank PLC, 450 B.R. 406 (S.D.N.Y. 2011), only discusses the Trustee's standing to bring common law claims, whether the Trustee has standing to bring RICO claims notwithstanding the fact that such authority is not expressly provided by SIPA similarly raises difficult issues of non-bankruptcy federal law. See Picard v. HSBC Bank PLC, --- B.R. ----, 2011 WL 3200298 (S.D.N.Y. 2011)(concluding that the Trustee lacks standing to bring claims not available to an ordinary bankruptcy trustee absent express authorization from SIPA).

District courts have original jurisdiction over bankruptcy cases and all civil proceedings "arising under title 11, or raising in or related to cases under title 11." 28 U.S.C. § 1334. Pursuant to 28 U.S.C. § 157(a), the district court may refer actions within its bankruptcy jurisdiction to the bankruptcy judges of the district. The Southern District of New York has a standing order in place that provides for automatic reference.

Notwithstanding the automatic reference, 28 U.S.C. § 157(d) describes circumstances in which the district court is authorized or required to withdraw the reference to the bankruptcy court:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceedings requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d).

Withdrawal is required where the proceedings would require "a bankruptcy court judge to engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes." City of New York v. Exxon Corp., 932 F.2d 1020, 1026 (2d Cir. 1991).

As an initial matter, it is clear that RICO is a federal non-bankruptcy statute, that is, a federal statute falling outside of the Bankruptcy Court's expertise. Moreover, the Court concludes that resolving the issues raised by UniCredit will require significant

interpretation of RICO, particularly in light of recent decisions addressing the extraterritorial application of RICO and the scope of the PSLRA's so-called "RICO Amendment," which bars RICO claims that are premised on securities violations. Specifically, the Court concludes that the following issues will require substantial and material interpretation of non-bankruptcy federal law: (1) whether RICO can be applied extraterritorially in this case, which primarily involves foreign actors; (2) whether the RICO claims are barred by the so-called "RICO Amendment" promulgated as part of the PSLRA; (3) whether the complaint adequately alleges proximate causation and the structural elements of a RICO claim.

Turning first to extraterritoriality, the Court concludes that determining whether the Trustee's RICO claims are extraterritorial in nature will require substantial interpretation of RICO. In response to the Supreme Court's decision in Morrison v. National Australia Bank Ltd., --- U.S. ----, 130 S. Ct. 2869 (2010), the Second Circuit recently held that RICO cannot be applied territorially. See Norex Petroleum v. Access Indus., Inc., 621 F.3d 29, 31 (2d Cir. 2010) (per curiam) (finding that RICO does not apply to actions that "primarily involve[] foreign actors and foreign acts"); see also Cedeno v. Intech Group, Inc., 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) (holding that RICO does not apply extraterritorially). UniCredit contends that since forty-nine of the fifty-seven RICO defendants, including UniCredit and its affiliates, are foreign defendants and since the

complaint in the Kohn Action focuses on actions committed abroad by actors subject to foreign laws, whether the Kohn Action "primarily involves foreign actors and foreign acts" or "claims that are essentially extraterritorial in focus" will require substantial and material interpretation of new Second Circuit and Supreme Court jurisprudence. While it is now settled law that RICO cannot be applied extraterritorially, the Court agrees with UniCredit that determining the precise contours of this relatively new doctrine will require significant interpretation of RICO.

Turning to whether the RICO claims are barred by the PSLRA's RICO Amendment, the Court concludes that this issue also warrants withdrawal of the reference to the Bankruptcy Court. The RICO Amendment provides that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of [RICO]." 18 U.S.C. § 1964(c). It is clear from the plain language of the RICO Amendment that a complaint expressly alleging violations of the federal securities laws cannot form the basis for a RICO claim. In this case, however, it is undisputed that the Trustee has not expressly pled allegations of securities fraud. The issue then becomes whether the allegations in the Kohn Action effectively amount to securities fraud and thus trigger the RICO Amendment. UniCredit contends that notwithstanding the Trustee's "artful" pleading, the RICO claims are barred by the RICO Amendment because the complaint alleges conduct that would be

actionable under the federal securities laws. Specifically, the Trustee's complaint alleges the existence of an "Illegal Scheme" designed to "feed" investor money into Madoff's Ponzi scheme while "conceal[ing] the fact that the Medici Enterprise Feeder Funds were 100% invested through [Madoff Securities]" so that defendants could "avoid regulator and investor scrutiny." See, e.g., Am. Compl. ¶¶ 1, 5-6, 16, 18.

Courts in this Circuit have reached different conclusions about how broadly the RICO Amendment should be applied. Compare Cohain v. Klimley, 08 Civ. 5047 (PGG), 2010 WL 3701362, at *10 (S.D.N.Y. Sept. 20, 2010) ("[T]he PSLRA bars all RICO claims based on any conduct that could be actionable under the securities laws, including conduct that constitutes aiding and abetting securities fraud.") and Thomas H. Lee Equity Fund V, L.P., v. Mayer Brown, Rowe & Maw LLP, 612 F. Supp. 2d 267, 283 (S.D.N.Y. 2009) ("[T]he RICO Amendment bars claims based on conduct that could be actionable under the securities laws even when the plaintiff, himself, cannot bring a cause of action under the securities laws."), with OSRecovery, Inc. v. One Groupe Int'l, Inc., 354 F. Supp. 2d 357, 368-71 (S.D.N.Y. 2005) (holding that RICO claims based on purported aiding and abetting securities violation were not barred by RICO Amendment because they were not actionable by the same plaintiff who brought the RICO claims). Given that there is disagreement about the scope of the RICO Amendment and given that UniCredit's alleged misconduct is arguably

actionable under the federal securities laws, the Court concludes that determining whether the RICO Amendment bars the Trustee's RICO claims against UniCredit will require more than a "simple application" of the PSLRA, see City of New York v. Exxon Corp., 932 F.2d 1020, 1026 (2d Cir. 1991), and thus needs to be resolved by an Article III judge.

Finally, the Court concludes that determining whether the Trustee sufficiently alleges proximate causation and the structural elements of a RICO claim also mandates withdrawal of the reference. With respect to proximate causation, "the RICO statute requires that the pattern of racketeering activity or the individual predicate acts impose a direct injury on plaintiffs" and thus that "a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were a substantial factor in the sequence of responsible causation." Lerner v. Fleet Bank, N.A., 318 F.3d 113, 123 (2d Cir. 2003) (internal citations and quotations omitted) (emphasis supplied). Here, there is a serious question as to whether UniCredit can be said to have directly caused injury to Madoff investors (who have no relationship with UniCredit) given the intervening misconduct of the two primary bad actors, Madoff and his now-defunct company Madoff Securities.

Determining whether the Trustee has plausibly alleged the structural elements of a RICO claim, such as the existence of an "enterprise" and UniCredit's participation in the "operation or management" of such enterprise, will also require substantial

interpretation of federal non-bankruptcy law. See, e.g., First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 176 (2d Cir. 2004) ("[O]ne is liable under RICO only if he 'participated in the operation or management of the enterprise itself."). "[A]n association-in-fact enterprise must have at least three structural features: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient to permit these associates to pursue the enterprise's purpose." Boyle v. United States, 129 S. Ct. 2237, 2244 (2009). Here, there is a serious question as to whether the disparate group of individuals and corporate entities named in the Kohn Action can plausibly be said to constitute an "enterprise" with a "common purpose" within the meaning of RICO. Even assuming arguendo that the complaint adequately pleads the existence of an enterprise, there is a serious question as to whether the amended complaint plausibly alleges that UniCredit participated in the "operation or management" of the enterprise, that is, that UniCredit played "some part in directing the enterprise's affairs." First Capital, 385 F.3d at 176 (internal quotation marks omitted) (emphasis supplied). Here, while the Trustee alleges that the purported RICO enterprise was "conceived" and "largely directed" by Kohn who "masterminded" the "vast illegal scheme to exploit her privileged relationship with Madoff," Am. Compl. ¶¶ 1, 5, the amended complaint suggests that UniCredit's role was much more limited. The core allegations concerning UniCredit are that UniCredit, in an effort

to generate fees, "fed" investor money into the Madoff Securities and "disguised" these investments by making them indirectly through feeder funds. Id. ¶¶ 19, 338-44. Thus, whether the Trustee's complaint sufficiently alleges that UniCredit played a role in the operation or management of the purported enterprise is another issue mandating withdrawal of the reference to the Bankruptcy Court.

Accordingly, for the foregoing reasons the Court affirms its June 3, 2011 Order withdrawing the reference to the Bankruptcy Court for the limited purpose of addressing the following threshold issues: (1) whether the Trustee has standing to bring the Kohn Action against UniCredit; (2) whether the Trustee's common law claims brought against UniCredit are preempted by SLUSA; and (3) whether the Trustee's RICO claims against UniCredit are barred because those claims are extraterritorial in nature, are barred by the PSLRA, are barred by proximate causation principles, or fail to plausibly allege the elements of a RICO claim.

The Clerk of the Court is hereby directed to close document number 1 on the docket of the case.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
September 6, 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING H. PICARD,
Plaintiff,

-v-

FRANK J. AVELLINO et al.,
Defendants.

11 Civ. 3882 (JSR)

IRVING H. PICARD,
Plaintiff,

-v-

ELINS FAMILY TRUST et al.,
Defendants.

11 Civ. 4772 (JSR)

IRVING H. PICARD,
Plaintiff,

-v-

ROBERT GREENBERGER and PHYLLIS GREENBERGER,
Defendants.

11 Civ. 4928 (JSR)

IRVING H. PICARD,
Plaintiff,

-v-

THE M&B WEISS FAMILY LIMITED PARTNERSHIP et al.,
Defendants.

11 Civ. 6244 (JSR)

IRVING H. PICARD,
Plaintiff,

-v-

STANLEY SHAPIRO et al.,
Defendants.

11 Civ. 5835 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Each of the defendants in the above captioned cases seeks mandatory withdrawal of the reference to the bankruptcy court of the underlying adversarial proceeding brought against each of them respectively by plaintiff Irving H. Picard, the trustee appointed pursuant to the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa et seq. Because these motions raise identical questions of law, albeit in different combinations, the Court issues this one Memorandum Order to decide which aspects of the underlying proceedings will be withdrawn, and which not. In large part, the Court relies on the reasoning set forth in its opinion in Picard v. Flinn Inv., LLC, 2011 WL 5921544 (S.D.N.Y. Nov. 28, 2011), which withdrew the reference in still other adversarial proceedings in the underlying bankruptcy of Bernard L. Madoff Investment Securities ("Madoff Securities").

District courts have original jurisdiction over bankruptcy cases and all civil proceedings "arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334. Pursuant to 28 U.S.C. § 157(a), the district court may refer actions within its bankruptcy jurisdiction to the bankruptcy judges of the district. The Southern District of New York has a standing order that provides for automatic reference.

Notwithstanding the automatic reference, the district court may, on its own motion or that of a party, withdraw the reference, in whole or in part, in appropriate circumstances. Withdrawal is mandatory "if the 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." 28 U.S.C. § 157(d). Notwithstanding the plain language of this section, however, the Second Circuit has ruled that mandatory "[w]ithdrawal under 28 U.S.C. § 157(d) is not available merely whenever non-Bankruptcy Code federal statutes will be considered in the bankruptcy court proceeding, but is reserved for cases where substantial and material consideration of non-Bankruptcy Code federal statutes is necessary for the resolution of the proceeding." In re Ionosphere Clubs, Inc., 922 F.2d 984, 995 (2d Cir. 1990).

The defendants in these cases identify many issues that they believe require "substantial and material consideration" of non-bankruptcy federal laws regulating organizations or activities affecting interstate commerce, including important unresolved issues under SIPA itself, a statute that has both bankruptcy and non-bankruptcy aspects and purposes. See In re Bernard L. Madoff Investment Securities, 654 F.3d 229, 235 (2d Cir. 2011) ("SIPA serves dual purposes: to protect investors, and to protect the securities market as a whole."); Picard v. HSBC Bank PLC, 450 B.R. 406, 410 (S.D.N.Y. 2011). The Court considers defendants' contentions in turn.

First, Shapiro and Greenberger argue that the Court must withdraw the reference to consider whether SIPA and other securities laws alter the standard that the Trustee must meet in order to show that a defendant did not receive transfers in "good faith" under 11 U.S.C. § 548(c). Cf. In re New Times Sec. Servs., Inc., 371 F.3d 68, 87 (2d Cir. 2004) ("[A] goal of greater investor vigilance, however, is not

emphasized in the legislative history of SIPA."). In its prior decisions, the Court has found not only that this issue merits withdrawal, but also that the securities laws do in fact alter the applicable standard. See Picard v. Katz, 2011 WL 4448638, at *5 (S.D.N.Y. Sept. 27, 2011) ("Just as fraud, in the context of federal securities law, demands proof of scienter, so too 'good faith' in this context implies a lack of fraudulent intent."). Specifically, the Court has held that, because the securities laws do not ordinarily impose any duty on investors to investigate their brokers, those laws foreclose any interpretation of "good faith" that creates liability for a negligent failure to so inquire. Id. Thus, to establish a lack of "good faith" on the part of securities customers under § 548(c) in the context of a SIPA bankruptcy, the trustee must show that the customer either actually knew of the broker's fraud or "willfully blinded" himself to it.

Determining whether the different allegations in each of the Trustee's complaints plausibly suggest "willful blindness"—which has historically been one of the law's most difficult concepts—will continue to require substantial and material consideration of the securities laws. Accordingly, the Court withdraws the reference in Shapiro and Greenberger in order to address the issue of how the securities laws affect what constitutes "good faith" in each case.

Second, each of the defendants argues that § 546(e) of the Bankruptcy Code prevents the Trustee from avoiding transfers as fraudulent except under § 548(a)(1)(A) of that Code. For

substantially the reasons stated in Picard v. Flinn Inv., LLC, the Court withdraws the reference in each case in order to address this issue. Notwithstanding the Court's decision in Flinn, the Trustee continues to claim that resolution of how § 546(e) applies to these cases does not require substantial and material consideration of the securities laws. Nonetheless, the Trustee's arguments in previously withdrawn cases belie this claim. For example, in Picard v. Blumenthal, the Trustee argued that applying § 546(e) would conflict with SIPA. See Trustee's Memorandum of Law in Opposition to Blumenthal's Motion to Dismiss at 16-17, Picard v. Blumenthal, 11 Civ. 4293 (JSR). Moreover, when arguing that transfers from Madoff Securities fall outside the ambit of § 546(e) because they do not complete a securities transaction, the Trustee has referred the Court to 17 C.F.R. § 240.15c1-1, a securities regulation that defines the term "the completion of the transaction." Because the Court must consider these provisions of securities law as well as those identified in Flinn, the Court again concludes that the issue of § 546(e)'s application merits withdrawal.[1]

[1] The Trustee and SIPC argue that § 546(e) does not apply to those who allegedly knew of Madoff Securities' fraud. According to the Trustee and SIPC, such alleged "cognoscenti" could not believe that transfers from Madoff Securities settled securities transactions. Moreover, the Trustee and SIPC claim that alleged cognoscenti cannot receive any protection from securities contracts if they intended to defraud others when they entered into those contracts. Cf. In re FBN Food Service, Inc., 175 B.R. 671, 682 (Bankr. N.D. Ill. 1994) ("A document which is a clear embodiment of the intent of the parties which has the purpose or effect of defrauding creditors of the bankruptcy estate is not protected by the parol evidence rule. A transferee of fraudulently conveyed funds cannot hide behind a contract which in fact defrauds creditors."). Nonetheless, the question before the Court is not whether § 546(e) applies, but whether resolving that

Third, Greenberger, the M & B Weiss Family Limited Partnership, Shapiro, and the Elins Family Trust argue that the Trustee cannot avoid transfers that, under applicable securities laws, satisfied antecedent debts. The Court considered this issue at length in Picard v. Flinn Inv., LLC, 2011 WL 5921544 (S.D.N.Y. Nov. 28, 2011), and concluded that it merited withdrawal of the reference. For the same reasons, the Court withdraws the reference in each case in order to address this issue.[2]

Fourth, each of the defendants argues that the Supreme Court's decision in Stern v. Marshall, 131 S. Ct. 2594 (2011), prevents the bankruptcy court from finally resolving fraudulent transfer actions because resolution of such actions requires an exercise of the "judicial Power" reserved for Article III courts. For substantially the reasons stated in Flinn, the Court withdraws the reference in each case in order to address this issue.[3]

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issue will require substantial and material consideration of non-bankruptcy law, which it plainly does.

[2] In connection with his arguments regarding antecedent debt, Greenberger notes that the Trustee apparently seeks to avoid transfers that occurred beyond the relevant limitations periods. See 11 U.S.C. § 548(a)(1) (two years); N.Y. C.P.L.R. § 213 (six years). Indeed, the Trustee's complaint includes a claim against Greenberger for recovery of "all" fraudulent transfers under N.Y. C.P.L.R. §§ 203(g) & 213(8), each of which provides that, for claims such as fraud, the statute of limitations begins to run only after a plaintiff, with reasonable diligence, could have discovered certain critical facts. Nonetheless, the issue of whether the Trustee may invoke N.Y. C.P.L.R. §§ 203(g) & 213(8) to extend the relevant limitations period is separate and distinct from the issue of whether he may avoid transfers that purportedly satisfied antecedent debts, and thus the Trustee and SIPC did not address this separate issue in their opposition briefs. The Court finds that Greenberger has not properly presented this issue and declines to address it.

[3] The Elins Family Trust defendants do not argue that the question raised by

Next, Avellino argues that the Trustee cannot bring avoidance actions under SIPA because that statute permits him to do so only "[w]henever customer property is not sufficient to pay in full the claims." 15 U.S.C. § 78fff-2(c)(3). The Court considered this issue in Flinn, and found that its resolution did not require substantial and material consideration of non-bankruptcy law. For the same reasons, the Court declines to withdraw the reference in Avellino to address this issue.

Avellino further argues that the Court should withdraw the reference to determine whether the Trustee has standing to bring fraudulent transfer claims. While the Trustee had initially brought common law claims against Avellino, the parties, in light of the Court's holding in Picard v. HSBC Bank PLC, thereafter stipulated to the dismissal of those claims. See Stipulation and Order dated September 19, 2011. This stipulation mooted any issues related to the common law claims in Avellino's motion to withdraw the reference. Nonetheless, Avellino maintains that his challenge to the Trustee's

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Stern requires mandatory withdrawal, but instead that, under In re Orion Pictures Corp., 4 F.3d 1095 (2d Cir. 1993), the Court should withdraw the reference for cause. Under Orion, a court deciding whether to withdraw for cause should consider "questions of efficient use of judicial resources, delay and costs to the parties, [and] uniformity of bankruptcy administration." 4 F.3d at 1101. Because what powers the bankruptcy court has to adjudicate fraudulent transfer claims ineluctably affects considerations such as how to efficiently use judicial resources and whether bankruptcy courts can uniformly administer the relevant laws, the Court follows its approach from Flinn and withdraws the reference to consider the question of the bankruptcy court's power. Once the Court has resolved the issue of the bankruptcy court's power to adjudicate fraudulent transfer claims, it will address the arguments put forth by the Elins Family Trust defendants concerning withdrawal for cause.

standing applied not only to the common law claims, but also to the Trustee's avoidance claims.

"It is well settled that a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself." Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118 (2d Cir. 1991). While the Trustee's avoidance claims are "held by the bankrupt corporation itself" under the relevant provisions of the Bankruptcy Code, see, e.g., 11 U.S.C. § 548 ("The trustee may avoid any transfer . . . ."), Avellino argues that mere invocation of a bankruptcy statute alone does not suffice to create standing under Wagoner. Cf. In re Stanwich Financial Services Corp., 2011 WL 1331926, at *2 (Bankr. D. Conn. 2011) ("Moreover, Second Circuit Wagoner jurisprudence does not forestall, per se, the application of the rule simply because a bankruptcy trustee (or another representative of the bankruptcy estate) has invoked a statute to bring a claim."). The court in Stanwich, however, found a lack of standing only because the plaintiff sought to portray a claim brought on behalf of creditors as a fraudulent transfer claim. Id. ("The plaintiff's deletion of the phrase 'aiding-and-abetting' is a mere cosmetic change and does not alter the fact that the plaintiff continues to assert its fraudulent transfer action against Bear Stearns and Hinckley Allen (and others) on the basis that . . . they participated in the alleged scheme to defraud the debtor's creditors."). In other words, the Court found that the plaintiff could not invoke the statute as a pretext, not that

the plaintiff would lack standing to bring an avoidance claim on behalf of the estate. Simply put, Avellino has cited no case holding that a Trustee lacks standing to bring an avoidance claim on behalf of an estate. Nor has Avellino identified any persuasive reason why a court might reach that conclusion. See In re Housecraft Indus. USA, Inc., 310 F.3d 64, 71 (2d Cir. 2002) (noting that a challenge to standing would be "meritless because §§ 548 and 549 both expressly provide that the 'trustee may avoid' the fraudulent transactions described in each provision"). In the absence of such reasons, the Court concludes that resolution of this issue will require no more than simple application of existing precedent and thus does not warrant withdrawal.

For the foregoing reasons, the Court withdraws the reference of these cases to the bankruptcy court for the limited purposes of deciding: (i) whether SIPA and other securities laws alter the standard the Trustee must meet in order to show that a defendant did not receive transfers in "good faith" under 11 U.S.C. § 548(c); (ii) whether the Trustee may, consistent with non-bankruptcy law, avoid transfers that Madoff Securities purportedly made in order to satisfy antecedent debts; (iii) whether, in light of this Court's decision in Picard v. Katz, 11 U.S.C. § 546(e) applies, limiting the Trustee's ability to avoid transfers; (iv) whether, after the United States Supreme Court's recent decision in Stern v. Marshall, 131 S. Ct. 2594 (2011), final resolution of claims to avoid transfers as fraudulent requires an exercise of "judicial Power," preventing the bankruptcy

court from finally resolving such claims; and (v) whether, if the bankruptcy court cannot finally resolve the fraudulent transfer claims in this case, it has the authority to render findings of fact and conclusions of law before final resolution. In all other respects, the motions to withdraw are denied.

The parties should convene a separate conference call for each case no later than March 5, 2011 to schedule further proceedings. The Clerk of the Court is hereby ordered to close document number 1 on the docket of each case.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
February 29, 2011

1715pic1 argument

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IRVING PICARD,

Plaintiff,

v. 11 Civ. 3605 (JSR)

SAUL B. KATZ, et al.,

Defendants.

----------x

July 1, 2011
4:40 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

BAKER HOSTETLER
Attorneys for Plaintiff
BY: DAVID J. SHEEHAN
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SECURITIES INVESTOR PROTECTION CORPORATION
Attorneys for Intervenor
BY: CHRISTOPHER H. LaROSA

(Case called)

MS. WAGNER: Good afternoon, your Honor. Karen Wagner, member of the firm of Davis, Polk & Wardwell for the Katz defendants.

THE COURT: Good afternoon.

MS. SESHENS: Dana Seshens, also with Davis, Polk & Wardwell also for the Katz defendants.

THE COURT: Good afternoon.

MS. SESHENS: Good afternoon.

MR. SHEEHAN: Good afternoon, your Honor. David Sheehan with Baker Hostetler for the trustee.

THE COURT: Good afternoon.

MR. BOHORQUEZ: Good afternoon, your Honor. Fernando Bohorquez for the trustee.

THE COURT: Good afternoon.

MR. LaROSA: Christopher LaRosa for the Security Investor Protection Corporation.

THE COURT: We are here on the motion to withdraw the bankruptcy reference. Let me hear first from moving counsel.

MS. WAGNER: Thank you, your Honor.

Your Honor, we are here to withdraw the reference because the case that is pending in the bankruptcy court, the adversary proceedings, raise a number of issues that require significant interpretation of SIPA and that also require significant interpretation of how SIPA interacts with other

laws including security, state law and the bankruptcy code. So we believe withdrawal of the reference is mandatory.

THE COURT: This mostly comes up by way of your defenses.

MS. WAGNER: Correct.

THE COURT: Does that matter?

MS. WAGNER: I don't think it matters at all, your Honor. I think the -- we are saying that there is no basis for the adversary proceedings because the avoidance laws cannot be applied in the way that the trustee is seeking to apply them and therefore we believe withdrawal of the reference is mandated now because all of the papers are before you. This might be an issue, I think it is one reason we didn't immediately move to withdraw the reference. There might be an issue if the only thing pending in front of you was a complaint for awardance. But you now have pending before you a completed motion to dismiss and, indeed, for summary judgment dismissing the complaint, which lays out all of the legal arguments related to that complaint. So, I do not think that that is relevant. I think this case is absolutely ripe and it is appropriate to consider all of these issues at this time.

THE COURT: Go ahead.

MS. WAGNER: Thank you, your Honor.

As your Honor is well aware, the issue before the Court right now is very narrow, it is due to legal questions

presented by the underlying motion require that the presiding Judge engage in a significant interpretation of federal laws apart from the bankruptcy statute, Title 11 of the U.S. Code. We do contend, as I said, that they certainly do.

The trustee is seeking a billion dollars from the plaintiffs which constitute sums withdrawn from their brokerage accounts over more than two decades. These payments, when they were made, were protected by state and federal laws that are well established and that govern the relationship between a broker and its customer and there would have been no question that no SIPA case commenced, but these transfers were entirely legally valid and appropriate and, indeed, had a customer at any time prior to the filing of the SIPA case, had the broker refused to make these payments, the customer could have gone to a Court and gotten a judgment requiring the broker to make the payments.

THE COURT: So, what are you saying, in part, as I read your papers, is that the trustee is seeking to impose on you, after the fact, duties that you would not have had at the time of the underlying events and that his purported basis for doing so is the bankruptcy law but it places, in your view, that law in conflict with the laws that actually created your duties at the time of the events.

MS. WAGNER: That's absolutely true, your Honor. And we further would argue that the laws that govern at the time

were such that when the payments were made, they discharged antecedent debt, to use the terms that are used in the bankruptcy and SIPA context. They discharged antecedent debt and I think we are very definitely arguing that you cannot have avoidance of any transfer that does discharge a valid antecedent debt. So, that is another of our arguments.

And, of course, finally we are arguing that a provision of the bankruptcy code, Section 546E, also limits very strongly the kinds of avoidance actions that can be brought in this case. That's correct, your Honor. But, our principal argument certainly is that the laws that were in effect at the time that all of this occurred, the laws were not SIPA, obviously, and SIPA, we argue, does not have any retroactive effect.

The trustee is arguing that because this is a SIPA case -- and I think he is arguing that it is because it is a Ponzi scheme that commenced, was the cause for the trigger of this SIPA proceeding -- that none of these laws can be considered to apply anymore, that he is permitted to go back in time, redo everything under a scheme which is unprecedented in any court before this, and he can reallocate people's rights and he can take away the antecedent debt defense because he is going to recalculate what that debt was at the time when it was discharged and on that basis he can engage in this effort to recalibrate everybody's rights.

Whether or not he can do that of course is the question that will be before the Court that hears this. The question before your Honor is does this raise a huge question of interpreting a law other than Title 11. And of course we argue that it does. Trustee's argument is based principally, I believe, on the provisions in SIPA that govern net equity and customer. Those are definitions that he uses to contend that he can in fact go back and recalculate all these claims so that he can even out customers losses over time and to do that by recovering from some people to pay other people. This is an unprecedented interpretation of SIPA. By itself I think it would mandate withdrawal.

THE COURT: I don't think he is saying quite that.

What he is saying, at least to the extent that I was able to read his 373-page complaint without falling asleep but I do admire his Tolstoy-like rhetoric, was that your clients knew from if not the beginning, certainly early on during their 25-year relationship with the Madoff company, that this was a Ponzi scheme and because your clients had, if you will, the inside track, they were reasonably comfortable in going along with the scheme figuring they would be the most likely not to be left holding the bag when the scheme came tumbling down. Of course, as it turns out, you lost what, a half billion dollars or something like that. But I'm not sure that's quite the same as your theory of let's redistribute the wealth.

MS. WAGNER: Your Honor, first of all, of course we take issue with all of that. Secondly --

THE COURT: No, I understand. These are just allegations.

MS. WAGNER: Absolutely.

Secondly, I think even the trustee doesn't allege exactly that. He alleges that we should have known starting at some point in --

THE COURT: He says you were willfully blind.

MS. WAGNER: He does say that.

THE COURT: It is not quite should have known and it is not quite did know, it is in between.

MS. WAGNER: That's correct, your Honor. And we have disputed all of that. But even if that were -- if there were some world in which that were true, there is still a question that is raised on this motion for summary judgment which is what law applies to that analysis. Is the law the law of the bankruptcy code that says according to the trustee, first of all, I can avoid this debt for, quote unquote, fictitious profits; and secondly, I can avoid it all because these people should have known.

What is the law that governs that? We argue that at the time these transfers occurred it was the securities laws that governed it and the securities laws do not impose upon a customer any obligation to investigate his broker. In fact,

the securities laws are quite the opposite, they protect the customer. And I think fairly read --

THE COURT: Are you saying that under the securities laws one sued by a customer could not assert an in pari delicto defense based on willful blindness?

MS. WAGNER: Your Honor, I think if you are positing that the customer would sue the broker for returning the securities on his statement but the broker would say that you are in pari delicto.

THE COURT: You knew or willfully blinded yourself to what was going on in our Ponzi scheme, therefore --

MS. WAGNER: Your Honor, I think in that situation probably the law would leave everybody where they are, I think, at that point. But, if that were the situation that was presented, I do think what they would have to prove is that the customer, when the customer made the investment with the broker, the customer knew at that point that there was a Ponzi scheme going on. That is not the allegation being made here.

The avoidance principles depend upon the transfer itself being avoidable and we are arguing that that transfer is not avoidable on the good faith basis alleged in the bankruptcy code, it has to be -- they have to prove that the customer knew at the time of the investment that Madoff was engaged in a Ponzi scheme, knew that they were involving themselves in a fraudulent scheme, and if they can prove that the customer was

therefore complicit then maybe there is an argument that there was no antecedent debt to back up the transfer had they got the money.

This is all governed by the bankruptcy code. The complaint, it is an avoidance complaint under the bankruptcy code and their position is, in the complaint, that the transfers were taken in bad faith because we should have known or were willfully blind that the transfers were transfers of other people's money. Our argument is you can't -- that is not a valid analysis where the transfers are from a broker to a customer based on a regularly issued statement. At that point you have to prove that the customer knew when the customer put in the money that the broker was engaged in a fraudulent scheme, so the customer is effectively --

THE COURT: There is a duty imposed.

MS. WAGNER: Correct.

THE COURT: And that's where you say the conflict between the alleged interpretation of the bankruptcy law invoked by the trustee and your interpretation of what your duty was under the securities laws, that's the issue that you think needs to be resolved by an Article 3 Court.

MS. WAGNER: There are several parts of that package but, yes, that is fundamentally the issue. Yes, your Honor.

THE COURT: Let me hear from your adversary. Thank you.

MS. WAGNER: Thank you, your Honor.

MR. SHEEHAN: Your Honor, not surprisingly, we disagree. I don't think there is an iota of an issue that requires Article 3 firepower here. Indeed, what we have before your Honor is a classic case that is brought every day in the bankruptcy court resolved by a bankruptcy judge involving issues that he deals with every day including antecedent debt which is part and parcel of every proof of claim in front of a judge that he deals with every day.

THE COURT: Well, let me ask you this: Your complaint substantially asserts a theory of willful blindness, yes?

MR. SHEEHAN: Yes, your Honor.

THE COURT: And willful blindness is a function, in part, of what there was a duty to look at. For example, in all the great accounting cases involving willful blindness the theory of the law is that an accountant has a duty to probe beyond what the average person would be probing and therefore if the accountant fails, purposefully or consciously fails to look for stuff that the average person would have no reason to look for but which an accountant has a duty to look for, then the accountant is engaged in willful blindness and may be liable in the same way as an intentional participant.

So, in this case is there not an issue of what was the duty to look of a customer situated in the position of the defendants here, and isn't that a function of non-bankruptcy

law?

MR. SHEEHAN: Absolutely not.

First of all, the accountant analogy --

THE COURT: I am glad it is absolutely not as opposed to just no.

MR. SHEEHAN: I suspect, your Honor, that it sounded a little bit overstated there but I can't react to it more strongly, your analogy than that, because we are not talking about accountants here or the decades and decades of law evolved through statute and decisional law surrounding accountant liability has no application here to begin with.

Secondly --

THE COURT: No, no. The analogy was designed to raise the question of whether willful blindness, by its very nature, can only be determined if one knows what duty there was, if any, to look.

MR. SHEEHAN: Yes.

THE COURT: Willful blindness means turning away from -- purposefully turning away from what one should have been looking at. And if the law, for example, was in a given situation then one had no duty to look at anything. Then there could never, in that hypothetical, be any willful blindness theory.

So, doesn't -- don't you have to determine, in any willful blindness case, what law determines what you need --

what the duty is to look?

MR. SHEEHAN: That was my second point.

THE COURT: Yes.

MR. SHEEHAN: I believe that you are absolutely right and there is a body of law, it is well-established, been in force for decades called the Bankruptcy Law. It is now embodied in Bankruptcy Code that has within it the law that provides that if you, as a creditor, operated on inquiry notice that you, during the course of the existence -- pre-bankruptcy the existence of that company had reason to know that something untoward was occurring without necessarily knowing exactly what it was, that you stand in a different position vis-a-vis the body of innocent creditors who had no reason to know, no inquiry notice. That is the body of law which is why I said at the outset we are in the bankruptcy world here, we are dealing with bankruptcy law and the bankruptcy code and these issues are dealt with there every day. None of this requires your Honor to get involved using Article 3 power to make that decision. It is done on a routine basis.

If you go through each and every one of the elements raised by my adversary whether it is antecedent debt, as you suggested to, you're dealt with every day, part and parcel of what the bankruptcy court does in determining what? A proof of claim. A proof of claim is the quintessential -- it is the essence of what goes on in the bankruptcy court.

What we have here is our adversaries file proofs of claim, we file adversary proceedings against them suggesting, no, you are not entitled under 502D of the Bankruptcy Code to get paid. Why? Because two reasons. One, under certain sections of the code you have received fictitious profits in the context of a Ponzi scheme other people's money. You cannot keep it, you never gave fair value. Another unique bankruptcy code law.

Then, beyond that, we say you acted in bad faith. What does bad faith mean in a bankruptcy context? You are in inquiry notice. The litany of things in the perhaps overly long complaint but we think it is just right, outlines what was exactly going on, what was going on over decades that puts those folks on notice that makes them stand out differently than the other body of creditors.

THE COURT: Is there not a difference, now, since you are suggesting, between a situation where a creditor says I want to be paid money that I've not previously been paid and you say, well, under the bankruptcy law the remaining assets of the debtor have to be apportioned taking account of all the things you just mentioned, so you may be out of luck.

MR. SHEEHAN: Yes.

THE COURT: Isn't that very different from a situation where you say we are going to go back 25 years and claw back from you monies that you got years and years ago on a theory

that because the happenstance occurred that the person who paid you ultimately went into bankruptcy decades later, the bankruptcy standard governs whether we can get back from you or not the money you were paid as opposed to what the law would have been if there had been no bankruptcy decades later.

Isn't that a very different question?

MR. SHEEHAN: I may have lost the thread of your question there, your Honor.

THE COURT: Well, my fault in making it too wordy.

What I am trying to suggest is it seems to me there might well be a difference in saying that if a debtor goes into bankruptcy and you want to get money out of the estate of that debtor, you have to meet the requirements of the bankruptcy law as opposed to saying we, the trustee, can go back and get from you a billion dollars for conduct that you took years before there was any remote possibility or likelihood of bankruptcy and yet apply the bankruptcy law to your conduct post facto.

MR. SHEEHAN: I understand the distinction, your Honor, and I do see those as two different situations, but I still think in the context of what we are arguing here today, the bankruptcy code controls both of those situations because the bankruptcy code anticipates the latter illustration. It anticipates that there can be pre-petition conduct that is going on within an organization that would give you inquiry notice that there is something untoward occurring and the

bankruptcy code gives the authority to the trustee to look back, to look back on that conduct and say, look, if we are going to have the equality of distribution of these assets those who are seeking relief like the first guy in your illustration, the guy who had been --

THE COURT: It is not equality of distribution of the assets, it is equality of distribution of sums that you are seeking to recover.

MR. SHEEHAN: Well, yes and no. I think you're right but I think I am too. I think we both are.

The reason I said equality of distribution is this --

THE COURT: Well, that's comforting.

MR. SHEEHAN: I feel good about it. I certainly do.

What I meant by that, your Honor, is this: Is that the estate happens, lights go out. Everybody is standing still looking around, where do we stand vis-a-vis this estate? The trustee comes in and what is his job? His job, which has gone on for decades, this is not a new unprecedented approach by a trustee, this is exactly what trustees have done going back, as we said to the Cunningham case in 1924; they take a look at it and they say, okay, we have a vast body of people all seeking to partake in the estate that has now been created by a function of the bankruptcy law. He then has to, or she has to look at it and say, okay, we have to evaluate these claims and then part of evaluating it is are there distinctions between

them. If all that was doing was during the course of bankruptcy -- and he is different than perhaps somebody who is perhaps dealing with it and was taking money out during a pre-satisfaction and that person is on an unequal footing vis-a-vis the estate frozen in period of time they're ahead of the game, they got more money than they should have. That's what the code is saying. That's what the bankruptcy law is saying.

So, the trustee creates this pool of money and then redistributes it. That doesn't mean that, for example, in the Katz/Wilpon situation where a claim has been filed and it is a net loser claim that ultimately Katz/Wilpon will participate in the distribution, they will, upon resolution of this litigation because it is all within the context, just as Chief justice Roberts taught us in Stern v. Marshall, when you in fact have the resolution of the claim resolving all of their issues and it all gets resolved at once, where does it belong? In the bankruptcy court. It is not before an Article 3 Judge. There are no such issues here before your Honor today.

What is 546E but a bankruptcy code provision. What did we learn the other day from the Enron decision? Did anyone say that justice Gonzalez did not have jurisdiction, that he went beyond his powers. Of course not. He didn't like it, they reversed it. I think Judge Koeltl was right, not the majority, but that's my opinion. The point is, at the end of

the day they didn't say there was no jurisdiction. Why? Because it was the bankruptcy code. And Judge Gonzalez had every right and did the right thing and he decided that, ultimately got reversed but he was in the right ballpark, he had jurisdiction.

THE COURT: Was that issue raised?

MR. SHEEHAN: It is raised here that that is an issue.

THE COURT: No, no. I'm saying in the Second Circuit decision that you are referencing, the Enron decision, was the issue of whether Judge Gonzalez had jurisdiction and that there should have been mandatory withdrawal to a district court? I don't recall that issue being raised.

MR. SHEEHAN: And of course it wasn't.

THE COURT: So, what is the relevance?

MR. SHEEHAN: Because it would be inappropriate to do so.

THE COURT: No, no, no. This is a funny argument.

What you are saying is that a Court, in this case the Second Circuit, didn't decide an issue that was never presented to them. Yes, indeed. And in fact that's their job not to decide issues that are not presented to them except in the most extraordinary circumstances.

I don't see what the relevance of that case is.

MR. SHEEHAN: I think it is only relevant in this sense: That it represents traditionally whether it has been

dealt with in 546E. There is no change, there is no unprecedented nature of a 546E application. It represents only that. I'm not suggesting otherwise, that if your Honor looks back at the history of 546E and the cases that dealt with that, they've never said that that belongs not -- and your Honor may say well, it was never raised and the reason it was never raised is because it appropriately belongs -- belongs with the bankruptcy judge. He resolves that issue. Yes, it is appealed, yes, it is reviewed, but there is no basis for suggesting that somehow this requires the presence of five --

THE COURT: I still find it, forgive me, a funny argument that because an issue has -- your argument essentially because an issue has not been raised previously therefore the issue is without merit. On that theory, of course, there would never be any changes in the law whatsoever.

MR. SHEEHAN: I understand that, your Honor, and perhaps I am making more of it than I should and your Honor's admonition is well understood. I was simply suggesting that in fact there is no basis -- let me just abandon that, since it is clearly unappealing.

The thing that I was trying to get through to your Honor is this, is that 546E is part of the code. It gets resolved on a daily basis by bankruptcy judges.

THE COURT: That I do understand.

MR. SHEEHAN: And there is no basis here for

suggesting that that somehow reaches out and requires Article 3 firepower. It just doesn't. And the same thing is true with the other issues that are raised. Think about it. What was being argued to your Honor here copiously in the briefs is Article 8 of the UCC. Last time I looked that does not trigger 157 D firepower. It just doesn't. That's a state law issue.

And, by the way, the very state law, interestingly enough, anticipate a bankruptcy filing. And what does that very state law tell you?

THE COURT: You mean the debtor/creditor law?

MR. SHEEHAN: No, not Article 8 itself.

THE COURT: Article 8 of the UCC.

MR. SHEEHAN: Right, suggest -- doesn't suggest, it states -- all these rules in there, antecedent debt, what the broker owes based on the statement, all of that gets trumped -- trumped -- by the filing of the SIPA proceeding and SIPA takes over and controls. Two reasons, one, it says so; secondly, supremacy clause.

So, is that, again, the kind of issue that requires the Article 3 Judge to step in and resolve? We suggest not. It is something that clearly was dealt with and very readily so by Judge Lifland along with the antecedent debt issues which he dealt with. All of those things are things that are dealt with, traditionally, by the Court every day. These are not unique issues, they're quite frankly, respectfully, we can call

them core but another term can be run of the mill. They're there every day and every bankruptcy judge deals with them and nothing that has been raised here changes any of that other than to suggest, in sort of a conclusory fashion, it is unprecedented. It is novel. In what sense is it novel? It is not novel at all. It is the kind of thing, as I said more than once and I am repeating myself, are dealt with every day in the bankruptcy court.

THE COURT: You are saying that all they're saying, in your view, is that because it is big bucks it is novel and that doesn't -- that's a distinction without difference.

MR. SHEEHAN: No, I don't think it is just big bucks, your Honor. I think -- and I value my colleague's opinion and their positions here, I understand what they're saying. I think what they're trying to suggest, your Honor, is that somehow because there is a SIPA statute involved that that somehow creates a federal question issue for your Honor to reach out and deal with. And that might be so in another context such as you recently decided in HSBC which they referred to.

THE COURT: There is no doubt in my mind that this is a very different situation from HSBC and that, to be frank, in my view, is an easy case for withdrawal. This is a much closer case. So, I agree with you that that involved issues that are not remotely triggered here.

MR. SHEEHAN: And, your Honor, obviously I'm advocating my position that it is beyond remote, they're not even in the ballpark. No pun intended.

At the end of the day what we are looking at here, and as your Honor studies this and looks at it, and I know you will, each of those issues raised by --

THE COURT: I think that is a terrible slight to a now winning team.

MR. SHEEHAN: 4 out of 5, they're looking pretty good, Judge. They're looking pretty good.

But, the point is that as we study the law with regard to mandatory withdrawal of the reference -- and that is what we are talking about here, we are talking about mandatory withdrawal of the reference -- and so I get it right, I'm going to treat and I am reading from the Ionosphere case we are talking about, the Ionosphere decision in the Second Circuit, it says that it should be construed narrowly to begin with. And I don't think there is anything here that would suggest you should go beyond that, and that mandatory material consideration of non-bankruptcy federal issues that are necessary for resolution, I submit to your Honor as your Honor canvasses these issues and looks at these issues as I just have done, I won't repeat it, none of those reach that level, reach that criteria that require you to reach out and bring them to you. I believe that all of those issues, and many of them as

we have outlined to your Honor, and I don't want to get into that part of the brief, have already been dealt with. Many of these issues have been dealt with in the context of the net equity dispute. Clearly in the net equity dispute those issues of antecedent debt, state law, UCC, all were argued before Judge Lifland, before the Second Circuit. All of those issues were dealt with there because they're appropriately dealt with in that context. There is no need to then go to this Court and suggest that there is a need to review them again.

THE COURT: All right. Thank you very much.

MR. SHEEHAN: Thank you.

THE COURT: Did counsel for SiPC want to say anything?

MR. LaROSA: Just a couple of comments, your Honor.

First of all, it seems to me that there may actually be two issues that are raised here, not one. The first issue is whether or not, as we see it whether or not the existence of whether or not the account balances that are reflected on fraudulent account statements issued as part of the Ponzi scheme can qualify as antecedent debt for purposes of the bankruptcy code and that's clearly a bankruptcy code question.

The second question is the one that wasn't much discussed in the papers but one which I think your Honor has raised today which is what significance, if any, does a pre liquidation duty or lack of duty stemming from some non-bankruptcy securities law have for purposes of the

bankruptcy code.

THE COURT: Yes. And you correctly state -- it was interesting to me that although this was raised by the movants, neither the movants nor the respondents spent as much time on that issue as on the other issues but it does seem to me to be at least a colorable issue and that's why I wanted to hear what you had to say to that.

MR. LaROSA: We think perhaps it is a colorable issue but we think if it is, it is a colorable issue under the bankruptcy code.

The question is, for example, assuming arguendo that there were no duty, what effect, if any, would that have under the avoidance provisions. That would be the issue. And so it is really --

THE COURT: Well, I am looking, for example, at what the Second Circuit said in In Re: New Times Security Services, Inc., 371 F.3d 68, (2d Cir. 2004) that is referenced in the papers, "A goal of greater investor diligence is not emphasized in the legislative history of SIPA. Instead, the drafters' emphasis was on promoting investor confidence in the securities market and protecting broker/dealer customers."

So, one reading of that, and certainly not self-evident but one reading of that would be that Congress envisioned that SIPA would not be used to impose the kind of duty that allegedly would trigger the willful blindness

avoidance of duty that's asserted here in the complaint. And I guess my question to you is, assuming that's a reasonable interpretation of SIPA and of what the Second Circuit said about SIPA but assuming that it is by no means a slam dunk interpretation given that it wasn't exactly what was being or even in the same context when it was raised in the New Times Securities case as it is in this case, isn't the determination of what duty or not there is which is the premise on which any willful blindness deviation from that duty would fall a question of non-bankruptcy law and important question of non-bankruptcy law, a non-obvious question of non-bankruptcy law that needs to be resolved by the District Court?

(Continued on next page)

MR. LA ROSA: Your Honor, that case came up in the context of whether or not to allow a customer claim, and that's a very different scenario --

THE COURT: I agree.

MR. LA ROSA: -- than the one we're involved in here.

Obviously SIPA is a remedial statute. While the customers provisions do have to be construed narrowly, and we're not even sure the statute is properly applied, it is a remedial statute and I think the feeling was in that case that one shouldn't penalize claimants too much or require too much of them in making a decision about whether or not to allow the claims. That's a totally different context than what we're dealing with here, which is a situation where someone has received essentially transfers of other people's money.

THE COURT: What law do you say --

MR. LA ROSA: And extends the Bankruptcy Code, by the way. SIPA incorporates by reference --

THE COURT: Yes. So what law do you say determines the duty of inquiry, if any, of a customer of a securities brokerage firm of the kind that Mr. Madoff had here?

MR. LA ROSA: In the context of the causes of action brought by the trustee?

THE COURT: Yes.

MR. LA ROSA: It would be the avoidance provisions of the Bankruptcy Code.

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THE COURT: I must say I find that very difficult to understand, and forgive me, I certainly want to hear your response.

MR. LA ROSA: Sure.

THE COURT: How can it be that the law governing someone's duty to inquire at a given moment in time is determined not by what the governing laws in place at that moment in time were as to what in the normal course would be that person's duty, but by the happenstance that, decades later, the entity involved went into bankruptcy?

MR. LA ROSA: That's the nature of bankruptcy law, your Honor.

THE COURT: I'm not sure I agree with that. That is clearly the nature of bankruptcy law to the extent that a creditor is making claims for what the creditor has not previously received. It's clearly the nature of bankruptcy law with respect to preferences within the 90-day period. I'm not so sure that that's the established law governing duty of inquiry with respect to claims made by the trustee for events that occurred 20 years earlier. What's your authority on that?

MR. LA ROSA: It would be the Bankruptcy Code itself. By the way, your Honor --

THE COURT: Where do you find that in the Bankruptcy Code?

MR. LA ROSA: Let me point your Honor to a case

decided about four years ago by the Bankruptcy Court in this district. It's called In re Bayou Group LLC, 362 B.R. 624. It's a Ponzi scheme, of course, very much like this case. It was a case involving fictitious account statements that were issued, very much like this case, that showed fictitious account balances, very much like this case, and, of course, the trustee attempted to, in that case, recover redemption payments that were made on the basis of the balances shown in these fraudulent account statements, and there was a motion to dismiss filed.

THE COURT: Was it a willful blindness case?

MR. LA ROSA: The words willful blindness were not used.

THE COURT: Because I think it's totally different. You don't need the bankruptcy law at all if you're dealing with a coconspirator or thief. That law, I think, goes back about 500 years. But willful blindness, by contrast, has been one of the most controversial areas in the law, both bankruptcywise and nonbankruptcywise, for at least the last four decades.

MR. LA ROSA: I guess my point, your Honor, is what the court decided in that case was not to give effect to the balances shown on these account statements despite the fact that it's quite possible that the recipients of these redemption payments could have enforced what purported to be their right to the assets shown on those statements prior to

the commencement of the bankruptcy. In other words, the bankruptcy law, in effect, vitiated a prior right that existed prior to the bankruptcy. And that doesn't seem to me to be dissimilar to what's going on here. In fact, what we're saying is the bankruptcy law now determines whether or not you can get away with willful blindness when you could before.

THE COURT: I understand that argument. I think that is different from saying that the bankruptcy law determines what is willful blindness in a particular context. That is, I think, not inherently a function of the bankruptcy law, at least I haven't yet been persuaded it is. It's one thing to say if you were in fact willfully blind under whatever the appropriate legal standard was, then you may owe money to the bankruptcy trustee. It's quite something else to say, And we're going to determine after the fact, so to speak, under the bankruptcy law, what the definition of willful blindness in any given context is oblivious to any other federal laws that may set the standard.

MR. LA ROSA: I don't think it would be oblivious to, your Honor. I think it would merely be, in effect, the Bankruptcy Code ultimately sort of resolves the issue. It might be, for example, that they would present evidence and make the argument that they had no duty under preliquidation law and that should be taken into account in determining, for example, whether or not they were willfully blind for purposes

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of the application of the avoidance provisions, but it wouldn't be determinative. It would be bankruptcy law that would be determinative. It would be, in a sense, a piece of evidence that they would offer and an argument that they would make, but it wouldn't settle the matter.

THE COURT: Thank you very much.

Let me hear in rebuttal from counsel for the defendants.

MS. WAGNER: Thank you, your Honor.

I think that this argument has resulted in a focus on a number of things that are very important to this discussion, a key one being we are not here before your Honor to discuss the merits of our proof of claim in this bankruptcy. That is an issue which is in fact in front of the Second Circuit, and that is an extremely different issue, as your Honor has pointed out, from how you judge the actions of a party 20 years before a SIPC proceeding was filed, and those are extremely different issues. I think that it is impossible to say, especially when you're dealing with a regulated broker-dealer whose customers have the benefits of the federal securities laws, it's impossible to say, or at least I should say an Article III judge should decide whether the protections of the federal securities laws somehow are vitiated by the ultimate filing of a SIPC proceeding. That seems to me very unlikely, but it is what is being presented to you today.

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If I could just address a couple of other things that were discussed. First of all, the 546(e) issue in Enron. There's no question that the issue in Enron was does 546(e) cover redemptions on commercial paper. That is definitely a bankruptcy question because it's a 546(e) is part of the Bankruptcy Code. That is not issue that is involved in this case. The issue in this case is: In a SIPA case, does 546(e) apply, and the position that has been taken is it does not apply because it is not consistent with what we are trying to achieve here, which is equality. So that is clearly a question that is withdrawable because that has SIPA and the Bankruptcy Code at odds. So I believe that is clearly withdrawable and it's very different from what was decided in Enron.

In the Ivy case, Ivy did not involve a registered broker-dealer. The redemptions there were equity redemptions from a hedge fund, a whole different body of law. We are very focused here on the fact that this is a registered broker-dealer who issued regular statements who said he was taking money from customers in order to buy Blue Chip securities. He sent statements to say that's what he had done. There's no other way for a customer to determine what he's done. He then sold them. There were cash in the accounts. People took the cash out. This is fundamental to the whole system of broker-dealer regulations. It would be a shock to the system to be told, Maybe, one day if we find out your

broker was engaged in a Ponzi scheme, all of this is going to come back to haunt you. All of the money you put in there you're going to have to give back. It's a complete conflict between the securities laws and the Bankruptcy Code, your Honor.

Finally, on the UCC and supremacy clause, if there were a conflict between SIPA and the UCC, clearly the notion would come into play. But there is no conflict, and there is surely no conflict found in the UCC. The UCC says if there is a bankruptcy, the bankruptcy will determine distribution on the claims. It certainly does not say that the UCC has nothing more TO DO with what the claims are. In fact, in normal bankruptcies, the existence and value of the claim are determined by nonbankruptcy law. The allowance and division are determined by bankruptcy law. That is normally what happens and that is what we're saying should happen in this case. But, in any event, we're not asking to have our claims allowed; we're asking to have a huge lawsuit against us dismissed on the grounds that we are governed by the securities laws, and the Bankruptcy Code cannot reach back to SIPA in particular. It's not the bankruptcy law, it's SIPA changing the bankruptcy law.

Your Honor, just one final point. As you heard, I think, in the trustee's argument, he's objecting to equality, and he cites to the Supreme Court Cunningham case. Equality

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and Cunningham are preference matters. Preference law in the Bankruptcy Code is something that has nothing to do with knowledge or intent. It is an absolute statute. If you get something more than I got during the 90 days preceding bankruptcy, you have to give it back, and that's all there is to it. It doesn't matter what either of us knew about anything, but that's a 90-day period. That's not a 25-year period.

So what my colleague is arguing here is is that somehow the 90 days should be stretched to be 25 years. And what's the basis for that? That's SIPA. He's saying SIPA allows him to do that, so again that's a huge interpretation of SIPA that I think merits withdrawal of the reference.

THE COURT: Thank you all for this very helpful argument.

I have thought a lot about this issue even before this argument, and it seems to me that part of what we have here is, in effect, one of the dangers that you sometimes have when you have specialized courts dealing with only one particular area of federal law, and that is something of a tunnel vision. It does not seem to me to be self-evident at all that the bankruptcy law sets the parameters of the duty of inquiry that a customer in a securities brokerage investment situation has. The area of willful blindness or the concept of doctrine of willful blindness, which is the premise of the voluminous

complaint in this action has been among the most difficult and controversial areas of the law for at least half a century. Judges as great as Learned Hand and Henry Friendly have struggled with this concept, which is somewhat between negligence and purposefulness but where in between is a function of what is the duty of inquiry, and the duty of inquiry varies from situation to situation but also from legal context to legal context.

Here, the movants have made, in the Court's view, a more than plausible argument that the duty of inquiry of their clients in a securities context is governed by securities law and cannot be overridden after the fact by the bankruptcy law or by the interpretation of a nonbankruptcy law, SIPA, being asserted by the trustee. Now, they may be totally wrong about that. But it seems to me on its face to raise a highly material issue of interpretation not just of bankruptcy law, which is for the Bankruptcy Court in the first instance, but of nonbankruptcy law, securities law of SIPA, and indeed, there are even intimations, though not raised by the movants, of constitutional issues.

So I think that the Court, though finding this not nearly as easy a situation as the previous ones I've had to deal with involving the trustee, is obliged and mandated to withdraw the reference, not forever, but to make a determination of the threshold issues, and I include in that

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all three issues raised by the movants. I have considered the other objections to withdrawal raised by the trustee, such as untimeliness and waiver and the like, and I find them, to be frank, entirely without merit. The difficult issue here was the one that has been the source of this excellent argument from all parties here this afternoon. But in the end, I think withdrawal is mandated.

So let me ask counsel for the movants when you can submit your brief on the three issues that this Court will now consider.

MS. WAGNER: Your Honor, the briefing on the underlying motion's all done already, so you have it all. But if you would like us to submit, you know, take out the parts of it that --

THE COURT: I think there has to be a formal motion here of some sort. This is, in effect, a motion to dismiss, is it not?

MS. WAGNER: I guess my conception of it, your Honor, was that the motion that is already pending and briefed is now before you.

THE COURT: I'm happy to take it on those terms.

Let me ask counsel for the trustee and SIPA. Do you want to put in further responses, or do you want the Court to decide this on the papers you've submitted?

MR. SHEEHAN: I would like to do a further submission

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based on your Honor's comments this afternoon.

THE COURT: Very good. When would you like to do that?

MR. SHEEHAN: Two, three weeks, whatever. I don't know. Whatever your Honor thinks is appropriate.

THE COURT: That's fine. I'm anxious to move these things along not only because there's the need to have threshold issues resolved promptly but also because if I resolve them negatively to the movants, I can't wait to send the case back to Judge Lifland to get it off my calendar. Three weeks would be fine.

MR. SHEEHAN: I might have spoken too quickly, but I'll try to work on it. I was thinking here, reflecting on what your Honor said about these issues being troubling to Judges Friendly and Hand, whether three weeks will be enough time. But we'll work with three weeks.

THE COURT: Okay. That would be July 22.

Does that work for SIPA as well?

MR. LA ROSA: It does, and we would reserve the right to file something. We may or may not. But we would reserve the opportunity.

THE COURT: Very good. How about a response from the movants?

MS. WAGNER: We would like to respond, your Honor. It's sort of the in the middle of vacation period, but I don't

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want to hold you up.

THE COURT: How many lawyers are there at Davis Polk?

MS. WAGNER: There are a lot.

THE COURT: I bet they're not all taking vacation.

MS. WAGNER: We wish we were.

Your Honor, I would like three weeks.

Your Honor, if I may.

THE COURT: Just let me get the schedule set. So that would be August 12 and we will have oral argument on August 19 at 4 p.m.

MS. WAGNER: Your Honor, that's what I was going to ask you. There is argument set on this motion in the Bankruptcy Court. So I'm assuming that is, you've got it now before you.

THE COURT: I'm staying everything --

MS. WAGNER: Exactly.

THE COURT: -- in the Bankruptcy Court. When was the argument set?

MS. WAGNER: August 17.

THE COURT: I can't guarantee this, of course, but my tendency is to try to get quick decisions. So it won't delay things, and assuming I find in favor of your adversary, it won't delay things very long in the Bankruptcy Court, in any event.

MS. WAGNER: It won't.

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THE COURT: Anyway, yes, everything is stayed in the Bankruptcy Court until I decide this motion.

MS. WAGNER: Thank you, your Honor.

THE COURT: All right. Anything else we need to take up?

MR. SHEEHAN: No. Thank you, Judge.

THE COURT: Thanks so much.

(Proceedings adjourned)

Exhibit 6

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff, Plaintiff, v. ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.); and ABN AMRO BANK (SWITZERLAND) AG (f/k/a ABN AMRO BANK (SCHWEIZ)), Defendants.	Adv. Pro. No. 11-02760 (BRL) **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW OF ABN AMRO BANK N.V. (PRESENTLY KNOWN AS THE ROYAL BANK OF SCOTLAND, N.V.) IN SUPPORT OF ITS MOTION TO WITHDRAW THE BANKRUPTCY COURT REFERENCE

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STATUTES

Defendant ABN AMRO Bank N.V., presently known as The Royal Bank of Scotland, N.V. ("RBS/ABN"),[1] submits this memorandum of law in support of its motion for an order pursuant to 28 U.S.C. § 157(d) and Rule 5011 of the Federal Rules of Bankruptcy Procedure withdrawing the reference of this action to the United States Bankruptcy Court for the Southern District of New York.

PRELIMINARY STATEMENT

This adversary proceeding arises out of the Ponzi scheme carried out by Bernard L. Madoff through Bernard L. Madoff Investment Securities LLC ("BLMIS"). RBS/ABN was not a customer of BLMIS and had no relationship with Bernard Madoff or BLMIS, but was a Dutch bank that is alleged to have received transfers from Harley International (Cayman) Limited ("Harley"), a Cayman Islands company.

The Complaint's claims are fundamentally flawed and the Trustee is not entitled to recover from RBS/ABN any of the alleged transfers, which are entirely extraterritorial in nature. Resolution of the Trustee's claims, however, will require substantial and material interpretation of non-bankruptcy federal law, including the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa, et seq., pursuant to which the Trustee initiated this action, other federal securities laws, and constitutional questions, all of which must be determined by an Article III court. Withdrawal of the reference is mandatory under these circumstances, and RBS/ABN respectfully requests that the reference to the Bankruptcy Court be withdrawn for the following reasons.

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[1] ABN AMRO Bank (Switzerland) AG (f/k/a ABN AMRO Bank (Schweiz)) ("ABN Switzerland") is also a defendant in this action. Defendant RBS/ABN is not an affiliate of ABN Switzerland, and ABN Switzerland, which is represented by different counsel in this matter, is not a party to this motion.

First, resolution of the Trustee's purported claims will require substantial and material interpretation of SIPA in order properly to determine the interaction between SIPA and Section 546(e) of the Bankruptcy Code, which protects transfers like those from BLMIS to Harley that are made "in connection with a securities contract." The United States District Court for the Southern District of New York has already determined that consideration of these statutes presents a removable issue, and the same result should be reached in this case.

Second, the transfers allegedly made from Harley, a Cayman Islands entity, to RBS/ABN, a Dutch bank, are entirely foreign, and RBS/ABN intends to demonstrate that SIPA and the Bankruptcy Code provisions on which the Trustee relies cannot be applied extraterritorially, in keeping with the Supreme Court's decision in Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010). Interpretation of the presumption against extraterritoriality, as articulated in Morrison and applied to SIPA, presents a novel and important issue of non-bankruptcy federal law, and accordingly, withdrawal is warranted on mandatory and permissive grounds.

Third, as the United States District Court for the Southern District of New York has already ruled, the reference should be withdrawn to determine whether the Bankruptcy Court lacks the constitutional authority to render a final judgment on the Trustee's fraudulent conveyance claims. As RBS/ABN will demonstrate, the Supreme Court's decision in Stern v. Marshall, 131 S. Ct. 2594 (2011), mandates that only an Article III court may finally resolve fraudulent conveyance actions like those at issue here, the adjudication of which represents an exercise of "judicial power." Resolution of this important constitutional issue of first impression warrants withdrawal.

Fourth, the Trustee's avoidance claims against Harley, a customer of BLMIS, are premised on the theory that brokerage customers like Harley were obligated to conduct due diligence on their broker and the broker's auditor to determine whether any "red flags" existed indicating wrongdoing. As RBS/ABN will demonstrate, no such due diligence obligation exists under the securities laws governing brokerage relationships. Resolution of the Trustee's theory that SIPA imposes that obligation retroactively will require substantial and material interpretation of SIPA, and accordingly, RBS/ABN is entitled to an Article III court determination of the Trustee's claims.

Fifth, RBS/ABN will demonstrate that the Trustee cannot avoid those transfers from BLMIS to Harley that satisfied an antecedent debt under applicable securities laws. Because the Trustee is expected to continue to argue that statements received by BLMIS's customers in accordance with securities laws do not reflect obligations of BLMIS to those customers, "significant interpretation" of the securities laws is necessary to resolve the Trustee's claims, as the District Court has already held.

For all of these reasons, the reference to the Bankruptcy Court should be withdrawn.

FACTUAL BACKGROUND[2]

At all relevant times, defendant RBS/ABN was a Dutch-incorporated bank headquartered in Amsterdam, the Netherlands. (Complaint ("Compl.") ¶ 22.)[3] Harley is an

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[2] The facts are taken from the allegations contained in the Complaint. They are not accepted as true by RBS/ABN, and will be contested at the appropriate time.

[3] The Complaint in this action is attached as "Exhibit A" to the Declaration of Michael S. Feldberg dated March 14, 2012 ("Feldberg Decl."), along with the other documents referenced in this memorandum of law.

international business company organized under the laws of the Cayman Islands, with a principal place of business at P.O. Box 156, North Quay, Douglas, Isle of Man, 1M99 I NR. (Complaint, Picard v. Harley Int'l (Cayman) Ltd., Adv. Pro. No. 09-01187 (BRL) (Bankr. S.D.N.Y. May 12, 2009) (Docket No. 1) (the "Harley Complaint"), Feldberg Decl. Ex. B, ¶ 31.)

The Trustee commenced an action against Harley in the Bankruptcy Court pursuant to SIPA, the Bankruptcy Code and other applicable law, seeking to avoid and recover initial transfers of "Customer Property" from BLMIS to Harley. (Compl. ¶ 49.) Harley did not appear in the action, and the Trustee ultimately obtained a default judgment against Harley in the amount of $1,072,820,000. (See Compl. ¶ 50.) The Complaint alleges that a portion of these initial transfers, in the amount of $21,799,920, was subsequently transferred to RBS/ABN and is recoverable pursuant to the Trustee's statutory authority under SIPA, the Bankruptcy Code and the New York Debtor and Creditor Law. (Compl. ¶¶ 55, 66.)

LEGAL STANDARD

While a Standing Order of this Court automatically refers to the Bankruptcy Court all cases and proceedings commenced under title 11,[4] 28 U.S.C. § 157(d) provides that a party is entitled to mandatory withdrawal of that reference if resolution of the proceeding "requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." Accordingly, if the Bankruptcy Court would be

[4] On January 31, 2012, an Amended Standing Order of Reference was issued, stating that "[i]f a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court." (Amended Standing Order of Reference M-431 (S.D.N.Y. Jan. 31, 2012), Feldberg Decl. Ex. C.)

required to engage in "substantial and material consideration of non-Bankruptcy Code federal [law]" to resolve the proceeding, withdrawal is necessary. Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.), 922 F.2d 984, 995 (2d Cir. 1990); Picard v. Flinn Invs., LLC, 463 B.R. 280, 286-88 (S.D.N.Y. 2011) (withdrawing the reference to consider federal constitutional issues).

Consideration is "substantial and material" when a Bankruptcy Court would be required to "engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes." City of New York v. Exxon Corp., 932 F. 2d. 1020, 1026 (2d Cir. 1991). Consideration is also substantial and material "even where a non-bankruptcy federal statute only 'arguably conflicts' with the Bankruptcy Code." In re Dana Corp., 379 B.R. 449, 459 (S.D.N.Y. 2007) (internal quotations omitted). When the Bankruptcy Court would be required to engage in the "intricacies" of non-bankruptcy law, as opposed to "routine application" of that law, withdrawal is mandatory. Chemtura Corp. v. United States, No. 10 Civ. 503 (RMB), 2010 WL 1379752, at *2 (S.D.N.Y. Mar. 26, 2010) (citing In re Dana Corp., 379 B.R. at 453).

The District Court need not find that "novel or unsettled questions of non-bankruptcy law are presented in order to withdraw the reference," Enron Corp. v. J.P. Morgan Sec., Inc. (In re Enron Corp.), 388 B.R. 131, 139 (S.D.N.Y. 2008), nor must there be questions of first impression present. In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig., No. 03 MDL 1529 (LMM), 2006 WL 337667, at *3 (S.D.N.Y. Feb. 10, 2006). A right to mandatory withdrawal, however, is even more stark where matters of first impression are concerned. See Bear, Stearns Sec. Corp. v. Gredd, No. 01 Civ. 4379 (NRB), 2001 WL 840187, at *2 (S.D.N.Y. July 25, 2001).

In addition to mandatory withdrawal, Section 157(d) provides for withdrawal on permissive grounds where cause is shown, including where judicial efficiency would be served by such a withdrawal. See 28 U.S.C. § 157(d); Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1101 (2d Cir. 1993).

For the reasons stated below, withdrawal of the reference is warranted on both mandatory and permissive grounds, because resolution of the Trustee's claims requires substantial and material consideration of non-bankruptcy federal law issues, several of which involve important matters of first impression.

ARGUMENT

I. THE APPLICATION OF SECTION 546(e) IN THE CONTEXT OF A SIPC LIQUIDATION REQUIRES SUBSTANTIAL AND MATERIAL INTERPRETATION OF FEDERAL SECURITIES LAWS.

RBS/ABN intends to demonstrate that the Complaint's claims are barred by the safe harbor provisions of Section 546 of the Bankruptcy Code and should therefore be dismissed. Section 546(e) is one of several safe harbor provisions applicable here that preclude the avoidance of certain transfers, providing in part that the Trustee "may not avoid a transfer that is a … settlement payment … made by or to (or for the benefit of) a . . . stockbroker, financial institution, financial participant, or securities clearing agency, . . . in connection with a securities contract … that is made before the commencement of the case, except under section 548(a)(1)(A) of this title." 11 U.S.C. §546(e). The safe harbor is interpreted broadly, with the goal of "minimiz[ing] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." In re Enron Creditors Recovery Corp., 651 F.3d 329, 334 (2d Cir. 2011) (quoting Kaiser Steel Corp. v. Charles Schwab & Co., Inc., 913 F.2d 846, 849 (10th Cir. 1990) (citation omitted)).

Here, the Trustee alleges that Harley had a "direct customer account[] with BLMIS's investment advisory business," and that RBS/ABN allegedly received subsequent transfers of "Customer Property" that originated from that BLMIS customer account. (Compl. ¶ 2.) But, as the District Court held in Picard v. Katz, the relationships between BLMIS and its customers were governed by "securities contracts," and Section 546(e)'s protection of "settlement payments" made in connection with such securities contracts includes all payments made by BLMIS to its customers, including Harley. See 462 B.R. 447, 451-52 (S.D.N.Y. 2011). Accordingly, the Trustee cannot avoid the alleged transfers from BLMIS to Harley as preferences or constructively fraudulent transfers pursuant to Section 546(e). See Katz, 462 B.R. at 453. Because the Trustee may recover from a subsequent transferee only those transfers that are avoided, the Trustee cannot recover from RBS/ABN the alleged subsequent transfers as preferences or constructively fraudulent. See 11 U.S.C. § 550(a) ("to the extent that a transfer is avoided . . . the trustee may recover . . . the value of such property").[5]

Withdrawal of the reference is mandatory to resolve the Trustee's claims because interpretation of § 546(e) in this context necessarily requires the interpretation of SIPA, part of the federal securities laws. As the District Court recognized, "[w]hether § 546(e) applies" in this SIPA proceeding "depends on how a Court resolves numerous questions of securities laws" and requires the court to undertake "significant interpretation" of those securities laws in order to resolve the Trustee's claims. Flinn, 463 B.R. at 285 (withdrawing the reference in Madoff-

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[5] As an alleged subsequent transferee, RBS/ABN is fully entitled to raise defenses to the alleged avoidability of the initial transfers from BLMIS to Harley. See Dye v. Sachs (In re Flashcom, Inc.), 361 B.R. 519, 525 (Bankr. C.D. Cal. 2007) ("every court to address this issue" of whether a defendant has "a constitutional right to defend" against a recovery action has held that "a stipulated or default judgment entered in an avoidance action does not preclude the defendants in a recovery action from disputing the avoidability of the transfer and raising appropriate defenses.").

related fraudulent conveyance actions to interpret § 546(e) in the context of SIPA and in light of Katz). Indeed, as the District Court observed in Katz, "the safe harbor stands 'at the intersection of two important national legislative policies on a collision course—the policies of bankruptcy and securities law.'" 462 B.R. at 451 (quoting In re Enron, 651 F.3d at 334).

For the same reasons, withdrawal is mandatory here.

II. WITHDRAWAL OF THE REFERENCE IS MANDATORY TO CONSIDER THE IMPACT OF *MORRISON*.

Withdrawal of the reference is further mandated because determining whether SIPA applies extraterritorially requires substantial and material interpretation of non-bankruptcy federal law. In Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010), the Supreme Court reinforced the longstanding presumption against the extraterritorial application of federal statutes and held that unless a contrary intent is expressed, Congressional legislation is "meant to apply only within the territorial jurisdiction of the United States." Id. at 2877. Accordingly, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." Id. at 2878.

Here, RBS/ABN will assert that the Trustee seeks to recover wholly foreign transfers to the London branch of RBS/ABN, a Dutch bank, from Harley, a Cayman entity. (Compl. ¶ 2.) But the provisions on which the Trustee relies, SIPA and Section 550 of the Bankruptcy Code, are silent as to their extraterritorial application. Nothing in the language or legislative history of these provisions indicates that they were intended to apply to transactions that occurred outside the U.S., and several pre-Morrison cases have concluded that bankruptcy laws in the context of preferences and fraudulent conveyances in fact do not apply extraterritorially. See Barclay v. Swiss Fin. Corp. Ltd. (In re Midland Euro Exch. Inc.), 347 B.R. 708 (Bankr. C.D. Cal. 2006) (rejecting extraterritorial application of Section 548 of the

Bankruptcy Code and dismissing plaintiff's action to avoid wholly foreign transaction); Maxwell Commc'n Corp. plc v. Barclays Bank plc (In re Maxwell Commc'n Corp. plc), 170 B.R. 800, 809-14 (Bankr. S.D.N.Y. 1994) (dismissing plaintiff's action to avoid preferential transfer under Section 547 of the Bankruptcy Code on similar grounds).

Nor does SIPA apply extraterritorially. Nothing in the plain language of SIPA, including 15 U.S.C. § 78fff-2(c)(3), the transfer recovery provision on which the Trustee relies, provides a clear indication of its application to overseas transfers or transactions. Accordingly, because the "statute gives no clear indication of an extraterritorial application, it has none," Morrison, 130 S. Ct. at 2878, and, as RBS/ABN will demonstrate, the Trustee cannot recover the wholly foreign alleged transfers from Harley to RBS/ABN.

The Trustee is expected to argue, as he has in related adversary proceedings, that SIPA and the Bankruptcy Code's avoidance and recovery provisions do have extraterritorial reach. Accordingly, resolution of these questions will require substantial and material interpretation of both bankruptcy and non-bankruptcy federal law, and withdrawal of the reference is mandatory. Moreover, the question is one of first impression with implications for not just interstate, but international commerce, and accordingly warrants withdrawal on both mandatory and permissive grounds. See 28 U.S.C. § 157(d); Bear Stearns, 2001 WL 840187, at *2 ("[W]here matters of first impression are concerned, the burden of establishing a right to mandatory withdrawal is more easily met.") (internal citations and quotations omitted); Order, Picard v. Kohn, No. 11 Civ. 1181 (JSR) (S.D.N.Y. Sept. 6, 2011) (Docket No. 55), Feldberg Decl. Ex. D (withdrawing reference in Madoff-related adversary proceeding in light of Morrison to consider whether RICO claims at issue were extraterritorial in nature).

III. WITHDRAWAL IS WARRANTED AS THE BANKRUPTCY COURT LACKS CONSTITUTIONAL AUTHORITY PURSUANT TO *STERN V. MARSHALL* TO RENDER A FINAL DECISION

In Stern v. Marshall, 131 S. Ct. 2594 (2011), the Supreme Court held that the Bankruptcy Courts may not enter final judgment with respect to common law actions where, as here, the action brings private law claims seeking only to augment the bankruptcy estate and does not stem from the bankruptcy case itself. Id. at 2618. Application of Stern in this case will require substantial interpretation of non-bankruptcy federal law, in particular the constitutional authority of the Bankruptcy Court to render a final decision in this fraudulent conveyance action.

The Supreme Court held in Stern v. Marshall that although the Bankruptcy Court had the statutory authority under 28 U.S.C. § 157(b)(2)(C) to decide a "core" state law tort counterclaim, it lacked the constitutional authority to reach a final judgment because the claimant was entitled to have the claim heard by an Article III court. Id. at 2608. The Court's decision in Stern was rooted in its earlier cases limiting the authority of the bankruptcy courts, including Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), where the Court held that a trustee's right to recover a fraudulent transfer is "more accurately characterized as a private rather than a public right," quintessentially a common law claim similar to a state law contract action brought by a bankrupt corporation seeking to augment the estate, rather than "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." Id. at 55-56.

Relying on Granfinanciera, the Stern court saw "no reason to treat [the state law] counterclaim any differently from the fraudulent conveyance action in Granfinanciera," reaffirming that "Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." Stern, 131 S. Ct. at 2618 (emphasis in original).

The same rationale applies here, where RBS/ABN has not filed a proof of claim in the BLMIS SIPA liquidation and, accordingly, the Trustee's allegations will not be resolved in the claim allowance process.

As the District Court has already recognized, resolution of the Bankruptcy Court's authority to enter a final judgment in fraudulent conveyance actions, and the question of whether doing so would usurp the "judicial Power" reserved for Article III courts, "requires 'significant interpretation' of both Article III and the Supreme Court precedent analyzing it," and accordingly, withdrawal is appropriate. Flinn, 463 B.R. at 287; Picard v. Avellino, No. 11 Civ. 3882 (JSR) (S.D.N.Y. Feb. 29, 2012), Feldberg Decl. Ex. E, at 6. Moreover, the District Court recognized that under Section 157(d), "the Court has full discretion to withdraw the reference, on its own initiative, for 'cause shown,'" and found that "the litigants' interest in having an Article III court resolve a difficult constitutional issue constitutes adequate cause." Flinn, 463 B.R. at 288 n.3.[6] Withdrawal on mandatory and permissive grounds is accordingly warranted here.

IV. THE TRUSTEE SEEKS TO IMPOSE DILIGENCE OBLIGATIONS THAT CONFLICT WITH NON-BANKRUPTCY FEDERAL LAW

RBS intends to demonstrate that the Trustee cannot avoid the transfers at issue from BLMIS to Harley, and accordingly cannot recover from ABN, because the claims represent an improper attempt retroactively to impose a due diligence obligation on brokerage customers, including Harley, to investigate their broker for potential wrongdoing prior to investing. Resolution of the Trustee's claims will necessarily require interpretation of SIPA, which governs

[6] The Amended Standing Order does not alter this result. It provides that the Bankruptcy Court may hear all core proceedings and, in the event that it lacks constitutional authority to render a final decision, its order will be treated as proposed findings of fact and conclusions of law, unless otherwise ordered by the District Court. (Feldberg Decl. Ex. C.) It does not limit a defendant's right to seek withdrawal, particularly where the District Court has already held that withdrawal is appropriate on mandatory and permissive grounds to decide the important constitutional questions at issue. See Flinn, 463 B.R. at 288 n.3; Avellino, No. 11 Civ. 3882 (JSR), Feldberg Decl. Ex. E, at 6.

the relationship between a registered broker and its customers, and whether such diligence obligations may then be imposed on alleged subsequent transferees like RBS/ABN that are even further removed from Madoff's fraud.

The Harley Complaint alleges that Harley "failed to exercise reasonable due diligence of BLMIS and its auditors in connection with the Ponzi scheme," and that Harley was "on notice" of wrongdoing. (Harley Complaint, Feldberg Decl. Ex. B ¶ 36.) But neither SIPA nor any other governing law at the time imposed on customers like Harley the obligation to investigate a broker and the broker's auditors, as alleged. SIPA is designed to protect customers from their brokers, not to impose new diligence obligations prior to investing. See In re New Times Sec. Servs. Inc., 371 F.3d 68, 86-87 (2d Cir. 2004) (holding that a "goal of greater investor vigilance, however, is not emphasized in the legislative history of SIPA."). Indeed, in withdrawing the Bankruptcy Court reference on these precise grounds, the District Court noted in a related proceeding that it is not "self-evident" that the "bankruptcy law sets the parameters of the duty of inquiry that a customer in a securities brokerage investment situation has." (Tr. of Oral Arg., Picard v. Katz, 11 Civ. 03605 (JSR) (S.D.N.Y. July 1, 2011), Feldberg Decl. Ex. F, at 32:21-23).) The District Court further concluded that the defendants in that action had made "a more than plausible argument that the duty of inquiry . . . in a securities context is governed by securities law and cannot be overridden after the fact by the bankruptcy law or by the interpretation of a non-bankruptcy law, SIPA, being asserted by the trustee."[7] (Feldberg Decl. Ex. F, Tr. at 33:9-14.)

[7] In ultimately ruling on this issue, the District Court held that where bankruptcy law is informed by federal securities law, "good faith" is to be measured by the "willful blindness" standard, rather than "inquiry notice." Katz, 462 B.R. at 455.

These observations take on added weight in light of the Supreme Court's decision in Stern v. Marshall, where the Court reiterated that the Bankruptcy Courts' powers are limited by the Constitution, and that the presence of a statute prescribing authority to the Bankruptcy Court does not necessarily render that authority constitutional under Article III. See infra, at Section III. Where, as here, a complaint alleges that SIPA and bankruptcy law impose ex post facto duties on Harley, and by extension, RBS/ABN, the District Court is the proper forum to resolve the questions of non-bankruptcy federal law.

V. SUBSTANTIAL AND MATERIAL INTERPRETATION OF THE SCURITIES LAWS IS REQUIRED TO DETERMINE WHETHER TRANSFERS FROM BLMIS SATISFIED ANTECEDENT DEBTS.

ABN/RBS intends to demonstrate that the Bankruptcy Code and the New York Debtor and Creditor Law preclude the Trustee from avoiding transfers that, under applicable securities laws, satisfied antecedent debts owed by BLMIS to its customers, including Harley. Because the Trustee may recover from alleged subsequent transferees only those transfers that may be avoided, see 11 U.S.C. § 550(a), the alleged transfers are not recoverable from RBS/ABN.

Under Section 548(a)(1)(B) of the Bankruptcy Code, the Trustee may not recover as constructively fraudulent any transfer for which the debtor was provided with reasonably equivalent value. 11 U.S.C. § 548(a)(1)(B). Moreover, Section 548(c) of the Bankruptcy Code provides that a transfer may not be avoided where the transferee took "for value and in good faith." 11 U.S.C. § 548(c). The Bankruptcy Code further expressly provides that repayment of an antecedent debt constitutes "value." 11 U.S.C. § 548(d)(2)(A) ("'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor . . . ."). Consistent with these provisions, it is well settled that an "antecedent debt" is satisfied by transfers from the

debtor that reduce a customer's principal investment. See, e.g., Merrill v. Abbott (In re Independent Clearing House Co.), 77 B.R. 843, 857 (D. Utah 1987) ("From the time a defendant entrusted his money to the debtors, he had a claim against the debtors for the return of his money."); Katz, 462 B.R. at 453 ("It is clear that the principal invested by any of Madoff's customers 'gave value to the debtor,' and therefore may not be recovered by the Trustee absent bad faith.").

In accordance with its obligations under the securities laws, BLMIS "regularly sent reports to [customers] updating them on their investments' performances." Flinn, 463 B.R. at 285 (citing 17 C.F.R § 240.10b-10, which requires brokers like BLMIS to disclose information regarding trades to investors). The Trustee is expected to argue, as he has in related proceedings, that these brokerage statements received by customers from BLMIS do not reflect valid obligations of BLMIS and do not amount to "antecedent debts," because Madoff was operating a Ponzi scheme. (See Compl. ¶ 29 ("BLMIS's IA Business customers received fabricated monthly or quarterly statements showing that securities were held in, or had been traded through, their accounts. The securities purchases and sales shown in the account statements never occurred.")

Resolution of the Trustee's claim will require substantial and material application of the securities laws, and, as the District Court has already determined, withdrawal is accordingly appropriate. See Flinn, 463 B.R. at 288 (withdrawing the reference to consider "whether the Trustee may, consistent with non-bankruptcy law, avoid transfers that [BLMIS] purportedly made in order to satisfy antecedent debts"); Avellino, 11 Civ. 3882 (JSR), Feldberg Decl. Ex. E, at 6. The same result is warranted here.

CONCLUSION

For the foregoing reasons, the reference to the Bankruptcy Court should be withdrawn.

Dated: March 14, 2012
New York, New York

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Exhibit 7

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff, Plaintiff, v. ABN AMRO BANK N.V. (presently known as THE ROYAL BANK OF SCOTLAND, N.V.); and ABN AMRO BANK (SWITZERLAND) AG (f/k/a ABN AMRO BANK (SCHWEIZ)), Defendants.	Adv. Pro. No. 11-02760 (BRL) **ORAL ARGUMENT REQUESTED**

NOTICE OF MOTION OF ABN AMRO BANK N.V. (PRESENTLY KNOWN AS THE ROYAL BANK OF SCOTLAND, N.V.) IN SUPPORT OF ITS MOTION TO WITHDRAW THE BANKRUPTCY COURT REFERENCE

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law of ABN AMRO Bank N.V. (Presently Known as The Royal Bank of Scotland, N.V.) ("RBS/ABN") dated March 14, 2012, the Declaration of Michael S. Feldberg dated March 14, 2012 and the exhibits thereto, and all the papers filed and proceedings had herein, defendant RBS/ABN hereby respectfully moves for an order pursuant to 28 U.S.C.§ 157(d), Rule 5011 of the Federal Rules of Bankruptcy Procedure, and Rule 5011-1 of the Local Rules of the Bankruptcy Court, withdrawing the reference to the United States Bankruptcy Court for the Southern District of New York of the above-captioned adversary proceeding.

RBS/ABN has made no previous request for the relief requested by this motion.

RBS/ABN respectfully requests oral argument on this motion.

Dated: New York, New York
March 14, 2012

ALLEN & OVERY LLP

By: /s/ Michael S. Feldberg

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Exhibit 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION,	
Plaintiff,	12-mc-115 (JSR)
-v-	Adv. Pro. No. 08-01789 (SMB)
BERNARD L. MADOFF INVESTMENT SECURITIES LLC,	ORDER
Defendant.	
In re:	
MADOFF SECURITIES	

8/4/14

JED S. RAKOFF, U.S.D.J.

On July 10, 2014, the Court issued an Order directing counsel to parties with individual issues not addressed by the Court's decisions in the consolidated withdrawals to inform the Court by letter by July 18, 2014. See ECF No. 552. The Court received several such letters and addressed the issues they raised in separate Orders. Any remaining motions to withdraw the reference are hereby denied and all the adversary proceedings are returned to the Bankruptcy Court. The Clerk of Court is directed to close all the civil cases seeking to withdraw the reference related to this matter.

SO ORDERED.

Dated: New York, NY
August 1, 2014

JED S. RAKOFF, U.S.D.J.

Exhibit 9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, -v- BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-mc-115 (JSR) OPINION AND ORDER
In re: MADOFF SECURITIES	
PERTAINS TO: Consolidated proceedings on extraterritoriality issues	

JED S. RAKOFF, U.S.D.J.

The question here presented is whether section 550(a)(2) of the Bankruptcy Code applies extraterritorially in the context of this proceeding. Specifically, Irving H. Picard (the "Trustee"), the trustee appointed under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa-78*lll*, to administer the estate of Bernard L. Madoff Investment Securities LLC ("Madoff Securities"), here seeks to recover funds that, having been transferred from Madoff Securities to certain foreign customers, were then in turn transferred to certain foreign persons and entities that comprise the defendants here at issue. These defendants seek to dismiss the Trustee's claims against them, arguing that 11 U.S.C. § 550(a)(2),

the Bankruptcy Code provision allowing for such recovery, does not apply extraterritorially. The Court assumes familiarity with the underlying facts of the Madoff Securities fraud and ensuing bankruptcy and recounts here only those facts that are relevant to the instant issues.

Central to the question here presented is the role of the so-called "feeder funds," foreign investment funds that pooled their own customers' assets for investment with Madoff Securities. As customers of Madoff Securities, the feeder funds at times withdrew monies from Madoff Securities, which they subsequently transferred to their customers, managers, and the like. When Madoff Securities collapsed in late 2008, many of these funds — which had invested all or nearly all of their assets in Madoff Securities — likewise entered into liquidation in their respective home countries. The Trustee seeks to recover not only the allegedly avoidable transfers made to the feeder funds but also subsequent transfers of alleged Madoff Securities customer property made by those funds to their immediate and mediate transferees. It is the recovery of those subsequent transfers — transfers made abroad between a foreign transferor and a foreign transferee — that is the subject of the instant consolidated proceeding.

For example, in October 2011, the Trustee filed an adversary proceeding against CACEIS Bank Luxembourg and CACEIS Bank (together, "CACEIS"), seeking $50 million in subsequent transfers of alleged Madoff Securities customer property. See Decl. of Jaclyn M.

Metzinger dated Mar. 23, 2013, Ex. A ("CACEIS Compl.") ¶ 2, No. 12 Civ. 2434, ECF No. 2 (S.D.N.Y. filed Apr. 2, 2012). CACEIS Bank Luxembourg is a Luxembourg société anonyme operating there, while CACEIS Bank is a French société anonyme operating in France. Id. ¶¶ 22-23. Both entities serve as custodian banks and engage in asset management for "corporate and institutional clients." Id. ¶¶ 3, 22-23.

The Trustee seeks to recover alleged Madoff Securities customer funds received by CACEIS. However, CACEIS did not invest directly with Madoff Securities; instead, it invested funds with Fairfield Sentry Limited and Harley International (Cayman) Limited, two Madoff Securities feeder funds that in turn invested CACEIS's assets in Madoff Securities. Id. ¶ 2. Fairfield Sentry is a British Virgin Islands ("BVI") company that had invested more than 95% of its assets in Madoff Securities. Id. It is currently in liquidation in the BVI and has settled the Trustee's avoidance and recovery action against it for a fraction of the Trustee's initial claim. See id. ¶¶ 24, 43. Harley is a Cayman Islands company that was also one of Madoff Securities' largest feeder funds, and it is now in liquidation in the Cayman Islands. Id. ¶ 25. The Trustee obtained a default judgment against Harley for more than $1 billion in November 2010. Id. ¶ 53. The Trustee alleges that CACEIS received $50 million in recoverable subsequent transfers as a customer of Fairfield Sentry and Harley, and he asserts a right to reclaim those transfers under 11 U.S.C. § 550(a)(2). See id. ¶¶ 60-69.

CACEIS and the other consolidated defendants have moved to dismiss the Trustee's complaints in their respective adversary proceedings, arguing that section 550(a)(2) of the Bankruptcy Code does not apply extraterritorially and therefore does not reach subsequent transfers made abroad by one foreign entity to another. These defendants previously moved to withdraw the reference to the Bankruptcy Court, and the Court granted that motion on a consolidated basis with respect to the following issue: "whether SIPA and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate, or mediate foreign transferees." See Order at 3, No. 12 Misc. 115, ECF No. 167 (S.D.N.Y. June 7, 2012). The Court received briefing on this issue from the defendants, the Trustee, and the Securities Investor Protection Corporation ("SIPC") and heard oral argument on September 21, 2012. The Court concludes that (1) the application of section 550(a)(2) here would constitute an extraterritorial application of the statute, and (2) Congress did not clearly intend such an application. Moreover, given the factual circumstances at issue in these cases, even if section 550(a)(2) could be applied extraterritorially, such an application would be precluded here by considerations of international comity. This Opinion and Order addresses these issues in turn and directs further proceedings upon return to the Bankruptcy Court.

"It is a 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (quoting EEOC v. Arabian American Oil Co. ("Aramco"), 499 U.S. 244, 248 (1991)). This presumption against extraterritorial application of federal statutes "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Aramco, 499 U.S. at 248.

In determining whether the presumption against extraterritoriality applies, the Court must determine, first, whether the factual circumstances at issue require an extraterritorial application of the relevant statutory provision; and second, if so, whether Congress intended for the statute to apply extraterritorially. See, e.g., Morrison, 130 S. Ct. at 2877-88 (engaging in this analysis with respect to section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)); In re Maxwell Commc'n Corp. ("Maxwell I"), 186 B.R. 807, 816 (S.D.N.Y. 1995) (setting out this two-step inquiry in analyzing section 547 of the Bankruptcy Code).

The Court turns first to the question of whether the Trustee's use of section 550(a) here is in fact an extraterritorial application of the statute. In Morrison, when determining whether an underlying U.S.-based deception was sufficient to make application of section 10(b) of the Exchange Act domestic, rather than

extraterritorial, the Supreme Court looked to "the 'focus' of congressional concern," or, in other words, the "transactions that the statutes seeks to 'regulate.'" 130 S. Ct. at 2884.

The Trustee and SIPC argue that the "focus" of congressional concern in a SIPA liquidation is the regulation of the SIPC-member U.S. broker-dealer, so that the application of any of the incorporated provisions of the Bankruptcy Code is inherently domestic. But this argument proves too much. It cannot be that any connection to a domestic debtor, no matter how remote, automatically transforms every use of the various provisions of the Bankruptcy Code in a SIPA bankruptcy into purely domestic applications of those provisions. On the level of policy, this approach could raise serious issues of international comity, as discussed below. And, as a matter of precedent, Morrison suggests that such a sweeping approach fails to engage in the necessary analysis of the way in which the statutes are utilized, as "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States." 130 S. Ct. at 2884. Accordingly, a mere connection to a U.S. debtor, be it tangential or remote, is insufficient on its own to make every application of the Bankruptcy Code domestic. Cf. Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010) (per curiam) (stating, in the context of a RICO claim, that "simply alleging that some domestic conduct occurred cannot support a claim of domestic application").

The Court therefore looks to the regulatory focus of the Bankruptcy Code's avoidance and recovery provisions specifically. On a straightforward reading of section 550(a), this recovery statute focuses on "the property transferred" and the fact of its transfer, not the debtor. See 11 U.S.C. § 550(a) (allowing a trustee to recover "the property transferred . . . to the extent that a transfer is avoided" under one of the Bankruptcy Code's avoidance provisions). Moreover, section 548, the avoidance provision that is primarily at issue in these proceedings, similarly focuses on the nature of the transaction in which property is transferred, not merely the debtor itself. See, e.g., 11 U.S.C. § 548(c) (allowing a transferee who "takes for value and in good faith . . . [to] retain any interest transferred . . . to the extent that such transferee . . . gave value to the debtor in exchange for such transfer"); cf. In re Maxwell Commc'n Corp. ("Maxwell II"), 93 F.3d 1036, 1051 (2d Cir. 1996) (noting that "scrutiny of the transfer is at the heart of" an avoidance action). Accordingly, under Morrison, the transaction being regulated by section 550(a)(2) is the transfer of property to a subsequent transferee, not the relationship of that property to a perhaps-distant debtor.

To determine whether the transfers at issue in this consolidated proceeding occurred extraterritorially, "the court considers the location of the transfers as well as the component events of those transactions." Maxwell I, 186 B.R. at 817. Here, the relevant transfers and transferees are predominantly foreign:

foreign feeder funds transferring assets abroad to their foreign customers and other foreign transferees. See, e.g., CACEIS Compl. ¶ 2. This scenario is similar to circumstances found to implicate extraterritorial applications of the Bankruptcy Code's avoidance provisions in other cases. See, e.g., Maxwell I, 186 B.R. at 815 (finding application of 11 U.S.C. § 847 to be extraterritorial where "the antecedent debts were incurred overseas, the transfers on account of those debts were made overseas, and the recipients . . . [are] all foreigners"); In re Midland Euro Exch. Inc., 347 B.R. 708, 717 (Bankr. C.D. Cal. 2006) (noting that the parties agreed that the trustee's "claims would result in extraterritorial application of [11 U.S.C.] § 548" where "[t]he transferor was a Barbados corporation, the transferee was an English corporation, the funds originated from a bank account in London and, although transferred through a bank account in New York, eventually ended up in another bank account in England"). Although the chain of transfers originated with Madoff Securities in New York, that fact is insufficient to make the recovery of these otherwise thoroughly foreign subsequent transfers into a domestic application of section 550(a).[1] See Maxwell I, 186 B.R. at 816-17 (rejecting the claim that

[1] Nor is the fact that some of the defendants here allegedly used correspondent banks in the United States to process dollar-denominated transfers sufficient to make these foreign transfers domestic. See, e.g., Cedeno v. Intech Grp., Inc., 733 F. Supp. 2d 471, 472 (S.D.N.Y. 2010) (dismissing a RICO claim as impermissibly extraterritorial where "[t]he scheme's contacts with the United States, however, were limited to the movement of funds into and out of U.S.-based bank accounts").

the alleged preferential transfers were domestic because the funds for the transfers derived from the sale of U.S. assets); cf. Morrison, 130 S. Ct. at 2886 (rejecting the notion that the section 10(b) claim at issue was domestic because a significant portion of the fraudulent conduct occurred in the United States). Accordingly, the Court concludes that the subsequent transfers that the Trustee seeks to recover here are foreign transfers and thus would require an extraterritorial application of section 550(a).

The Court therefore turns to the second prong of the extraterritoriality inquiry: whether such an extraterritorial application was intended by Congress. The Supreme Court has explained that "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" Morrison, 130 S. Ct. at 2877 (quoting Aramco, 499 U.S. at 248). "When a statute gives no clear indication of an extraterritorial application, it has none." Id. In deciding whether Congress has "clearly expressed" such an intent, the Court looks first to the language of section 550(a), which reads:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a).

Nothing in this language suggests that Congress intended for this section to apply to foreign transfers, and the Trustee does not argue otherwise. Cf. Maxwell I, 186 B.R. at 819 ("[N]othing in the language or legislative history of [11 U.S.C.] § 547 expresses Congress' intent to apply the statute to foreign transfers."); Midland, 347 B.R. at 717 ("Nothing in the text of [11 U.S.C.] § 548 indicates congressional intent to apply it extraterritorially."). The Court therefore looks to "context," Morrison, 130 S. Ct. at 2883, including surrounding provisions of the Bankruptcy Code, to determine whether Congress nevertheless intended that section 550(a) apply extraterritorially.

Attempting to rebut the presumption against extraterritoriality, the Trustee focuses on section 541 of the Bankruptcy Code, which defines "property of the estate" to include certain specified property "wherever located and by whomever held." 11 U.S.C. § 541(a). It is uncontested here that the phrase "wherever located" is intended to give the Trustee title over all of the debtor's property, regardless of whether it is physically present in the United States. See H.R. Rep. No. 82-2320, at 10, reprinted in 1952 U.S.C.C.A.N. 1960, at 1976. According to the Trustee, section 541 is incorporated into the avoidance and recovery provisions of the Bankruptcy Code, which use the phrase "an interest of the debtor in property" to define the transfers that may be avoided, a phrase

that is repeated in section 541 in defining "property of the estate." See, e.g., 11 U.S.C. § 548(a) (allowing a trustee to "avoid any transfer . . . of an interest of the debtor in property"); see also Begier v. I.R.S., 496 U.S. 53, 58-59 (1990) (looking to section 541's definition of "property of the estate" in defining "property of the debtor" under section 547). Under the Trustee's theory, section 541's reference to "wherever located and by whomever held" is thereby indirectly incorporated into the Bankruptcy Code's avoidance and recovery provisions, indicating that Congress intended that those provisions apply extraterritorially as well.

Though clever, the theory is neither logical nor persuasive. That section 541's definition of "property of the estate" may be relevant to interpreting "property of the debtor" does not necessarily imply that transferred property is to be treated as "property of the estate" under section 541 prior to recovery by the Trustee. As the Court of Appeals for the Second Circuit has explained,

> In accordance with 11 U.S.C. § 541(a)(1) (1988), the property of a bankruptcy estate includes (with exceptions not presently pertinent) "all legal or equitable interests of the debtor in property as of the commencement of the case;" and pursuant to 11 U.S.C. § 541(a)(3) (1988), the property of a bankruptcy estate also includes "[a]ny interest in property that the trustee recovers" under specified Bankruptcy Code provisions, including 11 U.S.C. § 550 (1988). . . . "If property that has been fraudulently transferred is included in the § 541(a)(1) definition of property of the estate, then § 541(a)(3) is rendered meaningless with respect to property recovered pursuant to fraudulent transfer actions." Further, "the inclusion of property recovered by the trustee pursuant to his avoidance powers in a separate definitional

> subparagraph clearly reflects the congressional intent that such property is not to be considered property of the estate until it is recovered."

In re Colonial Realty Co., 980 F.2d 125, 131 (2d Cir. 1992) (citation omitted) (quoting In re Saunders, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989)).

Under the logic of Colonial Realty, whether "property of the estate" includes property "wherever located" is irrelevant to the instant inquiry: fraudulently transferred property becomes property of the estate only after it has been recovered by the Trustee, so section 541 cannot supply any extraterritorial authority that the avoidance and recovery provisions lack on their own. See Maxwell I, 186 B.R. at 820 ("Because preferential transfers do not become property of the estate until recovered, § 541 does not indicate the Congress intended § 547 to govern extraterritorial transfers." (citing Colonial Realty, 980 F.2d at 131)); Midland, 347 B.R. at 718 (finding that "neither the plain language of the statute nor its reading in conjunction with other parts of the Code establish[es] congressional intent to apply § 548 extraterritorially," in part because "allegedly fraudulent transfers do not become property of the estate until they are avoided").[2]

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[2] The Trustee asks the Court to adopt the Fourth Circuit's decision in In re French, 440 F.3d 145, 152 (4th Cir. 2006), which holds that the presumption against extraterritoriality does not apply to avoidance and recovery actions. However, the logic of French is inconsistent with the Second Circuit's decision in Colonial Realty, as French relies on a notion that the foreign property "would have been property of the debtor's estate" absent a fraudulent transfer, id., whereas Colonial Realty implies that section 541 would not

Indeed, the fact that section 541, by virtue of its "wherever located" language, applies extraterritorially may cut against the Trustee's argument. In Morrison, the Supreme Court similarly contrasted section 10(b) with another provision of the Exchange Act, noting that the other section "contains what [section] 10(b) lacks: a clear statement of extraterritorial effect. . . . [W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." 130 S. Ct. at 2883; see also Norex, 631 F.3d at 33 ("Morrison . . . forecloses Norex's argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.").

Nor does section 78fff-2(c)(3) of SIPA, which empowers a SIPA trustee to utilize the Bankruptcy Code's avoidance and recovery provisions to reclaim customer property, overcome the presumption against extraterritorial application. As with section 550(a) of the Bankruptcy Code, section 78fff-2(c)(3) of SIPA does not expressly provide for extraterritorial application; rather, it primarily incorporates the avoidance and recovery provisions of the Bankruptcy Code, suggesting that whatever limitations apply to an ordinary

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apply until after property has been recovered. In any event, French is also factually distinguishable, as "[m]ost of the activity surrounding [the relevant] transfer took place in the United States . . . [and] almost all of the parties with an interest in this litigation — the debtor, the transferees, and all but one of the creditors — are based in the United States, and have been for years." Id. at 154. Accordingly, the Court declines to adopt either French's reasoning or its ultimate determination.

bankruptcy likewise limit a SIPA liquidation. See 15 U.S.C. § 78fff-2(c)(3) (empowering a SIPA trustee to "recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of Title 11"). As a more general matter, SIPA's predominantly domestic focus suggests a lack of intent by Congress to extend its reach extraterritorially. Cf. Morrison, 130 S. Ct. at 2878 (finding that the Exchange Act's focus is the purchase and sale of securities in the United States). For example, SIPA expressly excludes from SIPC membership brokers whose primary business is conducted outside of the United States, see 15 U.S.C. § 78ccc(a)(2)(A)(i), and likewise excludes as a "customer" any person whose claim arises out of transactions with a foreign subsidiary of a SIPC member, see 15 U.S.C. § 78*lll*(2)(C)(i). Furthermore, although the Trustee points to SIPA section 78eee(b)(2)(A)(i), which provides for "exclusive jurisdiction of such debtor and its property wherever located (including property located outside the territorial limits of such court . . .)," the effect of this provision is no different from that of section 841 of the Bankruptcy Code. See 15 U.S.C. § 78eee(b)(2)(A)(iii) (providing a SIPA trustee with "the jurisdiction, powers, and duties conferred upon a court of the United States having jurisdiction over cases under Title 11"). That is, although section 78eee(b)(2)(A)(i) uses the phrase "wherever located," this phrase relates only to property

of the debtor, which, as discussed above, includes transferred property only after it has been recovered by the Trustee.[3]

Finally, the Trustee contends that policy concerns require that section 550(a) of the Bankruptcy Code apply extraterritorially; that is, the Trustee argues that a contrary result would allow a U.S. debtor to fraudulently transfer all of his assets offshore and then retransfer those assets to avoid the reach of U.S. bankruptcy law. However, as other courts have found, the desire to avoid such loopholes in the law "must be balanced against the presumption against extraterritoriality, which serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Midland, 347 B.R. at 718. Assuming that any such intentional fraud occurred, the Trustee here may be able to utilize the laws of the countries where such transfers occurred to avoid such an evasion while at the same time avoiding international discord. Furthermore, although the Trustee argues that finding no extraterritorial application would undermine the primary policy objective of SIPA – the equitable distribution of customer funds to customers of the debtor – the Trustee has long insisted that indirect customers of Madoff Securities, like many of

[3] To the extent that the district court in In re Bevill, Bresler & Schulman, Inc., 83 B.R. 880 (D.N.J. 1988), found that SIPA applies extraterritorially, that case relied on an analysis that is outdated in light of the Supreme Court's decision in Morrison. See, e.g., id. at 896 (stating that "[e]xtraterritorial application of SIPA is also consistent with the extraterritorial application of other federal securities laws," including section 10(b)).

the defendants here, are not themselves creditors of the customer-property estate. See In re Bernard L. Madoff Inv. Sec. LLC, 708 F.3d 422, 427 (2d Cir. 2013) (adopting this position). Therefore, the Trustee's claim that the defendants here are being treated somehow more favorably than customer-beneficiaries of the SIPA estate — who are not similarly situated to these non-beneficiaries — is disingenuous, especially since the defendants here stand to benefit little, if at all, from the customer-property estate through their now-defunct feeder funds. In sum, the Court concludes that the presumption against extraterritorial application of federal statutes has not been rebutted here; the Trustee therefore may not use section 550(a) to pursue recovery of purely foreign subsequent transfers.

While the foregoing is dispositive, the Court further concludes, in the alternative, that even if the presumption against extraterritoriality were rebutted, the Trustee's use of section 550(a) to reach these foreign transfers would be precluded by concerns of international comity. Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Maxwell II, 93 F.3d at 1046 (quoting Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)); see also id. at 1047 (noting that "international comity is a separate notion from the 'presumption

against extraterritoriality,' and may "preclude the application" of an otherwise extraterritorial statute). Courts conducting a comity analysis must engage in a choice-of-law analysis to determine whether the application of U.S. law would be reasonable under the circumstances, comparing the interests of the United States and the relevant foreign state. See id. at 1047-48.

The Second Circuit has previously stated that "[c]omity is especially important in the context of the Bankruptcy Code." Id. at 1048. The facts underlying the instant proceeding illustrate why this is so. As is the case with Fairfield Sentry and Harley, many of the feeder funds are currently involved in their own liquidation proceedings in their home countries. These foreign jurisdictions have their own rules concerning on what bases the recipient of a transfer from a debtor should be required to disgorge it. See, e.g., In re Fairfield Sentry Ltd. Litig., 458 B.R. 665, 672 (S.D.N.Y. 2011) (noting that the foreign representative of Fairfield Sentry's estate had filed against its investors "statutory claims under BVI law for 'unfair preferences' and 'undervalue transactions'"). Indeed, the BVI courts have already determined that Fairfield Sentry could not reclaim transfers made to its customers under certain common-law theories — a determination in conflict with what the Trustee seeks to accomplish here. See Decl. of Marco E. Schnabl dated July 13, 2012, Ex. C., No. 12 Misc. 115, ECF No. 236 (S.D.N.Y. filed July 13, 2012).

The Trustee is seeking to use SIPA to reach around such foreign liquidations in order to make claims to assets on behalf of the SIPA customer-property estate — a specialized estate created solely by a U.S. statute, with which the defendants here have no direct relationship. Without any agreement to the contrary (which the Trustee does not suggest exists), investors in these foreign funds had no reason to expect that U.S. law would apply to their relationships with the feeder funds. Cf. Maxwell II, 93 F.3d at 1051 (finding that, for purposes of the comity analysis, "England has a much closer connection to these disputes than does the United States" where the transfer occurred in England and "English law applied to the resolution of disputes arising under" the credit agreements under which the relevant transfers were made). Given the indirect relationship between Madoff Securities and the transfers at issue here, these foreign jurisdictions have a greater interest in applying their own laws than does the United States. Accordingly, as the Second Circuit found in Maxwell II, "the interests of the affected forums and the mutual interest of all nations in smoothly functioning international law counsel against the application of United States law in the present case." Id. at 1053.

In sum, the Court finds that section 550(a) does not apply extraterritorially to allow for the recovery of subsequent transfers received abroad by a foreign transferee from a foreign transferor. Therefore, the Trustee's recovery claims are dismissed to the extent

that they seek to recover purely foreign transfers.[4] Except to the extent provided in other orders, the Court directs that the following adversary proceedings be returned to the Bankruptcy Court for further proceedings consistent with this Opinion and Order: (1) those cases listed in Exhibit A of item number 167 on the docket of 12-mc-115; and (2) those cases listed in the schedule attached to item number 468 on the docket of 12-mc-115 that were designated as having been added to the "extraterritoriality" consolidated briefing.

SO ORDERED.

Dated: New York, NY
July 6, 2014

JED S. RAKOFF, U.S.D.J.

[4] The Trustee argues that dismissal at this stage is inappropriate because additional fact-gathering is necessary to determine where the transfers took place. However, it is the Trustee's obligation to allege "facts giving rise to the plausible inference that" the transfer occurred "within the United States." Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 69 (2d Cir. 2012). Here, to the extent that the Trustee's complaints allege that both the transferor and the transferee reside outside of the United States, there is no plausible inference that the transfer occurred domestically. Therefore, unless the Trustee can put forth specific facts suggesting a domestic transfer, his recovery actions seeking foreign transfers should be dismissed.

Exhibit 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

Defendant.

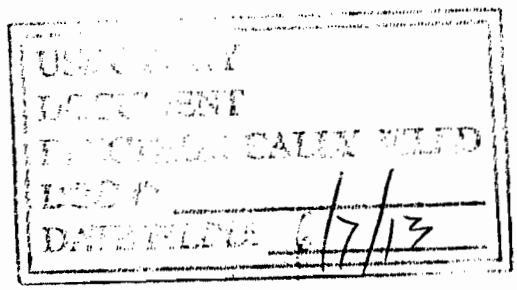
12 MC 115 (JSR)

ORDER

In re:

MADOFF SECURITIES

PERTAINS TO THE CASES LISTED ON EXHIBIT B



JED S. RAKOFF, U.S.D.J.:

In 2012, the Court consolidated proceedings regarding various issues on which the Court withdrew the reference to the Bankruptcy Court in avoidance and recovery actions brought by Irving H. Picard (the "Trustee"), appointed as trustee pursuant to the Securities Investor Protection Act ("SIPA") for the consolidated liquidation of Bernard L. Madoff Investment Securities, LLC ("Madoff Securities"). Filed within each consolidation order was a schedule of cases included within that consolidated proceeding. However, some cases were listed only by name in the appended schedule (i.e. without the applicable case number). Additionally, since the filing of those Orders, the Trustee has initiated new adversary proceedings, and the Court has

issued various orders, on the consent of the parties, adding these individual cases to one or more of the consolidated proceedings.

To ensure all covered cases are included within the relevant consolidated proceedings, the Court issued an Order on May 13, 2013 directing the clerk to docket any future orders in the consolidated proceedings (1) on the docket of 12 MC 115, (2) on the docket of the cases listed in the original schedule appended to the relevant consolidated order, and (3) on the docket of the cases listed in the schedule appended to the May 13, 2013 order, to the extent that a given case was added to the relevant consolidated proceedings (as reflected in the final column for each case). *See* Order, *In re Madoff Sec.*, 12 MC 115, ECF No. 468 (S.D.N.Y. May 13, 2013) (hereinafter the "May 2013 Order"). The May 2013 Order, including the schedules appended thereto, are attached as Exhibit A to this Order.

The May 2013 Order is hereby expanded to apply to certain prior orders and/or decisions issued by the Court and entered in the relevant consolidated proceedings. Accordingly, the clerk is hereby directed to docket the below-listed orders and/or decisions issued by the Court in connection with the consolidated proceedings as described below.

The following orders shall be docketed in cases with respect to which "Stern v. Marshall" is listed in the final column of the schedules included as Exhibit B hereto:

- Order, No. 12 MC 115, ECF No. 4 (S.D.N.Y. Apr. 13, 2012); and
- Opinion and Order, No. 12 MC 115, ECF No. 427 (S.D.N.Y. Jan. 4, 2013).

The following orders shall be docketed in cases with respect to which "Section 546(e)" is listed in the final column of the schedules included as Exhibit B hereto:

- Order, No. 12 MC 115, ECF No. 119 (S.D.N.Y. May 16, 2012);
- Order, No. 12 MC 115, ECF No. 439 (S.D.N.Y. Feb. 13, 2013); and

- Opinion and Order, No. 12 MC 115, ECF No. 460 (S.D.N.Y. Apr. 15, 2013).

The following order shall be docketed in cases with respect to which "Extraterritoriality" is listed in the final column of the schedules included as Exhibit B hereto:

- Order Regarding Extraterritoriality Issues, No. 12 MC 115, ECF No. 167 (S.D.N.Y. June 7, 2012).

The following order shall be docketed in cases with respect to which "Good Faith" is listed in the final column of the schedules included as Exhibit B hereto:

- Order Regarding the "Good Faith" Standard, No. 12 MC 115, ECF No. 197 (S.D.N.Y. June 25, 2012).

The following orders shall be docketed in cases with respect to which "Section 550(a)" is listed in the final column of the schedules included as Exhibit B hereto:

- Order Regarding 11 U.S.C. § 550(a), No. 12 MC 115, ECF No. 314 (S.D.N.Y. Aug. 22, 2012); and
- Order Regarding 11 U.S.C. § 550(a), No. 12 MC 115, ECF No. 422 (S.D.N.Y. Dec. 12, 2012).

The following orders shall be docketed in cases with respect to which "Section 502(d)" is listed in the final column of the schedules included as Exhibit B hereto:

- Order Regarding 11 U.S.C. § 502(d), No. 12 MC 115, ECF No. 155 (S.D.N.Y. June 1, 2012); and
- Order Regarding 11 U.S.C. § 502(d), No. 12 MC 115, ECF No. 435 (S.D.N.Y. Feb. 13, 2013).

The following order shall be docketed in cases with respect to which "[Standing and SLUSA]"is listed in the final column of the schedules included as Exhibit B hereto:

- Order Regarding Standing and SLUSA Issues, No. 12 MC 115, ECF No. 114 (S.D.N.Y. May 18, 2012).

The following order shall be docketed in cases with respect to which "Antecedent Debt" is listed in the final column of the schedules included as Exhibit B hereto:

- Order Regarding Antecedent Debt Issues, No. 12 MC 115, ECF No. 107 (S.D.N.Y. May 16, 2012).

SO ORDERED.

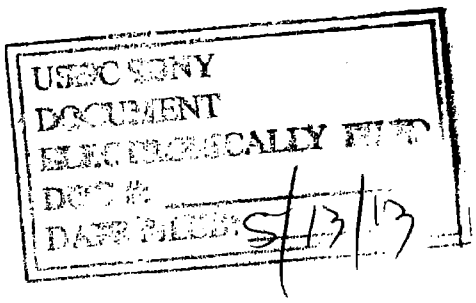
JED S. RAKOFF, U.S.D.J.

Date: New York, New York
June 5, 2013

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, -v- BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12 MC 115 (JSR) ORDER
In re: MADOFF SECURITIES	
PERTAINS TO: ALL CASES	



JED S. RAKOFF, U.S.D.J.

In 2012, the Court consolidated proceedings regarding various issues on which the Court withdrew the reference to the Bankruptcy Court in avoidance and recovery actions brought by Irving H. Picard (the "Trustee"), appointed as trustee pursuant to the Securities Investor Protection Act ("SIPA") for the consolidated liquidation of Bernard L. Madoff Investment Securities, LLC ("Madoff Securities"). See, e.g., Order Regarding 11 U.S.C. § 550(a), No. 12 MC 115, ECF No. 314 (S.D.N.Y. Aug. 22, 2012); Order Regarding the "Good Faith" Standard, No. 12 MC 115, ECF No. 197 (S.D.N.Y. June 25, 2012); Order Regarding Extraterritoriality Issues, No. 12 MC 115, ECF No. 167 (S.D.N.Y. June 7, 2012); Order Regarding 11 U.S.C. § 502(d), No. 12 MC 115, ECF No. 155 (S.D.N.Y. June 1, 2012); Order Regarding

Standing and SLUSA Issues, No. 12 MC 115, ECF No. 114 (S.D.N.Y. May 18, 2012); Order Regarding 11 U.S.C. § 546(e), No. 12 MC 115, ECF No. 119 (S.D.N.Y. May 16, 2012); Order Regarding Antecedent Debt Issues, No. 12 MC 115, ECF No. 107 (S.D.N.Y. May 16, 2012); Order Regarding Stern v. Marshall, No. 12 MC 115, ECF No. 4 (S.D.N.Y. April 13, 2012).

Filed with each of these consolidation orders was a schedule of cases included within that consolidated proceeding. However, at the time the Orders were issued, some cases had not yet been assigned case numbers, and thus those cases were listed only by name in the appended schedule. Additionally, since the filing of those Orders, the Trustee has initiated new adversary proceedings, and the Court has issued various orders, on the consent of the parties, adding these individual cases to one or more of the consolidated proceedings.

On May 6, 2013, the Trustee convened a conference call with representative counsel for defendants whose cases fit the two scenarios described above. In order to ensure that any further proceedings in the consolidated matters are docketed in each case covered by that proceeding, the Trustee submitted to the Court a new schedule of cases, appended to this Order, listing all of the cases that had previously been missing case numbers or that had been added since the original consolidation orders were issued.

Accordingly, when future the Court issues future orders in any of the consolidated proceedings, the Court hereby directs the Clerk

of the Court to docket the orders: (1) on the docket of 12 MC 115; (2) on the docket of the cases listed in the original schedule appended to the relevant consolidation order; and (3) on the docket of cases listed in the schedule appended to this Order, to the extent that a given case was added to the relevant consolidated proceeding (as reflected in the final column for each case).

SO ORDERED.

Dated: New York, NY
May 11, 2013

JED S. RAKOFF, U.S.D.J.

MOTIONS TO WITHDRAW ADDED TO CONSOLIDATED ISSUE BRIEFINGS PURSUANT TO CONSENT ORDERS				
1.	***Picard v. Wolfson Equities*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09449-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall[1]
2.	***Picard v. ZWD Investments*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09450-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
3.	***Picard v. Lanx BM Investments*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09448-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
4.	***Picard v. South Ferry #2 LP*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09451-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
5.	***Picard v. South Ferry Building Co.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09447-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
6.	***Picard v. United Congregations Mesora*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09445-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
7.	***Picard v. Chesed Congregations of America***	11-cv-09446-	K&L Gates LLP	Added to Consolidated Briefing on:

[1] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. April 13, 2012). ECF No. 4 ("Stern v. Marshall").

	In re Madoff Secs., No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	JSR	Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	• Stern v. Marshall
8.	***Picard v. S. Donald Friedman, et al*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. June 18, 2012), ECF No. 189	12-cv-02343-JSR	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Added to Consolidated Briefing on: • IRA Mandatory Withdrawals[2]
9.	***Picard v. Arden Asset Management, Inc., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-02581-JSR	Seward & Kissel LLP M. William Munno (munno@sewkis.com) Mandy DeRoche (deroche@sewkis.com) Michael B. Weitman (weitman@sewkis.com)	Added to Consolidated Briefing on: • Section 550(a)[3]
10.	***Picard v. Plaza Investments International Limited, et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 24, 2012), ECF No. 126	12-cv-02646-JSR	Debevoise & Plimpton LLP Joseph P. Moodhe (Jpmoodhe@debevoise.com) Shannon Rose Selden (srselden@debevoise.com)	Added to Consolidated Briefing on: • Antecedent Debt[4]
11.	***Picard v. Atlantic Security Bank*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-02980-JSR	Arnold & Porter LLP Scott B. Schreiber (Scott.Schreiber@aporter.com) Andrew T. Karron (Andrew.Karron@aporter.com)	Added to Consolidated Briefing on: • Section 550(a)
12.	***Picard v. Mistral (SPC)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 25, 2012), ECF No. 138	12-cv-03532-JSR	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Added to Consolidated Briefing on: • Stern v. Marshall

[2] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. May 15, 2012), ECF No.99 ("IRA Mandatory Withdrawals").
[3] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. August 22, 2012), ECF No. 314 ("Section 550(a)").
[4] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. May 15, 2012), ECF No. 107 ("Antecedent Debt").

13.	***Picard v. Zephyros Limited*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 25, 2012), ECF No. 138	12-cv-03533-JSR	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Added to Consolidated Briefing on: • Stern v. Marshall
14.	***Picard v. Standard Chartered Financial Services (Luxembourg) S.A., et al*** (Moving Parties - Standard Chartered Bank International (Americas) Ltd. Standard Chartered International (USA) Ltd.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Aug. 2, 2012), ECF No. 268	12-cv-04328-JSR	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Sharon L. Nelles (nelless@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e)[5]
15.	***Picard v. Barfield Nominees Limited et al*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-05278-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Brian M. Sabados (brian.sabados@kattenlaw.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality[6] • Good Faith [7]
16.	***Picard v. BNP Paribas S.A., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-05796-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace (bpeace@cgsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality
17.	***Picard v. Six Sis AG*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-05906-JSR	Chaffetz Lindsey LLP Peter R. Chaffetz (peter.chaffetz@chaffetzlindsey.com) Andreas A. Frischknecht	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e)

[5] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. May 16, 2012), ECF No. 119 ("Section 546(e)").
[6] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. June 7, 2012), ECF No. 167 ("Extraterritoriality").
[7] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. June 25, 2012), ECF No. 197 ("Good Faith").

			(andreas.frischknecht@chaffetzlindsey.com) Erin E. Valentine (erin.valentine@chaffetzlindsey.com)	• Extraterritoriality • Good Faith
18.	***Picard v. Bank Hapoalim B.M., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06187-JSR	Chadbourne & Parke LLP Scott S. Balber (sbalber@chadbourne.com) Emily Abrahams (eabrahams@chadbourne.com) Benjamin D. Bleiberg (bbleiberg@chadbourne.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
19.	***Picard v. Intesa Sanpaolo S.p.A., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06291-JSR	Davis Polk & Wardwell LLP Elliot Moskowitz (elliot.moskowitz@davispolk.com) Andrew Ditchfield (andrew.ditchfield@davispolk.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
20.	***Picard v. ABN AMRO Fund Services (Isle of Man) Nominees Limited, et al.)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06290-JSR	Tannenbaum Helpern Syracuse & Hirschtritt LLP Ralph A. Siciliano (siciliano@thsh.com) Zev. F. Raben (raben@thsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
21.	***Picard v. Standard Chartered Financial Services (Luxembourg) S.A., et al.*** (Moving Party is Standard Chartered Financial Services (Luxembourg) S.A.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06292-JSR	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Sharon L. Nelles (nelless@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith

22.	***Picard v. Intesa Sanpaolo S.p.A., et al.*** (Moving Parties - Eurizon Capital SGR S.p.A., f/k/a Nextra Alternative Investments SGR S.p.A., Eurizon Low Volatility, f/k/a Nextra Low Volatility, Eurizon Low Volatility II, f/k/a Nextra Low Volatility II, Eurizon Low Volatility PB, f/k/a Nextra Low Volatility PB, Eurizon Medium Volatility, f/k/a Nextra Medium Volatility, Eurizon Medium Volatility II, f/k/a Nextra Medium Volatility II, and Eurizon Total Return, f/k/a Nextra Total Return) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-07157	Davis Polk & Wardwell LLP Elliot Moskowitz (elliot.moskowitz@davispolk.com) Andrew Ditchfield (andrew.ditchfield@davispolk.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
23.	***Picard v. Citivic Nominees Ltd.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-07228-JSR	Cleary Gottlieb Steen & Hamilton LLP Carmine D. Boccuzzi, Jr. (cboccuzzi@cgsh.com) David Y. Livshiz (dlivshiz@cgsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
24.	***Picard v. Caprice International Group, Inc., et al.*** (Moving Party is Citibank (Switzerland) Ltd.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-07230-JSR	Cleary Gottlieb Steen & Hamilton LLP Carmine D. Boccuzzi, Jr. (cboccuzzi@cgsh.com) David Y. Livshiz (dlivshiz@cgsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
25.	***Picard v. Banque Degroof SA/NV (a/k/a Banque Degroof Bruxelles a/k/a Bank Degroof SA/NV), et al.*** (Moving Defendants: Banque Degroof SA/NV, Banque Degroof Luxembourg S.A., Banque Degroof France SA, Degroof Gestion Institutionnelle Luxembourg S.A., Aforge Finance Holding S.A.S., Aforge Finance	12-cv-08709-JSR	Otterbourg, Steindler, Houston & Rosen, P.C. Peter Feldman (pfeldman@oshr.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)

	S.A.S., Aforge Gestion S.A.S., and Aforge Capital Management S.A.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421			
26.	***Picard v. Banque Degroof SA/NV (a/k/a Banque Degroof Bruxelles a/k/a Bank Degroof SA/NV), et al.*** (Moving Defendants: Elite-Stability Fund Sicav and Elite-Stability Fund Sicav Stablerock Compartment, as represented by their Liquidator Pierre Delandmeter, Pierre Delandmeter, as Liquidator for Elite-Stability Fund Sicav and Elite-Stability Fund Sicav Stablerock Compartment, Access International Advisors LLC, Access Management Luxembourg (f/k/a Access International Advisors (Luxembourg) SA), as represented by it Liquidator Fernand Entringer, and Fernand Entringer, as Liquidator for Access Management Luxembourg (f/k/a Access International Advisors (Luxembourg) SA) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-08709-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
27.	***Picard v. Banque Cantonale Vaudoise*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421	12-cv-08816-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack (Jzulack@fzwz.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
28.	***Picard v. Societe Generale Private Banking (Suisse) S.A. (f/k/a SG Private Banking Suisse S.A.), et al.***	12-cv-08860-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt

	(Moving Defendants: Societe Generale Private Banking (Suisse) S.A. (f/k/a SG Private Banking Suisse S.A.); Societe Generale Private Banking (Lugano-Svizzera) S.A. (f/k/a SG Private Banking (Lugano-Svizzera) S.A.); Socgen Nominees (UK) Limited; Lyxor Asset Management S.A., as Successor in Interest to Barep Asset Management S.A.; Societe Generale Holding de Participations S.A., as Successor in Interest to Barep Asset Management S.A.; SG AM AI Premium Fund L.P. (f/k/a SG AM Alternative Diversified U.S. L.P.); Lyxor Asset Management Inc. (f/k/a SGAM Asset Management, Inc.), as General Partner of SG AM AI Premium Fund L.P.; SG Audace Alternatif (f/k/a SGAM AI Audace Alternatif); SGAM AI Equilibrium Fund (f/k/a SGAM Alternative Multi-Manager Diversified Fund); Lyxor Premium Fund (f/k/a SGAM Alternative Diversified Premium Fund); Societe Generale S.A., as Trustee for Lyxor Premium Fund; Societe Generale Bank & Trust S.A.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421		(Jzulack@fzwz.com)	• Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
29.	***Picard v. Lombard Odier Darier Hentsch & Cie*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421	12-cv-08858-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack (Jzulack@fzwz.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
30.	***Picard v. Bordier & Cie*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y.	12-cv-08861-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt

	Dec. 11, 2012), ECF No. 421		(Jzulack@fzwz.com)	• Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
31.	***Picard v. ABN AMRO Fund Services*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-09115-JSR	Latham & Watkins Christopher R. Harris (christopher.harris@lw.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
32.	***UBS Deutschland AG, et al (Moving Defendant - UBS Deutschland AG)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-09380-JSR	Gibson, Dunn & Crutcher LLP Marshall King (mking@gibsondunn.com) Gabriel Herrmann (gherrmann@gibsondunn.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
33.	***UBS Deutschland AG, et al (Moving Defendant - LGT Bank (Switzerland) Ltd.)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-09380-JSR	Milbank, Tweed, Hadley & McCloy LLP Stacey J. Rappaport (srappaport@milbank.com) Dorothy Heyl (dheyl@milbank.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
34.	***Picard v. Montbarry Incorporated, et al*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	13-cv-00502-JSR	Simon & Partners LLP Bradley D. Simon (bsimon@simonlawyers.com) Marko & Magolnick Joel S. Magolnick (magolnick@mm-pa.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Good Faith
35.	***Picard vs. LGT Bank in Liechtenstein Ltd.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. March 5, 2013) ECF No. 447	13-cv-01394-JSR	Milbank, Tweed, Hadley & McCloy LLP Stacey J. Rappaport (srappaport@milbank.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e)

			Dorothy Heyl (dheyl@milbank.com)	• Extraterritoriality • Good Faith • Section 550(a)

ACTIONS IN THE EXHIBIT A TO THE CONSOLIDATED BRIEFING ORDERS (Missing District Court Docket Numbers)				
1.	***Picard v. Bell Ventures Limited, et al***	11-cv-05507	Jacobs Partners LLC Mark R. Jacobs (mark.jacobs@jacobs-partners.com) Michele Marxkors (mmarxkors@jacobs-partners.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
2.	***Picard v. Elaine Pikulik***	11-cv-08532	Rubinstein & Corozzo LLP Ronald Rubinstein (rcorozzo1@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
3.	***Picard v. Peter Joseph***	12-cv-00036	Golenbock Eiseman Assor Bell & Peskoe LLP David J. Eiseman (deiseman@golenbock.com) Douglas L. Furth (dfurth@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
4.	***Picard v. Gary J. Korn, et al.***	12-cv-00037	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com) Michael S. Weinstein (mweinstein@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
5.	***Picard v. Theodore Story, et al.***	12-cv-00039	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com) Michael S. Weinstein (mweinstein@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
6.	***Picard v. Story Family Trust #3, et al.***	12-cv-00040	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

			Michael S. Weinstein (mweinstein@golenbock.com)	
7.	***Picard v. Douglas D. Johnson***	12-cv-00091	Herrick, Feinstein LLP Howard R. Elisofon (helisofon@herrick.com) Hanh V. Huynh (hhuynh@herrick.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
8.	***Picard v. Kohn, et al.*** (as filed by UniCredit Bank Austria AG)	12-cv-02161	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
9.	***Picard v. HSBC Bank, plc, et al.*** (as filed by UniCredit Bank Austria AG)	12-cv-02162	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
10.	***Picard v. HSBC Bank, plc, et al.*** (as filed by UniCredit S.p.A. and Pioneer Alternative Investment Management Ltd.)	12-cv-02239	Skadden, Arps, Slate, Meagher & Flom LLP Susan L. Saltzstein (susan.saltzstein@Skadden.com) Marco E. Schnabl (Marco.Schnabl@Skadden.com) Jeremy A. Berman (jeremy.berman@Skadden.com) Jason C. Putter (jason.putter@skadden.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
11.	***Picard v. Kohn, et al.*** (as filed by UniCredit S.p.A. and Pioneer Global Asset Management S.p.A.)	12-cv-02240	Skadden, Arps, Slate, Meagher & Flom LLP Susan L. Saltzstein	Missing Consolidated Briefing Orders: • Section 546(e)

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12.	***Picard v. Walter J. Gross Revocable Trust, et al.***	12-cv-02340	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
13.	***Picard v. Shum Family Partnership III, LP, et al.***	12-cv-02342	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
14.	***Picard v. S. Donald Friedman, et al***	12-cv-02343	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
15.	***Picard v. Second Act Associates, L.P., et al.***	12-cv-02367	Sanders Ortoli Vaughn-Flam Rosenstadt LLP Jeremy B. Kaplan (jk@sovrlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
16.	***Picard v. Cohmad Securities Corporation, et al.*** (All Moving Parties and Joinders)	12-cv-02368 12-cv-02347 12-cv-02369 12-cv-02589 12-cv-02676 12-cv-02930 12-cv-03101 12-cv-03103 12-cv-03124 12-cv-03034 12-cv-03404 12-cv-03663	Katsky Korins LLP Robert A. Abrams rabrams@katskykorins.com Siegel, Lipman, Dunay, Shepard & Miskel, LLP Kenneth W. Lipman klipman@sldsmlaw.com Vinson & Elkins LLP Steven Paradise (sparadise@velaw.com) Clifford Thau	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt

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			Westerman Ball Ederer Miller & Sharfstein LLP Richard Gabriele (rgabriele@westermanllp.com) Jeffrey A. Miller (jmiller@westermanllp.com)	
17.	***Picard v. Lewis W. Bernard 1995 Charitable Remainder Trust, et al.***	12-cv-02407	Golenbock Eiseman Assor Bell & Peskoe LLP Douglas L. Furth (dfurth@golenbock.com) Michael Weinstein (mweinstein@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
18.	***Picard v. Kostin Company, et al.***	12cv-02409	Morgan, Lewis & Bockius LLP Bernard J. Garbutt III (bgarbutt@morganlewis.com) Menachem O. Zelmanovitz (mzelmanovitz@morganlewis.com) Andrew D. Gottfried (agottfried@morganlewis.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
19.	***Picard v. Estate of William E. Sorrel, et al***	12-cv-02411	Rosenfeld & Kaplan, LLP Tab K. Rosenfeld (tab@rosenfeldlaw.com) Steven Kaplan (steve@rosenfeldlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
20.	***Picard v. Banca Carige, S.P.A.***	12-cv-02408	Kasowitz, Benson, Torres, & Friedman LLP David J. Mark (dmark@kasowitz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
21.	***Picard v. Banco Itau Europa Luxembourg S.A., et al***	12-cv-02432	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

22.	***Picard v. Estate of Doris M. Pearlman, et al***	12-cv-02433	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Joanna M. Hepburn (Joanna.hepburn@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
23.	***Picard v. Banque Privee Espirito Santo S.A.***	12-cv-02442	Flemming Zulack Williamson Zauderer LLP Elizabeth A. O'Connor (eoconnor@fzwz.com) John F. Zulack (Jzulack@fzwz.com) Megan Davis (mdavis@fzwz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
24.	***Picard v. Bennett M. Berman Trust, et al.*** (Jeffrey Berman and Jeffrey Berman Foundation - Moving Parties)	12-cv-02451	Goodwin Procter LLP Daniel M. Glosband (dglosband@goodwinprocter.com) Larkin M. Morton (lmorton@goodwinprocter.com) Christopher Newcomb (cnewcomb@goodwinprocter.com) Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
25.	***Picard v. DOS BFS Family Partnership II, L.P., et al.***	12-cv-02453	Westerman Ball Ederer Miller & Sharfstein LLP John Westerman (jwesterman@westermanllp.com) Mickee Hennessy, Esq. (mhennessy@westermanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
26.	***Picard v. Credit Suisse AG, et al***	12-cv-02454	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari	Missing Consolidated Briefing Orders: • Stern v. Marshall

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27.	***Picard v. The Sumitomo Trust and Banking Co., Ltd.***	12-cv-02481	Becker, Glynn, Melamed & Muffly LLP Zeb Landsman (zlandsman@beckerglynn.com) Jordan E. Stern (jstern@beckerglynn.com) Michelle Mufich (mmufich@beckerglynn.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
28.	***Picard v. Magnify Inc., et al.***	12-cv-02482	Kobre & Kim LLP Steven G. Kobre (steven.kobre@kobrekim.com) Danielle L. Rose (danielle.rose@kobrekim.com) David H. McGill (david.mcgill@kobrekim.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
29.	***Picard v. James Lowrey, et al.***	12-cv-02510	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Laura Clinton (laura.clinton@klgates.com) Martha Rodriguez Lopez (martha.rodriguezlopez@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
30.	***Picard v. Chris Lazarides***	12-cv-02511	Gibbons P.C. Michael S. O'Reilly (moreilly@gibbonslaw.com) Christopher, Nick P. (Christopher@gibbonslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
31.	***Picard v. Stuart J. Rabin***	12-cv-02512	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

32.	***Picard v. Morris Blum Living Trust, et al***	12-cv-02513	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Laura Clinton (laura.clinton@klgates.com) Martha Rodriguez Lopez (martha.rodriguezlopez@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
33.	***Picard v. Albert D. Angel, et al.***	12-cv-02522	Skoloff & Wolfe, P.C. Jonathan W. Wolfe (jwolfe@skoloffwolfe.com) Barbara A. Schweiger (bschweiger@skoloffwolfe.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
34.	***Picard v. Katz Group Limited Partnership, et al.***	12-cv-02523	Becker Meisel LLC Stacey L. Meisel (slmeisel@beckermeisel.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
35.	***Picard v. Trust 'A' U/W/G Hurwitz, et al.***	12-cv-02525	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence E. Rifken (rifkenl@gtlaw.com) Thomas J. McKee, Jr. (mckeet@gtlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
36.	***Picard v. Allen R. Hurwitz, et al.***	12-cv-02526	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence E. Rifken (rifkenl@gtlaw.com) Thomas J. McKee, Jr. (mckeet@gtlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
37.	***Picard v. Brandi Hurwitz, et al.***	12-cv-02527	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence E. Rifken	Missing Consolidated Briefing Orders: • Stern v. Marshall

			(rifkenl@gtlaw.com) Thomas J. McKee, Jr. (mckeet@gtlaw.com)	
38.	***Picard v. The June Bonyor Revocable Trust Restated UA dtd 5/22/00, et al***	12-cv-02528	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) David G. Barger (bargerd@gtlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
39.	***Picard v. Banque J. Safra (Suisse) SA***	12-cv-02587	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
40.	***Picard v. Vizcaya Partners Limited, et al.***	12-cv-02588	Sullivan & Cromwell LLP (for Bank J. Safra (Gibraltar) Limited) Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com) Katten Muchin Rosenman LLP (for Zeus Partners Ltd) Anthony L. Paccione (anthony.paccione@kattenlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
41.	***Picard v. Delta National Bank & Trust Company***	12-cv-02615	Duane Morris LLP John Dellasportas (dellajo@duanemorris.com) William C. Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

42.	***Picard v. Abu Dhabi Investment Authority***	12-cv-02616	Quinn Emanuel Urquhart & Sullivan, LLP Peter E. Calamari (petercalamari@quinnemanuel.com) Marc L. Greenwald (marcgreenwald@quinemanuel.com) Eric M. Kay (erickay@quinnemanuel.com) David S. Mader (davidmader@quinnemanuel.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
43.	***Picard v. Weiner Investments, L.P., et al.***	12-cv-02617	Manion McDonough & Lucas, P.C. James R. Walker (jwalker@mmlpc.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
44.	***Picard v. Estate of Ella N. Waxberg, et al.*** - (Sonya Kahn and Marvin D. Waxberg - Moving Parties)	12-cv-02620	Frank, White-Boyd, PA Julianne R. Frank (jrfbnk@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
45.	***Picard v. Stefanelli Investors Group, et al*** (Bankr. Dkt No. 10-05255; Joan L. Apisa & Danielle L. D'Esposito – Moving Party)	12-cv-02621	Law Office of Scott A. Steinberg Michael Harrison (harrisonm@optonline.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
46.	***Picard v. Nine Thirty LL Investments, LLC, et al***	12-cv-02622	Wolff & Samson, PC Ronald L. Israel (risrael@wolffsamson.com) Sperling & Slater P.C. Michael G. Dickler (mdickler@sperling-law.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
47.	***Picard v. Kohn, et al.*** (as filed by the Kohn Defendants)	12-cv-02639	The Law Office of Sheldon Eisenberger Sheldon Eisenberger (sheldon@eisenbergerlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

			Neuberger, Quinn, Gielen, Rubin & Gibber, PA Price O. Gielen (pog@nqgrg.com) Nathan D. Adler (nda@nqgrg.com)	
48.	***Picard v. HSBC Bank, plc, et al.*** (as filed by the Kohn Defendants)	12-cv-02640	The Law Office of Sheldon Eisenberger Sheldon Eisenberger (sheldon@eisenbergerlaw.com) Neuberger, Quinn, Gielen, Rubin & Gibber, PA Price O. Gielen (pog@nqgrg.com) Nathan D. Adler (nda@nqgrg.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
49.	***Picard v. Falcon Private Bank Ltd (f/k/a AIG Private Bank AG)***	12-cv-02645	Pillsbury Winthrop Shaw Pittman LLP Eric Fishman (eric.fishman@pillsburylaw.com) Karen Dine (karen.dine@pillsburylaw.com) Brandon Johnson (brandon.johnson@pillsburylaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
50.	***Picard v. Peter G. Chernis Revocable Trust Dtd 1/16/87, as amended, et al.***	12-cv-02715	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

51.	***Picard v. Marilyn Chernis Revocable Trust, et al***	12-cv-02716	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
52.	***Picard v. Picard v. Chernis Family Living Trust (2004)***	12-cv-02717	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
53.	***Picard v. Robyn G. Chernis Irrevocable Trust u/d/t 7/4/93***	12-cv-02718	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

54.	***Picard v. Evelyn Chernis Irrevocable Trust Agreement For Samantha Eyges Dtd October 6th 1986, et al***	12-cv-02721	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
55.	***Picard v. Residuary Trust for Phyllis Reischer under the Amended & Restated Indenture of Trust dated 8/8/01, et al***	12-cv-02723	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
56.	***Picard v. Douglas Shapiro***	12-cv-02725	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

57.	***Picard v. Magnus A. Unflat, et al***	12-cv-02726	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
58.	***Picard v. G.R.A.M. Limited Partnership, et al***	12-cv-02727	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
59.	***Picard v. Deborah Madoff, et al.*** (Deborah Madoff – Moving Party)	12-cv-02751	Cohen & Gresser LLP Mark S. Cohen (mcohen@cohengresser.com) Daniel H. Tabak (dtabak@cohengresser.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
60.	***Picard v. Peter B. Madoff, et al.*** (Deborah Madoff and Stephanie S. Mack – Moving Parties)	12-cv-02752	Cooley LLP Alan Levine (alevine@cooley.com) Lawrence C. Gottlieb (lgottlieb@cooley.com) Laura Grossfield Birger	Missing Consolidated Briefing Orders: • Stern v. Marshall

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61.	***Picard v. JD Partners LLC, et al.***	12-cv-02755	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
62.	***Picard vs. America Israel Cultural Foundation, Inc***	12-cv-02756	SNR Denton US LLP Carole Neville (carole.neville@snrdenton.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
63.	***Picard v. HSD Investments, L.P., et al***	12-cv-02757	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Michael A. Bartelstone (mbartelstone@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
64.	***Picard vs. RKD Investments, L.P, et al.***	12-cv-02759	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Michael A. Bartelstone (mbartelstone@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
65.	***Picard v. Richard M. Glantz, et al.***	12-cv-02778	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
66.	***Picard v. Macher Family Partnership, et al.***	12-cv-02779	Law Office of Richard E. Signorelli Richard E. Signorelli	Missing Consolidated Briefing Orders:

			(rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	• Stern v. Marshall
67.	***Picard v. Stephen H. Stern***	12-cv-02780	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
68.	***Picard v. Dahme Family Bypass Testamentary Trust Dated 10/27/76, et al***	12-cv-02781	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
69.	***Picard v. The Lustig Family 1990 Trust, et al***	12-cv-02782	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
70.	***Picard v. David Ivan Lustig***	12-cv-02783	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
71.	***Picard v. Liselotte J. Leeds Lifetime Trust***	12-cv-02784	Dow Lohnes PPLC Leslie H. Wiesenfelder (lwiesenfelder@dowlohnes.com) Brent Olson (bolson@dowlohnes.com) Michael Hays (mhays@dowlohnes.com) Daniel Prichard (dprichard@dowlohnes.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
72.	***Picard v. Michael S. Leeds, et al.***	12-cv-02785	Dow Lohnes PPLC Leslie H. Wiesenfelder (lwiesenfelder@dowlohnes.com) Brent Olson	Missing Consolidated Briefing Orders: • Stern v. Marshall

			(bolson@dowlohnes.com) Michael Hays (mhays@dowlohnes.com) Daniel Prichard (dprichard@dowlohnes.com)	
73.	***Picard vs. The Leeds Partnership, et al.***	12-cv-02786	Dow Lohnes PPLC Leslie H. Wiesenfelder (lwiesenfelder@dowlohnes.com) Brent Olson (bolson@dowlohnes.com) Michael Hays (mhays@dowlohnes.com) Daniel Prichard (dprichard@dowlohnes.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
74.	***Picard v. The Public Institution for Social Security***	12-cv-02787	Goodwin Procter LLP Daniel M. Glosband (dglosband@goodwinprocter.com) Larkin M. Morton (lmorton@goodwinprocter.com) Christopher Newcomb (cnewcomb@goodwinprocter.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
75.	***Picard v. MAF Associates, LLC, et al.***	12-cv-02788	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
76.	***Picard v. Lisa Liebmann Adams***	12-cv-02789	Day Pitney LLP Helen Harris (hharris@daypitney.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
77.	***Picard v. Estate of Ruth Schlesinger, et al***	12-cv-02790	Foley Hoag LLP Kenneth S. Leonetti (kleonetti@foleyhoag.com) Schlesinger Gannon & Lazetera LLP Thomas P. Gannon	Missing Consolidated Briefing Orders: • Stern v. Marshall

			(tgannon@sglllp.com) Ross Katz (rkatz@sglllp.com)	
78.	***Picard v. 1998 William Gershen Revocable Trust, et al***	12-cv-02791	Foley Hoag LLP Kenneth S. Leonetti (kleonetti@foleyhoag.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
79.	***Picard vs. Dawn Pascucci Barnard, et al.***	12-cv-02792	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
80.	***Picard v. Dean L. Greenberg***	12-cv-02794	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
81.	***Picard v. Estate of Samuel Robert Roitenberg, et al.***	12-cv-02795	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

82.	***Picard v. Sheldon Shaffer, et al.***	12-cv-02796	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
83.	***Picard v. Sheldon Shaffer Trust Dtd 3/26/1996, et al.***	12-cv-02797	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
84.	***Picard v. Sidney Ladin Revocable Trust Dated 12/30/96, et al.***	12-cv-02798	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
85.	***Picard vs. Samuel Robinson***	12-cv-02799	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

			Brendan M. Scott (bscott@klestadt.com)	
86.	***Picard v. UBS AG, UBS (Luxembourg) S.A., et al*** (Reliance Management (BVI) Limited and Reliance Management (Gibraltar) Limited – Moving Parties)	12-cv-02802	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Seward & Kissel LLP Mark J. Hyland (hyland@sewkis.com) Mandy DeRoche (deroche@sewkis.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
87.	***Picard v. Defender Limited, et al***	12-cv-02871	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Seward & Kissel LLP Mark J. Hyland (hyland@sewkis.com) Mandy DeRoche (deroche@sewkis.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
88.	***Picard vs. The Estate of Doris Igoin, et al.***	12-cv-02872	Kelley Drye & Warren LLP Jonathan K. Cooperman (Jcooperman@KelleyDrye.com) Seungwhan Kim (skim@kelleydrye.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
89.	***Picard vs. Burton R. Sax***	12-cv-02873	Meltzer, Lippe, Goldstein & Breitsone, LLP Pedram A. Tabibi (ptabibi@meltzerlippe.com) Sally M. Donahue	Missing Consolidated Briefing Orders: • Stern v. Marshall

			(sdonahue@meltzerlippe.com)	
90.	***Picard v. Sax-Bartels Associates, Limited Partnership***	12-cv-02874	Meltzer, Lippe, Goldstein & Breitsone, LLP Pedram A. Tabibi (ptabibi@meltzerlippe.com) Sally M. Donahue (sdonahue@meltzerlippe.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
91.	***Picard vs. The 1995 Jack Parker Descendant Trust No. 1, et al.***	12-cv-02875	Kasowitz, Benson, Torres, & Friedman LLP Marc E. Kasowitz (mkasowitz@kasowitz.com) Daniel J. Fetterman (dfetterman@kasowitz.com) David J. Mark (dmark@kasowitz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
92.	***Picard vs. JRAG, LLC, et al.***	12-cv-02876	Kasowitz, Benson, Torres, & Friedman LLP Marc E. Kasowitz (mkasowitz@kasowitz.com) Daniel J. Fetterman (dfetterman@kasowitz.com) David J. Mark (dmark@kasowitz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
93.	***Picard v. KBC Investments Limited,***	12-cv-02877	Sidley Austin LLP Alan M. Unger (aunger@sidley.com) Bryan Krakauer (bkrakauer@sidley.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
94.	***Picard v. Meritz Fire & Marine Insurance Co. Ltd.***	12-cv-02878	Steptoe & Johnson LLP Kristin Darr (kdarr@steptoe.com) Seong H. Kim (skim@steptoe.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
95.	***Picard v. The Article Fourth Non-Exempt Trust Created Under the Leo M. Klein***	12-cv-02879	Blank Rome LLP James V. Masella, III	Missing Consolidated Briefing Orders:

	Trust Dated June 14, 1989 as Amended and Restated, et al.		(JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com) Ryan E. Cronin (RCronin@BlankRome.com)	• Stern v. Marshall
96.	***Picard v. Korea Exchange Bank***	12-cv-02880	King & Spalding LLP Richard A. Cirillo (rcirillo@kslaw.com) Joshua Edgemon (jedgemon@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
97.	***Picard v. National Bank of Kuwait***	12-cv-02881	King & Spalding LLP Richard A. Cirillo (rcirillo@kslaw.com) Joshua Edgemon (jedgemon@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
98.	***Picard v. XYZ2 Corp. [Redacted - Under Seal]***	12-cv-02882	Cooley LLP Lawrence C. Gottlieb (lgottlieb@cooley.com) Michael A. Klein (mklein@cooley.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
99.	***Picard v. Howard Kaye***	12-cv-02884	McClaughlin & Stern, LLP Lee S. Shalov (lshalov@mclaughlinstern.com) Marc Rosenberg (mrosenberg@mclaughlinstern.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
100.	***Picard v. Mildred S. Poland, et al***	12-cv-02885	McClaughlin & Stern, LLP Lee S. Shalov (lshalov@mclaughlinstern.com) Marc Rosenberg (mrosenberg@mclaughlinstern.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
101.	***Picard v. Bernard Gordon, et al.***	12-cv-02922	Ruskin Moscou Faltischeck, P.C. Mark S. Mulholland (mmulholland@rmfpc.com) Thoams A. Telesca (ttelesca@rmfpc.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

102.	***Picard vs. George E. Nadler***	12-cv-02923	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
103.	***Picard v. Janis Berman***	12-cv-02924	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
104.	***Picard vs. Candice Nadler Revocable Trust DTD 10/18/01, et al.***	12-cv-02925	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
105.	***Picard v. Loeb Living Trust, et al***	12-cv-02926	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
106.	***Picard v. Leon Flax, et al.***	12-cv-02928	Katten Muchin Rosenman LLP Anthony L. Paccione anthony.paccione@kattenlaw.com Brian L. Muldrew brian.muldrew@kattenlaw.com	Missing Consolidated Briefing Orders: • Stern v. Marshall
107.	***Picard vs. Scott Gottlieb, et al.***	12-cv-02931	Day Pitney LLP Joshua W. Cohen (jwcohen@daypitney.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
108.	***Picard v. PetcareRX, Inc.***	12-cv-02932	Dickstein Shapiro LLP Deborah A. Skakel	Missing Consolidated Briefing Orders:

			(Skakeld@dicksteinshapiro.com) Shaya M. Berger (bergers@dicksteinshapiro.coom)	• Stern v. Marshall
109.	***Picard v. Merkin, et al.***	12-cv-02933	Dechert LLP Andrew J. Levander (andrew.levander@dechert.com) Neil A. Steiner (neil.steiner@dechert.com) Reed Smith LLP James C. McCarroll (jmccarroll@reedsmith.com) Jordan W. Siev (jsiev@reedsmith.com) John L. Scott (jlscott@reedsmith.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
110.	***Picard v. Orbita Capital Return Strategy Limited***	12-cv-02934	Dechert LLP Gary Mennitt (gary.mennitt@dechert.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
111.	***Picard v. The Robert Auerbach Revocable Trust, et al.***	12-cv-02975	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
112.	***Picard v. CRS Revocable Trust, et al.***	12-cv-02976	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
113.	***Picard v. Robert S. Bernstein***	12-cv-02977	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
114.	***Picard v. Gutmacher Enterprises, LP, et al***	12-cv-02978	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall

115.	***Picard v. The S. James Coppersmith Charitable Remainder Unitrust, et al.***	12-cv-02979	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
116.	***Picard v. Atlantic Security Bank***	12-cv-02980	Arnold & Porter LLP Scott B. Schreiber (Scott.Schreiber@aporter.com) Andrew T. Karron (Andrew.Karron@aporter.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
117.	***Picard v. Cardinal Management Inc., et al***	12-cv-02981	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
118.	***Picard v. Radcliff Investments Limited, et al.***	12-cv-02982	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
119.	***Picard v. Amy Joel***	12-cv-03100	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
120.	***Picard v. Robert A. Luria, et al***	12-cv-03101	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
121.	***Picard v. Amy J. Luria, et al.***	12-cv-03102	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

122.	***Picard v. The Estate of Gladys C. Luria, et al.***	12-cv-03104	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
123.	***Picard v. Patricia Samuels, et al.***	12-cv-03105	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
124.	***Picard v. Sylvia Joel, et al.***	12-cv-03106	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
125.	***Picard vs. The LDP Corp. Profit Sharing Plan and Trust, et al.***	12-cv-03107	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
126.	***Picard v. Jeffrey Shankman***	12-cv-03108	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
127.	***Picard v. Pictet et Cie***	12-cv-03402	Debevoise & Plimpton LLP Michael E. Wiles (mewiles@debevoise.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
128.	***Picard v. Stanley Plesent***	12-cv-03403	Pro Se Defendant 24 Maple Avenue Larchmont, NY 10538 914-834-8260	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt

129.	***Picard v. Merrill Lynch International***	12-cv-03486	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
130.	***Picard v. Merrill Lynch Bank (Suisse) SA***	12-cv-03487	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
131.	***Picard v. Fullerton Capital PTE. Ltd.***	12-cv-03488	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
132.	***Picard v. Cathay United Bank, et al.***	12-cv-03489	Baker & McKenzie LLP David W. Parham (david.Parham@bakermckenzie.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
133.	***Picard v. Mistral (SPC)***	12-cv-03532	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Missing Consolidated Briefing Orders: • Section 546(e)
134.	***Picard v. Zephyros Limited***	12-cv-03533	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Missing Consolidated Briefing Orders: • Section 546(e)
135.	***Picard v. Srione, LLC, et al.***	12-cv-04092	Law Offices of Stephen Goldstein Stephen Goldstein Sgoldlaw@gmail.com	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt

136.	***Picard vs. Gail Nessel***	12-cv-04178	Halperin Battaglia Raicht, LLP Alan D. Halperin (ahalperin@halperinlaw.net) Scott A. Ziluck (sziluck@halperinlaw.net) Neal W. Cohen (ncohen@halperinlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
137.	***Picard v. Janet Jaffe Trust UA Dtd 4/20/90, et al***	12-cv-04188	Bernfeld, DeMatteo & Bernfeld, LLP David Bernfeld (davidbernfeld@bernfeld-dematteo.com) Jeffrey Bernfeld (jeffreybernfeld@bernfeld-dematteo.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt • IRA Mandatory Withdrawals
138.	***Picard v. Laurel Kohl and Jodi Kohl***	12-cv-04189	Okin, Hollander & DeLuca LLP Paul S. Hollander (phollander@ohdlaw.com) Gregory S. Kinoian (gkinoian@ohdlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
139.	***Picard v. Royal Bank of Canada, et al.***	12-cv-04939-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Brian M. Sabados (brian.sabados@kattenlaw.com) Mark T. Ciani (mark.ciani@kattenlaw.com)	Added to Consolidated Briefing on: • Good Faith
140.	***Picard v. Intesa Sanpaolo S.p.A., et al.***	12-cv-06291; 12-cv-07157	Davis Polk & Wardwell LLP Elliot Moskowitz (elliot.moskowitz@davispolk.com) Andrew Ditchfield (andrew.ditchfield@davispolk.com)	Added to Consolidated Briefing on: • Section 550(a)

EXHIBIT B

MOTIONS TO WITHDRAW ADDED TO CONSOLIDATED ISSUE BRIEFINGS PURSUANT TO CONSENT ORDERS				
1.	***Picard v. Wolfson Equities*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09449-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall[1]
2.	***Picard v. ZWD Investments*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09450-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
3.	***Picard v. Lanx BM Investments*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09448-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
4.	***Picard v. South Ferry #2 LP*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09451-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
5.	***Picard v. South Ferry Building Co.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09447-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
6.	***Picard v. United Congregations Mesora*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09445-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
7.	***Picard v. Chesed Congregations of America***	11-cv-09446-	K&L Gates LLP	Added to Consolidated Briefing on:

[1] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. April 13, 2012). ECF No. 4 ("Stern v. Marshall").

	In re Madoff Secs., No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	JSR	Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	• Stern v. Marshall
8.	***Picard v. S. Donald Friedman, et al*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. June 18, 2012), ECF No. 189	12-cv-02343-JSR	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Added to Consolidated Briefing on: • IRA Mandatory Withdrawals[2]
9.	***Picard v. Arden Asset Management, Inc., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-02581-JSR	Seward & Kissel LLP M. William Munno (munno@sewkis.com) Mandy DeRoche (deroche@sewkis.com) Michael B. Weitman (weitman@sewkis.com)	Added to Consolidated Briefing on: • Section 550(a)[3]
10.	***Picard v. Plaza Investments International Limited, et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 24, 2012), ECF No. 126	12-cv-02646-JSR	Debevoise & Plimpton LLP Joseph P. Moodhe (Jpmoodhe@debevoise.com) Shannon Rose Selden (srselden@debevoise.com)	Added to Consolidated Briefing on: • Antecedent Debt[4]
11.	***Picard v. Atlantic Security Bank*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-02980-JSR	Arnold & Porter LLP Scott B. Schreiber (Scott.Schreiber@aporter.com) Andrew T. Karron (Andrew.Karron@aporter.com)	Added to Consolidated Briefing on: • Section 550(a)
12.	***Picard v. Mistral (SPC)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 25, 2012), ECF No. 138	12-cv-03532-JSR	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Added to Consolidated Briefing on: • Stern v. Marshall

[2] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. May 15, 2012), ECF No.99 ("IRA Mandatory Withdrawals").
[3] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. August 22, 2012), ECF No. 314 ("Section 550(a)").
[4] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. May 15, 2012), ECF No. 107 ("Antecedent Debt").

13.	***Picard v. Zephyros Limited*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 25, 2012), ECF No. 138	12-cv-03533-JSR	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Added to Consolidated Briefing on: • Stern v. Marshall
14.	***Picard v. Standard Chartered Financial Services (Luxembourg) S.A., et al*** (Moving Parties - Standard Chartered Bank International (Americas) Ltd. Standard Chartered International (USA) Ltd.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Aug. 2, 2012), ECF No. 268	12-cv-04328-JSR	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Sharon L. Nelles (nelless@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e)[5]
15.	***Picard v. Barfield Nominees Limited et al*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-05278-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Brian M. Sabados (brian.sabados@kattenlaw.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality[6] • Good Faith [7]
16.	***Picard v. BNP Paribas S.A., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-05796-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace (bpeace@cgsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality
17.	***Picard v. Six Sis AG*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-05906-JSR	Chaffetz Lindsey LLP Peter R. Chaffetz (peter.chaffetz@chaffetzlindsey.com) Andreas A. Frischknecht	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e)

[5] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. May 16, 2012), ECF No. 119 ("Section 546(e)").
[6] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. June 7, 2012), ECF No. 167 ("Extraterritoriality").
[7] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. June 25, 2012), ECF No. 197 ("Good Faith").

			(andreas.frischknecht@chaffetzlindsey.com) Erin E. Valentine (erin.valentine@chaffetzlindsey.com)	• Extraterritoriality • Good Faith
18.	***Picard v. Bank Hapoalim B.M., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06187-JSR	Chadbourne & Parke LLP Scott S. Balber (sbalber@chadbourne.com) Emily Abrahams (eabrahams@chadbourne.com) Benjamin D. Bleiberg (bbleiberg@chadbourne.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
19.	***Picard v. Intesa Sanpaolo S.p.A., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06291-JSR	Davis Polk & Wardwell LLP Elliot Moskowitz (elliot.moskowitz@davispolk.com) Andrew Ditchfield (andrew.ditchfield@davispolk.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
20.	***Picard v. ABN AMRO Fund Services (Isle of Man) Nominees Limited, et al.)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06290-JSR	Tannenbaum Helpern Syracuse & Hirschtritt LLP Ralph A. Siciliano (siciliano@thsh.com) Zev. F. Raben (raben@thsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
21.	***Picard v. Standard Chartered Financial Services (Luxembourg) S.A., et al.*** (Moving Party is Standard Chartered Financial Services (Luxembourg) S.A.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06292-JSR	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Sharon L. Nelles (nelless@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith

22.	***Picard v. Intesa Sanpaolo S.p.A., et al.*** (Moving Parties - Eurizon Capital SGR S.p.A., f/k/a Nextra Alternative Investments SGR S.p.A., Eurizon Low Volatility, f/k/a Nextra Low Volatility, Eurizon Low Volatility II, f/k/a Nextra Low Volatility II, Eurizon Low Volatility PB, f/k/a Nextra Low Volatility PB, Eurizon Medium Volatility, f/k/a Nextra Medium Volatility, Eurizon Medium Volatility II, f/k/a Nextra Medium Volatility II, and Eurizon Total Return, f/k/a Nextra Total Return) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-07157	Davis Polk & Wardwell LLP Elliot Moskowitz (elliot.moskowitz@davispolk.com) Andrew Ditchfield (andrew.ditchfield@davispolk.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
23.	***Picard v. Citivic Nominees Ltd.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-07228-JSR	Cleary Gottlieb Steen & Hamilton LLP Carmine D. Boccuzzi, Jr. (cboccuzzi@cgsh.com) David Y. Livshiz (dlivshiz@cgsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
24.	***Picard v. Caprice International Group, Inc., et al.*** (Moving Party is Citibank (Switzerland) Ltd.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-07230-JSR	Cleary Gottlieb Steen & Hamilton LLP Carmine D. Boccuzzi, Jr. (cboccuzzi@cgsh.com) David Y. Livshiz (dlivshiz@cgsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
25.	***Picard v. Banque Degroof SA/NV (a/k/a Banque Degroof Bruxelles a/k/a Bank Degroof SA/NV), et al.*** (Moving Defendants: Banque Degroof SA/NV, Banque Degroof Luxembourg S.A., Banque Degroof France SA, Degroof Gestion Institutionnelle Luxembourg S.A., Aforge Finance Holding S.A.S., Aforge Finance	12-cv-08709-JSR	Otterbourg, Steindler, Houston & Rosen, P.C. Peter Feldman (pfeldman@oshr.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)

	S.A.S., Aforge Gestion S.A.S., and Aforge Capital Management S.A.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421			
26.	***Picard v. Banque Degroof SA/NV (a/k/a Banque Degroof Bruxelles a/k/a Bank Degroof SA/NV), et al.*** (Moving Defendants: Elite-Stability Fund Sicav and Elite-Stability Fund Sicav Stablerock Compartment, as represented by their Liquidator Pierre Delandmeter, Pierre Delandmeter, as Liquidator for Elite-Stability Fund Sicav and Elite-Stability Fund Sicav Stablerock Compartment, Access International Advisors LLC, Access Management Luxembourg (f/k/a Access International Advisors (Luxembourg) SA), as represented by it Liquidator Fernand Entringer, and Fernand Entringer, as Liquidator for Access Management Luxembourg (f/k/a Access International Advisors (Luxembourg) SA) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-08709-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
27.	***Picard v. Banque Cantonale Vaudoise*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421	12-cv-08816-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack (Jzulack@fzwz.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
28.	***Picard v. Societe Generale Private Banking (Suisse) S.A. (f/k/a SG Private Banking Suisse S.A.), et al.***	12-cv-08860-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt

	(Moving Defendants: Societe Generale Private Banking (Suisse) S.A. (f/k/a SG Private Banking Suisse S.A.); Societe Generale Private Banking (Lugano-Svizzera) S.A. (f/k/a SG Private Banking (Lugano-Svizzera) S.A.); Socgen Nominees (UK) Limited; Lyxor Asset Management S.A., as Successor in Interest to Barep Asset Management S.A.; Societe Generale Holding de Participations S.A., as Successor in Interest to Barep Asset Management S.A.; SG AM AI Premium Fund L.P. (f/k/a SG AM Alternative Diversified U.S. L.P.); Lyxor Asset Management Inc. (f/k/a SGAM Asset Management, Inc.), as General Partner of SG AM AI Premium Fund L.P.; SG Audace Alternatif (f/k/a SGAM AI Audace Alternatif); SGAM AI Equilibrium Fund (f/k/a SGAM Alternative Multi-Manager Diversified Fund); Lyxor Premium Fund (f/k/a SGAM Alternative Diversified Premium Fund); Societe Generale S.A., as Trustee for Lyxor Premium Fund; Societe Generale Bank & Trust S.A.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421		(Jzulack@fzwz.com)	• Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
29.	***Picard v. Lombard Odier Darier Hentsch & Cie*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421	12-cv-08858-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack (Jzulack@fzwz.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
30.	***Picard v. Bordier & Cie*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y.	12-cv-08861-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt

	Dec. 11, 2012), ECF No. 421		(Jzulack@fzwz.com)	• Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
31.	***Picard v. ABN AMRO Fund Services*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-09115-JSR	Latham & Watkins Christopher R. Harris (christopher.harris@lw.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
32.	***UBS Deutschland AG, et al (Moving Defendant - UBS Deutschland AG)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-09380-JSR	Gibson, Dunn & Crutcher LLP Marshall King (mking@gibsondunn.com) Gabriel Herrmann (gherrmann@gibsondunn.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
33.	***UBS Deutschland AG, et al (Moving Defendant - LGT Bank (Switzerland) Ltd.)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-09380-JSR	Milbank, Tweed, Hadley & McCloy LLP Stacey J. Rappaport (srappaport@milbank.com) Dorothy Heyl (dheyl@milbank.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
34.	***Picard v. Montbarry Incorporated, et al*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	13-cv-00502-JSR	Simon & Partners LLP Bradley D. Simon (bsimon@simonlawyers.com) Marko & Magolnick Joel S. Magolnick (magolnick@mm-pa.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Good Faith
35.	***Picard vs. LGT Bank in Liechtenstein Ltd.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. March 5, 2013) ECF No. 447	13-cv-01394-JSR	Milbank, Tweed, Hadley & McCloy LLP Stacey J. Rappaport (srappaport@milbank.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e)

			Dorothy Heyl (dheyl@milbank.com)	• Extraterritoriality • Good Faith • Section 550(a)

ACTIONS IN THE EXHIBIT A TO THE CONSOLIDATED BRIEFING ORDERS (Missing District Court Docket Numbers)				
1.	***Picard v. Bell Ventures Limited, et al***	11-cv-05507	Jacobs Partners LLC Mark R. Jacobs (mark.jacobs@jacobs-partners.com) Michele Marxkors (mmarxkors@jacobs-partners.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
2.	***Picard v. Elaine Pikulik***	11-cv-08532	Rubinstein & Corozzo LLP Ronald Rubinstein (rcorozzo1@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
3.	***Picard v. Peter Joseph***	12-cv-00036	Golenbock Eiseman Assor Bell & Peskoe LLP David J. Eiseman (deiseman@golenbock.com) Douglas L. Furth (dfurth@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
4.	***Picard v. Gary J. Korn, et al.***	12-cv-00037	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com) Michael S. Weinstein (mweinstein@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
5.	***Picard v. Theodore Story, et al.***	12-cv-00039	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com) Michael S. Weinstein (mweinstein@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
6.	***Picard v. Story Family Trust #3, et al.***	12-cv-00040	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

			Michael S. Weinstein (mweinstein@golenbock.com)	
7.	***Picard v. Douglas D. Johnson***	12-cv-00091	Herrick, Feinstein LLP Howard R. Elisofon (helisofon@herrick.com) Hanh V. Huynh (hhuynh@herrick.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
8.	***Picard v. Kohn, et al.*** (as filed by UniCredit Bank Austria AG)	12-cv-02161	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
9.	***Picard v. HSBC Bank, plc, et al.*** (as filed by UniCredit Bank Austria AG)	12-cv-02162	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
10.	***Picard v. HSBC Bank, plc, et al.*** (as filed by UniCredit S.p.A. and Pioneer Alternative Investment Management Ltd.)	12-cv-02239	Skadden, Arps, Slate, Meagher & Flom LLP Susan L. Saltzstein (susan.saltzstein@Skadden.com) Marco E. Schnabl (Marco.Schnabl@Skadden.com) Jeremy A. Berman (jeremy.berman@Skadden.com) Jason C. Putter (jason.putter@skadden.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
11.	***Picard v. Kohn, et al.*** (as filed by UniCredit S.p.A. and Pioneer Global Asset Management S.p.A.)	12-cv-02240	Skadden, Arps, Slate, Meagher & Flom LLP Susan L. Saltzstein	Missing Consolidated Briefing Orders: • Section 546(e)

			(susan.saltzstein@Skadden.com) Marco E. Schnabl (Marco.Schnabl@Skadden.com) Jeremy A. Berman (jeremy.berman@Skadden.com) Jason C. Putter (jason.putter@skadden.com)	• Stern v. Marshall
12.	***Picard v. Walter J. Gross Revocable Trust, et al.***	12-cv-02340	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
13.	***Picard v. Shum Family Partnership III, LP, et al.***	12-cv-02342	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
14.	***Picard v. S. Donald Friedman, et al***	12-cv-02343	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
15.	***Picard v. Second Act Associates, L.P., et al.***	12-cv-02367	Sanders Ortoli Vaughn-Flam Rosenstadt LLP Jeremy B. Kaplan (jk@sovrlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
16.	***Picard v. Cohmad Securities Corporation, et al.*** (All Moving Parties and Joinders)	12-cv-02368 12-cv-02347 12-cv-02369 12-cv-02589 12-cv-02676 12-cv-02930 12-cv-03101 12-cv-03103 12-cv-03124 12-cv-03034 12-cv-03404 12-cv-03663	Katsky Korins LLP Robert A. Abrams rabrams@katskykorins.com Siegel, Lipman, Dunay, Shepard & Miskel, LLP Kenneth W. Lipman klipman@sldsmlaw.com Vinson & Elkins LLP Steven Paradise (sparadise@velaw.com) Clifford Thau	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt

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			Westerman Ball Ederer Miller & Sharfstein LLP Richard Gabriele (rgabriele@westermanllp.com) Jeffrey A. Miller (jmiller@westermanllp.com)	
17.	***Picard v. Lewis W. Bernard 1995 Charitable Remainder Trust, et al.***	12-cv-02407	Golenbock Eiseman Assor Bell & Peskoe LLP Douglas L. Furth (dfurth@golenbock.com) Michael Weinstein (mweinstein@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
18.	***Picard v. Kostin Company, et al.***	12cv-02409	Morgan, Lewis & Bockius LLP Bernard J. Garbutt III (bgarbutt@morganlewis.com) Menachem O. Zelmanovitz (mzelmanovitz@morganlewis.com) Andrew D. Gottfried (agottfried@morganlewis.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
19.	***Picard v. Estate of William E. Sorrel, et al***	12-cv-02411	Rosenfeld & Kaplan, LLP Tab K. Rosenfeld (tab@rosenfeldlaw.com) Steven Kaplan (steve@rosenfeldlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
20.	***Picard v. Banca Carige, S.P.A.***	12-cv-02408	Kasowitz, Benson, Torres, & Friedman LLP David J. Mark (dmark@kasowitz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
21.	***Picard v. Banco Itau Europa Luxembourg S.A., et al***	12-cv-02432	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

22.	***Picard v. Estate of Doris M. Pearlman, et al***	12-cv-02433	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Joanna M. Hepburn (Joanna.hepburn@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
23.	***Picard v. Banque Privee Espirito Santo S.A.***	12-cv-02442	Flemming Zulack Williamson Zauderer LLP Elizabeth A. O'Connor (eoconnor@fzwz.com) John F. Zulack (Jzulack@fzwz.com) Megan Davis (mdavis@fzwz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
24.	***Picard v. Bennett M. Berman Trust, et al.*** (Jeffrey Berman and Jeffrey Berman Foundation - Moving Parties)	12-cv-02451	Goodwin Procter LLP Daniel M. Glosband (dglosband@goodwinprocter.com) Larkin M. Morton (lmorton@goodwinprocter.com) Christopher Newcomb (cnewcomb@goodwinprocter.com) Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
25.	***Picard v. DOS BFS Family Partnership II, L.P., et al.***	12-cv-02453	Westerman Ball Ederer Miller & Sharfstein LLP John Westerman (jwesterman@westermanllp.com) Mickee Hennessy, Esq. (mhennessy@westermanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
26.	***Picard v. Credit Suisse AG, et al***	12-cv-02454	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari	Missing Consolidated Briefing Orders: • Stern v. Marshall

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27.	***Picard v. The Sumitomo Trust and Banking Co., Ltd.***	12-cv-02481	Becker, Glynn, Melamed & Muffly LLP Zeb Landsman (zlandsman@beckerglynn.com) Jordan E. Stern (jstern@beckerglynn.com) Michelle Mufich (mmufich@beckerglynn.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
28.	***Picard v. Magnify Inc., et al.***	12-cv-02482	Kobre & Kim LLP Steven G. Kobre (steven.kobre@kobrekim.com) Danielle L. Rose (danielle.rose@kobrekim.com) David H. McGill (david.mcgill@kobrekim.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
29.	***Picard v. James Lowrey, et al.***	12-cv-02510	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Laura Clinton (laura.clinton@klgates.com) Martha Rodriguez Lopez (martha.rodriguezlopez@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
30.	***Picard v. Chris Lazarides***	12-cv-02511	Gibbons P.C. Michael S. O'Reilly (moreilly@gibbonslaw.com) Christopher, Nick P. (Christopher@gibbonslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
31.	***Picard v. Stuart J. Rabin***	12-cv-02512	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

32.	***Picard v. Morris Blum Living Trust, et al***	12-cv-02513	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Laura Clinton (laura.clinton@klgates.com) Martha Rodriguez Lopez (martha.rodriguezlopez@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
33.	***Picard v. Albert D. Angel, et al.***	12-cv-02522	Skoloff & Wolfe, P.C. Jonathan W. Wolfe (jwolfe@skoloffwolfe.com) Barbara A. Schweiger (bschweiger@skoloffwolfe.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
34.	***Picard v. Katz Group Limited Partnership, et al.***	12-cv-02523	Becker Meisel LLC Stacey L. Meisel (slmeisel@beckermeisel.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
35.	***Picard v. Trust 'A' U/W/G Hurwitz, et al.***	12-cv-02525	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence E. Rifken (rifkenl@gtlaw.com) Thomas J. McKee, Jr. (mckeet@gtlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
36.	***Picard v. Allen R. Hurwitz, et al.***	12-cv-02526	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence E. Rifken (rifkenl@gtlaw.com) Thomas J. McKee, Jr. (mckeet@gtlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
37.	***Picard v. Brandi Hurwitz, et al.***	12-cv-02527	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence E. Rifken	Missing Consolidated Briefing Orders: • Stern v. Marshall

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38.	***Picard v. The June Bonyor Revocable Trust Restated UA dtd 5/22/00, et al***	12-cv-02528	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) David G. Barger (bargerd@gtlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
39.	***Picard v. Banque J. Safra (Suisse) SA***	12-cv-02587	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
40.	***Picard v. Vizcaya Partners Limited, et al.***	12-cv-02588	Sullivan & Cromwell LLP (for Bank J. Safra (Gibraltar) Limited) Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com) Katten Muchin Rosenman LLP (for Zeus Partners Ltd) Anthony L. Paccione (anthony.paccione@kattenlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
41.	***Picard v. Delta National Bank & Trust Company***	12-cv-02615	Duane Morris LLP John Dellasportas (dellajo@duanemorris.com) William C. Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

42.	***Picard v. Abu Dhabi Investment Authority***	12-cv-02616	Quinn Emanuel Urquhart & Sullivan, LLP Peter E. Calamari (petercalamari@quinnemanuel.com) Marc L. Greenwald (marcgreenwald@quinemanuel.com) Eric M. Kay (erickay@quinnemanuel.com) David S. Mader (davidmader@quinnemanuel.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
43.	***Picard v. Weiner Investments, L.P., et al.***	12-cv-02617	Manion McDonough & Lucas, P.C. James R. Walker (jwalker@mmlpc.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
44.	***Picard v. Estate of Ella N. Waxberg, et al.*** - (Sonya Kahn and Marvin D. Waxberg - Moving Parties)	12-cv-02620	Frank, White-Boyd, PA Julianne R. Frank (jrfbnk@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
45.	***Picard v. Stefanelli Investors Group, et al*** (Bankr. Dkt No. 10-05255; Joan L. Apisa & Danielle L. D'Esposito – Moving Party)	12-cv-02621	Law Office of Scott A. Steinberg Michael Harrison (harrisonm@optonline.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
46.	***Picard v. Nine Thirty LL Investments, LLC, et al***	12-cv-02622	Wolff & Samson, PC Ronald L. Israel (risrael@wolffsamson.com) Sperling & Slater P.C. Michael G. Dickler (mdickler@sperling-law.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
47.	***Picard v. Kohn, et al.*** (as filed by the Kohn Defendants)	12-cv-02639	The Law Office of Sheldon Eisenberger Sheldon Eisenberger (sheldon@eisenbergerlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

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48.	***Picard v. HSBC Bank, plc, et al.*** (as filed by the Kohn Defendants)	12-cv-02640	The Law Office of Sheldon Eisenberger Sheldon Eisenberger (sheldon@eisenbergerlaw.com) Neuberger, Quinn, Gielen, Rubin & Gibber, PA Price O. Gielen (pog@nqgrg.com) Nathan D. Adler (nda@nqgrg.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
49.	***Picard v. Falcon Private Bank Ltd (f/k/a AIG Private Bank AG)***	12-cv-02645	Pillsbury Winthrop Shaw Pittman LLP Eric Fishman (eric.fishman@pillsburylaw.com) Karen Dine (karen.dine@pillsburylaw.com) Brandon Johnson (brandon.johnson@pillsburylaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
50.	***Picard v. Peter G. Chernis Revocable Trust Dtd 1/16/87, as amended, et al.***	12-cv-02715	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

51.	***Picard v. Marilyn Chernis Revocable Trust, et al***	12-cv-02716	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
52.	***Picard v. Picard v. Chernis Family Living Trust (2004)***	12-cv-02717	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
53.	***Picard v. Robyn G. Chernis Irrevocable Trust u/d/t 7/4/93***	12-cv-02718	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

54.	***Picard v. Evelyn Chernis Irrevocable Trust Agreement For Samantha Eyges Dtd October 6th 1986, et al***	12-cv-02721	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
55.	***Picard v. Residuary Trust for Phyllis Reischer under the Amended & Restated Indenture of Trust dated 8/8/01, et al***	12-cv-02723	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
56.	***Picard v. Douglas Shapiro***	12-cv-02725	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

57.	***Picard v. Magnus A. Unflat, et al***	12-cv-02726	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
58.	***Picard v. G.R.A.M. Limited Partnership, et al***	12-cv-02727	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
59.	***Picard v. Deborah Madoff, et al.*** (Deborah Madoff – Moving Party)	12-cv-02751	Cohen & Gresser LLP Mark S. Cohen (mcohen@cohengresser.com) Daniel H. Tabak (dtabak@cohengresser.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
60.	***Picard v. Peter B. Madoff, et al.*** (Deborah Madoff and Stephanie S. Mack – Moving Parties)	12-cv-02752	Cooley LLP Alan Levine (alevine@cooley.com) Lawrence C. Gottlieb (lgottlieb@cooley.com) Laura Grossfield Birger	Missing Consolidated Briefing Orders: • Stern v. Marshall

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61.	***Picard v. JD Partners LLC, et al.***	12-cv-02755	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
62.	***Picard vs. America Israel Cultural Foundation, Inc***	12-cv-02756	SNR Denton US LLP Carole Neville (carole.neville@snrdenton.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
63.	***Picard v. HSD Investments, L.P., et al***	12-cv-02757	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Michael A. Bartelstone (mbartelstone@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
64.	***Picard vs. RKD Investments, L.P, et al.***	12-cv-02759	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Michael A. Bartelstone (mbartelstone@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
65.	***Picard v. Richard M. Glantz, et al.***	12-cv-02778	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
66.	***Picard v. Macher Family Partnership, et al.***	12-cv-02779	Law Office of Richard E. Signorelli Richard E. Signorelli	Missing Consolidated Briefing Orders:

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67.	***Picard v. Stephen H. Stern***	12-cv-02780	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
68.	***Picard v. Dahme Family Bypass Testamentary Trust Dated 10/27/76, et al***	12-cv-02781	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
69.	***Picard v. The Lustig Family 1990 Trust, et al***	12-cv-02782	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
70.	***Picard v. David Ivan Lustig***	12-cv-02783	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
71.	***Picard v. Liselotte J. Leeds Lifetime Trust***	12-cv-02784	Dow Lohnes PPLC Leslie H. Wiesenfelder (lwiesenfelder@dowlohnes.com) Brent Olson (bolson@dowlohnes.com) Michael Hays (mhays@dowlohnes.com) Daniel Prichard (dprichard@dowlohnes.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
72.	***Picard v. Michael S. Leeds, et al.***	12-cv-02785	Dow Lohnes PPLC Leslie H. Wiesenfelder (lwiesenfelder@dowlohnes.com) Brent Olson	Missing Consolidated Briefing Orders: • Stern v. Marshall

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73.	***Picard vs. The Leeds Partnership, et al.***	12-cv-02786	Dow Lohnes PPLC Leslie H. Wiesenfelder (lwiesenfelder@dowlohnes.com) Brent Olson (bolson@dowlohnes.com) Michael Hays (mhays@dowlohnes.com) Daniel Prichard (dprichard@dowlohnes.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
74.	***Picard v. The Public Institution for Social Security***	12-cv-02787	Goodwin Procter LLP Daniel M. Glosband (dglosband@goodwinprocter.com) Larkin M. Morton (lmorton@goodwinprocter.com) Christopher Newcomb (cnewcomb@goodwinprocter.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
75.	***Picard v. MAF Associates, LLC, et al.***	12-cv-02788	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
76.	***Picard v. Lisa Liebmann Adams***	12-cv-02789	Day Pitney LLP Helen Harris (hharris@daypitney.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
77.	***Picard v. Estate of Ruth Schlesinger, et al***	12-cv-02790	Foley Hoag LLP Kenneth S. Leonetti (kleonetti@foleyhoag.com) Schlesinger Gannon & Lazetera LLP Thomas P. Gannon	Missing Consolidated Briefing Orders: • Stern v. Marshall

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78.	***Picard v. 1998 William Gershen Revocable Trust, et al***	12-cv-02791	Foley Hoag LLP Kenneth S. Leonetti (kleonetti@foleyhoag.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
79.	***Picard vs. Dawn Pascucci Barnard, et al.***	12-cv-02792	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
80.	***Picard v. Dean L. Greenberg***	12-cv-02794	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
81.	***Picard v. Estate of Samuel Robert Roitenberg, et al.***	12-cv-02795	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

82.	***Picard v. Sheldon Shaffer, et al.***	12-cv-02796	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
83.	***Picard v. Sheldon Shaffer Trust Dtd 3/26/1996, et al.***	12-cv-02797	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
84.	***Picard v. Sidney Ladin Revocable Trust Dated 12/30/96, et al.***	12-cv-02798	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
85.	***Picard vs. Samuel Robinson***	12-cv-02799	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

			Brendan M. Scott (bscott@klestadt.com)	
86.	***Picard v. UBS AG, UBS (Luxembourg) S.A., et al*** (Reliance Management (BVI) Limited and Reliance Management (Gibraltar) Limited – Moving Parties)	12-cv-02802	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Seward & Kissel LLP Mark J. Hyland (hyland@sewkis.com) Mandy DeRoche (deroche@sewkis.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
87.	***Picard v. Defender Limited, et al***	12-cv-02871	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Seward & Kissel LLP Mark J. Hyland (hyland@sewkis.com) Mandy DeRoche (deroche@sewkis.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
88.	***Picard vs. The Estate of Doris Igoin, et al.***	12-cv-02872	Kelley Drye & Warren LLP Jonathan K. Cooperman (Jcooperman@KelleyDrye.com) Seungwhan Kim (skim@kelleydrye.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
89.	***Picard vs. Burton R. Sax***	12-cv-02873	Meltzer, Lippe, Goldstein & Breitsone, LLP Pedram A. Tabibi (ptabibi@meltzerlippe.com) Sally M. Donahue	Missing Consolidated Briefing Orders: • Stern v. Marshall

			(sdonahue@meltzerlippe.com)	
90.	***Picard v. Sax-Bartels Associates, Limited Partnership***	12-cv-02874	Meltzer, Lippe, Goldstein & Breitsone, LLP Pedram A. Tabibi (ptabibi@meltzerlippe.com) Sally M. Donahue (sdonahue@meltzerlippe.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
91.	***Picard vs. The 1995 Jack Parker Descendant Trust No. 1, et al.***	12-cv-02875	Kasowitz, Benson, Torres, & Friedman LLP Marc E. Kasowitz (mkasowitz@kasowitz.com) Daniel J. Fetterman (dfetterman@kasowitz.com) David J. Mark (dmark@kasowitz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
92.	***Picard vs. JRAG, LLC, et al.***	12-cv-02876	Kasowitz, Benson, Torres, & Friedman LLP Marc E. Kasowitz (mkasowitz@kasowitz.com) Daniel J. Fetterman (dfetterman@kasowitz.com) David J. Mark (dmark@kasowitz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
93.	***Picard v. KBC Investments Limited,***	12-cv-02877	Sidley Austin LLP Alan M. Unger (aunger@sidley.com) Bryan Krakauer (bkrakauer@sidley.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
94.	***Picard v. Meritz Fire & Marine Insurance Co. Ltd.***	12-cv-02878	Steptoe & Johnson LLP Kristin Darr (kdarr@steptoe.com) Seong H. Kim (skim@steptoe.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
95.	***Picard v. The Article Fourth Non-Exempt Trust Created Under the Leo M. Klein***	12-cv-02879	Blank Rome LLP James V. Masella, III	Missing Consolidated Briefing Orders:

	Trust Dated June 14, 1989 as Amended and Restated, et al.		(JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com) Ryan E. Cronin (RCronin@BlankRome.com)	• Stern v. Marshall
96.	***Picard v. Korea Exchange Bank***	12-cv-02880	King & Spalding LLP Richard A. Cirillo (rcirillo@kslaw.com) Joshua Edgemon (jedgemon@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
97.	***Picard v. National Bank of Kuwait***	12-cv-02881	King & Spalding LLP Richard A. Cirillo (rcirillo@kslaw.com) Joshua Edgemon (jedgemon@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
98.	***Picard v. XYZ2 Corp. [Redacted - Under Seal]***	12-cv-02882	Cooley LLP Lawrence C. Gottlieb (lgottlieb@cooley.com) Michael A. Klein (mklein@cooley.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
99.	***Picard v. Howard Kaye***	12-cv-02884	McClaughlin & Stern, LLP Lee S. Shalov (lshalov@mclaughlinstern.com) Marc Rosenberg (mrosenberg@mclaughlinstern.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
100.	***Picard v. Mildred S. Poland, et al***	12-cv-02885	McClaughlin & Stern, LLP Lee S. Shalov (lshalov@mclaughlinstern.com) Marc Rosenberg (mrosenberg@mclaughlinstern.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
101.	***Picard v. Bernard Gordon, et al.***	12-cv-02922	Ruskin Moscou Faltischeck, P.C. Mark S. Mulholland (mmulholland@rmfpc.com) Thoams A. Telesca (ttelesca@rmfpc.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

102.	***Picard vs. George E. Nadler***	12-cv-02923	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
103.	***Picard v. Janis Berman***	12-cv-02924	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
104.	***Picard vs. Candice Nadler Revocable Trust DTD 10/18/01, et al.***	12-cv-02925	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
105.	***Picard v. Loeb Living Trust, et al***	12-cv-02926	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
106.	***Picard v. Leon Flax, et al.***	12-cv-02928	Katten Muchin Rosenman LLP Anthony L. Paccione anthony.paccione@kattenlaw.com Brian L. Muldrew brian.muldrew@kattenlaw.com	Missing Consolidated Briefing Orders: • Stern v. Marshall
107.	***Picard vs. Scott Gottlieb, et al.***	12-cv-02931	Day Pitney LLP Joshua W. Cohen (jwcohen@daypitney.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
108.	***Picard v. PetcareRX, Inc.***	12-cv-02932	Dickstein Shapiro LLP Deborah A. Skakel	Missing Consolidated Briefing Orders:

			(Skakeld@dicksteinshapiro.com) Shaya M. Berger (bergers@dicksteinshapiro.coom)	• Stern v. Marshall
109.	***Picard v. Merkin, et al.***	12-cv-02933	Dechert LLP Andrew J. Levander (andrew.levander@dechert.com) Neil A. Steiner (neil.steiner@dechert.com) Reed Smith LLP James C. McCarroll (jmccarroll@reedsmith.com) Jordan W. Siev (jsiev@reedsmith.com) John L. Scott (jlscott@reedsmith.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
110.	***Picard v. Orbita Capital Return Strategy Limited***	12-cv-02934	Dechert LLP Gary Mennitt (gary.mennitt@dechert.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
111.	***Picard v. The Robert Auerbach Revocable Trust, et al.***	12-cv-02975	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
112.	***Picard v. CRS Revocable Trust, et al.***	12-cv-02976	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
113.	***Picard v. Robert S. Bernstein***	12-cv-02977	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
114.	***Picard v. Gutmacher Enterprises, LP, et al***	12-cv-02978	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall

115.	***Picard v. The S. James Coppersmith Charitable Remainder Unitrust, et al.***	12-cv-02979	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
116.	***Picard v. Atlantic Security Bank***	12-cv-02980	Arnold & Porter LLP Scott B. Schreiber (Scott.Schreiber@aporter.com) Andrew T. Karron (Andrew.Karron@aporter.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
117.	***Picard v. Cardinal Management Inc., et al***	12-cv-02981	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
118.	***Picard v. Radcliff Investments Limited, et al.***	12-cv-02982	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
119.	***Picard v. Amy Joel***	12-cv-03100	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
120.	***Picard v. Robert A. Luria, et al***	12-cv-03101	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
121.	***Picard v. Amy J. Luria, et al.***	12-cv-03102	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

122.	***Picard v. The Estate of Gladys C. Luria, et al.***	12-cv-03104	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
123.	***Picard v. Patricia Samuels, et al.***	12-cv-03105	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
124.	***Picard v. Sylvia Joel, et al.***	12-cv-03106	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
125.	***Picard vs. The LDP Corp. Profit Sharing Plan and Trust, et al.***	12-cv-03107	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
126.	***Picard v. Jeffrey Shankman***	12-cv-03108	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
127.	***Picard v. Pictet et Cie***	12-cv-03402	Debevoise & Plimpton LLP Michael E. Wiles (mewiles@debevoise.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
128.	***Picard v. Stanley Plesent***	12-cv-03403	Pro Se Defendant 24 Maple Avenue Larchmont, NY 10538 914-834-8260	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt

129.	***Picard v. Merrill Lynch International***	12-cv-03486	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
130.	***Picard v. Merrill Lynch Bank (Suisse) SA***	12-cv-03487	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
131.	***Picard v. Fullerton Capital PTE. Ltd.***	12-cv-03488	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
132.	***Picard v. Cathay United Bank, et al.***	12-cv-03489	Baker & McKenzie LLP David W. Parham (david.Parham@bakermckenzie.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
133.	***Picard v. Mistral (SPC)***	12-cv-03532	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Missing Consolidated Briefing Orders: • Section 546(e)
134.	***Picard v. Zephyros Limited***	12-cv-03533	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Missing Consolidated Briefing Orders: • Section 546(e)
135.	***Picard v. Srione, LLC, et al.***	12-cv-04092	Law Offices of Stephen Goldstein Stephen Goldstein Sgoldlaw@gmail.com	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt

136.	***Picard vs. Gail Nessel***	12-cv-04178	Halperin Battaglia Raicht, LLP Alan D. Halperin (ahalperin@halperinlaw.net) Scott A. Ziluck (sziluck@halperinlaw.net) Neal W. Cohen (ncohen@halperinlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
137.	***Picard v. Janet Jaffe Trust UA Dtd 4/20/90, et al***	12-cv-04188	Bernfeld, DeMatteo & Bernfeld, LLP David Bernfeld (davidbernfeld@bernfeld-dematteo.com) Jeffrey Bernfeld (jeffreybernfeld@bernfeld-dematteo.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt • IRA Mandatory Withdrawals
138.	***Picard v. Laurel Kohl and Jodi Kohl***	12-cv-04189	Okin, Hollander & DeLuca LLP Paul S. Hollander (phollander@ohdlaw.com) Gregory S. Kinoian (gkinoian@ohdlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
139.	***Picard v. Royal Bank of Canada, et al.***	12-cv-04939-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Brian M. Sabados (brian.sabados@kattenlaw.com) Mark T. Ciani (mark.ciani@kattenlaw.com)	Added to Consolidated Briefing on: • Good Faith
140.	***Picard v. Intesa Sanpaolo S.p.A., et al.***	12-cv-06291; 12-cv-07157	Davis Polk & Wardwell LLP Elliot Moskowitz (elliot.moskowitz@davispolk.com) Andrew Ditchfield (andrew.ditchfield@davispolk.com)	Added to Consolidated Briefing on: • Section 550(a)

Exhibit 11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff,

-v-

BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

Defendant.

In re:

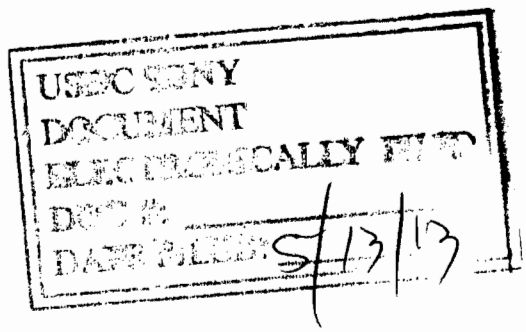
MADOFF SECURITIES

PERTAINS TO:

ALL CASES

12 MC 115 (JSR)

ORDER



JED S. RAKOFF, U.S.D.J.

In 2012, the Court consolidated proceedings regarding various issues on which the Court withdrew the reference to the Bankruptcy Court in avoidance and recovery actions brought by Irving H. Picard (the "Trustee"), appointed as trustee pursuant to the Securities Investor Protection Act ("SIPA") for the consolidated liquidation of Bernard L. Madoff Investment Securities, LLC ("Madoff Securities"). See, e.g., Order Regarding 11 U.S.C. § 550(a), No. 12 MC 115, ECF No. 314 (S.D.N.Y. Aug. 22, 2012); Order Regarding the "Good Faith" Standard, No. 12 MC 115, ECF No. 197 (S.D.N.Y. June 25, 2012); Order Regarding Extraterritoriality Issues, No. 12 MC 115, ECF No. 167 (S.D.N.Y. June 7, 2012); Order Regarding 11 U.S.C. § 502(d), No. 12 MC 115, ECF No. 155 (S.D.N.Y. June 1, 2012); Order Regarding

Standing and SLUSA Issues, No. 12 MC 115, ECF No. 114 (S.D.N.Y. May 18, 2012); Order Regarding 11 U.S.C. § 546(e), No. 12 MC 115, ECF No. 119 (S.D.N.Y. May 16, 2012); Order Regarding Antecedent Debt Issues, No. 12 MC 115, ECF No. 107 (S.D.N.Y. May 16, 2012); Order Regarding Stern v. Marshall, No. 12 MC 115, ECF No. 4 (S.D.N.Y. April 13, 2012).

Filed with each of these consolidation orders was a schedule of cases included within that consolidated proceeding. However, at the time the Orders were issued, some cases had not yet been assigned case numbers, and thus those cases were listed only by name in the appended schedule. Additionally, since the filing of those Orders, the Trustee has initiated new adversary proceedings, and the Court has issued various orders, on the consent of the parties, adding these individual cases to one or more of the consolidated proceedings.

On May 6, 2013, the Trustee convened a conference call with representative counsel for defendants whose cases fit the two scenarios described above. In order to ensure that any further proceedings in the consolidated matters are docketed in each case covered by that proceeding, the Trustee submitted to the Court a new schedule of cases, appended to this Order, listing all of the cases that had previously been missing case numbers or that had been added since the original consolidation orders were issued.

Accordingly, when future the Court issues future orders in any of the consolidated proceedings, the Court hereby directs the Clerk

of the Court to docket the orders: (1) on the docket of 12 MC 115; (2) on the docket of the cases listed in the original schedule appended to the relevant consolidation order; and (3) on the docket of cases listed in the schedule appended to this Order, to the extent that a given case was added to the relevant consolidated proceeding (as reflected in the final column for each case).

SO ORDERED.

Dated: New York, NY
May 11, 2013

JED S. RAKOFF, U.S.D.J.

MOTIONS TO WITHDRAW ADDED TO CONSOLIDATED ISSUE BRIEFINGS PURSUANT TO CONSENT ORDERS

1.	***Picard v. Wolfson Equities*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09449-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall[1]
2.	***Picard v. ZWD Investments*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09450-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
3.	***Picard v. Lanx BM Investments*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09448-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
4.	***Picard v. South Ferry #2 LP*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09451-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
5.	***Picard v. South Ferry Building Co.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09447-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
6.	***Picard v. United Congregations Mesora*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	11-cv-09445-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Added to Consolidated Briefing on: • Stern v. Marshall
7.	***Picard v. Chesed Congregations of America***	11-cv-09446-	K&L Gates LLP	Added to Consolidated Briefing on:

[1] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. April 13, 2012). ECF No. 4 ("Stern v. Marshall").

	In re Madoff Secs., No. 12-MC-0115 (S.D.N.Y. May 1, 2012), ECF No. 67	JSR	Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	• Stern v. Marshall
8.	***Picard v. S. Donald Friedman, et al*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. June 18, 2012), ECF No. 189	12-cv-02343-JSR	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Added to Consolidated Briefing on: • IRA Mandatory Withdrawals[2]
9.	***Picard v. Arden Asset Management, Inc., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-02581-JSR	Seward & Kissel LLP M. William Munno (munno@sewkis.com) Mandy DeRoche (deroche@sewkis.com) Michael B. Weitman (weitman@sewkis.com)	Added to Consolidated Briefing on: • Section 550(a)[3]
10.	***Picard v. Plaza Investments International Limited, et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 24, 2012), ECF No. 126	12-cv-02646-JSR	Debevoise & Plimpton LLP Joseph P. Moodhe (Jpmoodhe@debevoise.com) Shannon Rose Selden (srselden@debevoise.com)	Added to Consolidated Briefing on: • Antecedent Debt[4]
11.	***Picard v. Atlantic Security Bank*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-02980-JSR	Arnold & Porter LLP Scott B. Schreiber (Scott.Schreiber@aporter.com) Andrew T. Karron (Andrew.Karron@aporter.com)	Added to Consolidated Briefing on: • Section 550(a)
12.	***Picard v. Mistral (SPC)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 25, 2012), ECF No. 138	12-cv-03532-JSR	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Added to Consolidated Briefing on: • Stern v. Marshall

[2] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. May 15, 2012), ECF No.99 ("IRA Mandatory Withdrawals").
[3] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. August 22, 2012), ECF No. 314 ("Section 550(a)").
[4] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. May 15, 2012), ECF No. 107 ("Antecedent Debt").

13.	***Picard v. Zephyros Limited*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. May 25, 2012), ECF No. 138	12-cv-03533-JSR	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Added to Consolidated Briefing on: • Stern v. Marshall
14.	***Picard v. Standard Chartered Financial Services (Luxembourg) S.A., et al*** (Moving Parties - Standard Chartered Bank International (Americas) Ltd. Standard Chartered International (USA) Ltd.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Aug. 2, 2012), ECF No. 268	12-cv-04328-JSR	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Sharon L. Nelles (nelless@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e)[5]
15.	***Picard v. Barfield Nominees Limited et al*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-05278-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Brian M. Sabados (brian.sabados@kattenlaw.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality[6] • Good Faith [7]
16.	***Picard v. BNP Paribas S.A., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-05796-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace (bpeace@cgsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality
17.	***Picard v. Six Sis AG*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-05906-JSR	Chaffetz Lindsey LLP Peter R. Chaffetz (peter.chaffetz@chaffetzlindsey.com) Andreas A. Frischknecht	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e)

[5] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. May 16, 2012), ECF No. 119 ("Section 546(e)").
[6] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. June 7, 2012), ECF No. 167 ("Extraterritoriality").
[7] *See* Order, *In re Madoff Sec.*, No. 12-mc-0115 (S.D.N.Y. June 25, 2012), ECF No. 197 ("Good Faith").

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18.	***Picard v. Bank Hapoalim B.M., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06187-JSR	Chadbourne & Parke LLP Scott S. Balber (sbalber@chadbourne.com) Emily Abrahams (eabrahams@chadbourne.com) Benjamin D. Bleiberg (bbleiberg@chadbourne.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
19.	***Picard v. Intesa Sanpaolo S.p.A., et al.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06291-JSR	Davis Polk & Wardwell LLP Elliot Moskowitz (elliot.moskowitz@davispolk.com) Andrew Ditchfield (andrew.ditchfield@davispolk.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
20.	***Picard v. ABN AMRO Fund Services (Isle of Man) Nominees Limited, et al.)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06290-JSR	Tannenbaum Helpern Syracuse & Hirschtritt LLP Ralph A. Siciliano (siciliano@thsh.com) Zev. F. Raben (raben@thsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
21.	***Picard v. Standard Chartered Financial Services (Luxembourg) S.A., et al.*** (Moving Party is Standard Chartered Financial Services (Luxembourg) S.A.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-06292-JSR	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Sharon L. Nelles (nelless@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith

22.	***Picard v. Intesa Sanpaolo S.p.A., et al.*** (Moving Parties - Eurizon Capital SGR S.p.A., f/k/a Nextra Alternative Investments SGR S.p.A., Eurizon Low Volatility, f/k/a Nextra Low Volatility, Eurizon Low Volatility II, f/k/a Nextra Low Volatility II, Eurizon Low Volatility PB, f/k/a Nextra Low Volatility PB, Eurizon Medium Volatility, f/k/a Nextra Medium Volatility, Eurizon Medium Volatility II, f/k/a Nextra Medium Volatility II, and Eurizon Total Return, f/k/a Nextra Total Return) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-07157	Davis Polk & Wardwell LLP Elliot Moskowitz (elliot.moskowitz@davispolk.com) Andrew Ditchfield (andrew.ditchfield@davispolk.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith
23.	***Picard v. Citivic Nominees Ltd.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-07228-JSR	Cleary Gottlieb Steen & Hamilton LLP Carmine D. Boccuzzi, Jr. (cboccuzzi@cgsh.com) David Y. Livshiz (dlivshiz@cgsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
24.	***Picard v. Caprice International Group, Inc., et al.*** (Moving Party is Citibank (Switzerland) Ltd.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Oct. 15, 2012), ECF No. 395	12-cv-07230-JSR	Cleary Gottlieb Steen & Hamilton LLP Carmine D. Boccuzzi, Jr. (cboccuzzi@cgsh.com) David Y. Livshiz (dlivshiz@cgsh.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
25.	***Picard v. Banque Degroof SA/NV (a/k/a Banque Degroof Bruxelles a/k/a Bank Degroof SA/NV), et al.*** (Moving Defendants: Banque Degroof SA/NV, Banque Degroof Luxembourg S.A., Banque Degroof France SA, Degroof Gestion Institutionnelle Luxembourg S.A., Aforge Finance Holding S.A.S., Aforge Finance	12-cv-08709-JSR	Otterbourg, Steindler, Houston & Rosen, P.C. Peter Feldman (pfeldman@oshr.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)

	S.A.S., Aforge Gestion S.A.S., and Aforge Capital Management S.A.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421			
26.	***Picard v. Banque Degroof SA/NV (a/k/a Banque Degroof Bruxelles a/k/a Bank Degroof SA/NV), et al.*** (Moving Defendants: Elite-Stability Fund Sicav and Elite-Stability Fund Sicav Stablerock Compartment, as represented by their Liquidator Pierre Delandmeter, Pierre Delandmeter, as Liquidator for Elite-Stability Fund Sicav and Elite-Stability Fund Sicav Stablerock Compartment, Access International Advisors LLC, Access Management Luxembourg (f/k/a Access International Advisors (Luxembourg) SA), as represented by it Liquidator Fernand Entringer, and Fernand Entringer, as Liquidator for Access Management Luxembourg (f/k/a Access International Advisors (Luxembourg) SA) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-08709-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
27.	***Picard v. Banque Cantonale Vaudoise*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421	12-cv-08816-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack (Jzulack@fzwz.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
28.	***Picard v. Societe Generale Private Banking (Suisse) S.A. (f/k/a SG Private Banking Suisse S.A.), et al.***	12-cv-08860-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt

	(Moving Defendants: Societe Generale Private Banking (Suisse) S.A. (f/k/a SG Private Banking Suisse S.A.); Societe Generale Private Banking (Lugano-Svizzera) S.A. (f/k/a SG Private Banking (Lugano-Svizzera) S.A.); Socgen Nominees (UK) Limited; Lyxor Asset Management S.A., as Successor in Interest to Barep Asset Management S.A.; Societe Generale Holding de Participations S.A., as Successor in Interest to Barep Asset Management S.A.; SG AM AI Premium Fund L.P. (f/k/a SG AM Alternative Diversified U.S. L.P.); Lyxor Asset Management Inc. (f/k/a SGAM Asset Management, Inc.), as General Partner of SG AM AI Premium Fund L.P.; SG Audace Alternatif (f/k/a SGAM AI Audace Alternatif); SGAM AI Equilibrium Fund (f/k/a SGAM Alternative Multi-Manager Diversified Fund); Lyxor Premium Fund (f/k/a SGAM Alternative Diversified Premium Fund); Societe Generale S.A., as Trustee for Lyxor Premium Fund; Societe Generale Bank & Trust S.A.) *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421		(Jzulack@fzwz.com)	• Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
29.	***Picard v. Lombard Odier Darier Hentsch & Cie*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Dec. 11, 2012), ECF No. 421	12-cv-08858-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack (Jzulack@fzwz.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
30.	***Picard v. Bordier & Cie*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y.	12-cv-08861-JSR	Flemming Zulack Williamson Zauderer LLP John F. Zulack	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt

	Dec. 11, 2012), ECF No. 421		(Jzulack@fzwz.com)	• Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
31.	***Picard v. ABN AMRO Fund Services*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-09115-JSR	Latham & Watkins Christopher R. Harris (christopher.harris@lw.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
32.	***UBS Deutschland AG, et al (Moving Defendant - UBS Deutschland AG)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-09380-JSR	Gibson, Dunn & Crutcher LLP Marshall King (mking@gibsondunn.com) Gabriel Herrmann (gherrmann@gibsondunn.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
33.	***UBS Deutschland AG, et al (Moving Defendant - LGT Bank (Switzerland) Ltd.)*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	12-cv-09380-JSR	Milbank, Tweed, Hadley & McCloy LLP Stacey J. Rappaport (srappaport@milbank.com) Dorothy Heyl (dheyl@milbank.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Extraterritoriality • Good Faith • Section 550(a)
34.	***Picard v. Montbarry Incorporated, et al*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. Feb. 4, 2013) ECF No. 434	13-cv-00502-JSR	Simon & Partners LLP Bradley D. Simon (bsimon@simonlawyers.com) Marko & Magolnick Joel S. Magolnick (magolnick@mm-pa.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Section 546(e) • Good Faith
35.	***Picard vs. LGT Bank in Liechtenstein Ltd.*** *In re Madoff Secs.*, No. 12-MC-0115 (S.D.N.Y. March 5, 2013) ECF No. 447	13-cv-01394-JSR	Milbank, Tweed, Hadley & McCloy LLP Stacey J. Rappaport (srappaport@milbank.com)	Added to Consolidated Briefing on: • Stern v. Marshall • Antecedent Debt • Section 546(e)

			Dorothy Heyl (dheyl@milbank.com)	• Extraterritoriality • Good Faith • Section 550(a)

ACTIONS IN THE EXHIBIT A TO THE CONSOLIDATED BRIEFING ORDERS (Missing District Court Docket Numbers)				
1.	***Picard v. Bell Ventures Limited, et al***	11-cv-05507	Jacobs Partners LLC Mark R. Jacobs (mark.jacobs@jacobs-partners.com) Michele Marxkors (mmarxkors@jacobs-partners.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
2.	***Picard v. Elaine Pikulik***	11-cv-08532	Rubinstein & Corozzo LLP Ronald Rubinstein (rcorozzo1@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
3.	***Picard v. Peter Joseph***	12-cv-00036	Golenbock Eiseman Assor Bell & Peskoe LLP David J. Eiseman (deiseman@golenbock.com) Douglas L. Furth (dfurth@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
4.	***Picard v. Gary J. Korn, et al.***	12-cv-00037	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com) Michael S. Weinstein (mweinstein@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
5.	***Picard v. Theodore Story, et al.***	12-cv-00039	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com) Michael S. Weinstein (mweinstein@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
6.	***Picard v. Story Family Trust #3, et al.***	12-cv-00040	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

			Michael S. Weinstein (mweinstein@golenbock.com)	
7.	***Picard v. Douglas D. Johnson***	12-cv-00091	Herrick, Feinstein LLP Howard R. Elisofon (helisofon@herrick.com) Hanh V. Huynh (hhuynh@herrick.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
8.	***Picard v. Kohn, et al.*** (as filed by UniCredit Bank Austria AG)	12-cv-02161	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
9.	***Picard v. HSBC Bank, plc, et al.*** (as filed by UniCredit Bank Austria AG)	12-cv-02162	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
10.	***Picard v. HSBC Bank, plc, et al.*** (as filed by UniCredit S.p.A. and Pioneer Alternative Investment Management Ltd.)	12-cv-02239	Skadden, Arps, Slate, Meagher & Flom LLP Susan L. Saltzstein (susan.saltzstein@Skadden.com) Marco E. Schnabl (Marco.Schnabl@Skadden.com) Jeremy A. Berman (jeremy.berman@Skadden.com) Jason C. Putter (jason.putter@skadden.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
11.	***Picard v. Kohn, et al.*** (as filed by UniCredit S.p.A. and Pioneer Global Asset Management S.p.A.)	12-cv-02240	Skadden, Arps, Slate, Meagher & Flom LLP Susan L. Saltzstein	Missing Consolidated Briefing Orders: • Section 546(e)

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12.	***Picard v. Walter J. Gross Revocable Trust, et al.***	12-cv-02340	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
13.	***Picard v. Shum Family Partnership III, LP, et al.***	12-cv-02342	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
14.	***Picard v. S. Donald Friedman, et al***	12-cv-02343	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
15.	***Picard v. Second Act Associates, L.P., et al.***	12-cv-02367	Sanders Ortoli Vaughn-Flam Rosenstadt LLP Jeremy B. Kaplan (jk@sovrlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
16.	***Picard v. Cohmad Securities Corporation, et al.*** (All Moving Parties and Joinders)	12-cv-02368 12-cv-02347 12-cv-02369 12-cv-02589 12-cv-02676 12-cv-02930 12-cv-03101 12-cv-03103 12-cv-03124 12-cv-03034 12-cv-03404 12-cv-03663	Katsky Korins LLP Robert A. Abrams rabrams@katskykorins.com Siegel, Lipman, Dunay, Shepard & Miskel, LLP Kenneth W. Lipman klipman@sldsmlaw.com Vinson & Elkins LLP Steven Paradise (sparadise@velaw.com) Clifford Thau	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt

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			Westerman Ball Ederer Miller & Sharfstein LLP Richard Gabriele (rgabriele@westermanllp.com) Jeffrey A. Miller (jmiller@westermanllp.com)	
17.	***Picard v. Lewis W. Bernard 1995 Charitable Remainder Trust, et al.***	12-cv-02407	Golenbock Eiseman Assor Bell & Peskoe LLP Douglas L. Furth (dfurth@golenbock.com) Michael Weinstein (mweinstein@golenbock.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
18.	***Picard v. Kostin Company, et al.***	12cv-02409	Morgan, Lewis & Bockius LLP Bernard J. Garbutt III (bgarbutt@morganlewis.com) Menachem O. Zelmanovitz (mzelmanovitz@morganlewis.com) Andrew D. Gottfried (agottfried@morganlewis.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
19.	***Picard v. Estate of William E. Sorrel, et al***	12-cv-02411	Rosenfeld & Kaplan, LLP Tab K. Rosenfeld (tab@rosenfeldlaw.com) Steven Kaplan (steve@rosenfeldlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
20.	***Picard v. Banca Carige, S.P.A.***	12-cv-02408	Kasowitz, Benson, Torres, & Friedman LLP David J. Mark (dmark@kasowitz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
21.	***Picard v. Banco Itau Europa Luxembourg S.A., et al***	12-cv-02432	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

22.	***Picard v. Estate of Doris M. Pearlman, et al***	12-cv-02433	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Joanna M. Hepburn (Joanna.hepburn@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
23.	***Picard v. Banque Privee Espirito Santo S.A.***	12-cv-02442	Flemming Zulack Williamson Zauderer LLP Elizabeth A. O'Connor (eoconnor@fzwz.com) John F. Zulack (Jzulack@fzwz.com) Megan Davis (mdavis@fzwz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
24.	***Picard v. Bennett M. Berman Trust, et al.*** (Jeffrey Berman and Jeffrey Berman Foundation - Moving Parties)	12-cv-02451	Goodwin Procter LLP Daniel M. Glosband (dglosband@goodwinprocter.com) Larkin M. Morton (lmorton@goodwinprocter.com) Christopher Newcomb (cnewcomb@goodwinprocter.com) Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
25.	***Picard v. DOS BFS Family Partnership II, L.P., et al.***	12-cv-02453	Westerman Ball Ederer Miller & Sharfstein LLP John Westerman (jwesterman@westermanllp.com) Mickee Hennessy, Esq. (mhennessy@westermanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
26.	***Picard v. Credit Suisse AG, et al***	12-cv-02454	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari	Missing Consolidated Briefing Orders: • Stern v. Marshall

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27.	***Picard v. The Sumitomo Trust and Banking Co., Ltd.***	12-cv-02481	Becker, Glynn, Melamed & Muffly LLP Zeb Landsman (zlandsman@beckerglynn.com) Jordan E. Stern (jstern@beckerglynn.com) Michelle Mufich (mmufich@beckerglynn.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
28.	***Picard v. Magnify Inc., et al.***	12-cv-02482	Kobre & Kim LLP Steven G. Kobre (steven.kobre@kobrekim.com) Danielle L. Rose (danielle.rose@kobrekim.com) David H. McGill (david.mcgill@kobrekim.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
29.	***Picard v. James Lowrey, et al.***	12-cv-02510	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Laura Clinton (laura.clinton@klgates.com) Martha Rodriguez Lopez (martha.rodriguezlopez@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
30.	***Picard v. Chris Lazarides***	12-cv-02511	Gibbons P.C. Michael S. O'Reilly (moreilly@gibbonslaw.com) Christopher, Nick P. (Christopher@gibbonslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
31.	***Picard v. Stuart J. Rabin***	12-cv-02512	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

32.	***Picard v. Morris Blum Living Trust, et al***	12-cv-02513	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Laura Clinton (laura.clinton@klgates.com) Martha Rodriguez Lopez (martha.rodriguezlopez@klgates.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
33.	***Picard v. Albert D. Angel, et al.***	12-cv-02522	Skoloff & Wolfe, P.C. Jonathan W. Wolfe (jwolfe@skoloffwolfe.com) Barbara A. Schweiger (bschweiger@skoloffwolfe.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
34.	***Picard v. Katz Group Limited Partnership, et al.***	12-cv-02523	Becker Meisel LLC Stacey L. Meisel (slmeisel@beckermeisel.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
35.	***Picard v. Trust 'A' U/W/G Hurwitz, et al.***	12-cv-02525	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence E. Rifken (rifkenl@gtlaw.com) Thomas J. McKee, Jr. (mckeet@gtlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
36.	***Picard v. Allen R. Hurwitz, et al.***	12-cv-02526	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence E. Rifken (rifkenl@gtlaw.com) Thomas J. McKee, Jr. (mckeet@gtlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
37.	***Picard v. Brandi Hurwitz, et al.***	12-cv-02527	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence E. Rifken	Missing Consolidated Briefing Orders: • Stern v. Marshall

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38.	***Picard v. The June Bonyor Revocable Trust Restated UA dtd 5/22/00, et al***	12-cv-02528	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) David G. Barger (bargerd@gtlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
39.	***Picard v. Banque J. Safra (Suisse) SA***	12-cv-02587	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
40.	***Picard v. Vizcaya Partners Limited, et al.***	12-cv-02588	Sullivan & Cromwell LLP (for Bank J. Safra (Gibraltar) Limited) Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com) Katten Muchin Rosenman LLP (for Zeus Partners Ltd) Anthony L. Paccione (anthony.paccione@kattenlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
41.	***Picard v. Delta National Bank & Trust Company***	12-cv-02615	Duane Morris LLP John Dellasportas (dellajo@duanemorris.com) William C. Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

42.	***Picard v. Abu Dhabi Investment Authority***	12-cv-02616	Quinn Emanuel Urquhart & Sullivan, LLP Peter E. Calamari (petercalamari@quinnemanuel.com) Marc L. Greenwald (marcgreenwald@quinemanuel.com) Eric M. Kay (erickay@quinnemanuel.com) David S. Mader (davidmader@quinnemanuel.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
43.	***Picard v. Weiner Investments, L.P., et al.***	12-cv-02617	Manion McDonough & Lucas, P.C. James R. Walker (jwalker@mmlpc.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
44.	***Picard v. Estate of Ella N. Waxberg, et al.*** - (Sonya Kahn and Marvin D. Waxberg - Moving Parties)	12-cv-02620	Frank, White-Boyd, PA Julianne R. Frank (jrfbnk@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
45.	***Picard v. Stefanelli Investors Group, et al*** (Bankr. Dkt No. 10-05255; Joan L. Apisa & Danielle L. D'Esposito – Moving Party)	12-cv-02621	Law Office of Scott A. Steinberg Michael Harrison (harrisonm@optonline.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
46.	***Picard v. Nine Thirty LL Investments, LLC, et al***	12-cv-02622	Wolff & Samson, PC Ronald L. Israel (risrael@wolffsamson.com) Sperling & Slater P.C. Michael G. Dickler (mdickler@sperling-law.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
47.	***Picard v. Kohn, et al.*** (as filed by the Kohn Defendants)	12-cv-02639	The Law Office of Sheldon Eisenberger Sheldon Eisenberger (sheldon@eisenbergerlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

			Neuberger, Quinn, Gielen, Rubin & Gibber, PA Price O. Gielen (pog@nqgrg.com) Nathan D. Adler (nda@nqgrg.com)	
48.	***Picard v. HSBC Bank, plc, et al.*** (as filed by the Kohn Defendants)	12-cv-02640	The Law Office of Sheldon Eisenberger Sheldon Eisenberger (sheldon@eisenbergerlaw.com) Neuberger, Quinn, Gielen, Rubin & Gibber, PA Price O. Gielen (pog@nqgrg.com) Nathan D. Adler (nda@nqgrg.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
49.	***Picard v. Falcon Private Bank Ltd (f/k/a AIG Private Bank AG)***	12-cv-02645	Pillsbury Winthrop Shaw Pittman LLP Eric Fishman (eric.fishman@pillsburylaw.com) Karen Dine (karen.dine@pillsburylaw.com) Brandon Johnson (brandon.johnson@pillsburylaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
50.	***Picard v. Peter G. Chernis Revocable Trust Dtd 1/16/87, as amended, et al.***	12-cv-02715	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

51.	***Picard v. Marilyn Chernis Revocable Trust, et al***	12-cv-02716	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
52.	***Picard v. Picard v. Chernis Family Living Trust (2004)***	12-cv-02717	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
53.	***Picard v. Robyn G. Chernis Irrevocable Trust u/d/t 7/4/93***	12-cv-02718	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

54.	***Picard v. Evelyn Chernis Irrevocable Trust Agreement For Samantha Eyges Dtd October 6th 1986, et al***	12-cv-02721	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
55.	***Picard v. Residuary Trust for Phyllis Reischer under the Amended & Restated Indenture of Trust dated 8/8/01, et al***	12-cv-02723	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
56.	***Picard v. Douglas Shapiro***	12-cv-02725	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

57.	***Picard v. Magnus A. Unflat, et al***	12-cv-02726	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
58.	***Picard v. G.R.A.M. Limited Partnership, et al***	12-cv-02727	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
59.	***Picard v. Deborah Madoff, et al.*** (Deborah Madoff – Moving Party)	12-cv-02751	Cohen & Gresser LLP Mark S. Cohen (mcohen@cohengresser.com) Daniel H. Tabak (dtabak@cohengresser.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
60.	***Picard v. Peter B. Madoff, et al.*** (Deborah Madoff and Stephanie S. Mack – Moving Parties)	12-cv-02752	Cooley LLP Alan Levine (alevine@cooley.com) Lawrence C. Gottlieb (lgottlieb@cooley.com) Laura Grossfield Birger	Missing Consolidated Briefing Orders: • Stern v. Marshall

			(lbirger@cooley.com) Michael A. Klein (mklein@cooley.com) Cohen & Gresser LLP Mark S. Cohen (mcohen@cohengresser.com) Daniel H. Tabak (dtabak@cohengresser.com)	
61.	***Picard v. JD Partners LLC, et al.***	12-cv-02755	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
62.	***Picard vs. America Israel Cultural Foundation, Inc***	12-cv-02756	SNR Denton US LLP Carole Neville (carole.neville@snrdenton.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
63.	***Picard v. HSD Investments, L.P., et al***	12-cv-02757	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Michael A. Bartelstone (mbartelstone@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
64.	***Picard vs. RKD Investments, L.P, et al.***	12-cv-02759	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Michael A. Bartelstone (mbartelstone@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
65.	***Picard v. Richard M. Glantz, et al.***	12-cv-02778	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
66.	***Picard v. Macher Family Partnership, et al.***	12-cv-02779	Law Office of Richard E. Signorelli Richard E. Signorelli	Missing Consolidated Briefing Orders:

			(rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	• Stern v. Marshall
67.	***Picard v. Stephen H. Stern***	12-cv-02780	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
68.	***Picard v. Dahme Family Bypass Testamentary Trust Dated 10/27/76, et al***	12-cv-02781	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
69.	***Picard v. The Lustig Family 1990 Trust, et al***	12-cv-02782	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
70.	***Picard v. David Ivan Lustig***	12-cv-02783	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
71.	***Picard v. Liselotte J. Leeds Lifetime Trust***	12-cv-02784	Dow Lohnes PPLC Leslie H. Wiesenfelder (lwiesenfelder@dowlohnes.com) Brent Olson (bolson@dowlohnes.com) Michael Hays (mhays@dowlohnes.com) Daniel Prichard (dprichard@dowlohnes.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
72.	***Picard v. Michael S. Leeds, et al.***	12-cv-02785	Dow Lohnes PPLC Leslie H. Wiesenfelder (lwiesenfelder@dowlohnes.com) Brent Olson	Missing Consolidated Briefing Orders: • Stern v. Marshall

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73.	***Picard vs. The Leeds Partnership, et al.***	12-cv-02786	Dow Lohnes PPLC Leslie H. Wiesenfelder (lwiesenfelder@dowlohnes.com) Brent Olson (bolson@dowlohnes.com) Michael Hays (mhays@dowlohnes.com) Daniel Prichard (dprichard@dowlohnes.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
74.	***Picard v. The Public Institution for Social Security***	12-cv-02787	Goodwin Procter LLP Daniel M. Glosband (dglosband@goodwinprocter.com) Larkin M. Morton (lmorton@goodwinprocter.com) Christopher Newcomb (cnewcomb@goodwinprocter.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
75.	***Picard v. MAF Associates, LLC, et al.***	12-cv-02788	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
76.	***Picard v. Lisa Liebmann Adams***	12-cv-02789	Day Pitney LLP Helen Harris (hharris@daypitney.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
77.	***Picard v. Estate of Ruth Schlesinger, et al***	12-cv-02790	Foley Hoag LLP Kenneth S. Leonetti (kleonetti@foleyhoag.com) Schlesinger Gannon & Lazetera LLP Thomas P. Gannon	Missing Consolidated Briefing Orders: • Stern v. Marshall

			(tgannon@sglllp.com) Ross Katz (rkatz@sglllp.com)	
78.	***Picard v. 1998 William Gershen Revocable Trust, et al***	12-cv-02791	Foley Hoag LLP Kenneth S. Leonetti (kleonetti@foleyhoag.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
79.	***Picard vs. Dawn Pascucci Barnard, et al.***	12-cv-02792	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
80.	***Picard v. Dean L. Greenberg***	12-cv-02794	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
81.	***Picard v. Estate of Samuel Robert Roitenberg, et al.***	12-cv-02795	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

82.	***Picard v. Sheldon Shaffer, et al.***	12-cv-02796	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
83.	***Picard v. Sheldon Shaffer Trust Dtd 3/26/1996, et al.***	12-cv-02797	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
84.	***Picard v. Sidney Ladin Revocable Trust Dated 12/30/96, et al.***	12-cv-02798	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
85.	***Picard vs. Samuel Robinson***	12-cv-02799	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

			Brendan M. Scott (bscott@klestadt.com)	
86.	***Picard v. UBS AG, UBS (Luxembourg) S.A., et al*** (Reliance Management (BVI) Limited and Reliance Management (Gibraltar) Limited – Moving Parties)	12-cv-02802	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Seward & Kissel LLP Mark J. Hyland (hyland@sewkis.com) Mandy DeRoche (deroche@sewkis.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
87.	***Picard v. Defender Limited, et al***	12-cv-02871	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Seward & Kissel LLP Mark J. Hyland (hyland@sewkis.com) Mandy DeRoche (deroche@sewkis.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
88.	***Picard vs. The Estate of Doris Igoin, et al.***	12-cv-02872	Kelley Drye & Warren LLP Jonathan K. Cooperman (Jcooperman@KelleyDrye.com) Seungwhan Kim (skim@kelleydrye.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
89.	***Picard vs. Burton R. Sax***	12-cv-02873	Meltzer, Lippe, Goldstein & Breitsone, LLP Pedram A. Tabibi (ptabibi@meltzerlippe.com) Sally M. Donahue	Missing Consolidated Briefing Orders: • Stern v. Marshall

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90.	***Picard v. Sax-Bartels Associates, Limited Partnership***	12-cv-02874	Meltzer, Lippe, Goldstein & Breitsone, LLP Pedram A. Tabibi (ptabibi@meltzerlippe.com) Sally M. Donahue (sdonahue@meltzerlippe.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
91.	***Picard vs. The 1995 Jack Parker Descendant Trust No. 1, et al.***	12-cv-02875	Kasowitz, Benson, Torres, & Friedman LLP Marc E. Kasowitz (mkasowitz@kasowitz.com) Daniel J. Fetterman (dfetterman@kasowitz.com) David J. Mark (dmark@kasowitz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
92.	***Picard vs. JRAG, LLC, et al.***	12-cv-02876	Kasowitz, Benson, Torres, & Friedman LLP Marc E. Kasowitz (mkasowitz@kasowitz.com) Daniel J. Fetterman (dfetterman@kasowitz.com) David J. Mark (dmark@kasowitz.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
93.	***Picard v. KBC Investments Limited,***	12-cv-02877	Sidley Austin LLP Alan M. Unger (aunger@sidley.com) Bryan Krakauer (bkrakauer@sidley.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
94.	***Picard v. Meritz Fire & Marine Insurance Co. Ltd.***	12-cv-02878	Steptoe & Johnson LLP Kristin Darr (kdarr@steptoe.com) Seong H. Kim (skim@steptoe.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
95.	***Picard v. The Article Fourth Non-Exempt Trust Created Under the Leo M. Klein***	12-cv-02879	Blank Rome LLP James V. Masella, III	Missing Consolidated Briefing Orders:

	Trust Dated June 14, 1989 as Amended and Restated, et al.		(JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com) Ryan E. Cronin (RCronin@BlankRome.com)	• Stern v. Marshall
96.	***Picard v. Korea Exchange Bank***	12-cv-02880	King & Spalding LLP Richard A. Cirillo (rcirillo@kslaw.com) Joshua Edgemon (jedgemon@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
97.	***Picard v. National Bank of Kuwait***	12-cv-02881	King & Spalding LLP Richard A. Cirillo (rcirillo@kslaw.com) Joshua Edgemon (jedgemon@kslaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
98.	***Picard v. XYZ2 Corp. [Redacted - Under Seal]***	12-cv-02882	Cooley LLP Lawrence C. Gottlieb (lgottlieb@cooley.com) Michael A. Klein (mklein@cooley.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
99.	***Picard v. Howard Kaye***	12-cv-02884	McClaughlin & Stern, LLP Lee S. Shalov (lshalov@mclaughlinstern.com) Marc Rosenberg (mrosenberg@mclaughlinstern.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
100.	***Picard v. Mildred S. Poland, et al***	12-cv-02885	McClaughlin & Stern, LLP Lee S. Shalov (lshalov@mclaughlinstern.com) Marc Rosenberg (mrosenberg@mclaughlinstern.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
101.	***Picard v. Bernard Gordon, et al.***	12-cv-02922	Ruskin Moscou Faltischeck, P.C. Mark S. Mulholland (mmulholland@rmfpc.com) Thoams A. Telesca (ttelesca@rmfpc.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

102.	***Picard vs. George E. Nadler***	12-cv-02923	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
103.	***Picard v. Janis Berman***	12-cv-02924	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
104.	***Picard vs. Candice Nadler Revocable Trust DTD 10/18/01, et al.***	12-cv-02925	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
105.	***Picard v. Loeb Living Trust, et al***	12-cv-02926	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
106.	***Picard v. Leon Flax, et al.***	12-cv-02928	Katten Muchin Rosenman LLP Anthony L. Paccione anthony.paccione@kattenlaw.com Brian L. Muldrew brian.muldrew@kattenlaw.com	Missing Consolidated Briefing Orders: • Stern v. Marshall
107.	***Picard vs. Scott Gottlieb, et al.***	12-cv-02931	Day Pitney LLP Joshua W. Cohen (jwcohen@daypitney.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
108.	***Picard v. PetcareRX, Inc.***	12-cv-02932	Dickstein Shapiro LLP Deborah A. Skakel	Missing Consolidated Briefing Orders:

			(Skakeld@dicksteinshapiro.com) Shaya M. Berger (bergers@dicksteinshapiro.coom)	• Stern v. Marshall
109.	***Picard v. Merkin, et al.***	12-cv-02933	Dechert LLP Andrew J. Levander (andrew.levander@dechert.com) Neil A. Steiner (neil.steiner@dechert.com) Reed Smith LLP James C. McCarroll (jmccarroll@reedsmith.com) Jordan W. Siev (jsiev@reedsmith.com) John L. Scott (jlscott@reedsmith.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
110.	***Picard v. Orbita Capital Return Strategy Limited***	12-cv-02934	Dechert LLP Gary Mennitt (gary.mennitt@dechert.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
111.	***Picard v. The Robert Auerbach Revocable Trust, et al.***	12-cv-02975	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
112.	***Picard v. CRS Revocable Trust, et al.***	12-cv-02976	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
113.	***Picard v. Robert S. Bernstein***	12-cv-02977	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
114.	***Picard v. Gutmacher Enterprises, LP, et al***	12-cv-02978	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall

115.	***Picard v. The S. James Coppersmith Charitable Remainder Unitrust, et al.***	12-cv-02979	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall
116.	***Picard v. Atlantic Security Bank***	12-cv-02980	Arnold & Porter LLP Scott B. Schreiber (Scott.Schreiber@aporter.com) Andrew T. Karron (Andrew.Karron@aporter.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
117.	***Picard v. Cardinal Management Inc., et al***	12-cv-02981	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
118.	***Picard v. Radcliff Investments Limited, et al.***	12-cv-02982	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
119.	***Picard v. Amy Joel***	12-cv-03100	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
120.	***Picard v. Robert A. Luria, et al***	12-cv-03101	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
121.	***Picard v. Amy J. Luria, et al.***	12-cv-03102	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall

122.	***Picard v. The Estate of Gladys C. Luria, et al.***	12-cv-03104	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
123.	***Picard v. Patricia Samuels, et al.***	12-cv-03105	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
124.	***Picard v. Sylvia Joel, et al.***	12-cv-03106	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
125.	***Picard vs. The LDP Corp. Profit Sharing Plan and Trust, et al.***	12-cv-03107	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
126.	***Picard v. Jeffrey Shankman***	12-cv-03108	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall
127.	***Picard v. Pictet et Cie***	12-cv-03402	Debevoise & Plimpton LLP Michael E. Wiles (mewiles@debevoise.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
128.	***Picard v. Stanley Plesent***	12-cv-03403	Pro Se Defendant 24 Maple Avenue Larchmont, NY 10538 914-834-8260	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt

129.	***Picard v. Merrill Lynch International***	12-cv-03486	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
130.	***Picard v. Merrill Lynch Bank (Suisse) SA***	12-cv-03487	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
131.	***Picard v. Fullerton Capital PTE. Ltd.***	12-cv-03488	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
132.	***Picard v. Cathay United Bank, et al.***	12-cv-03489	Baker & McKenzie LLP David W. Parham (david.Parham@bakermckenzie.com)	Missing Consolidated Briefing Orders: • Section 546(e) • Stern v. Marshall
133.	***Picard v. Mistral (SPC)***	12-cv-03532	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Missing Consolidated Briefing Orders: • Section 546(e)
134.	***Picard v. Zephyros Limited***	12-cv-03533	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com	Missing Consolidated Briefing Orders: • Section 546(e)
135.	***Picard v. Srione, LLC, et al.***	12-cv-04092	Law Offices of Stephen Goldstein Stephen Goldstein Sgoldlaw@gmail.com	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt

136.	***Picard vs. Gail Nessel***	12-cv-04178	Halperin Battaglia Raicht, LLP Alan D. Halperin (ahalperin@halperinlaw.net) Scott A. Ziluck (sziluck@halperinlaw.net) Neal W. Cohen (ncohen@halperinlaw.net)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
137.	***Picard v. Janet Jaffe Trust UA Dtd 4/20/90, et al***	12-cv-04188	Bernfeld, DeMatteo & Bernfeld, LLP David Bernfeld (davidbernfeld@bernfeld-dematteo.com) Jeffrey Bernfeld (jeffreybernfeld@bernfeld-dematteo.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt • IRA Mandatory Withdrawals
138.	***Picard v. Laurel Kohl and Jodi Kohl***	12-cv-04189	Okin, Hollander & DeLuca LLP Paul S. Hollander (phollander@ohdlaw.com) Gregory S. Kinoian (gkinoian@ohdlaw.com)	Missing Consolidated Briefing Orders: • Stern v. Marshall • Antecedent Debt
139.	***Picard v. Royal Bank of Canada, et al.***	12-cv-04939-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Brian M. Sabados (brian.sabados@kattenlaw.com) Mark T. Ciani (mark.ciani@kattenlaw.com)	Added to Consolidated Briefing on: • Good Faith
140.	***Picard v. Intesa Sanpaolo S.p.A., et al.***	12-cv-06291; 12-cv-07157	Davis Polk & Wardwell LLP Elliot Moskowitz (elliot.moskowitz@davispolk.com) Andrew Ditchfield (andrew.ditchfield@davispolk.com)	Added to Consolidated Briefing on: • Section 550(a)

Exhibit 12

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SECURITES INVESTOR PROTECTION CORPORARTION	)	
USA / Plaintiff(s)	)	
v.	)	Case No.: 12 MISC 115
BERNARD L. MADOFF	)	
Defendant(s)	)	

NOTICE OF FILING OF OFFICIAL TRANSCRIPT

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/s VINCENT BOLOGNA
Court Reporter

Date: 9/28/12

Exhibit 13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

SECURITIES INVESTOR PROTECTION CORPORATION, IRVING H. PICARD,

Plaintiffs,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES, LLC,

Defendant.

----------x

New York, N.Y.

12 Misc. 115 (JSR)

September 21, 2012
4:36 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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THE CLERK: This is September 21, 2012. This is SIPC, Irving Picard v. Bernard L. Madoff Investment Securities, Docket Number 12 Miscellaneous 115.

Will everyone please be seated, and will the parties please identify themselves for the record.

MS. GRIFFIN: Good afternoon, your Honor. Regina Griffin, Baker Hostetler, counsel for the SIPC Trustee, Irving Picard.

THE COURT: Good afternoon.

MR. LaROSA: Chris LaRosa from SIPC.

THE COURT: Good afternoon.

MR. LONG: Your Honor, Thomas Long, also on behalf of the Trustee.

THE COURT: Good afternoon.

MR. VELIE: Good afternoon, your Honor. Frank Velie, of Sullivan & Worcester. I represent Bank Austria, and I will be speaking here today on behalf of the extraterritoriality defendants.

THE COURT: Good afternoon.

MR. KORTMANSKY: Good afternoon, your Honor. Jonathan Kortmansky, also from Sullivan & Worcester, also representing Bank Austria. I will be assisting Mr. Velie and Mr. Velie will be speaking.

THE COURT: All right.

MR. LACY: Your Honor, I'm Rob Lacy, from Sullivan &

Cromwell. I represent about six different defendants, and I am here because I may have something to add about the Bankruptcy Code when Mr. Velie gets done.

THE COURT: I'm sorry?

MR. LACY: I may have something to add about the Bankruptcy Code when Mr. Velie is done.

THE COURT: OK.

MR. BERMAN: Jeremy Berman, from Skadden, Arps, Meagher & Flom, on behalf of UniCredit and Pioneer.

THE COURT: Good afternoon.

All right. So let me hear from whoever wants to speak on behalf of moving counsel.

MR. VELIE: May it please the Court? I'm Frank Velie. As I said, I represent Bank Austria and I'm speaking here for numerous extraterritorial defendants.

The motion which is before the Court is to dismiss certain claims brought by the Trustee to recover under Section 550 of the Bankruptcy Code subsequent to transfers. The subsequent transfers issued here, your Honor, are wholly foreign. They are from foreign persons. They are to the defendants, all of whom are foreign persons. They all took place abroad, pursuant to foreign law.

Unless you particularly ask me to, Judge, I am going to try to avoid matters that are laid out in the briefs, as I understand it is your practice to have read them and you don't

want me to repeat.

The remarkable thing about this motion, your Honor, is that the Trustee's claims are absolutely unprecedented. There is no precedent whatever offered by the Trustee or by SIPC where a Court reached out and recovered for a trustee foreign transfers of this type. There are only two instances -- in all the briefing, there are only two cases that deal with a similar issue; that is the Maxwell case and the Midland Euro case. The Maxwell, as I'm sure the Court is aware, three courts here -- the Bankruptcy Court, the United States District Court for the Southern District and the United States Court of Appeals for the Second Circuit -- all held that a person in the shoes of a trustee, and there he was an examiner, was not permitted to extend the recovery or, actually, the avoidance of the section in that case to extraterritorial transfer. And in the Midland Euro case -- that's the Bankruptcy Court for the Central District of California -- the same result.

What's remarkable about those two cases is in both cases the transferor was the debtor. It was a foreign debtor, and in both cases the transferee was an initial transferee. This is a distinction from our case, but an important one which cuts in our favor. Because, as I'm sure the Court will recognize, an initial transferee takes something out of the pocket of the estate that harms the estate, whereas it's no skin off the nose of the trustee if the initial transferee

gives something to somebody else. That does not take anything out of the pocket of the debtor. In any event, there is no precedent and so this Court is being invited to do what I would claim is a very radical thing, which is to undo these wholly foreign transfers.

Not only is the case unprecedented but it appears to fly -- the claims are unprecedented, but they appear to fly directly into the Morrison decision of the Supreme Court. I don't have to rehearse that here, but the obvious thing about Morrison is it is a bright-line test. If the statute doesn't say it has extraterritorial reach, it has none.

Here, as we showed in the briefs, and I will not go into this in detail, neither of the statutes at issue here -- neither Section 550 of the Code nor 78fff-2(c)(3) of SIPA -- say that they have extraterritorial reach, and that should be the ball game.

Surprisingly, the Trustee and SIPC argue: No problem. We're not in the way of Morrison. This is a domestic application here. We are not reaching out extraterritorially.

I actually find that very surprising because, as I started out by saying, these are claims to recover subsequent transfers made by foreign persons to the foreign defendants overseas under foreign law. I would think that their argument falls of its own weight, and I am going to give it little bit of a shove.

Without authority, what we are offered is a syllogism, and the syllogism goes like this. It has three premises.

Number one: The Code and SIPC have only one focus.

The second premise: That focus is to replenish the estate of domestic debtors.

And number three: What we have here is a domestic debtor. It made a transfer. Therefore, we can go all over the world and recover anything that was transferred initially by the debtor.

That's the syllogism.

Number one. Morrison does not suggest or hold that a doorstopper, like the Code, or even a relatively narrowly-focused statute like SIPA would have only one focus. In fact, in Morrison, the focus was on 10b. And there was a contrary, a contrasting focus on Sections 30a and 30b, which are extraterritorial. The Court naturally finding that since Congress knows how to write extraterritoriality into a statute when it wants to, it didn't put it in 10b and it did put it in 30a and 30b.

Second, as we've laid out in the briefs -- and I will not, unless you ask me to, go into this in any detail -- the proper transfer here under Absolute Activist and in Morrison is obviously the transfers, the transfers at issue. And we point that all out in the brief.

The third point is that the transfers here are not

domestic in any regard; they are wholly foreign. As an example, this is a miniaturized version of the HSBC Complaint in which Bank Austria is sued. Count One talks about preferential transfers (initial transferees), that's against the feeder fund defendants except for Primeo. Count Two is preferential transfers of subsequent transferees. This is what we are focusing on. It is counts such as this in which we are sued and which should be the proper focus of the Court in this matter. So all three of the premises of the syllogism don't hold up under analysis.

But the conclusion doesn't, either. And it certainly doesn't follow and it probably stands the presumption against extraterritoriality on its head to say, well, if we have a domestic debtor and it is domestic focus, we can go all over the globe and undue transfers that have any commercial practice between commercial parties in other countries and take their money away. It's the impact of this which seems to us to be wholly unreasonable.

This Court is being asked -- again, without any precedent -- this Court is being asked, first, to go out and to say in effect to foreign persons forget your law, forget that you may have litigated with a liquidator in the country where you live and you may have even prevailed against that liquidator on certain claims and have gotten to keep the transfer at issue, a broker-dealer in the United States went

bankrupt. And when a broker dealer goes bankrupt, a special statute springs into effect and after-the-fact this special statute under U.S. law -- you would be saying to these foreign persons -- this legal fiction springs into effect after the fact and it gives the trustee a right to claim your money. And we're going to take your money, and we're going to take your money and we're going to give it to that trustee so he can share it out among customers of his bankrupt. And, oh, by the way, you're not customers of his bankrupt so you are not going to get anything.

They're asking you to say, and to be the very first court to have done this, to say to foreign sovereigns, in the person of foreign courts in their court-appointed liquidators, forget your liquidation, forget that you are trying to get assets for the purpose of doing something for the creditors of the feeder funds, these hedge funds in various places where there are liquidations going on in these foreign countries under the supervision of foreign courts, forget all of that. We've got this legal fiction, and we're going to take every penny and we're going to give it to our bankrupt to share among its creditors.

This seems to me a radical intrusion into foreign matters, into matters which are the concern of foreign sovereigns, foreign courts, foreign liquidators, and the like, as well as foreign commercial persons.

I am going to leave to your reading of the briefs exegesis of SIPA and the Code, but I think it is plain when you look there you will see that there is no mention of extraterritoriality and, in particular, in SIPA, a mention of a very domestic focus. SIPA Section 78fff-2(c)(3), which is the recovery section, is a very important section which says for purposes of the transfers, for the purpose of such transfer, state law will not apply; state law is superseded. Obviously, the people who wrote that had a domestic concern. They did not say all that they could have: Disregard foreign law, this fiction will spring into effect.

I want to say a quick word about the concept of comity. Here we're talking about legislative or prescriptive comity. This is basically a canon of legislative interpretation. And it says even if the trustee were to have a plausible reading of these statutes which gives it extraterritorial reach, if the impact, as it is here, is to unreasonably interfere with the activities of foreign commercial persons, or the activities of a foreign sovereign, then the court must find some other reading of the statute to avoid that.

Comity, of course, as the Court will recall, was the grounds on which the Second Circuit upheld the decision of the District Court and the Bankruptcy Court in the Maxwell case.

And then a final word.

The Trustee says that the result we argue for is absurd. I was tempted, in preparing this argument, to say, oh, no, their argument is absurd. But that's not the right word for it. It's aggressive. It goes far too far. It is radical is what it is. Their argument is a radical one. This Court is being invited to do something that no other court has done, and it is a radical result.

I also wanted to say, and we did say this in the briefs but I'll finish with this: It is never absurd to read a statute for what it holds and what it does not hold.

Unless you have any questions for me, your Honor --

THE COURT: No. But I do want to hear if there is anything else that any moving counsel wants to say before I hear from responding counsel.

MR. LACY: No, your Honor.

MR. BERMAN: No, your Honor.

THE COURT: OK. Let me hear from Trustee's counsel.

MS. GRIFFIN: Your Honor, would you have any objection to me arguing from here?

THE COURT: No. But just be sure -- a lot of folks are here to hear what you have to say. Some of them are even your friends, so speak loudly enough.

MS. GRIFFIN: Your Honor, I will do my best.

Your Honor, we heard a lot about how there is no precedent. Your Honor, Morrison came down about two years ago,

and I don't think the Trustee disputes that this is the first time that the Court is really being asked to address the issues that were raised about presumption against extraterritoriality that were raised in Morrison with regard to the Bankruptcy Code SIPA. But, your Honor, it's very clear that the defendants' briefs do not engage in any meaningful analysis or focus of the Code or SIPA as Morrison instructs.

And, your Honor, Morrison very clearly directs that you look to the Act as a whole, the Bankruptcy Code or SIPA, you look to the object of solicitude of the statute, you look to what activity Congress is seeking to regulate, and you look to what parties the statute was meant to protect. And, your Honor, it's not about parsing the words of a particular statute; it is looking to what was Congress's -- what was the heart of what Congress was trying to regulate when it enacted the Code? And when the Supreme Court looked in Morrison at 10b, it concluded that essentially Congress' focus was on regulating the transactions -- the purchase-and-sale transactions of securities on a domestic exchange.

And, your Honor, if you apply that analysis here to the Bankruptcy Code and SIPA, you will absolutely see that it is not a syllogism. The heart of what the Bankruptcy Code is seeking to regulate is the liquidation of a debtor. The object of solicitude of the -- but, actually, the purpose of the Bankruptcy Code, it does have more than one purpose. It has

two purposes, one of which is not relevant, which is to provide a debtor a fresh start; but the other is the maximization of the estate's assets for distribution to creditors.

And, your Honor, the avoidance and recovery provisions of the Code effectuate that purpose by essentially righting the wrongs committed by debtors, domestic debtors, who deplete their estate's assets by fraudulently conveying them to other parties. And, your Honor, what parties of the statutes are meant to protect are the defrauded creditors of the debtor here.

And, your Honor, the defense's analysis, if you look in their papers, it is all over the map. As a matter of fact, they don't even address the issue in their moving papers. They talk about -- they seem to suggest that the focus is on the transferees, where they live or where they reside. But, your Honor, it's clear that under the Morrison focus analysis, not the statute's language but the focus analysis, that Congress wasn't focused on the recipients of fraudulent transfers. And if you apply Morrison's analysis here, it's very clear that all the Trustee is doing is using the Bankruptcy Code to remedy the fraudulent conveyances of a domestic debtor here and that using the Morrison analysis, that is nothing more than a domestic application of the avoidance and recovery --

THE COURT: But doesn't that argument cut more strongly in the case of initial transfers, as opposed to

secondary transfers?

MS. GRIFFIN: Well, your Honor, essentially, that's another point we were about to make. The focus of Congress on the avoidance and recovery provisions is not on subsequent transfers. If you very clearly look at 548, it is talking about the avoidance of the debtor's transfers. And counsel is right, we are talking about the initial transfers. And what 550 permits is the recovery of those transfers from any particular recipient.

And so, again, focusing on Congress's focus in enacting those provisions, it's on recovering that property that was fraudulently conveyed by this debtor; it was not on the particular type of transferee. It certainly wasn't on any potential subsequent transfer because it could be recovered from the initial transferee.

And, your Honor, if you look at the investment advisor cases that we point to in our brief, I think it is SEC v. Gruss and SEC v. ICP Asset Management, in those cases the Court looked to the Investment Advisor Act. And while the companies there pointed to the fact that they thought the focus was on the client and where the client might be located, the reality is the Court said when they looked at the Investment Advisor Act, it was, of course, what was Congress concerned with and focused on? The investment advisor.

So it comes down to this, your Honor. Under Morrison,

once you determine what Congress's focus is, whatever other facts that are outside that focus are not really relevant to the analysis here. So the fact of where particular recipients of the fraudulent transfers may reside are not within Congress's focus. The fact of where particular subsequent transfers may have taken place is not within Congress's focus. Those facts may be relevant to other defenses -- personal jurisdiction; it could have to do with whether or not the Trustee's judgment obtained here may be enforceable somewhere else -- but it does not go to the heart of the issue before the Court, and that is whether the presumption against the extraterritorial application of statutes applies here because this involves a purely domestic application of the statute.

And, your Honor, a word on Maxwell.

Maxwell was, of course, decided before the Morrison decision came out, but that case involved a foreign debtor. And so, your Honor, that would be arguably the quintessential example of what would be the extraterritorial application of the Bankruptcy Code and the avoidance and recovery provisions. Where it was a foreign company, an English company, that had liquidation proceedings going on in London. They had the very unusual circumstances of having dual primary liquidation proceedings going on in both the U.S. and in London. But Judge Brosnan focused on the fact that there, using a center-of-gravity test, the English company had made

preferential transfers overseas to English and French banks and basically in response to debts that were incurred by those banks overseas.

And, your Honor, pre-Morrison it was a center-of-gravity test. Post-Morrison that would probably be a situation where that English company cannot use the U.S. Bankruptcy Code and avoidance and recovery provisions to recover those transfers. That is not what we're talking about here.

And as a matter of fact, your Honor, counsel for the defendants brings up the liquidation in the BVI, and we're getting into a whole comity analysis, which, by the way, wasn't, you know, for the briefing before your Honor. We merely pointed out in our brief that the defendants' analysis of Morrison was flawed and it appeared to be more like a comity analysis.

I'm going to get into a very brief discussion -- I know you've read our papers; I'm not going to belabor the issue. But the very fact that the Fairfield liquidators are pursuing avoidance actions elsewhere in their insolvency proceedings -- and BVI is not surprising -- in a fraud as massive as this one, there are litigations involving multiple laws, multiple parties in various jurisdictions. Investors are suing feeder funds. Investors are suing the managers of those funds. Auditors are being sued all over the world. Insolvency

proceedings everywhere. But, your Honor, one of the things defendants didn't say is that the BVI didn't decide that the bankruptcy causes of action of those feeder funds were dismissed. Those causes of action of that feeder fund are actually pending right now. Those avoidance actions of the Fairfield liquidators, the Madoff feeder funds, are pending before Judge Lifland.

And you know what, your Honor, they're being brought in an ancillary proceeding here using the laws of the debtor's home country, the BVI. They're using their own country's laws, their Bankruptcy Code and avoidance and recovery provisions, because that's what the international community has decided to do.

Essentially, your Honor -- and I am drifting into comity, and, I'm sorry, I am just going to head in that general direction. But that's what Chapter 15 and the countries that adopted this model insolvency code say. Basically, those countries that have signed onto UNCITRAL have decided that they are going to aid the main proceeding of a bankrupt debtor and they are going to decide that that main proceeding is where the center of main interest of the debtor is -- generally, your Honor, where the debtor's principal place of business is. And so, your Honor, if you look at all the comity factors that are listed in the Restatement 403 that deal with the Restatement on Foreign Relations 403 and you look at them here, and it is very

clear that even under a comity analysis there is no other country that has more of an interest in ensuring that its bankruptcy code and avoidance provisions are applied to its debtor in the United States.

Certainly -- as a matter of fact, defendants don't even proffer another country's avoidance action or bankruptcy code that should apply to this debtor. And right there that's the rub, your Honor. The very case they cite to you, that feeder fund is using its own laws because that's the way it is supposed to work. There is no conflict.

But if you go through all of these factors -- the link of the activity to the territory of the regulating state, the extent to which the activity takes place within the territory or has substantial direct and foreseeable effect upon or in the territory -- obviously, your Honor -- and the connections such as the nationality, residence, or economic activity between the regulating state and the person principally responsible for the activity to be regulated -- without a doubt, your Honor, certainly the United States has a very significant interest in regulating the conduct of the debtor here, headquartered in the U.S., that orchestrated the most massive Ponzi scheme ever, out of New York, transferred all of its property out of a bank account in New York. So that factor clearly militates in favor here. Again, nothing pointed to by the other parties in that regard.

The character of the activity to be regulated, the importance of regulation to the regulate state. Obviously, the Bankruptcy Code and SIPA are two separate acts that are very concerned with this. Congress was very concerned and had a very serious interest in ensuring that and, including SIPA, the expedited return of customer property that is fraudulently conveyed by a financially-troubled in this case bankrupt broker-dealer.

I could go on, your Honor: The importance of the regulation to the international, political, legal, or economic system; the extent to which the regulation is consistent with the traditions of the international system; the extent to which another state may have any interest in regulating the activity.

The only law that the defendants point to is really a point that their own home residence might possibly be more interested in protecting the defendants in these particular actions.

And essentially, your Honor, with all due respect, comity is not the issue here, and it is certainly not the analysis under Morrison.

And, frankly, your Honor, even were this to be a situation where you concluded that this was a situation that requires extraterritorial application of the Code or SIPA, the decision in French that we point to in our brief, which essentially says, look, the Supreme Court has decided that to

determine what property or transfers that a trustee may attempt to recover and avoid, we have to look to essentially Section 541 of the Code, which has language, you know, essentially that defines what the property of the estate is, as wherever located; and that has been held to apply territorial without doubt, your Honor.

And as the French Fourth Circuit Court pointed out, because Congress intended to essentially determine what property could be transferred by referring to that statute, you have to look at what property was property of the debtor, wherever it was situated, as if before it was filed. An easier way for me to explain this, your Honor, is to give a hard example because I get caught up in the language when speaking.

Bernard Madoff had a yacht in France. And before the bankruptcy, just before we see the fraud -- and this is an example, it is not a fact -- he, before the fraud is revealed and before the bankruptcy proceeding is commenced, he fraudulently transfers that yacht in France to his nephew. Subsequently the bankruptcy proceeding is brought here in the United States.

Now, all the French court is saying is that but for that transfer that yacht would have been property of the debtor's estate here, and French is saying essentially that because Congress indicated its intent, you have to refer to Section 541 in order to determine what you can avoid, it would

make sense that the Trustee should be permitted to avoid that transfer in order to recall that to the estate that which should have been part of the estate but for that fraudulent transfer.

And so, your Honor, I guess what I would like to conclude with is a point that we weren't saying that defendants' arguments were absurd. We're saying that to stop the efficacy of the Bankruptcy Code at the borders would have absurd results. And we gave an instance of just before the bankruptcy what would have happened if Bernard Madoff had transferred billions of dollars of the customers' property to a cousin in Europe and then subsequently transfer it to another cousin in Switzerland. And, your Honor, that simply cannot be the result of that once the property leaves the jurisdictional territory of the United States, that somehow the doctrine of the presumption against extraterritoriality is going to stop that from happening.

And the other thing is, your Honor, as we pointed out in our papers, is the Code doesn't splice between who is a foreign resident and who is a domestic residence. And certainly claims of the customers, despite statements in the defendants' papers that somehow the Trustee has denied claims based on a party's foreign status, that is completely not the case. Two of biggest creditors in this case who got distributions this week are foreign creditors.

Your Honor, it has absolutely nothing to do with it. The fact that they were denied their customer claim had only to do with the fact that they didn't fit within the definition of "customer" under SIPA because they were an indirect investor.

So, your Honor, it would be absurd to use just the mere happenstance of a party's residence to define the analysis of extraterritoriality when those same parties could come in, and some of these same parties have, as we pointed out, filed claims in this very proceeding. So how does it work that we can't go out but they can come in?

So, your Honor, unless you have any further questions?

THE COURT: No. Thank you very much.

Let me hear from SIPC, if they want to be heard.

MR. LaROSA: We don't, actually, your Honor. We will stand on our papers, and I would be happy to answer any questions your Honor wants.

THE COURT: Very good. Let's go back to moving counsel.

MR. VELIE: Thank you, your Honor.

I still haven't heard any precedent, and the important point is not -- the starting point is not Morrison. Extraterritoriality and the presumption against extraterritoriality has been in our law since 1909, when Justice Holmes wrote the American Banana case. In the entire history of the Code, from 1978 forward, and the bankruptcy law

before that, there is no instance when a court has said to a trustee, it's OK, go recover a foreign transfer. Not one. Never. You would be the first..

That's the first point.

The second point is I thought I heard something about Section 550 saying that if you can avoid you can recover immediate and subsequent transfers and so on. We all know that that doesn't mean that you can't impose or look at defenses. The defense from 546(e), for example, the safe harbor for securities settlement payments, has to be interposed between that moment when there is an avoidance and a recovery. The defenses in 550 may be imposed. So the defense of extraterritoriality also needs to be looked at and imposed.

Because in the final analysis what we're being offered is a way to read the statute, and if the Trustee's counsel is correct and you read the statute this way, you will have all that impact on foreign sovereigns and foreign individual commercial transactions that I described earlier. When you have something like that, that was what the presumption against extraterritoriality was supposed to deal with, and that's why Morrison put in a bright-line test. And the bright-line test is very simple -- if it is not in the statute, that's it.

Finally, a word about the "absurd" result.

I think what the Trustee is trying to say here is that the Trustee will be without a remedy in the event you rule for

us, but that's not the case. Number one, there is a remedy which is provided in the Code in Section 1505, which we pointed out in our papers. He can go to foreign courts and go to the foreign court and ask for whatever relief the foreign court is willing to give him.

In fact, not only is that the case from the Code, showing that the drafters of the Code perceived that there might be this problem and solved it by legislating comity, just the way they legislate the permission for foreign liquidators to come here and open ancillary proceedings, they can open, as happened in Maxwell, a full-blown Chapter 11 or Chapter 7 case. Similarly, a Trustee here can go into foreign court and go there and ask for what the foreign law permits, and that would be the appropriate thing to do. It is not only the appropriate thing to do, the Trustee knows about it and is doing it and has brought proceedings in various countries around the world.

With your permission, I am going to read from the International Law Practicum, which is a publication of the International Section of the New York State Bar Association, and in it is an article in which Mr. Sheehan, who is Trustee's counsel, is one of the principal authors. And here he is speaking to a symposium, and he says -- he had been talking about foreign actions that he has brought and going into foreign courts and seeking relief in the foreign courts. "Almost every one of the foreign actions has a parallel

proceeding here in the U.S. Bankruptcy Court. The reason for that is fairly obvious. That is, what if we were just to rest on our laurels in the Bankruptcy Court and it turns out we lose the extraterritoriality issue, the personal jurisdiction issue, or whatever that issue may be? Are we therefore, what? Out of luck? We can't go anywhere? So what we're doing is parallel proceedings, and we participated, as I said earlier" -- this is Sheehan speaking -- "throughout the Caribbean Islands and in the U.K."

And that is what he was doing. He has a remedy. It is not absurd at all.

THE COURT: I don't actually see how the issue of whether he has or has not a remedy is relevant. Maybe I have missed something.

If he has a right to bring the lawsuit here, he has a right to bring the lawsuit here. If he doesn't, the fact that it would or would not deprive him of a remedy seems to me neither here nor there.

MR. VELIE: I am not arguing with you on that Judge.

Who I'm arguing with is Trustee's counsel who says that we are arguing for an absurd result, a result in which the Trustee would be without a remedy, and the answer is that that happens to be incorrect --

THE COURT: As I understood the Trustee -- and this is a gross oversimplification, but, I mean, let's take an example

that has nothing do with this case or even the laws here involved; it is just an abstraction.

So I steal your cow and I give it to my son. This is clearly a hypothetical since I only have daughters.

MR. VELIE: You don't have a cow either.

THE COURT: Not the last I checked.

And my son takes it to Europe and he sells it to someone there. And now you bring an action for the recovery of the cow or its value and you bring it to get the person who now has the cow. And that may not be an enforceable judgment, which is the point your adversary was making, but she's saying there is something absurd that you shouldn't be able to bring an action for recovery of the cow in the hands of -- we could make it even an easier case for her -- let's say that the person to whom the cow was sold in Europe knows that it is a stolen cow. So that's kind of absurdity I think she is trying to suggest.

MR. VELIE: Perhaps. But I think what we need to put into this discussion, Judge, is the distinction in the law between chattels and money. A stolen chattel does not deprive the owner of his title, and he can go anywhere and say I'm owner. That is not the case with money. There is the money rule, which allows the person who receives the transfer of money to put up all manner of defenses.

So I just want to try to help you in your thinking

about this. Don't be thinking about stolen chattels, stolen artwork or the like; it is a completely different ballgame. What we have here is a question of statutory interpretation purely, and that is that pursuant to the money rule can this Trustee ask this Court to undo a transfer that took place in the Cayman Islands, say, or in Europe between foreign persons and under foreign law?

And the following observations: No judge has ever done it before. The Bankruptcy Code seems to tell the Trustee if you want to go abroad, go to a foreign court and get your remedy there. Morrison tells us look to the statute and see if this is permitted, because it is plainly extraterritorial. And there is nothing in the statute that says that Congress intended this.

So in the final analysis, if you read it the way the Trustee reads it, we have this terrific, in the sense of full of terror, impact on foreign sovereigns, courts and persons -- never before permitted by a court from 1978 on or even before, as far as we could find. So you are being invited to do something new and, I submit, radical.

THE COURT: All right. Thank you very much.

All right --

MR. LACY: Your Honor, could I say a word?

THE COURT: Yes, but it had better be responsive to what the Trustee just said because you had your opportunity to

be heard in the beginning.

MR. LACY: Yes, your Honor.

I wanted to draw together three things that the Trustee's counsel said.

The first, of course, is that the Trustee's counsel treated this entire question in terms of whether United States Bankruptcy Code allows the avoidance of the initial transfer, and that is not the issue. The issue is whether Section 550(a)(2) of the Bankruptcy Code allows the recovery of money from a subsequent transferee. So the question you have to answer is does 550(a)(2) fly outside the United States.

Now, I want to emphasize the importance of that distinction by referring to another thing the Trustee's counsel said. The Trustee's counsel said there is no rule that says a foreign customer cannot submit a claim in a SIPC liquidation. That has nothing to do with this.

The rule, which the Trustee has enforced vigorously, is that the investor in a feeder fund which was a customer of BLMIS cannot submit a claim in a SIPC proceeding. And that's who the subsequent transferees are. The subsequent transferees who we are moving on behalf of cannot assert claims in the bankruptcy case because they were not customers of BLMIS, and the Trustee, with now the support of this Court and the Second Circuit, established that those subsequent transferees, because they are not customers, cannot assert a claim in a SIPA

proceeding and will never share in any of the recoveries that the Trustee accomplishes by avoiding transfers.

The third point is that we heard an astonishing discussion concerning the importance and value of the Fairfield Funds' assertion of claims under the BVI Insolvency Act. I wanted to go back to that.

Section 550(a)(1) gives the Trustee the right to recover by avoided transfer from the initial transferee; that would be the feeder fund in these cases. Section 550 says you can't get a double recovery; if you get it from the initial transferee, you can't get it from anybody else.

Now, suppose that a judgment is obtained against the feeder fund, against the initial transferee. Why shouldn't the satisfaction of that judgment end the case against the subsequent transferee? The reason it won't end the case against the subsequent transferee, if the Trustee is allowed to assert these claims, is because, of course, the initial transferee turns out to be insolvent. There isn't enough money there.

But what happens then? That insolvent initial transferee, in the cases we are talking about, is a foreign entity. It's winding up. Its insolvency proceeding should proceed under the law where it's organized, and I take it that the Trustee's counsel endorses that.

Well, if the Trustee gets a judgment against a feeder

fund, an initial transferee, based on the avoidance of the transfer, he becomes a creditor in the foreign solvency proceeding. He will share in any recoveries that the Fairfield liquidator obtains as a result of these things you have heard about under the BVI Insolvency Act. Why isn't that enough?

The Trustee is here saying but we're not satisfied with that, because whereas all the other creditors in the BVI insolvency proceeding have to share and share alike, we can go straight to somebody who received a transfer from that foreign entity and we can recover the whole thing ourselves. We can go around the liquidator. We don't have to rely on the liquidator's insolvency proceeding and the liquidator's recovery actions, and we don't have to share with the other creditors. We are going to go straight around the liquidation straight to the remote transferee and recover. That seems to me to put the comity issue in very sharp relief, but I think it also affects the extraterritoriality question, the Morrison question, because in Morrison and in EEOC v. Arabian American Oil, the Supreme Court has made clear that one of the things you think about when you answer the question concerning extraterritoriality is whether you are going to be doing something seriously disruptive to affairs that are supposed to be governed by foreign law. And it seems to me that the Trustee's argument today has demonstrated that the claims they are trying to assert here would have exactly that effect.

Thank you, your Honor.

THE COURT: Thank very much.

Anyone else on the moving counsel's side who wants to be heard

MR. BERMAN: No, your Honor.

THE COURT: All right. I will give the Trustee an opportunity to have the final word, if you would like.

MS. GRIFFIN: Thank you, your Honor. It will be very brief.

Your Honor, I guess all I would ask you to do when you hear these analyses that drill down to these very esoteric issues is to back up and look at the two issues that are before your Honor, and they are is this a domestic application of the Bankruptcy Code to a U.S. debtor to replenish the estate of property that rightfully belongs here, and is the Trustee using the Code as it was intended by Congress?

Two, your Honor, just to point out a little factual inaccuracy. In those actions that the Trustee is pursuing abroad, he is bringing claims brought under the U.S. Bankruptcy Code. He is pursuing them in the event -- in the alternative under foreign law in the event that the defendants either default here and -- you know, it is to preserve his rights in case a party tests jurisdiction or the enforceability of a default judgment. And, your Honor, frankly, that is what the defendants are really trying to do here. They are really

trying to cloak what are jurisdictional issues or enforceability issues in the guise of a statutory construction issue, and that is not what Congress intended.

Thank you, your Honor.

THE COURT: All right. Well, I want to thank all counsel for excellent argument.

The Court will take the matter sub judice. Thanks very much.

(Pause)

THE COURT: So I spoke too soon. There is one other lawyer who wants to be heard.

MR. SCHIMMEL: Thank you. Your Honor, I represent CACEIS Bank and CACEIS Bank Luxembourg, which are --

THE COURT: You need to identify yourself.

MR. SCHIMMEL: Daniel Schimmel, of Kelley Drye & Warren, for defendants CACEIS Bank and CACEIS Bank Luxembourg.

I wanted to add one point that goes to the cow example that your Honor raised and one of the cases that's cited in the brief, which is the Midland case. I think that case is actually on point and responds to your question, because it involved a massive Ponzi scheme organized in the United States. The perpetrators of that Ponzi scheme were convicted in the Central District of California. The debtor in that case comprised both entities in the U.S., including California corporations and foreign entities. The transferor was a

Barbados corporation. And the Court in that case looked at the extraterritorial application of the avoidance provisions of the Bankruptcy Code and said they do not apply extraterritorially to these transfers, that the presumption against extraterritoriality applied even though it was a crime in the United States, a Ponzi scheme in the United States, and the debtor comprised some U.S. entities, and the Court looked at where the transfer took place. That was the key factor.

THE COURT: All right. Thank you very much.

Does the Trustee want to add anything on that?

MS. GRIFFIN: Your Honor, that was pre-Morrison and so that would be my only -- was it post?

(Counsel conferred)

MR. SCHIMMEL: It is pre.

MS. GRIFFIN: And, your Honor, if the Court were to apply the Morrison analysis, I think the result would be as the Trustee submits.

THE COURT: All right. Thank you all very much.

This is an easy case. I'm being asked to make an everyday application that has never been done before, if I understand the competing arguments of counsel.

So I will take it sub judice.

- - -

Exhibit 14

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-mc-00115 (JSR) ECF Case Electronically Filed
In re: MADOFF SECURITIES	

DESIGNATION OF LEAD COUNSEL FOR EXTRATERRITORIAL DEFENDANTS PURSUANT TO ORDER OF THE COURT DATED JUNE 6, 2012 (ECF NO. 167)

Pursuant to this Court's June 6, 2012 Order, *see* Order, *In re Madoff Sec.*, No. 12-mc-00115 (S.D.N.Y. June 6, 2012), ECF No. 167, the Extraterritorial Defendants (as defined in the Consolidated Memorandum of Law in Support of the Extraterritorial Defendants' Motion to Dismiss as Ordered by the Court on June 6, 2012, *In re Madoff Sec.*, No. 12-mc-00115 (S.D.N.Y. July 13, 2012), ECF No. 235), hereby designate Franklin B. Velie of Sullivan & Worcester LLP as lead counsel to advocate the Extraterritorial Defendants' position at oral argument on September 21, 2012 at 4:00 P.M.

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Dated: August 31, 2012
New York, New York

Respectfully submitted,

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Exhibit 15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	No. 12-mc-00115 (JSR) ECF Case Electronically filed
In re: MADOFF SECURITIES	

CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF THE EXTRATERRITORIAL DEFENDANTS' MOTION TO DISMISS

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ARGUMENT

The memoranda of the Trustee and SIPC ("Respondents") in opposition to the motion fail to overcome the Extraterritorial Defendants' showing that the relevant provisions of the Bankruptcy Code and SIPA do not have extraterritorial application. The Respondents concede that the Trustee's claims depend on the application of SIPA section 78fff-2(c)(3) in addition to the Bankruptcy Code provisions. (Tr. Mem. 10-11; SIPC Mem. 2-3.) Thus, the claims at issue here are precluded by *Morrison*'s presumption against extraterritoriality, as applied separately to both the Code and SIPA. Moreover, that result follows separately from SIPA's language reflecting an affirmative intent to limit section 78fff-2(c)(3) to domestic transactions.

Perhaps recognizing this, Respondents rely primarily on arguments that the Trustee's claims do not actually involve extraterritorial application of the provisions, but those arguments are based on two fundamental mischaracterizations. First, they misinterpret the focus of the relevant statutes, which is the transfers that are allegedly subject to avoidance and recovery, not "domestic debtors." Second, they argue as if the transfers the Trustee seeks to recover were transfers by BLMIS, not the wholly foreign subsequent transfers that are the subject of this motion. (Tr. Mem. 1, 3, 4, 17.) As explained in our Opening Consolidated Memorandum ("Def. Mem."), "[t]he Extraterritorial Defendants are foreign persons and entities, virtually all of whom (or which) are alleged to be immediate or mediate transferees of alleged initial transferees of what was customer property in the hands of BLMIS." (Def. Mem. 3.)[1] The Extraterritorial Defendants did not receive the transfers from BLMIS that the Respondents argue are domestic.

[1] An initial transfer would not be subject to the provisions on which the Trustee relies if it occurred outside the United States. *See Maxwell Communication Corp. v. Barclays Bank PLC (In re Maxwell Communication Corp.)*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd on other grounds*, 93 F.3d 1036 (2d Cir. 1996). However, the moving defendants only seek dismissal of claims to recover subsequent transfers between foreign parties.

Rather, as in *Morrison*, the subsequent transfers at issue here are foreign transactions among foreign parties.

The Second Circuit has made clear that a party asserting a claim pursuant to a statute that does not apply outside the United States has the burden of pleading facts showing that his claim is domestic. *Absolute Activist Value Master Fund v. Ficeto*, 677 F.3d 60, 69-70 (2d Cir. 2012). The Trustee has made no pretense of satisfying this requirement in his claims against the Extraterritorial Defendants, and those claims should be dismissed.

I. THE PROVISIONS ON WHICH THE TRUSTEE MUST RELY TO RECOVER THE SUBSEQUENT TRANSFERS DO NOT APPLY EXTRATERRITORIALLY.

A. Section 78fff-2(c)(3) of SIPA Does Not Have Extraterritorial Application.

There is no merit to Respondents' contention that SIPA section 78fff-2(c)(3) has extraterritorial effect because it "incorporates" the Bankruptcy Code's Avoidance and Recovery Provisions, which in their view "incorporate" 11 U.S.C. § 541. (Tr. Mem. 3-4, 23-24; SIPC Mem. 11-12.) This is not the case because, as discussed in the Opening Memorandum and pages 4-7 below, the Bankruptcy Code Avoidance and Recovery Provisions do not themselves have extraterritorial application. In addition, there is nothing in section 78fff-2(c)(3) to overcome the presumption that it lacks extraterritorial effect, and its reference to "the laws of any State" confirms that this section is intended to apply to transactions in the United States. (*See* Def. Mem. 18.)

The Trustee's response that this provision relates only to preference claims (*see* Tr. Mem. 24 n.25) is unsupported and wrong. Section 78fff-2(c)(3)'s legal fiction is as essential to the Trustee's fraudulent transfer claims as it is to his preference claims because a SIPA trustee

cannot avoid a transfer under either theory unless it is deemed a transfer of "an interest of the debtor in property." *See* 11 U.S.C. §§ 547(b), 548(a)(1).[2]

Nor does *Hill v. Spencer Savings & Loan Association (In re Bevill, Bresler & Schulman, Inc.)*, 83 B.R. 880 (D.N.J. 1988), support the Trustee's position. As mentioned in our Opening Memorandum (at 18 n.16), but wholly ignored by Respondents, that pre-*Morrison* and pre-*Arabian American Oil* case was based on the explicit understanding that section 10(b) applies extraterritorially. *See In re Bevill*, 83 B.R. at 896 ("Extraterritorial application of SIPA is also consistent with the extraterritorial application of other federal securities laws."). In the wake of *Morrison's* contrary holding, the analysis in *Bevill* supports the conclusion that SIPA has no extraterritorial effect, "consistent with" the lack of extraterritorial application of section 10(b).

Bevill provides no support for the Trustee's position for the additional reason that the challenged transfers in that case were made by a domestic broker-dealer to domestic savings and loan associations. *See* 83 B.R. at 883 & n.1. Those transfers would be self-evidently domestic as a matter of common sense and under the test adopted by the Second Circuit in *Absolute Activist*, because the obligations to make the transfers arose here, and no extraterritorial application of SIPA or the Bankruptcy Code was required.[3]

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[2] Respondents' invocation of section 78eee(b)(2)(A)(i) does nothing to suggest an intention to give extraterritorial application to section 78fff-2(c)(3). (Tr. Mem. 23; SIPC Mem. 11-12.) Section 78eee(b)(2)(A)(i) simply provides that upon the filing of an application for a protective decree with respect to a debtor, the court "shall have exclusive jurisdiction of such debtor and its property, wherever located." It corresponds to 28 U.S.C. § 1334(c), in the jurisdictional provision for ordinary bankruptcy cases, and no more manifests an intention to give section 78fff-2(c)(3) extraterritorial effect than section 1334 does with respect to the Avoidance and Recovery Provisions. *See Maxwell*, 186 B.R. at 817-18.

[3] Moreover, the transfer was avoided under section 549 of the Bankruptcy Code, which is irrelevant here. Section 549 provides for avoidance of a transfer of "property of the estate" that occurs "after the commencement of the case" and is not authorized by either the Bankruptcy Code or the court. *Bevill* involved a post-petition transfer of property in London which was

B. The Bankruptcy Code's Avoidance and Recovery Provisions Do Not Have Extraterritorial Application.

Respondents argue that because section 541 defines the "property of the estate" that is created upon the commencement of a bankruptcy case to include property "wherever located and by whomever held," this somehow gives the Avoidance and Recovery Provisions extraterritorial scope because they refer to pre-bankruptcy transfers of "an interest of the debtor in property." (Tr. Mem. 19-20.) The Bankruptcy Court rejected this argument in *Maxwell*:

> [P]roperty which has been preferentially transferred does not become property of the estate until recovered. *In re Colonial Realty Co.*, 980 F.2d 125, 131-32 (2d Cir. 1992). . . . Thus, the fact that the estate is defined to include property overseas does not mean that property which never became property of the estate is subject to recapture through the extraterritorial use of section 547.

170 B.R. 800, 811 (Bankr. S.D.N.Y. 1994). On appeal, this Court agreed. *Maxwell*, 186 B.R. at 819-20. In addition, the Court noted that "broad, boilerplate language . . . is insufficient to overcome the presumption against extraterritoriality," and "any ambiguity in the statute must be resolved in favor of refusing to apply the law to events occurring outside U.S. territory." *Id.* at 818-19 (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 251(1991)). This same principle was reaffirmed in *Morrison*.

The Trustee is mistaken in asserting that *Begier v. IRS*, 496 U.S. 53 (1990), held that "Section 541 of the Code was expressly incorporated into Section 547 of the Code . . . ." (Tr. Mem. 20.) *Begier* never uses the word "incorporate," much less "expressly incorporate."

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already "property of the estate." It was therefore important that section 549 reached "property of the estate" and the post-petition transfers implicated the Bankruptcy Court's "exclusive jurisdiction" of the debtor's property "wherever located," 28 U.S.C. § 1334. Here, the "estate" did not come into existence until after the property was transferred, the property had never been subject to the Bankruptcy Court's jurisdiction, and the transfers occurred outside the United States. Section 549 and *Bevill* are simply irrelevant.

Rather, in considering a purely *domestic* transfer, the Supreme Court used section 541's enumeration of property of the estate "for guidance" to determine whether cash held subject to a statutory trust was property of the debtor *before* it was transferred. *Id*. at 58-59. The Court took account of the fact that the cash held in trust would not have been property of the estate, pursuant to section 541's exclusion of equitable interests in property to which the debtor had only bare legal title, in holding that the trust funds were not property of the debtor before they were transferred to the IRS. The decision had nothing to do with extraterritoriality, and the words in section 541 on which the Trustee's argument is based, "wherever located," are never referred to in *Begier*.

Respondents also rely on *French v. Liebmann (In re French)*, 440 F.3d 145 (4th Cir. 2006), to argue that section 541 is incorporated into the Avoidance and Recovery Provisions. However, that case—which predates *Morrison*—clearly does not support the application of the Avoidance and Recovery Provisions to foreign transfers between foreign parties. In *French*, the Fourth Circuit permitted a trustee to use section 548 to recover property in the Bahamas for which the deed was transferred by an American mother to her American children "at a Christmas party held in Maryland," and observed that "from the outset both sides have treated § 548's reach as extraterritorial." *Id*. at 148, 150-51. The court based its conclusion on the fact that "[m]ost of the activity surrounding th[e] transfer took place in the United States [and] almost all of the parties with an interest in this litigation . . . are based in the United States, and have been for years." *Id*. at 154.

There is likewise no merit to SIPC's argument, based on *Begier* and *French*, that "during the pendency of the action," "Congress intended that property sought by the trustee through an avoidance or recovery action have the status of property of the estate for purpose of that action

only." (SIPC Mem. 17.) The only issue discussed in *Begier* concerning the status of the property the trustee sought to recover was whether it was property of the debtor *before it was transferred*, and the Court never suggested that it had any special status "during the pendency of the action." *French*, likewise, concluded that section 548 allows a trustee to recover property that would have been property of the estate prior to the transfer "even if that property is not 'property of the estate' *now*." 440 F.3d at 151 (emphasis in original). In any event, any argument that transferred property remains the debtor's "property" would not establish that a transfer of such property outside the United States is subject to recovery under the Avoidance and Recovery Provisions.

Finally, there is no merit to the Trustee's argument that section 541(a)(3), which provides that the estate includes "[a]ny interest in property the trustee recovers under" section 550, would be "render[ed a] nullity" unless "Section 550 applies extraterritorially." (Tr. Mem. 22.) The fact that a lengthy enumeration of property of the debtor, "wherever located," includes property actually recovered pursuant to the Avoidance and Recovery Provisions gives no guidance whatsoever concerning what property may be so recovered or the reach of the statutory provisions on which Respondents rely.

In contrast with section 541(a), which provides that the commencement of a case under the Code may create an "estate . . . comprised of [certain] property . . . *wherever located*," the Avoidance and Recovery Provisions do not contain any such language.[4] This intentional

[4] The Trustee also argues that section 541 cannot be contrasted with the Avoidance and Recovery Provisions because, in his view, "these provisions work together as a cohesive whole to replenish a debtor's estate." (Tr. Mem. 21 n.24.) These provisions cannot be lumped together simply because they appear in the same chapter of title 11. Rather, section 541 has the particular purpose of "creat[ing] the bankruptcy estate, which consists of all of the property that will be subject to the jurisdiction of the bankruptcy court." 5 *Collier on Bankruptcy* ¶ 541.01 (16th ed.

omission[5] must be respected. *See*, *e.g.*, *Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993) (noting that "where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

II. *MORRISON* CONFIRMS THAT THE TRUSTEE'S CLAIMS ARE EXTRATERRITORIAL.

Because the Avoidance and Recovery Provisions are plainly "focused" on the transfers that the Trustee seeks to recover, *Morrison* confirms that the Trustee's attempt to recover foreign transfers that were made by foreign entities to other foreign entities, in foreign jurisdictions and subject to foreign law, would violate the presumption against extraterritoriality.

A. The Focus of the Relevant Statutes is the Transfers.

The Supreme Court's admonition in *Morrison* to consider the "focus" of a statute in determining whether a given application of the statute would be extraterritorial reflects the same considerations that underlie the presumption against extraterritoriality. The presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." 130 S. Ct. at 2877. Accordingly, the legislative "focus" relevant to the presumption

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2012). On the other hand, Avoidance and Recovery Provisions such as section 548 harken back to common law principles that long predate the Code and are "an elemental and ancient part of debtor-creditor relations." *Id.* ¶ 548.01 (emphasis added).

[5] The fact that the omission is intentional is confirmed by the legislative history cited by the Trustee (Tr. Mem. 20 n.23), which undercuts rather than supports his argument. The Trustee points out that in 1984 sections 547 and 548 were amended by replacing the phrase "property of the debtor" with "interest of the debtor in property," and notes that as a result "the language of Sections 547 and 548 now mirrored the Section 541 language." (Tr. Mem. 20 n.23.) If this has any significance for this motion, it is surely that when Congress transplanted the phrase "interest of the debtor in property" to the avoidance provisions it must have focused on, and apparently chose not to transplant, the words "wherever located" that immediately follow this phrase in section 541.

against extraterritoriality is the conduct or transaction to which the statute attaches legal consequences.

In an early case recognizing the presumption against extraterritoriality, Justice Holmes wrote, "The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *American Banana Co. v. United Fruit Co*., 213 U.S. 347, 356 (1909), *abrogated by Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962); *see also Maxwell*, 170 B.R. at 809 (citing *American Banana*, 213 U.S. at 356). In *Arabian American Oil*, the Court held that Title VII does not apply to an employment relationship overseas even though the plaintiff and defendant were both United States domiciliaries and the plaintiff was hired in the United States. 499 U.S. at 256. In *Morrison*, the Court held that the "focus" of section 10(b) of the Exchange Act was the transactions that Congress sought to regulate. 130 S. Ct. at 2884. *Morrison* expressly rejected the argument that the occurrence of "significant conduct" in the United States can overcome the presumption against extraterritoriality. *Id*. at 2886.

It should not be controversial that the focus of the Avoidance and Recovery Provisions is in fact the transfers that they might subject to avoidance and recovery. The Avoidance and Recovery Provisions provide that transfers are subject to avoidance or recovery based on factors centered on the transfers themselves. Sections 544-545 and 547-548 provide that a bankruptcy trustee may avoid transfers that have certain characteristics, subject to various defenses relating to other characteristics of those transfers: Their timing, purpose, effect on the transferor and transferee, and so on. Section 546 prescribes various limitations on the Trustee's avoidance powers based on the nature of the transfers. Section 550(a)(2), the specific provision governing the Trustee's claims against the Extraterritorial Defendants, authorizes recovery of property to

the extent its initial transfer has been avoided, pursuant to the avoidance provisions just described, but subject to additional defenses specific to the subsequent transfer, relating to value and good faith.

SIPA section 78fff-2(c)(3) also focuses on transfers, and provides a trustee with standing to avoid transfers. It provides that property that would have been customer property before it was transferred shall be deemed to have been property of the debtor, and that the customer that received such property shall be deemed to have been a creditor, notwithstanding "the law of any State to the contrary."

Maxwell, although predating *Morrison*, recognized that the location of the transfers determined whether application of the Avoidance and Recovery Provisions would violate the presumption against extraterritoriality. The Bankruptcy Court refused to apply section 547 to foreign transfers because, among other things, "the antecedent debts were incurred overseas, the transfers on account of those debts were made overseas, and the recipients. . . [are] all foreigners." *Maxwell*, 186 B.R. at 815. This Court affirmed that decision even though (i) Maxwell Communication had filed a chapter 11 proceeding in the United States, and was therefore a debtor in possession under the Bankruptcy Code, and (ii) the challenged transfers "consist[ed] of proceeds from the sale of U.S. assets." *Id*. at 813.[6] While the foreign company

[6] The Trustee asserts that *Maxwell* "could not take place in the current bankruptcy landscape precisely because Congress has anticipated the problem of differing insolvency laws across multiple jurisdictions" by establishing chapter 15. (Tr. Mem. 15 n.15.) The Trustee's assertion is based on its incorrect belief that "*Maxwell* was conducted pursuant to section 304 of the Bankruptcy Code, which has been superseded by chapter 15." In fact, Maxwell Communications had filed a case under chapter 11, prior to commencing an insolvency proceeding in England. *Maxwell*, 186 B.R. at 813; 11 U.S.C. § 109(a) (permitting a foreigner to be a "debtor" under the Bankruptcy Code if it has "property in the United States"). Because Maxwell Communications was a debtor under chapter 11, *Maxwell* clearly *could* "take place in the current bankruptcy landscape."

that was the debtor in *Maxwell* could have used the Avoidance and Recovery Provisions to recover transfers that occurred *in* the United States, it could not use those same provisions to recover transfers that occurred *outside* of the United States. *Maxwell*, 170 B.R. at 812.

B. The Focus of the Relevant Statutes is Not "Domestic Debtors."

There is no merit to the Trustee's and SIPC's argument that the focus of the Avoidance and Recovery Provisions is "domestic debtors" because the "Bankruptcy Code seeks to protect domestic debtors and their creditors." (Tr. Mem. 8-9; SIPC Mem. 9-10.) Putting aside the fact that the Bankruptcy Code and SIPA do not distinguish between "domestic debtors" and foreign debtors with assets in the United States, *see* 11 U.S.C. § 109,[7] the Trustee is mistaken in asserting that the focus of the Avoidance and Recovery Provisions is the debtor.

To be sure, there are other provisions of the Bankruptcy Code that focus on the administration of the debtor *post-petition.* This, however, does not mean that the debtor is the "focus" of every provision of the Code, including the Avoidance and Recovery Provisions. In determining that the "focus" of section 10(b) of the Exchange Act is purchases and sales of securities in the United States, *Morrison* did not require courts to identify a single "focus" for all

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[7] Because a foreigner with assets in the United States may commence a plenary case under the Bankruptcy Code, 11 U.S.C. §109(a), the Trustee's argument that the Bankruptcy Code and SIPA are focused on "domestic" debtors and broker-dealers is baseless. Although the Trustee misleadingly implies that *Begier* held that the "object of the avoidance and recovery provisions . . . [is] to restore property to domestic debtors' estates for distribution to creditors" (Tr. Mem. 9), *Begier* says *nothing* about "domestic" estates; rather, it simply notes that the basic purpose of the Bankruptcy Code is "to preserve the property" that could be included in "the bankruptcy estate"—without noting where that estate is located. *Begier*, 496 U.S. at 58. In addition, SIPA's liquidation provisions generally apply to any SIPC member, and, as a general matter, any broker dealer with customer accounts in the United States must be a SIPC member. *See* 15 U.S.C. § 78eee(a)(3); 15 U.S.C. § 78*lll*(5) (defining debtor under SIPA liquidation provisions as member of SIPC "with respect to whom an application for a protective decree has been filed under [section 78eee(a)(3)]");15 U.S.C. § 78o(b), 15 U.S.C. § 78ccc(a)(2) (requirement for SIPC membership).

the provisions that Congress codifies as a single "Act" or "Code." *Morrison*, 130 S. Ct. at 2884. The Court gave no indication that *Morrison*'s conclusion concerning the focus of section 10(b) and other provisions regulating securities transactions would apply, for example, to the provisions regulating securities exchanges for which the act is named, *see* 15 U.S.C. § 78f, or its provisions regulating broker-dealers, *see* 15 U.S.C. § 78o.[8] As reflected in the cases cited by the Trustee concerning the application of the Investment Advisers Act, discussed below, the focus of a statute designed to regulate a particular type of business is the business itself. SIPC and Trustee recognize that "[SIPA] and the Exchange Act are different acts with different purposes" (Tr. Mem. 11) even though SIPA was enacted as an amendment to, and is codified as part of, the Exchange Act, *see* 15 U.S.C. § 78bbb.

The Trustee's argument that the Avoidance and Recovery Provisions are focused on the debtor is flatly inconsistent with *Morrison, Arabian American Oil*, and the plain language of the Bankruptcy Code. The notion that the focus of a statute is the person to be protected was implicitly rejected by the Supreme Court in *Arabian American Oil*. *See also Loving v. Princess Cruise Lines, Ltd.*, No. CV 08-2898, 2009 WL 7236419, at *8 (C.D. Cal. Mar. 5, 2009) (dismissing claims of Texas residents brought under Title III of the Americans with Disabilities Act as statute "does not apply extraterritorially" to require adequate accommodations at foreign ports). *Morrison* did not state that the "focus" of a section 10(b) claim was United States investors; rather, the focus was on the *transaction* underlying the claim. *Morrison*, 130 S. Ct. at 2884.

[8] Section 27 of the Exchange Act, as amended subsequent to *Morrison*, likewise has an entirely different focus: "Conduct occurring outside the United States that has a foreseeable substantial effect within the United States." 15 U.S.C. § 78aa(b)(2).

Two decisions cited by Respondents concerning the Investment Advisers Act (the "IAA") are irrelevant. As these cases state, the IAA seeks to regulate and "to prevent fraudulent practices by investment advisers." *SEC v. Gruss*, No. 11-Civ-2420, 2012 U.S. Dist. LEXIS 66052, at *22 (S.D.N.Y. May 9, 2012) (citation omitted); *SEC v. ICP Asset Mgmt.*, No. 10-Civ-4791, 2012 U.S. Dist. LEXIS 86561, at *8-9 (S.D.N.Y. Jun. 21, 2012). Because the IAA seeks to regulate conduct by investment advisors in the United States, it is not surprising that the "focus of the IAA is clearly on the investment adviser and its actions." *Gruss*, 2012 U.S. Dist. LEXIS 66052, at *23. However, the Avoidance and Recovery Provisions do not seek to "regulate" the debtor or any other party.

C. The Subsequent Transfers At Issue Here Were Extraterritorial.

Respondents pretend that the transfers at issue here are from BLMIS. (Tr. Mem. 1, 3-4, 17; SIPC Mem. 2-3, 9-10.) They are not. The Trustee is asserting claims to recover subsequent foreign transfers. It is those claims that the defendants have moved to dismiss. *See supra* at 1 n.1.

Because claims seeking to *recover* subsequent transfers under section 550 are separate from claims to *avoid* transfers, but depend on the successful assertion of an avoidance claim, the Trustee may only recover the transfers to the Extraterritorial Defendants if he shows that both his avoidance claim and his claim under 11 U.S.C. § 550(a)(2) are "domestic" claims. In other words, even if the Trustee could avoid an initial transfer because the initial transfer is domestic, he would still need to plead facts showing that a subsequent transfer to an Extraterritorial Defendant is also a domestic transaction. Finally, because he can only recover "customer property" by invoking section 78fff-2(c)(3), he must show that his claim involves a domestic application of that provision.

The Trustee's own allegations against the Extraterritorial Defendants establish that the subsequent transfers he seeks to recover under 11 U.S.C. § 550(a)(2) are extraterritorial transactions. Shortly after *Morrison* was decided, the Second Circuit held that a transaction in a security that is not traded on a domestic exchange is "domestic" only "when the parties *incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States*." *Absolute Activist*, 677 F.3d at 69 (emphasis added). The Second Circuit made clear that the plaintiff has the burden of alleging specific facts showing that the transaction that is the subject of a claim under section 10(b) is domestic. *Id*. at 69-70. "The mere assertion that transactions 'took place in the United States' is insufficient to adequately plead the existence of domestic transactions." *Id*. at 70. Because the allegations against the Extraterritorial Defendants show that the transfers which the Trustee seeks to recover were made by foreign parties to foreign defendants abroad, he has not only failed to meet this burden but has affirmatively shown that he cannot do so.[9]

Morrison specifically forecloses the Trustee's argument that his claims are domestic because the initial fraudulent transfers were made in "furtherance of a Ponzi scheme BLMIS conducted out of its New York offices." (Tr. Mem. 17.) This is no different from the argument that the Supreme Court rejected in *Morrison* when it held that section 10(b) does not apply to foreign transactions simply because "significant conduct" occurred in the United States and this conduct was "material to the fraud's success." 130 S. Ct. at 2886. In reaching this conclusion, the Court rejected the reasoning of the district and circuit courts, which held that section 10(b) did not apply because the acts performed in the United States did not "compris[e] the heart of the

[9] Defendants' Opening Consolidated Memorandum explained why the Trustee cannot plausibly assert that the transfers are domestic because dollars were transferred through correspondent banks in the United States, and Respondents have not made such an assertion

alleged fraud." *Id.* at 2876. The fact that the transfers that the Trustee seeks to recover may have involved money transferred from New York does not convert extraterritorial claims into domestic ones. In *Maxwell*, this Court held that section 547 did not apply to transfers in England even though the transferred money was proceeds of sales of assets in the United States. 186 B.R. at 817.[10]

III. IN THE ALTERNATIVE, THE TRUSTEE'S CLAIMS SHOULD BE DISMISSED ON GROUNDS OF COMITY

Wholly apart from the fact that the statutes on which the Trustee relies do not apply to the extraterritorial transfers he seeks to recover, his claims against the Extraterritorial Defendants must be dismissed on separate and independent grounds of international comity.

Relying on *Maxwell*, the Trustee incorrectly concludes that there is no conflict here between domestic and foreign law, because there is no foreign liquidation proceeding regarding BLMIS. (Tr. Mem. 15 n.16.) In *Maxwell*, the Court of Appeals held that there was a true conflict because the debtor's assets could not be distributed in a manner consistent with the rules of both jurisdictions. 93 F.3d at 1050. The only difference in how the debtor's assets would have been distributed in *Maxwell* depending on whether United States or English law governed the debtor's preference claims arose from the difference in the likelihood of success of those claims under the different legal regimes. This is precisely the situation here.

[10] The Trustee's assertion that after *Morrison* "some courts continue to apply a 'center of gravity' analysis to determine the nature of the claims at issue" (Tr. Mem. 17) is not supported by the only decision cited by the Trustee, *Kriegman v. Cooper* (*In re LLS Americas, LLC)*, No. 11-80093-PCW11, 2012 Bankr. LEXIS 3026 (Bankr. E.D. Wa. July 2, 2012). *LLS* did not mention *Morrison* and, instead, engaged in a traditional choice of law analysis that is beside the point if the statute does not apply to the conduct in question under *Morrison*. *Id.* at *24-30. The parties did not mention *Morrison* in the papers submitted in connection with the motion, and there is no reason to suppose that the court considered it. *See* Dkt. No. 59 (Feb. 8, 2012); Dkt. No. 63 (Feb. 14, 2012); Dkt. No. 95 (Apr. 20, 2012); Dkt. No. 97 (Apr. 25, 2012); Dkt. No. 101 (Apr. 25, 2012).

The transfers that the Trustee seeks to recover from the Extraterritorial Defendants were made in foreign jurisdictions and were subject to foreign laws governing their validity. The recipients of the transfers are entitled to rely on the law of their own countries to determine the validity and finality of those transfers. As illustrated by the decision in the Fairfield liquidation discussed in the next paragraph, foreign law is unlikely to require a foreigner to forfeit money it received from a foreign hedge fund because a transfer to the hedge fund was voidable under United States law. A clear conflict between U.S. and foreign law would thus exist if this Court were to construe the relevant statutes to apply outside the United States. *Id.* at 1050.

The conflict is particularly acute in this case because the Fairfield Funds and other foreign investment funds that were the initial transferees of BLMIS's transfers are undergoing or could become subject to court-supervised liquidation proceedings in foreign jurisdictions, and the foreign liquidators may themselves seek separately to recover redemption payments made by these funds to their investors. *See, e.g., In re Fairfield Sentry Ltd. Litig.*, 458 B.R. 665, 671-72 (S.D.N.Y. 2011). A court in the British Virgin Islands has already determined that, under its common law, the Fairfield liquidator may not recover such transfers from Fairfield customers. (Def. Mem. 11-12.) Thus, the Trustee is seeking to recover, by exporting U.S. law, the same transfers that the Fairfield liquidator may not recover under BVI law. The conflict could hardly be clearer. *Maxwell*, 93 F.3d at 1050.

In conducting a comity analysis, the court must consider the interests of the United States and the foreign state and determine whether application of U.S. law would be reasonable under the circumstances. *See Maxwell*, 93 F.3d at 1051-1052; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797-98 (1993). The Second Circuit's comity analysis in *Maxwell* took account of the factors listed in section 403(2) of the *Restatement (Third) of Foreign Relations Law of the United*

States (1987).[11] *See* 93 F.3d at 1048. Applying those factors compels the conclusion that it would be inappropriate to apply the Bankruptcy Code and SIPA to these foreign transfers.[12] The subsequent transfers that the Trustee seeks to recover took place outside of the United States, between foreign entities. Given the location of the transfers and the nationalities of the parties, the relevant foreign jurisdictions have much closer connections to the transfers at issue, and a greater interest in regulating the transfers, many of which were in response to foreign redemptions by foreign investors of shares in foreign investment funds. In addition, the parties to the transfers had a reasonable expectation that foreign law would apply. *See id.* at 1052. With respect to those foreign funds in liquidation, the relevant foreign jurisdictions have a strong interest in applying their own law to the transfers as part of the liquidation proceedings. The same is true of foreign service providers, regulated under the laws of other nations, that received fees or other compensation from foreign investment funds. The only arguable "connection" between these transfers and the United States is the Trustee's allegation that they originated with

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[11] The Second Circuit summarized these factors as follows:

> Whether so legislating would be "unreasonable" is determined "by evaluating all relevant factors, including, where appropriate," such factors as the link between the regulating state and the relevant activity, the connection between that state and the person responsible for the activity (or protected by the regulation), the nature of the regulated activity and its importance to the regulating state, the effect of the regulation on justified expectations, the significance of the regulation to the international system, the extent of other states' interests, and the likelihood of conflict with other states' regulations.

93 F.3d at 1048.

[12] SIPC performs a misdirected comity analysis and concludes that, because BLMIS, its principals, and most of its customers and creditors were located in the United States, the United States has a closer connection to these actions and its law should therefore apply. (SIPC Mem. at 23-25.) A comity analysis that is properly focused on the transfers at issue in these actions, however, clearly demonstrates that foreign jurisdictions have a stronger interest in the transfers.

BLMIS. Thus, the United States' interest in applying its bankruptcy law here is comparatively weak and its application would be unreasonable under the circumstances. *Id.* at 1051 (where only United States connection was that some transferred funds were proceeds of the sale of assets in the United States, foreign law applied).

The Code itself contradicts the Trustee's claim that United States law is to be applied whenever a U.S.-based bankruptcy is involved. Section 1505 provides that a bankruptcy trustee "may be authorized by the [Bankruptcy Court] to act in a foreign country . . . in any way permitted by the applicable *foreign* law." 11 U.S.C. § 1505 (emphasis added). Thus, the Code contemplates that the trustee will apply to a foreign court for aid in recovering assets located within that court's jurisdiction, and the foreign court will determine whether the trustee may proceed under U.S. or foreign law. Indeed, the fact that section 1505 limits a trustee to acting in ways permitted by foreign law further establishes that the Congress, when it considered the question of extraterritoriality, did not intend for United States law to apply worldwide.

IV. DISMISSAL OF THE EXTRATERRITORIAL DEFENDANTS WOULD NOT BE "ABSURD" OR "PREMATURE."

There is no color of merit to the Trustee's argument that limiting the application of the Avoidance and Recovery Provisions to domestic transactions as required by *Morrison* "would render the Avoidance and Recovery Provisions of the Code utterly ineffectual and have absurd results." (Tr. Mem. 25.) As this Court has recognized in dismissing the Trustee's avoidance claims pursuant to section 546(e), there is nothing "that is in any way absurd" in dismissing claims that are not authorized by the relevant statutes. *Picard v. Katz*, 466 B.R. 208, 213 (S.D.N.Y. 2012).

The fact that the statutes on which the Trustee relies lack extraterritorial application will have little effect on the Trustee's claims to recover initial transfers, and no effect at all on his

recovery of domestic transfers. To the extent the Trustee is able to recover property or its value from an initial transferee, 11 U.S.C. § 550(d) precludes a duplicative recovery from a subsequent transferee regardless of geographic limitations. If the initial transferee is unable to return an avoided transfer, the Trustee will have the rights of a creditor to commence and participate in an insolvency proceeding of the initial transferee. If the initial transferee is a foreign entity, his rights as a creditor against subsequent transferees will be governed by the foreign insolvency laws of the entity's domicile, exactly as contemplated by chapter 15 of the Bankruptcy Code. *See* 11 U.S.C. §§ 1505 (U.S. bankruptcy trustee may be authorized to act in foreign country "in any way permitted by the applicable foreign law").

It is not true that "Defendants wrongly interpret the Bankruptcy Code and SIPA as being geographically limited to the recovery of fraudulent transfers that remain only within the United States' borders." (Tr. Mem. 25.) Defendants' argument is that SIPA and the Avoidance and Recovery Provisions of the Code do not reach transfers from one foreign person to another which took place abroad. There is likewise no risk that barring the Trustee from recovering subsequent transfers from foreign defendants "would enable fraudulent actors to easily place avoidable and recoverable transactions beyond the reach of U.S. law." (SIPC Mem. 7.) As the Trustee knows, BLMIS did not make any of the transfers to the Extraterritorial Defendants, and dismissing claims against foreign investors, nominees, custodians, and service providers that received transfers from unaffiliated foreign hedge funds would obviously not provide any incentive for unscrupulous, would-be-debtors to fraudulently transfer their assets out of the reach of their creditors. *See IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs., Inc.)*, 408 F.3d 689, 705-06 (11th Cir. 2005); *French*, 440 F.3d at 154.

There is no basis for the Trustee's assertion that it would be "absurd" to permit foreign creditors to share in the proceeds of the BLMIS estate while barring the Trustee from asserting Avoidance and Recovery claims against them. (Tr. Mem. 25-27.) The Trustee has successfully maintained that SIPA does not protect anyone who did not have an account with BLMIS. *See*, *e.g.*, *SIPC v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, 454 B.R. 285, 297 (Bankr. S.D.N.Y. 2011). Because foreign investors, custodians, nominees, service providers, and others that are being sued because they received transfers from foreign feeder funds did not have accounts with BLMIS, the Trustee cannot credibly assert that such creditors would be entitled to recovery while being immunized from Avoidance and Recovery Claims.

Finally, there is no merit to the Trustee's argument that dismissal of the claims against the Extraterritorial Defendants pursuant to *Morrison* should be deferred because "further fact-gathering would be necessary to identify where particular defendants reside and where the fraudulent transfers and subsequent transfers took place." (Tr. Mem. 27.) As the Second Circuit explained in *Absolute Activist*, a plaintiff that asserts a claim under a statute that does not apply outside the United States must "allege[] facts giving rise to the plausible inference" that its claim is "domestic." 677 F.3d at 69-70. The Trustee has alleged the residence of the Extraterritorial Defendants in his complaints and clearly alleged that all or substantially all of them have been sued only because they received transfers from other foreigners. Because the statutes governing his claims lack extraterritorial application and he alleges no facts suggesting that he is seeking to recover domestic transfers, his claims must be dismissed.

CONCLUSION

For the reasons stated above and in the Opening Consolidated Memorandum, the motion should be granted and the complaints against the Extraterritorial Defendants should be dismissed.

Dated: New York, New York
August 31, 2012

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Exhibit 16

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-misc-00115 (JSR)
In re: MADOFF SECURITIES	
PERTAINS TO THE CASES LISTED ON EXHIBIT A:	

JOINDER TO THE TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CONCERNING EXTRATERRITORIALITY

Young Conaway Stargatt and Taylor, LLP ("Young Conaway") is counsel to Irving H. Picard (the "Trustee"), as trustee for the substantively consolidated liquidation proceeding (the "BLMIS Liquidation") of Bernard L. Madoff Investment Securities, LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"), and the estates of Bernard L. Madoff ("Madoff," and together with BLMIS, each a "Debtor" and collectively, the "Debtors") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), and is counsel of record for the Trustee in the adversary proceedings identified on **Exhibit A** annexed hereto (collectively, the "YCST Adversaries").

In each of the YCST Adversaries, certain defendants filed motions to withdraw the reference to the United States Bankruptcy Court for the Southern District of New York (the "Motions to Withdraw the Reference").

By Order of this Court dated June 6, 2012 (the "Extraterritoriality Order"), the YCST Adversaries were consolidated with certain other adversary proceedings pending in the BLMIS Liquidation for the limited purpose of addressing the Extraterritoriality Issue (as defined in the Extraterritoriality Order).

In the above noted capacity, Young Conaway, on behalf of the Trustee, hereby joins, in its entirety, the *Trustee's Memorandum of Law in Opposition to Defendants' Motion to Dismiss Concerning Extraterritoriality as Ordered by the Court On June 6, 2012*, District Court Case No. 12 Misc. 00115 (JSR) [Docket No. 310] filed by Baker & Hostetler LLP on August 17, 2012 pursuant to the Extraterritoriality Order, and adopts as its own all arguments asserted therein.

Dated: August 17, 2012
New York, New York

/s/ Matthew B. Lunn

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EXHIBIT A

YCST Adversaries

Adversary Proceeding	Adversary Proceeding Number	District Court Number
Picard v. Caceis Bank Luxembourg, *et al.*	11-02758	12-cv-02434
Picard v. Crédit Agricole (Suisse) S.A., *et al.*	12-01022	12-cv-02494

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-misc-00115 (JSR)
In re: MADOFF SECURITIES	
PERTAINS TO THE FOLLOWING CASES:	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. CRÉDIT AGRICOLE (SUISSE) S.A., and CRÉDIT AGRICOLE S.A., a/k/a BANQUE DU CRÉDIT AGRICOLE, Defendants.	Case No. 12-cv-02494 (JSR) Adv. Pro. No. 12-01022 (BRL)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. CACEIS BANK LUXEMBOURG and CACEIS BANK, Defendants.	Case No. 11-cv-02434 (JSR) Adv. Pro. No. 11-02758 (BRL)

CERTIFICATE OF SERVICE

I, Matthew B. Lunn, hereby certify that on August 17, 2012, I caused a true and correct copy of the *Joinder to the Trustee's Memorandum of Law in Opposition to Defendants' Motion to Dismiss Concerning Extraterritoriality* to be filed electronically with the Court and served upon the parties in this action who receive electronic service through CM/ECF, and served by electronic mail upon the parties as set forth in Schedule A.

Dated: New York, New York
August 17, 2012

By: /s/ Matthew B. Lunn
Matthew B. Lunn

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Exhibit 17

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendants.	12 Misc. 00115 (JSR)
In re MADOFF SECURITIES	
PERTAINS TO THE CASES LISTED IN EXHIBIT A	

JOINDER TO THE TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CONCERNING EXTRATERRITORIALITY AS ORDERED BY THE COURT ON JUNE 6, 2012

Windels Marx Lane & Mittendorf, LLP is Special Counsel to Irving H. Picard, trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff (the "Trustee"), and is counsel of record for the Trustee in the adversary proceedings listed in Exhibit A. By Order of this Court dated June 6, 2012 (the

"Extraterritoriality Order"), the reference of certain adversary proceedings was withdrawn for the limited purpose of deciding the Extraterritoriality Issue (as defined in the Extraterritoriality Order). An Order of this Court dated June 25, 2012 added more adversary proceedings to the Extraterritoriality Order.

In the above noted capacity, Windels Marx hereby joins in its entirety the Trustee's Memorandum of Law in Opposition to Defendants' Motion to Dismiss Concerning Extraterritoriality as Ordered by the Court on June 6, 2012, filed by Baker Hostetler on August 17, 2012 in the consolidated docket *SIPC v. Bernard L. Madoff Investment Securities LLC (In re Madoff Securities)*, District Court Case No. 12 Misc. 00115 (JSR) [Dkt. No. 310], and all arguments asserted therein.

Dated: New York, New York
August 17, 2012

By: /s/ Howard L. Simon

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EXHIBIT A

EXTRATERRITORIALITY
WINDELS MARX ADVERSARY PROCEEDINGS

	CASES	DISTRICT COURT CASE NO.	COUNSEL REPRESENTATION
1	***Picard v. Trincaster Corporation***	12-cv-02486-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
2	***Picard v. Royal Bank of Canada, et al.***	12-cv-04938-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Bruce M. Sabados (bruce.sabados@kattenlaw.com) Mark T. Ciani (mark.ciani@kattenlaw .com)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendants.	12 Misc. 00115 (JSR)
In re MADOFF SECURITIES	
PERTAINS TO THE FOLLOWING CASES:	
IRVING H. PICARD, Plaintiff, v. TRINCASTER CORPORATION Defendant.	Adv. Pro. No. 11-02731 (BRL) District Court Case No. 12 Civ. 02486 (JSR)

IRVING H. PICARD, Plaintiff, v. ROYAL BANK OF CANADA, et al. Defendants.	Adv. Pro. No. 12-01699 (BRL) District Court Case No. 12 Civ. 04938 (JSR)

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Yani Indrajana Ho, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and is employed at Windels Marx Lane & Mittendorf, LLP, 156 West 56th Street, New York, NY 10019, and that on August 17, 2012, I served the

Joinder to the Trustee's Memorandum of Law in Opposition to Defendants' Motion to Dismiss Concerning Extraterritoriality as Ordered by the Court on June 6, 2012

upon the interested parties by emailing those parties as set forth on the attached Schedule A, true and correct copies via electronic transmission to the email addresses as set forth on the attached Schedule A.

/s/ Yani Indrajana Ho
Yani Indrajana Ho

Sworn to before me this
17th Day of August 2012

/s/ Maritza Segarra
Maritza Segarra
Notary Public, State of New York
No. 03-4652865
Qualified in Westchester County
Commission Expires December 31, 2013

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Exhibit 18

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	No. 12-mc-00115 (JSR) ECF Case Electronically Filed
In re: BERNARD L. MADOFF, Debtor.	

TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CONCERNING EXTRATERRITORIALITY AS ORDERED BY THE COURT ON JUNE 6, 2012

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OTHER AUTHORITIES

Irving H. Picard (the "Trustee") as trustee for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") and Bernard L. Madoff ("Madoff"), by and through his undersigned counsel, respectfully submits this Memorandum in opposition to the motion to dismiss concerning extraterritoriality filed by defendants encompassed in this Court's June 6, 2012 and June 26, 2012 Orders ("Defendants").[1]

PRELIMINARY STATEMENT

The Moving Defendants, recipients of fraudulent transfers from Madoff's massive Ponzi scheme, claim that they are immunized from liability because they are "foreign persons or entities" who are not subject to the avoidance and recovery laws of the United States. *See* Consolidated Memorandum of Law in Support of Extraterritorial Defendants' Motion to Dismiss, as Ordered by the Court on June 6, 2012 ("Defs' Br.") at 3. They contend that the Trustee is using the Securities Investor Protection Act ("SIPA") and the avoidance and recovery provisions of the United States Bankruptcy Code ("Bankruptcy Code" or "Code") "to reach transfers that took place abroad" in violation of the presumption against extraterritoriality recently reaffirmed by the Supreme Court in *Morrison v. Nat'l Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010). But the Defendants' analysis of *Morrison* is fatally flawed.

Morrison analyzed two separate issues: (i) whether Congress affirmatively intended for Section 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act") to apply extraterritorially; and (ii) whether a review of Congress' "focus" in enacting the statute was domestic as applied to the claims at issue, such that no extraterritorial application was required

[1] *See* Order, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Secs.)*, No. 12-mc-00115 (S.D.N.Y. June 7, 2012), ECF No. 167; Consent Order, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Secs.)*, No. 12-mc-00115 (S.D.N.Y. June 26, 2012), ECF No. 203, at 7-9 (Ex. B).

there. Defendants intentionally ignore *Morrison's* second analysis regarding Congress' focus, and for good reason: because that analysis confirms that the Trustee's avoidance and recovery claims here involve only a domestic application of SIPA and the Code. In any event, Congress has clearly expressed its intention that these provisions of SIPA and the Code apply extraterritorially.

The issue that the Supreme Court decided in *Morrison* was a very narrow one—whether Section 10(b) of the Exchange Act provided a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges. *Morrison* at 2875. Determining that Congress' "focus" in enacting the Exchange Act was the regulation of securities purchased or sold on a domestic U.S. exchange, the Court concluded that the plaintiffs' claims there, which related to securities traded on a foreign exchange, would require an extraterritorial application of the statute. *Id.* at 2883-84. Reaffirming the long-standing presumption against extraterritoriality, the Supreme Court concluded after reviewing the Exchange Act and its context, including its legislative history, that Congress had not clearly expressed any intention that it was to be applied extraterritorially, and accordingly dismissed the claims. *Id.* at 2877-2888.

Applying the "focus" construct of *Morrison* here, it is clear that the Trustee's claims involve nothing more than a domestic application of SIPA and the Bankruptcy Code. Congress' focus in enacting the Bankruptcy Code was the regulation of U.S. debtors in liquidation or reorganization proceedings under Title 11, and the protection of their creditors. Consistent with that focus, the Code provides causes of action to avoid and recover fraudulent conveyances made by domestic debtors, in order to replenish the domestic debtor's estate for distribution to creditors. Likewise, the focus of SIPA is the liquidation of U.S. broker-dealers, which are

members of the Securities Investor Protection Corporation ("SIPC") and the protection of their customers. Consistent with that focus, SIPA, through incorporation of specified provisions of the Bankruptcy Code, provides causes of action to avoid and recover a broker-dealers' fraudulent conveyances of customer property.

Thus, application of *Morrison*'s focus analysis here confirms a very unremarkable proposition: it is entirely appropriate for a U.S. court-appointed trustee of a U.S. broker-dealer in a liquidation proceeding in a U.S. Court to use SIPA and the Bankruptcy Code to avoid and recover fraudulent transfers made by the U.S. broker-dealer of its customers' property to replenish the broker-dealer's estate for the benefit of its customers.

To manufacture the appearance of extraterritoriality, Defendants attempt to place the "focus" upon the fact that they are foreign residents who received initial or subsequent transfers of BLMIS customer property purportedly beyond the borders of the United States. The location of the recipients is not relevant to a *Morrison* inquiry because Congress' focus in enacting the Bankruptcy Code and SIPA was not on the recipients of fraudulent transfers but rather on domestic debtor/broker-dealers. So long as the Trustee's claims are consistent with Congress' focus—which they are, because the Trustee is seeking to use the Bankruptcy Code and SIPA to remedy the fraudulent transfers of a domestic debtor, not a foreign debtor—extraterritorial application of the statutes is not required. Put differently, *Morrison* does not, as Defendants contend, stand for the proposition that transferees outside of the United States have immunity from avoidance and recovery actions merely by virtue of being foreign residents.

Even were the Trustee's claims deemed to require extraterritorial application of the Bankruptcy Code and SIPA, Congress has clearly indicated its intention that the provisions relevant here were meant to apply extraterritorially. Indeed, to hold otherwise would have

absurd results Congress never intended, including permitting U.S. debtors to fraudulently transfer all of their assets offshore, where their trustees could not recover them for creditors. In addition, under Defendants' view of the Code and SIPA, non-U.S. citizens would be permitted to enjoy the benefits of sharing in a debtor's estate, while facing no liability for receiving the proceeds of the debtor's fraudulent transfers. Such a construction of the acts would provide an unfair advantage to non-U.S. citizens by shifting the burden of replenishing the debtor's estate solely to U.S. transferees. Congress clearly never intended such inequitable results.

BRIEF FACTUAL BACKGROUND

The Moving Defendants received initial and/or subsequent transfers of fraudulent conveyances of BLMIS customer property. They include Feeder Funds which had customer accounts at BLMIS, and their managers; Feeder Fund investors who invested in both U.S. and non-U.S. based Feeder Funds knowing that all, or nearly all, of the Feeder Funds' assets were to be forwarded to BLMIS, which maintained custody of the assets purportedly to invest in U.S. Securities and U.S. Treasuries; and so-called "leverage providers" that created investment products based on multiplied returns of specified BLMIS Feeder Funds, and which invested in the Feeder Funds. In their motion, the Moving Defendants emphasize that many of the subsequent transfers occurred between and among non-U.S. entities. They ignore the fact that every transfer that forms the basis of the initial and subsequent transferee claims in these actions was a fraudulent conveyance made by BLMIS.

Notably, many of the Defendants who claim on this motion that the Code and SIPA do not apply to foreign residents, have in fact taken advantage of the protections of those acts by filing customer claims in BLMIS's liquidation proceeding.

ARGUMENT

I. *MORRISON* CONFIRMS THAT THE TRUSTEE'S CLAIMS DO NOT REQUIRE EXTRATERRITORIAL APPLICATION OF THE BANKRUPTCY CODE OR SIPA

Defendants' invocation of *Morrison* to support their contention that the claims here are extraterritorial is meritless. Defendants seemingly confuse the fact that *Morrison* and the cases analyzing the presumption against extraterritoriality do not set forth a jurisdictional inquiry. Rather, *Morrison* and its progeny frame the issue as a merits-based inquiry, analyzing whether Congress intended the Bankruptcy Code and SIPA to provide a cause of action to the Trustee to avoid and recover fraudulent transfers made by BLMIS, a debtor/broker-dealer in liquidation in the U.S. *Id.* at 2876-77; s*ee Steele v. Bulova Watch Co.*, 73 S.Ct. 252, 255-56 (1952) (Supreme Court noting that the question posed by the presumption against extraterritoriality "is whether Congress intended to make the law applicable to the facts of this case"). The Trustee's claims here seek to apply the Bankruptcy Code and SIPA domestically in precisely the manner that Congress intended, and therefore, no extraterritorial application of the laws is required.

A. *Morrison's* Two-Part Analysis

In *Morrison*, Australian investors brought claims against Australian and American defendants for alleged securities violations under Section 10(b) of the Exchange Act involving securities traded on the Australian stock exchange. *Morrison*, 130 S. Ct. at 2875-76. The Supreme Court found, unlike the courts below, that the foreign elements of the case posed a question not of jurisdiction, but, instead a merits-based inquiry into what particular claims could be brought pursuant to Section 10(b) of the Exchange Act. *Id.* at 2876-77. The *Morrison* Court specifically analyzed two separate issues: (i) whether Congress affirmatively intended for Section 10(b) of the Exchange Act to apply extraterritorially; and (ii) if the statute was not meant to apply extraterritorially, whether the *Morrison* plaintiffs' Section 10(b) claims could

nevertheless survive because they involved a purely domestic application of the statute. *Id.* at 2877-88.

The Supreme Court in *Morrison* reaffirmed the presumption against extraterritoriality of a federal statute, a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Id.* at 2877 (internal citation omitted). This principle "rests upon the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.* (internal citation omitted). Contrary to Defendants' assertion that *Morrison* "disavowed any mode of statutory interpretation" other than the plain statutory language,[2] it was only after reviewing the language of Section 10(b) of the Exchange Act and the statute's context, including its legislative history, that the Supreme Court concluded that Congress had not clearly expressed any intention that it was to be applied extraterritorially. *See id.* at 2883. In fact, the Supreme Court noted that explicit statutory language evincing Congress' intent to provide for an extraterritorial application is not required. *See id.* Courts can assuredly consult statutory context to determine Congress' intent. *Id.*

After determining that Section 10(b) did not apply extraterritorially, the Supreme Court moved to the second issue of determining whether the plaintiffs' claims even required extraterritorial application of the statute, because the claims would survive if they involved a purely domestic application of the statute. *Id.* at 2883-84. To ascertain whether a plaintiff's claims involve a domestic or extraterritorial application of a statute, the *Morrison* Court set forth an inquiry which involves a determination of the "focus" of Congressional concern in enacting that law. *Id.* To determine Congress' focus, the Supreme Court first looked to the act in

[2] Defs' Br. at 5.

question as a whole, and then applied that focus to the particular statute at issue. *See id.* at 2884-85 (analyzing focus of Exchange Act, then applying to plaintiff's Section 10(b) claims by considering the "object[] of the statute's solicitude," what the statute "seeks to regulate," and "the parties or prospective parties" that the statute seeks to protect) (internal marks and citations omitted).[3] If the focus of Congressional concern is found to be domestic as applied to the plaintiff's specific claim, the claim does not require extraterritorial application. *Morrison*, 130 S. Ct. at 2883-84. Inasmuch as Congress' focus in enacting the relevant provisions of the Exchange Act was the regulation of securities purchased or sold on a U.S. exchange, the Court concluded that because the *Morrison* plaintiffs' claims related to securities traded on a foreign exchange, the claims required an unauthorized extraterritorial application of the statute. *Id.* at 2883-88. Accordingly, the action was dismissed.

B. ***Morrison's*** **Focus Test Confirms that the Trustee's Claims Involve a Domestic Application of the Bankruptcy Code and SIPA**

Since *Morrison,* courts have reviewed other securities laws beyond the Exchange Act to consider whether the presumption against extraterritorial application barred the claims at issue. Notwithstanding the presence of foreign parties, those courts have held that because Congress' focus in enacting the relevant acts was domestic as applied to the claims at issue, no extraterritorial application of those laws was required. For example, in *SEC v. ICP Asset Mgmt., LLC*, the court found that because the focus of the Investment Advisers Act is on domestic investment advisers, it was irrelevant that the complaint involved foreign clients engaged in foreign transactions. *See ICP Asset Mgmt, LLC*, 2012 WL 2359830, at *2-3. Likewise, in *SEC*

[3] *See also SEC v. Gruss*, 2012 WL 1659142 at *9-10 (S.D.N.Y. May 9, 2012) (analyzing focus of the Investment Advisers Act, then applying to plaintiff's Section 206 claims); *In re Alstom SA Secs. Litig.*, 741 F. Supp. 2d 469, 472-73 (S.D.N.Y. 2010) *(accord).*

v. Gruss, the Court came to the same conclusion in applying Section 206 of the Investment Advisers Act. *See SEC v. Gruss*, 2012 WL 1659142, at *8 (S.D.N.Y. May 9, 2012).

Thus, Defendants' mere incantation that the presumption against extraterritoriality automatically precludes claims against foreign defendants is wrong. To the contrary, under a proper *Morrison* analysis, the Trustee's claims require nothing more than a domestic application of SIPA and the Bankruptcy Code.[4]

1. The Focus of the Bankruptcy Code is on Debtors Under Title 11

Identifying Congress' "focus" in enacting the Bankruptcy Code is simple: debtors that file for bankruptcy under Title 11 of the United States Code.[5] What the Bankruptcy Code seeks to regulate is the reorganization and/or liquidation of domestic debtors. *See* generally 11 U.S.C. § 101 *et. seq.* The Bankruptcy Code seeks to protect domestic debtors and their creditors, as is

[4] Defendants' claim that courts post-*Morrison* have "uniformly concluded" that federal securities law claims in Madoff-related actions cannot be asserted extraterritorially is misleading and factually inaccurate. (Defs' Br. at 4, n.4.) The cases Defendants rely on address the applicability of Section 10(b) to "foreign parties, governed by foreign law and concerning foreign securities" -- the precise issue decided in *Morrison*. *In re Banco Santander Securities-Optimal Litigation*, 732 F. Supp. 2d 1305, 1314 (S.D. Fla. 2010); *see also In re Optimal U.S. Litig.,* No. 10 Civ. 4059 (SAS), 2012 WL 1988713 (S.D.N.Y. June 4, 2012); *In re Merkin*, 817 F. Supp. 2d 346 (S.D.N.Y. 2011). None of those cases concerned avoidance and recovery actions brought by a United States trustee based on fraudulent transfers by a domestic debtor/broker-dealer. Further, Defendants omit to mention that at least one other court in this district refused to dismiss a Madoff-related securities class action on the basis of the presumption against extraterritoriality. *See Anwar v. Fairfield Greenwich Ltd.,* 728 F.Supp.2d 372, 405 (S.D.N.Y. 2010).

[5] As defined in Section 109, as long as a party is a U.S. resident, or has a domicile, place of business or property in the United States, that party can qualify as a "debtor" under Title 11. *See* 11 U.S.C. § 109.

evidenced by the purposes of the Code, which are to provide debtors with a fresh start, and/or to marshal, maximize and liquidate domestic debtors' assets for distribution to their creditors.[6]

Consistent with the Code's focus on domestic debtors and Congress' concern for their creditors, Sections 548 and 550 regulate domestic debtors by providing causes of action to avoid and recover assets fraudulently transferred by the debtor. In *Begier v. IRS*, 496 U.S. 53, 58 (1990), the Supreme Court held that the object of the avoidance and recovery provisions' solicitude is "to preserve the property includable within the bankruptcy estate" and to restore property to domestic debtors' estates for distribution to creditors.[7] The parties that the avoidance and recovery provisions of the Code seek to protect are the defrauded creditors of domestic debtors. *See Morrison*, 130 S. Ct. at 2884 (marks and citations omitted).

2. The Focus of SIPA is on Domestic Broker-Dealers

Because SIPA is a hybrid statute which incorporates numerous chapters of the Bankruptcy Code, Congress' "focus" in enacting SIPA is similar to that of the Bankruptcy Code: domestic broker-dealers in liquidation.

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[6] *See* H.R. REP. NO. 95-595, at 10 (1977) ("[t]he present purposes of the Bankruptcy Act are twofold: either to rehabilitate financially a distressed debtor or to assemble and liquidate [debtor's] assets for distribution to creditors") (citations omitted); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 353 (1985) (an "important goal of the bankruptcy laws [is] to maximize the value of the estate"); *Toibb v. Radloff*, 501 U.S. 157, 163 (1991) (recognizing "general [Bankruptcy] Code policy of maximizing the value of the bankruptcy estate"); *French v. Liebmann (In re French)*, 440 F.3d 145, 154 (4th Cir. 2006), *cert. denied*, 549 U.S. 815 ("the Code's avoidance provisions protect creditors by preserving the bankruptcy estate against illegitimate depletions") (citation omitted).

[7] *See also Universal Church v. Geltzer*, 463 F.3d 218, 228 (2d Cir. 2006) (purpose is "to protect the interests of creditors against fraudulent transfers"); *French*, 440 F.3d at 154 (purpose is "to protect the rights of both debtors and creditors during insolvency" (citation omitted)); S. REP. NO. 95-989, Bankruptcy Reform Act of 1978, at ch. 5 (1978) (purpose of revising the Code to "include all of the property of the debtor [in the case] and to allow the trustee more easily to recover property that may have been transferred by the debtor").

Through the enactment of SIPA, Congress created "a new form of liquidation proceeding applicable only to SIPC member firms," which was designed to return promptly customer property. *See, e.g.*, *SIPC v. Barbour*, 421 U.S. 412, 416 (1975). SIPC's members consist of domestic broker-dealers who are registered with the Securities Exchange Commission. *See* 15 U.S.C. § 78ccc(a)(2)(A); *SEC v. Packer, Wilbur & Co.*, 498 F.2d 978, 980 (2d Cir. 1974). A liquidation under SIPA is essentially a bankruptcy proceeding that is conducted under specified chapters of the Bankruptcy Code. *See* 15 U.S.C. § 78fff(b); *Exch. Nat'l Bank of Chicago v. Wyatt,* 517 F.2d 453, 457-459 (2d Cir. 1975); *In re Adler Coleman Clearing Corp.*, 198 B.R. 70, 74 (Bankr. S.D.N.Y. 1996). A trustee in a SIPA liquidation proceeding has the general powers of a bankruptcy trustee, as well as additional duties specified by the Act related to recovering and distributing customer property. *See* 15 U.S.C. Section 78fff-1.

For the purposes of *Morrison's* focus analysis, SIPA seeks to regulate the liquidation of domestic broker-dealers.[8] The object of SIPA's solicitude is to "protect the public customers of securities dealers from suffering the consequences of financial instability in the brokerage industry." *SEC v. F.O. Baroff Co.*, 497 F.2d 280, 281 (2d Cir. 1974) (citations omitted); *see also SEC v. Packer*, 498 F.2d at 980. Consistent with SIPA's focus on domestic broker-dealers, Section 78fff-2(c)(3) provides causes of action to recover customer

[8] *See, e.g.*, *SIPC v. Barbour*, 421 U.S. at 415 (SIPA "upgrade[s] the financial responsibility requirements for registered brokers and dealers"); *SEC v. Packer*, 362 F. Supp. at 514 (recognizing SIPA's focus on domestic broker-dealers by seeking to "strengthen the financial responsibility of the brokerage industry").

property that was fraudulently transferred by a domestic broker-dealer to restore the funds of customer property for distribution to customers.[9]

Defendants suggest that SIPA has the same focus that the Supreme Court determined in *Morrison* was the focus of Section 10(b) of the Exchange Act because SIPA was enacted as an amendment to the Exchange Act. *See* Defs' Br. at 19. As noted previously, courts have recognized that different acts under Title 15 of the U.S. Code, such as the Investment Advisers Act, have different purposes than Section 10(b). *See*, *e.g*, *ICP Asset Mgmt*, 2012 WL 2359830, at *2-3. Here, the legislative history of SIPA makes clear that the Securities Investor Protection Act and the Exchange Act are different acts[10] with different purposes.[11] *See* S. REP. NO. 95-763 (1978), reprinted in 1978 U.S.C.C.A.N. 764, 780 ("the purposes of the 1934 Act and SIPA are

[9] SIPA's main purpose was "not to prevent fraud or conversion, but to reverse losses resulting from brokers' insolvency" and was "intended to expedite the return of customer property." Bench Mem. Determining Trustee's Motion for Entry of an Injunction at 17, *Picard v. Maxam Absolute Return Fund, L.P.*, No. 10-05342 (BRL), Dkt. No. 53 (Oct. 12, 2011) (quoting *In re Bernard L. Madoff Inv. Secs., LLC*, 2011 WL 3568936, at *9, 10 (2d Cir. August 16, 2011) (internal marks omitted)). One of the main tenets of customer protection is equality of distribution among all customers. *See* H.R. REP. NO. 95-595, at 266, 269 (1977); *Hill v. Spencer Savings & Loan Ass'n (In re Bevill, Bresler, & Schulman, Inc.)*, 83 B.R. 880, 888 (D.N.J. 1988) ("SIPA envisions an orderly liquidation of the debtor, and equitable treatment of customers" and "provides for pro rata distribution of customer property, including proceeds from avoidance actions, in satisfaction of customer claims."

[10] For example, where the Exchange Act provides for a private right of action, SIPA has none. *See SIPC v. Barbour*, 421 U.S. at 424 ("[u]nlike the Securities Exchange Act … a private right of action under the SIPA would be consistent neither with the legislative intent, nor with the effectuation of the purposes it is intended to serve").

[11] *See also Mitchell v. Chicago P'ship Bd., Inc*., 246 B.R. 854, 857 (N.D. Ill. 2000) (recognizing "important distinction" between the Exchange Act and SIPA and finding that the purpose of the 1934 Act and SIPA are different); *Ahammed v. SIPC* (*In re Primeline Secs. Corp.),* 295 F.3d 1100, 1108 n.7 (10th Cir. 2002) (recognizing the different definition of "security" under SIPA and the Exchange Act because of the different purpose of each Act). *See also* 3 COLLIER ON BANKRUPTCY Pt. 2, ¶ 60.79 (14th ed. rev. 1977) ("it must be observed that the Securities Investor Protection Act stands alone").

different"); H. R. REP. NO. 95-746, at 35 (1977) (same). Although SIPA is technically an amendment to Title 15 of the United States Code, Congress expressly created separate provisions for SIPA that have different purposes than the Exchange Act. Thus, to treat SIPA as simply an extension of the Exchange Act for the purposes of *Morrison's* "focus" analysis is contrary to Congress' express intent.[12]

C. Because Congress' Focus Is Domestic as Applied to the Trustee's Claims, No Extraterritorial Application of the Statutes is Required

It is clear that the Trustee's claims here, which seek to recover fraudulent conveyances of customer property made by a domestic debtor/broker-dealer, do not require extraterritorial application of the Bankruptcy Code or SIPA. The Trustee's claims seek to remedy the wrongful acts of a debtor/member broker-dealer[13] in a U.S. liquidation proceeding. BLMIS perpetrated a massive Ponzi scheme from its operations in the United States, and fraudulently transferred customer property out of its bank accounts in the United States. Consistent with Congress' "focus" in enacting the Code and SIPA, the Trustee's avoidance and recovery actions seek to recover customer property fraudulently transferred by that domestic debtor/broker-dealer to return it to customers.

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[12] Defendants argue that SIPA lacks extraterritorial intent because following the *Morrison* decision in 2010, Congress has not passed additional legislation with respect to SIPA that would expressly imbue it with the extraterritorial application. Defendants are attempting to conflate the Exchange Act—which Section 929(P)(b) of the Dodd Frank Act amends—with SIPA, an independent act that requires its own analysis with respect to *Morrison*. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, § 929P(b), 124 Stat. at 1862. And as stated more fully above, Congress affirmatively intended that SIPA apply extraterritorially based on the language of the statute.

[13] Although BLMIS was a registered broker-dealer member of SIPC, at all times relevant to the proceedings, BLMIS was purporting to act as investment adviser to its thousands of customers.

Accordingly, under the principles set forth in *Morrison*, because the Trustee's avoidance and recovery actions focus on the acts of BLMIS, a domestic debtor, his claims involve a purely domestic application of the Bankruptcy Code and SIPA.[14] *See ICP Asset Mgmt.*, 2012 WL 2359830, at *3 (analyzing *Morrison* in the context of the Investment Advisers Act and holding that the focus of the act was on the domestic investment adviser, therefore, the claims did not require extraterritorial application notwithstanding the involvement of foreign parties); *SEC v. Gruss*, 2012 WL 1659142, at *6, 8-9 (denying a motion to dismiss after the focus of the Investment Adviser Act was determined to be on the domestic investment adviser, not the U.S. securities exchange).

In contrast, a true extraterritorial application of the Bankruptcy Code would exist if a party were seeking to use the Code to avoid fraudulent transfers made by a foreign debtor. Those were the facts in *In re Maxwell Commc'n Corp. v. Societe Generale*, 93 F.3d 1036 (2d Cir. 1996), a case upon which Defendants rely.

Maxwell involved an attempt to use Section 547 of the Bankruptcy Code to avoid a preference made abroad by the debtor, an English holding company, to English and French creditors. *Maxwell Commc'n Corp. v. Barclays Bank* (*In re Maxwell Commc'n. Corp.*), 170 B.R. 800, 814 (Bankr. S.D.N.Y. 1994). In addition to the holding company's insolvency proceeding in England, the debtor simultaneously filed a petition for relief under Chapter 11 in the United

[14] Even in cases involving RICO, a statute which the courts have found does not apply extraterritorially, motions to dismiss have been denied where the plaintiffs' claims did not involve an extraterritorial application of the statute. *See CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d 1193, 1210 (D. Colo. 2011) ("while I agree that RICO does not apply extraterritorially, I do not agree that this case, as alleged, involves an extraterritorial application of the statute"); *Chevron Corp. v. Dozinger*, No. 11 Civ 0691, 2012 WL 1711521, at *7-9 (S.D.N.Y. May 14, 2012) (denying a motion to dismiss because the RICO claims at issue did not require extraterritorial application of the statute).

States. *Maxwell*, 93 F.3d at 1041. Rather than seeking to utilize the stricter preference laws of England, the debtor's examiner sought to use the less stringent preference provisions of the Bankruptcy Code.

Because the same preference action could have been brought by the English administrators under English law in the debtor's English insolvency proceeding, the bankruptcy court held that the U.S. examiner's suit was barred because Section 547 did not apply extraterritorially on the facts of that case. *Maxwell*, 170 B.R. at 814. Notably, the bankruptcy court expressly declined to extend the holding in the manner that Defendants advocate here to preclude any domestic debtor from pursuing fraudulent transfers overseas:

> To be clear, I do not hold today that no debtor may pursue a transfer overseas. What I do hold is that where a foreign debtor makes a preferential transfer to a foreign transferee and the center of gravity of that transfer is overseas, the presumption against extraterritoriality prevents utilization of section 547 to avoid the transfer.

Id. at 814 (emphasis added). So, too, the Second Circuit expressly "declined to decide" whether the presumption against extraterritoriality would compel a conclusion that the Bankruptcy Code does not reach the pre-petition transfers at issue. *Maxwell*, 93 F.3d at 1055 ("Thus, we express no view regarding the banks' contention that the Bankruptcy Code *never* applies to non-domestic conduct or conditions.") (emphasis in original).

Thus, *Maxwell* does not stand for the proposition that, as a matter of law, the avoidance provision of Section 547 of the Bankruptcy Code cannot apply extraterritorially as Defendants claim. Moreover, the facts of *Maxwell* are inapposite. Unlike *Maxwell*, there is no foreign

debtor here, and no competing foreign liquidation proceeding for BLMIS.[15] Unlike *Maxwell*, BLMIS's fraudulent transfers of customer property took place in New York as a consequence of a fraud conceived and executed in the United States.[16] Put simply, the facts and rationale of *Maxwell* have no bearing on this case.

D. The Defendants Ignore the Focus Test Espoused in *Morrison*

Defendants attempt to manufacture the appearance of extraterritoriality by emphasizing that they are non-U.S. residents who received subsequent transfers of the debtor's customer property abroad. But Defendants' analysis is faulty because under no reading of *Morrison* is the

[15] Notwithstanding Defendants' mistaken assertion to the contrary (Defs' Br. at 9), *Maxwell* could not take place in the current bankruptcy landscape precisely because Congress has anticipated the problem of differing insolvency laws across multiple jurisdictions. Notably, Chapter 15 of the Bankruptcy Code establishes that the main liquidation proceeding of an entity is to proceed in the jurisdiction where the entity's "center of main interest" or COMI is located (generally, the debtor's principal place of business). 15 Collier on Bankruptcy ¶ 1502.01[4] (16th ed. 2010). Under the COMI concept, the law of the center of main interest should govern proceedings ancillary to the COMI. *See In re Condor Insurance Ltd.*, 601 F.3d 319, 329 (5th Cir. 2010) (in ancillary proceeding brought in U.S. bankruptcy court pursuant to Chapter 15, court held that law of debtor's COMI governed avoidance action).

Prior to the enactment of Chapter 15 of the Code in 2005, *Maxwell* was conducted pursuant to Section 304 of the Bankruptcy Code in parallel liquidation proceedings in the U.S. and the U.K. With the enactment of Chapter 15, Section 304 of the Code was superseded. In a post-Chapter 15 world, the *Maxwell* case would invariably have had its COMI in the U.K, and as a result, the U.K. liquidation laws and proceeding would have had primacy over any ancillary proceedings elsewhere, including in the United States.

[16] Defendants further attempt to cloud the issues by referencing other litigation in U.S. and foreign jurisdictions involving BLMIS Feeder Funds. *See* Defs' Br. at 11. In a case of this magnitude, it is expected that there will be a variety of lawsuits involving numerous claims against a multitude of parties in different fora involving different laws. The existence of these other lawsuits in the U.S. and abroad in no way abrogates a U.S. trustee's power and duty to use the avoidance and recovery provisions of the Bankruptcy Code and SIPA to replenish the estate of a domestic debtor for the benefit of its creditors. There is no "conflict" of laws requiring any comity analysis, because the Bankruptcy Code and SIPA apply to BLMIS's liquidation; the relevant foreign laws apply to the liquidation of foreign entities.

efficacy of federal statutes halted at the U.S. borders merely because their application may affect entities or individuals outside of this country.[17]

By emphasizing their purported lack of contacts with the United States, Defendants mistakenly confuse *Morrison's* focus analysis with a personal jurisdiction analysis.[18] Defendants misplace the "focus" on their foreign residence, and on the fact that they received initial and subsequent transfers of BLMIS customer property purportedly abroad. But under *Morrison*, once Congress' focus has been determined, other facts not germane to that focus are irrelevant to the inquiry. *Morrison*, 130 S. Ct. at 2844.

Here, Congress' focus in enacting the Bankruptcy Code and SIPA was on debtor broker-dealers in liquidation proceedings within the United States; it was clearly not on the recipients of fraudulent transfers. Thus, where Defendants reside or where they received the initial or subsequent transfers of BLMIS customer property is entirely irrelevant to the "focus" construct of *Morrison*. *See Absolute Activist Value Master Fund Ltd. v. Ficeto,* 677 F.3d 60, 69 (2d Cir.

[17] Defendants also appear to conflate the issues involving the presumption against extraterritoriality with principles of comity. *See* Defs' Br. at 7-8. While the issue at hand involving extraterritoriality is entirely unrelated to comity, if a comity inquiry were relevant, the Supreme Court has referred to the factors in Restatement (Third) of Foreign Relations Law § 403 (1987) ("Restatement"). *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993). It is clear that application of the Restatement's factors concerning comity lead to the inescapable conclusion here that it is entirely appropriate and reasonable to apply the U.S. Bankruptcy Code (and SIPA) to avoid and recover a U.S. debtor's fraudulent transfers, essentially for all of the same reasons set forth above. *See* Restatement § 403 (in determining limitations on a state's ability to prescribe law with respect to particular persons or activity, factors to be considered include, among others, the extent to which the activity takes place within the territory, or has substantial, direct effect in the territory; the connections between the regulating state and the person principally responsible for the activity to be regulated (*e.g.* BLMIS), or between that state and those whom the regulation is designed to protect (*e.g.* customers/creditors)).

[18] Facts regarding defendants' residence or where they received subsequent transfers are not germane to a *Morrison* analysis because the domestic and/or extraterritorial application of a federal statute is a merits issue, not a jurisdictional issue. *Morrison*, 130 S. Ct. at 2876.

2012) (in determining whether a particular securities transaction is domestic, the Second Circuit rejected test that would "look[] to the identity of the parties, the type of security at issue, or whether each individual defendant engaged in conduct within the United States"); *CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d at 1209 (rejecting argument that RICO defendants' foreign residence rendered application of statute extraterritorial); *Chevron Corp. v. Dozinger*, 2012 WL 1711521, at *8 (noting that RICO's focus "would afford a remedy to a U.S. plaintiff who claims injury caused by domestic acts of racketeering activity without regard to the nationality or foreign character of the defendants").

Defendants obliquely imply in their brief that a proper reading of *Morrison* requires the focus to be on their subsequent transfers of BLMIS customer property. *See* Defs' Br. at 3. But Defendants mischaracterize the nature of the Trustee's claims. The Trustee is not seeking to avoid any subsequent transfers between foreign parties; he is seeking to avoid initial fraudulent transfers of customer property made by BLMIS, a U.S. debtor/broker-dealer, and to recover a portion of that customer property which Defendants received. Every fraudulent transfer at issue originated from Madoff's New York-based J.P. Morgan bank account, and was made in furtherance of a Ponzi scheme BLMIS conducted out of its New York offices. Because the Trustee's claims are domestic as applied, the mere fact that Defendants may have received some of BLMIS's customer property in a foreign country is irrelevant under *Morrison*'s analysis.

Post-*Morrison*, some courts continue to apply a "center of gravity" analysis to determine the nature of the claims at issue. *See In re LLS Americas, LLC*, No. 09- 06194-PCW11, 2012 WL 2564722, at *8-9 (E.D. Wa. July 2, 2012). For example, the *LLS Americas* case involved a Ponzi scheme based in the United States with numerous fraudulent transfers to foreign defendants. The *LLS Americas* court looked to the Ponzi scheme as a whole, and determined that

despite the presence of numerous foreign transfers, the center of gravity must be where the debtor carried out the fraudulent scheme: the United States.[19] *Id.* at *8-10. Even under a "center of gravity" analysis, the Trustee's avoidance and recovery claims are domestic.

II. CONGRESS EXPRESSED ITS INTENT THAT THE BANKRUPTCY CODE AND SIPA APPLY EXTRATERRITORIALLY

Even were the Court to find that the Trustee's claims against Defendants require extraterritorial application of the Bankruptcy Code and SIPA, it is clear that Congress expressed its affirmative intention that the avoidance and recovery provisions apply extraterritorially.

The *Morrison* court made clear that explicit statutory language is not required to establish Congress' intent that a statute apply extraterritorially,[20] and instead held that the statutory context, including its legislative history, should be considered to determine Congress' intent. *Morrison*, 130 S. Ct. at 2883. As set forth more fully below, Congress expressed its intent to apply the avoidance and recovery provisions of the Code and SIPA extraterritorially.

A. The Code's Avoidance and Recovery Provisions Apply Extraterritorially

Section 548 of the Code specifically allows for the avoidance of "transactions which unfairly or improperly deplete a debtor's assets or [ ] unfairly or improperly dilute the claims against those assets." 5 Collier on Bankruptcy ¶ 548.01 (16th ed. 2010). Under these circumstances, a trustee may avoid fraudulent transfers because the debtor is deemed to have

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[19] *See also Interbulk, Ltd. v. Louis Dreyfus Corp. (In re Interbulk, Ltd.)*, 240 B.R. 195, 198-99 (Bankr. S.D.N.Y. 1999); *Florsheim Grp. Inc. v. USAsia Int'l Corp*. (*In re Florsheim Grp. Inc.*), 336 B.R. 126, 131-32 (Bankr. N.D. Ill. 2005), for cases explaining the "center of gravity" test pre-*Morrison*.

[20] Indeed, as the Supreme Court held in *Steele v. Bulova Watch Co.*, Congress can affirmatively intend for a statute to apply extraterritorially without explicit statutory language to that effect. *Steele*, 73 S. Ct. at 255-56 (holding that Congress intended that the Lanham Act to apply extraterritorially without express statutory language).

retained his interest in the property at the time of the transfer because such transactions "are designed, or have the effect of unfairly draining the pool of assets available to satisfy creditors' claims." *Id*. at ¶ 548.01[a]. Thus, unlike "property of the estate" under Section 541 (*see infra*) this "interest of the debtor in property" does not arise from the initiation of a bankruptcy proceeding, but precedes it, dating back to the debtor's fraudulent transfer of property. While the pre-petition "interest of the debtor in property" referenced in these sections is not defined in the avoidance provisions of the Code, the Supreme Court in *Begier* defined that phrase by referring to the same language that is defined in Section 541 of the Code. *Begier*, 496 U.S. at 57-58.

Section 541 of the Code indisputably applies extraterritorially. Section 541 establishes that upon the commencement of a bankruptcy proceeding, an estate of the debtor is created. The section then defines "property of the estate" to include property "wherever located and by whomever held." 11 U.S.C. § 541. The phrase "wherever located and by whomever held" explicitly applies to overseas property based on the legislative history of Section 541 and its predecessor Section 70(a) under the Bankruptcy Act of 1898. Congress stated that its intent in adding this phrase was to "make clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States."[21] Thus, courts have uniformly held that Section 541 applies extraterritorially. *See, e.g., In re Simon,* 153 F.3d 991, 996 (9th Cir. 1998) (holding debtor's estate includes debtor's property wherever located); *In re Deak & Co.,* 63 B.R. 422, 427 (Bankr. S.D.N.Y. 1986) (holding Section 541 applied to all debtor's property, whether located domestically or abroad); *U.S. Lines, Inc. v. GAC*

[21] H.R. REP. NO. 82-2320, at 10, *reprinted in* 1952 U.S.C.C.A.N. 1960, at 1976 (1952); *see Deak & Co., Inc. v. Soedjono (In re Deak & Co.),* 63 B.R. 422, 426-427 (Bankr. S.D.N.Y. 1986) (Lifland, J.); *French, et al. v. Liebmann (In re French)*, 440 F.3d 145, 151 (4th Cir. 2006).

Marine Fuels Ltd. (In re McLean Indus., Inc.), 68 B.R. 690, 694 (Bankr. S.D.N.Y. 1986) (holding Section 541 refers to property located both within the United States and abroad).[22]

In *Begier*, the Supreme Court noted that Section 541 of the Code was expressly incorporated into Section 547 of the Code (the preference avoidance provision), and proceeded to consult that statute for context to ascertain what was "property of the debtor" as that phrase was used in Section 547 – and is incorporated in Section 548 as well:

> Because the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate-the property available for the distribution to creditors-'property of the debtor' subject to the [avoidance] provision[s] is best understood as that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings. For guidance, then, we must turn to § 541, which delineates the scope of 'property of the estate' and serves as the postpetition analog to § 547(b)'s 'property of the debtor.'

Begier, 496 U.S. at 58-59 (emphasis added).[23]

[22] *In re Rajapakse,* 346 B.R. 233, 235-36 (Bankr. N.D. Ga. 2005) (same); *In re Siskind,* No. 02-65786-NVA, 2008 WL 2705528, at *14 (Bankr. D. Md. July 3, 2008) (same); *Hobson v. Travelstead* (*In re Travelstead),* 227 B.R. 638, 654-655 (D. Md. 1998) (same); *In re Int'l Admin. Servs.*, *Inc.*, 211 B.R. 88, 93-94 (Bankr. M.D. Fla. 1997) (same).

[23] As the Supreme Court noted in *Begier,* the legislative history concerning the relevant amendments to Sections 547 and 548 of the Code supports this interpretation. *See Begier*, 496 U.S. at 59, n.3; *In re French*, 440 F.3d at 152. Sections 547 and 548 of the Code were amended in 1984 to substitute "an interest of the debtor in property" for the phrase "property of the debtor." *See Begier*, 496 U.S. at 59, n.3; S. REP. NO. 98-65, at 81 (1983). In doing so, the language of Sections 547 and 548 now mirrored the Section 541 language, "interests of the debtor in property." *Id.* Congress described the new language included in Sections 547 and 548 as a "clarifying change," rendering the language of these provisions fully consistent with parallel language of Section 541. *Id.*

Because 541 applies extraterritorially, and Sections 547, 548, and 550 of the Code expressly incorporate the language of Section 541,[24] Congress manifested its intent that the avoidance and recovery provisions of the Code also apply extraterritorially. As explained by the Fourth Circuit in the *French* case:

> By incorporating the language of § 541 to define what property a trustee may recover under his avoidance powers, § 548 plainly allows a trustee to avoid any transfer of property that would have been 'property of the estate' prior to the transfer in question—as defined by § 541—even if that property is not 'property of the estate' now. Through this incorporation, Congress made manifest its intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, wherever that property is located.

French, et al. v. Liebmann (In re French), 440 F.3d 145, 151-152 (4th Cir. 2006) (emphasis added) (internal citations omitted).

Defendants rely on *In re Midland Euro Exchange* to support their assertion that Sections 548 and 550 of the Code do not apply extraterritorially (Defs' Br. at 8, n.7), but the *Midland* court misunderstood the analysis presented in *French*. *In re Midland Euro Exch.*, 347 B.R. 708, 718-719 (Bankr. C.D. Cal. 2006). Contrary to the characterization in *Midland*, the *French* court did not hold that avoidable transfers are "property of the estate" as defined in Section 541. *French*, 440 F.3d at 151-152, n.2. Rather, that court held – consistent with the Supreme Court's

[24] Defendants erroneously contend that *Morrison* stands for the proposition that because Section 541 explicitly applies extraterritorially, and no other provisions of the Code contain an express statement of extraterritorial application, that alone mandates only domestic application for all other provisions of the Code. (Defs' Br. at 14). A review of *Morrison* makes clear that it held nothing of the sort, but instead refused to extend Congress' intent to apply Section 30(a) of the Exchange Act extraterritorially to Section 10(b). *Morrison*, 130 S. Ct. at 2883-4. Unlike the Exchange Act, which addresses a large swath of topics under its heading, the Bankruptcy Code, and particularly the provisions of Chapter 5 of the Bankruptcy Code, must be read as a whole, because these provisions work together as a cohesive whole to replenish a debtor's estate and allow for the fair treatment of a domestic debtor's creditors. *See Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438, 449 (1901) ("all the sections of the [Bankruptcy] [A]ct must be construed together as means to effect its purpose").

decision in *Begier* – that the definition of "property of the estate" utilized in Section 541 is simply incorporated into Sections 547 and 548 for the purposes of prepetition property, and that this definition evidences Congressional intent that the avoidance provisions apply extraterritorially to property "wherever located." *French*, 440 F.3d at 151-152.

Section 550 of the Code provides that "to the extent that a transfer is avoided under section … 548 … of this title, the trustee may recover ... the property transferred." 11 U.S.C. § 550. The reference in Section 550 to the "transfer" avoided under section 548 thus expressly incorporates the meaning of the term "transfer of an interest of the debtor in property." 11 U.S.C. § 548. Thus, for the same reasons Section 548 applies extraterritorially as described above, so too does Section 550. *See French*, 440 F.3d at 152 ("Congress thus demonstrated an affirmative intention to allow avoidance [and recovery] of transfers of foreign property that, but for a fraudulent transfer, would have been property of the debtor's estate").

In addition, Congress expressed its affirmative intent to apply the recovery provisions of Section 550 extraterritorially by explicit reference in Section 541 to Section 550. Section 541 enumerates specific categories of property included in its definition of property of the estate "wherever located and by whomever held," which includes "[a]ny interest in property the trustee recovers under" Section 550. 11 U.S.C. § 541(a)(3). In order to give effect to the phrase "wherever located" in connection with Section 541(a)(3), this provision must be interpreted to mean that Section 550 applies extraterritorially, otherwise it would render Section 541(a)(3) a nullity. Such a result would be contrary to fundamental canons of statutory interpretation.

Because Congress has expressed its affirmative intent that the avoidance and recovery provisions apply extraterritorially, they necessarily work together to enable the Trustee to

recover fraudulently conveyed customer property whether located in the United States or overseas.

B. The Plain Language of SIPA Makes Clear that it Applies Beyond the Boundaries of the United States

SIPA § 78eee(b)(2)(A) grants federal courts "exclusive jurisdiction of such debtor and its property *wherever located* (including property located outside the territorial limits of such court and property held by any other person as security for a debt or subject to a lien)." 15 U.S.C. § 78eee(b)(2)(A)(i) (emphasis added). That same provision also grants the bankruptcy court "the jurisdiction, powers, and duties conferred upon a court of the United States having jurisdiction over cases under Title 11" (15 U.S.C. § 78eee(b)(2)(A)(iii))—powers and jurisdiction that are not confined to the borders of the United States. *See Picard v. Maxam Absolute Return Fund, L.P.*, 2012 WL 1570859, at *4 (S.D.N.Y. May 4, 2012) ("Congress *has* expressed its intent that bankruptcy courts (by delegation from district courts) are to have jurisdiction over a debtor's estate of property, *wherever located* and by *whomever held*.") (internal citations omitted) (emphasis in original in part); *Sinatra v. Gucci* (*In re Gucci*), 309 B.R. 679, 683 (S.D.N.Y. 2004); *Picard v. Chais* (*In re Bernard L. Madoff Inv. Secs. LLC*), 440 B.R. 274, 281-82 (Bankr. S.D.N.Y. 2010) (recognizing that the power to avoid and recover fraudulent transfers and preferences may be applied both in the United States and beyond).

Moreover, the Trustee has authority under SIPA to recover property constituting a fraudulent transfer when, as here, customer property is not sufficient to pay in full the claims of customers. Section 78fff-2(c)(3) of SIPA provides that "the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if

and to the extent that such transfer is voidable or void under the provisions of Title 11."[25] 15 U.S.C. § 78fff-2(c)(3).

In re Bevill is particularly relevant here because it is the only case that has analyzed the extraterritorial reach of SIPA. *See Hill v. Spencer Savings & Loan Ass'n (In re Bevill, Bresler, & Schulman, Inc.)*, 83 B.R. 880, 895-96 (D.N.J. 1988). The *Bevill* court analyzed the statute and concluded that Congress intended for SIPA to apply extraterritorially. In reaching its conclusion, the *Bevill* court highlighted the fact that SIPA "grants federal district courts exclusive jurisdiction of the debtor and its property wherever located (including property located outside the territorial limits of such court.)" *Id.* at 895 (internal marks and citation omitted). The court concluded that SIPA's sweeping jurisdiction combined with its aim of protecting customers of a failed U.S. broker-dealer through the ratable distribution of customer property evidenced Congress' intent to apply SIPA § 78fff-2 (c)(3) extraterritorially. *Id.*

Finally, SIPA expressly grants the Trustee with the authority to avoid and recover transfers to the extent they are void or voidable pursuant to Title 11 of the U.S. Code. *See* 15 U.S.C. §§ 78fff-2(c)(3), 78fff(b). Thus, for all of the reasons set forth above, because Sections 548 and 550 of the Code apply extraterritorially, so too does SIPA in this context.

[25] Defendants argue that Section 78fff-2(c)(3) of SIPA does not provide for extraterritorial avoidance powers because, among other things, the statute refers to "the laws of any State to the contrary notwithstanding." But that phrase, taken in the context of Section 78fff-2(c)(3), has nothing to with territoriality and is merely there to provide that for purposes of a preference action (which can only be brought against a creditor) brought against a customer under Section 547(a) of the Bankruptcy Code, such customer is deemed a "creditor," notwithstanding any state law to the contrary. *Cf.* Section 547(b) of the Code ("the trustee may avoid any transfer of an interest of the debtor in property (1) to or for the benefit of a creditor") (emphasis added).

III. HALTING THE BANKRUPTCY CODE AT THE U.S. BORDERS WOULD HAVE ABSURD RESULTS

A. Congress Never Intended to Permit a U.S. Debtor to Fraudulently Transfer its Property Oversees to the Detriment of its Creditors

Defendants wrongly interpret the Bankruptcy Code and SIPA as being geographically limited to the recovery of fraudulent transfers that remain only within the United States' borders. (Defs' Br. at 6-8). Such an interpretation would render the avoidance and recovery provisions of the Code utterly ineffectual,[26] and have absurd results.

In particular, restricting the avoidance and recovery provisions to use within the geographic United States would provide an avenue for all future domestic debtors to defraud and evade their creditors by simply transferring all of their assets overseas where they could never be recovered by a U.S. trustee. Under Defendants' interpretation of *Morrison*, if Madoff had transferred his defrauded customers' billions of dollars to a relative residing in England, who subsequently transferred those funds to another relative in Switzerland, the Trustee would be precluded as a matter of law from recovering those funds.

As the Eleventh Circuit noted in affirming a trustee's avoidance and recovery action in connection with a debtor who attempted to evade its creditors by having the same funds transferred over 100 times:

> The cornerstone of the bankruptcy courts has always been the doing of equity, and in situations such as this, where money is spread throughout the globe, fraudulent transferors should not be allowed to use § 550 as both a shield and a sword. Not only would subsequent transferees avoid incurring liability, but they would also defeat recovery and further diminish the assets of the estate. An opposite result would foster the creation of similar enterprises, for creditors would design increasingly complex transactions, with the knowledge that more transfers decrease the likelihood of a successful avoidance action. Moreover, the increased

[26] *See United States v. Menasche*, 348 U.S. 528, 538 (1955).

> cost in litigation and the delays associated with prolonged investigations would only contribute to a debtor's shrinking estate.

In re Int'l Admin. Servs., Inc., 408 F.3d 689, 707 (11th Cir. 2005) (internal marks and citations omitted).

As the Fourth Circuit has noted, "it is unlikely that Congress would desire to accord an invariable exemption from the Code's operation to those who leave our borders to engage in fraud." *French*, 440 F.3d at 155 (Wilkinson, J. concurring); *Underwood v. Hilliard* (*In re Rimsat Ltd.*), 98 F.3d 956, 961 (7th Cir. 1996) (Posner, J.) ("[t]he efficacy of the bankruptcy proceeding depends on the court's ability to control and marshal the assets of the debtor wherever located"); *see also Steele*, 344 U.S. at 287 (Supreme Court refusing to apply presumption against extraterritoriality to case where defendants' deliberate actions in violation of Lanham Act taken outside of the United States caused injury within the U.S., finding that "we do not think that petitioner by so simple a device can evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders").

B. Congress Did Not Intend for the Code's Application to Depend upon a Party's Foreign Residence Status

The Bankruptcy Code contains no exceptions to its application based upon a party-in-interest's domicile, and this is exemplified by the fact that the Code provides the same rights and protections to foreign creditors as it does U.S. creditors. Thus, in a proceeding under Title 11, the Trustee acts as a fiduciary for *all* creditors, and there is no priority or special treatment accorded to creditors because of their United States residence. *See* 11 U.S.C. § 101(10). Similarly, nothing in SIPA's definition of "customers" excludes foreign investors from its protections, nor provides any preferential treatment or priority to U.S. customers. *See* 15 U.S.C. § 78lll(2). In other words, SIPA and the Bankruptcy Code provide for the participation and

status of foreign customers and creditors on a *pari passu* basis with all other customers and creditors.

Indeed, several of the Moving Defendants who claim that the Bankruptcy Code and SIPA are inapplicable to them because they are foreign domiciliaries, have sought to take advantage of the protections of SIPA and the Bankruptcy Code by filing claims pursuant to those acts against BLMIS's estate.[27] *See* Defs' Br. at 12. Interpreting the Code in the manner proposed by Defendants would have the absurd result of favoring a debtor's foreign creditor/customers over domestic creditors/customers, because foreign creditors could share in the estate and yet be immunized from liability for any avoidance and recovery actions to the detriment of U.S. creditors, a result Congress plainly never intended.

IV. GIVEN THE FACT INTENSIVE NATURE OF THE EXTRATERRITORIALITY ANALYSIS, DISMISSAL AT THIS STAGE IS PREMATURE

Assuming, *arguendo*, that the Court were to accept Defendants' arguments, dismissal at this stage would be inappropriate. At a minimum, further fact-gathering would be necessary to identify where particular defendants reside and where the fraudulent transfers and subsequent transfers took place. *See Ficeto*, 667 F.3d at 71 (concluding that plaintiffs should be given leave to amend in order to plead additional factual allegations, as their briefs and oral argument represented that additional facts could support that extraterritoriality under *Morrison* was not required); *SEC v. Gruss*, 2012 WL 1659142, at *11 (same).

[27] Defendants assert that because the Trustee denied certain of their customer claims, that somehow this suggests that SIPA lacks extraterritorial reach. *See* Defs' Br. at 21-22. To the contrary, the denial of certain defendants' claims had nothing to do with their foreign status, but was instead due to the fact that these parties did not qualify as "customers" under SIPA because they were indirect investors of BLMIS. *See Securities Investor Protection Corporation v. Bernard L. Madoff Investment Secs. LLC*, 454 B.R. 285 (Bankr. S.D.N.Y. 2011), *aff'd sub nom.*, *Aozora Bank Ltd. v Securities Investor Protection Corporation*, 2012 WL 28468 (S.D.N.Y. Jan. 4, 2012).

The various Moving Defendants all stand in unique postures vis-à-vis BLMIS. Some were direct BLMIS customers, who directly availed themselves of investing in the U.S., and who agreed to jurisdiction in New York (*e.g.*, Radcliff Investments Limited, Plaza Investments International Limited). Still others are subsequent transferees who directed their investments to Feeder Funds, which were managed by U.S. entities, while knowing the Feeder Funds' assets would be held by BLMIS (*e.g.*, Banco Bilbao Vizcaya Argentaria, Merrill Lynch International). Still other Defendants have filed claims within this proceeding and, accordingly, have irrevocably subjected themselves to the jurisdiction of the bankruptcy court (*e.g.*, Cardinal Management, Inc., Defender Limited, Estate of Doris Igoin). Others invested in U.S.-based Feeder Funds (*e.g.* ABN Amro). As to others who claim to have no contact with the U.S. or to have received subsequent transfers abroad, the parties should have the opportunity to take adequate discovery regarding these matters before the Court issues any final ruling on this matter.[28]

[28] *See Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, 645 F.3d 1307, 1310-1311 (11th Cir. 2011) (holding that the bright-line nature of the *Morrison* test and the lack of information given in the early stages of the proceeding prevented the Court from determining the extraterritoriality question); *In re Optimal U.S. Lit.*, ---F. Supp. 2d ---, No. 10 Civ. 4059 (SAS), 2012 WL 1988713, at *1 (S.D.N.Y. June 4, 2012) (reaffirming that the "*Morrison* argument was better resolved in the context of a more fully-developed factual record that unequivocally establishes where all of [the] shares were issued" (internal marks and citation omitted)); *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 405 (S.D.N.Y. 2010) (finding that a "more developed factual record is necessary to inform a proper determination as to whether [*Morrison* applied]" (citation omitted)); *De Lage Landen Fin. Servs., Inc. v. Rasa Floors LP*, Civ. No. 08–0533, 2009 WL 884114, at *8-9 (E.D. Pa. March 31, 2009) (applying New York law) (same).

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests the Court deny the Motion.

Dated: August 17, 2012
New York, NY

/s/ Regina Griffin

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	No. 12-mc-00115 (JSR) ECF Case Electronically Filed
In re: BERNARD L. MADOFF, Debtor.	

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CHRISTINA I. BELANGER, being duly sworn, deposes and says: I am over eighteen years age, not a party to this action and am employed by the law firm of Baker & Hostetler LLP, located at 45 Rockefeller Plaza, New York, NY 10111.

On August 17, 2012, I served the ***TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CONCERNING EXTRATERRITORIALITY AS ORDERED BY THE COURT ON JUNE 6, 2012*** by emailing the interested parties true and correct copies via electronic transmission to the email addresses designated for delivery to those parties or by placing a true and correct copy thereof in a sealed package designated for regular U.S. Mail to the designated party as set forth on *Schedule A*.

TO: See *Attached Schedule A*

CHRISTINA I. BELANGER

Sworn to before me this
17th day of August, 2012

Notary Public

Theresa Blaber
Notary Public, State of New York
No. 01BL6122229
Qualified in Queens County
Commission Expires 2-13

SCHEDULE A

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Exhibit 19

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 extraterritoriality)

MEMORANDUM OF LAW OF THE
SECURITIES INVESTOR PROTECTION CORPORATION IN
OPPOSITION TO EXTRATERRITORIAL DEFENDANTS' MOTION TO DISMISS

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PUBLICATIONS AND PERIODICALS:

Pursuant to this Court's Extraterritoriality Order of June 6, 2012, the Securities Investor Protection Corporation ("SIPC") submits this memorandum of law addressing extraterritoriality as an asserted basis for dismissal of the claims brought by Irving H. Picard ("Trustee"), as trustee for the consolidated liquidation under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa et seq., of Bernard L. Madoff Investment Securities LLC ("BLMIS"), and of Bernard L. Madoff ("Madoff"), against the defendants ("Defendants") affected by the Extraterritoriality Order.

STATEMENT OF THE ISSUES

The instant motions present the following issues:

(1) Whether extraterritorial application of the avoidance and recovery provisions of SIPA and the Bankruptcy Code (11 U.S.C.) is appropriate where Congress's "focus" in enacting those provisions in both SIPA and the Bankruptcy Code is the protection of the creditors of debtors that are domestic, and where the "center of gravity" of both the transfers which the Trustee seeks to avoid and recover, and of the fraud underlying those transfers, is the United States?

(2) Whether extraterritorial application of the avoidance and recovery provisions of SIPA and the Bankruptcy Code is permissible where Congress affirmatively has provided that the Bankruptcy Court has exclusive jurisdiction over property of the debtor, wherever located, "including property located outside the territorial limits of such court," and where Congress also provided that, for purposes of applying the Bankruptcy Code's avoidance and recovery provisions to actions brought by a SIPA trustee to recover customer property, "the property so transferred shall be deemed to have been property of the debtor"?

(3) Whether extraterritorial application is consistent with international comity where the center of gravity of the transfers and of the underlying fraud in question is the United States?

SUMMARY OF THE ARGUMENT

The instant motions challenge the Trustee's actions to avoid and recover fraudulent and preferential transfers of stolen BLMIS customer property on the ground that the Defendants are located overseas and adjudication of the Trustee's claims therefore would impermissibly require the extraterritorial application of the avoidance and recovery provisions of SIPA and the Bankruptcy Code. The Defendants are mistaken. When enacting the avoidance and recovery provisions of the Bankruptcy Code and SIPA, Congress focused on debtors that are domestic, and its objective was to maximize recovery for the creditors of such debtors. In accordance with this focus, avoidable and recoverable transfers made by domestic debtors and/or with property received from them are treated as domestic transactions, regardless of where the subsequent transfers of that debtor's property may have taken place. Moreover, the "center of gravity" of the Ponzi scheme operated by BLMIS, and of the transfers made in connection with that scheme, was the United States ("United States" or "U.S."), and the application of U.S. avoidance and recovery law to those transfers is therefore wholly domestic under applicable law.

Even if the Trustee's actions called for the extraterritorial application of U.S. law, that application would be permissible because SIPA and the Bankruptcy Code provide the Bankruptcy Court with worldwide jurisdiction over "property of the estate," and further provide that property of the kind sought by the Trustee must be treated as "property of the estate" for purposes of avoidance and recovery claims like those brought by the Trustee. Those provisions thus reflect a clear Congressional intent in favor of the extraterritorial application of the

avoidance and recovery provisions of SIPA and the Bankruptcy Code, an intent more than sufficient to overcome any otherwise applicable presumption against extraterritoriality.

Moreover, in light of the fact that BLMIS and its Ponzi scheme were organized, managed, and operated in the United States, that many of the victims of the scheme are and were domiciled here, and that the Trustee seeks the return of customer property stolen by BLMIS in this country, there is no doubt that the U.S. has the primary interest in having its avoidance and recovery laws apply to the transfers in issue in these cases. As a consequence, although there are foreign insolvency proceedings with some connection to those transfers, the doctrine of international comity provides no basis for declining to apply U.S. avoidance and recovery law.

STATEMENT OF THE FACTS

SIPC adopts, and incorporates herein by reference, the statement of facts in the Trustee's memorandum. Briefly, through the avoidance and recovery actions at issue, the Trustee seeks to recover stolen BLMIS customer property transferred by BLMIS to some of the Defendants, many of which were hedge funds organized in foreign jurisdictions but doing business in New York with BLMIS. Those hedge funds then transferred the property received from BLMIS to their investors, some of whom are also domiciled outside the United States and are also Defendants here. The Trustee seeks to recover the stolen BLMIS customer property received by these investor-transferees through these subsequent transfers.

ARGUMENT

As discussed in detail below, the Trustee's claims do not require the extraterritorial application of any of the avoidance and recovery provisions of SIPA and the Bankruptcy Code. On the contrary, Congress's focus in enacting those provisions was the protection of creditors of debtors that are domestic. When made by such domestic debtors, transactions themselves are

deemed to be domestic for purposes of the longstanding presumption against extraterritoriality. Further, the "center of gravity" of all of the transfers at issue, and of the fraud underlying them, was the United States, and those transactions were also domestic, not foreign, under that analysis. Even if the subject transactions were foreign, there would be no impediment to the extraterritorial application of the avoidance and recovery provisions. In fact, SIPA expressly provides for such application where the Trustee seeks to avoid and recover customer property. Finally, due both to the U.S. center of gravity of these transactions, and the BLMIS Ponzi scheme and its effects, and to the absence of any comparable focus and effect outside the U.S., international comity provides no basis to decline application of the avoidance and recovery provisions here.

I. Adjudication of the Trustee's claims does not require extraterritorial application of the avoidance and recovery provisions of SIPA and the Bankruptcy Code because the transfers in question were domestic

In Morrison v. Nat'l Austl. Bank Ltd., __ U.S. __, 130 S.Ct. 2869 (2010), the Supreme Court reaffirmed the longstanding presumption against the extraterritorial application of Congressional legislation absent an affirmative expression by Congress in favor of such application. That presumption, however, applies only when a party seeks to enforce a Congressional statute "beyond the territorial boundaries of the United States." See, e.g., EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("Aramco"); French v. Liebmann (In re French), 440 F.3d 145, 149 (4th Cir.), cert. den., 549 U.S. 815 (2006); Kollias v. D&G Marine Maint., 29 F.3d 67, 72 (2d Cir. 1994), cert. den., 513 U.S. 1146 (1995). It has no application when "'the conduct which Congress seeks to regulate occurs largely within the United States' – that is, when regulated conduct is domestic rather than extraterritorial." French, 440 F.3d at 149

(quoting Environmental Def. Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993)). In this Court's summary:

> A two-fold inquiry is required when attempting to apply the presumption [against extraterritoriality] in a specific factual setting…. First, a court must determine if the presumption applies at all: after identifying the conduct proscribed or regulated by the particular legislation in question, a court must consider if that conduct occurred outside of the borders of the U.S…. Second, if the presumption is implicated, an inquiry into Congressional intent must be undertaken to determine if Congress intended to extend the coverage of the relevant statute to such extraterritorial conduct.

Maxwell Communication Corp. PLC v. Societe Generale PLC (In re Maxwell Communication Corp. PLC), 186 B.R. 807, 815-16 (S.D.N.Y. 1995), aff'd, 93 F.3d 1036 (2d Cir. 1996) (citations omitted).

As the courts in this jurisdiction and elsewhere have long recognized, "[n]ot every transaction that has a foreign element represents an extraterritorial application of our laws." Maxwell Communication Corp. PLC v. Barclays Bank PLC (In re Maxwell Communication Corp. PLC), 170 B.R. 800, 809 (Bankr. S.D.N.Y. 1994), aff'd, 186 B.R. 807 (S.D.N.Y. 1995), aff'd, 93 F.3d 1036 (2d Cir. 1996). See also, e.g., French, 440 F.3d at 149-50. In Morrison, the Supreme Court explained that identifying the location of a transaction depends critically on Congress's "focus" in enacting the statute which may be applied to that transaction. In this connection, in Morrison, the Court held that, when enacting Section 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), Congress's "focus" was limited to "[t]ransactions in securities listed on domestic exchanges, and domestic transactions in other securities..." See 130 S.Ct. at 2884. Accordingly, the Court concluded that securities transactions that occurred on foreign exchanges fell outside of Congress's Section 10(b) "focus,"

and must be treated as foreign for purposes of the presumption against extraterritoriality. Id. at 2884-86.

For the reasons discussed at length in the Trustee's memorandum, and below with regard to SIPA, Congress's focus in enacting the avoidance and recovery provisions of both SIPA and the Bankruptcy Code was the protection of the customers and other creditors of domestic debtors, particularly, in the case of SIPA, the customers of domestic securities broker-dealers. See infra. More specifically, through these provisions, Congress intended to maximize recovery for the creditors of a domestic bankruptcy estate by enabling the bankruptcy trustee to undo fraudulent and preferential pre-petition transfers either made by a domestic debtor or with property received from such a debtor. Id. Given this "focus," transfers that a bankruptcy or SIPA trustee challenges through the avoidance and recovery provisions of SIPA and the Bankruptcy Code must be treated as domestic, and therefore unaffected by the presumption of extraterritoriality, regardless of the actual physical location in which those transfers occurred.

That outcome accords perfectly with the "center of gravity" test in use prior to Morrison, a test with an uncertain status in the wake of Morrison, but one still invoked by some courts. Under the "center of gravity" test, the courts look to where the "center of gravity" of the transaction is located in order to determine whether that transaction occurred within the United States, or outside of it.[1] See, e.g., Kriegman v. Cooper (In re LLS America, LLC), 2012 WL

[1] The "center of gravity" test has its origin in state and federal law conflicts of law rules. See Motor Club of America Ins. Co. v. Hanifi, 145 F.3d 170, 178-79 (4th Cir.), cert. den., 525 U.S. 1001 (1998); Jay L. Westbrook, The Lessons of Maxwell Communication, 64 Fordham L. Rev. at 2533-2541 (1996) ("Westbrook"). Federal common law conflict rules apply to areas of particular federal interest, including avoidance and recovery claims brought pursuant to SIPA and Sections 547, 548, and 550 of the Bankruptcy Code, while the laws of the forum state, i.e., New York law, arguably govern state claims brought pursuant to Section 544(a) of the Bankruptcy Code. See Bianco v. Erkins (In re Gaston & Snow), 243 F.3d 599, 604-607 (2d Cir.), cert. den., 534 U.S. 1042 (2001); O'Toole v. Karnani (In Trinsum Group, Inc.), 460 B.R.

2564722, at * 9 (Bankr. E.D. Wash. July 2, 2012) ("Courts must look at the facts of each case to determine whether or not the center of gravity of the transaction exists outside the United States"); Florsheim Group, Inc. v. USAsia Int'l Corp. (In re Florsheim Group, Inc.), 336 B.R. 126, 130 (Bankr. N.D. Ill. 2005); Maxwell, 170 B.R. at 809. See also Westbrook, 64 Fordham L. Rev. at 2531.

In seeking to identify the "center of gravity" of transactions challenged under the avoidance and recovery provisions of the Bankruptcy Code, the courts give little weight to the physical location of those transactions, due largely to the risk that a contrary emphasis would enable fraudulent actors to easily place avoidable and recoverable transactions beyond the reach of U.S. law. See, e.g., French, 440 F.3d at 150 (fact that real property transferred in transaction subject to attack under Bankruptcy Code Section 548 as a fraudulent transfer was located in the Bahamas, and that deed of transfer was recorded there, "does not seem critical because § 548 focuses not on the property itself, but on the fraud of transferring it"); Gushi Bros. Co. v. Bank of Guam, 28 F.3d 1535, 1538 (9th Cir. 1994); Maxwell, 186 B.R. at 816; Westbrook, 64 Fordham L. Rev. at 2539-40. In this regard, in explaining in Maxwell why the fact that a funds transfer occurred in England counted for little in determining the center of gravity of the transaction, this Court cautioned that:

> Because MCC [the debtor] actually parted with the transferred funds in England, it is possible to view the transfers as occurring wholly outside the borders of the U.S. However, such a limited conception of "transfer" for purposes of an extraterritoriality analysis would have potentially dangerous implications for the future application of § 547: a creditor – be it foreign or domestic – who wished to characterize a transfer as extraterritorial could

379, 389-90 (Bankr. S.D.N.Y. 2011); In re Bidermann Industries U.S.A., 241 B.R. 76, 82-83 (Bankr. S.D.N.Y. 1999). There is no discernible difference between New York and federal common law in this area.

> simply arrange to have the transfer made overseas, a result made all too easy in the age of the multinational company and information superhighway.

Maxwell, 186 B.R. at 816; Westbrook, 64 Fordham L. Rev. at 2539-40 (there are "dangers involved in a literal application of a presumption against extraterritoriality based on the 'location' of a transaction… [t]hat danger is particularly great as to a preference claim in a transnational insolvency because the payment itself, the physical transfer, is easy to separate rhetorically and easy to manipulate factually").

Accordingly, in applying the "center of gravity" test, this Court and others have long emphasized the location of the underlying fraud, not the transfer, in determining the center of gravity of a challenged transaction. See, e.g., French, 440 F.3d at 150 ("The physical place where the deed was recorded is at most 'incidental' to the actual conduct proscribed by § 548 [, which] focuses not on the property itself, but on the fraud of transferring it…"); Tabor v. Bodisen Biotech, Inc., 581 F.Supp.2d 552, 561 (S.D.N.Y. 2008) ("A court looks at the 'essential core' or center of gravity of the wrongdoing, and thus where the predominant activities of the alleged fraudulent transaction have taken place" (emphasis added)); O'Mahony v. Accenture Ltd., 537 F.Supp.2d 506, 513 (S.D.N.Y. 2008) (same). Moreover, the conduct constituting fraud is frequently complex, and extends to acts and events well beyond the challenged transfers. Accordingly, any "center of gravity" analysis must look past the specific transfers at the conduct comprising the underlying fraud, as this Court has emphasized:

> [T]he conduct constituting the charged fraud causing the asserted financial losses is rarely a single act readily traceable in its entirety to a discrete time and place. Rather, more commonly, the alleged misdeeds may comprise but one aspect of a scheme on a larger scale, a link in a transactional chain… .

In re Alstom SA Secs. Litig., 406 F.Supp.2d 346, 372 (S.D.N.Y. 2005).

The need for this approach is particularly acute when applying the "center of gravity" test to avoidance and recovery actions brought in connection with Ponzi schemes, which inevitably involve a fraudulent core distinct from the particular transfers in issue. See, e.g., LLS America, 2012 WL 2564722, at * 10. In this context, rather than focusing solely upon the location of those transfers, the courts examine the principal location of the scheme of which those transfers form a part, along with the location of victims who invested in the scheme and the place where the principal adverse impact of the scheme was felt. Id. In a recent decision, one bankruptcy court expounded upon this approach and the need for it, explaining that:

> This specific motion concerns only one adversary of the hundreds filed and only two defendants of the 20 defendants named in this adversary. In analyzing the motion, the existence of other defendants and the other adversary proceedings cannot be ignored. Unlike most choice of law disputes involving a single transaction or a limited number of transactions among very few parties, the events which gave rise to this dispute arose from the solicitation of investments involving hundreds of investors located both in the United States and Canada. It involves numerous legal entities and thousands of transactions occurring over a period of years. Under such circumstances, the focus must be on that activity as a whole rather than a specific transaction with a specific party at a specific place in time.

Id.

Application of these principles to the present case is straightforward. The BLMIS Ponzi scheme was organized and operated in the United States. The funds used to operate the scheme were received, held, and disbursed to investors in and from accounts in the U.S., including all of the funds distributed to the hedge fund Defendants prior to the subsequent transfer by those funds to their hedge fund investors. Many of the BLMIS victim/accountholders reside and are domiciled here, and, accordingly, the vast majority of the avoidance and recovery actions brought by the Trustee involve transfers that were made and received exclusively within the U.S.

In short, the "center of gravity" of the BLMIS Ponzi scheme, and all of the transfers made in connection with it – including those subsequent transfers of stolen customer property made by hedge fund Defendants to their overseas investors – is the United States. Adjudication of the Trustee's claims therefore does not require extraterritorial application of the avoidance and recovery provisions of SIPA and the Bankruptcy Code.

II. Both SIPA and the Bankruptcy Code expressly authorize the extraterritorial application of the avoidance and recovery provisions in those statutes

In any event, such application is expressly authorized. As noted, in Morrison, the Supreme Court reaffirmed the longstanding presumption against the extraterritorial application of Congressional legislation. See 130 S.Ct. at 2877. That presumption is not absolute, however, and "must give way when Congress exercises its undeniable 'authority to enforce its laws beyond the territorial boundaries of the United States.'" See French, 440 F.3d at 151 (quoting Aramco, 499 U.S. at 248). More specifically, when Congress has clearly expressed an affirmative intention to give a statute extraterritorial effect, then the courts are obliged to respect that intention and to apply the statute abroad. See Morrison, 130 S. Ct. at 2877; Aramco, 499 U.S. at 248; Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957); French, 440 F.3d at 151. Importantly, overcoming the presumption against extraterritoriality does not require a clear statement that a statute applies extraterritorially, "if by that is meant a requirement that a statute say 'this law applies abroad.'" U.S. v. Weingarten, 632 F.3d 60, 65 (2d Cir. 2011) (quoting Morrison, 130 S. Ct. at 2883). Rather, the presumption may be overcome by clear evidence of Congressional intent in favor of extraterritorial application. See, e.g., id. Further, in evaluating Congress's intent, courts must look to "all available evidence," including, inter alia, the statutory text, the overall statutory scheme, legislative history, and other pertinent non-textual sources. See, e.g., Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 177 (1993); Smith v. United

States, 507 U.S. 197, 201-03 n. 4 (1993); Weingarten, 632 F.3d at 65; French, 440 F.3d at 151; United States v. Gatlin, 216 F.3d 207, 215-216 (2d Cir. 2000).

SIPA and the Bankruptcy Code both contain provisions creating exclusive, in rem jurisdiction in the United States bankruptcy courts over, respectively, "property of the debtor" and "property of the estate." See SIPA § 78eee(b)(2)(A); 11 U.S.C. § 541(a)(1). Moreover, both provisions contain language indicating unequivocally that Congress intended the bankruptcy courts' jurisdiction to operate on a worldwide basis, extending to property of the debtor and estate "wherever located." SIPA § 78eee(b)(2)(A); 11 U.S.C. § 541(a)(1). In accord with this language, and the intent standing behind it, the courts in this jurisdiction have long recognized that the Bankruptcy Code's in rem jurisdictional provision applies extraterritorially. See, e.g., Jackson v. Novak (In re Jackson), 593 F.3d 171, 176 (2d Cir. 2010); Picard v. Maxam Absolute Return Fund, L.P. (In re Bernard L. Madoff Investment Secs. LLC), 2012 WL 1570859, at * 3 (S.D.N.Y. May 4, 2012) ("Maxam") ("In a case before a bankruptcy court, the court has in rem jurisdiction over all estate property…regardless of the location of the property…"); Nakash v. Zur (In re Nakash), 190 B. R. 763, 768 (Bankr. S.D.N.Y. 1996) ("[L]egislative history makes clear Congress' intent that 'wherever located' language be broadly construed to include property located in and outside of the U.S."). The language of SIPA is even more explicit - specifically extending a bankruptcy court's in rem jurisdiction to "property located outside the territorial limits of such court"[2] - and the existence of a clear Congressional intent in favor of

[2] SIPA Section 78eee(b)(2)(A) provides, in pertinent part, that:

> Upon the filing of an application with a court for a protective decree with respect to a debtor, such court –

extraterritorial application of SIPA's in rem jurisdictional provision therefore is not in question. See SIPA § 78eee(b)(2)(A).

Moreover, vesting the bankruptcy courts with worldwide jurisdiction over estate property is essential to effectuate Congress's purposes in enacting the liquidation provisions of both the Bankruptcy Code and SIPA. Both statutes divide estate creditors into classes and provide for the allocation of estate property to creditors in each class. Property allocable to each class generally is then distributed ratably among the creditors in the class on the basis of the respective amounts of their allowed claims. See SIPA § 78fff-2(c)(1); 11 U.S.C. § 726(b) (providing for pro rata distribution of estate property among creditors of same class); XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.), 16 F.3d 1443, 1453 (6th Cir. 1994) ("Ratable distribution among all creditors is one of the strongest policies behind the bankruptcy laws"). The overriding objective of both SIPA and the Bankruptcy Code thus is the equal treatment of similarly situated creditors.

The efficacy of this system depends heavily on the bankruptcy court's "ability to control and marshal the assets of the debtor wherever located…." Maxam, 2012 WL 1570859, at * 3 (quoting Underwood v. Hilliard (In re Rimsat, Ltd.), 98 F.3d 956, 961 (7th Cir. 1996) (Posner, J.)). And SIPA's efficacy, in particular, depends critically on the presiding court's power to marshal "customer property" and to return it to customers. The "customer" provisions of SIPA lie at the heart of the statute, and are the principal expression of Congress's intent to create in SIPA a unique liquidation scheme applicable exclusively to securities broker-dealers. These provisions create a special class of claimants - "customers" - and accord to members of that class relief not available to other claimants. See, e.g., In re Bernard L. Madoff Investment Secs. LLC,

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(i) shall have exclusive jurisdiction of such debtor and its property wherever located (including property located outside the territorial limits of such court…)

424 B.R. 122, 133 (Bankr. S.D.N.Y. 2010), aff'd, 654 F.3d 229 (2d Cir. 2011) ("BLMIS"), cert. dismissed, 132 S. Ct. 2712 (2012), and cert. den., 2012 WL 396489 and 2012 WL 425188 (June 25, 2012). In particular, in a SIPA liquidation, "customers" have priority in the distribution of "customer property," a fund of assets generally consisting of the cash and securities "received, acquired or held" by the debtor for its "customers" in the ordinary course of its business, along with the proceeds of any such property transferred by the debtor. See SIPA §§ 78fff-2(b) and (c)(1), 78lll(4). "Customers" generally share ratably in this fund to the extent of their "net equity" and do so on a priority basis, to the exclusion of general creditors.[3] See SIPA § 78fff-2(b) and (c)(1).

Consistent with Congress's emphasis in SIPA on the priority of customers and customer satisfaction, Congress included in SIPA several provisions designed to maximize the pool of customer property available for distribution to customers. For instance, Congress defined "customer property" expansively to include, inter alia, any property of the debtor "which, upon compliance with applicable laws, rules, and regulations, would have been set aside or held for the benefit of customers," regardless of whether such property was, in fact, so set aside and held. See SIPA § 78lll(4)(D) (2008). Moreover, Congress significantly enhanced the power of a SIPA trustee to use the avoidance provisions of the Bankruptcy Code to recover property properly

[3] To the extent that the fund of "customer property" is insufficient to satisfy the "net equity" claims of "customers" in full, SIPA mandates that SIPC provide additional relief by making limited advances to the SIPA trustee for this purpose from the SIPC Fund. SIPA § 78fff-3(a). See also SEC v. Packer, Wilbur & Co., 498 F.2d 978, 983, 985 (2d Cir. 1974). In this regard, SIPC may advance to the SIPA trustee not more than $500,000 per customer, of which no more than $100,000 (now $250,000 per a Congressional amendment not applicable to this case) may be used to satisfy that portion of a claim which is for cash rather than for securities. See SIPA § 78fff-3(a). Thus, each "customer" with a valid claim is assured of satisfaction within the limits indicated, relief not available to general creditors. Id.; In re A.R. Baron & Co., 226 B.R. 790, 795 (Bankr. S.D.N.Y. 1998).

subject to distribution to customers, providing that, for purposes of those provisions, "the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property...[and] the property so transferred shall be deemed to have been property of the debtor."[4] See SIPA § 78fff-2(c)(3) (emphasis added). The language of this provision suggests that, whether or not property sought by a SIPA trustee in an avoidance or recovery action actually qualifies as property of the debtor's estate, Congress intended that such property be treated as such for purposes of the action.

The language of the companion provisions of the Bankruptcy Code reinforces this conclusion. Section 541(a)(1) of the Bankruptcy Code provides that "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case," while Sections 547 and 548 empower the trustee to avoid fraudulent transfers of such "interest(s) of the debtor in property." 11 U.S.C. §§ 541(a)(1), 547(a)(1), 548(a)(1). Both the Supreme Court and the Fourth Circuit have noted the parallelism between the language of these sections, and both have concluded, in essence, that, for purposes of the Code's avoidance provisions, "property of the debtor" and "property of the estate" are interchangeable concepts.

[4] SIPA Section 78fff-2(c)(3) provides:

> Whenever customer property is not sufficient to pay in full the claims set forth in subparagraphs (A) through (D) of paragraph (1), the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of title 11. Such recovered property shall be treated as customer property. For purposes of such recovery, the property so transferred shall be deemed to have been the property of the debtor and, if such transfer was made to a customer or for his benefit, such customer shall be deemed to have been a creditor, the laws of any State to the contrary notwithstanding.

See Begier v. I.R.S., 496 U.S. 53, 58-59 (1990); French, 440 F.3d at 151-52. In this regard, the Supreme Court explained that:

> Because the purpose of the avoidance provision is to preserve property includable within the bankruptcy estate – the property available for distribution to creditors - "property of the debtor" subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings. For guidance, then, we must turn to § 541, which delineates the scope of "property of the estate" and serves as the postpetition analog to § 547(b)'s "property of the debtor."

In French, the Fourth Circuit took the matter a step further, finding that the parallelism between the language of Sections 541 and 548 reflects Congress's intent that property sought by the trustee through an avoidance action be treated as "property of the estate" for purposes of that action, stating specifically that:

> By incorporating the language of § 541 to define what property a trustee may recover under his avoidance powers, § 548 plainly allows a trustee to avoid any transfer of property that *would have been* 'property of the estate' prior to the transfer in question – as defined by § 541 – even if that property is not 'property of the estate' *now*.

French, 440 F.3d at 151 (emphasis in original). On this basis, the Fourth Circuit reasoned that "Congress…demonstrated an affirmative intention to allow avoidance of transfers of foreign property that, but for a fraudulent transfer, would have been property of the debtor's estate" and concluded that extraterritorial application of the avoidance provisions is permissible. Id. at 152.

In a SIPA case, where the trustee uses his enhanced avoidance powers to seek recovery of property that "would have been customer property" absent the avoidable transfer, the Fourth Circuit's reasoning and holding apply with even greater force. In a case addressing this issue, a federal District Court in New Jersey reached precisely this conclusion. Because Congress's "central purpose" in enacting Section 78fff-2(c)(3) as part of SIPA was to permit the trustee to

recover property that, but for the transfer, would have been customer property, Congress clearly intended that section to apply to property located outside the United States and sought through an avoidance or recovery action governed by the section. See Matter of Bevill, Bressler & Schulman, Inc., 83 B.R. 880, 895 (D.N.J. 1988).

The Defendants attempt preemptively to rebut the foregoing by citing three cases – FDIC v. Hirsch (In re Colonial Realty, Inc.), 980 F.2d 125 (2d Cir. 1992); Maxwell Communication Corp., supra; and Barclay v. Swiss Fin. Corp. (In re Midland Euro Exchange, Inc.), 347 B.R. 708 (Bankr. C.D. Cal. 2006) – for the proposition that property sought through an avoidance action does not become property of the estate until the action has been resolved and the property in question has been recovered by the trustee. The third case, Midland Euro Exchange, largely adopts the reasoning of the first, and thus adds little to the discussion. See 347 B.R. at 718-19. In the first case, Colonial Realty, the Second Circuit reasoned that interpreting the reference in Bankruptcy Code Section 541(a)(1) to "all legal or equitable interests of the debtor in property" to encompass property sought through an avoidance action would nullify Code Section 541(a)(3). The latter section brings into "property of the estate" any interest in property recovered by the trustee under 11 U.S.C. Section 550. See Colonial Realty, 980 F.2d at 131. As the Second Circuit remarked, "[i]f property that has been fraudulently transferred is included in the § 541(a)(1) definition of property of the estate, then § 541(a)(3) is rendered meaningless with respect to property recovered pursuant to fraudulent transfer actions." Id. (quoting In re Saunders, 101 B.R. 303, 304-06 (Bankr. N.D. Fla. 1989)).

But neither the Supreme Court in Begier, nor the Fourth Circuit in French, suggested that property sought by the trustee through an avoidance or recovery action is actually property of the estate, only that it must be treated as such during the pendency of the action, and then only for

purposes of the action. See French, 440 F.3d at 151-52. Thus, while, for bankruptcy purposes other than the trustee's avoidance or recovery action (e.g., the "turnover" provisions in Code Sections 542 and 543), the property in question is not property of the estate, it has the status of such property for the limited purposes of the trustee's avoidance or recovery action.[5] If that action is successful, and the trustee actually recovers the property sought, then that property becomes property of the estate for all purposes pursuant to Code Section 541(a)(3). Accordingly, under the Begier/French analysis, Section 541(a)(3) retains a distinct and important role in delineating the scope of "property of the estate" under the Bankruptcy Code, and interpreting Section 541(a)(1) and the Bankruptcy Code's avoidance provisions (i.e., Sections 544, 547, and 548) to require the treatment of property sought in an avoidance or recovery action as "property of the estate" does nothing to nullify that role.

The decision in Maxwell is even less helpful to the Defendants. In Maxwell, the Court reviewed the legislative history to 11 U.S.C. Section 547, the Code's preference provision, and concluded that its history revealed no Congressional intent in favor of extraterritorial application of the provision. But the Court deliberately ignored both the text and legislative history of Section 541(a)(1), the Code's in rem jurisdictional provision, because, per Colonial Realty, "preferential transfers do not become property of the estate until recovered." See Maxwell, 186 B.R. at 820. As discussed, however, Congress intended that property sought by the trustee through an avoidance or recovery action have the status of property of the estate for purposes of that action only. See Begier, 496 U.S. at 58-59; French, 440 F.3d at 152. With that status, such

[5] The recovery provision in Bankruptcy Code Section 550(a) incorporates the avoidance provisions by reference, and thus necessarily reflects the same Congressional intent in favor of extraterritorial application. See 11 U.S.C. § 550(a). Section 541 brings within "property of the estate" any property recovered by a bankruptcy trustee, "wherever located and by whomever held." See id. at § 541(a)(3).

property falls within Congress's grant to the bankruptcy courts of worldwide, in rem jurisdiction; a grant more than sufficient to overcome any applicable presumption against extraterritoriality, as the Fourth Circuit explained in French. Id. And again, the same reasoning applies with equal force to the companion provisions in SIPA. See SIPA §§ 78eee(b)(2)(A), 78fff-2(c)(3), and 78lll(4)(D).

The Defendants attack the propriety of extraterritorial applications of the SIPA provisions in a few more ways, however. First, they suggest that, because SIPA Section 78fff-2(c)(3) does not state explicitly that it applies extraterritorially, it cannot be held to so apply. Next, they assert that, since SIPA is an amendment to the Exchange Act, Congress's decision to include in the Dodd-Frank Wall Street Reform and Consumer Act ("Dodd-Frank") a section that legislatively overrules elements of the holding in Morrison, implies that Congress's silence in the same legislation regarding SIPA Section 78fff-2(c)(3) indicates a Congressional acceptance that the SIPA section has only domestic application. Finally, the Defendants suggest that Congress intended SIPA to address "primarily domestic concerns," and that this domestic focus somehow reflects a related bias against extraterritorial application of the statute.

None of these arguments has any merit, and some are based on clearly erroneous premises. For the reasons discussed in detail above, the text of Section 78fff-2(c)(3) reinforces the conclusion drawn in French that Congress intended property sought by a trustee in an avoidance or recovery action, that would have been "customer property" but for the transfer challenged through the action, to be treated as both "customer property" and "property of the estate" for purposes of that action. See supra. Again, Congress's unequivocal intent that the bankruptcy courts' jurisdiction over such property be worldwide is sufficient to rebut the general

presumption against extraterritoriality. See French, 440 F.3d at 152; SIPA § 78eee(b)(2)(A); 11 U.S.C. § 541(a)(1).

The Defendants' assertion that Congressional silence in Dodd-Frank concerning extraterritorial application of SIPA implies that Congress intended to confine the statute to domestic application represents precisely the wrong inference from the facts. As the Defendants themselves suggest, Congress's decision to include Section 929P(b) as part of Title IX of Dodd-Frank, Pub. L. No. 111-203, §929P(b), 124 Stat. 1864-1865, and thereby ensure that Section 10(b) of the Exchange Act apply extraterritorially in actions brought by the SEC and Department of Justice, was a direct response to the specific, and contrary, holding in Morrison. At the time Dodd-Frank was enacted, however, no court had held – and none to date has held – that SIPA Section 78fff-2(c)(3) is limited to domestic application. As a consequence, Congress likely felt no need to make the contrary point through legislation. In fact, Congress's silence on the subject in the wake of Morrison suggests that it intended that Section 78fff-2(c)(3) apply extraterritorially and concluded that specific legislation to that effect would be redundant.

In another leap of logic, the Defendants next suggest that, since SIPA is part of Title 15, and Morrison held that another provision of that title - Section 10(b) of the Exchange Act – does not apply abroad, SIPA Section 78fff-2(c)(3) also cannot so apply. As the Second Circuit recognized in another matter arising in the BLMIS liquidation, however, SIPA is not solely a securities statute, but rather a hybrid statue arising simultaneously under the securities and bankruptcy laws. See SIPA §§ 78bbb, 78fff(b) (to the extent consistent with SIPA, a SIPA liquidation shall be conducted "as though it were being conducted" under several chapters and parts thereof, of the Bankruptcy Code); In re Bernard L. Madoff Investment Secs. LLC, 654 F.3d 229, 242 n. 10 (2d Cir. 2011). Moreover, in recognition of the fact that SIPA has different

purposes, SIPA is deemed to be an amendment to the Exchange Act only "[e]xcept as otherwise provided in [SIPA]." See S. Rep. No. 95-763, at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 764, 780 ("[T]he purposes of the 1934 act and SIPA are different"); H. Rep. No. 95-746, at 35 (1977) (same). See also Mitchell v. Chicago Partnership Bd., Inc., 246 B.R. 854, 857 (N.D. Ill. 2000) (recognizing "important distinction" between SIPA and Exchange Act); Daniel v. Int'l Brotherhood of Teamsters, 561 F.2d 1223, 1231-32 (7th Cir. 1977), rev'd on other grounds, 439 U.S. 551 (1979) (discussing "sui generis" definition of "customer" in SIPA); James W. Moore, Lawrence P. King, 3 (Pt. 2) Collier on Bankruptcy § 60.79 at 1228 (14th ed. 1977) ("It must be observed that the Securities Investor Protection Act stands alone").

The fact that two provisions appear in the same title does not mean that Congress had the same intent with respect to both, and a particularized examination of Congressional intent with respect to each provision is appropriate. Such an examination here confirms that Congress intended Section 78fff-2(c)(3) to apply extraterritorially, for the reasons discussed. Moreover, post-Morrison judicial decisions regarding other provisions of Title 15 have given those provisions extraterritorial effect, thus confirming that the courts do not treat the provisions of that title uniformly when assessing extraterritoriality. See, e.g., United States v. Mandell, 2011 WL 924891, at ** 5, 6 (S.D.N.Y. March 16, 2011) (holding that securities fraud provisions of 15 U.S.C. §§ 78j(b) and 78ff apply extraterritorially because "[t]he securities, mail and wire fraud statutes are designed to protect United States citizens from such [fraudulent and manipulative] schemes").

Finally, the Defendants' assertion that SIPA's focus is exclusively domestic is simply false. As relevant here, SIPA applies with equal force to both domestic and foreign persons. While SIPA is designed to preserve investor confidence in U.S. securities markets, and its

"focus" is the protection of the customers of securities broker-dealers registered as such under U.S. law, it aims to do so by encouraging investment in those markets from both domestic and foreign sources. Accordingly, nothing in SIPA's definition of the term "customer," for example, excludes investors with a foreign domicile, and the special protection accorded "customers" under SIPA has always been available to securities investors with accounts at failed, SIPC-member broker-dealers, without regard to investor domicile. See SIPA § 78lll(2). SIPA thus offers equal protection to both domestic and foreign investors.[6]

This equality in the availability of protection under SIPA suggests that Congress also intended equality in the liability of investors for the receipt of avoidable or recoverable transfers. Absent symmetry of this kind, foreign investors with cash and securities held in securities accounts at a SIPC-member broker-dealer would enjoy all of the protections and preferred status available to SIPA "customers," where applicable, but would also be exempt from liability for preferential and fraudulent transfers made by the debtor, to the detriment of its other customers and creditors; an exemption not available to the debtor's domestic investors. Under this reading, SIPA would favor foreign over domestic investors, a construction for which there is absolutely no support in SIPA's text, overall design, or legislative history, and one at odds with its core purpose of providing equal treatment for all customers.

[6] The Defendants' citation to SIPC v. Bernard L. Madoff Investment Secs. LLC, 454 B.R. 285 (Bankr. S.D.N.Y. 2011), aff'd sub nom., Aozora Bank Ltd. v. SIPC (In re Aozora Bank Ltd.), 2012 WL 28468 (S.D.N.Y. Jan. 4, 2012), is specious. SIPC and the Trustee opposed "customer" status for the claimants in that case not because some (but not all) of those claimants were foreign, but because none of the claimants had any cognizable property interests in cash or securities held by BLMIS for its customers. The claimants held shares or other ownership interests in certain "feeder fund" entities that, in turn, invested in BLMIS. The claimants thus invested in, not through, the feeder funds, and had no direct, legally cognizable relationship with the assets they claimed. As such, SIPC and the Trustee concluded they were not SIPA "customers." Both the Bankruptcy Court and this Court agreed. See 454 B.R. at 290-91; 2012 WL 28468 at ** 7-8.

Finally, the Defendants' reliance on Cedeño v. Intech Group, Inc., 733 F.Supp.2d 471 (S.D.N.Y. 2010), aff'd, 457 Fed. App'x 35 (2d Cir. 2012), and In re Banco Santander Securities-Optimal Litig., 732 F.Supp.2d 1305 (S.D. Fla. 2010), aff'd, 439 Fed App'x 840 (11th Cir. 2011), is misplaced. Both cases involved suits by foreign plaintiffs against foreign defendants. See Cedeño, 733 F.Supp.2d at 472; Santander, 732 F.Supp.2d at 1311-12. In Cedeño, this Court dismissed an action brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, where the action's only connection to the United States was "the movement of funds into and out of U.S.-based bank accounts." Cedeño, 733 F.Supp.2d at 473. In Santander, the court dismissed for forum non conveniens an action brought by foreign investors against foreign defendants for alleged fraud and negligence in the foreign sale of shares in foreign investment funds closed to investment by U.S. investors. Santander, 732 F.Supp.2d at 1316-18. In the wake of Morrison, the Santander court quite logically concluded, inter alia, that Section 10(b) simply could not be applied to those transactions. Id.

Neither Cedeño nor Santander has any meaning for the instant cases. Both Cedeño and Santander involved statutes not at issue here and factual allegations with only the most tenuous connection to the United States. In contrast, the instant cases involve transfers of funds stolen from customers of a U.S. brokerage in the U.S., and made, in the first instance, to investors in the Ponzi scheme pursuant to which that theft occurred – a scheme which unquestionably had its "center of gravity" in New York City. Moreover, and more critically, unlike RICO and Section 10(b) of the Exchange Act, the relevant provisions of SIPA and the Bankruptcy Code were intended by Congress to apply extraterritorially for the reasons stated above. Under Morrison, that intent is all that is required to overcome any otherwise applicable presumption against extraterritoriality.

III. International comity is not implicated where, as here, the Trustee is attempting to recover property stolen from investors in a U.S. broker-dealer as part of a Ponzi scheme with its "center of gravity" in the U.S.

In an effort to stave off denial of their motions, the Defendants contend that it would be inappropriate for this Court to consider these cases because the subsequent transfers that the Trustee seeks to recover were made by hedge funds located in foreign jurisdictions and subject to foreign laws, including those of the British Virgin Islands ("BVI"), the Cayman Islands, Luxembourg, and Switzerland. Without quite saying so, the Defendants invoke the doctrine of international comity, and suggest that the Court should defer to the courts in the referenced jurisdictions in order to avoid a conflict between U.S. and foreign law and judicial proceedings.

International comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." JPMorgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) (quoting Hilton v. Guyot, 159 U.S. 113 (1895)). The doctrine is separate from the presumption against extraterritoriality, and, in the absence of specific Congressional intent to the contrary may be invoked to decline an otherwise proper application of U.S. law overseas. See Maxwell, 93 F.3d at 1047. Although the doctrine is difficult to define with precision, the Second Circuit has explained that "[s]tates normally refrain from prescribing laws that govern activities connected with another state 'when the exercise of such jurisdiction is unreasonable.'" Id. at 1047-48. The Second Circuit has identified a host of factors that bear on "reasonableness" in this context.[7] Id. at 1048.

[7] These factors include "[t]he link between the regulating state and the relevant activity, the connection between that state and the person responsible for the activity (or protected by the regulation), the nature of the regulated activity and its importance to the regulating state, the

Where, as here, the U.S. and foreign actions are both insolvency proceedings, the focus is on which jurisdiction has the closer connection to the dispute at hand and which has the stronger interest in having its law applied to that dispute. See Maxwell, 93 F.3d at 1051-52. In invoking the comity doctrine to decline application of U.S. preference law to transactions implicated in both a U.S. bankruptcy proceeding and a U.K. insolvency administration, for example, the Second Circuit explained that:

> England has a much closer connection to these disputes than does the United States. The debtor and most of its creditors – not only the beneficiaries of the pre-petition transfers – are British. Maxwell [the debtor] was incorporated under the laws of England, largely controlled by British nationals, governed by a British board of directors and managed in London by British executives. These connecting factors indicated what the bankruptcy judge called the "Englishness" of the debtor, which was one reason for recognizing the [U.K. insolvency] administrators – who are officers of the High Court – as Maxwell's corporate governance. These same factors, particularly the fact that most of Maxwell's debt was incurred in England, show that England has the strongest connection to the present litigation…Because of the strong British connection to the present dispute, it follows that England has a stronger interest than the United States in applying its own avoidance law to these actions.

Id. (citation omitted).

These cases present the mirror image of Maxwell, with the same factors that favored primacy in the U.K. in Maxwell favoring U.S. primacy here. BLMIS, and its Ponzi scheme, were organized, managed, and operated in the U.S., and all of its principals, along with most of its customers and other creditors, were domiciled here. The property sought by the Trustee through the instant actions was stolen by BLMIS from customers in the U.S., which thus has a strong interest in ensuring that all of that property is concentrated in the hands of a single

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effect of the regulation on justified expectations, the significance of the regulation to the international system, the extent of other states' interests, and the likelihood of conflict with other states' regulations." Maxwell, 93 F.3d at 1048.

fiduciary for distribution in accordance with U.S. law. In sum, the BLMIS Ponzi scheme had its "center of gravity" in the U.S., and the U.S. therefore has the primary interest in having its law applied to actions seeking the recovery of property stolen and fraudulently transferred as part of that scheme.

CONCLUSION

For the aforementioned reasons, the Defendants' motions to dismiss should be denied.

DATED: August 17, 2012

Respectfully submitted,

JOSEPHINE WANG
General Counsel

/s/ Kevin H. Bell
KEVIN H. BELL
Senior Associate General Counsel
For Dispute Resolution

CHRISTOPHER H. LAROSA
Senior Associate General Counsel –
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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 extraterritoriality)

CERTIFICATE OF SERVICE

I, Kevin H. Bell, hereby certify that on August 17, 2012, I caused true and correct copies of the Memorandum of Law of the Securities Investor Protection Corporation In Opposition to Extraterritorial Defendants' Motion to Dismiss 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/ Kevin H. Bell
Kevin H. Bell

SCHEDULE A

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Exhibit 20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-mc-00115 (JSR) ECF Case Electronically Filed
In re: MADOFF SECURITIES	

DECLARATION OF MARCO E. SCHNABL IN SUPPORT OF THE EXTRATERRITORIAL DEFENDANTS' MOTION TO DISMISS

Pursuant to 28 U.S.C. § 1746, Marco E. Schnabl declares:

1. I am a member of the bar of this Court and a member of the law firm Skadden, Arps, Slate, Meagher & Flom LLP.

2. I am counsel to Defendants UniCredit S.p.A., Pioneer Global Asset Management S.p.A, and Pioneer Alternative Investment Management Ltd., but submit this declaration in support of the motion made by all Extraterritorial Defendants[1] to dismiss with

[1] As defined in the Memorandum of Law in Support of the Extraterritorial Defendants' Motion to Dismiss, dated July 13, 2012, filed contemporaneously herewith.

prejudice the claims seeking recovery against such Extraterritorial Defendants on grounds that certain statutory provisions on which the plaintiff relies have no extraterritorial reach.

3. I hereby place before the Court true and correct copies of the following documents:

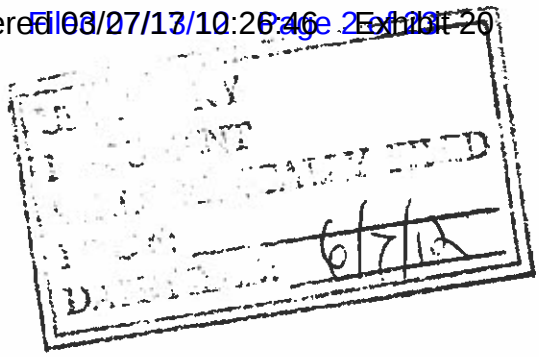
Exhibit A	Extraterritoriality Order, *SIPC v. Bernard L. Madoff Inv. Sec. LLC* (In re Madoff Sec.), No. 12-mc-0115, (S.D.N.Y. June 7, 2012), ECF No. 167.
Exhibit B	Consent Order, *SIPC v. Bernard L. Madoff Inv. Sec. LLC* (In re Madoff Sec.), No. 12-mc-0115, (S.D.N.Y. June 26, 2012), ECF No. 203.
Exhibit C	Judgment, Eastern Caribbean Court of Appeal, Territory of the Virgin Islands, *Quilvest Finance Ltd. et al. v. Fairfield Sentry Ltd. (In Liquidation)*, HCVAP 2011/Q41 *et al*. (entered June 13, 2011).
Exhibit D	Trustee's Memorandum of Law in Opposition to Primeo Fund's Motion to Withdraw the Reference, *Picard v. HSBC*, 11-civ-06524 (JSR) (S.D.N.Y. Dec. 7, 2011), ECF No. 18.
Exhibit E	Trustee's Memorandum of Law in Opposition to Defendant's Motion to Withdraw the Reference, *Picard v. Banco Bilbao Vizcaya Argentaria, S.A.*, 11-civ-07100 (JSR) (S.D.N.Y. Jan. 31, 2012), ECF No. 15.
Exhibit F	Trustee's Memorandum of Law in Opposition to Defendants' Motions to Withdraw the Reference, *Picard v. Oreades Sicav*, 11 Civ. 07763 (JSR) (S.D.N.Y. Feb. 21, 2012), ECF No. 17.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 13, 2012 in New York, New York.

/s/ Marco E. Schnabl
Marco E. Schnabl

EXHIBIT A



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-MC-0115 **ORDER**
In re: MADOFF SECURITIES	**(Relates to consolidated proceedings on Extraterritoriality Issues)**

PERTAINS TO CASES LISTED IN EXHIBIT A

JED S. RAKOFF, U.S.D.J.:

WHEREAS:

A. Pending before the Court are various adversary proceedings commenced by Irving H. Picard, as trustee ("Trustee"), in connection with the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") and the estate of Bernard L. Madoff under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"), in which the Trustee has sought to avoid or recover certain transfers made by BLMIS in the 90 day, two year, six year and/or longer period(s) preceding December 11, 2008 (the "Transfers"). In these proceedings, certain defendants (the "Extraterritoriality Defendants") have sought withdrawal of the reference from the Bankruptcy Court to this Court, among other grounds, for the Court's determination of the Extraterritoriality Issue as defined below.

B. Exhibit A hereto, prepared by the Trustee's counsel, identifies the single cases or, in certain instances, the lead case of related adversary proceedings where defendants are represented by common counsel, in which Extraterritoriality Defendants have filed motions to withdraw the reference (or joined in such motions, which joinders are deemed included in the scope of this Order unless expressly stated otherwise on Exhibit A) from the Bankruptcy Court to this Court to determine whether SIPA and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate or mediate foreign transferees (the "Extraterritoriality Issue"). Such cases and joinders are referred to herein as the "Adversary Proceedings."

C. The Court, over the objections of the Trustee and the Securities Investor Protection Corporation ("SIPC"), previously withdrew the reference from the Bankruptcy Court to consider issues concerning whether the Trustee may avoid or recover Transfers that BLMIS made to certain defendants abroad. *See* Primeo Fund, et al., No. 12 MC 0115 (S.D.N.Y. Order dated May 15, 2012) [ECF No. 97] (the "Extraterritoriality Withdrawal Ruling").

D. Pursuant to Extraterritoriality Withdrawal Ruling, the Court has decided to consolidate briefing on the merits of the Extraterritoriality Issue, and the resolution of this issue will govern all pending motions to withdraw the reference and those pending motions to dismiss that have not yet been fully briefed and argued. See Extraterritorial Withdrawal Ruling, p. 10-11; SIPC v. Bernard L. Madoff Inv. Secs. LLC (In re Madoff Secs.), No. 12 MC 0115 (S.D.N.Y. Order dated Apr. 19, 2012) [ECF No. 22] (the "Common Briefing Order"). The Court's Extraterritoriality Withdrawal Ruling also directed counsel for the Trustee to convene a

conference among the Extraterritoriality Defendants and to schedule consolidated proceedings no later than May 23, 2012.

E. On May 23, 2012 counsel for the Trustee, SIPC, and the Extraterritoriality Defendants convened a conference call with the Court, and the Court thereafter ordered that the parties submit by no later than June 6, 2012 a proposed order agreed to by the parties for withdrawal and briefing of a consolidated motion to dismiss related to the Extraterritoriality Issue.

BASED ON THE FOREGOING, IT IS HEREBY ORDERED AS FOLLOWS:

1. The reference of the Adversary Proceedings listed in Exhibit A is withdrawn, in part, from the Bankruptcy Court to this Court solely with respect to the Extraterritoriality Defendants for the limited purpose of hearing and determining whether SIPA and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate or mediate foreign transferees. Except as otherwise provided herein or in other orders of this Court, the reference to the Bankruptcy Court is otherwise maintained for all other purposes.

2. The Trustee and SIPC are deemed to have raised, in response to all pending motions for withdrawal of the reference based on the Extraterritoriality Issue, all arguments previously raised by either or both of them in opposition to all such motions granted by the Extraterritoriality Withdrawal Ruling, and such objections or arguments are deemed to be overruled, solely with respect to the Extraterritoriality Issue, for the reasons stated in the Extraterritoriality Withdrawal Ruling.

3. All objections that could be raised by the Trustee and/or SIPC to the pending motions to withdraw the reference in the Adversary Proceedings, and the defenses and

responses thereto that may be raised by the affected defendants, are deemed preserved on all matters.

4. On or before July 13, 2012, the Extraterritoriality Defendants shall file a single consolidated motion to dismiss pursuant to Fed. R. Civ. P. 12 (made applicable to the Adversary Proceeding by Fed. R. Bankr. P. 7012) and a single consolidated supporting memorandum of law, not to exceed forty (40) pages (together, the "Extraterritoriality Motion to Dismiss").

5. The Trustee and SIPC shall each file a memorandum of law in opposition to the Extraterritoriality Motion to Dismiss, not to exceed forty (40) pages each, addressing the Extraterritoriality Withdrawal Ruling Issue (the "Trustee's Opposition") on or before August 17, 2012.

6. Young Conaway Stargatt & Taylor, LLP, which is conflicts counsel for the Trustee, and Windels Marx Lane & Mittendorf, LLP, which is special counsel to the Trustee, each may file a joinder, not to exceed two (2) pages (excluding exhibits identifying the relevant adversary proceedings), to the Trustee's Opposition, on behalf of the Trustee in certain of the adversary proceedings listed on Exhibit A hereto on or before August 17, 2012. In either case, the respective joinders may only specify what portions of the Trustee's Opposition are joined and shall not make or offer any additional substantive argument.

7. The Extraterritoriality Defendants shall file one consolidated reply brief, not to exceed twenty (20) pages, on or before August 31, 2012 (the "Reply Brief"). In the event the Trustee files an amended complaint (the "Amended Complaint") in any of the Adversary Proceedings after the Extraterritoriality Motion to Dismiss is filed, the Reply Brief shall include a reference (by civil action number and docket number only) to a representative Amended Complaint filed by the Trustee against Extraterritoriality Defendants. Any further requirement

that the Amended Complaints subject to the Extraterritoriality Motion to Dismiss be identified or filed is deemed waived and satisfied. In the event the Trustee files an Amended Complaint, he shall, at the time the Amended Complaint is filed, provide the Extraterritoriality Defendants a blackline reflecting the changes made in the Amended Complaint from the then operative complaint.

8. The Court will hold oral argument on the Extraterritoriality Motion to Dismiss on September 21, 2012, at 4:00 p.m. (the "Hearing Date").

9. On or before August 31, 2012, the Extraterritoriality Defendants shall designate one lead counsel to advocate their position at oral argument on the Hearing Date, but any other attorney who wishes to be heard may appear and so request.

10. The caption displayed on this Order shall be used as the caption for all pleadings, notices and briefs to be filed pursuant to this Order.

11. All communications and documents (including drafts) exchanged between and among any of the defendants in any of the adversary proceedings, and/or their respective attorneys, shall be deemed to be privileged communications and/or work product, as the case may be, subject to a joint interest privilege.

12. This Order is without prejudice to any and all grounds for withdrawal of the reference (other than the Extraterritoriality Issue) raised in the Adversary Proceedings by the Extraterritoriality Defendants and any matter that cannot properly be raised or resolved on a Rule 12 motion, all of which are preserved.

13. Nothing in this Order shall: (a) waive or resolve any issue not specifically raised in the Extraterritoriality Motion to Dismiss; (b) waive or resolve any issue raised or that could be raised by any party other than with respect to the Extraterritoriality Issue, including related issues

that cannot be resolved on a motion under Fed. R. Civ. P. 12; or (c) notwithstanding Fed. R. Civ. P. 12(g)(2) or Fed. R. Bankr. P. 7012(g)(2), except as specifically raised in the Extraterritoriality Motion to Dismiss, limit, restrict or impair any defense or argument that has been raised or could be raised by any Extraterritoriality Defendant in a motion to dismiss under Fed. R. Civ. P. 12 or Fed. R. Bankr. P. 7012, or any other defense or right of any nature available to any Extraterritoriality Defendant (including, without limitation, all defenses based on lack of personal jurisdiction or insufficient service of process), or any argument or defense that could be raised by the Trustee or SIPC in response thereto.

14. Nothing in this Order shall constitute an agreement or consent by any Extraterritoriality Defendant to pay the fees and expenses of any attorney other than such defendant's own retained attorney. This paragraph shall not affect or compromise any rights of the Trustee or SIPC.

15. This Order is without prejudice to and preserves all objections of the Trustee and SIPC to timely-filed motions for withdrawal of the reference currently pending before this Court (other than the withdrawal of the reference solely with respect to the Extraterritoriality Issue) with respect to the Adversary Proceedings, and the defenses and responses thereto that may be raised by the affected defendants, are deemed preserved on all matters.

16. The procedures established by this Order, or by further Order of this Court, shall constitute the sole and exclusive procedures for determination of the Extraterritoriality Issue in the Adversary Proceedings (except for any appellate practice resulting from such determination), and this Court shall be the forum for such determination. To the extent that briefing or argument schedules were previously established with respect to the Extraterritoriality Issue in any of the Adversary Proceedings, this Order supersedes all such schedules solely with respect to the

Extraterritoriality Issue. To the extent that briefing or argument schedules are prospectively established with respect to motions to withdraw the reference or motions to dismiss in any of the Adversary Proceedings, the Extraterritoriality Issue shall be excluded from such briefing or argument and such order is vacated. For the avoidance of doubt, to the extent any of the Extraterritoriality Defendants have issues other than the Extraterritoriality Issue or issues set forth in the Common Briefing Order that were withdrawn, those issues will continue to be briefed on the schedule previously ordered by the Court. Except as stated in this paragraph, this Order shall not be deemed or construed to modify, withdraw or reverse any prior Order of the Court that granted withdrawal of the reference in any Adversary Proceeding for any reason.

SO ORDERED.

Dated: New York, New York
June 6, 2012

JED S. RAKOFF, U.S.D.J.

EXHIBIT A

1.	***Picard v. Primeo***	11-cv-06524-JSR	Morrison & Foerster LLP Gary S. Lee (glee@mofo.com) Joel C. Haims (jhaims@mofo.com) LaShann M. DeArcy (ldearcy@mofo.com) Kiersten A. Fletcher (kfletcher@mofo.com)
2.	***Picard v. ABN AMRO Bank N.V. (presently known as the Royal Bank of Scotland, N.V.), et al.*** (as filed by Rye Select Broad Market XL Portfolio Ltd.)	11-cv-06848-JSR	Morrison & Foerster LLP Gary S. Lee (glee@mofo.com) Joel C. Haims (jhaims@mofo.com) LaShann M. DeArcy (ldearcy@mofo.com) Kiersten A. Fletcher (kfletcher@mofo.com)
3.	***Picard v. ABN AMRO Bank N.V. (presently known as the Royal Bank of Scotland, N.V.), et al.*** (as filed by ABN AMRO Incorporated, ABN AMRO Bank, N.V.)	11-cv-06878-JSR	Allen & Overy LLP Michael S. Feldberg (michael.feldberg@allenovery.com) Bethany Kriss (bethany.kriss@allenovery.com)
4.	***Picard v. ABN AMRO (Ireland) Ltd. (F/N/A Fortis Prime Fund Solutions Bank (Ireland) Ltd.,), et al.*** (as filed by Rye Select Broad Market XL Portfolio Ltd.)	11-cv-06849-JSR	Morrison & Foerster LLP Gary S. Lee (glee@mofo.com) Joel C. Haims (jhaims@mofo.com) LaShann M. DeArcy (ldearcy@mofo.com) Kiersten A. Fletcher (kfletcher@mofo.com)

5.	***Picard v. ABN AMRO (Ireland) Ltd. (F/N/A Fortis Prime Fund Solutions Bank (Ireland) Ltd.),, et al.,*** (as filed by ABN AMRO Custodial Services (Ireland) Ltd., ABN AMRO Bank (Ireland), Ltd.)	11-cv-06877-JSR	Latham & Watkins Christopher Harris (christopher.harris@lw.com) Cameron Smith (cameron.smith@lw.com)
6.	***Picard v. Banco Bilbao Vizcaya Argentaria, S.A.***	11-cv-07100-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com)
7.	***Picard v. Federico Ceretti, et al.*** (as filed by Federico Ceretti, Carlo Grosso, FIM Limited and FIM Advisers LLP)	11-cv-07134-JSR	Paul Hastings LLP Jodi Kleinick (jodikleinick@paulhastings.com) Barry Sher (barrysher@paulhastings.com) Mor Wetzler (morwetzler@paulhastings.com)
8.	***Picard v. Oreades Sicav, et al.*** (as filed by BNP Paribas Investment Partners Luxembourg S.A., BGL BNP Paribas S.A. and BNP Paribas Securities Services S.A.)	11-cv-07763-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace (bpeace@cgsh.com)
9.	***Picard v. Equity Trading Portfolio Ltd., et al.*** (as filed by BNP Paribas Arbitrage SNC)	11-cv-07810-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace (bpeace@cgsh.com)
10.	***Picard v. BNP Paribas Arbitrage SNC***	12-cv-00641-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace

				(bpeace@cgsh.com)
11.	***Picard v. Barclays Bank (Suisse) S.A., et al***	12-cv-01882-JSR	Hogan Lovells US LLP Marc J. Gottridge (marc.gottridge@hoganlovells.com) Andrew M. Behrman (andrew.behrman@hoganlovells.com)	
12.	***Picard v. ABN AMRO Bank N.V. (presently known as The Royal Bank of Scotland, N.V.), et al***	12-cv-01939-JSR	Allen & Overy LLP Michael S. Feldberg (michael.feldberg@allenovery.com) Bethany Kriss (bethany.kriss@allenovery.com)	
13.	**Picard v. Kohn, et al.** (as filed by UniCredit Bank Austria)	12-cv-02161-JSR	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)	
14.	***Picard v. HSBC Bank, plc, et al.*** (as filed by UniCredit Bank Austria)	12-cv-02162-JSR	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)	
15.	***Picard v. HSBC Bank, plc, et al.*** (as filed by UniCredit S.p.A. and Pioneer)	12-cv-02239-JSR	Skadden, Arps, Slate, Meagher, & Flom LLP (susan.saltzstein@Skadden.com) Marco E. Schnabl (Marco.Schnabl@Skadden.com)	

				Jeremy A. Berman (jeremy.berman@Skadden.com) Jason C. Putter (jason.putter@skadden.com)
16.	***Picard v. Kohn, et al.*** (as filed by UniCredit S.p.A. and Pioneer)	12-cv-02240-JSR		Skadden, Arps, Slate, Meagher, & Flom LLP Susan L. Saltzstein (susan.saltzstein@Skadden.com) Marco E. Schnabl (Marco.Schnabl@Skadden.com) Jeremy A. Berman (jeremy.berman@Skadden.com) Jason C. Putter (jason.putter@skadden.com)
17.	***Picard v. Bank Julius Baer & Co., Ltd.***	12-cv-02311-JSR		McKool Smith P.C. John P. Cooney, Jr. (jcooney@mckoolsmith.com) Eric B. Halper (ehalper@mckoolsmith.com) Virginia l. Weber (vweber@mckoolsmith.com)
18.	***Picard v. Lion Global Investors Limited***	12-cv-02349-JSR		Proskauer Rose LLP Gregg M. Mashberg (gmashberg@proskauer.com) Richard L. Spinogatti (rspinogatti@proskauer.com)
19.	***Picard v. Grosvenor Investment Management Ltd., et al.***	12-cv-02351-JSR		Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)
20.	***Picard v. Inteligo Bank Ltd. Panama Branch f/k/a/ Blubank Ltd. Panama Branch***	12-cv-02364-JSR		Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com) Jessica Bartlett

				(jessica.bartlett@shearman.com)
21.	***Picard v. Banca Carige, S.P.A.***	12-cv-02408-JSR	Kasowitz, Benson, Torres, & Friedman LLP David J. Mark (dmark@kasowitz.com)	
22.	***Picard v. Somers Dublin Limited, et al.***	12-cv-02430-JSR	Cleary Gottlieb Steen & Hamilton LLP Evan A. Davis (edavis@cgsh.com) Thomas J. Moloney (tmoloney @cgsh.com)	
23.	***Picard v. HSBC Bank, plc, et al.*** (as filed by the HSBC Defendants)	12-cv-02431-JSR	Cleary Gottlieb Steen & Hamilton LLP Charles J. Keeley (cjkeeley@cgsh.com) Tom Moloney (tmoloney@cgsh.com) Evan Davis (edavis@cgsh.com) David Brodsky (dbrodsky@cgsh.com)	
24.	***Picard v. Banco Itau Europa Luxembourg S.A., et al***	12-cv-02432-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com)	
25.	***Caceis Bank Luxembourg, et al.***	12-cv-02434-JSR	Kelley Drye & Warren LLP Thomas B. Kinzler (tkinzler@kelleydrye.com) Daniel Schimmel (dschimmel@kelleydrye.com) Jaclyn M. Metzinger (jmetzinger@kelleydrye.com)	

26.	***Picard v. Banque Privee Espirito Santo S.A.***	12-cv-02442-JSR	Flemming Zulack Williamson Zauderer LLP Elizabeth A. O'Connor (eoconnor@fzwz.com) John F. Zulack (Jzulack@fzwz.com) Megan Davis (mdavis@fzwz.com)
27.	***Picard v. Nomura International PLC***	12-cv-02443-JSR	Shearman & Sterling LLP Brian H. Polovoy (bpolovoy@shearman.com) Christopher R. Fenton (Cfenton@shearman.com) Andrew Z. Lipson (alipson@shearman.com)
28.	***Picard v. Nomura Bank International PLC***	12-cv-02446-JSR	Shearman & Sterling LLP Brian H. Polovoy (bpolovoy@shearman.com) Christopher R. Fenton (Cfenton@shearman.com) Andrew Z. Lipson (alipson@shearman.com)
29.	***Picard v. The Sumitomo Trust and Banking Co., Ltd.***	12-cv-02481-JSR	Becker, Glynn, Melamed & Muffly LLP Zeb Landsman (zlandsman@beckerglynn.com) Jordan E. Stern (jstern@beckerglynn.com) Michelle Mufich (mmufich@beckerglynn.com)
30.	***Picard v. UBS AG, et al.*** (M&B Capital Advisers Sociedad de Valores, S.A., M&B Capital Advisers Gestion SGIIC, S.A. -	12-cv-02483-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin

	Moving Parties) [Amended Motion to Withdraw]		(rlevin@cravath.com)
31.	***Picard v. Unifortune Asset Management SGR SPA, et al.***	12-cv-02485-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
32.	***Picard v. Trincaster Corporation***	12-cv-02486-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
33.	***Picard v. Banque Syz & Co., SA***	12-cv-02489-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
34.	***Picard v. Square One Fund Ltd., et al.***	12-cv-02490-JSR	Tannenbaum Helpern Syracuse & Hirschtritt LLP; Brune & Richard LLP. Tannenbaum Helpern Syracuse & Hirschtritt LLP Tammy P. Bieber (bieber@thsh.com) Brune & Richard LLP David Elbaum (delbaum@bruneandrichard.com) Bernfeld, DeMatteo & Bernfeld, LLP

				David Bernfeld (davidbernfeld@bernfeld-dematteo.com)
35.	***Picard v. Credit Agricole (Suisse) S.A., et al.***	12-cv-02494-JSR		Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com)
36.	***Picard v. SNS Bank N.V., et al***	12-cv-02509-JSR		Wilmer Cutler Pickering Hale and Dorr LLP Andrea J. Robinson (andrea.robinson@wilmerhale.com) Charles C. Platt (charles.platt@wilmerhale.com) George W. Shuster, Jr. (george.shuster@wilmerhale.com)
37.	***Picard v. Quilvest Finance Ltd.***	12-cv-02580-JSR		Jones Day Thomas E. Lynch (telynch@jonesday.com) Scott J. Friedman (sjfriedman@jonesday.com)
38.	***Picard v. Arden Asset Management, Inc., et al.***	12-cv-02581-JSR		Seward & Kissel LLP M. William Munno (munno@sewkis.com) Mandy DeRoche (deroche@sewkis.com) Michael B. Weitman (weitman@sewkis.com)
39.	***Picard v. Banque J. Safra (Suisse) SA***	12-cv-02587-JSR		Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com)

40.	***Picard v. Vizcaya Partners Limited, et al.***	12-cv-02588-JSR	Sullivan & Cromwell LLP (for Bank J. Safra (Gibraltar) Limited) Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com) Katten Muchin Rosenman LLP (for Zeus Partners Ltd) Anthony L. Paccione (anthony.paccione@kattenlaw.com)
41.	***Picard v. Abu Dhabi Investment Authority***	12-cv-02616-JSR	Quinn Emanuel Urquhart & Sullivan, LLP Peter E. Calamari (petercalamari@quinnemanuel.com) Marc L. Greenwald (marcgreenwald@quinnemanuel.com) Eric M. Kay (erickay@quinnemanuel.com) David S. Mader (davidmader@quinnemanuel.com)
42.	***Picard v. Fairfield Sentry Limited, et al.*** (as filed by Chester Global Strategy Fund Limited, Chester Global Strategy Fund, LP, Irongate Global Strategy Fund Limited, Fairfield Greenwich Fund	12-cv-02619-JSR	Simpson Thacher & Barlett LLP Mark G. Cunha (mcunha@stblaw.com) Peter E. Kazanoff (pkazanoff@stblaw.com) Wollmuth Maher & Deutsch LLP

	(Luxembourg), Fairfield Investment Fund Limited, Fairfield Investors (Euro) Ltd., and Stable Fund LP)	Frederick R. Kessler (fkessler@wmd-law.com) Paul R. DeFilippo (pdefilippo@wmd-law.com) Michael P. Burke (mburke@wmd-law.com) Debevoise & Plimpton LLP Mark P. Goodman (mpgoodman@debevoise.com) O'Shea Partners LLP Sean F. O'Shea (soshea@osheapartners.com) Michael E. Petrella (mpetrella@osheapartners.com) White & Case LLP Glenn M. Kurtz (gkurtz@whitecase.com) Andrew W. Hammond (ahammond@whitecase.com) Covington & Burling LLP Bruce A. Baird (bbaird@cov.com) Kasowitz, Benson, Torres & Friedman LLP Daniel J. Fetterman (dfetterman@kasowitz.com) Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C. Edward M. Spiro (espiro@maglaw.com)

			Dechert LLP Andrew J. Levander (andrew.levander@dechert.com) David S. Hoffner (david.hoffner@dechert.com)
43.	***Picard v. Fairfield Sentry Limited, et al.*** *(Joint Memorandum filed by various defendants)*	12-cv-02638-JSR	Simpson Thacher & Bartlett LLP Mark G. Cunha (mcunha@stblaw.com) Peter E. Kazanoff (pkazanoff@stblaw.com) Wollmuth Maher & Deutsch LLP Frederick R. Kessler (fkessler@wmd-law.com) Paul R. DeFilippo (pdefilippo@wmd-law.com) Michael P. Burke (mburke@wmd-law.com) Debevoise & Plimpton LLP Mark P. Goodman (mpgoodman@debevoise.com) O'Shea Partners LLP Sean F. O'Shea (soshea@osheapartners.com) Michael E. Petrella (mpetrella@osheapartners.com) White & Case LLP Glenn M. Kurtz (gkurtz@whitecase.com) Andrew W. Hammond (ahammond@whitecase.com)

				Covington & Burling LLP Bruce A. Baird (bbaird@cov.com) Kasowitz, Benson, Torres & Friedman LLP Daniel J. Fetterman (dfetterman@kasowitz.com) Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C. Edward M. Spiro (espiro@maglaw.com) Dechert LLP Andrew J. Levander (andrew.levander@dechert.com) David S. Hoffner (david.hoffner@dechert.com)
44.	***Picard v. Plaza Investments International Limited, et al.***	12-cv-02646-JSR		Debevoise & Plimpton LLP Joseph P. Moodhe (Jpmoodhe@debevoise.com) Shannon Rose Selden (srselden@debevoise.com)
45.	***Picard v. Defender Limited, et al*** (Defender Limited, Reliance Management (BVI) Limited, Reliance Management (Gibraltar) Limited and Tim Brockmann – Moving Parties)	12-cv-02800-JSR		Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com)
46.	***Picard v. UBS AG, et al.*** (Reliance Management (BVI) Limited and Reliance Management (Gibraltar) Limited	12-cv-02802-JSR		Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott

	– Moving Parties)		(bscott@klestadt.com)
47.	***Picard vs. The Estate of Doris Igoin, et al.***	12-cv-02872-JSR	Kelley Drye & Warren LLP Jonathan K. Cooperman (Jcooperman@KelleyDrye.com) Seungwhan Kim (skim@kelleydrye.com)
48.	***Picard v. KBC Investments Limited,***	12-cv-02877-JSR	Sidley Austin LLP Alan M. Unger (aunger@sidley.com) Bryan Krakauer (bkrakauer@sidley.com)
49.	***Picard v. Meritz Fire & Marine Insurance Co. Ltd.***	12-cv-02878-JSR	Steptoe & Johnson LLP Kristin Darr (kdarr@steptoe.com) Seong H. Kim (skim@steptoe.com)
50.	***Picard v. Leon Flax, et al.***	12-cv-02928-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione anthony.paccione@kattenlaw.com Brian L. Muldrew brian.muldrew@kattenlaw.com
51.	***Picard v. Orbita Capital Return Strategy Limited***	12-cv-02934-JSR	Dechert LLP Gary Mennitt (gary.mennitt@dechert.com)
52.	***Picard v. Atlantic Security Bank***	12-cv-02980-JSR	Arnold & Porter LLP Scott B. Schreiber (Scott.Schreiber@aporter.com) Andrew T. Karron (Andrew.Karron@aporter.com)

53.	***Picard v. Cardinal Management Inc., et al***	12-cv-02981-JSR	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)
54.	***Picard v. Radcliff Investments Limited, et al.***	12-cv-02982-JSR	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)
55.	***Picard v. Pictet et Cie***	12-cv-03402-JSR	Debevoise & Plimpton LLP Michael E. Wiles (mewiles@debevoise.com)
56.	***Picard v. Merrill Lynch International***	12-cv-03486-JSR	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)
57.	***Picard v. Merrill Lynch Bank (Suisse) SA***	12-cv-03487-JSR	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)
58.	***Picard v. Fullerton Capital PTE. Ltd.***	12-cv-03488-JSR	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)
59.	***Picard v. Cathay United Bank, et al.***	12-cv-03489-JSR	Baker & McKenzie LLP David W. Parham (david.Parham@bakermckenzie.com)

60.	***Picard v. Standard Chartered Financial Services (Luxembourg) S.A., et al***	12-cv-04328	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Sharon L. Nelles (nelless@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

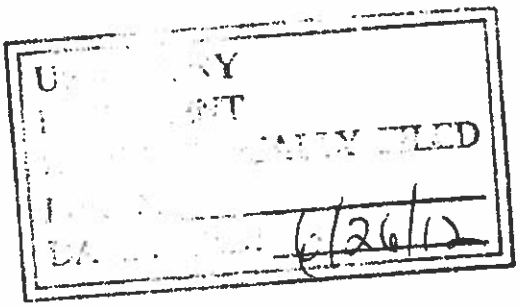
Defendant.

In re:

MADOFF SECURITIES

12 MC 0115

CONSENT ORDER



PERTAINS TO CASES LISTED IN EXHIBIT A

JED S. RAKOFF, U.S.D.J.:

On consent of (i) the defendants listed herein and on Exhibit A hereto (collectively, the "Defendants"), (ii) Irving H. Picard, as Trustee (the "Trustee") for the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC under the Securities Investor Protection Act, and (iii) the Securities Investor Protection Corporation ("SIPC", together with the Defendants and the Trustee, the "Parties"), the Parties agree as follows:

1. *Picard v. Legacy Capital Ltd., et al.*, No. 11-cv-07764 (JSR) (the "Legacy Capital Action"), and *Picard v. Natixis,* No. 11-cv-09501 (JSR) (the "Natixis Action") were inadvertently excluded from Exhibit A to the Order dated June 6, 2012; No. 12 MC 0115 (S.D.N.Y. June 7, 2012) (ECF No. 167) (the "Extraterritoriality Order"). The Trustee, SIPC and the moving Defendants in the Legacy Capital Action and the Natixis Action hereby agree that

the Extraterritoriality Order as entered shall apply to the Legacy Capital Action and Natixis Action *nunc pro tunc* to June 7, 2012. The Legacy Capital Action and Natixis Action will be covered by the Extraterritoriality Order in all respects.

2. *Picard v. Sarl Investment Company, Inc., et al.*, No. 12-cv-02754 (JSR) (the "Sarl Investment Action") was inadvertently excluded from the Exhibit A to the Order dated May 16, 2012, No. 12 MC 0115 (S.D.N.Y. May 15, 2012) (ECF No. 107) (the "Antecedent Debt Order"). The Trustee, SIPC and the moving Defendants in the Sarl Investment Action hereby agree that the Antecedent Debt Order as entered shall apply to the Sarl Investment Action *nunc pro tunc* to May 15, 2012. The Sarl Investment Action will be covered by the Antecedent Debt Order in all respects.

3. *Picard v. Lloyds TSB Bank PLC,* No. 12-cv-04722 (the "Lloyds Action") was excluded from Exhibit A to the Extraterritoriality Order, Exhibit A to the Antecedent Debt Order, Exhibit A to the Stern Order, and Exhibit A to the Order dated May 15, 2012, No. 12 MC 0115 (S.D.N.Y. May 16, 2012) (ECF No. 119) (the "Section 546(e) Order") because the Trustee served the Summons and Complaint in the Lloyds Action after the April 2, 2012 deadline for filing Motions to Withdraw the Reference to the Bankruptcy Court established pursuant to the *Administrative Order Establishing Deadline for Filing Motions to Withdraw the Reference*, Adv. Pro. No. 08-01789 (BRL) (Bank. S.D.N.Y. Mar. 5, 2012) (ECF No. 4707) (the "Withdrawal Motion Deadline"), and the relevant Motion in the Lloyd Action was filed on June 12, 2012. The Trustee, SIPC and the moving Defendants in the Lloyds Action hereby agree that the Extraterritoriality Order as entered shall apply to the Lloyds Action *nunc pro tunc* to June 7, 2012; the Antecedent Debt Order as entered shall apply to the Lloyds Action *nunc pro tunc* to May 15, 2012; the Stern Order as entered shall apply to the Lloyds Action *nunc pro tunc* to April

13, 2012; and the Section 546(e) Order as entered shall apply to the Lloyds Action *nunc pro tunc* to May 16, 2012. The Lloyds Action will be covered by the Extraterritoriality Order, Antecedent Debt Order, Stern Order, and Section 546(e) Order in all respects.

4. *Picard v. Brown Brothers Harriman & Co.*, No. 12-cv-04723 (JSR) (the "Brown Brothers Action") was excluded from Exhibit A to the Antecedent Debt Order, Exhibit A to the Stern Order, and Exhibit A to the Section 546(e) Order because the Trustee served the Summons and Complaint in the Brown Brothers Action after the Withdrawal Motion Deadline, and the relevant Motion in the Brown Brothers Action was filed on June 12, 2012. The Trustee, SIPC and the moving Defendants in the Brown Brothers Action hereby agree that the Antecedent Debt Order as entered shall apply to the Brown Brothers Action *nunc pro tunc* to May 15, 2012; the Stern Order as entered shall apply to the Brown Brothers Action *nunc pro tunc* to April 13, 2012; and the Section 546(e) Order as entered shall apply to the Brown Brothers Action *nunc pro tunc* to May 16, 2012. The Brown Brothers Action will be covered by the Antecedent Debt Order, Stern Order, and Section 546(e) Order in all respects.

5. *Picard v. Clariden Leu AG (f/k/a Clariden Bank AG), et al.*, No. 12-cv-04724 (the "Clariden Action") was excluded from Exhibit A to the Stern Order and Exhibit A to the Section 546(e) Order because the Trustee served the Summons and Complaint in the Clariden Action after the Withdrawal Motion Deadline, and the relevant Motion in the Clariden Action was filed on June 15, 2012. The Trustee, SIPC and the moving Defendants in the Clariden Action hereby agree that the Stern Order as entered shall apply to the Clariden Action *nunc pro tunc* to April 13, 2012; and the Section 546(e) Order as entered shall apply to the Clariden Action *nunc pro tunc* to May 16, 2012. The Clariden Action will be covered by the Stern Order and Section 546(e) Order in all respects.

6. *Picard v. Schroder & Co. Bank AG,* No. 12-cv-04749 (the "Schroder Action") was excluded from Exhibit A to the Extraterritoriality Order, Exhibit A to the Antecedent Debt Order, Exhibit A to the Stern Order, and Exhibit A to the Section 546(e) Order because the Trustee will have served the Summons and Complaint in the Schroder Action after the Withdrawal Motion Deadline, and the relevant Motion in the Schroder Action was filed on June 15, 2012. The Trustee, SIPC and the moving Defendant in the Schroder Action hereby agree that the Extraterritoriality Order as entered shall apply to the Schroder Action *nunc pro tunc* to June 7, 2012; the Antecedent Debt Order as entered shall apply to the Schroder Action *nunc pro tunc* to May 15, 2012; the Stern Order as entered shall apply to the Schroder Action *nunc pro tunc* to April 13, 2012; and the Section 546(e) Order as entered shall apply to the Schroder Action *nunc pro tunc* to May 16, 2012. The Schroder Action will be covered by the Extraterritoriality Order, Antecedent Debt Order, Stern Order, and Section 546(e) Order in all respects.

7. *Picard v. Multi-Strategy Fund Ltd., et al.,* No. 12-cv-04840 (the "Multi-Strategy Action") was excluded from Exhibit A to the Extraterritoriality Order, Exhibit A to the Stern Order, and Exhibit A to the Section 546(e) Order because the Trustee served the Summons and Complaint in the Multi-Strategy Action after the Withdrawal Motion Deadline, and the relevant Motion in the Multi-Strategy Action was filed on June 20, 2012. The Trustee, SIPC and the moving Defendants in the Multi-Strategy Action hereby agree that the Extraterritoriality Order as entered shall apply to the Multi-Strategy Action *nunc pro tunc* to June 7, 2012; the Stern Order as entered shall apply to the Multi-Strategy Action *nunc pro tunc* to April 13, 2012; and the Section 546(e) Order as entered shall apply to the Multi-Strategy Action *nunc pro tunc* to May

16, 2012. The Multi-Strategy Action will be covered by the Extraterritoriality Order, Stern Order, and Section 546(e) Order in all respects.

8. *Picard v. Credit Agricole Corporate And Investment Bank D/B/A Credit Agricole Private Banking Miami, F/K/A Calyon S.A. D/B/A Credit Agricole Miami Private Bank, Successor in Interest to Credit Lyonnais S.A.*, No. 12-cv-04867 (the "Credit Agricole Action") was excluded from Exhibit A to the Antecedent Debt Order, Exhibit A to the Stern Order, and Exhibit A to the Section 546(e) Order because the Trustee commenced the Summons and Complaint in the Credit Agricole Action after the Withdrawal Motion Deadline, and the relevant Motion in the Credit Agricole Action was filed on June 20, 2012. The Trustee, SIPC and the moving Defendants in the Credit Agricole Action hereby agree that the Antecedent Debt Order as entered shall apply to the Credit Agricole Action *nunc pro tunc* to May 15, 2012; the Stern Order as entered shall apply to the Credit Agricole Action *nunc pro tunc* to April 13, 2012; and the Section 546(e) Order as entered shall apply to the Credit Agricole Action *nunc pro tunc* to May 16, 2012. The Credit Agricole Action will be covered by the Antecedent Debt Order, Stern Order, and Section 546(e) Order in all respects.

9. *Picard v. Royal Bank of Canada, et al.*, Adv. Proc. No. 12-01669 (BRL) (the "Royal Bank Action") was excluded from Exhibit A to the Extraterritoriality Order, Exhibit A to the Antecedent Debt Order, Exhibit A to the Stern Order, and Exhibit A to the Section 546(e) Order because the Trustee commenced the Royal Bank Action after the Withdrawal Motion Deadline, and the relevant Motion in the Royal Bank Action was filed on June 21, 2012. The Trustee, SIPC and the moving Defendants in the Royal Bank Action hereby agree that the Extraterritoriality Order as entered shall apply to the Royal Bank Action *nunc pro tunc* to June 7, 2012; the Antecedent Debt Order as entered shall apply to the Royal Bank Action *nunc pro tunc*

to May 15, 2012; the Stern Order as entered shall apply to the Royal Bank *nunc pro tunc* to April 13, 2012; and the Section 546(e) Order as entered shall apply to the Royal Bank Action *nunc pro tunc* to May 16, 2012. The Royal Bank Action will be covered by the Extraterritoriality Order, Antecedent Debt Order, Stern Order, and Section 546(e) Order in all respects.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Date: New York, New York
June 25 2012

EXHIBIT A

District Court Action	Docket No.	Counsel for Moving Defendants	Relevant Consolidated Briefing Order
Picard v. Legacy Capital Ltd., et al. (as filed by Legacy Capital, Ltd., Montpellier Resources Ltd., Khronos LLC, Khronos Capital Research LLC, Rafael Mayer, David Mayer, and Issac Jimmy Mayer)	11-cv-07764-JSR	Stevens & Lee, P.C. (for Legacy Capital, Ltd.) Nicholas F. Kajon (nfk@stevenslee.com) Butzel Long (Montpellier Resources Ltd.) Peter D. Morgenstern (morgenstern@butzel.com) Regina M. Alter (alter@butzel.com) Joshua E. Abraham (abraham@butzel.com) Dickstein Shapiro LLP (for Rafael Mayer, David Mayer, Khronos LLC & Khronos Capital Research LLC) Eric Fisher (fishere@dicksteinshapiro.com) Barry N. Seidel (seidelb@dicksteinshapiro.com) Stefanie Birbrower Greer (greers@dicksteinshapiro.com) Shaya M. Berger (bergers@dicksteinshapiro.com) Stearns Weaver Miller Weissler Alhadeff & Sitterson, PA (for Jimmy Mayer) Eugene E. Stearns (estearns@stearnsweaver.com)	(1) Extraterritoriality Order

Picard v. Natixis	11-cv-09501-JSR	Harold D. Moorefield, Jr. (hmoorefield@stearnsweaver.com) Carlos J. Canino (ccanino@stearnsweaver.com)	Davis & Gilbert LLP Joseph Cioffi (jcioffi@dglaw.com) Bruce M. Ginsberg (bginsberg@dglaw.com) Howard J. Rubin (hrubin@dglaw.com) James R. Serritella (jserritella@dglaw.com) Freshfields Bruckhaus Deringer LLP David Onorato (david.onorato@freshfields.com) Cheryl Howard (cheryl.howard@freshfields.com) Susan Higgins (susan.higgins@freshfields.com)	(1) Extraterritoriality Order
Picard v. Sarl Investment Company, Inc., et al	12-cv-02754-JSR	Cole, Scott, & Kissane, P.A. Jonathan Vine, Esq. (Jonathan.Vine@csklegal.com) Meyer, Suozzi, English & Klein, P.C. Jessica Gittle Berman (jberman@msek.com)	(1) Antecedent Debt Order	
Picard v. Lloyds TSB Bank PLC	12-cv-04722	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Brian M. Sabados (brian.sabados@kattenlaw.com)	(1) Extraterritoriality Order (2) Antecedent Debt Order (3) Stern Order (4) Section 546(e) Order	

Picard v. Brown Brothers Harriman & Co.	12-cv-04723	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Brian M. Sabados (brian.sabados@kattenlaw.com)	(1) Antecedent Debt Order (2) Stern Order (3) Section 546(e) Order
Picard v. Clariden Leu AG (f/k/a Clariden Bank AG), et al	12-cv-04724	O'Melveny & Myers LLP William J. Sushon (wsushon@omm.com) Shiva Eftekhari (seftekhari@omm.com)	(1) Stern Order (2) Section 546(e) Order
Picard v. Schroder & Co. Bank AG	12-cv-04749	Ropes & Gray LLP Robert S. Fischler (robert.fischler@ropesgray.com) Stephen Moeller-Sally (ssally@ropesgray.com)	(1) Extraterritoriality Order (2) Antecedent Debt Order (3) Stern Order (4) Section 546(e) Order
Picard v. Multi-Strategy Fund Ltd., et al	12-cv-04840	Friedman Kaplan Seiler & Adelman LLP Robert J. Lack (rlack@fklaw.com) Gregory W. Fox (gfox@fklaw.com)	(1) Extraterritoriality Order (2) Stern Order (3) Section546(e) Order
Picard v. Credit Agricole Corporate And Investment Bank D/B/A Credit Agricole Private Banking Miami, F/K/A Calyon S.A. D/B/A Credit Agricole Miami Private Bank, Successor in Interest to Credit Lyonnais S.A.	12-cv-04867	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com)	(1) Antecedent Debt Order (2) Stern Order (3) Section 546(e) Order
Picard v. Royal Bank of Canada, et al.		Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Brian M. Sabados (brian.sabados@kattenlaw.com) Mark T. Ciani (mark.ciani@kattenlaw.com)	(1) Extraterritoriality Order (2) Antecedent Debt Order (3) Stern Order (4) Section 546(e) Order

EXHIBIT C

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2011/041

On appeal from the Commercial Division

BETWEEN:

QUILVEST FINANCE LIMITED

Appellant/Defendant

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/042

BETWEEN:

[1] CAJA DE AHORROS Y MONTE DE PIEDAD DE MADRID
[2] DEUTSCHE BANK (SUISSE) SA

Appellants/Defendants

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/043

BETWEEN:

SNS GLOBAL CUSTODY BV

Appellant/Defendant

and

FAIRFIELD SENTRY LIMITED (In Liquidation)

Respondent/Claimant

HCVAP 2011/044

BETWEEN:

DEUTSCHE BANK TRUST COMPANY AMERICAS

Appellant/Defendant

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/045

BETWEEN:

[1] BANK JULIUS BAER & CO LIMITED
[2] LLOYDS TSB BANK
[3] MARTELLO NOMINEES LIMITED (formerly MEESPIERSON NOMINEES (GUERNSEY) LIMITED)
[4] ABN AMRO FUND SERVICES (ISLE OF MAN) NOMINEES LIMITED (formerly FORTIS (ISLE OF MAN) NOMINEES LIMITED)

Appellants/Defendants

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/046

BETWEEN:

WISE GLOBAL FUND LIMITED

Appellant/Defendant

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/047

BETWEEN:

[1] LOMBARD, ODIER, DARIER, HENTSCH & CIE
[2] MIRABAUD & CIE

Appellants/Defendants

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/048

BETWEEN:

[1] SG PRIVATE BANKING (SUISSE) SA
[2] LOMBARD, ODIER, DARIER, HENTSCH & CIE

Appellants/Defendants

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/049

BETWEEN:

[1] EFG BANK SA
[2] EFG BANK EUROPEAN FINANCIAL GROUP SA
[3] PICTET & CIE
[4] SG PRIVATE BANKING (SUISSE) SA

Appellants/Defendants

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/050

BETWEEN:

[1] EFG BANKS SA
[2] SG PRIVATE BANKING (SUISSE) SA

Appellants/Defendants

and

FAIRFIELD SENTRY LIMITED (In Liquidation)

Respondent/Claimant

HCVAP 2011/051

BETWEEN:

PICTET & CIE

Appellant/Defendant

and

FAIRFIELD SENTRY LIMITED (In Liquidation)

Respondent/Claimant

HCVAP 2011/052

BETWEEN:

CREDIT SUISSE LONDON NOMINEES LIMITED

Appellant/Defendant

and

FAIRFIELD SENTRY LIMITED (In Liquidation)

Respondent/Claimant

HCVAP 2011/054

BETWEEN:

[1] CREDIT SUISSE LONDON NOMINEES LIMITED
[2] BUCKMORE NOMINEES LIMITED

Appellants/Defendants

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/055

BETWEEN:

CREDIT SUISSE LONDON NOMINEES LIMITED

Appellant/Defendant

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/056

BETWEEN:

CREDIT SUISSE LONDON NOMINEES LIMITED

Appellant/Defendant

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/058

BETWEEN:

[1] UBS AG NEW YORK
[2] UBS (CAYMAN) LIMITED

Appellants/Defendants

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/059

BETWEEN:

[1] UBS (CAYMAN) LIMITED
[2] UBS (LUXEMBOURG) SA

Appellants/Defendants

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/060

BETWEEN:

[1] UBS (CAYMAN ISLANDS) LIMITED
[2] UBS AG NEW YORK
[3] UBS (CAYMAN) LIMITED

Appellants/Defendants

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/061

BETWEEN:

UBS (LUXEMBOURG) SA

Appellant/Defendant

and

FAIRFIELD SENTRY LIMITED (in Liquidation)

Respondent/Claimant

HCVAP 2011/062

BETWEEN:

FAIRFIELD SENTRY LIMITED (In Liquidation)

Appellant/Claimant

and

[1] ALFREDO MIGANI & 22 others
[2] BANCO GENERAL SA/BANCA PRIVADA & 30 others
[3] BANK JULIUS BAER & CO LTD & 26 others
[4] BANK JULIUS BAER & CO LTD and others
[5] ARBITRAL FINANCE INC and 23 others
[6] BANK JULIUS BAER & CO LTD & 33 others
[7] WISE GLOBAL FUND LIMITED
[8] CREDIT SUISSE LONDON NOMINEES LIMITED

Respondents/Defendants

Before:

The Hon. Mde. Janice M. Pereira — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances:

Mr. Mark Hapgood, QC, with him, Mr. Phillip Kite, Mr. Kissock Laing and Ms. Colleen Farrington, for the Harney Westwood & Riegels Appellants/Respondents
Mr. David Lord, QC, with him, Mr. Robert Foote and Ms. Claire Goldstein, for the Ogier Appellants/Respondents

Mr. Dominic Chambers, QC, with him, Ms. Arabella Di Iorio, for the Maples & Calder Appellants/Respondents
Mr. David Railton, QC, with him, Mr. Paul Webster, QC and Ms. Nadine Whyte, for the O'Neal Webster Appellants/Respondents
Mr. Michael Brindle, QC, with him, Mr. Andrew Westwood, Mr. William Hare and Mr. Robert Nader, for Fairfield Sentry Limited

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2012: January 17, 18;
June 13.

Civil appeal – Commercial – Net Asset Value – Ponzi scheme – Trial of Preliminary Issues – What constitutes a certificate as to Net Asset Value per Share and Redemption Price within the meaning of Article 11(1) of Articles of Association of Fairfield Sentry – Mistake – Whether NAV per Share should be revalued – Contract – Mutual mistake – Common mistake – Whether surrendering shares was good consideration for payment of the Redemption Price – Whether contract voidable in equity or common law – Whether restitutionary claim available

Fairfield Sentry Limited ("Sentry") had invested a substantial amount of its funds with Bernard L. Madoff Investment Securities LLC ("BLMIS") on behalf of its shareholders between 1997 and 2008. BLMIS collapsed shortly thereafter when its proprietor, Bernard L. Madoff, admitted that it had been run as a Ponzi scheme. Both companies subsequently went into liquidation, BLMIS in the United States, and Sentry in the Territory of the Virgin Islands.

Sentry commenced a number of proceedings in the Virgin Islands against various former shareholders who had redeemed their shares in the company. The Articles of Association of Sentry stipulated that the price at which the shares were to be redeemed was to be calculated by reference to the company's Net Asset Value ("NAV"). Article 11 also provided that: "Any certificate as to the Net Asset Value per Share or as to the ... Redemption Price therefor given in good faith by or on behalf of the Directors shall be binding on all parties."

Sentry argued that in redeeming the shares, the NAV had been calculated under a mistake since BLMIS was in fact operating a Ponzi scheme and Sentry's investments in BLMIS were lost from the date of their investment in the company. Accordingly, its NAV was at all times either nil or a nominal value, so that the aggregate redemption sums should have been either nil or nominal. Sentry therefore contended that the former shareholders had been unjustly enriched at its expense and were liable to make restitution to the company of the amounts paid to them when the shares were redeemed.

The former shareholders (the defendants in the court below), in their pleaded defences contended, in essence, that the redemption proceeds had been paid out under a certificate as to the NAV pursuant to Article 11 and as such was conclusive and binding on Sentry. They relied on various documents comprising emails, contract notes, monthly statements as well as computer screen shots ("the Documents") as constituting certificates for the purposes of Article 11. They also contended that in surrendering their shares they gave good consideration for the payment of the Redemption Price and as such this was a complete defence to Sentry's claim.

The Article 11 Defence and the Good consideration Defence formed the basis of preliminary issues which were tried by the court below. The trial judge found in favour of Sentry in respect of the Article 11 Defence but found in favour of the former shareholders on the Good Consideration Defence. He subsequently, pursuant to a summary judgment application made by one of the former shareholders, dismissed Sentry's claims. The former shareholders appealed the judge's findings in respect of the Article 11 Defence. Sentry appealed against the judge's findings in relation to the Good Consideration Defence and in respect of the summary judgment given against it dismissing its claims.

Held: dismissing the appeals against the learned trial judge's findings in relation to the Article 11 Preliminary Issues and upholding his finding on the Article 11 Defence; awarding one set of costs to Fairfield Sentry to be in two-thirds of the amount assessed below, and dismissing the appeal against the learned trial judge's finding in relation to the Good Consideration defence and the grant of Summary Judgment and awarding costs to the former shareholders (as one set of costs) to be fixed at two thirds of the amount as assessed below, that:

1. Article 11(1) does not require that a certificate be signed. If this was the case, then the Article would have expressly so stated. The absence of a signature on a Document would not necessarily preclude it from being deemed a certificate for the purpose of Article 11(1).

   North Shore Ventures Ltd. v Anstead Holdings Inc. and Others [2011] 3 W.L.R. 628 distinguished.

2. The learned trial judge was right in holding that none of the Documents could have amounted to certificates. Firstly, the plain wording of the Article is that there can be a determination published without it having been certified. Secondly, the function that the Directors had delegated to Fairfield Greenwich and Citco was that of calculation; there is nothing in the documentation that indicates a delegation of either determination or certification. Thirdly, there is no reason why under Article 11 there cannot be an uncertified determination which is not binding; the plain meaning of the wording of the Article is that not every determination is intended to be binding on the parties. Fourthly, the mere stating of a precise price will not suffice for any Document to amount to a certificate. The learned trial judge was correct to find that a certificate must be something more than a simple statement.

Lastly, the certificate must have been issued either by the Directors or by some agency to whom the power to certify was delegated. The Documents were not issued by the Directors, nor was there any delegation of the power to certify.

3. A claimant may be entitled to restitution if he can show that a defendant was unjustly enriched at his expense. However, this payment may be irrecoverable where the claimant was required to pay by contract. In the present case, there were specified contractual obligations to be fulfilled by both Sentry and former shareholders by virtue of Article 10 of Sentry's Articles of Association. The former shareholders fully performed all their obligations under the contract. Upon a request by them for redemption of their shares, Sentry was contractually bound to pay the Redemption Price for the shares, the Redemption Price having been determined by the Directors of Sentry. Sentry, in paying the Redemption Price did so in the discharge of its debt obligations to the redeeming shareholders pursuant to Sentry's Articles which remained perfectly valid and in force.

   Goff & Jones: The Law of Unjust Enrichment (8th edn., Sweet & Maxwell 2011) considered.

4. The alleged mistaken calculation of the NAV does not undermine the legal obligation which required that Sentry pay the Redemption Price to the former shareholders upon their request. Sentry's contractual obligations gave rise to a debt obligation whatever the value of the shares and the surrender of the rights to the shares by the former shareholders was good consideration which would defeat Sentry's restitutionary claim.

5. The fact that BLMIS was operating as a Ponzi scheme did not render the contract between Sentry and the former shareholders impossible to perform. The subject matter of the subscription contract was the shares; as such the subject matter existed. The contract for the shares was with Sentry and not with BLMIS, and therefore it mattered not what the value of Sentry's investment in BLMIS was as this did not form part of the contract. It was clearly possible for Sentry to redeem or purchase the shares at a price which was fixed by its own Directors. Essentially, there remained a contract between Sentry and the former shareholders which was never invalidated. On the true construction of the contract it was still possible to be performed.

   Deutshe Morgan Grenfell Group plc v Inland Revenue Commissioners and another [2007] 1 A.C. 558 applied; **Bell and Another v Lever Brothers, Limited** [1932] A.C. 161 applied.

6. Mistake as to a quality of the thing contracted for would not affect assent unless it was the mistake of both parties, and was as to the existence of some quality which made the thing without the quality essentially different from the thing as it was believed to be. It cannot be said that there existed a common mistake for the alleged mistaken calculation of the NAV was solely a mistake of Sentry's. Likewise it cannot be said that there was anything essentially different about the subscription contract when it became known that BLMIS was operating as a Ponzi scheme, for the subscription contract was for the shares and the redemption payment was for the surrender of the shares. Thus, Sentry's payment for the redeemed shares based on Sentry's alleged mistaken calculation of the NAV did not nullify Sentry's obligation to pay on redemption.

   Bell and Another v Lever Brothers, Limited [1932] A.C. 161 applied; **Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd** [2003] Q.B. 679 applied.

7. Applicants for summary judgment are entitled to have their applications dealt with on the facts as they are, not as they might be. The adjournment sought by Sentry in the hope of turning up information which may assist or strengthen its case was rightly refused.

JUDGMENT

[1] **MITCHELL, JA [AG.]**: Fairfield Sentry Limited ("Sentry") was the largest of the 'feeder funds' which invested monies with Bernard L. Madoff Investment Securities LLC ("BLMIS") on behalf of its shareholders between 1997 and 2008. BLMIS collapsed in December 2008 when its proprietor, Bernard L. Madoff, admitted that it had been run as a Ponzi scheme. BLMIS is now in liquidation in the United States. Sentry was placed in liquidation in the Virgin Islands on 21st July 2009. It has commenced a number of proceedings in the Virgin Islands ("the Clawback Actions") against various shareholders who redeemed their shares in Sentry. The total amount claimed by Sentry in the Clawback Actions is more than US$1 billion.

[2] Sentry's Articles of Association ("the Articles") stipulated that the price at which the shares were to be redeemed should be calculated by reference to the Net Asset Value ("NAV") of Sentry. The Articles contained detailed provisions as to how the NAV was to be calculated. The claim made by Sentry in each of the Clawback

Actions is identical and is based on an alleged mistake in the calculations of the NAV of the shares redeemed by Sentry at the request of the shareholder in question.

[3] Sentry alleges that the NAV was calculated under a mistake as BLMIS was in fact operating a Ponzi scheme, and Sentry's investments in BLMIS were lost from the date of their investment in BLMIS. As a result, Sentry alleges, its NAV was at all times either nil or a nominal value, so that the aggregate redemption sums should have been either nil or nominal. The consequence was that the defendants to the Clawback Actions have been unjustly enriched at its expense. The defendants are liable to make restitution to Sentry of the amounts paid to them when Sentry redeemed their shares.

[4] The defendants to the Clawback Actions have all served defences. Broadly speaking, the individual defences are similar. Some are factually intensive. If a full trial had been held of all the matters raised in the defences it would have been a lengthy and expensive exercise. In order to try to avoid that, some of the defendants (the "P I Defendants") proposed that preliminary issues be tried in relation to two of the pleaded defences, the Article 11 Defence and the Good Consideration Defence. The learned trial judge accepted this proposal and formulated the preliminary issues himself. The preliminary issue trial related to a total of eight of the Clawback Actions. There were two issues, the first of which related to the Article 11 Defence and the second, to the Good Consideration Defence. They were:[1]

> "(1) Whether any (and, if so, which) of the documents copies of which are exhibited at pages 2 to 17 inclusive of exhibit PRK-1 to the affidavit of Phillip Kite sworn in the proceedings the short title and first reference to which is Fairfield Sentry Limited (in liquidation) -v- Bank Julius Baer & Co Limited and others BVIHC(COM) 30/2010 on 8 March 2011 (or copies of any further documents which may be exhibited to any witness statement made in

[1] See "Schedule of Preliminary Issues to be tried" which forms part of the order of Bannister J. dated 20th April 2011.

connection with this issue) ("the documents") is a certificate within the meaning of Article 11(1) of the Articles of Association of the Claimant ("Article 11(1)", "the Articles");

(2) If the answer to (1) is yes, whether any (and, if so, which) of the documents is:

(a) a certificate as to the Net Asset Value per share ('NAV'); or

(b) a certificate as to Redemption Price within the meaning of the Articles;

(3) If the answer to (2)(a) or (b) is yes:

Whether the publication or delivery by the Claimant

(a) as a matter of information only, or

(b) in connection with a redemption request

of a document containing substantially the same items of information as a document identified as falling within (2)(a) or (b) above to a redeeming or redeemed Member of the Claimant precludes the Claimant from asserting that money paid to that redeeming or redeemed Member on redemption exceeded the true Redemption Price and as such is recoverable as to the excess from such redeeming Member.

For the purposes of this issue 'document' includes emails and materials accessible on a website maintained by the Claimant or Citco Fund Services (Europe) BV or Fairfield Greenwich Group.

(4) Whether a redeeming Member of the Claimant in surrendering its shares gave good consideration for the payment by the Claimant of the Redemption Price and, if so, whether that precludes the Claimant from asserting that the money paid to that Member on redemption exceeded the true Redemption Price and as such is recoverable as to the excess from such redeeming Member."

The Article 11 Defence

[5] The Article 11 Defence refers to Article 11 of the Articles which makes provision for the determination of the NAV. The Article provides:

"11. (1) The Net Asset Value per Share of each class shall be determined by the Directors as at the close of business on each Valuation Day (except when determination of the Net asset Value per Share has been suspended under the provisions of paragraph (4) of this Article), on such

other occasions as may be required by these Articles and on such other occasions as the Directors may from time to time determine.

The Net Asset Value per Share shall be calculated at the time of each determination by dividing the value of the net assets of the Fund by the number of Shares then in issue or deemed to be in issue and by adjusting for each class of Shares such resultant number to take into account any dividends, distributions, assets or liabilities attributable to such class of Sharers pursuant to paragraph (2) of Article 4, all determined and calculated as hereinafter provided.

Any certificate as to the Net Asset Value per Share or as to the Subscription Price or Redemption Price therefor given in good faith by or on behalf of the Directors shall be binding on all parties."

There is no definition in the Articles as to the meaning of the word 'certificate' in the last paragraph of this Article.

[6] The first paragraph of Article 11(1) provides that the NAV per Share shall be determined by Sentry's Directors at the close of business on each Valuation Day and it stipulates how the NAV is to be calculated. The P I Defendants' position was that the above provision was satisfied when their shares in Sentry were redeemed. The legal effect is to prevent Sentry from attempting to go behind, disturb or recalculate the NAV.

[7] Some of the documents referred to in the Preliminary Issues (the "Documents") were issued by Fairfield Greenwich (Bermuda) Ltd. ("Fairfield Greenwich"). Fairfield Greenwich was Sentry's investment manager, to which the Directors had contractually delegated the day to day management of the fund. These Documents included e-mails stating the NAV per Share. The P I Defendants submitted that these were given with the actual and/or ostensible authority of the Directors, and so constituted 'certificates' within the meaning of Article 11(1). Sentry's witness, Albertus Lokhorst, formerly a Senior Account Manager employed by Citco, said in paragraph 7 of his witness statement that Citco was authorised by Fairfield Greenwich to issue monthly statements to registered shareholders.

"Citco" refers to Citco Fund Services (Europe) BV. Citco was the manager of Sentry under an Administration Agreement between Citco and Sentry dated 20th February 2003. In those circumstances, the P I Defendants submitted, Fairfield Greenwich itself must have had actual authority to send e-mails on behalf of the Directors containing the same information as to the NAV per Share as the monthly statements. Alternatively, and at the very least, Fairfield Greenwich had ostensible authority to send those e-mails by virtue of its position as Sentry's investment manager. This is the Article 11 Defence.

[8] The P I Defendants also alleged that, irrespective of the NAV per Share, they gave good consideration for Sentry's payment of the Redemption Price for the shares and that also provides them with a complete defence to Sentry's claims (the "Good Consideration Defence") which is dealt with by my learned sister Pereira J.A. whose judgment I have had the opportunity to read and with which I entirely agree and have nothing further to add.

[9] A number of points are to be noted about the structure and terms of Article 11(1):

(a) The first sub-paragraph provides for the *determination* by the Directors of Sentry of the NAV per Share at the close of business on each Valuation Day;

(b) The second sub-paragraph provides how the NAV per Share is to be *calculated* at the time of each determination;

(c) The third sub-paragraph then provides that *any certificate* as to the NAV per Share given in good faith by or on behalf of the Directors of Sentry is binding on the parties.

[10] The argument on the Article 11 Defence before the learned trial judge turned on whether or not there had been the requisite *certification* of the NAV by or on behalf of the Directors. The significance of the certification issue for the P I Defendants, they argued, was that once the NAV had been certified by or on behalf of the

Directors given in good faith it would be binding on all parties, and the Clawback Actions must fail.

[11] It is common ground that, by the Administration Agreement, Citco was obliged, subject to the orders, instructions and directions of the Directors, to calculate and publish the NAV per Share and to deal with all correspondence and communications in relation to the redemption of Shares. The P I Defendants submitted that, in consequence of this Agreement, Citco had actual and/or ostensible authority to issue certificates on behalf of the Directors within the meaning of the Articles, and the Documents issued by Citco constituted certificates "given ... on behalf of the Directors" within the meaning of Article 11(1). A certificate can be given not only by the Directors but by another on their behalf. Sentry submitted that none of the Documents amounted to a certificate, and the judge was right so to find. While the Directors had delegated to Citco the power to *calculate* the NAV they had not similarly delegated the power to *determine* or the power to *certify*.

[12] The judge's findings were as follows:

> "[29] The question, therefore, is whether any of the documents relied upon by the Defendants on this application is a certificate 'as to' the Net Asset Value and/or Redemption Price which has been signed by or on behalf of the Directors.
>
> "[30] The contract notes cannot, in my judgment, be certificates within the meaning of Article 11(1). Not only are they unsigned, but their purpose was not to certify a determination made by the Directors but to evidence the terms upon which Sentry itself was purchasing the shares of the redeeming member. They are documents produced on behalf of Sentry, not on behalf of the Directors as the body responsible for determining the NAV.
>
> "[31] The monthly statements certainly contain, within the section headed 'Fund Net Asset Values,' the information which one would expect to find in a certificate given by or on behalf of the Directors, but that does not, in my judgment, make them certificates signed by or on behalf of the Directors under Article 11. They are documents from which the inference may be drawn

that the Directors have arrived at the valuation contained in the relevant section of the statement but that is not, in my judgment, the same as a certificate 'given' by or on behalf of the Directors. The statements are not signed by or on behalf of the Directors. If the question is asked whether the monthly statements, or any particular parts of the monthly statements, are certificates given on behalf of the Directors as to their valuation of the fund at any particular date, the answer must, in my judgment, be 'No'. They are documents distributed by the fund administrators informing investors, among other things, of the NAV determined, it is to be inferred by the recipient, by or on the instructions of the Directors at given dates. That does not make them certificates given by or on behalf of the Directors. Chesterton's letter of 21 March 1974[15] [*Campbell v Edwards [1976] 1 WLR 403*] was a certificate. The monthly statements, in my judgement, are not.

"[32] For the same reasons, none of the emails (certainly not the emails from [Fairfield Greenwich]) can be regarded as a certificate given by or on behalf of the Directors. The same goes for the screenshot.

"[33] The documents relied upon by the Defendants are compelling evidence of the NAV determined by the Directors as at particular Valuation Days but they are not, in my judgment, certificates within the meaning of Article 11(1)."

[13] The judge handed down his judgment on 16th September 2011. By the above, he, in effect, determined the Article 11 issue in favour of Sentry. In essence, the judge found simply that there was no 'certificate' given by or on behalf of the Directors. He held that none of the documents relied on by the P I Defendants was a 'certificate' within the meaning of Article 11(1) and therefore there was nothing that was binding on Sentry and the P I Defendants. It is the judge's finding in relation to the Article 11 issue that constitutes the appeals listed as HCVAP 2011/41-52, 54-56, and 58-61 brought by the P I Defendants ("from now on referred to as the "P I Appellants") in this matter.

The Argument

[14] The P I Appellants submitted that while the judge correctly recognised that, in determining whether any of the Documents relied upon by the P I Appellants was a certificate, he had to consider Article 11(1) "against the background of the commercial purposes which Sentry's Articles of Association were intended to regulate". However, having recognised that the commercial purposes background was determinative, the judge did not identify those purposes and failed to take any such purposes into account.

[15] The P I Appellants submitted that the evidence which the judge failed to take into account came from Mr Peter Füglistaller, the Head of Special Mandates in Hedge Fund Execution at Credit Suisse (Zurich) AG at paragraph16 of his witness statement:

> "In my experience the confirmation of the NAV and Redemption Prices by these documents [that is, the documents relied upon by the Appellants as being "certificates"] is perfectly standard in the funds industry. Regular and accessible information on the NAV figure is clearly vital for an investor and investors rely on administrators, in this case Citco, to confirm the NAV."

[16] The P I Appellants submitted that the background facts which the judge failed to take into account included the following:

(1) The central importance of the calculation of the monthly NAV to Sentry's entire business operations, and in particular to the price of its shares for subscription and redemption purposes;

(2) The wide-ranging and far-reaching decisions made by investors and others in reliance on the NAV as determined in accordance with the Articles;

(3) The importance of certainty and finality in all commercial dealings, but especially so in the context of redeeming shares in Sentry because many of the shareholders were acting as nominees and would therefore have to account to their clients for the proceeds of redemption.

[17] The P I Appellants relied on a number of Documents as being certificates within the meaning of Article 11(1). These included: (a) the contract notes; (b) the monthly statements; (c) the e-mails; and (d) the screenshot. The judge wrongly held, they submitted, that the contract notes were not certificates within the meaning of Article 11. The *contract notes* were sent out by Citco on behalf of the Directors. They evidenced the terms on which Sentry was purchasing the redeemed shares. The terms on which Sentry was purchasing the shares were dictated by the determination of the NAV and the Redemption Price made by the Directors. The *monthly statements* were issued by Citco and contained the NAV per Share as determined by Citco. They were issued by Citco under express authority from the Directors. They contained the NAV per Share as calculated by Citco under the express authority of the Directors. The judge held that they were not certificates. The *e-mails* were from Citco and Fairfield Greenwich to various customers. They showed the final NAV per Share on Valuation Days. The *screenshots* were captures taken from Citco's online pricing service website. They also showed the NAV per Share on Valuation Days, and were similarly, they submitted, wrongly held by the judge not to be certificates.

[18] Mr. Brindle, QC, on behalf of Sentry, submitted that the learned trial judge was correct to hold that none of the Documents amounted to a certificate as described in Article 11. None of the *contract notes* called itself a certificate or certified anything. It was not signed by anyone. In the box it said that the transaction has been effected "In accordance with your instructions". It was no more than a note recording a transaction, a contract. It went on to say "For more information ... please contact Citco." If it was a certificate it would be final, clear and binding, and there would be no suggestion that further information might be forthcoming. This was a Citco document, and there was no indication that it was issued on behalf of the Directors. Similarly, he submitted, the *monthly statements* consisted principally of a summary of activities during a particular month. While a part of it did contain a statement of the NAV, it was principally designed to be a record or

account of monthly activities. It was not signed, nor did it call itself a certificate. Mr. Brindle, QC submitted that these characteristics were indicators but were not conclusive of their being certificates. The *e-mails* were signed but they appeared to be designed to give information. The phrase, "Please be advised ..." suggested the e-mail conveyed information, gave advice, not that it certified anything. They were entirely Citco documents and did not possess any degree of formality or certification, nor did they suggest they were given for or on behalf of the Directors of Sentry. Some of them were headed "Pricing information", so that is what they were. They ended with words to the effect, "If you do not wish to receive periodic messages such as this one in future, please unsubscribe by clicking here." This was not what one would expect from a certificate. The *screenshots*, he submitted, were grabs from the Citco website where information was stored. Such a screenshot could not possibly be held to be a certificate.

[19] The P I Appellants further submitted that the judge was wrong to hold in paragraph 27 of his judgment that in order for a document to be a certificate it needed to be signed by the Directors or on their behalf. He was wrong to hold that an unsigned certificate is a contradiction in terms. The absence of a signature is not determinative of the question whether a document is a certificate. By giving an unduly technical and narrow construction to the word 'certificate', Sentry seeks to exclude all the documents that would normally be issued in the course of processing redemption requests.

[20] Sentry, in response, submitted that the judge was right to find as he did. The absence of a signature is not a trump point, but an indication point. While a document is not required to be signed to qualify as a 'certificate', it would be some indication as to whether the document had the requisite degree of formality. None of the Documents has either the necessary formality or attests to the truth of the matters contained in it. In any event, Sentry submitted, even if one or more of the Documents was a 'certificate', it does not follow that any action based on mistake is thereby precluded. The phrase "binding on all parties" was designed to ensure

they could not argue over the calculation of the NAV, not to prevent restitution in a case of fundamental mistake.

[21] The P I Appellants further submitted that the judge was wrong to hold in paragraph 27 of his judgment that "all parties" in the context of the Articles must mean all parties bound by those Articles. These would be the members as among themselves, and each member on the one hand and Sentry on the other. The judge failed to appreciate the distinction between the NAV per Share and the Redemption Price. The last paragraph of Article 11(1) refers to a certificate as to the NAV per Share or as to the Subscription or Redemption Price. A certificate as to the Subscription or Redemption Price would only ever be issued to the subscriber or redeemer in question (as opposed to all shareholders). Accordingly, the judge should have held, it was submitted that the phrase "all parties" in Article 11(1) means, in relation to the Subscription Price and the Redemption Price, all parties to the certificate (as opposed to all parties bound by the Articles).

[22] The P I Appellants further submitted that the learned trial judge was wrong to hold in paragraph 28 of his judgment that a document will fall within the final paragraph of Article 11(1) only when it is a certificate given by or on behalf of the Directors in their character as the body responsible for determining the NAV under Article 11. That adds, they submitted, an unnecessary and unwarranted requirement which is not found in the words of Article 11(1) which merely requires the certificate to be given "by or on behalf of the Directors". The Article makes no distinction between different characters in which the Directors may act when they exercise the powers and fulfil the responsibilities given to them as Directors. The judge should have held that the correct question to ask was simply whether the Documents relied upon by the P I Appellants as constituting certificates were issued "by or on behalf of the Directors".

[23[The P I Appellants further submitted that the judge was wrong at paragraph 30 of his judgment to discount the possibility of the contract notes being certificates on

the ground that their purpose was not to certify a determination made by the Directors but to evidence the terms upon which Sentry itself was purchasing the shares of the redeeming members. This, they submitted, was an unsustainable distinction, because under Article 10(2) the Redemption Prices that the shareholders were entitled to receive were based on the NAV determinations made by the Directors. Any formal communication of a Redemption Price necessarily was a certification of the determination of both the NAV and the Redemption Price, i.e., the terms on which the shares of the redeeming members were being purchased by Sentry. The question was one of formality, but this was not dealt with by the judge.

[24] In any event, it was submitted, the judge should have held that, whatever other purposes the Documents may or may not have served, each of them fulfilled the purpose of being a certificate within the meaning of Article 11(1), and the fact that a Document may have served other purposes did not prevent it from being a certificate.

The Law

[25] No conclusive authority, lexicographical, judicial, or statutory, on the qualities required for a document to be a 'certificate' has been produced for the assistance of the Court. The P I Appellants offered the case of **The Queen v The Vestry of St Mary, Islington**.[2] This concerned a statutory provision for the costs of maintaining disused churchyards to be "repaid ... upon the certificate of the ... churchwardens". The churchwarden sent a letter asking for payment of £500 before he had entered into a contract for the works. He then entered into the contract and incurred liability for an amount in excess of £500. The Court held that he was entitled to be "repaid" even though he was not yet out of pocket. Pollock B. held at page 527 that the requirement for a certificate was "amply satisfied by the letter".

[2] (1890) L.R. 25 Q.B.D. 523.

[26] The P I Appellants also offered **Rexhaven Ltd. v Nurse and Another**.[3] This concerned forfeiture of a lease for non-payment of the service charge. The lease required the management company to estimate the costs for the next quarter and to send the lessee:

> "... a certificate of the amount so estimated and of the proportion thereof to be contributed by the lessee and the lessee shall be liable to contribute as aforesaid and such certificates shall be binding and conclusive and the amount so certified shall be paid by the lessee to the Management Company on demand".

[27] By the time of the disputed events, the amounts due in respect of the service charge had become payable directly to the landlord. The landlord's agents wrote a letter to the lessee, expressed as a request for payment of £190 under the lease in respect of the interim service charge, and a further letter giving a detailed breakdown of "our estimate of service charge expenditure". Judge Colyer, QC, sitting in the Chancery Division, held that the second letter was a certificate. He said:[4]

> "I accept, however, the propositions that Mr Neuberger has relied upon and in these circumstances I find that the letter of October 27, which of course was precise as to its figures, did satisfy the requirement for "a certificate", by which word I see the draftsman of this lease was requiring nothing more or less than a formal statement in writing of the precise amount or amounts. I would observe, but this is *obiter dicta*; that if the figures had been scribbled on the back of an envelope and handed in a highly informal manner to the tenant, in my view that would not be enough. Some degree of solemnity or formality is needed for a document to satisfy the requirement of this lease. It is not enough that it be scribbled down casually. It has to be written down and it has to be written down with precision; but here it was. I therefore see no hope of success in the defence that there was no good certificate in this case."

The P I Appellants rely on these two cases as authority for the proposition that a certificate is not required to contain the word 'certificate' for it to amount to such.

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[3] (1996) 28 H.L.R. 241 at 244.
[4] At p. 250.

[28] The dictionaries provide little assistance in determining whether any of the Documents relied on in this case amount to a 'certificate'. **Osborn's Concise Law Dictionary**[5] defines the word as meaning "A statement in writing by a person having a public or official status concerning some matter within his knowledge or authority". The definition in **Jowitt's Dictionary of English Law**[6] is identical, while giving examples of the principal varieties of certificates relating to legal matters taken from the cases and statutes. **Daniel Greenberg: Stroud's Judicial Dictionary of Words and Phrases**[7] gives various examples of the use of the word from the cases and statutes, and defines it as follows: "A 'certificate', ex vi termini [from the force of the term], imports that the party certifying knows the fact that he certifies", and cites Kenyon C.J. in **Farmer v Legg**.[8] What is certain is that the document is not required to be headed with the word "certificate". Further, the document would import that the party issuing it was certifying that he knows the fact that the document certifies.

[29] There are very few decisions in the West Indies of assistance. **Re Stewardship Credit Arbitrage Fund Ltd.**[9] was a decision of the Commercial Court in Bermuda. In this case, the company's bye-laws included a 'certificate' provision that was materially identical to that in Article 11(1). The company argued that the particular NAV was wrong because 70% of the assets had been lost to a Mr. Petters who had been charged with fraud in the United States (the "Petters fraud") and there was no realistic prospect that the company would recover value from the assets. In delivering his judgment refusing to recalculate the NAV, Bell J. emphasised the enormous practical difficulties of recalculating the NAV. He said:

> "[47] This argument ignores at least two factual matters. First, it ignores the provisions of bye-law 19.2 which provides:

[5] 11th edn., Sweet & Maxwell 2012.
[6] 3rd edn., Sweet & Maxwell 2012.
[7] 7th edn., Sweet & Maxwell 2012.
[8] 7 T.R. 191.
[9] (2008) 73 WIR 136.

> 'Any certificate as to Net Asset Value, a Class NAV, a Series NAV or the Net Asset Value per Participating Share of any Class or Series or as to the Subscription Price or Redemption Price therefor given in good faith by or on behalf of the Board shall be binding on all parties.'

For the company, it was suggested that there was no evidence that a certificate had been provided by the NAV calculation agent, who was identified in the prospectuses. Any such certificate would of course have been available to the company, but not to the Gottex funds. One would have expected that if the company wished to run this argument, it would have furnished evidence as to the position in relation to the production of a certificate.

[48] But that point apart, it is perfectly apparent that there are enormous difficulties in determining the true position, even if such an argument were to be accepted. There is no logic in simply recalculating the NAV at the redemption date for the Gottex funds of 31 March 2008, when the Petters fraud was not discovered until some months later; there would also be a need to effect a recalculation of the position when the Gottex funds first invested, and no doubt also in relation to all other redemptions and subscriptions. As Mr Potts put it, it would be necessary to unravel the entire operation of the fund and the magnitude of such a task cannot be over emphasised. It also seems to me that to do the exercise properly, the company would need to know the true position in relation to the value of the underlying loan collateral for each revision date, or, put another way, the extent of the Petters fraud in relation to each such collateral, a truly impossible task. No doubt that is precisely why the relevant bye-law contained the provision which it did, making for certainty once the NAV had been determined."

From the judgment of Bell J., a number of principles can be extracted. One, it is clear that the parties proceeded on the assumption that no certificate had been issued. It was accepted that a certificate would have barred the requested revaluation. The company itself wished to revalue the NAV. It would not have been in its interest to produce a certificate shutting it out from such a revaluation. But, neither did the other party argue that the issuing of contract notes and other documentation quoting the NAV amounted to a certificate. So, the point was not decided by Bell J.

[30] **In the Matter of Livingston International Fund Ltd. (In Liquidation)**[10] was a decision of Rawlins J. (as he then was) in the High Court in the Territory of the Virgin Islands. The Fund was being wound up. Interested parties had concerns and positions that were contrary to some of the recommendations that the Liquidator made in his Reports. The concerns related mainly to the calculation of the NAV and the payment dates for valuations for unpaid redemptions and outstanding redemption requests that preceded the suspension of redemption payments. The Liquidator recommended that the NAV should be recalculated for a particular period. Parties that would be adversely affected by a recalculation did not agree with this recommendation. The Liquidator referred the issues to the Court for determination. Regulation 69 of the Articles of Association provided, according to paragraph [74] of the judgment, that the NAV for the purpose of issuing and redeeming shares shall be determined by or under the direction of the Directors as at each applicable Valuation Date. It also stated that if the Directors and the auditors disagreed on the NAV and were unable to arrive at an agreement, the Directors should make the final determination. Further, Regulation 72 provided that any valuations made pursuant to the Articles shall be binding on all parties. Rawlins J. decided:

> "[84] ... Regulation 72 of the Articles of Association of the Fund is intended to promote certainty and business efficacy. Investors, particularly significant investors in private Funds, make far reaching decisions and, in turn, incur significant financial obligations on the basis of reported NAV's. ... For purposes of business efficacy in this case, I see no good reason to find that the published NAV's are not binding under Regulation 72."

This case can be distinguished from ours as a certificate was not required by the Articles before the NAV would be binding on the parties. This judgment gives us no assistance in identifying what could amount to a certificate.

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[10] British Virgin Islands Claim No. BVIHCV 2002/197 (delivered 19th May 2004, unreported).

[31] **Minster Trust Ltd. v Traps Tractors Ltd. and Others,**[11] relied on by Sentry is equally unhelpful. Here, a seller had let out plant and machinery on hire to contractors by a contract which provided that:[12]

> "On the completion of the hire each machine will be ... reconditioned by you ... under the supervision and to the satisfaction of the Hunt Engineering Company and the hire will cease on ... the issuance of their certificate that the machines have been satisfactorily overhauled on a fully reconditioned basis".

While the work of reconditioning was being carried out under the supervision of Hunts and before their final reports had been made, the seller sold the machinery by a contract of sale which provided that all the machines were to be supplied with the Hunt Engineering Certificate that they have been fully reconditioned to their satisfaction. Hunt's standard was a recognised standard in the industry. The final reports on each machine forwarded by Hunts to the seller, and tendered by the seller to the buyers as certificates under the contract of sale, were headed "Inspection report". These reports stated, among other things, that the unit in question "was accepted as reconditioned to the required standards". By this, Hunts meant the standard required by the contract with the firm that did the reconditioning, not up to their own standard. The parties intended that there should be a certificate from Hunts that the machines had been reconditioned up to an objective Hunts' standard. The reconditioning of the machines was subsequently found to be unsatisfactory, and the buyers claimed damages against the seller for breach of contract. Hunts did not consider themselves as certifying in terms of the contract of sale, but as reporting to their customer for whom alone the report was intended on the satisfactory completion of the reconditioning contract. It was held by Devlin J. in the Queen's Bench Division that the 'inspection reports' were not a compliance with the contract of sale and were not conclusive as to the standard of reconditioning, and the seller was, accordingly, in breach of contract. I do not think that there is anything in this judgment that can offer assistance on the

[11] [1954] 1 W.L.R. 963.
[12] See p. 964 of the judgment.

issues raised in this case, save that it is clear that the document did not have to call itself a certificate. It is the nature of the document that matters.

Conclusion

[32] Applying the law as expressed above, it would seem, in my judgment, that there is no requirement in Article 11(1) for a certificate to be signed. The Article merely says that a certificate must be "given" by or on behalf of the Directors. I accept the argument of the P I Appellants that if the Article required a certificate to be signed it would have said so.[13]

[33] However, I am satisfied that the learned trial judge was right to reject all of the Documents as amounting to a certificate for the following reasons. Article 11 deals with the different issues of determination, calculation and certification. The plain wording of the Article is that there can be a determination published without it having been certified. The wording "any" certificate suggests that it was not obligatory that there always be a certification on each occasion that the NAV is published. There is nothing in the Article to suggest that every publication of the NAV amounts to a certification as to its accuracy.

[34] The function that the Directors had delegated to Fairfield Greenwich and Citco was the function of calculation. There is nothing in the documentation that indicates a delegation of either of determination or of certification. While the Directors were entitled by the wording of the Article to delegate the function of certifying, there is nothing to indicate that they did in fact do so. It cannot be right that every statement of a precise NAV given in good faith by Citco or Fairfield Greenwich on behalf of Sentry whether in a contract note, in an email, or on a website amounts to a certification by or on behalf of the Directors. There would then, as in the **Livingston** case, be no need to expressly require that a calculation may be

[13] In North Shore Ventures Ltd. v Anstead Holdings Inc. and Others [2011] 3 W.L.R. 628 the relevant provision expressly stated that the certificate was to be "signed by North Shore".

certified. All published calculations once determined by the Directors would be automatically certified.

[35] There is no reason why under Article 11 there cannot be an uncertified determination which is not binding. The entire process of calculation of the NAV and its determination operates well and the process goes forward subject to the fact that it is not binding until it is certified by or on behalf of the Directors. The plain meaning of the wording of our Article 11 is that, unlike in the **Livingston** case, not every determination is intended to be binding on the parties.

[36] The mere stating of a precise price will not suffice for any document to amount to a certificate, as urged by the P I Appellants. The learned trial judge was correct to find that a certificate must be something more than a simple statement. It must be a document which contains some formal stamp to the truth of the matter in issue. In the case of a certificate as required by Sentry's Articles, the document must not merely state the NAV but purport to certify the Directors' determination of it.

[37] Further, according to Article 11 the certificate must have been issued either by the Directors or by some agency to whom the power to certify was delegated. The documents were not issued by the Directors, nor was there any delegation either in the Administration Agreement or elsewhere of the power to certify. I am satisfied that the learned trial judge was correct to find that none of the Documents relied on by the P I Appellants as constituting a certificate amounts to the requisite certificate.

[38] The commercial purpose point urged by the P I Appellants and relating to the finality and certainty of the NAV is attractive. However, while the re-calculation of the NAV might on occasion be burdensome and difficult, it does not appear from the language of Article 11 or from the authorities that this exercise should never be possible. There would otherwise be no point in providing for the possibility of the NAV being certified so as to bring finality to any question as to the accuracy of its

calculation. In any event, Sentry is not seeking in this case to have the NAV recalculated. No recalculation is required on the basis of the claims made by Sentry. Sentry is seeking to have the NAV revalued and declared of nil or of nominal value. This is purely a legal issue and does not involve any complex mathematical recalculation.

[39] The learned trial judge's finding at paragraph 27 that "all parties" in the context of the Articles must mean all parties bound by the Articles is neither here nor there. This conclusion of his does not go to the merit or substance of his finding. The clause was inserted into the Articles to provide that once a certificate had been issued by or on behalf of the Directors, no party to a particular document could argue over the calculation of the NAV. None of the Documents amounted to the requisite certificate for the issue to develop any significance.

[40] The fact that the learned trial judge found that the monthly statements and other Documents served other purposes than that of certifying the NAV is not of any significance. It is clear from his judgment that a certificate can perform additional roles such as giving information. What he found was that none of the Documents met the key element of putting a formal and binding stamp to the NAV.

[41] For all these reasons I would dismiss the appeals against the learned trial judge's findings in relation to the Article 11 Preliminary Issues, and I would uphold his finding on the Article 11 Defence, even if for different reasons. I would award costs (as one set) to Sentry to be in two thirds of the amount assessed below.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Janice M. Pereira
Justice of Appeal

I concur.

Davidson K. Baptiste
Justice of Appeal

The Good Consideration Issue

[42] **PEREIRA, JA:** The second preliminary issue determined by the learned trial judge was whether a redeeming member of Sentry in surrendering its shares gave good consideration for the payment by Sentry of the Redemption Price and, if so, whether that precludes Sentry from asserting that the money paid to that member on redemption exceeded the true Redemption Price and as such is recoverable as to the excess from such redeeming member.

[43] This second issue shares a common background to the Article 11 issue and is quite adequately set out by my learned brother Mitchell JA [Ag.] in his judgment and need not be repeated. The learned trial judge determined this issue against Sentry and this is the subject of Sentry's appeal in Appeal No. 62 of 2011.

[44] Sentry's claim is that the total NAV of the redemptions sought by the P I Respondents was calculated at various times and they were paid US$135,405,694.70 upon the redemption of their shares. The NAV was calculated under a mistake of fact as, unbeknown to the Sentry, BLMIS was in fact operating a Ponzi scheme and Sentry's investments in BLMIS were therefore lost from the date of Sentry's investments. The NAV was at all times either nil or a nominal sum. In the circumstances, the P I Respondents have been unjustly enriched at the expense of Sentry and are liable to make restitution. Further or alternatively, Sentry is entitled to set aside the redemptions on the ground that the payment of the Redemption Price was effected under a mutual mistake.

[45] The defences are all broadly similar. First, the redemption proceeds were paid to discharge a debt owed to each of the P I Respondents. Once Sentry had accepted the P I Respondents' requests to redeem the shares, Sentry became indebted to each of them for the amount of the Redemption Price. Sentry, in consideration of each of the P I Respondents redeeming its shares and relinquishing its rights as a shareholder in accordance with the Articles, discharged

the debt which it owed to each P I Respondent by paying to it the Redemption Price for its shares. Each P I Respondent gave good consideration for Sentry's payment so that they have not been unjustly enriched at Sentry's expense. Their position is that, irrespective of the NAV per share, they gave good consideration for Sentry's payment of the redemption price for the shares and that provides them with a complete defence to Sentry's claims. This is described as the Good Consideration Defence.

[46] The conflicting interests in our case are stark. Do the Good Consideration Defence and the common law rule on mutual mistake, among other factors, prevent Sentry from recovering the Redemption Price paid out to the earlier redeemers who were, as a consequence of the way the fraud was designed, paid excessive sums allegedly the proceeds of investments in Bernie Madoff's Ponzi scheme? Does the need for certainty in business transactions trump the right of a payer who has mistakenly paid sums of money in excess of the sums that were actually due to recover the excess? Or, is a feeder fund company entitled to claw back all sums which it had received from a Ponzi scheme that was masquerading as an investment scheme and which it had then paid out to some of its investors, so that all its duped investors who had lost their investment and received little or nothing may be repaid their investment funds pro rata?

[47] The learned trial judge on the Good Consideration Issue found as follows:

> "[34] Left to myself I would have held that the redemption of shares in this case amounted to a bargain and sale for which the consideration received by Sentry was the surrender of the rights of the redeeming shareholder. I cannot see how the subsequently discovered fact that BLMIS was a Ponzi scheme can be said to have vitiated that bargain so as to entitle Sentry to recover the redemption money/purchase price any more than could the discovery that a planning authority had not in fact granted consent for residential development vitiate a contract for the purchase of building plots by reason of the purchaser's own mistaken assumption that it had. [16] [*See per Lord Scott in Deutsch Morgan Grenfell Group plc v IRC [2006] UKHL 49 at paragraphs 84, 85.*] I further fail to understand how Sentry can recover the

redemption price in circumstances in which *restitutio in integrum* is no longer possible.

[35] I was referred to **Aiken v Short.**[17] [*(1856) 1 H&N 210*] and **Barclays Bank Ltd v WJ Simms Son & Cooke Southern Ltd.**[18] [*[1980] QB 677*] Neither case involved a sale and purchase. In the first, a bank paid off a debt due by a customer to a third party in the mistaken belief that the debt was secured on property which stood as security for the customer's account. It was held that the third party creditor had given good consideration by accepting the payment as discharging the debt due to her from the bank's customer. In his short judgement Pollock CB said:

> 'Suppose it was to be announced that there was to be a dividend on the estate of a trader, and persons to whom he was indebted went to an office and received instalments of the debts due to them, could the party paying recover back the money if it turned out he was wrong in supposing that he had the funds in hand?'

That appears to me to expose the fallacy upon which the present case is founded. **Barclays Bank v Simms**[19] [(supra)] takes the matter no further. It decided that payment on a cheque made by a bank in breach of mandate was ineffective to discharge the drawer's obligation on it and the bank was thus entitled to recover, in contradistinction to the situation in **Aiken v Short.**[20] [(supra)]. The cases are authority for the proposition that a party will not be able to recover a payment made by mistake where the payer has received consideration from the payee.

[36] In my judgment, therefore, it is not open to Sentry now to seek to recover the price which it paid for the purchase of the shares of redeeming investors simply because it calculated the NAV upon information which has subsequently proved unreliable for reasons unconnected with any of the redeemers."

[48] Another of the issues between the parties was the question whether the process of redemption created a new contract by way of sale. The learned trial judge found that it did. He held that the redemption of shares by the defendants amounted to a fresh bargain and sale for which the consideration received by Sentry was the surrender of the share rights of the redeeming shareholders and that Sentry would

not be able to recover a payment made by mistake where the payer had received any consideration from the payee. He was unable to see how the subsequently discovered fact that BLMIS was a Ponzi scheme could be said to have vitiated that bargain, i.e., the purported bargain for the redemption of shares, so as to entitle Sentry to recover the Redemption Price paid to the redeeming shareholder.

[49] The learned trial judge, (notwithstanding his misgivings[14]) having been persuaded to deal with the second issue as being one of pure law, framed the question in relation to the Good Consideration Defence in this way:

> "Whether a redeeming Member of the Claimant in surrendering its shares gave good consideration for the payment by the Claimant of the Redemption Price, and if so, whether that precludes the Claimant from asserting that the money paid to that Member on redemption exceeded the true Redemption Price and as such is recoverable as to the excess from such redeeming Member."

[50] It is trite that the approach which must then be adopted in determining the question as a preliminary issue is on the assumption that the case, as pleaded, is true.

[51] A useful starting point, in my view, is by referring to Sentry's pleaded case in relation to the Good Consideration issue. Sentry pleaded at paragraphs 9, 10, 11 and 12 of its statement of claim as follows:

> "9. The NAV was calculated under a mistake of fact as, unbeknown to the Claimant, BLMIS was in fact operating a ponzi scheme and its investments in BLMIS were therefore lost from the date of the Claimant's investment.
>
> 10. In the premises, the NAV of the Claimant at all times was nil or a nominal value and the Aggregate Redemption Sum should, accordingly have been nil, or in the alternative, a nominal sum.
>
> 11. In the circumstances, the Defendants have been unjustly enriched at the expense of the Claimant, and the Defendants are liable to make restitution to the Claimant in the aggregate sum of US$135,

[14] See para. 3 of the judgment.

405,694.70, or in the alternative the difference between that sum and the said nominal amount.

12. Further or alternatively, the Claimant is entitled to set aside the redemption of the Defendants' shares on the ground that the payment of the Aggregate Redemption sum was effected under a mutual mistake."

[52] The learned judge was criticised, in my view unfairly, for holding that surrendering of the shares and the payment of the redemption price amounted, in effect, to a new contract. This assumption may no doubt have had its origin in the way Sentry pleaded its case which no doubt had a bearing on the framing of the question for determination.

A new or existing contract?

[53] On appeal, the argument advanced by Sentry relying on the House of Lords decision in **Harvela Investments Ltd. v Royal Trust Company of Canada (C.I.) Ltd. and Others**,[15] is that the surrendering of the Shares and the payment of the Redemption Price did not amount to a new contract; rather that this took place pursuant to an existing contract which was contained in Article 10 of Sentry's Articles. Sentry says that this was simply (mistaken) performance of an existing contract. Sentry, pursuant to the contract contained in the Articles was obliged to redeem the shares and was already bound to pay pursuant to Article 10. It had no option. Likewise, as the P I Respondents point out, the request once received by Sentry, could not be withdrawn without the consent of Sentry's directors. Both Sentry and a redeeming shareholder would at that point become bound to fulfil certain obligations each to the other.

[54] In **Harvela**, the first defendant, a Jersey trust company was one of the trustees of a settlement and the registered holder on behalf of the trustees of shares in a company in which the plaintiff and the second defendant and his family also

[15] [1986] A.C. 207; [1985] 3 W.L.R. 276; [1985] 2 All E.R. 966.

owned shares. Whichever of the latter two groups acquired the trustees' shares would gain control of the company. Offers were made by both, and the first defendant decided to invite them to submit revised offers on identical terms and conditions. They invited each to submit any revised offer that it might wish to make by sealed tender by a certain date and time. The first defendant bound itself to accept the highest offer that complied with the terms. The plaintiff's offer was for a certain price. The second defendant's offer was for a specified amount in excess of any other offer, i.e., the price would be determined by reference to the price in any other offer. The first defendant informed both offerors that in the circumstances they were bound to accept and did accept the second defendant's offer. In an action by the plaintiff claiming the shares the High Court gave judgment in their favour. The Court of Appeal allowed an appeal. On appeal to the House of Lords it was held that the undertaking to accept the highest offer only invited fixed bids. The invitation on its true construction had created a fixed bidding sale and the second defendant had not been entitled to submit, and the first defendant had not been entitled to accept, a referential bid. The first defendant's acceptance of the second defendant's offer had been sent with the intention of fulfilling what they thought was their existing obligation due to their mistaken belief that they were bound to accept the second defendant's referential bid, not of creating any new obligation, and, accordingly, no second contract independent of the invitation had come into existence as a result of that message.

[55] I am satisfied on the facts of **Harvela**, that the conclusion arrived at by the House of Lords was correct in principle. I do not consider however, for the reasons which will unfold in this judgment that the ruling in that decision is of any particular relevance here.

[56] An issue arose on the appeal as to whether we should assume that the redeemed shares and associated rights had any value. At the hearing before the learned trial judge the parties had agreed to proceed on the basis that, even if the shares are valueless, on the mere fact they were delivered the good consideration defence

would apply. I have already stated above the assumption which must be made in relation to the pleaded cases, as this is an appeal from the determination of a preliminary issue based on the cases of the parties as pleaded. No evidence has been led.

[57] The law generally regards the surrendering of contractual rights as constituting good consideration. A very clear example of this is provided by the case of **Bell and Another v Lever Brothers, Limited**.[16] Lever Brothers employed the two defendants who committed serious breaches of their contracts of employment, which would have justified their summary dismissal. In ignorance of this fact, Lever Brothers entered into agreements with them to terminate their services on terms that they would receive substantial sums in compensation. The defendants themselves did not have in mind, when these agreements were concluded, that they could have been dismissed without compensation. The agreements were concluded under a common mistake as to the respective rights of the parties. When Lever Brothers discovered the directors' wrongdoing it claimed rescission of the agreements and repayment of the compensation.

[58] Justice Wright at first instance found that the mistake or misapprehension was as to the substance of the whole consideration and went "to the root of the whole matter". He concluded that the court, as a court of equity, could do all that justice required to constitute a restitutio in integrum. He ordered repayment of the money paid under the agreement. The Court of Appeal upheld this judgment. Scrutton L.J. held that the principle to be applied was the same as that applicable in the case of frustration. Either the contract was void because of an implied term that its validity shall depend on the existence at the time of the contract, and during its term of performance, of a particular state of facts, or that there is a mutual mistake of the parties, who have made the contract believing that a particular foundation to it exists, which is essential to its existence. In either case the absence of the

[16] [1932] A.C. 161.

assumed foundation made the contract void. Greer L.J. in concurring was of the view that a mistake as to the fundamental character of the subject matter of the contract was one which, if mutual, the law would regard as rendering the contract void.

[59] On appeal, the House of Lords, by a majority, reversed this decision. Lord Atkin held that mistake would only nullify consent where the parties contracted under the common mistaken assumption that the subject matter of the contract existed when, in fact, this was not the case. Mistake as to a quality of the thing contracted for would not affect assent unless it was the mistake of both parties, and was as to the existence of some quality which made the thing without the quality essentially different from the thing as it was believed to be. He held that it was wrong to decide that an agreement to terminate a definite specified contract was void if it turned out that the agreement had already been broken and could have been terminated otherwise. The contract released was the identical contract in both cases, and the party paying for release got exactly what he bargained for. It seemed immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain. From a commercial standpoint, the contracts of employment which the two directors surrendered might have been worthless because both directors were liable to instant dismissal without compensation. But, in the eyes of the law, the surrender of those contracts was sufficient consideration to support the large compensation payments which the directors were paid.

[60] Sentry concedes, based on the legal principles derived from the case law that if there was a new or separate redemption contract Sentry would not be able to recover the sums. On that basis it accepts that it would fall under the **Bell v Lever Brothers** principle where the parties had in fact made a fresh contract. However, Sentry says there was no new 'redemption contract' here - the only contract being the subscription contract contained in the Articles.

[61] Sentry says that there could be no good consideration given by the P I Respondents as the redeemable shares and the rights attached to them were, in essence, worthless. This is so, argues Mr. Brindle, QC on behalf of Sentry, because:

(a) The overwhelming majority of funds placed by the P I Respondents with Sentry for investment were invested in BLMIS;

(b) At all material times BLMIS was run as a Ponzi scheme and thus as a fraudulent scheme was, as a matter of law insolvent from inception;[17]

(c) Sentry's investments in BLMIS were therefore lost from the date they were made;

(d) Accordingly, the NAV of Sentry was at all material times nil, or alternatively, a nominal sum;

(e) Thus the shares surrendered to Sentry were of nominal or no value.

[62] The central plank in Sentry's argument is that Sentry owed no debt to the P I Respondents and therefore the mistaken payment to them could not be said to be made in discharge of a debt obligation of Sentry. This is so, says Sentry, because its true NAV was nil or nominal and thus the P I Respondents (as redeemers) were entitled to nothing. In essence, that here, the P I Respondents cannot justify their enrichment since they had no legal right to receive it.

[63] Sentry relies on the latest edition of **Goff & Jones: The Law of Unjust Enrichment**.[18] So does Mr. Hapgood, QC on behalf of the P I Respondents. Chapter 2 sets the stage for a claim based on unjust enrichment. It says:

> "English law provides that a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense, and that the circumstances are such that the law regards this enrichment as unjust. For example, a claimant will have a prima facie right to restitution where

[17] See Re Titan Investments Limited Partnership, Judicature Act, 2005 ABQB 637.
[18] 8th edn., Sweet & Maxwell 2011, p. 21, para. 2-01.

> he has transferred a benefit to a defendant by mistake, under duress, or for a basis that fails. Nevertheless, the defendant can escape liability if another legal rule entitles him to keep the benefit, and this rule overrides the rule generated by the law of unjust enrichment which holds that the defendant should make restitution. For example, a claimant may have paid money to a defendant by mistake, **but the payment may be irrecoverable if the claimant was required to pay by statute or by contract**. Although the claimant has a prima facie claim in unjust enrichment, the defendant's enrichment is justified by the statute or contract, with the result that the claimant's right to restitution is nullified.[1] *[Kleinwort Benson Ltd v Lincoln CC [1999] 2 A.C. 349 at 407-408, per Lord Hope, followed in Test Claimants in the F.I.I Litigation v HMRC [2010] EWCA Civ 103; [2010] S.T.C 1251 at 181], per Arden L.J.].* (My emphasis).

[64] Sentry therefore says, in reliance upon the texts **Goff & Jones: The Law of Restitution**[19] and **Graham Virgo: The Principles of the Law of Restitution**,[20] that it does not matter whether there was or was not consideration given when the relevant contract (namely the subscription contract contained in the Articles) was entered into, provided that at the time when restitution is sought it can be said that any such initial consideration has turned out to be valueless or of nominal value. Further, if there was some value in the shares then it operates pro tanto.

[65] Mr. Hapgood, QC made the general point that contract almost always trumps restitution. He relies also on the passage cited at paragraph 63 above from **Goff & Jones**. He put forward four propositions on behalf of the P I Respondents:

(i) A sum paid in discharge of a contractual debt cannot generally be recovered;

(ii) Redemption payments were paid to discharge a contractual debt unless Sentry's Article 10 obligation was void;

(iii) That the one contract, two-contracts theories are irrelevant to proposition (ii); and

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[19] 7th edn., Sweet & Maxwell 2007, para. 41-002.
[20] 2nd edn., Oxford University Press 2006, p. 171.

(iv) Even if wrong on (ii) and (iii) the redeemers in any event gave good consideration such as to defeat a restitutionary claim.

The Law

[66] It is common ground that the case at bar is a two party case. The learned trial judge in his judgment referred to the cases of **Aiken v Short**[21] and **Barclays Bank Ltd v W. J Simms Son & Cooke (Southern) Ltd. and Another**.[22] These were three party cases. The text writers **Goff & Jones**[23] and **Professor Virgo**[24] distinguish between two-party and three party cases. **Goff & Jones** at para. 29-19 state as follows:

> "In two- party cases, where a claimant pays money to a defendant to discharge a legal obligation that he owes the defendant, any claim to recover the money could be met by the response that the defendant's enrichment is justified by the legal right that he had to receive the money....Moreover, even if that were not enough to bar the claim, the defendant would also be entitled to rely on the change of position defence...having released his legal obligation against the claimant in exchange for the payment."

[67] The **Barclays Bank Ltd v W. J Simms** case, even though it concerned a tri-partite situation, dealt with the principles under which money paid under a mistake of fact is recoverable. It may be considered as a classic statement of the law on mistake. It was concerned with a payment made by the claimant bank which payment discharged (or was alleged to have discharged) an obligation owed to the defendant by a third party. In the tripartite situation there is no contractual relationship between the claimant and the defendant. Barclays Bank claimed a sum of money from the first defendant and the second defendant, the receiver of the first defendant. The bank claimed it had paid the money under a mistake of fact when the second defendant presented a cheque drawn on the bank in favour of the

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[21] (1856) 1 Hurlstone & Norman 210.
[22] [1980] Q.B. 677.
[23] Supra note 18.
[24] Supra note 19.

first defendant. The bank had overlooked its customer's instructions to stop payment on the cheque.

[68] Goff J. conducted an extensive review of the authorities dealing with the principles on which money paid under a mistake of fact is recoverable. He stated his conclusions as follows:

> "From this formidable line of authority certain principles can, in my judgment, be deduced: (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed to have done so."[25]

Goff J. added a footnote to principle 1. He said:

> "Of course, **if the money was due under a contract** between the payer and the payee, there can be no recovery on this ground **unless the contract itself is held void for mistake** (as in Norwich Union Fire Insurance Society Ltd. v. Wm. H. Price Ltd. [1934] A.C. 455) or **is rescinded** by the plaintiff." (My emphasis).

These statements in my view lend credence to Mr. Hapgood, QC's contention and are well recognised by Goff & Jones, on which Sentry places heavy reliance, that contract will ordinarily, defeat a restitutionary claim. This proposition holds true even under the modern law of restitution in recognition of the sanctity of contractual obligations.

[69] Principle 2(b) encapsulates the defence of good consideration. The defence may fail if the payer's mistake was induced by the payee, or possibly where the payee, being aware of the payer's mistake, did not receive the money in good faith. For

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[25] Supra note 20, p. 695.

the present purposes, neither of these situations arise in this case (as no such allegations have been made), and we can assume that the defendants acted throughout entirely innocently.

[70] Goff J. referred to two circumstances in which the defence of good consideration would or might fail because the transaction in which the consideration was given itself fell to be set aside (i.e. where the mistake was induced by the payee or bad faith by the payee). Similarly, Lord Scott in the **Deutsche Morgan Grenfell plc v Inland Revenue Commissioners and another**[26] case below, in addressing the situation in which the parties are in a contractual relationship, referred to the possibility that the defence would fail because the mistake enabled the contract to be set aside, or because the contract was void from the outset, or was avoided before payment.

[71] In **Deutshe Morgan Grenfell Group plc** the House of Lords considered a bipartite situation. The House did not disapprove of what Goff J. said in **Barclays Bank v W. J Simms**. Lord Scott of Foscote in considering the question whether money paid or property transferred under a mistake is necessarily recoverable said that, "It surely all depends on the part played by the mistake, whether of fact or law, in the sequence of events that has led to the payment or transfer."[27] After giving an example he then referred to the three circumstances set out by Goff J. in **Barclays Bank v W. J Simms** in which a restitutionary claim may fail. He then referred to the fundamental difference between the first and third circumstance on the one hand, and the second circumstance on the other. He then had this to say:

> "... Neither of these types of case [referring to the first and third circumstances] invalidates Robert Goff J's general proposition that if a mistake of fact causes a payment to be made that would not have been made but for the mistake, the payer will have a cause of action for its recovery. They are not true exceptions. The second however, does invalidate that proposition. If a contract has been entered into that would not have been entered into but for a mistake, but the contract is then

[26] [2007] 1 A.C. 558.
[27] Ibid, para. 84.

completed by a payment of the price for the goods or services that the payee has supplied, the payment cannot be recovered unless the contract can be set aside. The proposition seems such an obviously correct one that it may seem pointless to ask why it is that it is correct. But I think the question does need to be asked for the answer casts, in my opinion, valuable light on the nature of the restitutionary remedy for the recovery of money paid under a mistake.

85. The reason, it seems to me, why the proposition is correct is that the mistake does not necessarily undermine the legal obligation which required the payment of the money or for the discharge of which the money was paid. If the mistake does enable the contract to be set aside then, subject to a change of position defence, the money should be recoverable. **If the contract was void from the outset (as in the "swaps" cases) or had been avoided before the payment was made, the money should be recoverable. But if the legal obligation under which the money was paid cannot be, or has not been, invalidated, then, in my opinion, whether or not it can be shown that "but for" the mistake in question the money would not have been paid, a restitutionary remedy for the recovery of the money would not be available.**" (My emphasis).

[72] The leading modern authority on the law of mutual or common mistake in England is the decision of the Court of Appeal in **Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd**,[28] where Lord Phillips MR handed down the judgment of the Court. Tsavliris was commissioned to salvage the Cape Providence. It contacted an information service to enquire about ships near enough to the stricken ship to assist with the salvage and was told that the Great Peace was only 35 miles away from the Cape Providence. Tsavliris therefore chartered the Great Peace from its owners for five days. It sought no warranty or further information from the owners as to its position. In fact, unbeknown to both parties, the Great Peace was 410 miles away from the Cape Providence and would take several extra days to get to her. On discovering this, Tsavliris chartered another, nearer ship, cancelled the charter with the Great Peace, and refused to pay anything. The owners of the Great Peace sued for five days charter. Tsavliris defended by

[28] [2003] Q.B. 679.

alleging that the charter contract was either void at common law or, alternatively, voidable in equity, for common mistake. The trial judge applied the construction approach and gave judgment for the claimants. He held that while there was an implied condition precedent that the Great Peace was close enough to provide the specified service, this condition was satisfied, so the contract was valid.

[73] On appeal, Lord Phillips MR considered the history of the development of the law of common mistake and of frustration of contracts. He rejected the theory of the implied term as being unrealistic. He continued:

> "73 ...Where a fundamental assumption upon which an agreement is founded proves to be mistaken, it is not realistic to ask whether the parties impliedly agreed that in those circumstances the contract would not be binding. The avoidance of a contract on the ground of common mistake results from a rule of law under which, if it transpires that one or both of the parties have agreed to do something which it is impossible to perform, no obligation arises out of that agreement.
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> [74] In considering whether performance of the contract is impossible, it is necessary to identify what it is that the parties agreed would be performed. This involves looking not only at the express terms, but at any implications that may arise out of the surrounding circumstances. In some cases it will be possible to identify details of the "contractual adventure" which go beyond the terms that are expressly spelt out, in others it will not.
>
> [75] Just as the doctrine of frustration only applies if the contract contains no provision that covers the situation, the same should be true of common mistake. If, on true construction of the contract, a party warrants that the subject matter of the contract exists, or that it will be possible to perform the contract, there will be no scope to hold the contract void on the ground of common mistake.
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> [76] If one applies the passage from the judgment of Lord Alverstone CJ in Blakeley v Muller & Co 19 TLR 186, which we quoted above, to a case of common mistake, it suggests that the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the

> existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (iv) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."

While the decision does not bind this court, it is undoubtedly a correct statement of the law of common mistake in the Eastern Caribbean.

[74] Sentry has not sought to say that the subscription contract is to be set aside or avoided. Indeed as the P I Respondents point out and as noted by the trial judge, Sentry could not seek this as it is quite clear that restitutio in integrum is no longer possible. Rather, say the P I Respondents, what Sentry seeks to say is that the contracts between itself and its shareholders were void ab initio – in short that there was no contractual relationship at all. However, during the course of oral argument Mr. Brindle, QC made clear that Sentry was not seeking to void the contract in the Articles of Association. He says there was no contract induced by the mistake. He further contended that there was no need to set aside the subscription contract in order to recover.

What was the contract?

[75] With the legal principles extracted from the cases firmly in mind I return to the question: what was the contract here? Accepting that there was one existing contract namely the subscription contract as contained in Sentry's Articles then that contract calls for examination and then to consider the part played by the mistake in the sequence of events leading to the payment by Sentry.

[76] A proper starting point is the Private Placement Memorandum ("PPM"). The PPM is the source of the offer to subscribe. It sets out the rules for investment and for the redemption of the resulting shares. There is an entire section therein entitled

'Risk Factors'[29] which makes it clear that the purchase of shares in the Fund (Sentry) involves substantial risks that are incident to the Fund's allocation of assets to different types of investments. It then set out various risk factors. Included among them is this risk at paragraph 17:

> **"Possibility of Misappropriation of Assets.** When the Fund invests utilizing the "split strike conversion" strategy or in a Non–SSC Investment Vehicle, it will not have custody of the assets invested. Therefore there is always the risk that the personnel of any entity with which the Fund invests could misappropriate the securities or funds (or both) of the Fund."

The PPM also stated that the Split Strike Conversion strategy is implemented by BLMIS.[30] This makes it clear that Sentry was investing its shareholders subscription monies with full awareness of the risk of misappropriation. The shareholder was similarly aware of that risk. The shareholder, pursuant to the subscription agreement took the shares pursuant to the terms of the subscription agreement, the PPM and Sentry's Memorandum and Articles of Association. The PPM clearly stated that the shares were being issued only on the basis of the information contained in the PPM. The P I Respondents accordingly contend that Sentry must be deemed to have accepted the risks; and that the risks were on both sides. I agree. The P I Respondents say that the risk described at paragraph 17 of the PPM is precisely what happened here as the employees of BLMIS misappropriated the monies.

[77] The contractual obligations arising under Sentry's Articles must then be considered. Article 9 deals with the issuance of shares in Sentry following payment of the subscription price which is in turn based on the NAV as determined pursuant to Article 11. Article 10 then provides for the redemption of shares. In essence, on receipt of a redemption request Sentry is then obliged to redeem or purchase the shares.[31] The redemption or purchase of the shares is then effected

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[29] See Record of Appeal Tab 11 pp. 130-135 or the Private Placement Memorandum pp. 17-22.
[30] See Record of Appeal p. 122 or Private Placement Memorandum p. 9.
[31] Unless there has been a suspension as permitted under the Articles, a circumstance not relevant to this case.

at the redemption price which is the NAV per share. The NAV is determined in accordance with Article 11. Article 11 says that the NAV is determined by the Directors of Sentry and goes on further to say how the NAV is to be calculated. Upon the redemption or purchase of the shares the redeeming member's entitlement to any rights in the shares ceases.

[78] Under the subscription contract then, what were the obligations of the parties? For the shareholder it may be said firstly to subscribe for the shares by payment of the subscription price based on the NAV. Sentry's obligation on receipt of the subscription price was to issue to the subscriber, the shares for which payment was made. These obligations of the contract were here performed by the P I Respondents and Sentry. Sentry then took the subscription monies and invested them with BLMIS fully aware of the risks. The investment may yield a good return or it may be lost. The next stage contemplated by the contract was the redemption of the shares. To trigger this process, the shareholder submits a redemption request. On receipt of the redemption request, Sentry's obligation to redeem the shares and pay the redemption price based on the NAV as determined, (not by the redeeming shareholder but by Sentry) was activated. Indeed the redemption request could not be withdrawn without Sentry's consent.

[79] I agree with the P I Respondents that even within the context of the Article 10 contract it is clear to me that the exercise by a shareholder of his right of redemption would trigger contractual obligations on the part of Sentry, which were to redeem or purchase the shares and pay the redemption price as determined by it. I am also in full agreement with the P I Respondents that whether it was the existing Article 11 contract or whether the redemption request may be said to have brought about a new redemption contract is, to my mind wholly irrelevant. The simple fact is that the Article 10 contract clearly provided for the shareholder to redeem his shares, and that on the receipt of a redemption request given pursuant to the provisions of the Article, Sentry's obligation to redeem the shares and to pay the redemption price based on the NAV (whatever Sentry determined the NAV to

be) had been called in. The mistake here in terms of the sequence of events, may be said to have occurred at the point of the determination of the NAV by Sentry. Sentry's obligation to pay had already arisen. Put another way, Article 10 gave rise to a debt obligation on the part of Sentry in favour of the subscribing shareholder who had in fact performed all its obligations under the Article 10 contract and the redemption payment was made to discharge that debt obligation. Sentry by payment of the redemption price which was required for the performance of its side of the bargain, did exactly that – a redemption on its part and a payment to the redeeming shareholder to which the shareholder was entitled.

[80] I accordingly reject Mr. Brindle, QC's argument that no debt was due because due to the Ponzi scheme run by BLMIS, Sentry's NAV was nil or a nominal sum. I agree with the P I Respondents that Sentry's contractual obligations gave rise to a debt obligation whatever the value of the shares and the surrender of the rights to the shares by the P I Respondents, in my view, having fully performed their part of the contract, gave good consideration which defeats Sentry's restitutionary claim.

[81] The facts of this case falls to me squarely within the principle 2(b) as set out by Goff J. in **Barclays Bank v W. J Simms** and further expounded upon in the **Deutsche Morgan Grenfell** decision. I do not consider that the mistake here undermined the legal obligation placed upon Sentry under the contract which required it to pay the redemption price by way of discharging its obligations on the redemption of the shares. The subject matter of the contract was the shares. The contract for the shares was with Sentry and not with BLMIS, and therefore it mattered not what was the value of Sentry's investment in BLMIS. This did not form part of the contract. It was Sentry who had to determine the value of the payment for the redeemed shares but making that determination or having mistakenly so determined it, does not nullify the obligation to pay on redemption. The initial consideration was the subscription monies. I do not consider that it was of no value. The initial consideration was also fixed by reference to Sentry's NAV.

Sentry, clearly obtained something of value when it issued the shares pursuant to the Article 10 contract. On the payment of the redemption price Sentry got precisely what it paid for - the shares. Sentry was not carrying on a fraudulent Ponzi scheme. Indeed in the context of the subscription contract and Article 10 Sentry got all that it bargained for. This was not a contract where it can be said that the subject matter either did not exist, or ceased to exist or where the performance of the terms were impossible. It cannot be said that it was impossible for Sentry to redeem or purchase the shares at a price to be fixed solely by Sentry. Indeed the mistake as to Sentry's NAV cannot be said to be a common mistake but Sentry's. As was said by Lord Atkin in **Bell v Lever Brothers**, mistake as to a quality of the thing contracted for would not affect assent unless it was the mistake of both parties, and was as to the existence of some quality which made the thing without the quality essentially different from the thing as it was believed to be. The subscription contract was for the shares, and the redemption payment for the surrender of the shares and not for a specific value of any interest or investment in BLMIS.

[82] In relation to **Bell v Lever Brothers**, Lord Phillips in **Great Peace Shipping** stated that it is generally accepted that the principles of the law of common mistake expounded by Lord Atkin were based on the common law. The issue, he said was whether there subsists a separate doctrine of common mistake founded in equity which enables the court to intervene in circumstances where the mistake does not render the contract void under the common law principles. The Court answered this question in the negative. The Court held that:

> "There was no equitable jurisdiction to grant rescission for common mistake in circumstances that fell short of those in which the common law held a contract void; that it was not possible to distinguish between a mistake or common misapprehension which was fundamental in equity and one which had a quality which made the thing contracted for essentially different from the thing that it was believed to be at common law..."

[83] Another passage of Lord Phillips' judgment in **Great Peace Shipping** bears recital. At paragraph 85 he states thus:

> "...Supervening events which defeat the contractual adventure will frequently not be the responsibility of either party. Where, however, the parties agree that something shall be done which is impossible at the time of making the agreement, it is much more likely that, on the true construction of the agreement, one or the other will have undertaken the responsibility for the mistaken state of affairs. This may well explain why cases where contracts have been found to be void in consequence of common mistake are few and far between."

Here, the risk factors were spelled out, in relation to the shares in the PPM which formed part of the terms under which the shares were subscribed under the subscription agreement. It is not alleged that the subscription agreement (Article 10 contract) was void or ought to be set aside. There was an allocation of risks. It was contemplated that if the Fund (Sentry) did well then shareholders benefited from a higher yield on a return of their investments on redemption. If the Fund lost the investments then likewise the shareholder would take the loss. This was the risk understood and accepted by both sides. Accordingly it cannot be said that because Sentry mistakenly calculated its NAV at the time of redemption due to BLMIS's Ponzi scheme, that it made the contract as between Sentry and its shareholders essentially different from what it was believed to be.

[84] **Goff & Jones**[32] at para. 3-16 has this to say:

> "The general principle that no claim in unjust enrichment is permitted where a contract governing the benefit in question is still in force between the parties is today justifiable on the basis that the law should give effect to the parties' own allocations of risk and valuations, as expressed in the contract, and should not permit the law of unjust enrichment to be used to overturn those allocations or valuations."

[85] The P I Respondents make the general point in response to Sentry's restitution claim, that allowing such a claim is a recipe for uncertainty and confusion in commercial transactions. They rely on the dictum of Lord Goff in **Scandinavian**

[32] Supra note 16.

Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade),[33] where he said:

> "It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position, if necessary with the aid of advice from a qualified lawyer, because it may be commercially desirable for action to be taken without delay, action which may be irrevocable and which may have far-reaching consequences. It is for this reason, of course, that the English courts have time and again asserted the need for certainty in commercial transactions – for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly."

[86] I am happy to adopt this statement. It cannot be doubted that certainty is key in commercial transactions. Many modern day commercial transactions have a global dimension with far reaching consequences. Parties must be able to know what their legal position is and to make decisions based on that knowledge. It is therefore not surprising that throughout all the case law and the modern treatises on restitutionary remedies that such remedies invariably always give way to contractual obligations once ascertained or has led to the view that the law of unjust enrichment is a means of adjusting the relationships between parties 'whose rights are not met by some stronger doctrine of law" (such as the law of contract) and that the courts award restitution as a means of resolving "residual" problems.[34]

[87] For these reasons, albeit via a different route, I agree with the ultimate conclusion arrived at by the learned trial judge that the P I Respondents gave good consideration for the surrender of their shares and Sentry's restitutionary claim would be defeated. It is simply not open to Sentry to recover the redemption prices which it paid for the purchase of the redeemed shares because it has now been

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[33] [1983] Q.B. 529, p. 540.

[34] See Niru Battery Manufacturing Co and Another v Milestone Trading Ltd and Others [2003] EWCA Civ 1446; [2004] Q.B. 985 at [192]; and discussed by Goff & Jones – The Law of Unjust Enrichment (8th edn. Chapter 2).

discovered that it determined its NAV on unreliable or erroneous information from BLMIS which had nothing to do whatsoever with any of Sentry's shareholders. The shareholders fully performed all their obligations under the contract. Sentry, in paying the redemption price, did so in the discharge of its debt obligations to the redeeming shareholders pursuant to Sentry's Articles which remained perfectly valid and in force. Accordingly, I would dismiss Sentry's appeal on this issue.

The Summary Judgment

[88] Following delivery of the 16th September judgment, ABN Amro applied for summary judgment. The learned trial judge in his decision handed down on 10th October 2011 dismissed Sentry's claim against that defendant and granted summary judgment. He ordered that Sentry pay the costs of the application, such costs to be assessed if not agreed. He also ordered Sentry to pay 75% of the P I Respondents' costs of the trial of the Preliminary Issues, to include the costs of the application for preliminary issues, such costs to be assessed if not agreed.

[89] At paragraph 17 of his judgment, after considering the decision in **Great Peace Shipping** and the principles expounded therein went on to say as follows:

> "If one applies these principles to the present case, the question is whether the fact, contrary to the assumed understanding of both parties, that BLMIS was a Ponzi scheme, means that Sentry was unable to perform the contract which arose when a redemption notice was served in accordance with its Articles of Association. Sentry contracted to invest its members' money and return its product when demanded on the basis of a rateable proportion of Sentry's NAV. The fact that a fund in which it invested and which...was mistakenly believed by Sentry and ABN Amro to have been genuine, turned out to have been run fraudulently had no impact whatsoever upon Sentry's ability to perform these obligations. The fact, if true that upon redemption by ABN Amro, Sentry's directors should have declared a nil NAV does not make the contract void...Sentry's case on common mistake confuses (1) a shared mistaken assumption the truth of which is a necessary condition for the performance of a particular contract with (2) a shared mistaken assumption about the background against which it is expected that the contract will be performed. The

former case will mean that no contract can as a matter of law, be concluded. The latter will not."

With these observations I entirely agree.

[90] The learned judge went on to make the point that Sentry's claim as pleaded appears to treat the contract between Sentry and a redeemer as liable to be rescinded rather than void and referred to **Great Peace** as being 'clear authority that there is no jurisdiction in equity to rescind a contract binding in law on the grounds of common mistake. I have already referred to this at paragraph 82 above. He again reiterated that rescission is not available in circumstances as here where restitutio in integrum is impossible. He accordingly concluded that either way the claim made at paragraph 12 of Sentry's case, coupled with his decision on the good consideration point was bound to fail. With this conclusion I also agree. The learned judge quite rightly, could only deal with the case as pleaded.

[91] On the adjournment issue sought by Sentry in the hope that they may turn up information which may show knowledge of BLMIS's Ponzi scheme or bad faith on the part of redeemers, I need only repeat paragraph 22 of the learned judge's judgment with which I entirely agree:

> "...Applicants for summary judgment are entitled to have their applications dealt with on the facts as they are, not as they might be, and I have never heard of a summary judgment application being adjourned to give the unsuccessful party an opportunity to improve his position by searching for material upon which to make fresh allegations."

He, in my view, quite rightly refused the adjournment.

Conclusion

[92] For the reasons which I have given, I would dismiss Sentry's appeal on all points. I would award costs on this appeal to the P I Respondents (as one set of costs) to be fixed at two thirds of the amount as assessed below.

Janice M. Pereira
Justice of Appeal

I concur.

Davidson K. Baptiste
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendants.	Adv. Pro. No. 08-1789 (BRL) SIPA LIQUIDATION (Substantively Consolidated)
In re BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. HSBC Bank PLC, *et al.* Defendants.	Adv. Pro. No. 09-1364 (BRL) 11-CV-06524 (JSR)

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

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Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act ("SIPA"),[1] 15 U.S.C. §§ 78aaa *et seq.*, and the estate of Bernard L. Madoff ("Madoff," and together with BLMIS, each a "Debtor" and collectively, the "Debtors"), by and through his undersigned counsel, hereby submits this memorandum of law in opposition to Primeo Fund's Motion to Withdraw the Reference (the "Motion") and supporting Memorandum of Law (the "Mem. of Law") filed in *Picard v. HSBC Bank PLC, et al.*, Adv. Pro. No. 09-1364 (Bankr. S.D.N.Y.) (BRL),[2] No. 11-CV-06524 (S.D.N.Y.) (JSR) (ECF No. 1).

PRELIMINARY STATEMENT

Primeo Fund ("Primeo") is seeking to invoke this Court's jurisdiction in a full-on assault to deprive the Bankruptcy Court of its central role in this SIPA liquidation. Indeed, Primeo has recently asserted in a court abroad that it intended to challenge this Court's jurisdiction and this forum, and does not intend to request that this Court address the substantive issues it raises herein—undermining the very need for withdrawal of the reference.

In a parallel proceeding before the Grand Court of the Cayman Islands, Financial Services Division (the "Grand Court"), Primeo asserted that the New York courts have no jurisdiction over this dispute. Primeo further urged that the Grand Court should address many, if not all, of the issues in the current Motion, including the safe harbor provision of the Bankruptcy Code and the extraterritorial application of SIPA. Recognizing this tension, Primeo subtly concedes here that it intends to move for dismissal on grounds of personal jurisdiction and/or

[1] The Securities Investor Protection Act ("SIPA") is found at 15 U.S.C. §§ 78aaa *et seq.* For convenience, subsequent references to SIPA will omit "15 U.S.C."

[2] A copy of the complaint (cited as "Compl.") filed by the Trustee against Primeo among other parties, including HSBC Bank PLC, is annexed to the Declaration of Oren J. Warshavsky, Esq. ("Warshavsky Decl.") as Exhibit 1.

forum non conveniens. Mem. of Law at 3, n.1. Thus, Primeo seeks to reserve its right to make threshold arguments challenging this Court's jurisdiction while at the same time seeking what amounts to an advisory opinion on substantive law. This is clearly improper and a waste of this Court's time. Primeo should be required to choose between participating in the proceedings here (and waiving its jurisdictional and forum/venue-based challenges) or raising all threshold issues in the Bankruptcy Court.

This is forum shopping. Primeo aims to have both this Court and the Grand Court consider and make rulings on "core" bankruptcy causes of action; indeed, Primeo, by filing a counterclaim with the Grand Court, has requested recognition of what would be the equivalent of a customer claim, more than two years after the same were due in the BLMIS liquidation. In essence, Primeo has fashioned its own dual escape hatch: one in the Cayman Islands, where it contends that it is has no intent of proceeding substantively in the United States, and the other, here, where it seeks a determination of issues of core bankruptcy law.

Finally, Primeo's request to have this court consider the application of 546(e) is premature for another reason. Primeo is not an innocent bystander to the Madoff Ponzi scheme. Primeo is a professional investor—a feeder fund, that funneled money into the Madoff Ponzi scheme despite glaring indicia of fraud. For example, Madoff claimed that his options transactions took place on the Chicago Board Options Exchange (the "CBOE"). Yet, more than one third of the time, the purported options trading in Primeo's BLMIS account exceeded the *total* worldwide reported volume of comparable options contracts traded on the CBOE.[3] There were *two hundred seventy five* impossible options transactions in Primeo's account; even a single "impossible" options trade should have caused Primeo to investigate further. *See* Compl. ¶ 158.

[3] The volume of options contracts which BLMIS reported to Primeo exceed the total volume of contracts for options traded on the CBOE by almost thirty-eight percent. *See* Compl. ¶ 175.

The Bankruptcy Court, however, is the proper forum for litigating questions of bankruptcy law and claims against the Debtors in this SIPA proceeding.[4] And it is the Bankruptcy Court that should determine, in the first instance, both the existence of the safe harbor under section 546(e) and the appropriate standard to be applied under Bankruptcy Code section 548(c)—fundamental questions of bankruptcy law that require nothing more than construction and application of the Bankruptcy Code. Primeo's blatant forum shopping should not be countenanced, and its Motion should be denied.

BACKGROUND

A. Commencement of the SIPA Liquidation

Having adjudicated various Madoff liquidation matters, this Court's familiarity with the background of this matter is presumed.

B. SIPA Authorizes the Trustee to Pursue Avoidance Actions

SIPA § 78fff(b) grants the Trustee authority to conduct a SIPA liquidation proceeding "in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11." SIPA § 78fff(b); *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 231 (2d Cir. 2011) (the "*Second Circuit Net Equity Decision*") ("Pursuant to SIPA, Mr. Picard has the general powers of a bankruptcy trustee, as well as additional duties, specified by the Act, related to recovering and distributing customer property.") (citing SIPA § 78fff-1). SIPA § 78fff-2(c)(3) expressly incorporates the Bankruptcy Code and authorizes a

[4] Here, the Trustee seeks to avoid and recover fraudulent transfers that Primeo, among the other named Defendants, received from BLMIS prior to the commencement of the SIPA proceeding. SIPA § 78fff-2(c)(3) expressly incorporates the Bankruptcy Code and specifies that a SIPA proceeding is to "be conducted in accordance with, and as though it were being conducted under" the Bankruptcy Code and governed by relevant provisions of Title 11. Moreover, SIPA § 78eee-(b)(4) specifically requires that "[u]pon the issuance of a protective decree and appointment of a trustee . . . the 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." SIPA § 78eee-(b)(4) (emphasis added).

SIPA Trustee to recover any fraudulent transfers, including those to customers. SIPA § 78fff-2(c)(3); *Second Circuit Net Equity Decision*, 654 F.3d at 241 n.10 ("SIPA and the Code intersect to . . . grant a SIPA trustee the power to avoid fraudulent transfers for the benefit of customers.") (quoting *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. (In re Bernard L. Madoff Inv. Sec. LLC)*, 424 B.R. 122, 136 (Bankr. S.D.N.Y. 2010) (the "*Net Equity Decision*").

C. The Trustee's Avoidance Litigation Against Primeo

On July 15, 2009, the Trustee filed a complaint ("the Initial Complaint") against Primeo in Bankruptcy Court. Primeo defaulted when it failed to respond to the Initial Complaint as it did not acknowledge service or file any defense. The Trustee subsequently dismissed without prejudice the Initial Complaint. Primeo was then joined to a consolidated complaint against various parties, including HSBC Bank plc, for which an amended complaint was filed on December 5, 2010.

The Trustee's present action against Primeo involves a total of 61 individuals, feeder funds, and financial institutions that facilitated and furthered Madoff's fraud (the "HSBC Action"). The complaint alleges nine bankruptcy-related causes of action against Primeo, seeking to avoid intentional and/or constructive fraudulent transfers, as well as subsequent transfers, of customer property from BLMIS to Primeo, as provided for in the Bankruptcy Code. *See* Warshavsky Decl. Ex. 1. Specifically, the Trustee seeks to avoid from Primeo, transfers of approximately $145 million, the entirety of which are avoidable and recoverable under bankruptcy law as fraudulent transfers of customer property. *See* Compl. ¶ 57.

D. The Cayman Litigation

As Primeo defaulted and previously indicated that it would not proceed in the United States, as a precautionary measure, the Trustee commenced on December 9, 2010 parallel

proceedings against Primeo before the Grand Court (the "Cayman Litigation"). On August 17, 2011, after seeking a second extension of time to respond to the Trustee's complaint in this action, Primeo sought to expedite the Cayman proceedings by filing a "Defence and Counterclaim," in which Primeo asked the Grand Court to decide whether the provisions relied upon by the Trustee "apply extraterritorially as a matter of United States law" and the applicability of the safe harbor provision of section 546(e).[5] Further, while Primeo did not file a customer claim in the BLMIS liquidation, it did file a counterclaim in the Cayman Litigation, demanding damages in the amount invested and lost to BLMIS, and argued the Trustee's fraudulent transfer and preference claims were subject to mandatory "set-off" against the sums allegedly due to Primeo.[6]

The current Motion was filed on September 19, 2011, and a schedule for this matter was approved by this Court on November 11, 2011. Yet, Primeo has asserted before the Grand Court, both at the Case Management Conference on September 1, 2011 *and on November 18, 2011*, that this Court does not have jurisdiction over this dispute and will not address the substantive issues raised by Primeo's Motion. In that November 18, 2001 phone court conference, Primeo's counsel denied that it is seeking to litigate in New York on the merits as follows (for reference: "SR" refers to the Trustee's counsel, Stephen Robins QC, "MJJ" refers to

[5] *See* Primeo Defence & Counterclaim ¶ 51(1)-(2), (4)-(5), *Picard v. Primeo,* Cause No. FSD 275 of 2010 (AJJ), (Grand Court of Cayman Islands, August 17, 2011) (asserting that the provisions relied upon by the Trustee including section 547(b), 550(a)(1), or 551 of the Bankruptcy Code or SIPA section 78fff-2(c)(3) "do not apply extraterritorially as a matter of United States law. . ." and that "the Safe Harbor will prevent the trustee from avoiding transfers to Herald and Alpha Prime," from which Primeo allegedly received BLMIS funds). A copy of Primeo's Defence and Counterclaim is annexed as Exhibit 2 to the Warshavsky Decl.

[6] *See* Primeo Defence & Counterclaim ¶¶ 78-79.

Mr. Justice Andrew J. Jones QC who presided over the hearing, and "MC" refers to Primeo's counsel, Michael Crystal QC):

> SR: Well, My Lord, we have always tried to keep our evidence entirely factual and it's going to explain precisely what it is that Primeo is seeking to do in the New York litigation, which we say involves an attempt to litigate in New York matters which are already before this Court. And that is the basis on which we say, that if that is what Primeo is doing, then this litigation should be stayed to allow those matters to be determined in New York. So it is going . . .
>
> MC: That is going to be highly controversial My Lord, if that is really what they are really going to say.
>
> MJJ: Well . . .
>
> MC: Because it's not true.[7]

ARGUMENT

It should be noted at the outset that Primeo seeks nothing more than an advisory opinion from this Court. While moving substantively before the Court, Primeo has announced its intent to escape this Court's jurisdiction by moving to dismiss the Trustee's complaint for lack of personal jurisdiction. Mem. of Law at 3, n.1. Primeo should not be permitted to appear before this Court and participate in substantive motion practice while challenging the threshold issue of personal jurisdiction—which it interposed—only to later argue that this Court did not have the authority to rule in the first instance. As the Supreme Court has recently emphasized, the question whether a court can properly exercise personal jurisdiction over a defendant is of paramount importance because "whether a judicial judgment is lawful depends on whether the sovereign has the authority to render it." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780,

[7] *See* Transcript of Court Conference, *Picard v. Primeo*, Cause No. FSD 275 of 2010 (AJJ), (Grand Court of the Cayman Islands, Financial Services Division, November 18, 2011), at 27. A copy of the Transcript of the Case Management Conference in the Cayman Litigation is annexed as Exhibit 3 to the Warshavsky Decl.

2789 (2011). If this Court lacks personal jurisdiction as Primeo asserts (and the Trustee disagrees with this assertion) then Primeo is merely requesting an impermissible advisory opinion from this Court.

Primeo simply cannot have it both ways—allowing the Court to rule on a substantive motion and all the while maintaining that the Court has no authority to render such a ruling. Rather, the Trustee submits that the Court should hold the instant Motion in abeyance pending resolution of the threshold personal jurisdiction issues—which Primeo has put before this Court.[8]

I. PRIMEO'S MOTION CANNOT MEET THE REQUIREMENTS FOR MANDATORY WITHDRAWAL

Primeo contends that this Court must withdraw the reference of the HSBC Action pursuant to section 157(d), but does not and cannot demonstrate any of the exceptional circumstances required for mandatory withdrawal. Rather, the HSBC Action requires nothing more than adjudication of avoidance actions under the Bankruptcy Code to recover customer property. In pursuing these bankruptcy claims against Primeo, the Trustee is not violating SIPA. Rather, SIPA expressly authorizes the Trustee to avoid transfers that are void and voidable pursuant to Title 11. There is no exception in SIPA that precludes avoidance of transfers to customers; to the contrary, the recovery of transfers "to or on behalf of customers" is expressly contemplated in SIPA § 78fff-2(c)(3). *See also Second Circuit Net Equity Decision,* 654 F.3d at 242, n. 10.

None of these issues, however, require withdrawal of the reference as there is no conflict between Title 11 and other federal non-bankruptcy laws, nor has Primeo identified one.

[8] Indeed, this Court has stayed a similar motion to withdraw the reference as to certain defendants who contested personal jurisdiction because such threshold issues should ordinarily be resolved at the outset. Order, *Picard v. Trotanoy, et al.*, 11. Civ. 7112 (JSR) (S.D.N.Y. Dec. 6, 2011) at 1-2.

A. Section 157(d) Has Been Narrowly Construed in the Second Circuit

The scope of bankruptcy jurisdiction over all matters affecting a debtor and its property is broadly construed. *Shugrue v. Airline Pilots Ass'n, Int'l* (*In re Ionosphere Clubs, Inc.*), 922 F.2d 984, 994 (2d Cir. 1990). 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, as provided in section 157(d) of Title 28. *In re Ionosphere Clubs, Inc.*, 922 F.2d. at 993. The Second Circuit has consistently held that section 157(d) must be "construed narrowly," *see, e.g., id.* at 995, and 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 Indust., Inc. v. EPA (In re Combustion Equip. Assoc.)*, 67 B.R. 709, 711 (S.D.N.Y. 1986)) (internal quotation omitted). A narrow reading of the mandatory withdrawal provisions is necessary so as not to "eviscerate much of the work of the bankruptcy courts." *Houbigant, Inc. v. ACB Mercantile, Inc. (In re Houbigant, Inc.)*, 185 B.R. 680, 683 (S.D.N.Y. 1995).

Mandatory withdrawal "is not available merely because non-Bankruptcy Code federal statutes will be considered in the bankruptcy court proceeding." *In re Ionosphere Clubs, Inc.*, 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.* at 995 (emphasis added). "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." *City of New*

York v. Exxon Corp., 932 F.2d 1020, 1026 (2d Cir. 1991); *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).

Primeo cannot meet the standard for withdrawal of the reference to resolve the Trustee's claims because no material interpretation of non-bankruptcy federal statutes is required to resolve the issues at hand, nor is there any potential conflict between the Bankruptcy Code and other non-bankruptcy federal statutes. On its face, SIPA mandates removal to the bankruptcy court in the first instance. SIPA is routinely interpreted by bankruptcy courts, as it was originally derived from a bankruptcy statute and specifically incorporates the Bankruptcy Code. Primeo's allegation that SIPA cannot be analyzed and applied by the Bankruptcy Court is simply wrong, as evidenced by, *inter alia*, the *Net Equity Decision* and the Second Circuit's determination thereof.

B. The Trustee Has Standing to Assert Bankruptcy Causes of Action

All of the claims at issue in this case are either brought under bankruptcy law or the New York State Debtor Creditor law which is incorporated therein. There is no need to look beyond SIPA and bankruptcy law for the Trustee's standing to bring each of the claims asserted by the Trustee in this proceeding. In its Net Equity decision, the Second Circuit recognized that SIPA grants the Trustee the power to avoid fraudulent transfers. *See Second Circuit Net Equity Decision*, 654 F.3d at 241 n.10. The Second Circuit emphasized that a SIPA liquidation is "a hybrid proceeding" and a SIPA trustee "shall be vested with the same powers and title with respect to the debtor and the property of the debtor, including the same rights to avoid preferences, as a trustee in a case under Title 11." *Id.* citing 15 U.S.C. § 78fff-1(a). It is then

indisputable that the Trustee has standing to bring avoidance actions pursuant to SIPA and bankruptcy law.

C. *Stern v. Marshall* Does Not Require or Otherwise Warrant Withdrawal

Primeo next seeks refuge in the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Primeo attempts to draw a parallel between the Trustee's avoidance action and the counterclaim addressed by the *Stern* Court, arguing that the bankruptcy court would be limited and could not issue a final judgment against Primeo. Mem. of Law at 7-8. However, Primeo misinterprets *Stern*'s "narrow" ruling that does not "meaningfully change[ ] the division of labor" between bankruptcy courts and district courts. *Stern*, 131 S. Ct. at 2620.

Stern did not involve straightforward bankruptcy law claims for fraudulent transfers but instead concerned a creditor's claim for defamation and a state law counterclaim by the debtor for tortious interference. More importantly, *Stern* did not interpret 28 U.S.C. §§ 157(b)(2)(F) or 157(b)(2)(H), which identify as core proceedings those that "determine, avoid or recover" preferences and fraudulent conveyances, respectively.

Primeo's effort to relate these two completely distinct matters fails, because *Stern* did not hold that actions seeking to avoid and recover fraudulent transfers cannot be decided by non-Article III judges. As recently recognized by a court interpreting the decision,

> *Stern* is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case, and the ruling does not remove from the bankruptcy court its jurisdiction over matters directly related to the estate that can be finally decided in connection with restructuring debtor and creditor relations. . .

In re Salander O'Reilly Galleries, 453 B.R. 106, 115-16 (Bankr. S.D.N.Y. July 18, 2011). *See, e.g., Stern*, 131 S. Ct. at 2611 ("Here Vickie's claim is a state law action independent of the federal bankruptcy law"); *id.* at 2620 ("We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the

current statute . . . the question presented here is a 'narrow' one"); *In re Heller Ehrman LLP*, 2011 WL 4542512, at *4 (Bankr. N.D. Cal. Sept. 28, 2011) ("[T]he Supreme Court did not hold in Stern that bankruptcy judges lack authority to render final judgments on fraudulent transfer claims."). Indeed, courts considering *Stern* have declined to give it the expansive scope that Primeo requests.[9]

In contrast to the state law tortious interference counterclaim at issue in *Stern*, the Trustee has brought traditional avoidance actions against Primeo that the Bankruptcy Code specifically and exclusively authorizes bankruptcy trustees to pursue under Bankruptcy Code sections 544, 547, and 548. *See, e.g.*, *In re Extended Stay*, 2011 WL 5532258 at *7-8; *Kelley v. JPMorgan Chase & Co., et al.*, 2011 WL 4403289, at *6 (D. Minn. Sept. 21, 2011); *Michigan State Hous. Dev. Auth. v. Lehman Brothers, et al.*, No. 11-CV-3392 (S.D.N.Y., Sept. 14, 2011) (JGK). In short, *Stern* is fairly read as limited to state law counterclaims with no relationship to federal bankruptcy law. *Id.* at 2611.

Despite the narrow holding of *Stern*, Primeo claims that the Bankruptcy Court may no longer be permitted to hear fraudulent conveyance claims like those asserted in the complaint. Mem. of Law at 7. This sweeping interpretation of *Stern* is inconsistent with the decision itself and would deprive district courts of the specialized expertise of the bankruptcy courts to handle such claims. As Justice Roberts observed, this specialized expertise was not needed in the adjudication of the common law tort counterclaim addressed in *Stern*. *See Stern,* 131 S. Ct. at 2615 ("The 'experts' in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay.").

[9] *See In re Extended Stay*, 2011 WL 5532258 at *6; *In re Ambac Fin. Grp., Inc.*, 2011 WL 4436126, at *8 (Bankr. S.D.N.Y. Sept.23, 2011); *In re Heller Ehrman LLP*, 2011 WL 4542512, at *1; *In re Safety Harbor Resort and Spa*, 2011 WL 3240596, at *10 (Bankr. M.D .Fla. Aug. 30, 2011); *In re Olde Prairie Block Owner, LLC*, 2011 WL 3792406, at *5 (Bankr. N.D. Ill. Aug. 25, 2011); *In re Am. Bus. Fin. Servs., Inc.*, 2011 WL 3240596, at *2 (Bankr. D. Del. July 28, 2011).

However, specialized bankruptcy expertise is critical to the efficient administration of fraudulent transfer actions brought under the Bankruptcy Code, especially in this case where the Bankruptcy Court is administering over 1,000 related cases involving avoidance actions. Hence, *Stern's* treatment of a generic state law tort counterclaim, which was "in no way derived from or dependent upon bankruptcy law," but rather was "a state law tort action that exists without regard to any bankruptcy proceeding" is inapplicable to the Trustee's avoidance actions emanating from quintessential bankruptcy law and pending before Judge Lifland. *Id.* at 2618.

D. Interpretation of Section 546(e) of the Bankruptcy Code Does Not Warrant Mandatory Withdrawal

Primeo also asserts that the Court should withdraw the reference because the Trustee and SIPC are interpreting Bankruptcy Code section 546(e) in a manner that conflicts with SIPA. Mem. of Law at 10-15. However, withdrawal of the reference is not appropriate as to this issue because its resolution involves only straightforward application and interpretation of Bankruptcy Code provisions. This issue presents no interpretive or complicated issues of first impression under non-Title 11 federal laws, nor does Primeo try to assert one.

As indicated above, Primeo is not an innocent bystander to Madoff's Ponzi scheme, and thus the application of 546(e) is at least a question of fact—not a question of law. Primeo knowingly funneled investors' money into the Madoff Ponzi Scheme to reap unparalleled profits. Primeo, a professional investor, cannot credibly maintain that it was unaware of the: (i) unfeasible options volume trading in its account (*see* Compl. at 56); (ii) two hundred seventy five impossible options transactions in its account (*see id.* at 158); (iii) settling of trades in its account outside industry norms that did not comply with standard trading practices (*see id.* ¶¶ 221-22); and (iv) unauthorized margin trading in its account (*see id.* at 66). There are other indicia of fraud noted in the complaint, but these alone show that Primeo received fraudulent transfers in

the face of various indicia that BLMIS was not engaged in legitimate securities trading—any one of which is sufficient to demonstrate that Primeo cannot assert that there is not, at the very least, a factual issue as to whether it could have reasonably believed that BLMIS was engaged in legitimate trading activity.

Clearly then, this is nothing more than a transparent attempt to "escape" the Bankruptcy Court's prior decisions holding that, *inter alia*, section 546(e) is inapplicable in the context of a Ponzi scheme—especially when applied to bad-faith actors that knowingly participated in the fraud such as Primeo, who should not be granted the "safe harbor" of section 546(e). *See e.g., Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC)*, 440 B.R. 243 (Bankr. S.D.N.Y. 2010), *leave to appeal denied*, 2011 WL 3897970 (S.D.N.Y. Aug. 31, 2011), *aff'd,* 2011 WL 3897970 (S.D.N.Y. Aug 31, 2011); *In re Bernard L. Madoff Inv. Sec. LLC*, 2011 WL 4434632, at *16 (Bankr. S.D.N.Y. Sept. 22, 2011) (holding that "the application of section 546(e) must be rejected as contrary to the purpose of the safe harbor provision"). As a Court in this District recently explained in another case involving the securities industry, "avoiding an unfavorable decision is a not a proper basis for withdrawal of the reference." Transcript of Oral Argument, *Michigan State Hous. Dev. Auth. v. Lehman Brothers, et al.*, No. 11-CV-3392 (JGK) (S.D.N.Y., Sept. 14, 2011), at 65 (annexed to the Warshavsky Decl. as Exhibit 4).

More importantly, in a recent case in this judicial district, the Court did not find that the application of a defense under section 546(e) warranted mandatory withdrawal of the reference. *In re Extended Stay, Inc.*, 2011 WL 5532258, at *7. In particular, the *In re Extended Stay* Court noted that whether section 546(e) of the Bankruptcy Code precluded certain claims under the Fair Debt Collections Practices Act or certain securities laws, could not overcome "the 'narrow' scope this Circuit gives to mandatory withdrawal under section 157(d)" because the movants

failed to point to any federal statute requiring "significant interpretation" rather than mere application to a particular set of facts. *Id.* (citations omitted).

Finally, Primeo, like other various defendants, urges that the "securities laws" must be considered in connection with the application of section 546(e). Yet, neither Primeo nor any other defendant has ever pointed to a single securities law at issue. Bankruptcy Code section 546(e) *explicitly refers* to definitions in the Bankruptcy Code itself. Simply put, there is no additional law that needs to be interpreted outside of the Bankruptcy Code, nor has Primeo cited to any. As such, the determination of whether and how Bankruptcy Code section 546(e) should be applied requires only simple interpretation and application of the Bankruptcy Code. Accordingly, mere application of Title 11 is not a basis for mandatory withdrawal of the reference to the Bankruptcy Court pursuant to 28 U.S.C. § 157(d).

E. The Bankruptcy Court's Interpretation of Bankruptcy Code Section 548(c) Does Not Warrant Mandatory Withdrawal

Attempting to exempt themselves from the fraudulent conveyance laws and their obligation to demonstrate good faith to retain the fraudulent transfers they received from Madoff, Primeo claims that the Court must withdraw the reference because of the Trustee's allegedly "novel" interpretation of SIPA to "retroactively" impose a due diligence obligation on brokerage customers. Mem. of Law at 16-17.

Again, Primeo's attempt to manufacture a conflict between the Bankruptcy Code and SIPA wholly misses the mark. First, Primeo is not an innocent investor, but rather it is a sophisticated, professional investor. Second, any due diligence obligation that Primeo had upon becoming aware of facts that imputed inquiry notice of Madoff's fraud has nothing at all to do with any interpretation of SIPA or other non-bankruptcy federal law. Rather, Primeo's due diligence (or, in this case, lack thereof) is relevant only in the context of whether Primeo can

establish a good faith defense to the Trustee's avoidance claims under section 548(c) of the Bankruptcy Code and analogous state fraudulent conveyance laws. It is *not* a pleading requirement. As such an analysis requires nothing more than a straight-forward application of the Bankruptcy Code itself, as well as established case law interpreting the good faith defense under the Bankruptcy Code.

F. Interpretation of SIPA's Extraterritorial Application Does Not Warrant Mandatory Withdrawal

As part and parcel of its previewed jurisdictional and forum arguments, Primeo now urges that pursuant to the Supreme Court ruling in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), withdrawal is needed to determine whether SIPA has extraterritorial reach. However, Primeo misconstrues *Morrison,* the pre-*Morrison* body of law, and this Court's decision in *Picard v. Kohn*, 11 Civ. 1181 (JSR) (S.D.N.Y. Sept. 6, 2011), which addressed the extraterritorial application of the RICO statutes. There is no "substantial and material" interpretation of non-bankruptcy federal law that warrants mandatory withdrawal.

First, to be clear, *Morrison* dealt with the extraterritorial application of the 1934 Exchange Act, and more specifically with Australian nationals who invested in an Australian company, which traded on an Australian exchange. This is a bankruptcy liquidation in the United States and fraudulent business transactions that took place in New York, and an professional investor—Primeo—that invested directly into BLMIS, and into other feeder funds that were affiliated with Primeo and established for the sole purpose of investing into BLMIS. There is no apparent reason—and certainly no good reason—why the Trustee cannot avoid and recover the fraudulent transfers to Primeo simply because Primeo is incorporated in the Cayman Islands.

Primeo fails to cite to any specific securities law that would make *Morrison* applicable.

That is because such laws are designed to protect United States citizens from fraudulent schemes, not investors who chose to avail themselves of New York law and transfer money in and out of a New York bank account. Primeo is incorrect in asserting that SIPA has no clear indication of an extraterritorial application. SIPA specifically incorporates the Bankruptcy Code, making applicable almost all of the liquidation provisions that apply to ordinary bankruptcy liquidations. And those provisions, which include the power to avoid fraudulent transfers and preferences, may be applied both in the United States and beyond. *See Picard v. Chais*, 440 B.R. 274, 281 (Bankr. S.D.N.Y. 2010).

In fact, both the plain language and congressional intent underlying the Bankruptcy Code reveal a clear intent that the Code has extraterritorial application. While drafting the Code, Congress expressly recognized that a debtor's assets and interests would sometimes lie outside of the United States. Indeed, section 541(a) of the Code explicitly states that the commencement of a bankruptcy case creates an estate comprised of property "wherever located and by whomever held," 11 U.S.C. § 541(a). This clause echoes the worldwide jurisdictional language of 28 U.S.C. § 1334(e)(1), which states that "the district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." *See Deak & Co. Inc. v. Jr. R.M.P. Soedjono (In re Deak & Co., Inc.)*, 63 B.R. 422, 427 (Bankr. S.D.N.Y. 1986) ("Congress inserted this language to 'make clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States.'"); *In re Rajapakse*, 346 B.R. 233 (Bankr. N.D. Ga. 2005); *Diaz-Barba v. Kismet Acquistion, LLC*, 2010 WL 2079738, at *10 (S.D. Cal. May 20, 2010) (noting the court may exercise jurisdiction over all property of the bankrupt estate, even if located outside the United

States, because the provisions of the Code as they relate to property of the estate apply extraterritorially). *See also French v. Liebmann (In re French)*, 440 F.3d 145, 152 (4th Cir. 2005) (holding that since section 548 allows the avoidance of transfers of the debtor in property "wherever located," the presumption against extraterritoriality did not prevent the use of the court's avoidance powers).[10] The Trustee has the right, ability and fiduciary obligation to pursue property of the estate, wherever it is located, including from defendants like Primeo.

Primeo cites to two pre-*Morrison* cases holding that Congress did not intend the avoidance statutes to apply extraterritorially. These cases are inapposite, as both involve foreign debtor corporations that attempted to apply United States laws in an effort to recover foreign transfers. In contrast, the BLMIS liquidation is being conducted in the United States, and the fraudulent transfers in dispute are transactions involving the conveyance of customer property from the United States to Primeo. In fact, the same judge that issued a decision in *Maxwell Commc'n Corp. PLC v. Societe General PLC (In re Maxwell Commc'n Corp. PLC)*, 170 B.R. 800, 814 (Bankr. S.D.N.Y. 1994), later found, under circumstances similar to the instant case—where there is no concurrent bankruptcy proceeding by the debtor in a foreign country and the agreement underlying the challenged transfer was negotiated in New York—that Bankruptcy Code section 547 can be used to recover assets located abroad. *See In re Interbulk. Ltd.*, 240 B.R. 195 (Bankr. S.D.N.Y. 1999)

II. PRIMEO HAS FAILED TO DEMONSTRATE CAUSE FOR PERMISSIVE WITHDRAWAL

This Court may permissively withdraw the reference to Bankruptcy Court pursuant to

[10] Case law also demonstrates that the automatic stay under section 362 of the Code, which is one of the fundamental debtor protections provided by bankruptcy laws, applies extraterritorially. *Nakash v. Zur (In re Nakash)*, 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (finding that the stay exists to protect the estate from "a chaotic and uncontrolled scramble for the Debtor's assets in a variety of uncoordinated proceedings in different courts.").

section 157(d), but Primeo must show "cause" for such withdrawal. To determine whether such "cause" exists, this Court must first 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). As the movant, Primeo bears the burden of proving "cause" to warrant withdrawal. *See In re Ames Dep't Stores*, 1991 WL 259036, at *2 (S.D.N.Y. Nov. 25, 1991).

Primeo has failed to meet its burden. Its argument that withdrawal of the reference "will promote judicial efficiency, prevent delay, and limit costs to the parties" is completely bare and based entirely on the assertion that the *Stern* case will result in "protracted motion practice" concerning the Bankruptcy Court's authority to enter final judgments. Mem. of Law at 8. However, Primeo has done nothing more than raise the specter of *Stern*. It plainly has not analyzed the impact of *Stern* on a claim-by-claim basis with respect to the Trustee's complaint. And Primeo wholly fails to identify any material, incremental delay, or inefficiency that would result in light of *Stern*. None of the *Orion* factors warrant withdrawal.

A. The Bankruptcy Counts in the Trustee's Complaint Are All Core

Primeo does not challenge that the Trustee's Bankruptcy claims are all core proceedings, because it cannot do so. Pursuant to section 157, a proceeding may be core if it is "unique to or uniquely affected by the bankruptcy proceedings" or "directly affect[s] a core bankruptcy function." *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. and Indem. Ass'n., (In re U.S. Lines, Inc.)*, 197 F.3d 631, 637 (2d Cir. 1999). In enacting section 157, Congress intended core proceedings to be interpreted broadly and that "95 percent of the proceedings brought before bankruptcy judges would be core proceedings." *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398 (2d

Cir. 1990). A finding that claims are core "weighs against permissive withdrawal." *In re Leslie Fay Cos., Inc. v. Falbaum*, 1997 WL 555607, at *2 (S.D.N.Y. Sep. 4, 1997). Here, all of the Trustee's fraudulent conveyance and preference transfer claims against Primeo are brought pursuant to 11 U.S.C. §§ 544, 547, and 548, and therefore "arise under" Title 11.[11] *See Rahl v. Bande*, 316 B.R. 127, 131 (S.D.N.Y. 2004) (holding that claims under § 544(b) "arise under" Title 11 and are therefore core). Such avoidance actions are core claims according to the non-exhaustive list of core proceedings set forth in sections 157(b)(2)(F) and (b)(2)(H) of the Bankruptcy Code. *See* 28 U.S.C. §§ 157(b)(2)(F) (defining core matters to include "proceedings to determine, avoid, or recover preferences.") and 157(b)(2)(H) (defining core matters to include "proceedings to determine, avoid, or recover fraudulent conveyances.").

B. Primeo's Motion is Nothing More than Blatant Forum Shopping

As previously indicated, one of the important *Orion* factors is the curtailing of possible forum shopping by parties who perceive the Bankruptcy Court as an unfavorable forum in which to litigate their claims. This Court previously noted in *Schneider v. Riddick (In re Formica Corp.)* that "courts should employ withdrawal 'judiciously in order to prevent it from becoming just another litigation tactic for parties eager to find a way out of bankruptcy court.'" 305 B.R. 147, 151 (S.D.N.Y. 2004) (quoting *Kenai Corp. v. Nat'l Union Fire Ins. Co. (In re Kenai Corp.)*, 136 B.R. 59, 61 (S.D.N.Y. 1992)); *see also In re Fairfield Sentry Ltd.*, 2010 WL 4910119, at *4 (S.D.N.Y. Nov. 22, 2010) (to "allay" concerns of forum-shopping "'courts in this Circuit have construed section 157(d) narrowly in order to prevent an 'escape hatch' out of bankruptcy court'" (quoting *Enron Power Mktg., Inc. v. Holcim, Inc. (In re Enron Corp.)*, 2004 WL 2149124, at *5 (S.D.N.Y. Sept. 23, 2004)).

[11] *See* Exhibit 1.

Primeo clearly is engaging in forum shopping and is seeking only an advisory opinion from this Court. It has stated in a foreign court that it is not substantively proceeding here and there can be no clearer sign of forum shopping. While Primeo may argue that this Court is the more appropriate forum to address the substantive issues involving the extraterritoriality of SIPA and the application of Bankruptcy Code section 546(e), Primeo has raised these exact same issues in the Cayman Litigation.[12] There, Primeo filed a "Defence and Counterclaim" requesting that the Grand Court decide whether the provisions relied upon the Trustee "apply extraterritorially as a matter of United States law" and the applicability of the safe harbor provision of section 546(e).[13] More significantly, as stated, Primeo has asserted before the Grand Court, both at the Case Management Conference on September 1, 2011 and on November 18, 2011, that the New York courts have no jurisdiction over this dispute and will not address the substantive issues raised, including the safe harbor provision and extraterritoriality of SIPA. If Primeo never anticipates for this Court to interpret and analyze issues of "substantial and material" non-bankruptcy law pursuant to section 157(d), then the present Motion is moot, a blatant effort in judicial delay and forum shopping, and thus, should be wholly denied.

C. Withdrawal Would Impede Judicial Efficiency and Uniform Administration of the SIPA Bankruptcy Proceeding

The other *Orion* considerations weigh against withdrawal. The Bankruptcy Court has been administering the SIPA bankruptcy proceeding for nearly three years. Judicial economy would only be promoted by allowing the specialized Bankruptcy Court, already familiar with the

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[12] Given that it is entirely inappropriate and duplicative for Primeo to be raising the same points before this Court as it is seeking to argue before the Grand Court in the Cayman Islands, the Trustee requested the Grand Court institute a stay of the Cayman Litigation until further notice. The stay request will be fully briefed by January 13, 2012.

[13] *See* Primeo Defence & Counterclaim at ¶ 51(1)-(2), (4)-(5).

extensive record and proceedings in the BLMIS case, to initially adjudicate this case. *See Wedtech Corp. v. Banco Popular de Puerto Rico (In re Wedtech Corp.)*, 94 B.R. 293, 296 (S.D.N.Y. 1988); *In re Laventhol & Horwath*, 139 B.R. 109, 116 (S.D.N.Y.1992). It is the more efficient and appropriate course, as "[a]llowing the bankruptcy courts to consider complex questions of bankruptcy law before they come to the district court for de novo review promotes a more uniform application of bankruptcy law." *In re Extended Stay*, 2011 WL 5532258 at *10 (finding that preserving bankruptcy court's ability to determine claims that implicated section 546(e) of the Bankruptcy Code weighed against withdrawal of the reference).

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests the court deny the Motion.

Date: New York, New York
December 7, 2011

/s/ Oren J. Warshavsky

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EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-1789 (BRL) SIPA LIQUIDATION (Substantively Consolidated)
In re BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. BANCO BILBAO VIZCAYA ARGENTARIA, S.A., Defendant.	Adv. Pro. No. 10-05351 (BRL) 11 Civ. 07100 (JSR)

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

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Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act ("SIPA"),[1] 15 U.S.C. §§ 78aaa *et seq.*, and the estate of Bernard L. Madoff ("Madoff," and together with BLMIS, each a "Debtor" and collectively, the "Debtors"), by and through his undersigned counsel, hereby submits this memorandum of law in opposition to the Motion to Withdraw the Reference (the "Motion") and accompanying Memorandum of Law ("Mem. of Law") filed in the following action: *Picard v. Banco Bilbao Vizcaya Argentaria, S.A.,* Adv. Pro. No. 10-05351[2] (Bankr. S.D.N.Y.) (BRL), No. 11 Civ. 07100 (JSR) (S.D.N.Y.) (ECF No. 1).

PRELIMINARY STATEMENT

Through this procedural gamesmanship, Banco Bilbao Vizcaya Argentaria, S.A. ("Defendant" or "BBVA") is perverting section 157(d). Indeed, this is precisely the type of conduct against which courts in this Circuit have routinely cautioned. Attempting to jam a square peg into a round hole—and latch onto the parade of other motions to withdraw the reference filed with this Court—BBVA asks this Court, *inter alia*, to apply various provisions of title 11 of the United States Code (the "Bankruptcy Code") which, by their express terms, are plainly inapplicable to the case at bar. BBVA fails to recognize that the Trustee's action here is a **recovery** action under Bankruptcy Code section 550—not an *avoidance* action—which does not implicate the Bankruptcy Code provisions BBVA desperately seeks to invoke.

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[1] The Securities Investor Protection Act ("SIPA") is found at 15 U.S.C. §§ 78aaa *et seq*. For convenience, subsequent references to SIPA will omit "15 U.S.C."

[2] A copy of the complaint filed by the Trustee against BBVA in the referenced action is annexed to the Declaration of Oren J. Warshavsky, Esq. ("Warshavsky Decl.") as Exhibit 1.

Rather, the Trustee's action here—unlike any of the *avoidance* actions already before this Court—seeks to **recover** BLMIS customer property that was subsequently transferred to BBVA pursuant to section 550.[3] BBVA nevertheless seeks shelter under the safe harbor provision of section 546(e),[4] which does not apply to **recovery** actions under section 550.[5] Likewise, BBVA heavily relies on certain prior decisions of this Court withdrawing the reference to consider the implications of applying sections 548(c) and 546(e) in the context of *avoidance* actions, which have no application to the Trustee's *recovery* action presently before the Court. In the face of clear Second Circuit precedent narrowly construing section 157(d) and giving deference to bankruptcy courts to address purely core matters, withdrawal is unwarranted.

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[3] Bankruptcy Code § 550(a) provides:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553 (b), or 724 (a) of this title, the trustee may *recover*, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a) (emphasis added). It is a well-established principle that avoidance and recovery are separate and distinct concepts under the Bankruptcy Code. S. Rep. No. 95-989, at 90 (1978) (Section 550 "enunciates the separation between the concepts of avoiding a transfer and recovering from transferee . . . or from any immediate or mediate transferee. . ."). Section 550 empowers the Trustee to recover property transferred, or the value thereof, to an initial or subsequent transferee of an avoidable transfer.

[4] *See* 11 U.S.C. § 546(e).

[5] As recently recognized by this Court, "Section 546(e) … does not address avoidance under § 550(a). Section 550(a) permits avoidance of a subsequent transfer 'to the extent that a[n initial] transfer is avoided under section … 548.'"). Opinion and Order, *Picard v. Katz*, 11 Civ. 03605 (JSR) (S.D.N.Y. Jan. 17, 2012) at 13.

In short, the bankruptcy court is the proper forum for litigating questions of bankruptcy law in this SIPA proceeding.[6] And it is the bankruptcy court that should determine, in the first instance, the meaning, scope and reach of the provisions of the Bankruptcy Code as applied in this SIPA bankruptcy liquidation proceeding—fundamental questions of bankruptcy law that require nothing more than construction and application of the Bankruptcy Code.

ALLEGATIONS IN THE COMPLAINT

BBVA is not an innocent bystander to Madoff's Ponzi scheme. Rather, BBVA is a highly sophisticated financial institution that funneled money into the Madoff Ponzi scheme despite seeing and then ignoring indicia of fraud. Specifically, BBVA received at least $45 million in subsequent transfers of BLMIS customer property in connection with its redemption of shares it held in Fairfield Sentry Limited ("Sentry"), the flagship Madoff Feeder Fund managed by Fairfield Greenwich Group ("FGG"), which had direct investment accounts with BLMIS. *See* Complaint, Adv. Pro. No. 10-05351 (hereinafter referred to as "Compl.") (¶ 29-30, 66.) In fact, with knowledge of red flags of possible fraud, BBVA created leveraged investment products specifically designed for the same purpose: to exploit Madoff's low volatility and fictional "success" for its own institutional gain.

As early as May 2006, and prior to investing in the Madoff feeder funds or participating in any leveraged transaction referencing feeder funds, BBVA had identified several critical red flags regarding Sentry and BLMIS, putting it on notice of possible fraudulent activities at BLMIS. (Compl. ¶ 70.) For example, in a May 2006 e-mail among members of FGG, it was

[6] SIPA § 78fff-2(c)(3) expressly incorporates the Bankruptcy Code and specifies that a SIPA proceeding is to "be conducted in accordance with, and as though it were being conducted under" the Bankruptcy Code and governed by relevant provisions of title 11. Moreover, SIPA § 78eee-(b)(4) specifically requires that "[u]pon the issuance of a protective decree and appointment of a trustee … the 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." SIPA § 78eee-(b)(4).

reported that BBVA had "very strong reservations as to the Madoff counter-party risk." (Compl. ¶ 70-71.) BBVA had further requested that FGG confirm that Madoff was properly segregating assets, which suggest BBVA recognized that it was possible that Madoff could commingle or misappropriate investor assets. (*Id.*) BBVA also had expressed concerns with the lack of transparency at BLMIS and Madoff's secrecy concerning the options counterparties to the options that were supposedly being entered into by the feeder funds. (*Id.*)

Despite the numerous indicia of fraud at BLMIS, BBVA failed to perform any independent, meaningful due diligence of BLMIS in light of these concerns. BBVA's failure to act is illustrated by the fact that BBVA created internal documents exhibiting factual inaccuracies concerning BLMIS and Sentry which any meaningful due diligence would have detected. For example, an internal document circulated within BBVA on May 17, 2006, referred to in the Complaint as the "Sales Memo," stated BLMIS served as both broker-dealer and custodian for the Sentry assets under management. (*Id.* ¶ 79, 123-24.) Such an arrangement was atypical and unusual in the hedge fund industry as it resulted in a lack of checks and balances because no independent entity could verify the existence of the assets. (*Id.*) The Sales Memo also stated that Sentry's annual earnings were based on a 1% management fee and a 20% performance fee, which meant that Sentry, as opposed to BLMIS, was being rewarded with the type of fees that BLMIS should have charged for executing its purported split-strike conversion strategy. (*Id.* ¶ 82.) Madoff forfeited literally hundreds of millions, if not billions, of dollars, by allowing feeder funds like Sentry to "earn" the normal management fees based on assets under management and the performance of the fund. (*Id.*) Madoff's unusual fee structure did not go unnoticed by other investment professionals, and was aberrational when compared to the fees charged by most investment funds.

While BBVA was only an indirect investor in BLMIS, it had access to both public and non-public information that made BBVA aware of several red flags of possible fraud at BLMIS. For example, in terms of public information, Madoff claimed that his options transactions took place on the Chicago Board Options Exchange (the "CBOE"). Yet, the purported options trading volume reported to have been traded by BLMIS for the Sentry accounts *alone* would have exceeded the total options available on the CBOE nearly **97.6%** of the time. (*Id.* ¶ 105.) If BBVA had performed minimal due diligence and simply checked the number of listed options in the Sentry accounts against the number of same options actually traded on the CBOE, it would have been abundantly clear that Madoff's trading strategy was impossible due to market volume alone. (*Id.* ¶ 104.)

In terms of non-public information, BBVA had access to the Sentry Monthly Tear Sheets ("Tear Sheets") showing rates of return and the Sharpe ratio for the fund. (Compl. ¶101.) These Tear Sheets revealed that Sentry and BLMIS maintained consistent and impossibly positive rates of return during events—*i.e.*, the burst of the dotcom bubble in 2000, the September 11, 2011 terrorist attack, and the housing crisis of 2008—that otherwise devastated the S&P 100 Index. (*Id.* ¶¶ 128-129.) In fact, between 1996 and 2008, Sentry and its sister fund, Fairfield Sigma Limited, did not experience a *single* quarter of negative returns. (*Id.* ¶ 128.) Sentry outperformed the S&P 100 Index by 20 to 40 percent in each instance where the S&P 100 Index suffered double-digit losses. (*Id.* ¶ 129.)

Moreover, for a 13-year period, Sentry had a higher Sharpe ratio than money managers Warren Buffett, George Soros, Bruce Kovner and John Paulson in all but 6 of 52 quarters between 1995 and 2007. The probability of Sentry's Sharpe ratio outperforming these star money managers in almost every quarter for nearly 13 years is approximately **1 in 200,000,000**.

(Id. ¶ 104.) BBVA knew or should have known that BLMIS produced returns that were simply too good to be true, reflecting a pattern of abnormal profitability, both in terms of consistency and amounts that were simply not credible. (*Id.* ¶ 125.) Yet, BBVA never once made any inquiries as to any of the abnormalities and instead, opted for finding ways to exploit Madoff's unusually high returns. (*Id.* ¶ 72.)

BACKGROUND

A. Commencement of the SIPA Liquidation

Having adjudicated various Madoff liquidation matters, this Court's familiarity with the background of this matter is presumed.

B. SIPA Authorizes the Trustee to Pursue Bankruptcy Causes of Action

SIPA § 78fff(b) grants the Trustee authority to conduct a SIPA liquidation proceeding "in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11." SIPA § 78fff(b); *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 231 (2d Cir. 2011) (the "*Second Circuit Net Equity Decision*") ("Pursuant to SIPA, Mr. Picard has the general powers of a bankruptcy trustee, as well as additional duties, specified by the Act, related to recovering and distributing customer property.") (citing SIPA § 78fff-1). SIPA § 78fff-2(c)(3) expressly incorporates the Bankruptcy Code and authorizes a SIPA Trustee to recover any fraudulent transfers, including those to customers. SIPA § 78fff-2(c)(3); *Second Circuit Net Equity Decision*, 654 F.3d at 241 n.10 ("SIPA and the Code intersect to . . . grant a SIPA trustee the power to avoid fraudulent transfers for the benefit of customers.") (quoting *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. (In re Bernard L. Madoff Inv. Sec. LLC)*, 424 B.R. 122, 136 (Bankr. S.D.N.Y. 2010) (the "*Net Equity Decision*").

C. The Trustee's Recovery Action Against The Defendant

The Trustee's complaint against BBVA alleges various causes of action, all "core" matters arising under the Bankruptcy Code or the New York Fraudulent Conveyance Act (New York Debtor and Creditor Law § 270 *et seq.* (McKinney 2001) ("DCL")). *See* Warshavsky Decl. Ex. 1. Specifically, the Trustee seeks to recover the proceeds of certain avoided or avoidable initial transfers subsequently transferred to BBVA under Bankruptcy Code sections 550(a) and the DCL.

SUMMARY OF ARGUMENT

The Motion should be denied because none of the issues raised by BBVA require "substantial and material" interpretation of non-bankruptcy federal law warranting mandatory withdrawal under section 157(d). First, BBVA seeks withdrawal based upon the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). BBVA misinterprets *Stern*'s narrow ruling which has no effect on the bankruptcy court's authority to finally adjudicate the Trustee's recovery actions.

Next, BBVA attempts to shield itself from the Trustee's recovery action by invoking section 546(e), one of the Bankruptcy Code's "safe harbor" provisions. However, section 546(e) is plainly inapplicable to the Trustee's recovery action under section 550 and, thus, cannot provide any basis for withdrawal.

BBVA also argues that withdrawal is also necessary to determine whether SIPA and the Bankruptcy Code have extraterritorial reach under *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). Yet, BBVA ignores the Bankruptcy Code's language and the body of law interpreting it providing for the Code to apply to those who reside outside the United States.

In addition, BBVA alleges that withdrawal is required because of what BBVA characterizes as SIPA's retroactive due diligence obligation under section 548(c) for brokerage

customers. BBVA, a sophisticated institutional investor is not and was not a customer of the BLMIS broker dealer business or the investment advisory business. BBVA is a subsequent transferee from whom recovery is properly sought under the Bankruptcy Code.

Finally, BBVA failed to establish the requisite "cause" for permissive withdrawal pursuant to section 157(d)—all of the *Orion* factors militate against withdrawal. Without any mandatory or permissive grounds to withdraw the reference, the Motion should be denied.

ARGUMENT

I. THE DEFENDANT'S MOTION TO WITHDRAW THE RECOVERY ACTION CANNOT MEET THE REQUIREMENTS FOR MANDATORY WITHDRAWAL

A. Section 157(d) Has Been Narrowly Construed in the Second Circuit

The scope of bankruptcy jurisdiction over all matters affecting a debtor and its property is broadly construed. *Shugrue v. Airline Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 994 (2d Cir. 1990). 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 as provided in section 157(d) of title 28. *In re Ionosphere Clubs, Inc.*, 922 F.2d. at 995. The Second Circuit has consistently held that section 157(d) must be "construed narrowly," *see, e.g., id.*, and 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 Indust., Inc. v. EPA (In re Combustion Equip. Assoc.)*, 67 B.R. 709, 711 (S.D.N.Y. 1986)) (internal quotation omitted). A narrow reading of the mandatory withdrawal provisions is necessary so as

not to "eviscerate much of the work of the bankruptcy courts." *Houbigant, Inc. v. ACB Mercantile, Inc. (In re Houbigant, Inc.)*, 185 B.R. 680, 683 (S.D.N.Y. 1995).

Mandatory withdrawal "is not available merely because non-Bankruptcy Code federal statutes will be considered in the bankruptcy court proceeding." *In re Ionosphere Clubs, Inc.*, 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.* at 995 (emphasis added). "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." *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991); *Enron Corp. v. J.P. Morgan Sec.* (*In re Enron Corp.*), 388 B.R. 131, 136, 139 (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).

BBVA cannot meet the standard for withdrawal of the reference to resolve the Trustee's claims because no material interpretation of non-bankruptcy federal statutes is required to resolve the issues at hand, nor is there any potential conflict between the Bankruptcy Code and other non-bankruptcy federal statutes. On its face, SIPA mandates removal to the bankruptcy court in the first instance. SIPA is routinely interpreted by bankruptcy courts as it was originally derived from a bankruptcy statute and specifically incorporates the Bankruptcy Code. BBVA's allegation that SIPA cannot be analyzed and applied by the bankruptcy court is simply wrong, as evidenced by, *inter alia*, the *Net Equity Decision* and the Second Circuit's determination thereof.

B. *Stern v. Marshall* Does Not Require or Otherwise Warrant Withdrawal

BBVA seeks refuge in the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). BBVA strains to draw a parallel between the Trustee's traditional recovery actions under the Bankruptcy Code and the counterclaim addressed by the *Stern* Court. BBVA argues that the bankruptcy court here would somehow be limited and could not issue a final judgment against BBVA . *See* Mem. of Law at 7-9. Not so. BBVA wildly misconstrues *Stern*'s "narrow" ruling which makes clear that it does not "meaningfully change[ ] the division of labor" between bankruptcy courts and district courts. *Stern*, 131 S. Ct. at 2620.

Stern did not involve straightforward bankruptcy law claims for recovery of avoided or avoidable initial transfers from subsequent transferees but instead concerned a creditor's claim for defamation and a state law counterclaim by the debtor for tortious interference. *Stern* did not interpret 28 U.S.C. §§ 157(b)(2)(F) or 157(b)(2)(H), which identify as core proceedings those that "determine, avoid or recover" preferences and fraudulent conveyances.

BBVA's effort to relate these two completely distinct matters fails. *Stern* does not hold, nor even suggest, that actions seeking to avoid and recover fraudulent and/or preferential transfers are not properly the province of and rightly decided by non-Article III judges. As recently recognized by this district:

> *Stern* is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case, and the ruling does not remove from the bankruptcy court its jurisdiction over matters directly related to the estate that can be finally decided in connection with restructuring debtor and creditor relations. . .

In re Salander O'Reilly Galleries, 453 B.R. 106, 115-16 (Bankr. S.D.N.Y. July 18, 2011). *See, e.g., Stern*, 131 S. Ct. at 2611 ("Here Vickie's claim is a state law action independent of the federal bankruptcy law"); *id.* at 2620 ("We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the

current statute . . . the question presented here is a 'narrow' one"); *Kirschner v. Agoglia (In re Refco Inc.)*, 2011 WL 5974532, at *4 (Bankr. S.D.N.Y. Nov. 30, 2011) ("Clearly several of [the Court's] rationales argue that *Stern* does not preclude the bankruptcy court from issuing a final judgment on a fraudulent transfer claim"). Indeed, courts considering *Stern* have routinely declined to give it the expansive scope that BBVA requests.[7]

In contrast to the state law tortious interference counterclaim at issue in *Stern*, in the present case the Trustee has brought traditional bankruptcy causes of actions to recover the proceeds of avoided or avoidable transfers from BBVA that the Bankruptcy Code specifically and exclusively authorizes bankruptcy trustees to pursue under Bankruptcy Code section 550. *See, e.g.*, *In re Extended Stay, Inc.*, 2011 WL 5532258, at *7-8; *Kelley v. JPMorgan Chase & Co.*, 2011 WL 4403289, at *6 (D. Minn. Sept. 21, 2011); *Michigan State Hous. Dev. Auth. v. Lehman Brothers, et al.*, No. 11 Civ. 3392 (S.D.N.Y., Sept. 14, 2011) (JGK). In short, *Stern* is fairly read as limited to state law counterclaims with no relationship to federal bankruptcy law. *Id.* at 2611.

Despite the narrow holding of *Stern*, BBVA claims the bankruptcy court cannot finally

[7] *See In re Safety Harbor Resort & Spa*, 456 B.R. 703, 717 (Bankr. M.D. Fla. 2011) (finding that a bankruptcy court has jurisdiction to hear fraudulent transfer claims and "that nothing has changed" as a result of *Stern*); *In re Custom Contractors, LLC*, 2011 WL 6046397, at *6 (Bankr. S.D. Fla. Dec. 5, 2011) (This Court's job is [to apply *Stern*'s holding,] not to extend *Stern* to fraudulent transfer actions based on Supreme Court *dicta*, and in so doing, upend the division of labor between district and bankruptcy courts that has been in effect for nearly thirty years."); *In re Extended Stay, Inc.*, 2011 WL 5532258, at *6 ("Withdrawing the reference simply due to the uncertainty caused by *Stern* is a drastic remedy that would hamper judicial efficiency on the basis of a narrow defect in the current statutory regime identified by *Stern*."); *Field v. Lindell (In re The Mortgage Store, Inc.)*, 2011 WL 5056990, at *6–7 (D. Haw. Oct. 5, 2011) (determining not to withdraw the reference even if *Stern* applied to fraudulent transfer proceeding because "[w]ithdrawal of the reference at this stage would result in this court losing the benefit of the bankruptcy court's experience in both the law and the facts, resulting in an inefficient allocation of judicial resources"). *See also In re Ambac Fin. Grp., Inc.*, 2011 WL 4436126, at *8 (Bankr. S.D.N.Y. Sept.23, 2011); *In re Olde Prairie Block Owner, LLC*, 2011 WL 3792406, at *5 (Bankr. N.D. Ill. Aug. 25, 2011); *In re Am. Bus. Fin. Servs., Inc.*, 457 B.R. 314, 319-320 (Bankr. D. Del. 2011).

determine fraudulent conveyance and preferential transfer claims like those which underlay the Trustee's recovery action asserted in the case at issue in the instant action. *See* Mem. of Law at 7-9. Such a sweeping interpretation of *Stern* is inconsistent with the decision itself, would deprive district courts of bankruptcy courts' specialized expertise to handle such claims, and would have the practical effect of eliminating bankruptcy courts permanently.

As Justice Roberts observed, the bankruptcy court's specialized expertise was not needed in the adjudication of the common law tort counterclaim addressed in *Stern*. *See Stern,* 131 S. Ct. at 2615 ("The 'experts' in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay."). However, specialized bankruptcy expertise is critical to the efficient administration of avoidance and recovery actions brought under the Bankruptcy Code, especially in this case where the bankruptcy court is administering over 1,000 related cases and thousands of objections.

The importance of this particularized framework utilizing the bankruptcy court's expertise is magnified in a Ponzi scheme case, such as this case, where the majority of the debtor's assets were fraudulently transferred to third parties before BLMIS's bankruptcy resulting in the transferees receiving money stolen from other investors. As a consequence, the Bankruptcy Court must manage both the allowance of claims to those who were defrauded as well as recovery of fraudulent transfers in order to pay the allowed claims. This distinctive relationship is succinctly set forth in Judge Drain's *Refco* opinion:

> Since the enactment of the Bankruptcy Code, the management and determination of statutory avoidance claims has been a primary function of the bankruptcy courts. Such claims often play a prominent role in bankruptcy cases, either because of their sheer numbers or because of the effect that the potential avoidance of a transfer, lien, or obligation may have on creditors' recoveries. This is particularly so in cases where most, if not all, of the debtor's estate was transferred to third parties pre-bankruptcy, such

> as the many Ponzi-scheme driven cases of recent years, requiring a coordinated response overseen by one judge on behalf of a host of creditor-victims. The ability to manage efficiently the investigation and litigation of such claims, and their possible global settlement, decreases if handled on a piecemeal basis by different judges no matter how talented.

Id. at *5.

Judge Drain emphasizes the necessity of maintaining ties between the recovery action against BBVA and BLMIS's claims allowance process. It further makes clear the difference between *Stern's* treatment of a generic state law tort counterclaim, which was "in no way derived from or dependent upon bankruptcy law," but rather was "a state law tort action that exists without regard to any bankruptcy proceeding" *(Stern,* 131 S.Ct. at 2618) and the Trustee's recovery actions which "flow from a federal statutory scheme" and is "completely dependent upon adjudication of a claim created by federal law." *In re Refco Inc.,* 2011 WL 5974532, at *4 (quoting *Stern,* 131 S.Ct. at 2614) (concluding that bankruptcy courts have constitutional power to issue final judgments in fraudulent transfer actions even where the defendant had not filed a proof of claim in the bankruptcy).

C. The Safe Harbor Protections Under 546(e) Are Inapplicable Here and Do Not Warrant Mandatory Withdrawal

BBVA also asserts that the Court should withdraw the reference because interpretation of Bankruptcy Code section 546(e)[8] implicates "certain principles of securities law." *See* Mem. of

[8] Bankruptcy Code § 546(e) provides in pertinent part:

> Notwithstanding sections 544, 545, 547, 548 (a)(1)(B), and 548 (b) of this title, the trustee may not *avoid* a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made ... in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761 (4), or forward contract, that is made before the commencement of the case, except under section 548 (a)(1)(A) of this title.

Law at 15. However, the plain language of Bankruptcy Code section 546(e) provides that safe harbor protections do not apply to recovery actions against subsequent transferees under Bankruptcy Code section 550. In fact, this Court recently recognized that section 546(e) does not address recovery under section 550(a). *See* Opinion and Order, *Picard v. Katz*, 11 Civ. 03605 (JSR) (S.D.N.Y. Jan. 17, 2012) at 13 (reinstating the Trustee's count seeking recovery from subsequent transferees under Bankruptcy Code section 550(a) notwithstanding the application of section 546(e)).

Rather, Section 546(e), to the extent applicable to these cases,[9] may only limit the Trustee's ability to *avoid* transfers under sections 544, 545, 547, 548(a)(1)(B) and 548(b) of the Bankruptcy Code. Section 546(e) does not, however, limit the Trustee's ability to *recover* subsequent transfers under section 550. Just as Congress declined to include section 550 within the ambit of the safe harbors of section 546(e), so too should this Court decline BBVA's

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11 U.S.C. § 546(e) (emphasis added) (expressly excluding section 550 of the Bankruptcy Code and having no effect on a trustee's ability to recover property transferred or the value of such property under section 550).

[9] The Trustee continues to preserve and assert his position that the mere invocation of Bankruptcy Code section 546(e) by defendants such as BBVA does not provide a proper basis for mandatory withdrawal of the reference. Likewise, the Trustee reasserts his position that the same section of the Bankruptcy Code is inapplicable here, notwithstanding this Court's ruling in *Picard v. Katz*, No. 11 Civ. 3605, 2011 WL 4448638 at *2-3 (S.D.N.Y. Sept. 27, 2011). No other court has found that section 546(e) provides a basis for mandatory withdrawal of the reference under 28 U.S.C. § 157(d), *see Walker, Truesdell, Roth & Assocs. v. The Blackstone Group, L.P. (In re Extended Stay, Inc.)*, 2011 WL 5532258, at *7 (S.D.N.Y. Nov. 10, 2011), or that section 546(e) is properly extended to fictional transactions pursuant to a Ponzi scheme. *See, e.g., See Johnson v. Neilson (In re Slatkin)*, 525 F.3d 805, 819 (9th Cir. 2008); *Kipperman v. Circle Trust F.B.O. (In re Grafton Partners)*, 321 B.R. 527, 541 (9th Cir. BAP 2005) (applying section 546(e) to payments made in connection with a Ponzi scheme "would amount to an absurd contradiction of the securities laws"); *Wider v. Wooton*, 907 F.2d 570, 573 (5th Cir. 1990) (rejecting application of section 546(e) defense in a Ponzi scheme context so as not to "implicitly authorize fraudulent business practices through an unjustified extension of the stockbroker defense"); *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC)*, 2011 WL 3897970, at *12 (S.D.N.Y. Aug. 31, 2011); *Picard v. Madoff*, Adv. Pro. No. 09-1503, 2011 WL 4434632, at *15-16 (Bankr. S.D.N.Y. Sept. 22, 2011).

invitation to re-write the law to BBVA's liking. To do as BBVA requests would contradict the clear language of the Bankruptcy Code and grant subsequent transferees defenses Congress never directed or intended. At bottom, the Trustee's power to seek recovery of subsequent transfers from BBVA via section 550 can in no way be limited by section 546(e).

Even if section 546(e) was somehow applicable to the Trustee's claims, in a recent case in this district, the Court found that the application of an affirmative defense under section 546(e) did not warrant mandatory withdrawal of the reference. *In re Extended Stay, Inc.*, 2011 WL 5532258, at *7. In particular, the *In re Extended Stay* Court noted that the issue of whether or not section 546(e) of the Bankruptcy Code precluded certain claims under the Fair Debt Collections Practices Act or certain securities laws could not overcome "the 'narrow' scope this Circuit gives to mandatory withdrawal under section 157(d)" because the movants failed to point to any federal statute requiring "significant interpretation" rather than mere application to a particular set of facts. *Id.* (citations omitted).

Finally, BBVA urges that "securities law implications" must be considered in connection with the application of section 546(e). *See* Mem. of Law at 15. Yet, BBVA has not pointed to a single securities law at issue in the case at bar. Bankruptcy Code section 546(e) *explicitly refers* to definitions in the Bankruptcy Code itself. Simply put, there is no additional law that needs to be interpreted outside of the Bankruptcy Code, nor has BBVA cited to any. As such, the determination of whether and how Bankruptcy Code section 546(e) should be applied requires only simple interpretation and application of the Bankruptcy Code—determination which rests with the Bankruptcy Court.

D. Interpretation of the Extraterritoriality of SIPA and the Bankruptcy Code Does Not Warrant Mandatory Withdrawal

BBVA also asserts that pursuant to the Supreme Court ruling in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) withdrawal is needed to determine whether SIPA and the Bankruptcy Code have extraterritorial reach. *See* Mem. of Law at 16-17. However, in doing so BBVA misconstrues *Morrison,* the pre-*Morrison* body of law, and this Court's decision in *Picard v. Kohn*, 11 Civ. 1181 (JSR) (S.D.N.Y. Sept. 6, 2011), which addressed the extraterritorial application of the RICO statute. There is no "substantial and material" interpretation of non-bankruptcy federal law in the present case which warrants mandatory withdrawal. Indeed, BBVA is asking how *Morrison* applies, if at all, to the Trustee's claims under the Bankruptcy Code.

First, *Morrison* dealt with the extraterritorial application of the 1934 Exchange Act, and more specifically with Australian nationals who invested in an Australian company, which traded on an Australian exchange. The present case is a SIPA liquidation in the United States based on fraudulent business transactions that took place in New York, involved sophisticated entities—such as BBVA—that invested into feeder funds that were largely established for the sole purpose of investing with BLMIS. There is no apparent reason—and certainly no good reason—why the Trustee cannot recover the subsequent transfers of fraudulent and/or preferential transfers to BBVA simply because BBVA is incorporated outside the United States.

BBVA is also wrong when asserting that SIPA has no clear indication of an extraterritorial application and that this is an issue of first impression requiring mandatory withdrawal. *See* Mem. of Law at 16. SIPA specifically and expressly incorporates the Bankruptcy Code making applicable almost all of the liquidation provisions that apply to ordinary bankruptcy liquidations. And those provisions, which include the power to avoid and

recover fraudulent transfers and preferences may be applied both in the United States and beyond. *See Picard v. Chais*, 440 B.R. 274, 281 (Bankr. S.D.N.Y. 2010) (stating "[t]he United States has a strong interest in applying the provisions of the Bankruptcy Code" and holding that the exercise of personal jurisdiction over a foreign defendant was reasonable since the Trustee's claims arise under U.S. bankruptcy laws and are brought on behalf of all creditors and customers in this SIPA proceeding).

In fact, both the plain language and congressional intent underlying the Bankruptcy Code make it clear the Code does in fact have clear and unmistakable extraterritorial application. While drafting the Bankruptcy Code, Congress expressly recognized that a debtor's assets and interests would sometimes lie outside of the United States. Indeed, section 541(a) of the Bankruptcy Code explicitly states that the commencement of a bankruptcy case creates an estate comprised of property "wherever located and by whomever held," 11 U.S.C. § 541(a) (emphasis added).

Section 541(a) echoes the worldwide jurisdictional language of 28 U.S.C. § 1334(e)(1), which states that "the district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." *See Deak & Co. Inc. v. Jr. R.M.P. Soedjono (In re Deak & Co., Inc.)*, 63 B.R. 422, 427 (Bankr. S.D.N.Y. 1986) ("Congress inserted this language to 'make clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States.'"); *In re Rajapakse*, 346 B.R. 233 (Bankr. N.D. Ga. 2005); *Diaz-Barba v. Kismet Acquisition, LLC*, 2010 WL 2079738, at *10 (S.D. Cal. May 20, 2010) (noting the court may exercise jurisdiction over all property of the bankrupt estate, even if located outside the United States, because the provisions of the Code as

they relate to property of the estate apply extraterritorially). *See also French v. Liebmann (In re French)*, 440 F.3d 145, 152 (4th Cir. 2005) (holding that since section 548 allows the avoidance of transfers of the debtor in property "wherever located," the presumption against extraterritoriality did not prevent the use of the court's avoidance powers).[10] The Trustee has the right, ability and fiduciary obligation to pursue property of the estate, wherever it is located, including from BBVA.

BBVA's *Morrison* argument ignores the two sided process involved in bankruptcy and SIPA proceedings. In effect, BBVA argues the Bankruptcy Code's avoidance and recovery provisions cannot be applied to BBVA simply because it is based in Spain. If this Court accepts BBVA's argument, then it is also the result that no foreign national could make a claim in a bankruptcy or SIPA proceeding pending in the United States. Such an absurd result was never intended by Congress nor has it ever been countenanced by a court in this country.

In short, BBVA's *Morrison* argument fails to provide any justification for mandatory withdrawal of the reference. Bankruptcy courts are called upon by the Bankruptcy Code to hear and determine cases seeking the recovery of property wherever it is found. BBVA's foreign status is nothing unique. The bankruptcy court is fully empowered to hear these cases and there is no material and substantial issue of federal non-bankruptcy law requiring the withdrawal of the reference. As a result, under *Morrison* there is no basis for mandatory withdrawal of the reference.

[10] Case law also demonstrates that the automatic stay under section 362 of the Code, which is one of the fundamental debtor protections provided by bankruptcy laws, applies extraterritorially. *Nakash v. Zur (In re Nakash)*, 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (finding that the stay exists to protect the estate from "a chaotic and uncontrolled scramble for the Debtor's assets in a variety of uncoordinated proceedings in different courts.").

E. Bankruptcy Code Section 548(c) Is Inapplicable Here and Does Not Warrant Mandatory Withdrawal

In yet another attempt to seize upon this Court's prior rulings, BBVA seizes on defenses afforded to initial transferees under 548(c) as a basis for withdrawal of the reference. In so doing, BBVA ignores the fact 548(c) does not apply to actions to recover avoided or avoidable initial transfers. Despite emphasizing that it is not a BLMIS customer, BBVA seeks to assert defenses of the customer-initial transferees. BBVA does so in order to attempt to shoehorn itself into this Court's prior rulings in *Katz* by seeking to withdraw the reference to determine what BBVA characterizes as the Trustee's novel interpretation of SIPA to retroactively impose a due diligence obligation on brokerage customers. *See* Mem. of Law at 14-15.[11] BBVA's burden to prove the affirmative defense that it received BLMIS customer property in good faith is expressly delineated in Bankruptcy Code section 550(b),[12] which applies to the Trustee's *recovery* actions—not under Bankruptcy Code section 548(c), which is applicable to *avoidance* actions.

Bankruptcy Courts routinely apply the good faith defense standard to recovery actions under Bankruptcy Code section 550. *See, e.g.*, *In re Enron Corp.*, 333 B.R. 205, 232-33 (Bankr. S.D.N.Y. 2005); *In re Schick*, 223 B.R. 661, 664-65 (Bankr. S.D.N.Y. 1998); *In re CNB Intern.*, Inc., 393 B.R. 306, 329-30 (Bankr. W.D.N.Y. 2008); *Max Sugarman Funeral Home, Inc. v.*

[11] So the record does not suggest assent to this characterization, the Trustee seeks neither a novel interpretation, nor seeks any retroactive due diligence.

[12] Bankruptcy Code § 550(b) provides in pertinent part:

> (b) The trustee may not recover under section (a)(2) of this section from—
> (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or
> (2) any immediate or mediate good faith transferee of such transferee.

11 U.S.C. § 550(b).

A.D.B. Investors, 926 F.2d 1248, 1256 (1st Cir. 1991). As such, the good faith defense requires nothing more than a straightforward application of the Bankruptcy Code itself, as well as established case law interpreting the defense under the Bankruptcy Code. Thus, there is no basis for mandatory withdrawal of the reference.

II. THE DEFENDANT HAS FAILED TO DEMONSTRATE CAUSE FOR PERMISSIVE WITHDRAWAL

This Court may permissively withdraw the reference to bankruptcy court pursuant to section 157(d), but the Defendant must show "cause" for such withdrawal. To determine whether such "cause" exists, this Court must first 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). As the movant, the Defendant bears the burden of proving "cause" to warrant withdrawal. *See In re Ames Dep't Stores*, 1991 WL 259036, at *2 (S.D.N.Y. Nov. 25, 1991).

BBVA has failed to meet its burden. BBVA's argument that withdrawal of the reference will promote judicial efficiency, prevent delay, and/or limit cost to the parties is completely bare and based entirely on the assertion that the *Stern* case will result in protracted motion practice concerning the bankruptcy court's authority to enter final judgments. *See* Mem. of Law at 9-12. However, BBVA has done nothing more than raise the specter of *Stern*. BBVA has not analyzed the impact of *Stern* on a claim-by-claim basis with respect to the Trustee's complaint. And BBVA wholly fails to identify any material, incremental delay, or inefficiency that would result in light of *Stern*. None of the *Orion* factors warrant withdrawal.

A. The Bankruptcy Counts in the Trustee's Complaint Are All Core

While BBVA attempts to assert that the Trustee's seven bankruptcy claims are not core, pursuant to section 157, a proceeding may be core if it is "unique to or uniquely affected by the bankruptcy proceedings" or "directly affect[s] a core bankruptcy function." *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. and Indem. Ass'n., (In re U.S. Lines, Inc.)*, 197 F.3d 631, 637 (2d Cir. 1999). In enacting section 157, Congress intended core proceedings to be interpreted broadly and that "95 percent of the proceedings brought before bankruptcy judges would be core proceedings." *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398 (2d Cir. 1990). A finding that claims are core "weighs against permissive withdrawal." *In re Leslie Fay Cos., Inc. v. Falbaum*, 1997 WL 555607, at *2 (S.D.N.Y. Sep. 4, 1997). Here, all of the Trustee's claims against BBVA are brought pursuant to 11 U.S.C. § 550 and therefore "arise under" title 11.[13] While BBVA insists otherwise, recovery actions are core claims according to the non-exhaustive list of core proceedings set forth in sections 157(b)(2)(F) and (b)(2)(H) of the Bankruptcy Code. *See* 28 U.S.C. §§ 157(b)(2)(F) (defining core matters to include "proceedings to determine, avoid, or recover preferences.") and 157(b)(2)(H) (defining core matters to include "proceedings to determine, avoid, or recover fraudulent conveyances.").

B. Defendant's Motion is Nothing More than Blatant Forum Shopping

As previously indicated, one of the important *Orion* factors is the curtailing of possible forum shopping by parties who perceive the bankruptcy court as an unfavorable forum in which to litigate their claims. This Court previously noted in *Schneider v. Riddick (In re Formica Corp.)* that "courts should employ withdrawal 'judiciously in order to prevent it from becoming just another litigation tactic for parties eager to find a way out of bankruptcy court.'" 305 B.R. 147, 151 (S.D.N.Y. 2004) (quoting *Kenai Corp. v. Nat'l Union Fire Ins. Co. (In re Kenai Corp.)*,

[13] *See* Exhibit 1.

136 B.R. 59, 61 (S.D.N.Y. 1992)); *see also In re Fairfield Sentry Ltd.*, 2010 WL 4910119, at *4 (S.D.N.Y. Nov. 22, 2010) (to "allay" concerns of forum-shopping "'courts in this Circuit have construed section 157(d) narrowly in order to prevent an 'escape hatch' out of bankruptcy court'" (quoting *Enron Power Mktg., Inc. v. Holcim, Inc. (In re Enron Corp.)*, 2004 WL 2149124, at *5 (S.D.N.Y. Sept. 23, 2004)).

BBVA's Motion seeks, *inter alia*, to invoke sections of the Bankruptcy Code that are plainly inapplicable to their cases in a desperate attempt to manufacture a basis for withdrawal of the reference. As set forth above, by their express language, sections 546(e) and 548(c)—on their face—have no effect whatsoever on the Trustee's ability to recover subsequent transfers from BBVA under Bankruptcy Code section 550. Given the Bankruptcy Court's prior ruling on many of the issues that raised in the Motion—including finding that section 546(e) does not apply—BBVA is seeking to transfer its case to this Court, which BBVA perceives to be a more favorable forum, in the hope of getting a better outcome than in the bankruptcy court. Such outright forum shopping should not be countenanced.

C. The Jury Trial Issue Is Premature and Does Not Warrant Withdrawal of the Reference

BBVA argues in favor of withdrawal of the reference based on its inchoate right to demand a jury trial. *See* Mem. of Law at 11-12. However, any such right does not require withdrawal of the reference until the case is ready to proceed to trial. *In re Formica Corp,* 305 B.R. at 150. As this Court stated in *In re Kenai Corp.*:

> A rule that would require a district court to withdraw a reference simply because a party is entitled to a jury trial, regardless of how far along toward trial a case may be, runs counter to the policy favoring judicial economy that underlies the statutory scheme governing the relationship between the district courts and bankruptcy courts.

136 B.R. at 61 (*citing In re Adelphi Inst., Inc.*, 112 B.R. 534, 538 (S.D.N.Y. 1990)). *See In re*

Fairfield Sentry, Ltd., 2010 WL 4910119 at *3 (S.D.N.Y. Nov. 22, 2010) (denying motion to withdraw the reference to the bankruptcy court because it was premature and "[d]istrict courts 'are generally unreceptive to motions to withdraw references where the underlying action is in its preliminary stages.'"); *In re Enron Corp.*, 318 B.R. 273, 275 (S.D.N.Y. 2004) ("Even if the Bankruptcy Court determines that the proceeding is non-core, and thus this Court concludes that [the defendant] is entitled to a jury trial on its claims, the Court would still not withdraw the reference of the case to the Bankruptcy Court until the case is trial-ready."). Accordingly, to the extent that the reference may be withdrawn so that a jury trial may be conducted in the District Court, this may be done if and only when the case is ready for trial.

In fact, courts have consistently denied motions to withdraw the reference in spite of a valid demand for a jury trial, where judicial economy weighed in favor of maintaining the reference for pre-trial matters. *See In re Enron Corp.,* 295 B.R. 21, 28 (S.D.N.Y. 2003) ("Courts have also recognized that it serves the interests of judicial economy and efficiency to keep an action in Bankruptcy Court for the resolution of pre-trial, managerial matters, even if the action will ultimately be transferred to a district court for trial"). In *Wedtech Corp. v. Banco Popular de Puerto Rico (In re Wedtech Corp.),* the court stated that "the defendant's right to a jury trial would not be disturbed by allowing [the bankruptcy judge] to continue to oversee the pre-trial supervision of this case, until such time as the case is ready for trial or dispositive motions." 94 B.R. 293, 298 (S.D.N.Y. 1988). The bankruptcy judge's "expressed familiarity with the present action, as well as the factual overlap with the numerous cases before him, present[ed] a unique and compelling opportunity *to promote judicial economy and swift resolution,* to the benefit of both of the parties." *Id.* (emphasis added).

D. Withdrawal Would Impede Judicial Efficiency and Uniform Administration of the SIPA Bankruptcy Proceeding

The other *Orion* considerations weigh against withdrawal. The bankruptcy court has been administering the SIPA bankruptcy proceeding for over three years. Judicial economy would only be promoted by allowing the specialized bankruptcy court, already familiar with the extensive record and proceedings in the BLMIS case, to initially adjudicate these cases. *See In re Wedtech Corp.*, 94 B.R. at 296; *In re Laventhol & Horwath*, 139 B.R. 109, 116 (S.D.N.Y.1992). It is the more efficient and appropriate course, as "[a]llowing the bankruptcy courts to consider complex questions of bankruptcy law before they come to the district court for de novo review promotes a more uniform application of bankruptcy law." *In re Extended Stay, Inc.*, 2011 WL 5532258 at *10 (finding that preserving bankruptcy court's ability to determine claims that implicated section 546(e) of the Bankruptcy Code weighed against withdrawal of the reference).

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests the court deny the Motion.

Date: New York, New York
January 31, 2012

/s/ Oren J. Warshavsky

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EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendants.	Adv. Pro. No. 08-1789 (BRL) SIPA LIQUIDATION (Substantively Consolidated)
In re BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. OREADES SICAV represented by its liquidator INTER INVESTISSEMENTS S.A., INTER INVESTISSEMENTS S.A. (F/K/A INTER CONSEIL S.A.), BNP PARIBAS INVESTMENT PARTNERS LUXEMBOURG S.A. (F/K/A BNP PARIBAS ASSET MANAGEMENT LUXEMBOURG S.A., F/K/A PARVEST INVESTMENT MANAGEMENT COMPANY S.A.), BGL BNP PARIBAS S.A., and BNP PARIBAS SECURITIES SERVICES S.A., Defendants.	Adv. Pro. No. 10-05120 (BRL) 11 Civ. 07763 (JSR)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. EQUITY TRADING PORTFOLIO LIMITED,	Adv. Pro. No. 10-04457 (BRL) 11 Civ. 07810 (JSR)

EQUITY TRADING FUND, LTD., BNP PARIBAS ARBITRAGE, SNC,

Defendants.

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

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Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act ("SIPA"),[1] 15 U.S.C. §§ 78aaa *et seq.*, and the estate of Bernard L. Madoff ("Madoff," and together with BLMIS, each a "Debtor" and collectively, the "Debtors"), by and through his undersigned counsel, hereby submits this memorandum of law in opposition to the Motions to Withdraw the Reference (the "Motions")[2] and accompanying Memoranda of Law ("Mem. of Law") filed in the following actions: *Picard v. Oreades Sicav, et al.*, Adv. Pro. No. 10-05120 (Bankr. S.D.N.Y.) (BRL), No. 11 Civ. 07763[3] (JSR) (S.D.N.Y.) (ECF No. 1) (the "BNP Paribas Action"); *Picard v. Equity Trading Portfolio Limited, et al.*, Adv. Pro. No. 10-

[1] The Securities Investor Protection Act ("SIPA") is found at 15 U.S.C. §§ 78aaa *et seq*. For convenience, subsequent references to SIPA will omit "15 U.S.C."

[2] Pursuant to a chambers conference on January 5, 2012, the Court consolidated the two Motions in the above-captioned cases for briefing purposes and permitted the Trustee to file one brief in opposition to the Motions, not to exceed 30 pages.

[3] This is one of two related Motions filed in this action (hereinafter, the "BNP-Oreades Motion"), on behalf of the following subsequent transferee defendants: BNP Paribas Investment Partners Luxembourg S.A., BGL BNP Paribas S.A., and BNP Paribas Securities Services S.A. (collectively the "BNP Paribas Entities"). On February 17, 2012, Inter Investissements S.A., another subsequent transferee defendant, separately filed a joinder to the BNP-Oreades Motion in the above-referenced civil action, No. 11 Civ. 07763 (ECF No. 13). To the extent the Court deems this joinder to have been properly filed, the Trustee respectfully requests that the Court consider this response to be in opposition to the joinder as well.

[3] This is the other of the two related Motions filed in this action (hereinafter, the "BNP-Equity Motion"), on behalf of the subsequent transferee defendant, BNP Paribas Arbitrage, SNC (together with the BNP Paribas Entities, the "Subsequent Transferee Defendants."). Equity Trading Portfolio Limited and Equity Trading Fund, Ltd. (collectively, the "Equity Trading Defendants") separately filed a joinder to the Equity Trading Motion in the above-referenced civil action, No. 11 Civ. 07810 (together with the Subsequent Transferee Defendants and the BNP Paribas Entities, the "Movants").

04457 (Bankr. S.D.N.Y.) (BRL), No. 11 Civ. 07810 (JSR) (S.D.N.Y.) (ECF No. 1.) ("Equity Trading Action").[4]

PRELIMINARY STATEMENT

Through the Motions, the Movants have inappropriately sought to invoke this Court's jurisdiction while seeking to deprive the bankruptcy court of its central role of ensuring the ratable distribution of customer property to all customers—who have filed over 16,000 customer claims—in the largest SIPA liquidation in history. The Movants are blatantly engaging in forum shopping by seeking to bypass the bankruptcy court and withdraw actions involving quintessentially "core" bankruptcy causes of action that Congress intended the bankruptcy courts to hear and determine in the first instance.

The Movants have seized upon certain narrow rulings by this Court, and seek to convert section 157(d) into an "escape hatch" out of the bankruptcy court. Through this procedural gamesmanship, the Movants are perverting the meaning of section 157(d). Indeed, this is precisely the type of conduct against which courts in this Circuit have routinely cautioned. Movants' efforts to use section 157(d) to escape the bankruptcy court's jurisdiction should not be permitted in the face of clear Second Circuit precedent narrowly construing section 157(d) and giving deference to bankruptcy courts to address purely core matters. None of the issues raised in the Motions require *substantial and material consideration* of non-bankruptcy federal law.

In short, the bankruptcy court is the proper forum for litigating questions of bankruptcy law and claims against the Debtor in this SIPA proceeding.[5] And it is the bankruptcy court that

[4] A copy of the complaints that the Trustee filed against the defendants in the above-captioned actions is annexed to the Declaration of Oren J. Warshavsky, Esq. ("Warshavsky Decl.") as Exhibit 1.

[5] Here, the Trustee seeks to avoid and recover fraudulent transfers that the Movants received from BLMIS preceding the commencement of the SIPA proceeding. SIPA § 78fff-1(b) expressly

should determine, in the first instance, the meaning and scope of the provisions of the Bankruptcy Code as applied in this SIPA bankruptcy liquidation proceeding—fundamental questions of bankruptcy law that require nothing more than construction and application of the Bankruptcy Code. Accordingly, the Motions should be denied.

ALLEGATIONS IN THE COMPLAINTS

The Movants are not innocent bystanders to Madoff's Ponzi scheme. The Movants—highly sophisticated financial institutions and feeder funds—knew or should have known they were benefiting from fraudulent transactions in their BLMIS accounts or via subsequent transfers, and that the activity in such accounts was inconsistent with legitimate trading activity and credible returns. Instead, the Movants deliberately chose to ignore the numerous indicia of fraud and continued to invest and funnel investors' money into the Madoff Ponzi scheme, all in an effort to reap enormous profits and unearned management fees.

A. The BNP-Oreades Action

Oreades SICAV ("Oreades") maintained two accounts with BLMIS, account nos. 1FR032 and 1FR036 (collectively, the "Oreades Accounts"). (*See* Complaint, Adv. Pro. No. 10-05120 (hereinafter referred to as "BNP-Oreades Compl.") (¶ 42).) From the very start of Oreades's investments with BLMIS in 1997, a host of entities affiliated with BNP Paribas S.A. provided crucial infrastructure for those investments through the Oreades Accounts at BLMIS. These entities included the BNP Paribas Entities. (*Id.*) Upon information and belief, the BNP Paribas Entities together provided services to Oreades by serving as its manager, administrator,

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incorporates the Bankruptcy Code and specifies that a SIPA proceeding is to "be conducted in accordance with, and as though it were being conducted under" the Bankruptcy Code and governed by relevant provisions of title 11. Moreover, SIPA § 78eee(b)(4) specifically requires that "[u]pon the issuance of a protective decree and appointment of a trustee … the 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."

and custodian, and received substantial fees consisting of "Customer Property" for serving in these roles. (*Id.*) In addition to being subsequent transferees of Customer Property, the BNP Paribas Entities facilitated Madoff's fraud by funneling hundreds of millions of dollars of investors' money into BLMIS while ignoring troubling indicia of fraud at BLMIS. (*Id.*)

From the inception of the Oreades Accounts until March 2002, BGL BNP Paribas S.A. (as successor in interest to BNP Paribas (Luxembourg) S.A.) received Oreades's account statements from BLMIS and regularly corresponded with BLMIS to direct and conduct transactions in the Oreades Accounts, noting specific irregularities in dealing with BLMIS. (*Id.* ¶ 47.) For example, on December 23, 1997, Olivier Nolin, of BNP Paribas (Luxembourg) S.A., sent a fax to Madoff regarding one of the Oreades Accounts inquiring as to why "we have not received any cash statement since the 30th of [N]ovember. Is it normal? Did you see if it was possible to receive the cash statement on a daily or weekly basis." (*Id.* ¶ 48.) A copy of this fax contained within BLMIS's files bears a handwritten note from an unknown author, "BLM & I spoke to Nolin. All OK." (*Id.*) Another inquiry was made on August 17, 1999, when Dazy Renald of BNP Paribas (Luxembourg) S.A. sent a fax to BLMIS, asking whether BLMIS participated in a tender offer involving shares of DuPoint de Nemours & Co. (*Id.* ¶ 49.) BLMIS simply responded that they did not participate because, "it is our position that the nature of this offer was not consistent with the investment strategy." (*Id.*)

Upon information and belief, BNP Paribas (Luxembourg) S.A. did not further investigate. (*Id.* ¶ 50.) Had it chosen to press BLMIS further about its delayed account statements or its counterintuitive decision to forego participation in a potentially advantageous tender offer, it likely would have discovered that BLMIS was not, in fact, holding any DuPont shares, let alone engaging in any securities transactions. (*Id.*)

On or about March 20, 2002, BNP Paribas (Luxembourg) S.A. transferred responsibility for the Oreades Accounts to BNP Paribas Securities Services, which noticed other irregularities in dealing with BLMIS. (*Id.* ¶¶ 51-52.) For example, on July 10, 2003, Lionel Trouvain of BNP Paribas Securities Services sent an email to Patrick Littaye of Access International Advisors LLC ("Access"), which, on information and belief, had introduced Oreades to BLMIS. (*Id.* ¶ 53.) After reviewing a legal opinion on BLMIS that Littaye received from Access's outside counsel, Trouvain sent his July 10, 2003 e-mail in which he raised a number of troubling issues concerning Madoff. (*Id.*) First, with regard to the management of Oreades's assets, Trouvain noted that neither Madoff nor BLMIS met the requirements for serving as a manager under the rules established by the Commission de Surveillance du Secteur Financier ("CSSF"), the Luxembourg regulator. Trouvain wrote, "In the eyes of the CSSF, B. Madoff does not exist." (*Id.* ¶ 54.) With regard to the use of BLMIS as a sub-custodian for the assets of Oreades, Trouvain stated: "I get the impression that Bernard Madoff is not a bank and I would therefore like to know where the US Treasury Bills held in the Oreades USD and EUR portfolios are held." (*Id* ¶ 55.) Finally, with regard to BLMIS's method for reporting trades and confirmation of those reports, Trouvain noted that "the trades are sent by mail after 7 or 8 days and are posted after the fact . . . Market practices are really different today and it would seem that B. Madoff does not ever want to improve its order transmission methods." (*Id.* ¶ 56.) However, despite the subsequent exchanges with BLMIS, which included a letter from Trouvain's manager regarding the lack of any independent verification of assets (*see id.* ¶ 57), neither BNP Paribas Securities Services nor any other BNP Paribas Entities took any further steps to address their questions and concerns regarding BLMIS and the purported securities transactions reported by BLMIS. (*Id.* ¶ 60.)

B. The BNP-Equity Action

Defendant Equity Trading Portfolio Limited ("Equity Trading")[6] had access to a vast amount of information about BLMIS that was not available to the public. *See* Complaint, Adv. Pro. No. 10-04457 (hereinafter referred to as "BNP-Equity Compl.") (¶ 41.) The account statements and trade confirmations received from BLMIS showed that BLMIS was likely a fraud, but Equity Trading ignored these indicia of fraud and/or irregular trading. (*Id.*)

For example, Madoff claimed his options transactions took place on the Chicago Board Options Exchange (the "CBOE"). Yet, on many occasions, the purported options trading in Equity Trading's account (the "Equity Trading Account") exceeded the total daily reported volume of comparable options contracts traded on the CBOE. (*Id.* ¶ 42.) In fact, forty-three percent of all options trades in the Equity Trading Account could not have occurred. (*Id.*) If Equity Trading had performed minimal due diligence and simply checked the number of listed options in the Equity Trading Account against the number of the same options actually traded on the CBOE, it would have been abundantly clear that Madoff's trading strategy was impossible due to market volume alone. (*Id.* ¶¶ 42-43.) Equity Trading also ignored the inordinately high percentage of purported options transactions in its account that did not comply with standard trading practices, settling in a time frame outside of industry norms. (*Id.* ¶ 45.)

Equity Trading was aware of other aberrations. For instance, on six separate occasions covering seven days, the Equity Trading Account had a negative cash balance with BLMIS. (*Id.* ¶ 48.) In other words, transactions occurred in the Equity Trading Account *even* when the cash necessary to execute those transactions was not available. (*Id.*) Equity Trading did not have a margin agreement or an interest charge. No legitimate financial institution could have or would

[6] Defendant Equity Trading Fund, Ltd ("ETF") was a shareholder in Equity Trading, and upon information and belief, was the beneficial owner and creator of Equity Trading. *See* BNP-Equity Compl. ¶ 12.

have advanced the amount of money necessary to cover these negative balances without either of these mechanisms in place. (*Id.*) Moreover, BLMIS forfeited literally millions of dollars of interest on these extensions of credit. (*Id.*) This unusual fee structure did not go unnoticed by other investment professionals and was at the very least aberrational when compared to the fees charged by most non-BLMIS investment funds. However, in keeping with its *modus operandi*, Equity Trading did not ask questions. Rather, Equity Trading deliberately ignored the glaring indicia of fraud to unjustly benefit from its relationship with BLMIS. (*Id.*)

BACKGROUND

A. Commencement of the SIPA Liquidation

Having adjudicated various Madoff liquidation matters, this Court's familiarity with the background of this matter is presumed.

B. SIPA Authorizes the Trustee to Pursue Avoidance Actions

SIPA § 78fff(b) grants the Trustee authority to conduct a SIPA liquidation proceeding "in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11." SIPA § 78fff(b); *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 231 (2d Cir. 2011) (the "*Second Circuit Net Equity Decision*") ("Pursuant to SIPA, Mr. Picard has the general powers of a bankruptcy trustee, as well as additional duties, specified by the Act, related to recovering and distributing customer property.") (citing SIPA § 78fff-1). SIPA § 78fff-1(b) expressly incorporates the Bankruptcy Code and authorizes a SIPA Trustee to recover any fraudulent transfers, including those to customers. SIPA § 78fff-1(b); *Second Circuit Net Equity Decision*, 654 F.3d at 242 n.10 ("SIPA and the Code intersect to . . . grant a SIPA trustee the power to avoid fraudulent transfers for the benefit of customers.") (quoting *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. (In re Bernard L. Madoff Inv. Sec. LLC)*, 424 B.R. 122, 136 (Bankr. S.D.N.Y. 2010) (the "*Net Equity Decision*").

C. The Trustee's Avoidance Actions Against The Movants

The Trustee's complaints in the BNP-Oreades and BNP-Equity Actions allege various causes of action, all of which are "core" matters arising under the Bankruptcy Code or the New York Fraudulent Conveyance Act (New York Debtor and Creditor Law § 270 *et seq.* (McKinney 2001) ("DCL")). *See* Warshavsky Decl. Ex. 1. Specifically, the Trustee seeks to avoid certain transfers as (i) actual fraudulent transfers under Bankruptcy Code sections 548(a)(1)(A), 550(a), and 551 and the DCL; (ii) constructive fraudulent transfers under Bankruptcy Code sections 544, 548(a)(1)(B), 550(a), and 551 and the DCL; and (iii) preferential transfers under sections 547(b), 550 and 551. As a natural extension of his bankruptcy claims, the Trustee also seeks the disgorgement of all Customer Property by which Movants were unjustly enriched, wrongly converted, and currently hold.

ARGUMENT

I. THE MOVANTS' MOTIONS TO WITHDRAW THE AVOIDANCE ACTION CANNOT MEET THE REQUIREMENTS FOR MANDATORY WITHDRAWAL

The Movants contend that this Court must withdraw the reference pursuant to section 157(d), but do not and cannot demonstrate any of the exceptional circumstances required for mandatory withdrawal. Rather, the BNP-Oreades and BNP-Equity Actions require nothing more than adjudication of core avoidance and recovery actions under the Bankruptcy Code to recover Customer Property. In pursuing these bankruptcy claims against the Movants, the Trustee is not violating SIPA.[7] Rather, SIPA expressly authorizes the Trustee to avoid and recover transfers that are void and voidable pursuant to title 11. There is no exception in SIPA that precludes

[7] *See* Background, Section B *supra*. The Second Circuit noted "[a] SIPA liquidation is a hybrid proceeding" and that a SIPA trustee is conferred with the general powers of a bankruptcy trustee, as well as additional duties, including the ability to pursue fraudulent transfer actions on behalf of customers. *Second Circuit Net Equity Decision*, 654 F.3d at 231, 242 n. 10.

avoidance of transfers to customers; to the contrary, the recovery of transfers "to or on behalf of customers" is expressly contemplated in SIPA § 78fff-2(c)(3) and one of the main purposes of SIPA is to distribute Customer Property.

The Second Circuit recently confirmed that a SIPA trustee is conferred with the ability to pursue fraudulent transfer actions on behalf of customers. *Second Circuit Net Equity Decision,* 654 F.3d at 231, 242 n. 10. In fact, courts uniformly have held that a trustee may sue customers in SIPA cases for fraudulent transfers. *See, e.g., Picard v. Taylor (In re Park South Sec., LLC)*, 326 B.R. 505, 512-13 (Bankr. S.D.N.Y. 2005) (holding that the trustee had standing to bring fraudulent transfer claims against customers); *Jackson v. Mishkin (In re Adler, Coleman Clearing Corp.)*, 263 B.R. 406, 496 (S.D.N.Y. 2001) (affirming bankruptcy court's judgment that fraudulent transfers to customers were avoidable); *see also SIPC v. S.J. Salmon*, No. 72 Civ. 560, 1973 U. S. Dist. LEXIS 15606, at *31 (S.D.N.Y. Aug. 8, 1973) ("SIPA was not intended to make the fraudulent transfer provisions of the Bankruptcy Act inoperative as to stockbroker-debtors in SIPA proceedings."). In fact, the Trustee is pursuing his avoidance claims so that the salutary purposes of the statute may be affected. *See Second Circuit Net Equity Decision*, 654 F.3d at 242 n. 10. (Second Circuit noting that "in the context of this Ponzi scheme – the Net Investment Method is nonetheless more harmonious with provisions of the Bankruptcy Code that allow a trustee to avoid transfers made with the intent to defraud, *see* 11 U.S.C. § 548(a)(1)(A), and 'avoid[s] placing some claims unfairly ahead of others,' *In re Adler, Coleman Clearing Corp.*, 263 B.R. 406, 463 (Bankr. S.D.N.Y. 2001)."). None of these issues, however, require withdrawal of the reference as there is no conflict between title 11 and other federal non-bankruptcy laws. They merely require the application of such laws.

A. Section 157(d) Has Been Narrowly Construed in the Second Circuit

The scope of bankruptcy jurisdiction over all matters affecting a debtor and its property is broadly construed. *Shugrue v. Airline Pilots Ass'n, Int'l* (*In re Ionosphere Clubs, Inc.*), 922 F.2d 984, 994 (2d Cir. 1990). 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, as provided in section 157(d) of title 28. *In re Ionosphere Clubs, Inc.*, 922 F.2d. at 993. The Second Circuit has consistently held that section 157(d) must be "construed narrowly," *see, e.g., id.* at 995, and 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 Indust., Inc. v. EPA (In re Combustion Equip. Assoc.)*, 67 B.R. 709, 711 (S.D.N.Y. 1986)) (internal quotation omitted). A narrow reading of the mandatory withdrawal provisions is necessary so as not to "eviscerate much of the work of the bankruptcy courts." *Houbigant, Inc. v. ACB Mercantile, Inc. (In re Houbigant, Inc.)*, 185 B.R. 680, 683 (S.D.N.Y. 1995).

Mandatory withdrawal "is not available merely because non-Bankruptcy Code federal statutes will be considered in the bankruptcy court proceeding." *In re Ionosphere Clubs, Inc.*, 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.* at 995 (emphasis added). "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." *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991); *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).

The Movants cannot meet the standard for withdrawal of the reference to resolve the Trustee's claims because no material interpretation of non-bankruptcy federal statutes is required to resolve the issues at hand, nor is there any potential conflict between the Bankruptcy Code and other non-bankruptcy federal statutes. On its face, SIPA mandates removal to the bankruptcy court in the first instance. SIPA is routinely interpreted by bankruptcy courts, as it was originally derived from a bankruptcy statute and specifically incorporates the Bankruptcy Code. The Movants' allegation that SIPA cannot be analyzed and applied by the bankruptcy court is simply wrong, as evidenced by, *inter alia*, the *Net Equity Decision* and the Second Circuit's affirmance thereof.

B. Interpretation of Section 546(e) of the Bankruptcy Code Does Not Warrant Mandatory Withdrawal

The Movants assert that the Court should withdraw the reference because the Trustee and SIPC are interpreting Bankruptcy Code section 546(e) in a manner that conflicts with SIPA. *See* BNP-Oreades Motion at 8-11; BNP-Equity Motion at 8-11. However, withdrawal of the reference is not appropriate as to this issue because its resolution involves only straightforward application and interpretation of Bankruptcy Code provisions.[8] This issue presents no

[8] The Trustee continues to preserve and assert his position that the mere invocation of Bankruptcy Code section 546(e) by defendants, such as the Movants here, does not provide a proper basis for mandatory withdrawal of the reference. Likewise, the Trustee reasserts his position that the same section of the Bankruptcy Code is inapplicable here, notwithstanding this Court's ruling in *Picard v. Katz*, 2011 WL 4448638 at *2-3 (S.D.N.Y. Sept. 27, 2011). No other court has found that section 546(e) provides a basis for mandatory withdrawal of the reference under 28 U.S.C. § 157(d) , *see In re Extended Stay, Inc.*, 2011 WL 5532258, at *7, or that section

interpretive or complicated issues of first impression under non-title 11 federal laws, nor do the Movants try to assert one.

More importantly, the plain language of Bankruptcy Code section 546(e) provides that safe harbor protections do not apply to recovery actions against subsequent transferees, like those against the Subsequent Transferee Defendants here, under Bankruptcy Code section 550. In fact, this Court recently recognized that section 546(e) does not address recovery under section 550(a). *See* Opinion and Order, *Picard v. Katz*, 11 Civ. 03605 (JSR) (S.D.N.Y. Jan. 17, 2012) at 13 (reinstating the Trustee's count seeking recovery from subsequent transferees under Bankruptcy Code section 550(a) notwithstanding the application of section 546(e)). Section 546(e) does not limit the Trustee's ability to *recover* subsequent transfers under section 550. Just as Congress declined to include section 550 within the ambit of the safe harbors of section 546(e), so too should this Court decline the Subsequent Transferee Defendants' invitation to legislate and re-write the law to their liking. To do as the Subsequent Transferee Defendants request would contradict the clear language of the Bankruptcy Code and grant subsequent transferees defenses Congress never directed or intended. At bottom, the Trustee's power to seek recovery of subsequent transfers from the Subsequent Transferee Defendants via section 550 can in no way be limited by section 546(e).

546(e) is properly extended to fictional transactions pursuant to a Ponzi scheme. *See, e.g.*, *See Johnson v. Neilson (In re Slatkin)*, 525 F.3d 805, 819 (9th Cir. 2008); *Kipperman v. Circle Trust F.B.O. (In re Grafton Partners)*, 321 B.R. 527, 541 (9th Cir. BAP 2005) (applying section 546(e) to payments made in connection with a Ponzi scheme "would amount to an absurd contradiction of the securities laws"); *Wider v. Wooton*, 907 F.2d 570, 573 (5th Cir. 1990) (rejecting application of section 546(e) defense in a Ponzi scheme context so as not to "implicitly authorize fraudulent business practices through an unjustified extension of the stockbroker defense"); *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC)*, 2011 WL 3897970, at *12 (S.D.N.Y. Aug. 31, 2011); *In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. 87, 116-17 (Bankr. S.D.N.Y. 2011).

As for the Equity Trading Defendants, they are not innocent bystanders to Madoff's Ponzi scheme, and thus the application of 546(e) is at least a question of fact—not a question of law. The Equity Trading Defendants, given their high level of financial sophistication, cannot credibly maintain that they were unaware of the numerous red flags contrary to industry standards, including questions about Madoff's reported options volume, positive returns that were suspiciously consistent for too many years, and discrepancies in the time between trade dates and settlement dates as reflected on trade confirmations. There are other indicia of fraud noted in the complaint, but these alone demonstrate that the Equity Trading Defendants received fraudulent transfers of Customer Property—other people's money—in the face of various indicia that BLMIS was not engaged in legitimate securities trading and show that the Equity Trading Defendants cannot assert that there is not, at the very least, a factual issue as to whether they could have reasonably believed that BLMIS was engaged in legitimate trading activity.

Moreover, in a recent case in this district, the Court found that the application of an affirmative defense under section 546(e) did not warrant mandatory withdrawal of the reference. *In re Extended Stay, Inc.*, 2011 WL 5532258, at *7. In particular, the *In re Extended Stay* court noted that the issue of whether or not section 546(e) of the Bankruptcy Code precluded certain claims under the Fair Debt Collections Practices Act or certain securities laws could not overcome "the 'narrow' scope this Circuit gives to mandatory withdrawal under section 157(d)" because the movants failed to point to any federal statute requiring "significant interpretation" rather than mere application to a particular set of facts. *Id.* (citations omitted).

Finally, the Movants urge that the "securities laws" must be considered in connection with the application of section 546(e). Yet, the Movants have not pointed to a single securities law at issue. In fact, in support of their argument, the Movants cited to no statute other than

Bankruptcy Code section 546(e), which *explicitly refers* to definitions in the Bankruptcy Code itself. *See* BNP-Oreades Motion at 9; BNP-Equity Motion at 9. Simply put—and as demonstrated in the Movants' initial papers—no additional law needs to be interpreted outside of the Bankruptcy Code. As such, the determination of whether and how Bankruptcy Code section 546(e) should be applied requires only simple interpretation and application of the Bankruptcy Code. Accordingly, mere application of title 11 is not a basis for mandatory withdrawal of the reference to the bankruptcy court pursuant to 28 U.S.C. § 157(d).

C. ***Stern v. Marshall* Does Not Require or Otherwise Warrant Withdrawal**

The Movants attempt to argue that the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011) is cause for withdrawal. In their Motions, the Movants strain to draw a parallel between the Trustee's traditional avoidance action under the Bankruptcy Code and the counterclaim addressed by the *Stern* Court. The Movants argue that the bankruptcy court here would somehow be limited and could not issue a final judgment in either the BNP-Oreades or BNP-Equity Actions. *See* BNP-Oreades Motion at 11-12; BNP-Equity Motion at 11-12. Not so. The Movants wildly misconstrue *Stern*'s "narrow" ruling which makes clear that it does not "meaningfully change[ ] the division of labor" between bankruptcy courts and district courts. *Stern*, 131 S. Ct. at 2620.

Stern did not involve straightforward bankruptcy law claims for avoidance and recovery of fraudulent transfers, but instead concerned a creditor's claim for defamation and a state law counterclaim by the debtor for tortious interference. *Stern* did not interpret 28 U.S.C. §§ 157(b)(2)(F) or 157(b)(2)(H), which identify as core proceedings those that "determine, avoid or recover" preferences and fraudulent conveyances.

The Movants' efforts to relate these two completely distinct matters fail. *Stern* neither holds nor even suggests that actions seeking to avoid and recover fraudulent transfers are not

properly the province of and rightly decided by non-Article III judges. As recently recognized by this district:

> *Stern* is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case, and the ruling does not remove from the bankruptcy court its jurisdiction over matters directly related to the estate that can be finally decided in connection with restructuring debtor and creditor relations. . . .

In re Salander O'Reilly Galleries, 453 B.R. 106, 115-16 (Bankr. S.D.N.Y. 2011). *See, e.g.*, *Stern*, 131 S. Ct. at 2611 ("Here Vickie's claim is a state law action independent of the federal bankruptcy law"); *id.* at 2620 ("We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute . . . the question presented here is a 'narrow' one"); *Kirschner v. Agoglia (In re Refco Inc.)*, 461 B.R. 181 (Bankr. S.D.N.Y. 2011) ("Clearly several of [the Court's] rationales argue that *Stern* does not preclude the bankruptcy court from issuing a final judgment on a fraudulent transfer claim."). Indeed, courts considering *Stern* have routinely declined to give it the expansive scope that the Movants request.[9]

In contrast to the state law tortious interference counterclaim at issue in *Stern*, the Trustee

[9] *See In re Safety Harbor Resort & Spa*, 456 B.R. 703, 717 (Bankr. M.D. Fla. 2011) (finding that a bankruptcy court has jurisdiction to hear fraudulent transfer claims and "that nothing has changed" as a result of *Stern*); *In re Custom Contractors, LLC*, 2011 WL 6046397, at *6 (Bankr. S.D. Fla. Dec. 5, 2011) (This Court's job is [to apply *Stern*'s holding,] not to extend *Stern*) to fraudulent transfer actions based on Supreme Court *dicta*, and in so doing, upend the division of labor between district and bankruptcy courts that has been in effect for nearly thirty years."); *In re Extended Stay, Inc.*, 2011 WL 5532258, at *6 ("Withdrawing the reference simply due to the uncertainty caused by *Stern* is a drastic remedy that would hamper judicial efficiency on the basis of a narrow defect in the current statutory regime identified by *Stern*."); *Field v. Lindell (In re The Mortgage Store, Inc.)*, 2011 WL 5056990, at *6–7 (D. Haw. Oct. 5, 2011) (determining not to withdraw the reference even if *Stern* applied to fraudulent transfer proceeding because "[w]ithdrawal of the reference at this stage would result in this court losing the benefit of the bankruptcy court's experience in both the law and the facts, resulting in an inefficient allocation of judicial resources"). *See also In re Ambac Fin. Grp., Inc.*, 57 B.R. 299, 308 (Bankr. S.D.N.Y. 2011); *In re Olde Prairie Block Owner, LLC*, 457 B.R. 692, 698 (Bankr. N.D. Ill. 2011); *In re Am. Bus. Fin. Servs., Inc.*, 457 B.R. 314, 319-320 (Bankr. D. Del. 2011).

has brought traditional avoidance actions against the Movants that the Bankruptcy Code specifically and exclusively authorizes bankruptcy trustees to pursue under Bankruptcy Code sections 544, 547, 548 and 550. *See, e.g.*, *Walker, Truesdell, Roth & Assocs. v. The Blackstone Group, L.P. (In re Extended Stay, Inc.)*, 2011 WL 5532258, at *7-8 (S.D.N.Y. Nov. 10, 2011); *Kelley v. JPMorgan Chase & Co., et al.*, 2011 WL 4403289, at *6 (D. Minn. Sept. 21, 2011); *Michigan State Hous. Dev. Auth. v. Lehman Brothers*, No. 11 Civ. 3392 (JGK) (S.D.N.Y., Sept. 14, 2011). In short, *Stern* is fairly read as limited to state law counterclaims with no relationship to federal bankruptcy law. *Id.* at 2611.

Despite the narrow holding of *Stern*, the Movants claims the bankruptcy court cannot finally determine fraudulent conveyance and preference claims like those asserted in the Complaints. *See* BNP-Oreades Motion at 11-12; BNP-Equity Motion at 11-12. Such a sweeping interpretation of *Stern* is inconsistent with the decision itself, would deprive district courts of bankruptcy courts' specialized expertise to handle such claims, and would have the practical effect of eliminating bankruptcy courts permanently.

As Chief Justice Roberts observed, the bankruptcy court's specialized expertise was not needed in the adjudication of the common law tort counterclaim addressed in *Stern*. *See Stern,* 131 S. Ct. at 2615 ("The 'experts' in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay."). However, specialized bankruptcy expertise is critical to the efficient administration of fraudulent transfer and preference actions brought under the Bankruptcy Code, especially in this case where the bankruptcy court is administering over 1,000 related cases and thousands of objections.

The importance of this particularized framework utilizing the bankruptcy court's expertise is magnified in a Ponzi scheme case, such as this case, where the majority of the

debtor's assets were fraudulently transferred to third parties before BLMIS's bankruptcy, resulting in the transferees receiving money stolen from other investors. As a consequence, the bankruptcy court must manage both the allowance of claims to those who were defrauded as well as recovery of fraudulent transfers in order to pay the allowed claims. This distinctive relationship is succinctly set forth in Judge Drain's *Refco* opinion:

> Since the enactment of the Bankruptcy Code, the management and determination of statutory avoidance claims has been a primary function of the bankruptcy courts. Such claims often play a prominent role in bankruptcy cases, either because of their sheer numbers or because of the effect that the potential avoidance of a transfer, lien, or obligation may have on creditors' recoveries. This is particularly so in cases where most, if not all, of the debtor's estate was transferred to third parties pre-bankruptcy, such as the many Ponzi-scheme driven cases of recent years, requiring a coordinated response overseen by one judge on behalf of a host of creditor-victims. The ability to manage efficiently the investigation and litigation of such claims, and their possible global settlement, decreases if handled on a piecemeal basis by different judges no matter how talented.

In re Refco Inc., 461 B.R. at 188.

Judge Drain emphasizes the necessity of maintaining ties between the avoidance action against the Movants and BLMIS's claims allowance process. The *Refco* decision further makes clear the difference between *Stern's* treatment of a generic state law tort counterclaim, which was "in no way derived from or dependent upon bankruptcy law," but rather was "a state law tort action that exists without regard to any bankruptcy proceeding" (*Stern,* 131 S. Ct. at 2618), and the Trustee's avoidance actions which "flow from a federal statutory scheme" and are "completely dependent upon adjudication of a claim created by federal law." *Id.* at 187 (quoting *Stern,* 131 S. Ct. at 2614) (concluding that bankruptcy courts have constitutional power to issue final judgments in fraudulent transfer actions even where the defendant had not filed a proof of claim in the bankruptcy).

Even if the bankruptcy court did not have constitutional authority to finally adjudicate the Trustee's claims against the Movants, which it does, withdrawal is not warranted based on the clear mandate set forth in the recently entered Amended Standing Order of Reference, which provides:

> If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge *shall* . . . hear the proceeding and submit proposed findings of fact and conclusions of law to the district court.

Amended Standing Order of Reference, *In the Matter of Standing Order of Reference Re: Title 11*, 12 Misc. 00032 (S.D.N.Y. Feb. 2, 2012) (emphasis added). In light of this directive, a Court in this district recognized that this "explicit authority to issue proposed findings and conclusions in connection with core matters that are found to fall within the *Stern* holding[]" dictated maintaining the reference to the bankruptcy court. *See* Opinion & Order, *Adelphia Recovery Trust v. FLP Group, Inc.*, No. 11 Civ. 06847 (PAC) (S.D.N.Y. Jan. 30, 2012) at 10 (denying a motion to withdraw the reference predicated on *Stern* and the issue of whether a bankruptcy court may adjudicate fraudulent transfer claims to final judgment). As such, the bankruptcy court is required to hear the BNP-Oreades and BNP-Equity Actions pursuant to the Amended Standing Order of Reference, and if it is later determined that entry of a final judgment by the bankruptcy court would be inconsistent with Article III, then this Court may treat such judgment as proposed findings of fact and conclusions of law. *See id.*

D. Interpretation of the Extraterritoriality of SIPA and the Bankruptcy Code Does Not Warrant Mandatory Withdrawal

Movants also assert that pursuant to the Supreme Court ruling in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), withdrawal is required to determine whether SIPA and the

Bankruptcy Code have extraterritorial reach. *See* BNP-Oreades Motion at 17-19; BNP-Equity Motion at 17-19. However, there is no "substantial and material" interpretation of non-bankruptcy federal law in the present case which warrants mandatory withdrawal. Indeed, Movants are asking how *Morrison* applies, if at all, to the Trustee's claims under the Bankruptcy Code.

Morrison dealt with the extraterritorial application of the 1934 Exchange Act, and more specifically with Australian nationals who invested in an Australian company, which traded on an Australian exchange. The present case is a SIPA liquidation in the United States based on fraudulent business transactions that took place in New York, involved sophisticated entities—such as Movants—that either invested directly with BLMIS or invested in feeder funds that were largely established for the sole purpose of investing with BLMIS. There is no apparent reason—and certainly no good reason—why the Trustee cannot recover the initial or subsequent transfers of fraudulent and/or preferential transfers of Customer Property to Movants simply because Movants are incorporated outside the United States.

Movants also wrongly assert that SIPA expresses no clear indication of extraterritorial application and that this is an issue requiring mandatory withdrawal. *See* BNP-Oreades Motion at 17-18; BNP-Equity Motion at 17-18. SIPA specifically and expressly incorporates the Bankruptcy Code, making applicable almost all of the liquidation provisions that apply to ordinary bankruptcy liquidations. And those provisions, which include the power to avoid and recover fraudulent transfers and preferences, may be applied both in the United States and beyond. *See Picard v. Chais*, 440 B.R. 274, 281 (Bankr. S.D.N.Y. 2010) (stating "[t]he United States has a strong interest in applying the provisions of the Bankruptcy Code" and holding that the exercise of personal jurisdiction over a foreign defendant was reasonable since the Trustee's

claims arise under U.S. bankruptcy laws and are brought on behalf of all creditors and customers in this SIPA proceeding).

In fact, both the plain language and congressional intent underlying the Bankruptcy Code make it clear that the Code does in fact have clear and unmistakable extraterritorial application. While drafting the Bankruptcy Code, Congress expressly recognized that a debtor's assets and interests would sometimes lie outside of the United States. Indeed, section 541(a) of the Bankruptcy Code explicitly states that the commencement of a bankruptcy case creates an estate comprised of property "wherever located and by whomever held," 11 U.S.C. § 541(a) (emphasis added).

Section 541(a) echoes the worldwide jurisdictional language of 28 U.S.C. § 1334(e)(1), which states that "the district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." *See Deak & Co., Inc. v. Jr. R.M.P. Soedjono (In re Deak & Co., Inc.)*, 63 B.R. 422, 427 (Bankr. S.D.N.Y. 1986) ("Congress inserted this language to 'make clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States.'"); *In re Rajapakse*, 346 B.R. 233 (Bankr. N.D. Ga. 2005); *Diaz-Barba v. Kismet Acquisition, LLC*, 2010 WL 2079738, at *10 (S.D. Cal. May 20, 2010) (noting the court may exercise jurisdiction over all property of the bankrupt estate, even if located outside the United States, because the provisions of the Code as they relate to property of the estate apply extraterritorially). *See also French v. Liebmann (In re French)*, 440 F.3d 145, 152 (4th Cir. 2005) (holding that since section 548 allows the avoidance of transfers of the debtor in property "wherever located," the presumption against

extraterritoriality did not prevent the use of the court's avoidance powers).[10] The Trustee has the right, ability and fiduciary obligation to pursue property of the estate, wherever it is located, including from Movants.

Movants' *Morrison* argument ignores the two-sided process involved in bankruptcy and SIPA proceedings. In effect, Movants argue the Bankruptcy Code's avoidance and recovery provisions cannot be applied to Movants simply because they are based outside the United States. If this Court accepts Movants' argument, the result would be that no foreign national could make a claim in a bankruptcy or SIPA proceeding pending in the United States. Such an absurd result was never intended by Congress nor has it ever been countenanced by a court in this country.

In short, Movants' *Morrison* argument fails to provide any justification for mandatory withdrawal of the reference. Bankruptcy courts are called upon by the Bankruptcy Code to hear and determine cases seeking the recovery of property wherever it is found. Movants' foreign status is nothing unique. The bankruptcy court is fully empowered to hear these cases and there is no material and substantial issue of federal non-bankruptcy law requiring the withdrawal of the reference. As a result, under *Morrison*, there is no basis for mandatory withdrawal.

E. Substantial Consideration of SLUSA Is Neither Required Nor Applicable in the Avoidance Actions

Movants also argue that mandatory withdrawal is necessary because the BNP-Oreades

[10] Case law also demonstrates that the automatic stay under section 362 of the Code, which is one of the fundamental debtor protections provided by bankruptcy laws, applies extraterritorially. *Nakash v. Zur (In re Nakash)*, 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (finding that the stay exists to protect the estate from "a chaotic and uncontrolled scramble for the Debtor's assets in a variety of uncoordinated proceedings in different courts."); *Picard v. Maxam Absolute Return Fund, L.P. (In re Bernard L. Madoff Inv. Sec. LLC)*, 460 B.R. 106, 114 (Bankr. S.D.N.Y. 2011) (finding "that based upon the applicable Code sections, other indicia of congressional intent and case law in this district, the automatic stay applies extraterritorially.") (quoting *In re Nakash*, 190 B.R. at 768)).

and BNP-Equity Actions involve "significant interpretation" of federal securities law, including the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). *See* BNP-Oreades Motion at 14-17; BNP-Equity Motion at 14-17. This argument is a gross exaggeration and misrepresentation. Despite Movants' contentions, SLUSA simply does not preclude the Trustee's common law claims here and has no applicability. The determination of whether or not SLUSA applies does not rise to a "substantial" level of consideration compelling mandatory withdrawal.

SLUSA was enacted in 1998 to prevent claims based on state securities laws from circumventing the strict pleading requirements of the federal securities laws set forth in the PSLRA. *LaSala v. UBS, AG*, 510 F. Supp. 2d 213, 234 (S.D.N.Y. 2007). SLUSA requires the dismissal of: (i) a "covered class action"; (ii) based on state law; and (iii) alleging "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or that "the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p; *see also LaSala*, 510 F. Supp. 2d at 234.

The plain language of SLUSA, as well as all salient case law, dictates that SLUSA has no bearing on the Trustee's actions against Movants. First, neither the BNP-Oreades Action nor the BNP-Equity Action is a "covered class action" under SLUSA.[11] Second, that more than 50

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[11] SLUSA, itself states that:

> a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

15 U.S.C. § 78bb(f)(5)(D) (emphasis added). Both the plain language and legislative history of SLUSA confirm the Trustee is an "entity" exempt from the preemptive reach of the statute. *Lee v. Marsh & McLennan Cos., Inc.*, No. 06 Civ. 6523, 2007 WL 704033, at *4 (S.D.N.Y. March 7, 2007) (citing *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1008 (9th Cir. 2005)); S. Rep. 105-

persons may receive distributions of Customer Property does not transform the BNP-Oreades or BNP-Equity Actions into covered class actions.[12] Finally, the allegations made against Movants are not preempted by SLUSA because they are not based on untrue statements or omissions of material fact in connection with the purchase of covered securities. The Trustee's allegations are instead based on Movants' receipt of Customer Property as a result of fraudulent and/or preferential transfers. As such, SLUSA is inapplicable.

The minimal analysis—if any—of SLUSA required by Movants' assertions presents neither a conflict with the Bankruptcy Code nor a novel issue of first impression. There is no conflict between SLUSA and the Bankruptcy Code. Movants do not and cannot point to a "conflict" between SLUSA and title 11, nor do they point to anything requiring "interpretation" of SLUSA.

F. Unjust Enrichment, Conversion, and Money Had and Received Are New York State Law Claims That Do Not Warrant Mandatory Withdrawal

Movants also argue that the action should be withdrawn because the BNP-Oreades Action involves three common law claims, including unjust enrichment, conversion, and money had and received, and the BNP-Equity Action involves the common law claim of money had and

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182, 1998 WL 226714 at *7 (May 4, 1998) (explaining preclusion of a trustee's claims pursuant to SLUSA "could potentially deprive many bankruptcy trustees of the ability to pursue state-law securities fraud claims on behalf of an estate. Nothing in SLUSA suggests that Congress intended to work such a radical change in the bankruptcy laws").

[12] The fact that the Trustee's efforts will ultimately benefit the many customers of BLMIS does not transform the Trustee's efforts on behalf of BLMIS into a class action on behalf of BLMIS's customers. BLMIS's SIPA liquidation was not designated for the sole purpose of initiating litigation: the Trustee has been involved in liquidating the BLMIS estate determining over 16,000 customer claims, bringing more than 1,000 other actions, resolving many thousands of claims for billions of dollars, and administering the allocation of Customer Property among the customers and, ultimately, the general creditors of the consolidated BLMIS estate. As such, the Trustee is not an "entity" and the BNP-Oreades and BNP-Equity Actions are not class actions "on behalf of more than 50 people."

received. *See* BNP-Oreades Motion at 12-14; BNP-Equity Motion at 12-14. However, withdrawal is not necessitated here because these claims are all state law claims, which will not "require[] consideration," much less "substantial and material consideration" of non-bankruptcy **federal** statutes. 28 U.S.C. § 157(d); *In re Ionosphere Clubs, Inc.*, 922 F.2d at 995.

In Count Six of the BNP-Oreades Compl., the Trustee alleges that the BNP Paribas Entities were unjustly enriched at the expense of BLMIS customers. (¶¶ 115-119.) The BNP Paribas Entities received millions of dollars of other people's money from BLMIS that rightfully belongs to BLMIS customers. (*Id.*). These allegations do not involve federal statutory violations and are sufficient to state a claim for unjust enrichment. *See Silverman v. H.I.L. Assocs. Ltd. (In re Allou Distribs., Inc.)*, 387 B.R. 365, 412-13 (Bankr. E.D.N.Y. 2008) (analyzing a New York common law unjust enrichment claim).

In Count Seven of the BNP-Oreades Compl., the Trustee alleges that the BNP Paribas Entities converted funds in which the customers had a possessory interest. (*Id.* ¶¶ 120-123). The BNP Paribas Entities exercised dominion and control over those funds, in a manner inconsistent with BLMIS customers' rights, when they continued to allow Madoff to use their services and BLMIS customers' money to fund the Ponzi scheme. (*Id.*) These allegations state a claim for conversion under New York law and do not involve violations of federal statutes. *See Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 327–28 (Bankr. S.D.N.Y. 1999) (analyzing a conversion claim under New York state law).

In Count Eight of the BNP-Oreades Compl., the Trustee alleges the BNP Paribas Entities are currently in possession of Customer Property that they have no lawful or equitable right to, having obtained the monies through fraudulent means. (*Id.* ¶¶ 124-126). In Count Ten of the BNP-Equity Compl., the Trustee makes similar allegations as to all defendants named. (¶¶165-

167.) These allegations state a claim for money had and received under New York law and do not involve violations of federal statutes. *See In re Allou Distribs., Inc.*, 387 B.R. at 412-13 (analyzing a money had and received claim under New York state law). Thus, there is no basis for mandatory withdrawal of the reference.

II. THE MOVANTS HAVE FAILED TO DEMONSTRATE CAUSE FOR PERMISSIVE WITHDRAWAL

This Court may permissively withdraw the reference to bankruptcy court pursuant to section 157(d), but the Movants must show "cause" for such withdrawal. To determine whether such "cause" exists, this Court must first 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). Movants bear the burden of proving "cause" to warrant withdrawal. *See In re Ames Dep't Stores*, 1991 WL 259036, at *2 (S.D.N.Y. Nov. 25, 1991).

Movants have failed to meet their burden. Their argument that withdrawal of the reference will promote judicial efficiency, prevent delay, and/or limit cost to the parties is completely bare, contained in a footnote, and based primarily on the assertion that the *Stern* case will result in protracted motion practice concerning the bankruptcy court's authority to enter final judgments. *See* BNP-Oreades Motion at 12, n.5; BNP-Equity Motion at 12, n.7. None of the *Orion* factors warrant withdrawal.

A. The Trustee's Claims Are Core and/or Are "Related to" Core Claims

The Trustee's bankruptcy claims against the Movants are core pursuant to section 157. A proceeding may be core if it is "unique to or uniquely affected by the bankruptcy proceedings" or "directly affect[s] a core bankruptcy function." *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot.*

and Indem. Ass'n., (In re U.S. Lines, Inc.), 197 F.3d 631, 637 (2d Cir. 1999). In enacting section 157, Congress intended core proceedings to be interpreted broadly and that "95 percent of the proceedings brought before bankruptcy judges would be core proceedings." *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398 (2d Cir. 1990). A finding that claims are core "weighs against permissive withdrawal." *In re Leslie Fay Cos., Inc. v. Falbaum*, 1997 WL 555607, at *2 (S.D.N.Y. Sep. 4, 1997).

Here, the Trustee's bankruptcy claims against Movants are brought pursuant to 11 U.S.C. §§ 544, 547, 548 and 550 and therefore "arise under" title 11.[13] While Movants may insist otherwise, avoidance and recovery actions are core claims according to the non-exhaustive list of core proceedings set forth in sections 157(b)(2)(F) and (b)(2)(H) of the Bankruptcy Code. *See* 28 U.S.C. §§ 157(b)(2)(F) (defining core matters to include "proceedings to determine, avoid, or recover preferences.") and 157(b)(2)(H) (defining core matters to include "proceedings to determine, avoid, or recover fraudulent conveyances").

1. The Three State Law Claims Brought by the Trustee Are Core Because They Are Inextricably Tied to the Bankruptcy Claims

Likewise, the Trustee's state law claims for unjust enrichment, conversion, and money had and received, affect the bankruptcy estate and fall within the definition of core proceedings under the Bankruptcy Code. *See* 28 U.S.C. §§157(b)(2)(A) and (E) ("matters concerning the administration of the estate" and "orders to turn over property of the estate" are deemed core proceedings). The Trustee's state law claims are intertwined with his bankruptcy law claims and may be routinely handled by the bankruptcy court.

As the Second Circuit has emphasized, "bankruptcy courts are not precluded from adjudicating state-law claims when such claims are at the heart of the administration of the

[13] *See* Exhibit 1.

bankrupt estate." *In re Ben Cooper, Inc.*, 896 F.2d at 1399. *See also In re Millenium Seacarriers, Inc.*, 419 F.3d 83, 99 (2d Cir. 2005) (quoting *Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 191 (2d Cir. 2003). The Trustee's common law claims are embedded in his core bankruptcy claims and seek to impose a remedy to recover certain transfers of Customer Property for the benefit of BLMIS's customers as established under federal bankruptcy law.[14] These causes of action clearly should remain in the bankruptcy court.

2. The Bankruptcy Court May Preside Over Non-Core Claims Related to Underlying Action

Even if this Court finds the state law claims do "not fall within the statute's definitional ambit of 'core' under §157(c)," that does not necessarily warrant permissive withdrawal. *See, e.g., In re Fairfield Sentry Ltd.*, 2010 WL 4910119, at *2 (S.D.N.Y. Nov. 22, 2010) (denying motion to withdraw without addressing core/non-core determination, "which is not singularly dispositive" to motion); *Wedtech Corp. v. Banco Popular de Puerto Rico (In re Wedtech Corp.)*, 94 B.R. 293, 295 (S.D.N.Y. 1988) (non-core determination does not end the inquiry and automatically require withdrawal). The bankruptcy court may still exercise non-core jurisdiction during the pre-trial phase if the proceeding "is clearly a matter which is 'otherwise related' to the bankruptcy proceeding." *Enron Power Mktg., Inc. v. City of Santa Clara (In re: Enron Power Mktg.)*, 2003 WL 68036, at *6 (S.D.N.Y. Jan. 8, 2003) (quoting *Keene Corp. v. Williams Bailey*

[14] In other words, the Trustee's common law claims could not have been brought if not for the subsequent transfers made avoidable by the federal bankruptcy laws. They are "inextricably tied to the creation of the estate in bankruptcy for the benefit of [BLMIS]'s creditors; there would be no cause of action without the federal bankruptcy statutes that authorize it." *In re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983) (affirming bankruptcy court's imposition of constructive trust because retention of the property would result in unjust enrichment to the detriment of the creditors of the estate); *In re Builders Capital and Services, Inc.*, 317 B.R. 603, 609 (Bankr. W.D.N.Y. 2004) (same; bankruptcy court addressing imposition of constructive trust where Ponzi-scheme perpetrator unjustly enriched by the transfers of its customers). *See also In re Neumann Homes, Inc.*, 414 B.R. 383, 388 (ND Ill. 2009) (denied motion to withdraw action that included common law claims such as unjust enrichment, stating that such claims "are all premised upon the underlying action to avoid the preference and fraudulent conveyances.").

& Weisner, L.L.P. (In re Keene Corp.), 182 B.R. 379, 384 n. 3 (S.D.N.Y. 1995)).

Section 157(c)(1) provides that "a bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise *related* to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court [to enter] any final order or judgment. . ." 28 U.S.C. § 157(c)(1) (emphasis added). Given that the Trustee's common law claims are intertwined with and are legally and factually "related to" the bankruptcy counts in the complaint, the BNP-Oreades and BNP-Equity Actions belong in the bankruptcy court.

B. Movants' Motions Are Nothing More Than Blatant Forum Shopping

As previously indicated, one of the important *Orion* factors is the curtailing of possible forum shopping by parties who perceive the bankruptcy court as an unfavorable forum in which to litigate their claims. This Court previously noted in *Schneider v. Riddick (In re Formica Corp.)* that "courts should employ withdrawal 'judiciously in order to prevent it from becoming just another litigation tactic for parties eager to find a way out of bankruptcy court.'" 305 B.R. 147, 151 (S.D.N.Y. 2004) (quoting *Kenai Corp. v. Nat'l Union Fire Ins. Co. (In re Kenai Corp.)*, 136 B.R. 59, 61 (S.D.N.Y. 1992)); *see also In re Fairfield Sentry Ltd.*, 2010 WL 4910119, at *4 (S.D.N.Y. Nov. 22, 2010) (to "allay" concerns of forum-shopping "'courts in this Circuit have construed section 157(d) narrowly in order to prevent an 'escape hatch' out of bankruptcy court'" (quoting *Enron Power Mktg., Inc. v. Holcim, Inc. (In re Enron Corp.)*, 2004 WL 2149124, at *5 (S.D.N.Y. Sept. 23, 2004)).

C. Withdrawal Would Impede Judicial Efficiency and Uniform Administration of the SIPA Bankruptcy Proceeding

The other *Orion* considerations weigh against withdrawal as well. The bankruptcy court has been administering this SIPA bankruptcy proceeding for over three years. Judicial economy

would only be promoted by allowing the specialized bankruptcy court, already familiar with the extensive record and proceedings in the BLMIS case, to initially adjudicate these cases. *See In re Wedtech Corp.*, 94 B.R. at 296; *In re Laventhol & Horwath*, 139 B.R. 109, 116 (S.D.N.Y.1992). It is the more efficient and appropriate course, as "[a]llowing the bankruptcy courts to consider complex questions of bankruptcy law before they come to the district court for *de novo* review promotes a more uniform application of bankruptcy law." *In re Extended Stay, Inc.*, 2011 WL 5532258 at *10 (finding that preserving bankruptcy court's ability to determine claims that implicated section 546(e) of the Bankruptcy Code weighed against withdrawal of the reference).

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests the court deny the Motions.

Date: New York, New York
February 21, 2012

/s/ Oren J. Warshavsky

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Attorneys for Irving H. Picard, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff

Exhibit 21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-mc-00115 (JSR) ECF Case Electronically Filed
In re: MADOFF SECURITIES	

CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF EXTRATERRITORIAL DEFENDANTS' MOTION TO DISMISS, AS ORDERED BY THE COURT ON JUNE 6, 2012

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The "Extraterritorial Defendants" encompassed by the Extraterritoriality Order[1] respectfully submit this memorandum of law in support of their consolidated motion to dismiss the Complaints filed against them by Irving H. Picard, the trustee (the "Trustee") appointed under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"), for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS"), substantively consolidated with the estate of Bernard L. Madoff.

PRELIMINARY STATEMENT

In withdrawing the issue here, this Court noted that it was required to analyze title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Code") and SIPA to determine whether the Code's relevant avoidance and recovery provisions incorporated by SIPA, or SIPA itself, in fact reach transfers that took place abroad. *See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC* (In re Madoff Sec.), No. 12-mc-00115 (JSR), 2012 U.S. Dist. LEXIS 78804, at *27-28 (S.D.N.Y. May 15, 2012). We show here that they do not. Neither the SIPA provision nor the Code provisions on which the Trustee relies reach extraterritorially to allow him to avoid transfers received abroad or to recover from initial, immediate or mediate foreign transferees the transfers that are at issue in these litigations.

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[1] This submission is made on behalf of all defendants whose motions to withdraw the reference and joinders were granted by (i) the Extraterritoriality Order dated June 6, 2012, or (ii) the Consent Order dated June 26, 2012. *See* Order, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC* (In re Madoff Sec.), No. 12-mc-00115, Order (S.D.N.Y. June 7, 2012), ECF No. 167, at 8-22 (the "Extraterritoriality Order") annexed as Exhibit A to the July 13, 2012 Declaration of Marco E. Schnabl, submitted herewith, exhibits to which are cited as "Ex. __."; Consent Order, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC* (In re Madoff Sec.), No. 12-mc-00115 (S.D.N.Y. June 26, 2012), ECF No. 203, at 7-9 (Ex. B). As provided in paragraph 13 of the Extraterritoriality Order, nothing herein or in these proceedings waives or resolves any issue raised or that could be raised by any party save for the question of the extraterritorial reach of the relevant provisions of the Bankruptcy Code and/or SIPA, all such other issues having been reserved. Extraterritoriality Order at 5-6.

The Trustee relies on SIPA section 78fff-2(c)(3) which grants him the power to pursue what would have been "customer property" while in the hands of BLMIS so that, if recovered, it can be distributed as "customer property" under SIPA's priority scheme set out in section 78fff-2(c)(1). Indeed, the Trustee concedes that but for section 78fff-2(c)(3) he would have no power to seek such customer property from the Extraterritorial Defendants. Nothing in that section, however, even suggests that it is intended to apply extraterritorially and, under the most elemental application of *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), it does not. Like section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), at issue in *Morrison*, section 78fff-2(c)(3) of SIPA offers nothing in its plain meaning, context or otherwise that suggests it has extraterritorial scope. (*See* Point III.) The Trustee's claims fail on that ground alone.

The Trustee's claims fail for the separate and independent reason that the isolated provisions in the Code on which he relies (ostensibly to effect the recoveries he believes may be within the reach of section 78fff-2(c)(3)) do not have extraterritorial reach either. In fact, this Court (Scheindlin, J.) has already concluded that one of the Code provisions on which the Trustee relies has no extraterritorial reach. *See Maxwell Commc'n Corp. v. Sociéte Generale PLC* (In re Maxwell Commc'n Corp.), 186 B.R. 807 (S.D.N.Y. 1995), *aff'd on other grounds*, 93 F.3d 1036 (2d Cir. 1996). In the wake of *Morrison* (which we discuss in Point I), the same conclusion applies to all the Code's avoidance and recovery provisions on which the Trustee relies, including section 547 ("preferences"), section 548 ("fraudulent transfers"), and section 550(a) ("liability of transferee of avoided transfers"). These too have no extraterritorial reach, which dooms the Trustee's claims independently of the absence of extraterritorial scope in SIPA section 78fff-2(c)(3). (*See* Point II.)

BACKGROUND

The Extraterritorial Defendants are foreign persons and entities, virtually all of whom (or which) are alleged to be immediate or mediate transferees of alleged initial transferees of what was customer property in the hands of BLMIS. The Extraterritorial Defendants are mostly non-U.S. "subsequent transferees" that either invested in (or served as conduits for investments in) foreign investment vehicles, such as investment funds, which in turn invested (directly or indirectly) with BLMIS, or provided services to such vehicles in exchange for fees. In this regard, the sole arguable nexus to the U.S. alleged in conclusory fashion in the vast bulk of cases is that some initial transfers must have originated from BLMIS in New York,[2] and that certain Extraterritorial Defendants paid or received dollar-denominated funds through wire transfers that passed through correspondent bank accounts in New York. Certain Extraterritorial Defendants are also said to be defendants in Madoff-related litigations in multiple *foreign* jurisdictions.

ARGUMENT

I.
THE *MORRISON* DECISION

Morrison held, indeed confirmed, that the long-established presumption against extraterritorial application of a statute can only be overcome by a "clear indication of an extraterritorial application." 130 S. Ct. at 2878. *See also Norex Petroleum Ltd. v. Access Indus.,*

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[2] The complaints fall far short of adequately pleading facts that would support a connection (i.e. "tracing") between any initial transfers from BLMIS and the subsequent transfers occurring abroad between and among foreign subsequent transferees that are at issue here. Moreover, to the extent that entirely foreign subsequent transfers were followed by further domestic transfers, those later domestic subsequent transfers are subject to additional defenses, including a shelter defense. *See* 11 U.S.C. § 550(b)(2); *Weinman v. Simons* (In re Slack-Horner Foundries Co.), 971 F.2d 577 (10th Cir. 1992). In any event, we regard the tracing, the shelter defense and similar issues as beyond this application and they are, therefore, fully reserved for later consideration.

Inc., 631 F.3d 29, 32 (2d Cir. 2010) (rejecting RICO's extraterritorial application, and noting that *Morrison* "wholeheartedly embraces application of the presumption against extraterritoriality"), *cert. dismissed*, 80 U.S.L.W. 3016 (U.S. June 29, 2011) (No. 10-1310). "'[U]nless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, '[a court] must presume it is primarily concerned with domestic conditions.'" *Morrison*, 130 S. Ct. at 2877 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).[3]

In refusing to give section 10(b) of the Exchange Act extraterritorial application, *see Morrison*, 130 S. Ct. at 2881-83, the Supreme Court expressly disavowed decades of judicially engrafted tests of extraterritoriality ("conduct" or "effects"), *see SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003), *abrogated by Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869 (2010), that were based, not on legislative history or statutory text, but on the judiciary's "best judgment as to what Congress would have wished if these problems had occurred to it." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975), *abrogated by Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869 (2010); *see also id.* ("We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond.").[4]

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[3] This follows from the "'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison*, 130 S. Ct. at 2877 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). This "presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993).

[4] Thus, in the wake of *Morrison*, courts have uniformly concluded that federal securities law claims in Madoff-related actions cannot be asserted extraterritorially. *See In re Optimal U.S. Litig.*, No. 10 Civ. 4095 (SAS), 2012 U.S. Dist. LEXIS 77311 (S.D.N.Y. June 4, 2012); *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305 (S.D. Fla. 2010), *aff'd sub nom. Inversiones Mar Octava Limitada v. Banco Santander S.A.*, 439 F. App'x 840 (11th Cir 2011); *In re Merkin*, 817 F. Supp. 2d 346 (S.D.N.Y. 2011).

The Supreme Court in fact disavowed any mode of statutory interpretation that did not focus on plain statutory language, on which courts must rely first, *Morrison*, 130 S. Ct. at 2877-78, and then, if appropriate, on whether the statute even focuses on foreign transactions. *Id*. at 2884. "'[U]nless there is the *affirmative* intention of the Congress *clearly expressed* ' to give a statute extraterritorial effect, '[courts] must presume it is primarily concerned with domestic conditions.'" *Id*. at 2877 (emphasis added; citation omitted); *see also id*. at 2878 ("When a statute gives no *clear* indication of an extraterritorial application, *it has none*." (emphases added)). The Supreme Court held that "the presumption [against extraterritorial application] applies in *all cases*, preserving a stable background against which Congress can legislate." *Id.* at 2873 (emphasis added). *See Norex Petroleum*, 631 F.3d at 32 (holding that RICO has no extraterritorial effect as it is silent as to its extraterritorial reach); *see also Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473-74 (S.D.N.Y. 2010) (same), *aff'd sub nom*. *Cedeño v. Castillo*, 457 F. App'x 35 (2d Cir. 2012); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 915, 923 (C.D. Cal. 2011) (no extraterritorial reach for RICO and Magnuson-Moss Act; and questioning the extraterritorial application of certain California consumer protection statutes); *NewMarket Corp. v. Innospec Inc.*, No. 3:10CV503-HEH, 2011 U.S. Dist. LEXIS 54901 (E.D. Va. May 20, 2011) (foreign bribes and kickbacks not reached by Robinson-Patman Act under *Morrison*). Those provisions of the Code and SIPA on which the Trustee relies are equally constrained to the domestic sphere.

II.
THE CODE PROVISIONS AUTHORIZING AVOIDANCE AND RECOVERY OF PRE-PETITION TRANSFERS HAVE NO EXTRATERRITORIAL REACH

A. These Provisions Contain No Clear Indication Of Extraterritorial Reach, And Therefore They Have None

Code sections 547 and 548 are "avoidance" provisions, whereas section 550 is a "recovery" provision.[5] It is hornbook law that only *after* a transfer has been "avoided," pursuant to the relevant avoidance provision, is the Trustee then empowered (subject to appropriate limitations) to seek recovery from the "initial" transferee under section 550(a)(1) or from a "subsequent" transferee under section 550(a)(2).[6] That is, "avoidance" does not in and of itself result in "recovery," which only *follows* avoidance, subject to the separate limitations in section 550. *See, e.g.*, *Official Comm. of Unsecured Creditors v. JP Morgan Chase Bank* (In re M. Fabrikant & Sons, Inc.), 394 B.R. 721, 741 (Bankr. S.D.N.Y. 2008) ("The Bankruptcy Code separates the concepts of avoidance and recovery."); *see also* H.R. Rep. No. 95-595, at 375 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6331 ("Section 550 prescribes the liability of a transferee of an avoided transfer, and enunciates the separation between the concepts of avoiding

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[5] The Trustee also brings state law avoidance claims under section 544 of the Code. All arguments made here in connection with the reach of sections 547, 548 and 550 apply equally to section 544.

[6] Indeed, recovery from subsequent transferees is conditioned on the alleged initial transfers having been avoided first, else subsequent transfers are not recoverable, irrespective of whether SIPA or the Code reach extraterritorially. *See* 11 U.S.C. § 550(a) (permitting recovery only "to the extent that a transfer is avoided"); *see also Weinman v. Simons* (In re Slack-Horner Foundries Co.), 971 F.2d 577, 580 (10th Cir. 1992); *Gelzer v. Fur Warehouse, Ltd.* (In re Furs by Albert & Marc Kaufman, Inc.), Bankr. No. 03-41301 (SMB), 2006 WL 3735621, at *8 (Bankr. S.D.N.Y. Dec. 1, 2006). Thus, subsequent transfers alleged to have originated with initial transfers from, for example, BLMIS to Fairfield Sentry Limited ("Sentry"), are not recoverable because the Trustee settled with Sentry, rather than "avoided" the alleged initial transfers to Sentry under SIPA, the Code, or NYDCL, and the period for avoidance under section 546(a) has now expired. *See Picard v. Caceis Bank Luxembourg*, No. 12-cv-00234, (S.D.N.Y. April 2, 2012), ECF No. 2, Exhibit D.

a transfer and recovering from the transferee."). Under *Morrison*, nothing in any of these avoidance or recovery provisions permits the Trustee to avoid transfers that were received abroad or later to recover those transfers from foreign transferees, much less avoid or recover entirely foreign transfers received by foreigners from other foreign subsequent transferees. As in the case of the relevant sections of SIPA discussed below, nothing in the plain text of these provisions even hints at an extraterritorial reach, when it would have been elemental for Congress expressly to specify such scope. The Court in *Morrison* contrasted the many instances in which Congress expressly legislated the extraterritorial application of a statute with the failure to do so in section 10(b) of the Exchange Act, a failure that is just as apparent in the context of the avoidance and recovery sections arguably at issue here.

It is therefore not surprising that, more than a decade before *Morrison*, in *Maxwell Communication Corp. v. Barclays Bank plc* (In re Maxwell Communication Corp.), 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996), the Bankruptcy Court held that transfers made in the United Kingdom could *not* be recovered under the Code, despite their having involved proceeds of asset sales in the United States. The Court noted:

> There is nothing in either the language or legislative history of section 547 which demonstrates a clearly expressed congressional intent that this particular Code provision apply extraterritorially. The fact that the term "transfer," as used in section 547, has been interpreted quite broadly does not change this conclusion. The definition of transfer found in section 101(54) of the Code is undeniably broad but makes no reference whatsoever to the place where the transfer occurred or the place where the property is now found.

170 B.R. at 811. The Court reasoned, under canons of statutory interpretation that of course long preceded *Morrison*, that "where a foreign debtor makes a preferential transfer to a foreign transferee and the center of gravity of that transfer is overseas, the presumption against extraterritoriality prevents utilization of section 547 to avoid the transfer." *Id*. at 814.

On appeal, this Court (Scheindlin, J.) agreed, holding that neither the text of the relevant provisions, nor the structure or purpose of the Code reflected any intent that they be applied extraterritorially. *In re Maxwell Commc'n Corp.*, 186 B.R. at 819-21. The Court concluded, in words that presage *Morrison*, "[b]ecause Congress has not 'clearly expressed' its desire that section 547 govern extraterritorial conduct, that section cannot apply to the foreign transfers." *Id.* at 820-21 (citation omitted). On further appeal, the Second Circuit, at the time bound by latitudinarian precedents on how to determine extraterritoriality later overruled in *Morrison*, declined to decide whether section 547 had extraterritorial effect, but affirmed on the ground that section 547 should not be applied on international comity grounds. *See Maxwell Commc'n Corp. v. Societe Generale* (In re Maxwell Commc'n Corp.), 93 F.3d 1036, 1055 (2d Cir. 1996); *see also Midland Euro Exch. Inc. v. Swiss Fin. Corp.* (In re Midland Euro Exch. Inc.), 347 B.R. 708, 717-18 (Bankr. C.D. Cal. 2006) (holding that neither the plain language of section 548 nor other parts of the Code establish congressional intent to apply it extraterritorially).[7] The conclusion reached by Judge Scheindlin is even "more correct" today in the wake of *Morrison* than it was seventeen years ago.

[7] In *In re Midland Euro Exchange*, the court discussed and rejected a holding that arguably gave extraterritorial effect to section 548 in *French v. Liebmann* (In re French), 440 F.3d 145 (4th Cir. 2006). The court noted that the decision in *In re French* was based on the view that property that was the subject of a voidable transfer is nonetheless property of the estate within the meaning of 11 U.S.C. § 541, and it rejected that holding because it accepted the view of the majority of the Courts of Appeals, including the Second Circuit, *see FDIC v. Hirsch* (In re Colonial Realty Co.), 980 F.2d 125, 131 (2d Cir. 1992), that such property does not become part of the estate until the transfer has been avoided and recovered. *See In re Midland Euro Exch.*, 347 B.R. at 717-18 (*See* discussion below.) In any event, *In re French* involved a transfer by a U.S. domiciliary to U.S. domiciliaries, *see* 440 F.3d at 148, and the decision provides no precedent for applying the avoidance provisions to foreign defendants.

B. The Geographic Focus Of These Provisions Confirms That They Were Not Intended To Apply Extraterritorially

The comity concerns that led the Second Circuit to affirm in *Maxwell* anticipated *Morrison* fourteen years later, in its recognition that, as a principle of *statutory interpretation*, limiting U.S. legislation to the domestic sphere is particularly appropriate where the possibility of incompatibility between domestic and foreign legislation is apparent yet Congress has remained silent on how to address such obvious conflicts. *Morrison* said,

> [W]e reject the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad . . . . The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application "it would have addressed the subject of conflicts with foreign laws and procedures."

Morrison, 130 S. Ct. at 2885 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991)); *see also id*. at 2883-84. *Morrison* reminds us that the absence in the Code of any provisions to account for the obvious conflicts here is, in and of itself, a statutory interpretation basis that compels restricting to the domestic sphere the geographical reach of the Code and SIPA provisions on which the Trustee relies in these proceedings.[8]

It is beyond dispute that Bernard Madoff's misdeeds have had effects on persons and entities worldwide, many of which are businesses regulated by foreign laws and persons and entities under the supervision of different courts and laws. *See F. Hoffman-La Roche Ltd. v.*

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[8] Indeed, the Code increasingly displays express deference to the interests of competing jurisdictions. Section 304 in the Bankruptcy Code of 1978, dealing with proceedings ancillary to foreign insolvency proceedings, was regarded as a major step toward international cooperation. *See In re Maxwell Commc'n Corp.*, 170 B.R. at 816. In 2005, Congress amended the Code by replacing section 304 with Chapter 15 and made clear that "[t]he purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of – (1) cooperation between [United States and foreign courts]; and (2) greater legal certainty for trade and investment." 11 U.S.C. § 1501(a).

Empagran S.A., 542 U.S. 155, 164-65 (2004) (statutes to be construed to avoid interference with foreign sovereigns, particularly in "today's highly interdependent commercial world"); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). The principles on which avoidance is to be based, the terms on which recovery is to be allowed following avoidance, the extension of avoidance burdens to subsequent transferees, and the limitations and scope of recoveries embodied in Code provisions such as 547, 548 and 550, all reflect sensitive commercial policies, *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 896-97 (7th Cir. 1988), which each jurisdiction is entitled to accommodate as it sees fit.[9] Foreign jurisdictions are entitled to establish their own rules concerning when and on what basis the recipient of a transfer in those jurisdictions should be required to disgorge it. Likewise, foreign recipients of transfers made abroad should be able to rely on local law to determine the finality of transactions with other non-U.S. persons, without being required to risk that finality under standards foisted on them by U.S. law after the fact and that local markets could not plausibly regard as relevant. *See, e.g.*, *In re Maxwell Commc'n Corp.*, 186 B.R. at 820 (discussing differences in preference law between the U.S. and U.K.); *Morrison*, 130 S. Ct. at 2884-85 ("[W]e know of no one . . . who even believed that under established principles of international law Congress had the power to 'regulate' [foreign exchanges or transactions] . . . foreign countries regulate their domestic . . . transactions occurring within their territorial jurisdiction.").

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[9] Protection of transferees from the consequence of avoidance is even more vital in financial and other liquid markets, as Congress has recognized in the domestic sphere when enacting safe harbors for transfers relating to securities transactions, commodity and futures contracts, repurchase agreements and swaps. *See* 11 U.S.C. § 546(e)-(g); *see also Banque Worms v. BankAmerica Int'l*, 77 N.Y.2d 362, 372 (1991) (the need for finality in the settlement of cash transfers is "a singularly important policy goal," and to permit the recovery of settled transactions "'would disorganize all business operations and entail an amount of risk and uncertainty which no enterprise could bear'" (quoting *Hatch v. Fourth Nat'l Bank*, 147 N.Y. 184, 192 (1895))).

These are not simply theoretical concerns. The alleged foreign transfers that the Trustee seeks to recover include redemption payments from foreign funds to their own (non-U.S.) redeeming shareholders, and service payments by foreign funds to foreign service-providers, all subject to the laws and regulations of the British Virgin Islands (the "BVI"), the Cayman Islands, Luxembourg, Switzerland and many other countries. (HSBC Compl. ¶¶ 57- 59, 64, 81-84.) For example, three of these foreign funds, Fairfield Sentry Limited, Fairfield Sigma Limited and Fairfield Lambda Limited (the "Fairfield Funds"), which are BVI funds, are now subject to liquidation proceedings under court supervision in the BVI in the wake of their Madoff-related reverses. The court-appointed liquidator in those proceedings (the "Liquidator") has filed claims in the BVI and in New York, seeking to recover redemption payments made to the Fairfield Funds' foreign shareholders under common law claims of "mistake" and also pursuant to BVI insolvency statutes. *See In re Fairfield Sentry Ltd. Litig.*, 458 B.R. 665, 671-72 (S.D.N.Y. 2011). Both the BVI trial court and its appellate court rejected the attempt to recover or rescind these payments on common law grounds of "mistake," concluding that redeeming shareholders gave good consideration when they surrendered their shares and that no grounds for rescission existed, particularly because of the need for certainty in modern commercial transactions having "a global dimension with far reaching consequences." Judgment, Eastern Caribbean Court of Appeal, Territory of the Virgin Islands, *Quilvest Fin. Ltd. v. Fairfield Sentry Ltd. (In Liquidation)*, HCVAP 2011/Q41 (entered June 13, 2012), a copy of which is submitted as Ex. C (the "BVI Judgment").

Against this very real background, the conflict stemming from the Trustee's multiple extraterritorial efforts to recover here from foreign investors in the Fairfield Funds the same redemption payments that the Liquidator of the Fairfield Funds seeks to recover becomes

apparent. To permit the extraterritorial application of SIPA or the Code, so as to extract from foreign investors in the Fairfield Funds amounts that are already being sought under BVI law (and which the BVI courts have held that shareholders are entitled to keep, at least to the extent they are not subject to recovery under mistake theories) is precisely the sort of interference that comity is meant to avoid, *Empagran*, 542 U.S. at 164, and that *Morrison* commands courts to take into account in limiting a statute to its proper geographical reach. *Morrison*, 130 S. Ct. at 2883-85; *see also In re Maxwell Commc'n Corp.*, 93 F.3d at 1048 (noting that "comity is especially important in the context of bankruptcy law"). Transfers between foreigners abroad, subject to foreign law, should not be subject to SIPA or the Code. That is consistent with the "principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories." *Empagran*, 542 U.S. at 176 (Scalia, J., concurring in the judgment).

Furthermore, no argument that this would be "inequitable," which the Trustee may deploy in response, trumps the plain meaning of the statute. Where words in a statute are clear, "judicial inquiry is complete." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002). Twenty-five years ago, the Supreme Court already noted that although "policy" arguments may inform the reading of an *ambiguous* statute, they may not justify disregarding the language expressly used by Congress. *See Comm'r of Internal Revenue v. Asphalt Prods. Co.*, 482 U.S. 117, 121 (1987). The Court in *Lamie v. United States Trustee*, 540 U.S. 526 (2004) noted,

> If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." *United States v. Granderson*, 511 U.S. 39, 68 (1994) (concurring opinion). This allows both of our branches to adhere to our respected, and respective, constitutional roles. In the meantime, we must determine intent from the statute before us.

Id. at 542. Speculation about what the Trustee or SIPC may think is the right "policy" did not overcome the longstanding presumption against extraterritoriality twenty-five years ago when *Lamie* was decided, much less today in the wake of *Morrison*. *See In re Midland Euro Exch.*, 347 B.R. at 720 (stating that "Congress is the ultimate arbiter of the laws it enacts and it has the power to alter the language of the statute to clearly manifest its intent" and that "[t]his is particularly so given that Congress recognizes the need to verbalize its intent in order to overcome the presumption against extraterritoriality").

C. The Trustee's Possible Reliance On Section 541 Is Likewise To No Avail

In holding that section 10(b) of the Exchange Act lacks extraterritorial effect, the Supreme Court in *Morrison* pointedly contrasted section 10(b) with the text of section 30 of the Exchange Act (Foreign Securities Exchanges), 15 U.S.C. § 78dd, observing:

> Subsection 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect. Its explicit provision for a specific extraterritorial application would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges—and its limitation of that application to securities of domestic issuers would be inoperative.

Morrison, 130 S. Ct. at 2883-84. Moreover, although section 30(a) of the Exchange Act, 15 U.S.C. § 78dd(b), could be interpreted to apply abroad, "the presumption against extraterritoriality operates to limit that provision *to its terms*." *Id.* at 2882-83 (emphasis added). That is, the extraterritorial reach of section 30(a) did *not* extend to *other* sections of the Exchange Act by virtue of the application of the presumption against extraterritoriality alone.

In that light, section 541, far from aiding the Trustee's claim of extraterritoriality, in fact hinders it. Indeed, the limited (but express) reference to some form of "extraterritoriality" in *that* section underscores the absence of any extraterritoriality suggestion elsewhere, and the inference which *Morrison* sets out compels that none was intended in any other provisions, such as the avoidance and recovery sections at issue here. That is, the conclusion that the avoidance and

recovery provisions on which the Trustee relies here do *not* have extraterritorial application is confirmed by juxtaposing them to section 541(a) of the Code, which provides that the commencement of a case under certain provisions of the Code creates an "estate . . . comprised of all the [listed] property . . . wherever located."[10] Courts have interpreted the words "wherever located" to encompass within the "estate" property located abroad. *See United States Lines, Inc. v. GAC Marine Fuels Ltd.* (In re McLean Indus., Inc.), 68 B.R. 690, 694 (Bankr. S.D.N.Y. 1986). In contrast, no similar language, or language otherwise clearly expressing an intention to grant them extraterritorial reach, appears in the Code's avoidance and recovery provisions on which the Trustee relies in these proceedings. Under *Morrison*, that alone sufficiently demonstrates absence of extraterritorial scope for those avoidance and recovery provisions. *Morrison*, 130 S. Ct. at 2882-83.

Apart from the foregoing, the property that the Trustee is seeking to recover is not *now* part of the estate defined by section 541, and would not become part of the estate unless and until the transfer had been successfully avoided and the property has been recovered, as noted above. *See In re Colonial Realty*, 980 F.2d at 131; *Savage & Assocs., P.C. v. Mandl* (In re Teligent, Inc.), 325 B.R. 134, 137 (Bankr. S.D.N.Y. 2005) (fraudulently transferred property "does not become property of the estate until it has been recovered").[11] As the *In re Maxwell Communication Corp.* Court explained, section 541(a) "by its terms only applies to property

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[10] The cognate notion giving courts at the commencement of a case jurisdiction over property of the debtor "wherever located" can also be found in 28 U.S.C. § 1334(e)(1) and 15 U.S.C. § 78eee(b)(2)(A)(i). Neither alters the result here; indeed, they confirm the absence of extraterritorial reach of the relevant Code sections and of SIPA section 78fff-2(c)(3).

[11] The same is true for property subsequently transferred, as section 550(a) permits recovery of a subsequent transfer only "'to the extent that a transfer is avoided under' . . . some . . . avoidance statute." *In re Madoff Sec.*, 2012 U.S. Dist. LEXIS 78804, at *24 n.2 (quoting 11 U.S.C. § 550(a)).

which is property of the estate. Because preferential transfers do not become property of the estate until recovered, . . . section 541 does not indicate the Congress intended [the avoidance and recovery provisions] to govern extraterritorial transfers." *In re Maxwell Commc'n Corp.*, 186 B.R. at 820.

In other words, there is no disagreement that if an insolvent estate owned a building in, for example, London the estate would include that building in London at the commencement of the bankruptcy case pursuant to section 541. That inclusion, however, has no real bearing on (i) whether a trustee may reach out extraterritorially under, for example, section 548, to avoid a prepetition transfer of property (property that is *not* part of the estate until after it has been "recovered") that took place abroad between foreigners, much less on (ii) whether he can reach out extraterritorially and "recover" under section 550 (having first "avoided" extraterritorially) property in London or elsewhere abroad. That the debtor's estate should include property located beyond the U.S. border (i.e., "wherever located") says nothing about whether a trustee can reach out abroad and seek, by the extraterritorial application of U.S. law, to avoid transfers of property that is not part of the estate, let alone to recover the property from foreign recipients who received transfers from other foreign transferees abroad, under the protection of legal regimes for whom the U.S. laws governing avoidance and recovery actions are entirely alien. That freight cannot be carried by the two words "wherever located" in section 541. To the extent these words convey any notion of "extraterritoriality," they simply confirm that the estate at the commencement of a case includes property located abroad, and, by the statutory contrast which

Morrison applied, in fact confirm the absence of extraterritorial reach in the *other* (recovery and avoidance) provisions on which the Trustee relies.[12]

III.
THE RELEVANT PROVISIONS OF SIPA HAVE NO EXTRATERRITORIAL APPLICATION

A. Under *Morrison*, Section 78fff-2(c)(3) Has No Extraterritorial Reach: On That Ground Alone, The Trustee's Claims Against The Extraterritorial Defendants Fail

1. The Plain Text Of Section 78fff-2(c)(3) Confirms That It Has No Extraterritorial Scope

Section 78fff-2(c)(3) offers not a hint that it applies extraterritorially, much less the "clear indication" to that effect required under *Morrison* to overcome the presumption against extraterritoriality. It therefore has no such foreign scope. The absence of extraterritorial reach in that SIPA provision dooms all claims against the Extraterritorial Defendants, irrespective of the geographical scope of any Code section on which the Trustee may also rely to give effect to section 78fff-2(c)(3). It states as follow:

> [T]he trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of title 11. Such recovered property shall be treated as customer property. For purposes of such recovery, the property so transferred shall be deemed to have been the property of the debtor and, if such transfer was made to a customer or for his benefit, such customer shall be deemed to have been a creditor, the laws of any State to the contrary notwithstanding.[13]

15 U.S.C. § 78fff-2(c)(3).

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[12] We further note below (*see* Point III) that it is unnecessary to determine the geographic reach of the Code sections on which the Trustee may rely in light of the absence of extraterritorial reach in SIPA section 78fff-2(c)(3), without which the Trustee concededly lacks standing to assert *any* claims here.

[13] Under the plain language of that provision, as in the case of section 550 of the Code, here too the property at issue becomes "customer property" only after it has been recovered. *See In re Colonial Realty*, 980 F.2d at 131. In any event, all section 78fff-2(c)(3) deals with is "customer property."

There is no debate that section 78fff-2(c)(3) governs – indeed, is indispensable to – the recovery of customer property at issue here: SIPA and the Trustee plainly concede the point.[14] Judge Lifland came to the same conclusion. *See Picard v. Merkin* (In re Bernard L. Madoff Inv. Sec. LLC), 440 B.R. 243, 272 (Bankr. S.D.N.Y. 2010) (Lifland, J.)("*Merkin*").[15] But section 78fff-2(c)(3) does not mention or suggest extraterritorial application. Under *Morrison* this compels only one conclusion: it has none. Nothing in its legislative history is to the contrary, if inspection of that history were still relevant in the face of the clear statutory interpretations guidelines set out in *Morrison*. *See* H.R. Rep. No. 75-1409, pt. 2, at 31 (1937). *See also* John A. Gilchrist, *Stockbrokers' Bankruptcies: Problems Created by the Chandler Act*, 24 Minn. L. Rev. 52 (1939-1940). Accordingly, section 78fff-2(c)(3) does not reach abroad, or "abrogate"

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[14] *See* Trustee's Memorandum of Law in Opposition to Consolidated Brief on Behalf of Stern Withdrawal Defendants, 12-mc-00115 (JSR) (S.D.N.Y. May 25, 2012), ECF No. 141, at 30. ("But for the SIPA statute, 'there would be no legal basis for the [avoidance] actions' . . . . [S]ection 78fff-2(c)(3) 'allows the SIPA trustee to avoid . . . transfers in spite of the fact that a broker-dealer liquidation technically does not involve the debtor-creditor relationship.'" (alterations in original) (citations omitted)); Memorandum of Law of the Securities Investor Protection Corporation Addressing Issues Raised in the Court's Order Entered April 13, 2012, 12-mc-00115 (JSR) (S.D.N.Y. May 25, 2012), ECF No. 136, at 14-15 ("As has long been noted, the purpose of [section 78fff-2(c)(3)] is to ensure that a SIPA trustee can use the avoidance powers conferred by the Bankruptcy Code to recover customer property, even though, prior to the commencement of the liquidation, such property was not 'property of the debtor' and the debtor's brokerage customers were not its 'creditors' under state fraudulent transfer law.").

[15] *Merkin* makes crystal-clear that without section 78fff-2(c)(3) no provision of the Code alone would vouchsafe the Trustee power to assert claims for the recovery of "customer property." In rejecting the Trustee's argument that under section 78fff-2(c)(3) he was seeking to recover property of the "debtor" (i.e., of BLMIS), the Court observed that "[i]n a SIPA proceeding . . . property held by a broker-debtor for the account of a customer is *not property of the broker-debtor*," and therefore absent section 78fff-2(c)(3) "a SIPA trustee would *lack standing to utilize the[] avoidance sections* [of the Code]." *Merkin*, 440 B.R. at 272 (emphasis added). The Court held, in short, that in a SIPA proceeding the Trustee may assert the claims at issue here – for recovery of customer property disposed of by the insolvent broker – *only* because section 78fff-2(c)(3) permits it. *Id.* at 272-73.

Morrison in the SIPA context, or otherwise provides the Trustee with the power to recover abroad from the Extraterritorial Defendants.[16]

As noted, rather than demonstrating any extraterritorial reach, that provision has been read only to grant the Trustee standing to bring avoidance actions under the Code, despite the property at issue being "customer property" and not property in which the insolvent estate itself would otherwise have an interest. *See Picard*, 440 B.R. at 272; *see also Trefny v. Bear Stearns Sec. Corp.*, 243 B.R. 300, 321 (S.D. Tex. 1999). In other words, section 78fff-2(c)(3) only allows the segregation of "customer property" to coexist with the Trustee's power to seek avoidance and recovery of transfers that the insolvent broker may have effected from what is otherwise regarded as property of customers. Read in this light, the reference to "the laws of any State" in the last sentence of section 78fff-2(c)(3) simply rejects the application of domestic state law to argue that, solely for purposes of the actions authorized by section 78fff-2(c)(3), the customer/defendant is *not* to be deemed a "creditor" thus barring recovery on that ground. There is *nothing* in that provision that explicitly or implicitly expands the geographic scope of section 78fff-2(c)(3) or of SIPA to reach the extraterritorial transfers at issue here with the transparency required to overcome the presumption that *Morrison* compels us otherwise to recognize in "all cases." In fact, the last sentence of section 78fff-2(c)(3) demonstrates Congressional intent to supersede domestic *state* laws; nothing, however, is said about foreign law, to which Congress could easily have expressly referred. *Morrison*, 130 S. Ct. at 2885. Accordingly, the Trustee

[16] *But see Hill v. Spencer Sav. & Loan Ass'n* (In re Bevill, Bresler & Schulman, Inc.), 83 B.R. 880 (D.N.J. 1988), the only Court to conclude, long before *Morrison*, that SIPA has extraterritorial effect on grounds that the "[e]xtraterritorial application of SIPA is also consistent with the extraterritorial application of other federal securities laws" – a rationale overruled by *Morrison*. *Id*. at 896.

lacks any basis to assert claims against the Extraterritorial Defendants simply because section 78fff-2(c)(3) has no extraterritorial reach.[17]

2. The Focus Of SIPA Confirms That It Was Not Intended To Apply Extraterritorially

In determining geographic scope, *Morrison* enjoins the Court to give consideration to the scope of concerns addressed by the statute (i.e., "context") in addition to plain meaning. We respectfully submit that the "context" separately confirms that, plain meaning aside, SIPA and in particular section 78fff-2(c)(3) should not be given extraterritorial reach.

SIPA is an express amendment to the Exchange Act, and is in fact codified in title 15. *See* 15 U.S.C. § 78bbb; *Picard v. HSBC Bank Plc*, 450 B.R. 406, 410 (S.D.N.Y. 2011). Like section 10(b) of the Exchange Act at issue in *Morrison*, neither SIPA nor section 78fff-2(c)(3) in particular provides affirmative indications of extraterritorial scope. Thus, the same conclusion the Supreme Court reached in *Morrison* for another provision in the Exchange Act should apply here too. *See Morrison*, 130 S. Ct. at 2878; *see also Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) ("[T]he absence of a clear congressional statement is, in effect, equivalent to a statutory qualification saying, for example, '[n]otwithstanding any general language of this statute, this statute shall not apply extraterritorially . . . .'"). Tellingly, the Trustee has relied exclusively on the Code in his attempt to invest SIPA with extraterritorial reach, not on SIPA's own text.[18] This is surely a grudging concession under *Morrison* that SIPA and in particular

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[17] All comity concerns discussed in Point II in connection with the reach of the relevant provisions of the Code, apply equally to SIPA and to section 78fff-2(c)(3) in particular.

[18] *See, e.g.*, Trustee's Memorandum of Law in Opposition to Primeo Fund's Motion to Withdraw the Reference, *Picard v. HSBC*, 11 Civ. 06524 (JSR) (S.D.N.Y. Dec. 7, 2011), ECF No. 18, at 16-17 (stating that SIPA incorporates certain Code provisions, "[a]nd those provisions, which include the power to avoid fraudulent transfers and preferences, may be applied both in the United States and beyond"); Trustee's Memorandum of Law in

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section 78fff-2(c)(3) lack extraterritorial scope, in the absence of which reliance on the supposed extraterritoriality of any Code provision avails the Trustee nothing, as shown above.

This conclusion is underscored by Congress' unwillingness to vouchsafe SIPA the scope that the Trustee asserts it has, despite the numerous occasions on which it "has *expressly* legislated the extraterritorial application of a statute."[19] *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (emphasis added). In fact, Congress responded to *Morrison* in fewer than three weeks by adding section 929P(b) (unambiguously titled "Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws") to Title IX of the Dodd-Frank Act to provide what Congress believed was an affirmative indication of extraterritoriality for certain antifraud actions brought by the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ"). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1862 (2010).[20]

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Opposition to Defendant's Motion to Withdraw the Reference, *Picard v. Banco Bilbao Vizcaya Argentaria, S.A.*, 11 Civ. 07100 (JSR) (S.D.N.Y. Jan. 31, 2012), ECF No. 15, at 16-18 (same); Trustee's Memorandum of Law in Opposition to Defendants' Motions to Withdraw the Reference, *Picard v. Oreades Sicav*, 11 Civ. 07763 (JSR) (S.D.N.Y. Feb. 21, 2012), ECF No. 17, at 19-21 (same). (Copies of these Memoranda of Law are annexed hereto as Ex. D, Ex. E and Ex. F, respectively).

[19] *See, e.g.*, the Export Administration Act of 1979, 50 App. U.S.C. § 2415(2) (defining "United States person" to include "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern"); Coast Guard Act, 14 U.S.C. § 89(a) (Coast Guard searches and seizures upon the high seas); 18 U.S.C. § 7 (Criminal Code extends to high seas); 19 U.S.C. § 1701 (Customs enforcement on the high seas).

[20] In direct response to *Morrison*, the amendment sought to "*clearly* indicat[e] that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department." 156 Cong. Rec. H5,237 (daily ed. June 30, 2010) (emphasis added). Section 929(P)(b) amends section 27 of the Exchange Act and speaks of reviving in its subsections (b)(1) and (b)(2) the "conduct" and "effects" tests for cases brought by the SEC or the DOJ under the

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Thus, the Exchange Act, as amended in the wake of *Morrison*, now seeks *expressly* to overcome the presumption against extraterritorial reach in the antifraud provisions of the Exchange Act, but *only* to the extent *Morrison* would have barred foreign actions brought by the SEC and the DOJ. *See In re Optimal U.S. Litig.*, 2012 U.S. Dist. LEXIS 77311, at *13 n.28. That was the *sole* Congressional response to *Morrison*, a response which by its clear terms does not extend to any other provision of the securities laws, including SIPA.[21] Had Congress wished this (or any other) amendment to extend to the entire Exchange Act (or to SIPA, or to section 78fff-2(c)(3) in particular), it could have said so. It did not. Instead, Congress specifically chose to amend *only* section 27 of the Exchange Act in response to *Morrison*. That deliberate choice alone demonstrates that SIPA has no extraterritorial reach. *See Morrison*, 130 S. Ct. at 2883 (concluding that section 30(a)'s "explicit provision for a specific extraterritorial application would be quite superfluous if the rest of the Exchange Act [of which SIPA is a part] already applied to transactions on foreign exchanges"); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (explaining that a court should "avoid a reading which renders some words altogether redundant").

Likewise, SIPA's primarily domestic concerns, like those generally of the Exchange Act of which SIPA is a part, indicate an absence of extraterritorial reach. *See Morrison*, 130 S. Ct. at 2878 (Exchange Act's focus is the purchase and sale of securities *in the United States*). For

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antifraud provisions of the Exchange Act. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, § 929P(b), 124 Stat. at 1862.

[21] Congress did not likewise grant private actors like SIPC (or the trustees appointed by SIPC) extraterritorial powers. *See* Hr'g Tr. p. 4:18-21, July 28, 2011, *Picard v. Greiff*, 11 Civ. 3775 ("I think we're constrained by the words of Congress in the statute, which are very plain, that we're a DC nonprofit corporation and not an agency or establishment of the United States government . . . ."), Kevin Bell, Senior Associate General Counsel for Dispute Resolution, Securities Investor Protection Corporation.

example, SIPA expressly excludes from SIPC membership brokers or dealers whose principal business is conducted outside of the United States. *See* 15 U.S.C. § 78ccc(a)(2)(A)(i). SIPA also excludes from the definition of "customer" a person whose claim arises out of transactions with a foreign subsidiary of a member of SIPC. *See* 15 U.S.C. § 78*lll*(2)(C)(i). Indeed, the Trustee has rejected any net equity claims made by those, primarily non-U.S. persons, who invested in foreign funds that in turn invested with BLMIS, and thus were not regarded as "customers" of BLMIS under SIPA. *See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 285, 307 (Bankr. S.D.N.Y. 2011) (affirming Trustee's determinations denying claims of claimants without BLMIS accounts in their names, namely, investors in funds which in turn invested with BLMIS), *aff'd sub nom. Aozora Bank Ltd. v. Sec. Investor Prot. Corp.* (In re Aozora Bank Ltd.), No. 11 Civ. 5683 (DLC), 2012 WL 28468 (S.D.N.Y. Jan. 4, 2012). Further, SIPA excludes, for purposes of calculating gross revenues of SIPC members, revenues of such members' foreign subsidiaries. *See* 15 U.S.C. § 78ddd(i). Finally, SIPA permits the SEC to loan money to SIPC *only* if "such loan is necessary for the protection of customers of brokers or dealers and the maintenance of confidence in the *United States* securities markets." 15 U.S.C. § 78ddd(g) (emphasis added). Entirely aside then from plain text, all indicia of "concerns" or "context," express or implied, by which the Supreme Court in *Morrison* concluded that the reach of section 10(b) of the Exchange Act was only domestic compels the same conclusion here with respect to SIPA and, in particular, section 78fff-2(c)(3).

3. The Domestic Activity Allegedly At Issue Here Is Insufficient To Overcome *Morrison*'s Presumption Against Extraterritoriality In The SIPA Context

That in some instances the Trustee alleges that certain Extraterritorial Defendants may have wired dollar-denominated payments to an off-shore investment fund through correspondent

banks[22] in New York changes nothing. SIPA and section 78fff-2(c)(3) in particular still have no extraterritorial reach, and the Trustee's allegations do nothing to expand the geographic reach of those statutory provisions.

At least two courts, including this one, have followed *Morrison* and refused to apply U.S. law to foreign transactions even where correspondent banks in the U.S. were involved in the processing of dollar funds.[23] *See Cedeño*, 733 F. Supp. 2d at 472 (dismissing RICO claim even though scheme allegedly "'utilized New York-based U.S. banks to hold, move and conceal the fruits of fraud, extortion, and private abuse of public authority'"); *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d at 1317-19 (precluding application of U.S. securities laws in Madoff-related fraud claims against foreign funds, despite custodian's use of a correspondent bank to receive fees from the funds).

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[22] Correspondent banks "'are used to facilitate international financial transactions and money transfers.'" *Northrop Grumman Overseas Serv. Corp. v. Banco Wiese Sudameries*, No. 03 Civ. 1681(LAP), 2004 WL 2199547, at *8 (S.D.N.Y. Sept. 29, 2004) (quoting *Int'l Hous., Ltd. v. Rafidain Bank Iraq*, 712 F. Supp. 1112, 1118 (S.D.N.Y. 1989), *rev'd in part, dismissed in part*, 893 F.2d 8 (2d Cir. 1989)). Without them, it would often be impossible for banks to attend to the vital task of transferring money internationally by wire. *United States v. Davidson,* 175 F. App'x 399, 401 n.2 (2d Cir. 2006) (summary order). Because foreign banks typically cannot maintain branch offices in the United States, they maintain accounts in their own name at banks that are doing business in the United States to effect dollar transactions. *First Merch. Bank OSH, Ltd. v. Vill. Roadshow Pictures*, 01 Civ. 8370(GEL), 2002 WL 1423063, at *1 n.4 (S.D.N.Y. June 28, 2002). For such transactions, "neither the originator who initiates payment nor the beneficiary who receives it holds title to the funds at the correspondent bank." *Id*. (citation omitted).

[23] Furthermore, having a New York correspondent bank account is not even sufficient to subject a foreign bank, much less its foreign customer, to personal jurisdiction in New York under the "transaction of business" test. *Tamam v. Fransabank Sal*, 677 F. Supp. 2d 720, 727 (S.D.N.Y. 2010) (citing *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 762 (S.D.N.Y. 2004)); *Johnson Elec. N. Am., Inc. v. Bank of Wales, PLC*, No. 90 Civ. 6683, 1991 WL 20006, at *2 (S.D.N.Y. Feb. 8, 1991) ("[T]he mere existence of a correspondent bank relationship between a foreign bank and a New York correspondent bank is an insufficient basis for asserting personal jurisdiction over the foreign bank . . . under the less demanding 'transaction of business' test.").

Simply put, such "domestic" links are wholly insufficient to overcome the *Morrison* presumption, which can give way only where there is *express* and clear statutory evidence of extraterritorial reach, which both SIPA and the Code plainly lack. The connection to the United States provided by certain Extraterritorial Defendants' use of correspondent bank accounts is far less substantial than the domestic links roundly rejected by the Supreme Court in *Morrison* as a basis to apply U.S. law. There, the defendant's wholly owned subsidiary was headquartered in Florida, and the allegedly misleading statements were made within the domestic jurisdiction of the U.S. *See Morrison*, 130 S. Ct. at 2875-76. Yet *Morrison* reminds us that "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States . . . the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved." *Morrison*, 130 S. Ct. at 2884 (emphasis in the original). Simply put, relying on tangential domestic connections, which can always be unearthed where BLMIS was located in New York, to argue for the extraterritorial application of SIPA or the Code despite the absence of any express indication of extraterritoriality or any other indicia of extraterritoriality identified in *Morrison*, would simply resuscitate the very conduct or effects tests that *Morrison* buried.

B. The Presumption Against Extraterritoriality Is Not Otherwise Negated By Any Other SIPA Provision

To be sure, SIPA section 78eee(b)(2)(A)(i) provides that on the filing of an application with a court for a protective decree with respect to a broker/debtor, the court "shall have . . . jurisdiction of such debtor and its property wherever located."[24] 15 U.S.C. § 78eee(b)(2)(A)(i). The Trustee's anticipated reliance on the coda "wherever located" to imbue section 78fff-2(c)(3),

[24] Although this appears to parallel section 541's description of the estate at the commencement of a bankruptcy case, it is only a *jurisdictional* clause. *Cf.* 28 U.S.C. § 1334(e)(1)(same).

or SIPA generally, with extraterritorial reach is just as misguided under SIPA as it is under the Code. This carries us no farther than the similar discussion of section 541 above.

In other words, at issue here is whether section 78fff-2(c)(3) has extraterritorial reach – which we answered above in the negative. As we noted in the context of section 541 of the Code, this conclusion is likewise untethered to the *jurisdictional* reach of section 78eee(b)(2)(A)(i). In any event, that "estate" over which the court is granted jurisdiction under section 78eee(b)(2)(A)(i) does not yet include any property sought in these claims, which (a) the Trustee could seek only under the aegis of section 78fff-2(c)(3), itself lacking extraterritorial reach, and which (b) would come to augment "customer property" only *after* the application of relevant avoidance and recovery provisions that, as discussed above, also have no extraterritorial reach themselves.[25] Simply put, section 78eee(b)(2)(A)(i) has no more a bearing on whether section 78fff-2(c)(3) can be applied beyond the domestic sphere than the estate definition of section 541 has on the extraterritorial reach of the Code's relevant avoidance and recovery provisions. Nothing in how the insolvent broker's estate is defined under section 78eee(b)(2)(A)(i) affords the trustee the power to reach abroad and avoid and recover from the Extraterritorial Defendants foreign property that is not yet part of any such "estate."

Indeed, in amending SIPA's "Exclusive Jurisdiction" provision to include the debtor's "property wherever located," 15 U.S.C. § 78eee(b)(2)(A)(i), it was Congress' intention to "give the court authority to protect property located outside the territorial limits of the court *but within*

[25] As noted above, property sought from the Extraterritorial Defendants does not become part of the "estate" until *after* it might otherwise have been recovered under the relevant avoidance and recovery provisions, none of which have extraterritorial reach. *See In re Colonial Realty*, 980 F.2d at 131. Indeed, the rule that avoidance must precede recovery applies equally in the SIPA context. *See Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 312 (Bankr. S.D.N.Y. 1999).

the actual or constructive possession of the debtor." S. Rep. No. 95-763, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 764, 773. This says nothing as to whether the Trustee has power to resort to other avoidance and recovery provisions in the Code, let alone have standing which only SIPA section 78fff-2(c)(3) grants him, extraterritorially to avoid and recover property that was transferred prepetition and that is therefore plainly *not* within the actual or constructive possession of the debtor. It would be completely circular to rely on an expansive definition of "estate" as the source of the express and unambiguous grant of extraterritorial power that *Morrison* requires be reflected in section 78fff-2(c)(3) or the relevant avoidance and recovery provisions on which the Trustee relies.

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CONCLUSION

The Trustee's complaints fail to plead adequately any substantial domestic nexus for transfers made and received abroad by the Extraterritorial Defendants. Combined with the presumption against extraterritoriality, the insufficiency of the Trustee's allegations cannot be cured, and constitute ample and immediate grounds for dismissal with prejudice of the Trustee's avoidance actions under Fed. R. Civ. P. 12(b)(6).

For the foregoing reasons, the Extraterritorial Defendants respectfully request that the Court enter an order dismissing with prejudice the claims seeking recovery against the Extraterritorial Defendants.

Dated: New York, New York
July 13, 2012

Respectfully submitted,

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Exhibit 22

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-mc-00115 (JSR) ECF Case Electronically Filed
In re: MADOFF SECURITIES	

EXTRATERRITORIAL DEFENDANTS' NOTICE OF MOTION TO DISMISS

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law in Support of the Extraterritorial Defendants' Motion to Dismiss, dated July 13, 2012; the Declaration of Marco E. Schnabl dated July 13, 2012 and exhibits thereto; and all the papers filed and proceedings had herein, the Extraterritorial Defendants,[1] respectfully hereby move this Court before Hon. Jed S. Rakoff, at the United States Courthouse, 500 Pearl Street, New York, New York, for entry of an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing with prejudice the claims seeking recovery against such Extraterritorial Defendants.[2]

---

[1] As defined in the Memorandum of Law in Support of the Extraterritorial Defendants' Motion to Dismiss, dated July 13, 2012, filed contemporaneously herewith.

[2] The movants do not hereby submit to the personal jurisdiction of this Court, and make only those arguments permitted by the Court's order of limited withdrawal, which does not allow

(cont'd)

In accordance with the schedule set by the Court, moving papers from the Extraterritorial Defendants will be filed and served on or before July 13, 2012; opposition papers from Irving H. Picard, the trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC and the Securities Investor Protection Corporation shall be filed and served on or before August 17, 2012; reply papers from the Extraterritorial Defendants shall be filed and served on or before August 31, 2012; and oral argument before the Court will be held on Friday, September 21, 2012 at 4:00 P.M.

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the movants to raise all arguments that they would expect to make or be required to raise at this procedural stage under Rule 12 of the Federal Rules of Civil Procedure. Accordingly, they make this motion without waiving any rights, arguments or defenses, including their right to contest personal jurisdiction.

WHEREFORE, the Extraterritorial Defendants respectfully request that the Court enter an order dismissing with prejudice the claims seeking recovery against the Extraterritorial Defendants, and such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 13, 2012

Respectfully submitted,

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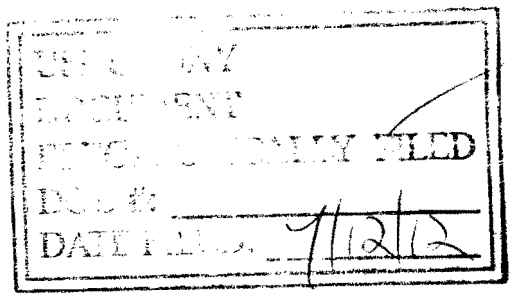
Exhibit 23



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

Defendant.

In re:

MADOFF SECURITIES

12 MC 115 (JSR)

ORDER

PERTAINS TO CASES LISTED IN EXHIBITS A, B AND C

JED S. RAKOFF, U.S.D.J.:

WHEREAS:

A. Pending before the Court are various adversary proceedings, which are listed on Exhibits A, B and C hereto (such cases and joinders thereto are collectively referred to herein as the "Adversary Proceedings"), commenced by Irving H. Picard, as trustee ("Trustee") in connection with the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") and the estate of Bernard L. Madoff under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.*, in which certain defendants (the "Defendants") have sought withdrawal of the reference from the Bankruptcy Court to this Court by reason of one or more of the following issues:

(1) whether 11 U.S.C. § 546(e) limits the Trustee's ability to avoid transfers made by BLMIS (*See* Order dated April 15, 2012, No. 12 MC 0115 (S.D.N.Y. May 16, 2012) (ECF No.119));

(2) whether provisions of the Internal Revenue Code that tax undistributed portions of Individual Retirement Accounts ("IRAs") prevent the Trustee from avoiding IRA distributions that would otherwise be taxed (*See* Order dated May 12, 2012, No. 12 MC 0115 (S.D.N.Y. May 15, 2012) (ECF No.99));

(3) whether the Trustee may, consistent with non-bankruptcy law, avoid transfers that BLMIS purportedly made in order to satisfy antecedent debts (*See* Order dated May 16, 2012, No. 12 MC 0115 (S.D.N.Y. May 15, 2012) (ECF No. 107));

(4) whether the Trustee has standing to pursue common law claims and, if so, whether the Securities Litigation Uniform Standards Act preempts the Trustee's common law claims (*See* Order dated May 15, 2012, No. 12 MC 0115 (S.D.N.Y. May 16, 2012) (ECF No. 114));

(5) (a) whether *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (the "*Stern* Decision") prevents the Bankruptcy Court from entering a final order or judgment resolving claims by the Trustee to avoid or recover initial or subsequent transfers as fraudulent transfers, fraudulent conveyances and/or preferences; (b) if the Bankruptcy Court cannot finally resolve the claims by the Trustee to avoid or recover initial or subsequent transfers as fraudulent transfers, fraudulent conveyances and/or preferences, whether the Bankruptcy Court has the authority to render proposed findings of fact and proposed conclusions of law, and (c) whether the Court should permissively withdraw the reference of the relevant

adversary proceedings based on the *Stern* Decision for cause shown pursuant to 28 U.S.C. § 157(d) (*See* Order dated April 13, 2012, No. 12 MC 0115 (S.D.N.Y. April 13, 2012) (ECF No. 4));

(6) whether SIPA and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate or mediate foreign transferees (*See* Order dated June 6, 2012, No. 12 MC 0115 (S.D.N.Y. June 7, 2012) (ECF No. 167));

(7) whether SIPA prevents the Trustee from disallowing customer claims under 11 U.S.C. § 502(d) (*See* Order dated June 1, 2012, No. 12 MC 0115 (S.D.N.Y. June 1, 2012) (ECF No. 155)); and

(8) whether SIPA and other securities laws alter the standard the Trustee must meet in order to show that a defendant did not receive transfers in "good faith" under either 11 U.S.C. § 548(c) or 11 U.S.C. § 550(b) (*See* Order dated June 23, 2012, No. 12 MC 0115 (S.D.N.Y. June 25, 2012) (ECF No. 197)).

The orders referenced above are collectively referred to herein as the "Consolidated Briefing Orders."

B. By Order dated June 6, 2012, *Picard v. Fiterman Inv. Fund., et al,* No. 12 MC 115 (S.D.N.Y. June 7, 2012) (ECF No. 164), the Court declined to withdraw for "cause shown" 28 U.S.C. § 157(d), stating that "[b]ecause the Court's interpretation of *Stern v. Marshall*, 131 S. Ct. 2594 (2011), may affect the analysis of whether the Court should withdraw 'for cause shown,' *see Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 463 67 (S.D.N.Y. 2011), the Court regards this argument as subsumed by the consolidated briefing

on the issues presented by *Stern*, *see* Order Regarding *Stern v. Marshall* dated April 13, 2012. Accordingly, the Court will resolve this issue when it decides the motion described in the April 13, 2012 Order." *See also* Order dated May 29, 2012, *Picard v. Conn. Gen. Life Ins. Co.*, 12 MC 0115 (S.D.N.Y. May 30, 2012) (ECF No. 149), in which the court declined to withdraw for "cause shown" based on the defendants' right to a jury trial (hereinafter, the "Permissive Withdrawal Orders").

C. By Order dated May 15, 2012, 12 MC 0115 (S.D.N.Y. May 16, 2012) (ECF No. 118) (the "Prior Administrative Order"), this court ruled that certain single cases or, in certain instances, the lead case of related Adversary Proceedings where defendants are represented by common counsel or joinders to such lead cases, where the motions to withdraw the reference in certain Adversary Proceedings only raised issues governed by certain of the Consolidated Briefing Orders would require no further action by the parties because the motions would be the subject of consolidated briefing pursuant to the Consolidated Briefing Orders.

D. On June 27, 2012, counsel for the Trustee convened a telephonic conference (the "Chambers Conference") with the Court among counsel for the Trustee, the Securities Investor Protection Corporation ("SIPC") and counsel for certain movants in multiple Adversary Proceedings, wherein counsel for the Trustee made an application for permission to submit a proposed order identifying: (i) all Adversary Proceedings, as set forth on Exhibit A, covered by the Prior Administrative Order; (ii) all Adversary Proceedings, as set forth on Exhibit B, that only raise issues that are now wholly subsumed by the Consolidated Briefing Orders and the Permissive Withdrawal Orders which require no further action; and (iii) all Adversary Proceedings, as set forth on Exhibit C, previously subject to various consent orders deferring briefing on permissive issues asserted as grounds for withdrawal of the reference which are now

fully subsumed by the Consolidated Briefing Orders for the reasons set forth in the Permissive Withdrawal Orders. The Adversary Proceedings and relevant counsel that participated in the Chambers Conference are listed in Exhibit D hereto. The Court granted this request during the Chambers Conference.

BASED ON THE FOREGOING, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Prior Administrative Order is hereby amended and superseded by this Order and the Adversary Proceedings listed on Exhibit A are incorporated by reference herein.

2. The motions to withdraw the reference in the Adversary Proceedings identified on Exhibit B hereto are governed by the Consolidated Briefing Orders and Permissive Withdrawal Orders and shall be resolved through the common briefing ordered therein.

3. The motions to withdraw the reference in the Adversary Proceedings identified on Exhibit C hereto, which raised permissive withdrawal arguments that were previously deferred by prior orders of this Court, are governed by the Permissive Withdrawal Orders and, for the reasons stated therein, the Court regards the permissive withdrawal arguments made in such motions as subsumed by the consolidated briefing on the issues presented by the *Stern* Order. Accordingly, the Court will resolve the permissive withdrawal issues raised in the motions to withdraw the reference in the Adversary Proceedings identified on Exhibit C when the Court decides the motion described in the *Stern* Order.

4. The prior consent orders entered by this Court with respect to the Adversary Proceedings identified on Exhibit C hereto are hereby vacated and superseded by this Order.

5. The resolution of the issues covered by Consolidated Briefing Orders and Permissive Withdrawal Orders shall govern the motions to withdraw the reference pending in the Adversary Proceedings and no further action is required with respect to such motions.

6. Any individual briefing schedules previously established with respect to motions to withdraw the reference pending in the Adversary Proceedings are hereby vacated.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Date: New York, New York
July 11, 2012

EXHIBIT A

1.	***Picard v. Fine K-S Trust, et al***	11-cv-08968-JSR	Goulston & Storrs, P.C. Christine D. Lynch (clynch@goulstonstorrs.com) Richard J. Rosensweig (rrosensweig@goulstonstorrs.com) Peter D. Bilowz (pbilowz@goulstonstorrs.com)
2.	***Picard v. Joseph M. Paresky Trust, et al***	11-cv-08969	Goulston & Storrs, P.C. Richard J. Rosensweig (rrosensweig@goulstonstorrs.com) Peter D. Bilowz (pbilowz@goulstonstorrs.com)
3.	***Picard v. Susan Paresky, et al***	11-cv-08970	Goulston & Storrs, P.C. Richard J. Rosensweig (rrosensweig@goulstonstorrs.com) Peter D. Bilowz (pbilowz@goulstonstorrs.com)
4.	***Picard v. Pisetzner Family Ltd P'ship, et al***	11-cv-09182-JSR	Greenberg Traurig P.A. Scott M. Grossman (grossmansm@gtlaw.com)
5.	***Picard v. Judith Pisetzner***	11-cv-09183-JSR	Greenberg Traurig P.A. Scott M. Grossman (grossmansm@gtlaw.com)
6.	***Picard v. Estate of Paul E. Feffer, et al***	11-cv-09275-JSR	Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)

7.	***Picard v. Schiff Family Holdings Nevada Limited Partnership, et al***	11-cv-09276-JSR	Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
8.	***Picard v. Franklin Sands***	11-cv-09277-JSR	Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
9.	***Picard v. Silna Family Inter Vivos Trust, et al***	11-cv-09278	Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
10.	***Picard v. Daniel Silna, et al***	11-cv-09279-JSR	Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
11.	***Picard v. Steven Schiff***	11-cv-09280-JSR	Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
12.	***Picard v. Shetland Fund Limited Partnership et al.***	11-cv-09281-JSR	Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
13.	***Picard v. Lori Chemla and Alexandre Chemla***	11-cv-09282-JSR	Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)

14.	***Picard v. Melissa Perlen***	11-cv-09367-JSR	Fulbright & Jaworski LLP David L. Barrack (dbarrack@fulbright.com) David A. Rosenzweig (drosenzweig@fulbright.com)
15.	***Picard v. Myra Perlen Revocable Trust***	11-cv-09369-JSR	Fulbright & Jaworski LLP David L. Barrack (dbarrack@fulbright.com) David A. Rosenzweig (drosenzweig@fulbright.com)
16.	***Picard v. Stuart Perlen Revocable Trust DND 1/4/08***	11-cv-09370-JSR	Fulbright & Jaworski LLP David L. Barrack (dbarrack@fulbright.com) David A. Rosenzweig (drosenzweig@fulbright.com)
17.	***Picard v. Mosaic Fund L.P. , et al***	11-cv-09444-JSR	Macht, Shapiro, Aarato & Isserles LLP Alexandra A.E. Shapiro (ashapiro@machtshapiro.com) Eric S. Olney (eolney@shapiroarato.com)
18.	***Picard v. Estelle G. Teitelbaum***	11-cv-09629-JSR	Kudman Trachten Aloe LLP Paul H. Aloe (paloe@kudmanlaw.com) Matthew H. Cohen (mcohen@kudmanlaw.com)
19.	***Picard v. Michael Frenchman and Laurie Frenchman***	11-cv-09630-JSR	Kudman Trachten Aloe LLP Paul H. Aloe (paloe@kudmanlaw.com) Matthew H. Cohen (mcohen@kudmanlaw.com)

20.	***Picard v. The Hausner Group, et al***	11-cv-09631-JSR	Kudman Trachten Aloe LLP Paul H. Aloe (paloe@kudmanlaw.com) Matthew H. Cohen (mcohen@kudmanlaw.com)
21.	***Picard v. Estate of Kay Frankel, et al***	11-cv-09680-JSR	Olshan Grundman Frome Rosenzweig & Wolosky LLP Thomas J. Fleming (tfleming@olshanlaw.com) Joshua S. Androphy (jandrophy@olshanlaw.com)
22.	***Picard v. Gary J. Korn, et al***	12-cv-00037-JSR	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com) Michael S. Weinstein (mweinstein@golenbock.com)
23.	***Picard v. Story, et al***	12-cv-00039-JSR	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com) Michael S. Weinstein (mweinstein@golenbock.com)
24.	***Picard v. Story Family Trust #3, et al***	12-cv-00040-JSR	Golenbock Eiseman Assor Bell & Peskoe LLP Jonathan L. Flaxer (jflaxer@golenbock.com) Michael S. Weinstein (mweinstein@golenbock.com)
25.	***Picard v. Nicolette Wernick Nominee P'ship, et al*** (M. Gordon Ehrlich – Moving Party)	12-cv-00041-JSR	Bingham McCutchen LLP Steven Wilamowsky (steven.wilamowsky@bingham.com)
26.	***Picard v. David Silver and Patricia W. Silver***	12-cv-00090-JSR	Morrison Cohen LLP (fperkins@morrisoncohen.com) Michael R. Dal Lago (mdallago@morrisoncohen.com)

27.	***Picard v. Muriel B. Cantor, et al***	12-cv-00205-JSR	Schlesinger Gannon & Lazetera LLP Thomas P. Gannon (tgannon@sglllp.com) Ross Katz (rkatz@sglllp.com)
28.	***Picard v. The Phoebe Blum Rev. Trust, et al.***	12-cv-00327-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com)
29.	***Picard v. Nathan Cohen***	12-cv-0519-JSR	Akerman Senterfitt LLP Susan F. Balaschak (susan.balaschak@akerman.com) Kathlyn Schwartz (kathlyn.schwartz@akerman.com) Elissa P. Fudim (elissa.fudim@akerman.com) Michael I. Goldberg (michael.goldberg@akerman.com)
30.	***Picard v. Edward A. Zraick, Jr., et al***	12-cv-00521-JSR	Hunton & Williams LP Peter S. Partee, Sr. (ppartee@hunton.com) Richard P. Norton (rnorton@hunton.com) Robert A. Rich (rrich2@hunton.com)
31.	***Picard v. Ringler Partners, L.P., et al***	12-cv-00606-JSR	Kudman Trachten Aloe LLP Paul H. Aloe (paloe@kudmanlaw.com) Evan S. Cowit (ecowit@kudmanlaw.com) Matthew H. Cohen

			(mcohen@kudmanlaw.com)
32.	***Picard v. Epstein Family Trust UWO Diana Epstein, et al***	12-cv-00645-JSR	Dickstein Shapiro LLP Eric Fisher (fishere@dicksteinshapiro.com) Stefanie Birbrower Greer (greers@dicksteinshapiro.com)
33.	***Picard v. Marvin L. Olshan***	12-cv-00701-JSR	Olshan Grundman Frome Rosenzweig & Wolosky LLP Thomas J. Fleming (tfleming@olshanlaw.com) Joshua S. Androphy (jandrophy@olshanlaw.com)
34.	***Picard v. The Croul Family Trust, et al***	12-cv-00758-JSR	Morrison & Foerster LLP Carl H. Loewenson, Jr. (cloewenson@mofo.com) David S. Brown (dbrown@mofo.com)
35.	***Picard v. The Alan Miller Diane Miller Revocable Trust, et al.***	12-cv-00885-JSR	Maslon Edelman Borman & Brand, LLP Kesha Lynn Tanabe kesha.tanabe@maslon.com
36.	***Picard v. Diane Wilson***	12-cv-00887-JSR	Simon & Partners LLP Bradley D. Simon (bradsimon@simonlawyers.com) Kenneth C. Murphy (KCMurphy@simonlawyers.com) Jonathan Stern (jstern@simonlawyers.com)
37.	***Picard v. Lexus Worldwide Ltd and Ilan Kelson*** (Moving Party is Ilan Kelson)	12-cv-01135-JSR	Dickstein Shapiro LLP Eric Fisher (fishere@dicksteinshapiro.com) Stefanie Birbrower Greer (greers@dicksteinshapiro.com)

38.	***Picard v. Gorek*** (Bankr. Dkt No. 10-04797)	12-cv-01137-JSR	Day Pitney LLP Thomas D. Goldberg (tgoldberg@daypitney.com)
39.	***Picard v. Gorek, et al*** (Bankr. Dkt No. 10-04623)	12-cv-01138-JSR	Day Pitney LLP Thomas D. Goldberg (tgoldberg@daypitney.com)
40.	***Picard v. Weindling***	12-cv-01690	Golenbock Eiseman Assor Bell & Peskoe LLP Douglas L. Furth (dfurth@golenbock.com) Jacqueline G. Veit (jveit@golenbock.com)
41.	***Picard v. Milton Goldworth***	12-cv-02226-JSR	Fulbright & Jaworski LLP David L. Barrack (dbarrack@fulbright.com) David A. Rosenzweig (drosenzweig@fulbright.com)
42.	***Picard v. M. Harvey Rubin Trust of 11/11/92, et al.***	12-cv-02314-JSR	Weisman Celler Spett & Modlin, P.C. Kenneth A. Hicks (khicks@wcsm445.com) John B. Sherman (jsherman@wcsm445.com)
43.	***Picard v. Ronald Eisenberg 1995 Continuing Trust, et al.***	12-cv-02352-JSR	Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)
44.	***Picard v. Isaac Blech***	12-cv-02353-JSR	Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)
45.	***Picard v. Second Act Associates, L.P., et al.***	12-cv-02367-JSR	Sanders Ortoli Vaughn-Flam Rosenstadt LLP Jeremy B. Kaplan (jk@sovrlaw.com)

46.	***Picard v. Estate of Stanley Chais, et al.***	12-cv-02371	Sills Cummis & Gross, P.C. Andrew H. Sherman (asherman@sillscummis.com)
47.	***Picard v. The Arthur and Rochelle Belfer Foundation, Inc., et al.***	12-cv-02372-JSR	Schlam Stone & Dolan LLP Richard H. Dolan (rhd@schlamstone.com) Bennette D. Kramer (bdk@schlamstone.com)
48.	***Picard v. Nancy Portnoy***	12-cv-02414-JSR	Kostelanetz & Fink LLP Brian C. Wille (bwille@kflaw.com) Christopher M. Ferguson (cferguson@kflaw.com)
49.	***Picard v. Helene Saren-Lawrence***	12-cv-02448	Herrick, Feinstein LLP Joshua J. Angel (jangel@herrick.com) Frederick E. Schmidt, Jr. (eschmidt@herrick.com)
50.	***Picard v. Estate of John Y. Seskis, et al.***	12-cv-02427-JSR	Sills Cummis & Gross, P.C. Kenneth R. Schachter (kschachter@sillscummis.com) Lori K. Sapir (lsapir@sillscummis.com)
51.	***Picard v. Fab Industries, Inc., et al***	12-cv-02428-JSR	Sills Cummis & Gross, P.C. Kenneth R. Schachter (kschachter@sillscummis.com) Lori K. Sapir (lsapir@sillscummis.com)
52.	***Picard v. Stanley I. Lehrer, et al.*** (Neal Goldman, Linda Sohn – Moving Parties)	12-cv-02429	Mintz & Gold LLP Steven G. Mintz (mintz@mintzandgold.com) Terence W. McCormick (McCormick@mintzandgold.com) Daniel K. Wiis

			(wiig@mintzandgold.com) Golenbock Eiseman Assor Bell & Peskoe LLP Michael Weinstein (mweinstein@golenbock.com) Douglas L. Furth (dfurth@golenbock.com)
53.	***Picard v. Dorothy Ervolino***	12-cv-02444-JSR	Otterbourg, Steindler, Houston, & Rosen P.C. Richard Gerard Haddad (rhaddad@oshr.com)
54.	***Picard v. The JP Group, et al.***	12-cv-02449	Herrick, Feinstein LLP Joshua J. Angel (jangel@herrick.com) Frederick E. Schmidt, Jr. (eschmidt@herrick.com)
55.	***Picard v. Bennett M. Berman Trust, et al.*** (Jeffrey Berman and Jeffrey Berman Foundation - Moving Parties)	12-cv-02451	Goodwin Procter LLP Daniel M. Glosband (dglosband@goodwinprocter.com) Larkin M. Morton (lmorton@goodwinprocter.com) Christopher Newcomb (cnewcomb@goodwinprocter.com) Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)
56.	***Picard v. DOS BFS Family Partnership II, L.P., et al.***	12-cv-02453	Westernman Ball Ederer Miller & Sharfstein LLP John Westerman (jwesterman@westermanllp.com) Mickee Hennessy, Esq. (mhennessy@westermanllp.com)
57.	***Picard v. Lebanese American University***	12-cv-02476-JSR	Wilmer Cutler Pickering Hale and Dorr LLP Philip David Anker (philip.anker@wilmerhale.com)

58.	***Picard v. RMGF Ltd. Partnership, et al.***	12-cv-02491-JSR	Seyfarth Shaw LLP William L. Prickett (wprickett@seyfarth.com) Ryan A. Malloy (rmalloy@seyfarth.com)
59.	***Picard v. Arthur Kepes Unified Credit Shelter Trust, et al.***	12-cv-02507	Frank Haron Weiner PLC Laevin J Weiner (jweiner@fhwnlaw.com) Michael J Hamblin (mhamblin@fhwnlaw.com)
60.	***Picard v. Irene Kepes Revocable Trust Restated UA dtd 5/22/00, et al.***	12-cv-02508	Frank Haron Weiner PLC Laevin J Weiner (jweiner@fhwnlaw.com) Michael J Hamblin (mhamblin@fhwnlaw.com)
61.	***Picard v. Estate of Syril Seiden, et al***	12-cv-02524	Milber Makris Plousadis & Seiden, LLP Leonardo D'Alessandro (ldalessandro@milbermakris.com) Marisa Laura Lanza (mlanza@milbermakris.com)
62.	***Picard v. Trust 'A' U/W/G Hurwitz, et al.***	12-cv-02525	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence Rifkin (rifkenl@gtlaw.com)
63.	***Picard v. Brandi Hurwitz, et al.***	12-cv-02527	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence Rifkin (rifkenl@gtlaw.com)
64.	***Picard v. The June Bonyor Revocable Trust Restated UA dtd 5/22/00, et al***	12-cv-02528	Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) David G. Barger

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65.	***Picard v. Ted Goldberg, et al.***	12-cv-02567	Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
66.	***Picard v. O.D.D. Investment, L.P., D.D.O., Inc., et al.***	12-cv-02568	Wachtel Masyr & Missry LLP (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
67.	***Picard v. Kenneth H. Landis***	12-cv-02569	Wachtel Masyr & Missry LLP (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
68.	***Picard v. Joel R. Levey***	12-cv-02570	Wachtel Masyr & Missry LLP (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
69.	***Picard v. Helene Juliette Feffer***	12-cv-02571	Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
70.	***Picard v. Gloria Landis, et al.***	12-cv-02572	Wachtel Masyr & Missry LLP (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
71.	***Picard v. Frances Levey Revocable Living Trust, et al.***	12-cv-02573	Wachtel Masyr & Missry LLP (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
72.	***Picard v. Carole Kasbar Bulman***	12-cv-02574	Wachtel Masyr & Missry LLP (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)

73.	***Picard v. Aaron D. Levey Revocable Living Trust, et al.*** (Bankr. Dkt. No. 10-05441)	12-cv-02576	Wachtel Masyr & Missry LLP (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
74.	***Picard v. Aaron D. Levey Revocable Living Trust, et al.*** (Bankr. Dkt. No. 10-04894)	12-cv-02577	Wachtel Masyr & Missry LLP (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
75.	***Picard v. Elaine S. Stein, et al***	12-cv-02579	Golenbock Eiseman Assor Bell & Peskoe LLP Michael S. Weinstein (mweinstein@golenbock.com) Douglas L. Furth (dfurth@golenbock.com)
76.	***Picard v. ABG Partners, et al.***	12-cv-02582	Goulston & Storrs, P.C. James F Wallack (jwallack@goulstonstorrs.com)
77.	***Picard v. Woodland Partners, L.P, et al.***	12-cv-02618	Manion McDonough & Lucas, P.C. James R. Walker (jwalker@mmlpc.com)
78.	***Picard v. Estate of Ella N. Waxberg, et al.*** - (Sonya Kahn and Marvin D. Waxberg - Moving Parties)	12-cv-02620	Frank, White-Boyd, PA Julianne R. Frank (jrfbnk@gmail.com)
79.	***Picard v. Douglas Shapiro***	12-cv-02725	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)

80.	***Picard v. G.R.A.M. Limited Partnership, et al***	12-cv-02727	Duane Morris LLP Patricia Piskorski Heer (phheer@duanemorris.com) Martin B. Shulkin (MBShulkin@duanemorris.com) Paul D. Moore (PDMoore@duanemorris.com) Jeffrey D. Sternklar (JDSternklar@duanemorris.com) William Heuer (wheuer@duanemorris.com)
81.	***Picard v. Matthew R. Kornreich, et al.***	12-cv-02750	Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)
82.	***Picard v. JD Partners LLC, et al.***	12-cv-02755	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)
83.	***Picard vs. RKD Investments, L.P, et al.***	12-cv-02759	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Michael A. Bartelstone (mbartelstone@kslaw.com)
84.	***Picard v. Macher Family Partnership, et al.***	12-cv-02779	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)
85.	***Picard v. Stephen H. Stern***	12-cv-02780	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)
86.	***Picard v. Dahme Family Bypass Testamentary Trust Dated 10/27/76, et al***	12-cv-02781	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha

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87.	***Picard v. The Lustig Family 1990 Trust, et al***	12-cv-02782	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)
88.	***Picard v. David Ivan Lustig***	12-cv-02783	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)
89.	***Picard v. MAF Associates, LLC, et al.***	12-cv-02788	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)
90.	***Picard vs. Dawn Pascucci Barnard, et al.***	12-cv-02792	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Heath D. Rosenblat (hrosenblat@kslaw.com)
91.	***Picard vs. Burton R. Sax***	12-cv-02873	Meltzer, Lippe, Goldstein & Breitsone, LLP Thomas J. McGowan (tmcgowan@meltzerlippe.com)
92.	***Picard v. Sax-Bartels Associates, Limited Partnership***	12-cv-02874	Meltzer, Lippe, Goldstein & Breitsone, LLP Pedram A. Tabibi (ptabibi@meltzerlippe.com) Sally M. Donahue (sdonahue@meltzerlippe.com)
93.	***Picard v. Korea Exchange Bank***	12-cv-02880	King & Spalding LLP Richard A. Cirillo (rcirillo@kslaw.com) Joshua Edgemon (jedgemon@kslaw.com

94.	***Picard v. National Bank of Kuwait S.A.K.***	12-cv-02881	King & Spalding LLP Richard A. Cirillo (rcirillo@kslaw.com) Joshua Edgemon (jedgemon@kslaw.com)
95.	***Picard v. Bernard Gordon, et al.***	12-cv-02922	Ruskin Moscou Faltischeck, P.C. Mark S. Mulholland (mmulholland@rmfpc.com) Thoams A. Telesca (ttelesca@rmfpc.com)
96.	***Picard vs. George E. Nadler***	11-cv-02923-JSR	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)
97.	***Picard v. Janis Berman***	12-cv-02924	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)
98.	***Picard vs. Candice Nadler Revocable Trust DTD 10/18/01, et al.***	11-cv-02925-JSR	Ingram Yuzek Gainen Carroll & Bertolotti, LLP Daniel L. Carroll (dcarroll@ingramllp.com) Jennifer B. Schain (jschain@ingramllp.com)
99.	***Picard vs. Scott Gottlieb, et al.***	12-cv-02931	Day Pitney LLP Joshua W. Cohen (jwcohen@daypitney.com)
100.	***Picard v. PetcareRX, Inc.***	12-cv-02932	Dickstein Shapiro LLP Deborah A. Skakel (Skakeld@dicksteinshapiro.com) Shaya M. Berger (bergers@dicksteinshapiro.com)

101.	***Picard v. Peter Knobel and Patrice Knobel***		Butzel Long PC Peter D. Morgenstern (morgenstern@butzel.com) Joshua E. Abraham (abraham@butzel.com)
102.	***Picard v. Arlene F. Silna Altman***		Wachtel Masyr & Missry LLP Howard Kleinhendler (hkleinhendler@wmllp.com) Sara Spiegelman (sspiegelman@wmllp.com)
103.	***Picard v. Allen R. Hurwitz, et al.***		Greenberg Traurig Maria J. DiConza (diconzam@gtlaw.com) Lawrence Rifkin (rifkenl@gtlaw.com)
104.	***Picard v. Elaine Pikulik***		Rubinstein & Corozzo LLP Ronald Rubinstein (rcorozzo1@gmail.com)

EXHIBIT B			
1.	***Picard v. Peter Joseph***	12-cv-00036-JSR	Golenbock Eiseman Assor Bell & Peskoe LLP David J. Eiseman (deiseman@golenbock.com) Douglas L. Furth (dfurth@golenbock.com)
2.	***Picard v. Queensgate Foundation***	12-cv-00038-JSR	Golenbock Eiseman Assor Bell & Peskoe LL David J. Eiseman (deiseman@golenbock.com) Douglas L. Furth (dfurth@golenbock.com) P
3.	***Picard v. Douglas D. Johnson***	12-cv-00091-JSR	Herrick, Feinstein LLP Howard R. Elisofon (helisofon@herrick.com) Hanh V. Huynh (hhuynh@herrick.com)
4.	***Picard v. Financiere Agache***	12-cv-00259-JSR	Barack Ferrazzano Kirschbaum & Nagelberg LLP William J. Barrett (william.barrett@bfkn.com) Kimberly J. Robinson (kim.robinson@bfkn.com)
5.	***Picard v. BNP Paribas Arbitrage SNC***	12-cv-00641-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace (bpeace@cgsh.com)
6.	***Picard v. Triangle Diversified Investments, et al***	12-cv-00700-JSR	Dickstein Shapiro LLP Eric Fisher (fishere@dicksteinshapiro.com) Stefanie Birbrower Greer (greers@dicksteinshapiro.com)
7.	***Picard v. Cohen Pooled Asset Account, et al***	12-cv-00883-JSR	Shapiro, Arato & Isserles LLP Alexandra A.E. Shapiro (ashapiro@machtshapiro.com) Eric S. Olney (eolney@shapiroarato.com) Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)
8.	***Picard v. Ostrin Family Partnership, et al***	12-cv-00884-JSR	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)

9.	***Picard v. Gertrude E. Alpern Rev. Trust, et al***	12-cv-00939-JSR	Klestadt & Winters, LLP Tracy L. Klestadt (tklestadt@klestadt.com) John E. Jureller, Jr. (jjureller@klestadt.com) Brendan M. Scott (bscott@klestadt.com)
10.	***Picard v. Lewis Alpern, et al***	12-cv-00940-JSR	Klestadt & Winters, LLP Tracy L. Klestadt (tklestadt@klestadt.com) John E. Jureller, Jr. (jjureller@klestadt.com) Brendan M. Scott (bscott@klestadt.com)
11.	***Picard v. Lehrer, et al.*** (Moving party Elaine Stein Roberts)	12-cv-1811-JSR	SNR Denton US LLP Carole Neville (carole.neville@snrdenton.com)
12.	***Picard v. Conn. Gen. Life Co., et al*** (As filed by Philadelphia Financial Life Assurance Co. - Bankr. Dkt. No. 10-04973)	12-cv-01228-JSR	Otterbourg, Steindler, Houston & Rosen, P.C. Richard Gerard Haddad (rhaddad@oshr.com)
13.	***Picard v. Conn. Gen. Life Co., et al*** (As filed by Philadelphia Financial Life Assurance Co. - Bankr. Dkt. No. 10-05065)	12-cv-01229-JSR	Otterbourg, Steindler, Houston & Rosen, P.C. Richard Gerard Haddad (rhaddad@oshr.com)
14.	***Picard v. Estate of Elaine S. Fox, et al***	12-cv-01691-JSR	Cole, Schotz, Meisel, Forman & Leonard, P.A. Laurence May (lmay@coleschotz.com) Jill B. Bienstock (jbienstock@coleschotz.com)
15.	***Picard v. ABN AMRO Bank N.V. (presently known as The Royal Bank of Scotland, N.V.), et al***	12-cv-01939-JSR	Allen & Overy LLP Michael S. Feldberg (michael.feldberg@allenovery.com) Bethany Kriss (bethany.kriss@allenovery.com)
16.	***Picard v. Lehrer, et al.*** (Moving party Douglas Ellenoff)	12-cv-02079-JSR	Ellenoff Grossman & Schole LLP Ted Poretz (tporetz@egsllp.com)
17.	***Picard v. Barbara S. Gross 2006 Grat, et al***	12-cv-02337-JSR	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)
18.	***Picard v. L&I Investments, LLC***	12-cv-02338-JSR	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)
19.	***Picard v. Steven E. Leber***	12-cv-02339-	Moses & Singer LLP

	Charitable Remainer Unitrust, et al	JSR	Mark N. Parry (mparry@mosessinger.com)
20.	***Picard v. Walter J. Gross Revocable Trust, et al.***	12-cv-02340-JSR	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)
21.	***Picard v. Shum Family Partnership III, LP, et al.***	12-cv-02342-JSR	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)
22.	***Picard v. S. Donald Friedman, et al***	12-cv-02343-JSR	Moses & Singer LLP Mark N. Parry (mparry@mosessinger.com)
23.	***Picard v. Estate of Richard L. Cash, et al.***	12-cv-02344-JSR	Katsky Korins LLP Robert A. Abrams (rabrams@katskykorins.com)
24.	***Picard v. Freda Epstein Revocable Trust, et al.***	12-cv-02345-JSR	Katsky Korins LLP; Sullivan & Cromwell LLP Robert A. Abrams (rabrams@katskykorins.com)
25.	***Picard v. Gladys Cash, et al.***	12-cv-02346-JSR	Katsky Korins LLP Robert A. Abrams (rabrams@katskykorins.com)
26.	***Picard v. S.H. & Helen R. Scheuer Family Foundation, Inc.***	12-cv-02348-JSR	Katsky Korins LLP Robert A. Abrams (rabrams@katskykorins.com)
27.	***Picard v. Inteligo Bank Ltd. Panama Branch f/k/a/ Blubank Ltd. Panama Branch***	12-cv-02364-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com) Jessica Bartlett (jessica.bartlett@shearman.com)
28.	***Picard v. Naidot & Co.***	12-cv-02365-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com) Jessica Bartlett (jessica.bartlett@shearman.com)
29.	***Picard v. Cohmad Securities Corporation, et al.*** (Richard Spring, The Spring Family Trust, and The Jeanne T. Spring Trust – Moving Parties)	12-cv-02368-JSR	Katsky Korins LLP; Siegel, Lipman, Dunay, Shepard & Miskel, LLP; Vinson & Elkins LLP Steven Paradise (sparadise@velaw.com) Clifford Thau (cthau@velaw.com) Nikolay Vydashenko

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30.	***Picard v. Robert Nystrom***	12-cv-02403-JSR	Friedman Kaplan Seiler & Adelman LLP; Clayman & Rosenberg LLP William P. Weintraub (wweintraub@fklaw.com) Gregory W. Fox (gfox@fklaw.com) Clayman & Rosenberg LLP Seth L. Rosenberg (rosenberg@clayro.com) Brian D. Linder (linder@clayro.com)
31.	***Picard v. Edward Blumenfeld***	12-cv-02405-JSR	Friedman Kaplan Seiler & Adelman LLP; Clayman & Rosenberg LLP William P. Weintraub (wweintraub@fklaw.com) Gregory W. Fox (gfox@fklaw.com) Clayman & Rosenberg LLP Seth L. Rosenberg (rosenberg@clayro.com) Brian D. Linder (linder@clayro.com)
32.	***Picard v. Lewis W. Bernard 1995 Charitable Remainder Trust, et al.***	12-cv-02407-JSR	Golenbock Eiseman Assor Bell & Peskoe LLP Douglas L. Furth (dfurth@golenbock.com) Michael Weinstein (mweinstein@golenbock.com)
33.	***Picard v. Kostin Company, et al.***	12cv-02409-JSR	Morgan, Lewis & Bockius LLP Bernard J. Garbutt III (bgarbutt@morganlewis.com) Menachem O. Zelmanovitz (mzelmanovitz@morganlewis.com) Andrew D. Gottfried (agottfried@morganlewis.com)
34.	***Picard v. Estate of William E. Sorrel, et al***	12-cv-02411-JSR	Rosenfeld & Kaplan, LLP Tab K. Rosenfeld (tab@rosenfeldlaw.com) Steven Kaplan (steve@rosenfeldlaw.com)

35.	***Picard v. Rita Sorrel***	12-cv-02412-JSR	Rosenfeld & Kaplan, LLP Tab K. Rosenfeld (tab@rosenfeldlaw.com) Steven Kaplan (steve@rosenfeldlaw.com)
36.	***Picard v. Milton Davis Non-Exempt Marital Trust U/A 12/13/84, et al.***	12-cv-02415-JSR	Whiteford Taylor & Preston LLP; Levin & Gann, P.A. Brent C. Strickland (bstrickland@wtplaw.com) Paul M. Nussbaum (pnussbaum@wtplaw.com) Kenneth Oestreicher (koestreicher@wtplaw.com) Levin & Gann, P.A. Stanford G. Gann, Sr. (sgann@levingann.com)
37.	***Picard v. G. Bruce Lifton***	12-cv-02416-JSR	Meyer, Suozzi, English & Klein, P.C. Kenneth R. Schachter (kschachter@sillscummis.com) Lori K. Sapir (lsapir@sillscummis.com)
38.	***Picard v. The Judie Lifton 1996 Revocable Trust DTD 9/5/1996, et al***	12-cv-02417-JSR	Meyer, Suozzi, English & Klein, P.C Alan Evan Marder (amarder@msek.com)
39.	***Picard v. Steven J. Lifton***	12-cv-02420-JSR	Meyer, Suozzi, English & Klein, P.C. Alan Evan Marder (amarder@msek.com)
40.	***Picard v. Banco Itau Europa Luxembourg S.A., et al***	12-cv-02432-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com)
41.	***Picard v. Nomura International PLC***	12-cv-02443-JSR	Shearman & Sterling LLP Brian H. Polovoy (bpolovoy@shearman.com) Christopher R. Fenton (Cfenton@shearman.com) Andrew Z. Lipson (alipson@shearman.com)
42.	***Picard v. Nomura Bank International PLC***	12-cv-02446-JSR	Shearman & Sterling LLP Brian H. Polovoy (bpolovoy@shearman.com) Christopher R. Fenton (Cfenton@shearman.com) Andrew Z. Lipson (alipson@shearman.com)
43.	***Picard v. Weithorn/Casper Associates for Selected Holdings, LLC, et al.***	12-cv-02450-JSR	Becker, Glynn, Melamed & Muffly LLP Chester B. Salomon

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44.	***Picard v. Carl Glick***	12-cv-02477-JSR	Becker, Glynn, Melamed & Muffly LLP Chester B. Salomon (csalomon@beckerglynn.com) Alec P. Ostrow (aostrow@beckerglynn.com)
45.	***Picard v. Lexington Capital Partners, L.P., et al***	12-cv-02478-JSR	Becker, Glynn, Melamed & Muffly LLP Chester B. Salomon (csalomon@beckerglynn.com) Alec P. Ostrow (aostrow@beckerglynn.com)
46.	***Picard v. Prospect Capital Partners, et al.***	12-cv-02479-JSR	Becker, Glynn, Melamed & Muffly LLP Chester B. Salomon (csalomon@beckerglynn.com) Alec P. Ostrow (aostrow@beckerglynn.com)
47.	***Picard v. David T. Washburn***	12-cv-02480-JSR	Becker, Glynn, Melamed & Muffly LLP Chester B. Salomon (csalomon@beckerglynn.com) Alec P. Ostrow (aostrow@beckerglynn.com)
48.	***Picard v. Magnify Inc., et al.***	12-cv-02482-JSR	Kobre & Kim LLP Steven G. Kobre (steven.kobre@kobrekim.com) Danielle L. Rose (danielle.rose@kobrekim.com) David H. McGill (david.mcgill@kobrekim.com)
49.	***Picard v. UBS AG, et al.*** (M&B Capital Advisers Sociedad de Valores, S.A., M&B Capital Advisers Gestion SGIIC, S.A. - Moving Parties) [Amended Motion to Withdraw]	12-cv-02483-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
50.	***Picard v. Bridge Holidays, LLC Defined Benefit Pension Plan, et al***	12-cv-02484-JSR	Cravath, Swaine, & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
51.	***Picard v. Square One Fund Ltd., et***	12-cv-02490-	Tannenbaum Helpern Syracuse &

	al.	JSR	Hirschtritt LLP; Brune & Richard LLP. Tannenbaum Helpern Syracuse & Hirschtritt LLP Tammy P. Bieber (bieber@thsh.com) Brune & Richard LLP David Elbaum (delbaum@bruneandrichard.com) Bernfeld, DeMatteo & Bernfeld, LLP David Bernfeld (davidbernfeld@bernfeld-dematteo.com)
52.	***Picard v. William Jay Cohen, et al.***	12-cv-02492-JSR	Shapiro Haber & Urmy LLP Charles E. Tompkins (ctompkins@shulaw.com) Thomas G. Shapiro (tshapiro@shulaw.com) Michelle H. Blauner (mblauner@shulaw.com)
53.	***Picard v. Stuart J. Rabin***	12-cv-02512-JSR	K&L Gates Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)
54.	***Picard v. Albert D. Angel, et al.***	12-cv-02522-JSR	Skoloff & Wolfe, P.C. Jonathan W. Wolfe (jwolfe@skoloffwolfe.com) Barbara A. Schweiger (bschweiger@skoloffwolfe.com)
55.	***Picard v. Lehrer, et al.*** (Moving parties Elaine S. Stein and Elaine S. Stein Revocable Trust)	12-cv-02578-JSR	Golenbock Eiseman Assor Bell & Peskoe LLP Michael Weinstein (mweinstein@golenbock.com) Douglas L. Furth (dfurth@golenbock.com)
56.	***Picard v. Arden Asset Management, Inc., et al.***	12-cv-02581-JSR	Seward & Kissel LLP M. William Munno (munno@sewkis.com) Mandy DeRoche (deroche@sewkis.com) Michael B. Weitman (weitman@sewkis.com)
57.	***Picard v. Safra National Bank of New York***	12-cv-02584-JSR	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch

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58.	***Picard v. Hope W. Levene***	12-cv-02585-JSR	Sullivan & Cromwell LLP Jeffrey T. Scott (scottj@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)
59.	***Picard v. Freda Epstein Revocable Trust, et al.***	12-cv-02586-JSR	Sullivan & Cromwell LLP Jeffrey T. Scott (scottj@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)
60.	***Picard v. Banque J. Safra (Suisse) SA***	12-cv-02587-JSR	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com)
61.	***Picard v. Vizcaya Partners Limited, et al.***	12-cv-02588-JSR	Sullivan & Cromwell LLP (for Bank J. Safra (Gibraltar) Limited) Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com) Katten Muchin Rosenman LLP (for Zeus Partners Ltd) Anthony L. Paccione (anthony.paccione@kattenlaw.com)
62.	***Picard v. Weiner Investments, L.P., et al.***	12-cv-02617-JSR	Manion McDonough & Lucas, P.C. James R. Walker (jwalker@mmlpc.com)
63.	***Picard v. Fairfield Sentry Limited, et al.*** (as filed by Chester Global Strategy Fund Limited, Chester Global Strategy Fund, LP, Irongate Global Strategy Fund Limited, Fairfield Greenwich Fund (Luxembourg), Fairfield Investment Fund Limited, Fairfield Investors (Euro) Ltd., and Stable Fund LP)	12-cv-02619-JSR	Simpson Thacher & Barlett LLP Mark G. Cunha (mcunha@stblaw.com) Peter E. Kazanoff (pkazanoff@stblaw.com) Wollmuth Maher & Deutsch LLP Frederick R. Kessler (fkessler@wmd-law.com) Paul R. DeFilippo (pdefilippo@wmd-law.com) Michael P. Burke

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64.	***Picard v. Merkin, et al.*** *(as filed by Bart M. Schwartz)*	12-cv-02623-JSR	Reed Smith LLP James C. McCarroll (jmccarroll@reedsmith.com) Jordan W. Siev (jsiev@reedsmith.com) John L. Scott (jlscott@reedsmith.com)
65.	***Picard v. Fairfield Sentry Limited, et al.*** *(Joint Memorandum filed by various defendants)*	12-cv-02638-JSR	Simpson Thacher & Bartlett LLP Mark G. Cunha (mcunha@stblaw.com) Peter E. Kazanoff (pkazanoff@stblaw.com) Wollmuth Maher & Deutsch LLP

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66.	***Picard v. UBS AG, et al.*** (Reliance International Research LLC – Moving Party)	12-cv-02641-JSR	Seward & Kissel LLP Mark J. Hyland (hyland@sewkis.com) Mandy DeRoche (deroche@sewkis.com
67.	***Picard v. Lakeview Hedging Fund, LP, et al.***	12-cv-02642-JSR	Wollmuth Maher & Deutsch LLP David H. Wollmuth David H. Wollmuth (dwollmuth@wmd-law.com)

			Michael P. Burke (mburke@wmd-law.com)
68.	***Picard v. Samuel-David Associates, Ltd., et al.***	12-cv-02644-JSR	Cromwell & Moring LLP; Quilling, Selander, Lownds, Winslett & Moser, P.C. Mark S. Lichtenstein (mlichtenstein@crowell.com) Steven B. Eichel (seichel@crowell.com) Quilling, Selander, Lownds, Winslett & Moser, P.C. Linda S. LaRue (llarue@qslwm.com)
69.	***Picard v. Falcon Private Bank Ltd (f/k/a AIG Private Bank AG)***	12-cv-02645-JSR	Pillsbury Winthrop Shaw Pittman LLP Eric Fishman (eric.fishman@pillsburylaw.com) Karen Dine (karen.dine@pillsburylaw.com) Brandon Johnson (brandon.johnson@pillsburylaw.com)
70.	***Picard v. Plaza Investments International Limited, et al.***	12-cv-02646-JSR	Debevoise & Plimpton LLP Joseph P. Moodhe (Jpmoodhe@debevoise.com) Shannon Rose Selden (srselden@debevoise.com)
71.	***Picard v. Doris Glantz Living Trust*** (Ronnie Harrington – Moving Party)	12-cv-02758-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com)
72.	***Picard v. Cohmad Securities Corporation, et al.*** (Moving parties - Cohmad Securities Corporation, Maurice J. Cohn, Marcia B. Cohn, Marilyn Cohn, Milton S. Cohn, Rosalie Buccellato)	12-cv-02676-JSR	Vinson & Elkins LLP Steven Paradise (sparadise@velaw.com) Clifford Thau (cthau@velaw.com) Nikolay Vydashenko (nvydashenko@velaw.com)
73.	***Picard v. Richard M. Glantz, et al.***	12-cv-02778-JSR	Law Office of Richard E. Signorelli Richard E. Signorelli (rsignorelli@nyclitigator.com) Bryan Ha (bhanyc@gmail.com)
74.	***Picard v. The Public Institution for Social Security***	12-cv-02787-JSR	Goodwin Procter LLP Daniel M. Glosband (dglosband@goodwinprocter.com)

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75.	***Picard v. Lisa Liebmann Adams***	12-cv-02789-JSR	Day Pitney LLP Helen Harris (hharris@daypitney.com)
76.	***Picard v. Estate of Ruth Schlesinger, et al*** (Estate of Ruth Schlesinger and Marcia Schlesinger Roiff – Moving Parties)	12-cv-02790-JSR	Foley Hoag LLP Kenneth S. Leonetti (kleonetti@foleyhoag.com)
77.	***Picard v. 1998 William Gershen Revocable Trust, et al***	12-cv-02791-JSR	Foley Hoag LLP Kenneth S. Leonetti (kleonetti@foleyhoag.com)
78.	***Picard v. Herbert R. Goldenberg Revocable Trust, et al***	12-cv-02793-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)
79.	***Picard v. Dean L. Greenberg***	12-cv-02794-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)
80.	***Picard v. Estate of Samuel Robert Roitenberg, et al.***	12-cv-02795-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)
81.	***Picard v. Sheldon Shaffer, et al.***	12-cv-02796-	Klestadt & Winters LLP

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82.	***Picard v. Sheldon Shaffer Trust Dtd 3/26/1996, et al.***	12-cv-02797-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)
83.	***Picard v. Sidney Ladin Revocable Trust Dated 12/30/96, et al.***	12-cv-02798-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com) Leonard, Street and Deinard Allen I Saeks (ais1548@leonard.com) Blake Shepard (blake.shepard@leonard.com)
84.	***Picard vs. Samuel Robinson***	12-cv-02799-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com)
85.	***Picard v. Defender Limited, et al*** (Defender Limited, Reliance Management (BVI) Limited, Reliance Management (Gibraltar) Limited and Tim Brockmann – Moving Parties)	12-cv-02800-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com)
86.	***Picard v. UBS AG, et al.*** (Reliance Management (BVI) Limited and Reliance Management (Gibraltar) Limited – Moving Parties)	12-cv-02802-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com)
87.	***Picard v. Defender Limited, et al*** (Reliance International Research	12-cv-02871-JSR	Seward & Kissel LLP Seward & Kissel LLP

	LLC and Justin Lowe – Moving Parties)		Mark J. Hyland (hyland@sewkis.com) Mandy DeRoche (deroche@sewkis.com)
88.	***Picard vs. The Estate of Doris Igoin, et al.***	12-cv-02872-JSR	Kelley Drye & Warren LLP Jonathan K. Cooperman (Jcooperman@KelleyDrye.com) Seungwhan Kim (skim@kelleydrye.com)
89.	***Picard v. KBC Investments Limited,***	12-cv-02877-JSR	Sidley Austin LLP Alan M. Unger (aunger@sidley.com) Bryan Krakauer (bkrakauer@sidley.com)
90.	***Picard v. XYZ2 Corp.***	12-cv-02882-JSR	Cooley LLP Lawrence C. Gottlieb (lgottlieb@cooley.com) Michael A. Klein (mklein@cooley.com)
91.	***Picard v. Leon Flax, et al.***	12-cv-02928-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione anthony.paccione@kattenlaw.com Brian L. Muldrew brian.muldrew@kattenlaw.com
92.	***Picard v. Merkin, et al.*** *(as filed by Merkin, Gabriel Capital Corporation)*	12-cv-02933-JSR	Dechert LLP Andrew J. Levander (andrew.levander@dechert.com) Neil A. Steiner (neil.steiner@dechert.com)
93.	***Picard v. The Robert Auerbach Revocable Trust, et al.***	12-cv-02975-JSR	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)
94.	***Picard v. CRS Revocable Trust, et al.***	12-cv-02976-JSR	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)
95.	***Picard v. Robert S. Bernstein***	12-cv-02977-JSR	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)
96.	***Picard v. Gutmacher Enterprises, LP, et al***	12-cv-02978-JSR	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)
97.	***Picard v. The S. James Coppersmith Charitable Remainder Unitrust, et al.***	12-cv-02979-JSR	Folkenflik & McGerity Max Folkenflik (MFolkenflik@fmlaw.net)
98.	***Picard v. Atlantic Security Bank***	12-cv-02980-JSR	Arnold & Porter LLP Scott B. Schreiber (Scott.Schreiber@aporter.com) Andrew T. Karron (Andrew.Karron@aporter.com)
99.	***Picard v. Cardinal Management***	12-cv-02981-	Clifford Chance US LLP

	Inc., et al	JSR	Jeff E. Butler (jeff.butler@cliffordchance.com)
100.	***Picard v. Radcliff Investments Limited, et al.***	12-cv-02982-JSR	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)
101.	***Picard v. Koch Industries Inc.***	12-cv-03033	Orrick, Herrington & Sutcliffe LLP Jonathan Guy (jguy@orrick.com) James W. Burke (jburke@orrick.com)
102.	***Picard v. Amy Joel***	12-cv-03100-JSR	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)
103.	***Picard v. Robert A. Luria, et al***	12-cv-03101-JSR	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)
104.	***Picard v. Amy J. Luria, et al.***	12-cv-03102-JSR	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)
105.	***Picard v. The Estate of Gladys C. Luria, et al.***	12-cv-03104-JSR	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)
106.	***Picard v. Patricia Samuels, et al.***	12-cv-03105-JSR	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)
107.	***Picard v. Sylvia Joel, et al.***	12-cv-03106-JSR	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)
108.	***Picard vs. The LDP Corp. Profit Sharing Plan and Trust, et al.***	12-cv-03107-JSR	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)
109.	***Picard v. Jeffrey Shankman***	12-cv-03108-JSR	Jaspan Schlesinger LLP Steven R. Schlesinger (sschlesinger@jaspanllp.com) Shannon Anne Scott (sscott@jaspanllp.com)

110.	***Picard v. Srione, LLC, et al.***	12-cv-04092-JSR	Law Offices of Stephen Goldstein Stephen Goldstein Sgoldlaw@gmail.com
111.	***Picard v. Turbo Investors, LLC***	12-cv-04177-JSR	Halperin Battaglia Raicht, LLP Alan D. Halperin (ahalperin@halperinlaw.net) Scott A. Ziluck (sziluck@halperinlaw.net) Neal W. Cohen (ncohen@halperinlaw.net)
112.	***Picard v. Lehrer, et al.*** (Moving party Neuberger Berman LLC)	12-cv-04721	Krebsbach & Snyder, P.C. Victor A. Machcinski, Jr. (vmachcinski@krebsbach.com)
113.	***Picard v. Lloyds TSB Bank PLC***	12-cv-04722	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Bruce M. Sabados (bruce.sabados@kattenlaw.com)
114.	***Picard v. Brown Brothers Harriman & Co.***	12-cv-04723	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Bruce M. Sabados (bruce.sabados@kattenlaw.com)
115.	***Picard v. Royal Bank of Canada, et al.***	12-cv-04939	Katten Muchin Rosenman LLP Anthony L. Paccione (anthony.paccione@kattenlaw.com) Bruce M. Sabados (bruce.sabados@kattenlaw.com) Mark T. Ciani (mark.ciani@kattenlaw.com)

EXHIBIT C			
1.	***Picard v. Bergman, et al***	11-cv-09058-JSR	Rosenberg Feldman Smith LLP Richard B. Feldman (rfeldman@rfs-law.com) McKenzie A. Livingston (mlivingston@rfs-law.com)
2.	***Picard v. Wolfson Equities***	11-cv-09449-JSR	K&L Gates LLP Richard A. Kirby (richard.kirby@klgates.com) Robert Honeywell (robert.honeywell@klgates.com)
3.	***Picard v. Anthony Stefanelli***	11-cv-09502-JSR	Rattet Pasternak, LLP Jonathan S. Pasternak (jpasternak@rattetlaw.com) James B. Glucksman (jglucksman@rattetlaw.com)
4.	***Picard v. Stefanelli Investor Group, et al*** (Mary Ann Stefanelli – Moving Party)	11-cv-09503-JSR	Rattet Pasternak, LLP Jonathan S. Pasternak (jpasternak@rattetlaw.com) James B. Glucksman (jglucksman@rattetlaw.com)
5.	***Picard v. Pati H. Gerber 1997 Trust, et al***	11-cv-09059-JSR	Schulte Roth & Zabel LLP Marcy Ressler Harris (marcy.harris@srz.com) Frank J. LaSalle (frank.lasalle@srz.com) Mark D. Richardson (mark.richardson@srz.com)
6.	***Picard v. Kase-Glass Fund, et al***	11-cv-09063-JSR	Stroock & Stroock & Lavan, LLP Melvin A. Brosterman (mbrosterman@stroock.com) Christopher Guhin (cguhin@stroock.com) Michele L. Palmer (mpahmer@stroock.com)
7.	***Picard v. Lemtag Associates, et al***	11-cv-09064-JSR	Stroock & Stroock & Lavan LLP Melvin A. Brosterman (mbrosterman@stroock.com) Christopher Guhin (cguhin@stroock.com) Michele L. Palmer (mpahmer@stroock.com)
8.	***Picard v. Mashanda Ltd***	11-cv-09220-JSR	Stroock & Stroock & Lavan LLP Melvin A. Brosterman (mbrosterman@stroock.com)

			Christopher Guhin (cguhin@stroock.com) Quinlan D. Murphy (qmurphy@stroock.com)
9.	***Picard v. FGLS Equity, LLC***	12-cv-00208-JSR	Stroock & Stroock & Lavan, LLP Lewis Kruger (lkruger@stroock.com) Kenneth Pasquale (kpasquale@stroock.com)
10.	***Picard v. HSD Investments, L.P., et al***	12-cv-02757	King & Spalding LLP Arthur J. Steinberg (asteinberg@kslaw.com) Michael A. Bartelstone (mbartelstone@kslaw.com)
11.	***Picard v. Barbara Kotlikoff Harman***	12-cv-02155-JSR	Stroock & Stroock & Lavan, LLP Melvin A. Brosterman (mbrosterman@stroock.com) Christopher Guhin (cguhin@stroock.com) Michele L. Palmer (mpahmer@stroock.com)
12.	***Picard v. Amy R. Roth***	12-cv-02156-JSR	Stroock & Stroock & Lavan, LLP Melvin A. Brosterman (mbrosterman@stroock.com) Christopher Guhin (cguhin@stroock.com) Michele L. Palmer (mpahmer@stroock.com)
13.	***Picard v. Benjamin W. Roth and Marion B. Roth***	12-cv-02157-JSR	Stroock & Stroock & Lavan, LLP Melvin A. Brosterman (mbrosterman@stroock.com) Christopher Guhin (cguhin@stroock.com) Michele L. Palmer (mpahmer@stroock.com)
14.	***Picard v. Estate of Muriel Lederman, et al.***	12-cv-02312-JSR	Stroock & Stroock & Lavan, LLP Melvin A. Brosterman (mbrosterman@stroock.com) Christopher Guhin (cguhin@stroock.com) Michele L. Palmer (mpahmer@stroock.com) Kramer Levin Naftalis & Frankel LLP Elise Scherr Frejka (efrejka@kramerlevin.com) Philip Bentley (pbentley@kramerlevin.com)

15.	***Picard v. Beaser Investment Company, LP, et al***	12-cv-00696-JSR	Blank Rome LLP James V. Masella, III (JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com) Ryan E. Cronin (RCronin@BlankRome.com)
16.	***Picard v. Samuel Beaser Amended & Restated Trust, et al***	12-cv-00697-JSR	Blank Rome LLP James V. Masella, III (JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com) Ryan E. Cronin (RCronin@BlankRome.com)
17.	***Picard v. Zieses Investment Partnership, et al***	12-cv-00698-JSR	Blank Rome LLP James V. Masella, III (JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com) Ryan E. Cronin (RCronin@BlankRome.com)
18.	***Picard v. G.S. Schwartz & Co., Inc, et al***	12-cv-00699-JSR	Blank Rome LLP James V. Masella, III (JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com) Ryan E. Cronin (RCronin@BlankRome.com)
19.	***Picard v. Kenneth W. Perlman, et al***	12-cv-00943-JSR	Blank Rome LLP James V. Masella, III (JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com) Ryan E. Cronin (RCronin@BlankRome.com)
20.	***Picard v. Leonard R. Ganz and Roberta Ganz***	12-cv-00944-JSR	Blank Rome LLP James V. Masella, III (JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com) Ryan E. Cronin (RCronin@BlankRome.com)
21.	***Picard v. George N. Faris***	12-cv-00945-JSR	Blank Rome LLP James V. Masella, III (JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com)

			Ryan E. Cronin (RCronin@BlankRome.com)
22.	***Picard v. Kreitman***	12-cv-01134-JSR	Blank Rome LLP James V. Masella, III (JMasella@BlankRome.com) Anthony A. Mingione (AMingione@BlankRome.com) Ryan E. Cronin (RCronin@BlankRome.com)

EXHIBIT D

Participants To June 27, 2012 Telephonic Conference

Irving H. Picard, *Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff*

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Kevin Bell
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Lauren Attard
(lattard@sipc.org)

Picard v. Triangle Diversified Investments, et al., 12-cv-00700-JSR

DICKSTEIN SHAPIRO LLP
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(greers@dicksteinshapiro.com)

Picard v. Turbo Investors, LLC, 12-cv-04177-JSR

HALPERIN BATTAGLIA RAICHT, LLP
Scott A. Ziluck
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Neal W. Cohen
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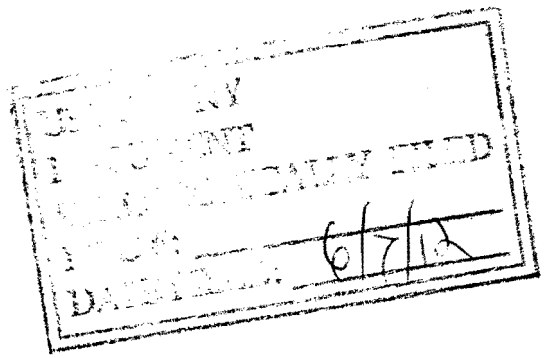
Exhibit 24



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	12-MC-0115 **ORDER**
In re: MADOFF SECURITIES	**(Relates to consolidated proceedings on Extraterritoriality Issues)**

PERTAINS TO CASES LISTED IN EXHIBIT A

JED S. RAKOFF, U.S.D.J.:

WHEREAS:

A. Pending before the Court are various adversary proceedings commenced by Irving H. Picard, as trustee ("Trustee"), in connection with the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") and the estate of Bernard L. Madoff under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"), in which the Trustee has sought to avoid or recover certain transfers made by BLMIS in the 90 day, two year, six year and/or longer period(s) preceding December 11, 2008 (the "Transfers"). In these proceedings, certain defendants (the "Extraterritoriality Defendants") have sought withdrawal of the reference from the Bankruptcy Court to this Court, among other grounds, for the Court's determination of the Extraterritoriality Issue as defined below.

B. Exhibit A hereto, prepared by the Trustee's counsel, identifies the single cases or, in certain instances, the lead case of related adversary proceedings where defendants are represented by common counsel, in which Extraterritoriality Defendants have filed motions to withdraw the reference (or joined in such motions, which joinders are deemed included in the scope of this Order unless expressly stated otherwise on Exhibit A) from the Bankruptcy Court to this Court to determine whether SIPA and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate or mediate foreign transferees (the "Extraterritoriality Issue"). Such cases and joinders are referred to herein as the "Adversary Proceedings."

C. The Court, over the objections of the Trustee and the Securities Investor Protection Corporation ("SIPC"), previously withdrew the reference from the Bankruptcy Court to consider issues concerning whether the Trustee may avoid or recover Transfers that BLMIS made to certain defendants abroad. *See* Primeo Fund, et al., No. 12 MC 0115 (S.D.N.Y. Order dated May 15, 2012) [ECF No. 97] (the "Extraterritoriality Withdrawal Ruling").

D. Pursuant to Extraterritoriality Withdrawal Ruling, the Court has decided to consolidate briefing on the merits of the Extraterritoriality Issue, and the resolution of this issue will govern all pending motions to withdraw the reference and those pending motions to dismiss that have not yet been fully briefed and argued. See Extraterritorial Withdrawal Ruling, p. 10-11; SIPC v. Bernard L. Madoff Inv. Secs. LLC (In re Madoff Secs.), No. 12 MC 0115 (S.D.N.Y. Order dated Apr. 19, 2012) [ECF No. 22] (the "Common Briefing Order"). The Court's Extraterritoriality Withdrawal Ruling also directed counsel for the Trustee to convene a

conference among the Extraterritoriality Defendants and to schedule consolidated proceedings no later than May 23, 2012.

E. On May 23, 2012 counsel for the Trustee, SIPC, and the Extraterritoriality Defendants convened a conference call with the Court, and the Court thereafter ordered that the parties submit by no later than June 6, 2012 a proposed order agreed to by the parties for withdrawal and briefing of a consolidated motion to dismiss related to the Extraterritoriality Issue.

BASED ON THE FOREGOING, IT IS HEREBY ORDERED AS FOLLOWS:

1. The reference of the Adversary Proceedings listed in Exhibit A is withdrawn, in part, from the Bankruptcy Court to this Court solely with respect to the Extraterritoriality Defendants for the limited purpose of hearing and determining whether SIPA and/or the Bankruptcy Code as incorporated by SIPA apply extraterritorially, permitting the Trustee to avoid the initial Transfers that were received abroad or to recover from initial, immediate or mediate foreign transferees. Except as otherwise provided herein or in other orders of this Court, the reference to the Bankruptcy Court is otherwise maintained for all other purposes.

2. The Trustee and SIPC are deemed to have raised, in response to all pending motions for withdrawal of the reference based on the Extraterritoriality Issue, all arguments previously raised by either or both of them in opposition to all such motions granted by the Extraterritoriality Withdrawal Ruling, and such objections or arguments are deemed to be overruled, solely with respect to the Extraterritoriality Issue, for the reasons stated in the Extraterritoriality Withdrawal Ruling.

3. All objections that could be raised by the Trustee and/or SIPC to the pending motions to withdraw the reference in the Adversary Proceedings, and the defenses and

responses thereto that may be raised by the affected defendants, are deemed preserved on all matters.

4. On or before July 13, 2012, the Extraterritoriality Defendants shall file a single consolidated motion to dismiss pursuant to Fed. R. Civ. P. 12 (made applicable to the Adversary Proceeding by Fed. R. Bankr. P. 7012) and a single consolidated supporting memorandum of law, not to exceed forty (40) pages (together, the "Extraterritoriality Motion to Dismiss").

5. The Trustee and SIPC shall each file a memorandum of law in opposition to the Extraterritoriality Motion to Dismiss, not to exceed forty (40) pages each, addressing the Extraterritoriality Withdrawal Ruling Issue (the "Trustee's Opposition") on or before August 17, 2012.

6. Young Conaway Stargatt & Taylor, LLP, which is conflicts counsel for the Trustee, and Windels Marx Lane & Mittendorf, LLP, which is special counsel to the Trustee, each may file a joinder, not to exceed two (2) pages (excluding exhibits identifying the relevant adversary proceedings), to the Trustee's Opposition, on behalf of the Trustee in certain of the adversary proceedings listed on Exhibit A hereto on or before August 17, 2012. In either case, the respective joinders may only specify what portions of the Trustee's Opposition are joined and shall not make or offer any additional substantive argument.

7. The Extraterritoriality Defendants shall file one consolidated reply brief, not to exceed twenty (20) pages, on or before August 31, 2012 (the "Reply Brief"). In the event the Trustee files an amended complaint (the "Amended Complaint") in any of the Adversary Proceedings after the Extraterritoriality Motion to Dismiss is filed, the Reply Brief shall include a reference (by civil action number and docket number only) to a representative Amended Complaint filed by the Trustee against Extraterritoriality Defendants. Any further requirement

that the Amended Complaints subject to the Extraterritoriality Motion to Dismiss be identified or filed is deemed waived and satisfied. In the event the Trustee files an Amended Complaint, he shall, at the time the Amended Complaint is filed, provide the Extraterritoriality Defendants a blackline reflecting the changes made in the Amended Complaint from the then operative complaint.

8. The Court will hold oral argument on the Extraterritoriality Motion to Dismiss on September 21, 2012, at 4:00 p.m. (the "Hearing Date").

9. On or before August 31, 2012, the Extraterritoriality Defendants shall designate one lead counsel to advocate their position at oral argument on the Hearing Date, but any other attorney who wishes to be heard may appear and so request.

10. The caption displayed on this Order shall be used as the caption for all pleadings, notices and briefs to be filed pursuant to this Order.

11. All communications and documents (including drafts) exchanged between and among any of the defendants in any of the adversary proceedings, and/or their respective attorneys, shall be deemed to be privileged communications and/or work product, as the case may be, subject to a joint interest privilege.

12. This Order is without prejudice to any and all grounds for withdrawal of the reference (other than the Extraterritoriality Issue) raised in the Adversary Proceedings by the Extraterritoriality Defendants and any matter that cannot properly be raised or resolved on a Rule 12 motion, all of which are preserved.

13. Nothing in this Order shall: (a) waive or resolve any issue not specifically raised in the Extraterritoriality Motion to Dismiss; (b) waive or resolve any issue raised or that could be raised by any party other than with respect to the Extraterritoriality Issue, including related issues

that cannot be resolved on a motion under Fed. R. Civ. P. 12; or (c) notwithstanding Fed. R. Civ. P. 12(g)(2) or Fed. R. Bankr. P. 7012(g)(2), except as specifically raised in the Extraterritoriality Motion to Dismiss, limit, restrict or impair any defense or argument that has been raised or could be raised by any Extraterritoriality Defendant in a motion to dismiss under Fed. R. Civ. P. 12 or Fed. R. Bankr. P. 7012, or any other defense or right of any nature available to any Extraterritoriality Defendant (including, without limitation, all defenses based on lack of personal jurisdiction or insufficient service of process), or any argument or defense that could be raised by the Trustee or SIPC in response thereto.

14. Nothing in this Order shall constitute an agreement or consent by any Extraterritoriality Defendant to pay the fees and expenses of any attorney other than such defendant's own retained attorney. This paragraph shall not affect or compromise any rights of the Trustee or SIPC.

15. This Order is without prejudice to and preserves all objections of the Trustee and SIPC to timely-filed motions for withdrawal of the reference currently pending before this Court (other than the withdrawal of the reference solely with respect to the Extraterritoriality Issue) with respect to the Adversary Proceedings, and the defenses and responses thereto that may be raised by the affected defendants, are deemed preserved on all matters.

16. The procedures established by this Order, or by further Order of this Court, shall constitute the sole and exclusive procedures for determination of the Extraterritoriality Issue in the Adversary Proceedings (except for any appellate practice resulting from such determination), and this Court shall be the forum for such determination. To the extent that briefing or argument schedules were previously established with respect to the Extraterritoriality Issue in any of the Adversary Proceedings, this Order supersedes all such schedules solely with respect to the

Extraterritoriality Issue. To the extent that briefing or argument schedules are prospectively established with respect to motions to withdraw the reference or motions to dismiss in any of the Adversary Proceedings, the Extraterritoriality Issue shall be excluded from such briefing or argument and such order is vacated. For the avoidance of doubt, to the extent any of the Extraterritoriality Defendants have issues other than the Extraterritoriality Issue or issues set forth in the Common Briefing Order that were withdrawn, those issues will continue to be briefed on the schedule previously ordered by the Court. Except as stated in this paragraph, this Order shall not be deemed or construed to modify, withdraw or reverse any prior Order of the Court that granted withdrawal of the reference in any Adversary Proceeding for any reason.

SO ORDERED.

Dated: New York, New York
June 6, 2012

JED S. RAKOFF, U.S.D.J.

EXHIBIT A

1.	***Picard v. Primeo***	11-cv-06524-JSR	Morrison & Foerster LLP Gary S. Lee (glee@mofo.com) Joel C. Haims (jhaims@mofo.com) LaShann M. DeArcy (ldearcy@mofo.com) Kiersten A. Fletcher (kfletcher@mofo.com)
2.	***Picard v. ABN AMRO Bank N.V. (presently known as the Royal Bank of Scotland, N.V.), et al.*** (as filed by Rye Select Broad Market XL Portfolio Ltd.)	11-cv-06848-JSR	Morrison & Foerster LLP Gary S. Lee (glee@mofo.com) Joel C. Haims (jhaims@mofo.com) LaShann M. DeArcy (ldearcy@mofo.com) Kiersten A. Fletcher (kfletcher@mofo.com)
3.	***Picard v. ABN AMRO Bank N.V. (presently known as the Royal Bank of Scotland, N.V.), et al.*** (as filed by ABN AMRO Incorporated, ABN AMRO Bank, N.V.)	11-cv-06878-JSR	Allen & Overy LLP Michael S. Feldberg (michael.feldberg@allenovery.com) Bethany Kriss (bethany.kriss@allenovery.com)
4.	***Picard v. ABN AMRO (Ireland) Ltd. (F/N/A Fortis Prime Fund Solutions Bank (Ireland) Ltd.,), et al.*** (as filed by Rye Select Broad Market XL Portfolio Ltd.)	11-cv-06849-JSR	Morrison & Foerster LLP Gary S. Lee (glee@mofo.com) Joel C. Haims (jhaims@mofo.com) LaShann M. DeArcy (ldearcy@mofo.com) Kiersten A. Fletcher (kfletcher@mofo.com)

5.	***Picard v. ABN AMRO (Ireland) Ltd. (F/N/A Fortis Prime Fund Solutions Bank (Ireland) Ltd.,), et al.,*** (as filed by ABN AMRO Custodial Services (Ireland) Ltd., ABN AMRO Bank (Ireland), Ltd.)	11-cv-06877-JSR	Latham & Watkins Christopher Harris (christopher.harris@lw.com) Cameron Smith (cameron.smith@lw.com)
6.	***Picard v. Banco Bilbao Vizcaya Argentaria, S.A.***	11-cv-07100-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com)
7.	***Picard v. Federico Ceretti, et al.*** (as filed by Federico Ceretti, Carlo Grosso, FIM Limited and FIM Advisers LLP)	11-cv-07134-JSR	Paul Hastings LLP Jodi Kleinick (jodikleinick@paulhastings.com) Barry Sher (barrysher@paulhastings.com) Mor Wetzler (morwetzler@paulhastings.com)
8.	***Picard v. Oreades Sicav, et al.*** (as filed by BNP Paribas Investment Partners Luxembourg S.A., BGL BNP Paribas S.A. and BNP Paribas Securities Services S.A.)	11-cv-07763-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace (bpeace@cgsh.com)
9.	***Picard v. Equity Trading Portfolio Ltd., et al.*** (as filed by BNP Paribas Arbitrage SNC)	11-cv-07810-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace (bpeace@cgsh.com)
10.	***Picard v. BNP Paribas Arbitrage SNC***	12-cv-00641-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com) Breon S. Peace

			(bpeace@cgsh.com)
11.	***Picard v. Barclays Bank (Suisse) S.A., et al***	12-cv-01882-JSR	Hogan Lovells US LLP Marc J. Gottridge (marc.gottridge@hoganlovells.com) Andrew M. Behrman (andrew.behrman@hoganlovells.com)
12.	***Picard v. ABN AMRO Bank N.V. (presently known as The Royal Bank of Scotland, N.V.), et al***	12-cv-01939-JSR	Allen & Overy LLP Michael S. Feldberg (michael.feldberg@allenovery.com) Bethany Kriss (bethany.kriss@allenovery.com)
13.	**Picard v. Kohn, et al.** (as filed by UniCredit Bank Austria)	12-cv-02161-JSR	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)
14.	***Picard v. HSBC Bank, plc, et al.***(as filed by UniCredit Bank Austria)	12-cv-02162-JSR	Sullivan & Worcester LLP Franklin B. Velie (fvelie@sandw.com) Jonathan Kortmansky (jkortmansky@sandw.com) Mitchell C. Stein (mstein@sandw.com)
15.	***Picard v. HSBC Bank, plc, et al.***(as filed by UniCredit S.p.A. and Pioneer)	12-cv-02239-JSR	Skadden, Arps, Slate, Meagher, & Flom LLP (susan.saltzstein@Skadden.com) Marco E. Schnabl (Marco.Schnabl@Skadden.com)

			Jeremy A. Berman (jeremy.berman@Skadden.com) Jason C. Putter (jason.putter@skadden.com)
16.	***Picard v. Kohn, et al.*** (as filed by UniCredit S.p.A. and Pioneer)	12-cv-02240-JSR	Skadden, Arps, Slate, Meagher, & Flom LLP Susan L. Saltzstein (susan.saltzstein@Skadden.com) Marco E. Schnabl (Marco.Schnabl@Skadden.com) Jeremy A. Berman (jeremy.berman@Skadden.com) Jason C. Putter (jason.putter@skadden.com)
17.	***Picard v. Bank Julius Baer & Co., Ltd.***	12-cv-02311-JSR	McKool Smith P.C. John P. Cooney, Jr. (jcooney@mckoolsmith.com) Eric B. Halper (ehalper@mckoolsmith.com) Virginia I. Weber (vweber@mckoolsmith.com)
18.	***Picard v. Lion Global Investors Limited***	12-cv-02349-JSR	Proskauer Rose LLP Gregg M. Mashberg (gmashberg@proskauer.com) Richard L. Spinogatti (rspinogatti@proskauer.com)
19.	***Picard v. Grosvenor Investment Management Ltd., et al.***	12-cv-02351-JSR	Proskauer Rose LLP Richard L. Spinogatti (rspinogatti@proskauer.com)
20.	***Picard v. Inteligo Bank Ltd. Panama Branch f/k/a/ Blubank Ltd. Panama Branch***	12-cv-02364-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com) Jessica Bartlett

			(jessica.bartlett@shearman.com)
21.	***Picard v. Banca Carige, S.P.A.***	12-cv-02408-JSR	Kasowitz, Benson, Torres, & Friedman LLP David J. Mark (dmark@kasowitz.com)
22.	***Picard v. Somers Dublin Limited, et al.***	12-cv-02430-JSR	Cleary Gottlieb Steen & Hamilton LLP Evan A. Davis (edavis@cgsh.com) Thomas J. Moloney (tmoloney @cgsh.com)
23.	***Picard v. HSBC Bank, plc, et al.*** (as filed by the HSBC Defendants)	12-cv-02431-JSR	Cleary Gottlieb Steen & Hamilton LLP Charles J. Keeley (cjkeeley@cgsh.com) Tom Moloney (tmoloney@cgsh.com) Evan Davis (edavis@cgsh.com) David Brodsky (dbrodsky@cgsh.com)
24.	***Picard v. Banco Itau Europa Luxembourg S.A., et al***	12-cv-02432-JSR	Shearman & Sterling LLP Heather Kafele (hkafele@shearman.com) Joanna Shally (jshally@shearman.com)
25.	***Caceis Bank Luxembourg, et al.***	12-cv-02434-JSR	Kelley Drye & Warren LLP Thomas B. Kinzler (tkinzler@kelleydrye.com) Daniel Schimmel (dschimmel@kelleydrye.com) Jaclyn M. Metzinger (jmetzinger@kelleydrye.com)

26.	***Picard v. Banque Privee Espirito Santo S.A.***	12-cv-02442-JSR	Flemming Zulack Williamson Zauderer LLP Elizabeth A. O'Connor (eoconnor@fzwz.com) John F. Zulack (Jzulack@fzwz.com) Megan Davis (mdavis@fzwz.com)
27.	***Picard v. Nomura International PLC***	12-cv-02443-JSR	Shearman & Sterling LLP Brian H. Polovoy (bpolovoy@shearman.com) Christopher R. Fenton (Cfenton@shearman.com) Andrew Z. Lipson (alipson@shearman.com)
28.	***Picard v. Nomura Bank International PLC***	12-cv-02446-JSR	Shearman & Sterling LLP Brian H. Polovoy (bpolovoy@shearman.com) Christopher R. Fenton (Cfenton@shearman.com) Andrew Z. Lipson (alipson@shearman.com)
29.	***Picard v. The Sumitomo Trust and Banking Co., Ltd.***	12-cv-02481-JSR	Becker, Glynn, Melamed & Muffly LLP Zeb Landsman (zlandsman@beckerglynn.com) Jordan E. Stern (jstern@beckerglynn.com) Michelle Mufich (mmufich@beckerglynn.com)
30.	***Picard v. UBS AG, et al.*** (M&B Capital Advisers Sociedad de Valores, S.A., M&B Capital Advisers Gestion SGIIC, S.A. -	12-cv-02483-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin

	Moving Parties) **[Amended Motion to Withdraw]**		(rlevin@cravath.com)
31.	***Picard v. Unifortune Asset Management SGR SPA, et al.***	12-cv-02485-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
32.	***Picard v. Trincaster Corporation***	12-cv-02486-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
33.	***Picard v. Banque Syz & Co., SA***	12-cv-02489-JSR	Cravath, Swaine & Moore LLP David Greenwald (dgreenwald@cravath.com) Richard Levin (rlevin@cravath.com)
34.	***Picard v. Square One Fund Ltd., et al.***	12-cv-02490-JSR	Tannenbaum Helpern Syracuse & Hirschtritt LLP; Brune & Richard LLP. Tannenbaum Helpern Syracuse & Hirschtritt LLP Tammy P. Bieber (bieber@thsh.com) Brune & Richard LLP David Elbaum (delbaum@bruneandrichard.com) Bernfeld, DeMatteo & Bernfeld, LLP

			David Bernfeld (davidbernfeld@bernfeld-dematteo.com)
35.	***Picard v. Credit Agricole (Suisse) S.A., et al.***	12-cv-02494-JSR	Cleary Gottlieb Steen & Hamilton LLP Lawrence B. Friedman (lfriedman@cgsh.com)
36.	***Picard v. SNS Bank N.V., et al***	12-cv-02509-JSR	Wilmer Cutler Pickering Hale and Dorr LLP Andrea J. Robinson (andrea.robinson@wilmerhale.com) Charles C. Platt (charles.platt@wilmerhale.com) George W. Shuster, Jr. (george.shuster@wilmerhale.com)
37.	***Picard v. Quilvest Finance Ltd.***	12-cv-02580-JSR	Jones Day Thomas E. Lynch (telynch@jonesday.com) Scott J. Friedman (sjfriedman@jonesday.com)
38.	***Picard v. Arden Asset Management, Inc., et al.***	12-cv-02581-JSR	Seward & Kissel LLP M. William Munno (munno@sewkis.com) Mandy DeRoche (deroche@sewkis.com) Michael B. Weitman (weitman@sewkis.com)
39.	***Picard v. Banque J. Safra (Suisse) SA***	12-cv-02587-JSR	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com)

40.	***Picard v. Vizcaya Partners Limited, et al.***	12-cv-02588-JSR	Sullivan & Cromwell LLP (for Bank J. Safra (Gibraltar) Limited) Robinson B. Lacy (lacyr@sullcrom.com) Joshua Fritsch (fritschj@sullcrom.com) Angelica M. Sinopole (sinopolea@sullcrom.com) Katten Muchin Rosenman LLP (for Zeus Partners Ltd) Anthony L. Paccione (anthony.paccione@kattenlaw.com)
41.	***Picard v. Abu Dhabi Investment Authority***	12-cv-02616-JSR	Quinn Emanuel Urquhart & Sullivan, LLP Peter E. Calamari (petercalamari@quinnemanuel.com) Marc L. Greenwald (marcgreenwald@quinnemanuel.com) Eric M. Kay (erickay@quinnemanuel.com) David S. Mader (davidmader@quinnemanuel.com)
42.	***Picard v. Fairfield Sentry Limited, et al.*** (as filed by Chester Global Strategy Fund Limited, Chester Global Strategy Fund, LP, Irongate Global Strategy Fund Limited, Fairfield Greenwich Fund	12-cv-02619-JSR	Simpson Thacher & Barlett LLP Mark G. Cunha (mcunha@stblaw.com) Peter E. Kazanoff (pkazanoff@stblaw.com) Wollmuth Maher & Deutsch LLP

	(Luxembourg), Fairfield Investment Fund Limited, Fairfield Investors (Euro) Ltd., and Stable Fund LP)		Frederick R. Kessler (fkessler@wmd-law.com) Paul R. DeFilippo (pdefilippo@wmd-law.com) Michael P. Burke (mburke@wmd-law.com) Debevoise & Plimpton LLP Mark P. Goodman (mpgoodman@debevoise.com) O'Shea Partners LLP Sean F. O'Shea (soshea@osheapartners.com) Michael E. Petrella (mpetrella@osheapartners.com) White & Case LLP Glenn M. Kurtz (gkurtz@whitecase.com) Andrew W. Hammond (ahammond@whitecase.com) Covington & Burling LLP Bruce A. Baird (bbaird@cov.com) Kasowitz, Benson, Torres & Friedman LLP Daniel J. Fetterman (dfetterman@kasowitz.com) Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C. Edward M. Spiro (espiro@maglaw.com)

			Dechert LLP Andrew J. Levander (andrew.levander@dechert.com) David S. Hoffner (david.hoffner@dechert.com)
43.	***Picard v. Fairfield Sentry Limited, et al.*** *(Joint Memorandum filed by various defendants)*	12-cv-02638-JSR	Simpson Thacher & Bartlett LLP Mark G. Cunha (mcunha@stblaw.com) Peter E. Kazanoff (pkazanoff@stblaw.com) Wollmuth Maher & Deutsch LLP Frederick R. Kessler (fkessler@wmd-law.com) Paul R. DeFilippo (pdefilippo@wmd-law.com) Michael P. Burke (mburke@wmd-law.com) Debevoise & Plimpton LLP Mark P. Goodman (mpgoodman@debevoise.com) O'Shea Partners LLP Sean F. O'Shea (soshea@osheapartners.com) Michael E. Petrella (mpetrella@osheapartners.com) White & Case LLP Glenn M. Kurtz (gkurtz@whitecase.com) Andrew W. Hammond (ahammond@whitecase.com)

			Covington & Burling LLP Bruce A. Baird (bbaird@cov.com) Kasowitz, Benson, Torres & Friedman LLP Daniel J. Fetterman (dfetterman@kasowitz.com) Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C. Edward M. Spiro (espiro@maglaw.com) Dechert LLP Andrew J. Levander (andrew.levander@dechert.com) David S. Hoffner (david.hoffner@dechert.com)
44.	***Picard v. Plaza Investments International Limited, et al.***	12-cv-02646-JSR	Debevoise & Plimpton LLP Joseph P. Moodhe (Jpmoodhe@debevoise.com) Shannon Rose Selden (srselden@debevoise.com)
45.	***Picard v. Defender Limited, et al*** (Defender Limited, Reliance Management (BVI) Limited, Reliance Management (Gibraltar) Limited and Tim Brockmann – Moving Parties)	12-cv-02800-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott (bscott@klestadt.com)
46.	***Picard v. UBS AG, et al.*** (Reliance Management (BVI) Limited and Reliance Management (Gibraltar) Limited	12-cv-02802-JSR	Klestadt & Winters LLP Tracy L. Klestadt (tklestadt@klestadt.com) Brendan M. Scott

	– Moving Parties)		(bscott@klestadt.com)
47.	***Picard vs. The Estate of Doris Igoin, et al.***	12-cv-02872-JSR	Kelley Drye & Warren LLP Jonathan K. Cooperman (Jcooperman@KelleyDrye.com) Seungwhan Kim (skim@kelleydrye.com)
48.	***Picard v. KBC Investments Limited,***	12-cv-02877-JSR	Sidley Austin LLP Alan M. Unger (aunger@sidley.com) Bryan Krakauer (bkrakauer@sidley.com)
49.	***Picard v. Meritz Fire & Marine Insurance Co. Ltd.***	12-cv-02878-JSR	Steptoe & Johnson LLP Kristin Darr (kdarr@steptoe.com) Seong H. Kim (skim@steptoe.com)
50.	***Picard v. Leon Flax, et al.***	12-cv-02928-JSR	Katten Muchin Rosenman LLP Anthony L. Paccione anthony.paccione@kattenlaw.com Brian L. Muldrew brian.muldrew@kattenlaw.com
51.	***Picard v. Orbita Capital Return Strategy Limited***	12-cv-02934-JSR	Dechert LLP Gary Mennitt (gary.mennitt@dechert.com)
52.	***Picard v. Atlantic Security Bank***	12-cv-02980-JSR	Arnold & Porter LLP Scott B. Schreiber (Scott.Schreiber@aporter.com) Andrew T. Karron (Andrew.Karron@aporter.com)

53.	***Picard v. Cardinal Management Inc., et al***	12-cv-02981-JSR	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)
54.	***Picard v. Radcliff Investments Limited, et al.***	12-cv-02982-JSR	Clifford Chance US LLP Jeff E. Butler (jeff.butler@cliffordchance.com)
55.	***Picard v. Pictet et Cie***	12-cv-03402-JSR	Debevoise & Plimpton LLP Michael E. Wiles (mewiles@debevoise.com)
56.	***Picard v. Merrill Lynch International***	12-cv-03486-JSR	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)
57.	***Picard v. Merrill Lynch Bank (Suisse) SA***	12-cv-03487-JSR	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)
58.	***Picard v. Fullerton Capital PTE. Ltd.***	12-cv-03488-JSR	Arnold & Porter LLP Pamela A. Miller (Pamela.Miller@aporter.com) Kent A. Yalowitz (Kent.Yalowitz@aporter.com)
59.	***Picard v. Cathay United Bank, et al.***	12-cv-03489-JSR	Baker & McKenzie LLP David W. Parham (david.Parham@bakermckenzie.com)

60.	***Picard v. Standard Chartered Financial Services (Luxembourg) S.A., et al***	12-cv-04328	Sullivan & Cromwell LLP Robinson B. Lacy (lacyr@sullcrom.com) Sharon L. Nelles (nelless@sullcrom.com) Patrick B. Berarducci (berarduccip@sullcrom.com)

Exhibit 25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, -v- BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	:	12 Misc. 115 (JSR)
In re: MADOFF SECURITIES	:	
PERTAINS TO THE FOLLOWING CASES:	:	
IRVING H. PICARD, Plaintiff, -v- PRIMEO FUND et al., Defendants.	:	11 Civ. 6524 (JSR)
IRVING H. PICARD, Plaintiff, -v- HERALD FUND SPC et al., Defendants.	:	11 Civ. 6541 (JSR)
IRVING H. PICARD, Plaintiff, -v- ALPHA PRIME FUND LIMITED et al., Defendants.	:	11 Civ. 6677 (JSR)
IRVING H. PICARD, Plaintiff, -v- ABN AMRO BANK (IRELAND) LTD. et al., Defendants.	:	11 Civ. 6877 (JSR)
IRVING H. PICARD, Plaintiff, -v- ABN AMRO BANK N.A. et al., Defendants.	:	11 Civ. 6878 (JSR)

IRVING H. PICARD, Plaintiff, -v- BANCO BILBAO VIZCAYA ARGENTENARIA, S.A., et al., Defendants.	:	11 Civ. 7100 (JSR)

JED S. RAKOFF, U.S.D.J.

Each of the defendants in the above captioned cases seeks mandatory withdrawal of the reference to the bankruptcy court of the underlying adversarial proceeding brought against each of them respectively by plaintiff Irving H. Picard, the trustee appointed pursuant to the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa et seq.[1] Because these motions raise identical questions of law, albeit in different combinations, the Court issues this one Memorandum Order to decide which aspects of the underlying proceedings will be withdrawn, and which not. In large part, the Court relies on the reasoning set forth in its opinions in Picard v. HSBC Bank, 450 B.R. 406 (S.D.N.Y. 2011), Picard v. Flinn Inv., LLC, 2011 WL 5921544 (S.D.N.Y. Nov. 28, 2011), and Picard v. Avellino, 2012 WL 826602 (S.D.N.Y. Feb. 29, 2012), which withdrew the reference in still other adversarial proceedings in the underlying bankruptcy of Bernard L. Madoff Investment Securities ("Madoff Securities").

District courts have original jurisdiction over bankruptcy cases and all civil proceedings "arising under title 11, or

[1] The Court has stayed these motions with respect to certain defendants pending the approval of settlement agreements between those defendants and the Trustee. In light of such stays, this opinion does not apply to any motions by those defendants.

arising in or related to cases under title 11." 28 U.S.C. § 1334. Pursuant to 28 U.S.C. § 157(a), the district court may refer actions within its bankruptcy jurisdiction to the bankruptcy judges of the district. The Southern District of New York has a standing order that provides for automatic reference.

Notwithstanding the automatic reference, the district court may, on its own motion or that of a party, withdraw the reference, in whole or in part, in appropriate circumstances. Withdrawal is mandatory "if the 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." 28 U.S.C. § 157(d). The Second Circuit has ruled that mandatory "[w]ithdrawal under 28 U.S.C. § 157(d) is not available merely whenever non-Bankruptcy Code federal statutes will be considered in the bankruptcy court proceeding, but is reserved for cases where substantial and material consideration of non-Bankruptcy Code federal statutes is necessary for the resolution of the proceeding." In re Ionosphere Clubs, Inc., 922 F.2d 984, 995 (2d Cir. 1990).

The defendants in these cases identify many issues that they believe require "substantial and material consideration" of non-bankruptcy federal laws regulating organizations or activities affecting interstate commerce, including important unresolved

issues under SIPA itself, a statute that has both bankruptcy and non-bankruptcy aspects and purposes. See In re Bernard L. Madoff Investment Securities, 654 F.3d 229, 235 (2d Cir. 2011) ("SIPA serves dual purposes: to protect investors, and to protect the securities market as a whole."); Picard v. HSBC Bank PLC, 450 B.R. 406, 410 (S.D.N.Y. 2011). The Court considers defendants' contentions in turn.

First, each of the defendants argues that the Court must withdraw the reference to consider whether SIPA and other securities laws alter the standard that the Trustee must meet in order to show that the defendants did not receive transfers in "good faith" under 11 U.S.C. § 548(c). The Court examined this issue in Avellino, and found that it merited withdrawal. 2012 WL 826602, at *1-*2. Accordingly, for the reasons stated in Avellino, the Court withdraws these cases in order to resolve this issue.[2]

[2] With respect to certain defendants, the Trustee argues that the fact that he seeks to recover subsequent transfers under § 550(a) rather than to avoid fraudulent transfers under § 548 renders § 548(c) inapplicable. The Court rejects this argument. Section 550(a) permits recovery of a subsequent transfer only "to the extent that a transfer is avoided under" § 548 or some other avoidance statute. Thus, if § 548(c) provides a defense against avoidance of the initial transfer, it also provides a defense against recovery of the subsequent transfer. Moreover, § 550(b) also provides a good faith defense for subsequent transferees. Given that the securities laws, as noted in Avellino, may require a different interpretation of good faith, the Court also withdraws the reference to the extent necessary to determine what "good faith" means under § 550(b).

Second, each of the defendants argues that § 546(e) of the Bankruptcy Code prevents the Trustee from avoiding transfers as fraudulent except under § 548(a)(1)(A) of that Code. For substantially the reasons stated in Flinn and Avellino, the Court withdraws the reference in each case in order to address this issue.[3]

Third, ABN Amro Bank (Ireland) Ltd. argues that the Trustee cannot avoid transfers that, under applicable securities laws, satisfied antecedent debts, providing value under 11 U.S.C. § 548(c). The Court considered this issue at length in Flinn, and concluded that it merited withdrawal of the reference. For the same reasons, the Court withdraws the reference in order to address this issue.[4]

Fourth, each of the defendants except Herald Fund SPC argues that the Supreme Court's decision in Stern v. Marshall, 131 S. Ct. 2594 (2011), prevents the bankruptcy court from finally resolving fraudulent transfer actions because resolution of such

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[3] The Court plans to consolidate briefing on the merits of many issues, including the availability of the safe harbor created by § 546(e), in this case and many others in which defendants have sought withdrawal of the reference to the Bankruptcy Court. Nothing in this Memorandum Order alters or affects any current or future order consolidating briefing in multiple cases.

[4] For the reasons stated above in footnote two, the Court rejects any suggestion that § 550(a) renders § 548(c) inapplicable and further withdraws the reference to the extent necessary to determine what constitutes "value" under the defense provided by § 550(b).

actions requires an exercise of the "judicial Power" reserved for Article III courts. For substantially the reasons stated in Flinn and Avellino, the Court withdraws the reference in each case in order to address this issue.

Turning to new issues, each of the defendants except Herald Fund SPC argues that the Court must withdraw the reference to determine whether SIPA applies extraterritorially, permitting the Trustee to avoid or recover transfers that occurred abroad. "When a statute gives no clear indication of an extraterritorial application, it has none." Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2878 (2010). SIPA incorporates the Bankruptcy Code to the extent that the two do not conflict, 15 U.S.C. § 78fff(b), and the Bankruptcy Code defines a bankruptcy estate to include certain property of the debtor, "wherever located and by whomever held," 11 U.S.C. § 541. Nonetheless, in the context of avoidance actions, property the debtor has fraudulently transferred does not become part of the estate until the bankruptcy trustee has recovered it. In re Colonial Realty Co., 980 F.2d 125, 131 (2d Cir. 1992). Thus, whether the Trustee can invoke the Bankruptcy Code to avoid transfers that occurred abroad or to recover from subsequent transferees located outside the United States is unclear, particularly after Morrison. Compare In re Maxwell Comm'cn Corp., 186 B.R. 807, 818-20

(S.D.N.Y. 1995), with In re Interbulk, Ltd., 240 B.R. 195, 198-99 (Bankr. S.D.N.Y. 1999).

In these cases, however, determination of whether the avoidance provisions apply abroad depends on consideration of SIPA as well as the Bankruptcy Code. Under 15 U.S.C. § 78fff-2(c)(3), "the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property." Moreover, § 78fff-2(c)(3) also provides that property the debtor has fraudulently transferred "shall be deemed to have been the property of the debtor." Accordingly, the Court must analyze SIPA as well as the Bankruptcy Code in order to determine what constitutes "property of the debtor," and thus whether the avoidance provisions created by the Bankruptcy Code and incorporated by SIPA can reach transfers that occurred abroad. Because a "substantial issue under SIPA is[,] . . . almost by definition, an issue 'the resolution of [which] requires consideration of both title 11 and other laws of the United States,'" HSBC, 450 B.R. at 410 (quoting 28 U.S.C. § 157(d)), the Court withdraws the reference to address this issue.

Next, ABN Amro Bank (Ireland) Ltd. and ABN Amro Bank N.A. argue that the Court must withdraw the reference to address whether 11 U.S.C. § 546(g) limits the Trustee's power to avoid transfers they received. Under 11 U.S.C. § 546(g), "[n]otwithstanding sections 544, 545, 547, 548(a)(1)(B) and

548(b) of this title, the trustee may not avoid a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement." "[F]inancial participant" means an entity with swap agreements with "a total gross dollar value of not less than $1,000,000,000" at any time during the fifteen months preceding filing or "gross mark-to-market positions of not less than $100,000,000" during the same period. 11 U.S.C. § 101(22A)(A). The term "swap agreement" includes "total return" swaps, the kind of swap in which the defendants here allegedly participated. Id. § 101(53B)(A)(VI); Complaint dated December 8, 2010, Picard v. ABN Amro Bank (Ireland) Ltd., 11 Civ. 6877 (JSR), ¶¶ 9-10; Complaint dated December 8, 2010, Picard v. ABN Amro Bank N.A, 11 Civ. 6878 (JSR), ¶¶ 9-10. The definition of "swap agreement" also provides that the term "shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act." 11 U.S.C. § 101(53B)(B).

This issue merits withdrawal. While the Court may require further factual development in order to determine whether

defendants qualify as "financial participant[s]" in a swap, cf. Complaint dated December 8, 2010, Picard v. ABN Amro Bank (Ireland) Ltd., 11 Civ. 6877 (JSR), ¶ 67; Complait dated December 8, 2010, Picard v. ABN Amro Bank N.A, 11 Civ. 6878 (JSR), ¶ 67, if the defendants do qualify, resolution on the issue will depend on assessing whether defendants received transfers "in connection with" a "swap agreement," a term the Bankruptcy Code defines in part by reference to the securities laws. Thus, the Court must determine whether the understanding of "swap agreement" advocated by each party would "challenge or affect" the definitions of that term set forth in non-bankruptcy law. Accordingly, the Court withdraws this issue to undertake the "substantial and material consideration" of that law that it requires.[5]

Finally, Alpha Prime Fund Limited and Herald Fund SPC argue that the Court must withdraw the reference to determine whether SIPA prevents the Trustee from disallowing their claims to Madoff Securities' estate under 11 U.S.C. § 502(d). The Court, considering the merits of this issue, has previously found that SIPA suspends the normal application of § 502(d) in this context. Picard v. Katz, 462 B.R. 447, 456 (S.D.N.Y. 2011). Since SIPA

[5] The Court, once again, rejects any suggestion that, if § 546(g) provided a defense to the avoidance of an initial transfer, the Trustee could nonetheless recover from subsequent transferees under § 550(a).

governs, rather than the Bankruptcy Code, the Court withdraws the reference to undertake the consideration of SIPA required.

For the foregoing reasons, the Court withdraws the reference of these cases to the bankruptcy court for the limited purposes of deciding: (i) whether SIPA and other securities laws alter the standard the Trustee must meet in order to show that a defendant did not receive transfers in "good faith" under 11 U.S.C. § 548(c); (ii) whether the Trustee may, consistent with non-bankruptcy law, avoid transfers that Madoff Securities purportedly made in order to satisfy antecedent debts; (iii) whether, in light of this Court's decision in Picard v. Katz, 11 U.S.C. § 546(e) applies, limiting the Trustee's ability to avoid transfers; (iv) whether, after the United States Supreme Court's recent decision in Stern v. Marshall, 131 S. Ct. 2594 (2011), final resolution of claims to avoid transfers as fraudulent requires an exercise of "judicial Power," preventing the bankruptcy court from finally resolving such claims; (v) whether, if the bankruptcy court cannot finally resolve the fraudulent transfer claims in this case, it has the authority to render findings of fact and conclusions of law before final resolution; (vi) whether SIPA applies extraterritorially, permitting the Trustee to avoid or recover transfers that occurred abroad; (vii) whether defendants were "financial participant[s]" in swap agreements and received transfers from Madoff Securities "in

connection with" those agreements such that § 546(g) limits the Trustee's ability to avoid transfers; and (viii) whether SIPA prevents the Trustee from disallowing customer claims under 11 U.S.C. § 502(d).

Furthermore, because the issue of whether SIPA applies extraterritorially poses only a legal question, the Court finds that consolidated argument on and resolution of that issue in all of the adversarial proceedings that have identified it as a basis for withdrawal will promote judicial efficiency. Accordingly, the Court directs counsel for the Trustee to convene a conference call with the defendants who have raised this issue no later than May 23, 2012 so that the parties can schedule consolidated proceedings.

With respect to issues that are not subject to consolidated proceedings -- specifically, whether relevant defendants received transfers in good faith and whether they may invoke the safe harbor created by § 546(g) -- the parties should convene a separate conference call for each case no later than May 18, 2011 to schedule further proceedings. The Clerk of the Court is hereby ordered to close document number 1 on the docket of each case.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
May 15, 2014

Exhibit 26

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE RAKOFF

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff,

-v-

BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

Defendant.

12 MISC 00115

12 MC ___ (JSR)

ORDER

In re:

MADOFF SECURITIES

FILED
U.S. DISTRICT COURT
12 APR 13 AM 9:10
S.D. OF N.Y.

JED S. RAKOFF, U.S.D.J.

1. All matters relating to Bernard L. Madoff Investment Securities LLC ("Madoff Securities") previously assigned to the undersigned, or assigned to the undersigned in the future, shall henceforth bear the caption and docket number set forth above, and the parties shall make sure that all filings are filed under the docket number set forth above. In addition, any filings filed under this docket number shall bear either the subheading "PERTAINS TO ALL CASES," the subheading "PERTAINS TO CASE(S) __ Civ. ___," or the subheading "PERTAINS TO CASE(S) LISTED IN APPENDIX __." Any filing fees associated with opening the master case file docket are waived.

2. The Clerk is directed to make sure that this Order and all subsequent docket entries under this docket number are also docketed simultaneously in the bankruptcy court under No. 08-1789 (BRL).

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
April 13, 2012