Exhibit 18

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. 08-01789 (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, Plaintiff, v. FEDERICO CERETTI, CARLO GROSSO, KINGATE GLOBAL FUND, LTD., KINGATE EURO FUND, LTD., KINGATE MANAGEMENT, LIMITED, FIM ADVISERS LLP, FIM LIMITED, CITI HEDGE FUND SERVICES LIMITED, FIRST PENINSULA INDIVIDUALLY AND AS TRUSTEES OF THE ASHBY TRUST, THE ASHBY TRUST, ASHBY INVESTMENT SERVICES LIMITED INDIVIDUALLY AND AS TRUSTEES OF THE ASHBY TRUST, ALPINE TRUSTEES LIMITED INDIVIDUALLY AND AS TRUSTEES OF THE EL PRELA TRUST, PORT OF HERCULES LTD. INDIVIDUALLY AND AS TRUSTEE OF THE EL PRELA TRUST, EL PRELA TRUST, EL PRELA GROUP HOLDING SERVICES, ASHBY HOLDING SERVICES LIMITED, AND EL PRELA TRADING INVESTMENTS LIMITED	Adv. Pro. No. 09-1161 (BRL)

AND HSBC BANK BERMUDA LIMITED,

Defendants.

MEMORANDUM IN SUPPORT OF FIM DEFENDANTS' MOTION TO WITHDRAW THE REFERENCE TO THE BANKRUPTCY COURT

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Defendants FIM Limited, FIM Advisers LLP (together, the "FIM Entities"), Carlo Grosso and Federico Ceretti (collectively, the "FIM Defendants") respectfully submit this memorandum of law in support of their motion, 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 for an order withdrawing the reference of the above-captioned adversary proceeding to the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").[1]

PRELIMINARY STATEMENT

The above-captioned adversary proceeding brought by the trustee (the "Trustee") for the liquidation of the Bernard L. Madoff Investment Securities LLC ("BLMIS") raises novel and unsettled questions of federal non-bankruptcy law that fall outside of the bankruptcy court's purview. The Trustee is seeking to avoid alleged transfers to two funds that invested in BLMIS and alleged subsequent transfers to parties that conducted business dealings with those funds or with the manager of the funds, and to recover damages via state common law claims the Trustee purports to assert on behalf of BLMIS customers. The Trustee's claims will require significant consideration and interpretation of federal non-bankruptcy statutes, including the Securities Investor Protection Act ("SIPA"), a federal securities law, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), another federal securities law, and other non-bankruptcy

[1] The FIM Defendants make this Motion to Withdraw the Reference without prejudice to, and without waiver of, any rights, arguments, or defenses they might otherwise have at law or in equity, including, without limitation, their rights to contest personal jurisdiction, to challenge the appropriateness of the forum, and to assert any applicable statute of limitations.

laws. As such, Congress has mandated that this proceeding be heard in an Article III court, and this Court must withdraw the reference of this adversary proceeding to the Bankruptcy Court.[2]

Significant Interpretation of SIPA: Withdrawal of the reference is mandatory because resolution of this proceeding will require significant interpretation of SIPA—a non-bankruptcy federal law—on three issues, and this interpretation must be carried out by an Article III court. ***First***, as confirmed by Judge Rakoff's recent decision in *Picard v. HSBC Bank PLC*, 450 B.R. 406 (S.D.N.Y. 2011), the Trustee does not have standing to make the common law claims alleged in this adversary proceeding. Despite his inability to bring such an action, and the parallel actions already proceeding against the same defendants in other jurisdictions, the Trustee improperly seeks to make claims on behalf of BLMIS customers. ***Second***, resolution of this action will require significant interpretation of SIPA in order to determine whether the Section 546(e) safe harbor in the Bankruptcy Code applies under SIPA. The alleged subsequent transfers are not voidable due to the application of 546(e), but the Trustee has previously argued that 546(e) does not apply under SIPA. ***Third***, the Court will need to address the first-impression question of whether SIPA has extraterritorial application in light of *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), because the alleged subsequent transfers are clearly extraterritorial and SIPA does not apply extraterritorially.

Significant Interpretation of SLUSA: Moreover, as numerous courts in this district have found, the Trustee's common law claims are preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") because they assert misrepresentations in connection with the

[2] The FIM Defendants also intend to move to dismiss on additional grounds, including international comity, forum non conveniens, and failure to state a claim. For reasons of judicial efficiency, the district court should also hear these grounds in the same motion to dismiss in order to avoid the need for multiple motions to dismiss in various courts.

purchase or sale of securities and seek damages on behalf of more than 50 persons. In a string of analogous cases, judges in this District have withdrawn the reference to address the federal issues of SLUSA and standing. For example, in *Picard v. HSBC Bank PLC*, Judge Rakoff withdrew the reference "for the limited purpose of resolving two difficult federal questions – whether the Trustee has standing to pursue his common law claims and whether the Trustee's Action is preempted by SLUSA."[3] Judge McMahon came to the same conclusion in *Picard v. JPMorgan Chase & Co.*, No. 11 Civ. 0913 (CM), 2011 WL 2119720, at *4 (S.D.N.Y. May 23, 2011), withdrawing the reference because "the SLUSA preemption and SIPA standing questions raised by the Trustee's complaint will require the bankruptcy court to engage in significant consideration of federal non-bankruptcy law." *See also Picard v. Greiff*, 11-Civ-3775 (JSR) (S.D.N.Y. Sept. 15, 2011); *Picard v. Kohn*, No. 11 Civ. 1181 (JSR) (S.D.N.Y. Sept. 6, 2011).

First-Impression Issues under *Stern*: Finally, withdrawal of the reference is mandatory because the bankruptcy court cannot determine the Trustee's claims against the FIM Defendants without substantial interpretation of federal law concerning the bankruptcy court's subject matter jurisdiction and constitutional authority for these claims in light of the U.S. Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). This issue is one of first impression and thus is more appropriately resolved by the district court. *Mishkin v. Ageloff*, 220 B.R. 784, 796 (S.D.N.Y. 1998) ("where matters of first impression are concerned, the burden of establishing a right to mandatory withdrawal is more easily met").

[3] Judge Rakoff also withdrew the reference in *Picard v. Kohn*, No. 11 Civ. 1181 (JSR) (S.D.N.Y. June 3, 2011) to consider the same two issues, as well as a third that is not relevant here. *See* Declaration of Jodi Kleinick in Support of FIM Defendants' Motion to Withdraw the Reference executed on October 7, 2011 ("Kleinick Decl."), Ex. 1.

In addition, withdrawal of the reference on a permissive basis is appropriate to promote judicial efficiency, and to prevent delay and cost to the parties given the unsettled nature of the bankruptcy court's jurisdiction.

BACKGROUND[4]

On December 11, 2008, the Securities and Exchange Commission filed a complaint in the District Court against Bernard L. Madoff and BLMIS (No. 08 CV 10791). Four days later, Judge Stanton entered an order pursuant to SIPA, 15 U.S.C. § 78aaa, *et seq.*, which, *inter alia*, appointed Irving H. Picard, Esq. as trustee for the liquidation of the business of BLMIS pursuant to Section 78eee(b)(3) of SIPA, and removed the proceeding to the Bankruptcy Court pursuant to Section 78eee(b)(4) of SIPA.

On May 20, 2011, the Trustee filed the Third Amended Complaint (the "Complaint") against the FIM Defendants and several other persons and entities, alleging wrongdoing in connection with two investment funds, Kingate Euro Fund, Ltd. and Kingate Global Fund, Ltd. (the "Kingate Funds").[5] Although the Kingate Funds lost over $750 million, the Trustee seeks damages of almost $1 billion. *See* Complaint Exhibit A.[6] The FIM Entities served as consultants to Defendant Kingate Management Limited ("KML"), the manager of the Kingate Funds. Messrs. Grosso and Ceretti are officers and directors of the FIM Entities. The Trustee

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[4] The following information is taken from allegations in the Complaint, and the FIM Defendants do not concede the accuracy of any information contained therein. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 770 (1993) (on motion to dismiss, allegations of complaint taken as true).

[5] The Trustee's initial complaint, First Amended Complaint and Second Amended Complaint in this adversary proceeding did not include the FIM Defendants as defendants. A copy of the Complaint is attached as Exhibit 2 to the Kleinick Decl.

[6] Showing cash deposits of $1,726,220,000 and total withdrawals of $975,541,729.

alleges that the FIM Defendants failed to conduct due diligence of the Kingate Funds, ignored "red flags" of the fraud, and were part of a "complex web" of Madoff business associates who contributed to Madoff's Ponzi scheme via a "network of trusts and shell companies" (Compl. ¶¶ 5, 26, 155). The Trustee seeks to avoid alleged transfers of hundreds of millions of dollars from all defendants and unspecified amounts of that as subsequent transfers against all the FIM Defendants. (*id.*, Count Nine, ¶¶ 331-337).

In addition, the Trustee alleges various state common law claims against the FIM Defendants: unjust enrichment (*id.*, Count Twelve, ¶¶ 347-50); conversion (*id.*, Count Thirteen, ¶¶ 351-53), and money had and received (*id.*, Count Fourteen, ¶¶ 354-56).[7] All of the common law claims against the FIM Defendants allege damages that were "suffered by BLMIS customers." (*id.*, ¶¶ 45, 48, 90, 343-44, 352). Recognizing that those claims originate with or belong to others, the Trustee alleges that he nevertheless has standing (a) "as bailee" of customer property, (b) pursuant to unidentified "express assignments of certain claims of the applicable accountholders," and (c) as "subrogee" of claims paid by the Securities Investor Protection Corporation ("SIPC"), which rights were allegedly "conferred" on the Trustee. *Id.*, ¶ 14(f), (g), (h). [8]

[7] The Trustee also alleges claims seeking recovery of subsequent transfers under New York Debtor and Creditor Law (*See* Compl., Count Nine, ¶¶ 331-37).

[8] The Trustee has voluntarily dismissed without prejudice the same state common law claims against other defendants in certain actions. *See, e.g., Picard v. Maxam Absolute Return Fund, L.P.*, 11-CIV-3261 (JSR) (S.D.N.Y. Aug. 25, 2011); *Picard v. Repex Ventures SA*, No. 11-CIV-3477 (BRL) (S.D.N.Y. Aug. 25, 2011).

ARGUMENT

I THESE ACTIONS ARE SUBJECT TO MANDATORY WITHDRAWAL OF THE REFERENCE

A. Bankruptcy Court Jurisdiction Over SIPA Proceedings

SIPA provides that a district court shall have the same jurisdiction over a SIPA proceeding as it would have over a case arising under the Bankruptcy Code. *See* 15 U.S.C. § 78eee (b) (2) (A). SIPA further provides for the removal of any SIPA proceeding to the bankruptcy court in the same district and that, upon such removal, the bankruptcy court will be vested with "all of the jurisdiction, powers and duties conferred by this chapter [as upon the district court]." *Id*., § 78eee (b) (4). Thus, the statutory scheme governing bankruptcy court subject matter jurisdiction over bankruptcy matters, set forth at 28 U.S.C. §§ 157 and 1334, is applicable to matters that originate as SIPA proceedings. *See*, *e.g.*, *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 4 F.3d 1556, 1564 (10th Cir. 1993); *SIPC v. Cheshier & Fuller LLP (In re Sunpoint Sec., Inc.)*, 262 B.R. 384, 393-94 (Bankr. E.D. Tex. 2001).

Pursuant to 28 U.S.C. § 1334, district courts have jurisdiction over all civil proceedings "arising under" the Bankruptcy Code, or "arising in" or "related to" cases under the Bankruptcy Code. However, 28 U.S.C. § 157(a) permits the district court to refer to the bankruptcy court within the same district "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." A standing order of this Court, dated July 10, 1984 (Ward, Acting C.J.), automatically refers to the Bankruptcy Court all title 11 cases and proceedings commenced in this District.

B. Withdrawal of the Reference

Despite the automatic referral under the standing order, 28 U.S.C. § 157(d) provides for two circumstances in which the district court either *may* or *must* withdraw the reference to the bankruptcy court:

> The district court may withdraw, in whole or in part, any case or proceeding referred [to the bankruptcy court] 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 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) (emphasis added).[9]

Courts interpreting the mandatory withdrawal provision of Section 157(d) have found it applicable where the matter requires "significant interpretation" of non-bankruptcy federal law, *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 (LMM), 2006 WL 337667, at *2 (S.D.N.Y. Feb. 10, 2006) (quoting *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991)), or "substantial and material consideration of non-Bankruptcy Code federal [law] [*sic*]." *Enron Power Mktg., Inc. v. Cal. Power Exch. Corp. (In re Enron Corp.)*, No. 04 Civ. 8177 (RCC), 2004 WL 2711101, at *2 (S.D.N.Y. Nov. 23, 2004) (quoting *Shugrue v. Air Line Pilots Ass'n Int'l (In re Ionosphere Clubs, Inc.*), 922 F.2d 984, 995 (2d Cir. 1990)). "Consideration is 'substantial and material' when the case requires the bankruptcy judge to make a 'significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes.'" *Picard v. JPMorgan Chase Bank, N.A.*, 2011 WL 2119720, at *3 (quoting *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991)). Notably,

[9] Motions to withdraw the reference are properly heard in the district court. *See* Fed. R. Bankr. P. 5011(a).

"[w]here matters of first impression are concerned, the burden of establishing a right to mandatory withdrawal is more easily met." *Picard v. JP Morgan Chase Bank, N.A.*, 2011 WL 2119720, at *3. Nonetheless, in determining whether withdrawal of the reference is mandatory, the Court does not need to evaluate the merits of the parties' claims; instead "it is sufficient for the Court to determine that the proceeding will involve consideration of federal non-bankruptcy law." *Id.* Such withdrawal is meant to "assure that an Article III judge decides issues calling for more than routine application of [federal laws] outside the Bankruptcy Code." *In re Enron Corp.*, 2004 WL 2711101, at *2.

Here, the important issues of SIPA interpretation – including the Trustee's standing, the applicability of 546(e) and the extraterritorial reach of the action – and the preemption of his common law claims under SLUSA require exactly the substantial and material consideration of non-Bankruptcy Code federal law that mandates withdrawal of the reference, as Judges Rakoff and McMahon have already held. The application of federal non-bankruptcy law required to address the issues of SIPA interpretation and SLUSA preemption are not matters of which the Bankruptcy Court customarily or often deals, and are precisely the types of disputes and issues that this Court is "better equipped to determine." *AT&T Co. v. Chateaugay Corp.*, 88 B.R. 581, 583 (S.D.N.Y. 1988). In addition, withdrawal of the reference is mandatory because the bankruptcy court cannot determine the Trustee's claims against the FIM Defendants without substantial interpretation of federal law concerning the bankruptcy court's subject matter jurisdiction and constitutional authority over these claims under the U.S. Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

Alternatively, withdrawal of the reference on a permissive basis would be appropriate in order to promote judicial efficiency, and to prevent delay and cost to the parties given the

unsettled nature of the bankruptcy court's jurisdiction. Given prior holdings finding mandatory withdrawal on precisely the same issues presented here, and in the interest of judicial efficiency, the FIM Defendants limit their discussion to the issue of mandatory withdrawal. Nonetheless, permissive withdrawal of the reference for cause would also be appropriate given the circumstances and issues presented here. *See, Picard v. HSBC Bank PLC*, 450 B.R. 406, 409 n.3 (S.D.N.Y. 2011). *See also In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir.1993).[10]

1. The Trustee's Claims Raise Substantial Issues Requiring Interpretation of SIPA

a. Whether the Trustee Has Standing Under SIPA

Multiple judges in this District have withdrawn the reference to address the Trustee's standing under SIPA to bring state common law claims similar to those alleged here, finding that the issue of standing raises difficult issues of non-bankruptcy federal law. *See, e.g., Picard v. HSBC*, 450 B.R. at 410 (quoting 28 U.S.C. § 157(d)) ("A substantial issue under SIPA is therefore, almost by definition, an issue 'the resolution of [which] requires consideration of both title 11 and other laws of the United States.'"); *Picard v. Katz*, No. 11-cv-03605 (JSR) (withdrawing reference where "highly material issues of interpretation not just of bankruptcy law" but also "nonbankruptcy law, securities law of SIPA" were raised); *Picard v. JPMorgan Chase Bank, N.A.*, 2011 WL 2119720, at *7 ("[A]n issue that requires significant interpretation of SIPA undoubtedly requires consideration of laws other than Title 11."). Although the FIM Defendants will substantively argue the dismissal of similar claims is warranted here, it is sufficient for the purposes of this motion to address the federal non-bankruptcy law required in addressing the Trustee's lack of standing.

[10] Although the FIM Defendants have not fully briefed the issue of permissive withdrawal, the FIM Defendants reserve the right to fully brief the issue if mandatory withdrawal is not granted.

Standing to bring any claim in a federal court is controlled by federal law. *See Shearson Lehman Hutton, Inc., v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) (holding that prudential considerations deprived a trustee from even having standing to bring in federal court a common law claim that is clearly defeated by the doctrine of *in pari delicto*). In an ordinary bankruptcy case, however, a 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." *Wagoner*, 944 F.2d at 118 (citing *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 434 (1972)). Resolution of this issue requires significant consideration of SIPA – which appears in title 15 of the United States Code, part of the federal securities laws – making withdrawal mandatory under 28 U.S.C. § 157(d). Therefore, for the purposes of the mandatory withdrawal it is sufficient to recognize that resolution of the issue will require significant consideration and interpretation of SIPA. Thus, mandatory withdrawal of the reference is required.

b. The Applicability of Section 546(e) Safe Harbor

To resolve this action will also require significant interpretation of SIPA in order to determine whether the Section 546(e) safe harbor in the Bankruptcy Code applies under SIPA. In the Complaint, the Trustee seeks to avoid, pursuant to sections 544, 547, 548, 550, and 551 of the Bankruptcy Code, an unspecified value of transfers allegedly received by the FIM Defendants as subsequent transferees. Compl. Count Nine ¶¶ 331-337. However, the alleged transfers are not voidable due to the "safe harbor" of section 546(e) of the Code, which protects from avoidance the transfers at issue and prevents the subsequent transfers from being recovered from the FIM Defendants. Specifically, section 546(e) bars the avoidance of transfers made in connection with securities contracts—here, the securities transactions entered into between BLMIS and the Funds. Moreover, because the transfers to the Funds were made to settle

securities transactions, they are also protected from avoidance by the "settlement payment" safe harbor of section 546(e). In other adversary proceedings, the Trustee has argued that the 546(e) safe harbor does not apply under SIPA. *See*, *e.g.*, *Picard v. Katz*, No. 11-cv-03605 (JSR) (granting motion to withdraw the reference, in part, based on the issue of whether the Section 546(e) safe harbor applies under SIPA). The Trustee's anticipated argument, that the 546(e) safe harbor does not limit a SIPA Trustee's avoidance powers, because application of 546(e) would be "inconsistent with SIPA," will require the court to resolve significant issues regarding the interpretation of SIPA, a non-bankruptcy statute. *See* Trustee's Opp. Br. at 35-36, *Picard v. Merkin et al.*, Adv. Pro. No. 09-1182 (BRL) (Bankr. S.D.N.Y. Feb. 24, 2010) (citing 15 U.S.C. § 78fff(b)). *See also Picard v. Katz*, No. 11-cv-03605 (JSR) (withdrawing reference where "highly material issues of interpretation not just of bankruptcy law" but also "nonbankruptcy law, securities law of SIPA" were raised); *Picard v. HSBC Bank PLC*, 450 B.R. at 410 (quoting 28 U.S.C. § 157(d)) ("A substantial issue under SIPA is therefore, almost by definition, an issue 'the resolution of [which] requires consideration of both title 11 and other laws of the United States.'"); *Picard v. JPMorgan Chase Bank, N.A.*, 2011 WL 2119720, at *7 ("[A]n issue that requires significant interpretation of SIPA undoubtedly requires consideration of laws other than Title 11.").

c. The Extraterritorial Application of the Bankruptcy Code

In addition, resolving the Trustee's claims against the FIM Defendants will require significant interpretation of SIPA and the presumption against extraterritoriality under *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). The question of whether the presumption against extraterritorial application of U.S. laws bars the Trustee's avoidance claims will be one of the critical issues of federal non-bankruptcy law that a court must resolve and that may

dispose of the Trustee's subsequent transfer claims against the FIM Defendants in their entirety. Withdrawal is mandatory for this reason alone.

Resolution of this issue will necessarily require resolution of federal non-bankruptcy law as well as issues of first impression. Even before *Morrison*, courts had found that certain avoidance provisions in the Bankruptcy Code did not apply extraterritorially. *In re Maxwell Commc'n Corp.*, 186 B.R. 807, 818 (S.D.N.Y. 1995) (pre-*Morrison* decision, holding that presumption against extraterritoriality prevented application of § 547 of the Bankruptcy Code to foreign transfers). In *Morrison*, the Supreme Court emphasized that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." 130 S. Ct. at 2878. SIPA contains no clear indication of an extraterritorial application (and thus has none), and to the extent that SIPA incorporates by reference certain avoidance provisions of the Bankruptcy Code, those provisions also contain no clear indication of an extraterritorial application (and thus have none).

Here, the Trustee alleges that Messrs. Grosso and Ceretti, both Italian citizens residing in the United Kingdom, and FIM Limited and FIM Advisers, both incorporated under the laws of the United Kingdom, received certain fees either directly or indirectly[11] from KML, a corporation organized under the laws of Bermuda, which in turn had received certain unspecified management fees from foreign investors in the Kingate Funds, both organized under the laws of the British Virgin Islands (Compl. ¶¶ 19, 21, 49, 50, 57, 61, 65, 68, 70). These transfers were clearly extraterritorial.

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[11] The Trustee has asserted that Messrs. Grosso and Ceretti received transfers of fees as the ultimate beneficiaries of certain entities that received transfers directly from KML. Those entities are The Ashby Trust, The El Prela Trust, Alpine Trustees Limited, Port of Hercules Trustees Limited, First Peninsula Trustees Limited, El Prela Group Holding Services Limited, Ashby Holding Services Limited, Ashby Investment Services Limited, and El Prela Trading Investments Limited. *See* Compl. ¶¶ 75-85. All of these entities are incorporated or organized in BVI or Liberia, some with administrative offices in Monaco. *Id.*

In order to resolve these claims, a court will need to determine whether SIPA applies extraterritorially. Moreover, this is an issue of first impression that requires significant interpretation of SIPA, and is a task that must be carried out by an Article III court. *See Bear, Stearns Sec. Corp. v. Gredd*, No. 01 Civ. 4379 (NRB), 2001 WL 840187, at *2 (S.D.N.Y. July 25, 2001) (quoting *Mishkin*, 220 B.R. at 796 ("'[W]here matters of first impression are concerned, the burden of establishing a right to mandatory withdrawal is more easily met.'").

2. The Trustee's Claims Raise Substantial Issues Regarding Whether They Are Preempted by SLUSA

Although mandatory withdrawal of the reference is warranted due to the standing issue alone, recent decisions also are instructive as to the thorough analysis of SLUSA, a federal non-bankruptcy statute, which will be required to determine whether the Trustee's common law claims are preempted. *HSBC Bank*, 2011 WL 1544494, at *5; *JPMorgan*, 2011 WL 2119720, at *4-7.[12] Congress enacted SLUSA in 1998 to prevent securities plaintiffs from attempting to circumvent the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995. In relevant part, SLUSA provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
> (A) a misrepresentation of a material fact in connection with the purchase or sale of a covered security; or
> (B) 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. § 78bb (f)(1).

[12] Judge Rakoff dismissed the Trustee's common law claims for lack of standing and did not address the issue of SLUSA. *Picard v. HSBC*, 450 B.R. at 409.

Here, most of the elements of SLUSA preemption are indisputably present: certain of the Trustee's claims are based on state common law; he alleges misrepresentations of material fact by BLMIS; and those misrepresentations were "in connection with the purchase or sale of a covered security." In prior cases, the Trustee's argument has focused on whether each of his lawsuits is a "covered class action." SLUSA defines a "covered class action" as "any single lawsuit in which . . . damages are sought on behalf of more than 50 persons or prospective class members." 15 U.S.C. § 78bb (f) (5) (B). Despite the Trustee's arguments to the contrary that he is only "one person" seeking damages, the Trustee's claims amount to a class action "on behalf of" thousands of BLMIS customers, thereby implicating SLUSA. Thus, as Judge McMahon explained in determining that mandatory withdrawal of the reference was required as to this issue: "[t]he Trustee misses the point." *JPMorgan*, 2011 WL 2119720, at *5. Further, there is little guidance in the Second Circuit addressing the definition of a "covered class action" in these circumstances. *Id.*

Irrespective of the Trustee's possible arguments against SLUSA preemption, the determination of whether SLUSA preempts the Trustee's claims will require careful analysis of SLUSA's language, purpose, and history, and consideration of the interpretation given to SLUSA by the district court. Accordingly, withdrawal of the reference is required.

3. The Trustee's Claims Raise First-Impression Issues under *Stern v. Marshall*

Under *Stern v. Marshall*, a bankruptcy court cannot determine a private law claim that is independent of the claims adjudication process. 131 S. Ct. at 2617-20. Otherwise, the bankruptcy court would be "exercis[ing] the essential attributes of judicial power that are reserved for Article III Courts." *Id.* at 2619 (internal quotations omitted). Thus, a bankruptcy judge may hear claims tied to the claims allowance process, but may not hear those that seek to

augment a bankruptcy estate. *Granfinanciera v. Nordberg*, 492 U.S. 33, 56 (1989). Because none of the FIM Defendants filed proofs of claim in the underlying bankruptcy case (*see* Compl. ¶¶ 274, 339), there is no possibility that the determination of the claims will implicate the claims adjudication process, and the Trustee's state common law claims, and possibly the Trustee's fraudulent conveyance claims, are private law matters under *Stern v. Marshall*. *See* 131 S.Ct. at 2613; *see also Samson v. Blixseth, et al. (In re Blixseth)*, No. 10-00088, 2011 WL 3274042, at *11 (Bankr. D. Mont. Aug. 1, 2011) (trustee's fraudulent conveyance claim is essentially a common law claim attempting to augment the estate and must be adjudicated by an Article III court). Moreover, given the unsettled nature of a bankruptcy court's constitutional authority to determine these claims, withdrawal of the reference is required. In addition, permissive withdrawal would promote judicial efficiency and is appropriate.

CONCLUSION

For the foregoing reasons, this Court should withdraw the reference to the Bankruptcy Court under 28 U.S.C. § 157(d), and this adversary proceeding should be heard in the District Court.

Dated: New York, New York
October 7, 2011

By: /s/ Jodi Kleinick

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