Exhibit 6

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Carmine D. Boccuzzi, Jr.
David Y. Livshiz
One Liberty Plaza
New York, New York 10006
Attorneys for Citibank (Switzerland) AG

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION,	:	Adv. Pro. No. 08-01789 (BRL)
Plaintiff-Applicant,	:	
v.	:	SIPA Liquidation
BERNARD L. MADOFF INVESTMENT SECURITIES LLC,	:	
Defendant.	:	(Substantively Consolidated)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,	:	Adv. Pro. No. 12-01700 (BRL)
Plaintiff,	:	**ORAL ARGUMENT REQUESTED**
v.	:	
CAPRICE INTERNATIONAL GROUP INC., CITIBANK (SWITZERLAND) LTD., ERIC SCHIFFER D/B/A/ DESERT ROSE LTD, PINE CLIFFS INVESTMENT LIMITED, CENARD INVESTMENTS LTD, AND ADVANCED STRATEGIES LTD.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR AN ORDER WITHDRAWING THE REFERENCE

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Defendant Citibank (Switzerland) AG ("Citibank Switzerland) 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 (the "Bankruptcy Rules") to withdraw the reference of the above-captioned action to the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").[1]

PRELIMINARY STATEMENT

In this action, the liquidating trustee (the "Trustee") of Bernard L. Madoff Investment Securities LLC ("BLMIS") improperly seeks to recover under the Bankruptcy Code and New York Debtor and Creditor Law ("NYDCL") approximately $24.5 million in alleged subsequent transfers to Citibank Switzerland and other defendants. Specifically, the Trustee alleges that ZCM Asset Holding Company (Bermuda) LLC ("ZCM") received transfers from Fairfield Sentry Limited ("Fairfield Sentry") of monies that Fairfield Sentry received from BLMIS. The Complaint further alleges that those transfers were subsequently received by Citibank Switzerland and other defendants.

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[1] Citibank Switzerland does not concede the truthfulness of the Trustee's allegations in the complaint (the "Complaint" or "Compl."), and Citibank Switzerland will respond to the substance of these allegations at the appropriate time. Citibank Switzerland makes this motion without prejudice to or waiver of any rights or defenses, including without limitation any defenses based on the lack of jurisdiction of the District Court or the Bankruptcy Court. Unless otherwise indicated, capitalized terms have the meaning assigned to them in the Complaint.

This proceeding is not subject to Judge Lifland's March 5, 2012 order (the "March 5 Order") setting a presumptive deadline of April 2, 2012 for motions to withdraw the reference because the Trustee did not commence this proceeding until June 6, 2012 and Citibank Switzerland was not served until August 2012, well after the April 2, 2012 deadline had expired. At a minimum, the fact that this action was commenced after the expiration of the April 2 deadline constitutes cause for an exception to the deadline, as contemplated by the March 5 Order. *See* Administrative Order Establishing Deadline for Filing Motions to Withdraw the Reference, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff)*, No. 08-01789 (BRL) (Bankr. S.D.N.Y. Mar. 15, 2012), ECF No. 4707.

Withdrawal of the reference of this action is mandatory because, as this Court has already ruled in hundreds of substantially similar cases, resolution of these claims will require significant interpretation of non-bankruptcy federal law, which must be determined by an Article III court. *See* 28 U.S.C. § 157(d). The Court has already granted numerous motions to withdraw the reference in similarly situated cases and has set consolidated briefing schedules concerning the issues addressed in this motion: (1) whether section 546(e) of the Bankruptcy Code applies to the Trustee's avoidance claims; (2) whether the "willful blindness" standard under SIPA governs a subsequent transferee's good faith defense; (3) whether, under *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the Trustee's claims must be adjudicated by an Article III court; (4) whether SIPA can apply extraterritorially in light of *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); and (5) whether Citibank Switzerland can be bound by the Trustee's consent judgment against Fairfield Sentry, to which Citibank Switzerland was not a party. *See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y.), ECF Nos. 119, 167; *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR), 2012 WL 1276383 (S.D.N.Y. Apr. 13, 2012). Citibank Switzerland consents to be subject to these Orders regarding consolidated briefing and adopt the consolidated briefing already filed with respect to these issues.

First, as this Court has repeatedly ruled, the Trustee's purported claims under the Bankruptcy Code raise significant and novel issues under the federal securities laws. Specifically, the Trustee contends that SIPA, a non-bankruptcy law, permits him to invoke the avoidance provisions of the Bankruptcy Code to avoid certain transfers from BLMIS to Fairfield Sentry, and then to recover such transfers from Citibank Switzerland, a subsequent transferee, despite the "safe harbor" provided by Section 546(e) of the Bankruptcy Code that protects the

transfers from avoidance. This Court has already held in multiple nearly identical cases that consideration of this interaction between SIPA and Section 546(e) of the Bankruptcy Code requires withdrawal of the reference. Order at 6-7, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y. May 16, 2012), ECF No. 119 (withdrawing the reference in approximately 100 adversary proceedings to decide issues related to the application of Section 546(e)); *Picard v. Katz*, No. 11-cv-3605 (JSR), 2011 WL 7267859 (S.D.N.Y. July 5, 2011) (granting motion to withdraw the reference, in part, based on the issue of whether the Section 546(e) safe harbor applies under SIPA); *see also Picard v. Flinn Invs., LLC*, 463 B.R. 280, 288 (S.D.N.Y. 2011) (withdrawing the reference to address, among other issues, "whether, in light of this Court's decision in *Picard v. Katz*, 11 U.S.C. § 546(e) applies [to a SIPA case], limiting the Trustee's ability to avoid transfers").

Second, determination of what standard governs a subsequent transferee's good faith defense to a recovery action by the Trustee requires substantial interpretation of non-bankruptcy federal law. This Court has already held that these issues of non-bankruptcy federal law warrant withdrawal of the reference in cases involving hundreds of similarly-situated defendants. *See* Order, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y. May 31, 2012), ECF No. 154.

Third, withdrawal of the reference is mandatory because the Bankruptcy Court cannot determine the Trustee's claims against Citibank Switzerland without substantial interpretation of non-bankruptcy federal law concerning the Bankruptcy Court's subject matter jurisdiction and constitutional authority under the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). This Court has also ruled in hundreds of similar cases that this issue too warrants withdrawal of the reference. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec.*

LLC (In re Madoff Sec.), 2012 WL 1276383 (withdrawing the reference in approximately 340 adversary proceedings to decide issues relating to *Stern v. Marshall*); *Flinn Invs.*, 463 B.R. at 288 (withdrawing the reference on the basis of *Stern v. Marshall*).

Fourth, the Trustee's claims under the Bankruptcy Code also seek to recover transfers made by the Fairfield Sentry to ZCM and subsequently to Citibank Switzerland pursuant to SIPA, despite the fact that many of these transfers took place entirely outside of the United States. Resolving many of these claims will therefore require determining whether SIPA can apply extraterritorially in light of *Morrison*. *See* 130 S. Ct. 2869. Citibank Switzerland will show it does not. This Court has also withdrawn the reference on this issue in several cases. Order at 6-7, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y. May 15, 2012), ECF No. 167.

Fifth, determining whether Citibank Switzerland can be bound by the Trustee's consent judgment against Fairfield Sentry, to which Citibank Switzerland was not a party, will require significant interpretation of non-bankruptcy federal law. In particular, the Trustee's apparent intention to rely on the consent judgment entered in its initial transferee suit against Fairfield Sentry as evidence that the subsequent transfers from Fairfield Sentry have been avoided as required under section 550(a) raises a serious due process concern that will require substantial consideration of non-bankruptcy law, and therefore mandates the withdrawal of the reference. Furthermore, this Court has already withdrawn the reference on this issue in numerous cases. Order at 2-6, *Picard v. Citibank, N.A. et al.*, No. 12-mc-00115 (JSR) (S.D.N.Y. July 3, 2012), ECF No. 214; Order, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y. Aug. 22, 2012), ECF No. 314.

Finally, even if withdrawal on these grounds were not mandatory, judicial

efficiency and uniformity concerns warrant permissive withdrawal. *See id.*

For all of these reasons collectively, and each of them individually, this Court should withdraw the reference to the Bankruptcy Court so that an Article III judge may decide these significant non-bankruptcy federal law issues.

BACKGROUND[2]

On June 6, 2012, the Trustee commenced this adversary proceeding in the Bankruptcy Court. The Trustee's Complaint alleges that Citibank Switzerland received from ZCM transfers of funds that ZCM received as subsequent transfers from Fairfield Sentry and that Fairfield Sentry received from BLMIS. The Complaint purports to assert claims for recovery under the Bankruptcy Code and NYDCL of alleged subsequent transfers Citibank Switzerland received. Declaration of David Y. Livshiz in Support of Citibank (Switzerland) AG's Motion to Withdraw the Reference to the Bankruptcy Court ("Livshiz Decl.") Ex. A (Compl. ¶¶ 50-54). The Trustee's allegations against Citibank Switzerland are baseless.

The Trustee commenced an action against Fairfield Sentry on May 18, 2009. The Trustee's complaint against Fairfield Sentry sought to avoid transfers Fairfield Sentry received from BLMIS. Livshiz Decl. Ex. A (Compl. ¶ 42).

ARGUMENT

An amended standing Order of this Court, dated February 1, 2012, automatically refers to the Bankruptcy Court all Title 11 cases and proceedings commenced in this district. Yet, 28 U.S.C. § 157(d) provides for mandatory and discretionary withdrawal of the reference as follows:

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[2] The facts summarized in this Background section are based on the allegations in the Trustee's Complaint, which Citibank Switzerland does not accept as true.

> 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 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). Section 157(d) applies in SIPA liquidation proceedings. *See, e.g.*, *Picard v. HSBC Bank PLC*, 450 B.R. 406, 410 (S.D.N.Y. 2011) (withdrawing the reference of an adversary proceeding to a SIPA liquidation requiring "substantial and material" consideration of SIPA and SLUSA); *Picard v. JPMorgan Chase & Co.*, 454 B.R. 307, 311 (S.D.N.Y. 2011); *Mishkin v. Ageloff*, 220 B.R. 784, 795-98 (S.D.N.Y. 1998).

Withdrawal is mandatory where, as here, "substantial and material consideration of non-Bankruptcy Code federal [law] is necessary for the resolution of the proceeding." *Shugrue v. Air Line Pilots Ass'n Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 995 (2d Cir. 1990) (citation omitted); *see also City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991) (withdrawal is mandatory where the proceeding requires "significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes"). In other words,

> [s]ection 157(d) reflects Congress's perception that specialized courts should be limited in their control over matters outside their areas of expertise. This provision also assures litigants that under certain circumstances their assertion of a federally created right will be considered outside the narrow confines of a bankruptcy court proceeding by a district court, which considers laws regulating interstate commerce on a daily basis and are "better equipped to determine them than are bankruptcy judges.

AT&T Co. v. Chateaugay Corp., 88 B.R. 581, 583 (S.D.N.Y. 1988) (quoting 1 *Collier on Bankruptcy* ¶ 3.01 at 3-53 (15th ed. 1986)). In determining whether withdrawal of the reference is mandatory, a district court "need not evaluate the merits of the parties' positions," but rather

need only decide whether the proceeding will involve "substantial and material consideration" of non-bankruptcy federal law. *Bear, Stearns Sec. Corp. v. Gredd*, No. 01-cv-4379 (NRB), 2001 WL 840187, at *3-4 (S.D.N.Y. July 25, 2001) (internal quotations and citations omitted).

The "substantial and material consideration" test does not require that an issue be one of first impression to warrant mandatory withdrawal. *See JPMorgan*, 454 B.R. at 311. Instead, as Judge McMahon noted in granting a motion to withdraw the reference in *Picard v. JPMorgan Chase & Co.*,"[r]egardless of a bankruptcy court's familiarity with a statute outside of Title 11, the requirements for mandatory withdrawal are satisfied if the proceeding requires consideration of a law outside of Title 11." *Id.* at 316.

Applying these standards, and for the reasons stated below, this Court should withdraw the reference of this action to the Bankruptcy Court.

POINT I

THE APPLICATION OF SECTION 546(e) OF THE BANKRUPTCY CODE IN THE CONTEXT OF THIS SIPC PROCEEDING RAISES SUBSTANTIAL ISSUES OF NON-BANKRUPTCY FEDERAL LAW

The resolution of this action will require significant interpretation of SIPA to determine whether the Section 546(e) safe harbor, which immunizes from avoidance certain transactions deemed preference payments and certain transactions made more than two years prior to a debtor's bankruptcy, applies in a SIPA liquidation. If this safe harbor applies, as this Court has already repeatedly ruled it does, as a matter of law the Trustee cannot avoid the alleged payments made from BLMIS to Fairfield Sentry as preference payments or constructive fraudulent transfers. Nor could the Trustee recover under state law avoidance statutes. *Picard v. Katz*, 462 B.R. 447, 451-52 (S.D.N.Y. 2011) (dismissing constructive fraudulent transfer and state law avoidance claims as barred by the Section 546(e) safe harbor); *Picard v. Greiff*, No. 11-

cv-3775, 2012 WL 1505349, at *6 (S.D.N.Y. Apr. 30, 2012); *Picard v. Avellino*, 469 B.R. 408, 412 (S.D.N.Y. 2012). Citibank Switzerland plans to assert the Section 546(e) safe harbor with respect to several of the Trustee's underlying claims.

Section 546(e) of the Bankruptcy Code provides that a "trustee may not avoid a transfer . . . that is a transfer made by or to . . . [a] stockbroker [or] financial institution . . . in connection with a securities contract . . . ." 11 U.S.C. § 546(e). Section 546(e) is one of several Bankruptcy Code provisions that preclude the avoidance of certain transfers and seek to balance the avoidance powers of the Trustee with the need to protect the securities and financial markets from disruption. As the Second Circuit Court of Appeals recently noted, these goals require that the protections of the safe harbors be interpreted "extremely broad[ly]." *Enron Creditors Recovery Corp. v. Alfa*, 651 F.3d 329, 334 (2d Cir. 2011) (citation omitted); *see also Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.)*, 453 B.R. 201, 211 (Bankr. S.D.N.Y. 2011) ("It is appropriate to resolve a dispute over the legal application of a safe harbor provision in the context of a dispositive motion . . . . Indeed, concluding as a general matter that all safe harbor disputes must proceed to trial would effectively undermine the objective legal certainty in securities transactions that motivated Congress' adoption of the safe harbor provisions.").

Applied here, Section 546(e) protects from avoidance most, if not all, of the alleged transfers by BLMIS to Fairfield Sentry as preferences or constructive fraudulent transfers. Moreover, because Section 550 only permits recovery of "*avoided*" transfers, the Trustee cannot recover the value of any such alleged preferential or constructive fraudulent transfers from a subsequent transferee, such as Citibank Switzerland. *See* 11 U.S.C. § 550 ("to the extent that a transfer *is avoided* . . . the trustee may recover . . . the value of such property"

from a subsequent transferee) (emphasis added).

In an attempt to escape the application of this safe harbor, the Trustee will likely argue, as he has consistently done elsewhere, that the safe harbor does not apply in any SIPA liquidation. *See, e.g.*, Trustee's Mem. In Opp. to Trotanoy's Mot. to Withdraw the Reference at 13 n.10, *Picard v. Trotanoy Investment Co., et al.*, No. 11-cv-07112 (JSR) (S.D.N.Y. Jan. 19, 2012), ECF No. 16; Trustee's Mem. In Opp. to Def.'s Mot. to Withdraw the Reference, at 14-15 & n.9, *Picard v. Banco Bilbao Vizcaya Argentaria, S.A.*, No. 11-cv-07100 (JSR) (S.D.N.Y. Jan. 31, 2012), ECF No. 15; Trustee's Mem. In Opp. to the Sterling Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J. at 90, *Picard v. Katz*, No. 10-5287 (BRL) (Bankr. S.D.N.Y. May 19, 2011), ECF No. 49. Addressing that argument will require a court to decide significant issues concerning the interpretation of SIPA, a non-bankruptcy statute.

Accordingly, a district court is the only proper forum for this issue, and this Court should withdraw the reference of this action for that reason. *See, e.g.*, Order at 6-7, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y. May 16, 2012), ECF No. 119 (withdrawing the reference on this and other grounds); Order, *Picard v. Katz*, No. 11-3605 (JSR) (S.D.N.Y. July 5, 2011), ECF No. 19 (withdrawing the reference on the issue of whether the Section 546(e) safe harbor applies in a SIPA liquidation); *see also Flinn Invs.*, 463 B.R. at 288 (same); *In re Dana Corp.*, 379 B.R. 449, 459 (S.D.N.Y. 2007) (withdrawal is mandatory "even where a non-bankruptcy federal statute only 'arguably conflicts' with the Bankruptcy Code"). Citibank Switzerland therefore respectfully requests that the Court grant withdrawal and allow Citibank Switzerland to join in the consolidated briefing on this issue. *See* Order, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y. May 16, 2012), ECF No. 119.

POINT II

WHETHER THE "WILLFUL BLINDNESS" STANDARD UNDER SIPA GOVERNS A SUBSEQUENT TRANSFEREE'S GOOD FAITH DEFENSE RAISES SUBSTANTIAL ISSUES OF NON-BANKRUPTCY FEDERAL LAW

Additionally, resolution of the Trustee's claim against Citibank Switzerland will require significant interpretation of federal non-bankruptcy law to determine what standard governs a subsequent transferee's good faith defense to a recovery action by the Trustee, as the District Court has determined in other similar cases. *See, e.g.*, *Picard v. Avellino*, 469 B.R. 408, 412 (S.D.N.Y. 2010) (consolidated withdrawal opinion; withdrawing reference in *Picard v. Shapiro*, 11 Civ. 5835 (JSR), and *Picard v. Greenberger*, 11 Civ. 4928 (JSR), to determine whether pleadings met the "willful blindness" standard in Madoff-related litigation).

In determining that neither the securities laws generally nor SIPA in particular impose a duty on customers to investigate brokers, and that "willful blindness" (rather than some form of "inquiry notice") is the appropriate standard against which to test a "good faith" defense, the Court in *Katz* concluded that the securities laws, of which SIPA is a part, inform the bankruptcy law. 462 B.R. at 455. Moreover, the *Katz* Court noted that a lack of due diligence "cannot be equated with a lack of good faith, at least so far as Section 548(c) is concerned as applied in the context of a SIPA trusteeship." *Id.*

Citibank Switzerland will contend that the same "willful blindness" standard applies to the "good faith" defense available to subsequent transferees under section 550(b). The decision in *Katz* anticipated this contention. *Picard v. Katz*, 466 B.R. 208, 214 (S.D.N.Y. 2012) ("[S]ince the Court concluded that the Trustee could avoid a transfer under § 548(a)(I)(A) (involving actual intent), it should have further concluded that the Trustee could also avoid *to the*

same extent subsequent transfers of the same funds under § 550." (emphasis added)). A subsequent transferee should not be held to a higher standard than initial transferees, especially because subsequent recipients are "much more likely to be innocent third parties." *Wasserman v. Bressman (In re Bressman)*, 327 F.3d 229, 236 n.2 (3d Cir. 2003) (internal quotation marks omitted). These are issues of non-bankruptcy federal law that this Court has already held warrant withdrawal of the reference in cases indistinguishable in relevant respects from this one. Indeed, this Court has already requested that the hundreds of similarly-situated defendants who have made this argument submit an order withdrawing the reference and setting a schedule for consolidated briefing. *See* Order, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR), ECF No. 154. Citibank Switzerland respectfully requests that the Court grant withdrawal of the reference and allow Citibank Switzerland to join in and adopt the consolidated briefing on this issue. *See, e.g.*, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y.), ECF Nos. 154, 197, 204; *Picard v. Franitza,* No. 12-mc-00115 (JSR), 2012 WL 2524513 (S.D.N.Y. June 26, 2012).

POINT III

ISSUES CONCERNING THE BANKRUPTCY COURT'S JURISDICTION UNDER *STERN V. MARSHALL* RAISE SUBSTANTIAL ISSUES OF NON-BANKRUPTCY FEDERAL LAW

The Supreme Court's ruling in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), and as applied recently by the district court in *Kirschner v. Agoglia, et al. (In re Refco)*, No. 11-cv-8250 (JSR), 2012 WL 1622496, at *4 (S.D.N.Y. May 9, 2012), that a bankruptcy court cannot address to final judgment private law claims independent of the claims adjudication process, will require a court to engage in substantial interpretation of unsettled non-bankruptcy federal law concerning

whether the Bankruptcy Court has jurisdiction and constitutional authority to hear this case.

The Trustee's claims to recover fraudulent transfers from Citibank Switzerland are private right claims. *See Stern*, 131 S. Ct. at 2614; *see also In re Refco*, 2012 WL 1622496, at *4. Several courts, including courts in this district, have concluded in light of *Stern* that a non-Article III court may not adjudicate fraudulent transfer claims that do not affect the debtor-creditor relationships at issue. *See, e.g.*, *In re Refco*, 2012 WL 1622496, at *4; *Adelphia Recovery Trust v. FLP Grp., Inc.*, No. 11-cv-6847 (PAC), 2012 WL 264180, at *5 (S.D.N.Y. Jan. 30, 2012); *Dev. Specialists, Inc. v. Akin Gump Strauss & Feld LLP*, 462 B.R. 457, 469 (S.D.N.Y. 2011); *Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 338 (Bankr. W.D. Mich. 2011). Because Citibank Switzerland did not file proofs of claim in the BLMIS SIPA liquidation, there is no possibility that determination of the Trustee's claims against Citibank Switzerland will implicate the claims adjudication process. The very purpose of the Trustee's Complaint is to recover millions of dollars only to augment the BLMIS estate, and the determination of any recovery against Citibank Switzerland is not relevant to the restructuring of the debtor-creditor relationships.

The Court should therefore withdraw the bankruptcy reference for this reason too, as it recently did in approximately 340 similar adversary proceedings. *See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR), 2012 WL 1276383 (S.D.N.Y. Apr. 13, 2012) (withdrawing the reference specifically to consider issues related to *Stern v. Marshall*); *see also Flinn Invs.*, 463 B.R. at 288. Citibank Switzerland respectfully requests that the Court grant withdrawal of the reference and allow Citibank Switzerland to join in and adopt the consolidated briefing on this issue. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y.),

ECF Nos. 78, 179; *See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, 2012 WL 1276383.

POINT IV

WHETHER SIPA APPLIES EXTRATERRITORIALLY RAISES SUBSTANTIAL ISSUES OF NON-BANKRUPTCY FEDERAL LAW

The resolution of the Trustee's claims also necessarily will require significant interpretation of SIPA and the presumption against its application extraterritorially under *Morrison*. 130 S. Ct. 2869. The Trustee alleges that Citibank Switzerland, a Swiss entity, received transfers from ZCM, a Bermuda entity, that received subsequent transfers from Fairfield Sentry, a British Virgin Islands entity, that received payments from their accounts with BLMIS. Livshiz Decl. Ex. A (Compl. ¶¶ 2, 23, 25). These transfers plainly occurred outside the United States. Whether *Morrison*'s presumption against extraterritorial application of U.S. law bars the Trustee's claims will be another critical issue of non-bankruptcy federal law that a court will need to determine and that will likely dispose of the Trustee's subsequent transfer claims against Citibank Switzerland. Withdrawal of the reference is mandatory for this reason too. This Court has previously withdrawn the reference on this ground and should do so here. Order at 6-7, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y. May 15, 2012), ECF No. 167; *see also* Order, *Picard v. Kohn*, No. 11-cv-01181 (JSR) (S.D.N.Y. Sept. 6, 2011), ECF No. 55 (withdrawing the reference to determine extraterritorial application of RICO). Citibank Switzerland respectfully requests that the Court grant withdrawal of the reference and allow Citibank Switzerland to join in and adopt the consolidated briefing on this issue. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-115 (JSR) (S.D.N.Y. June 7, 2012), ECF No. 167.

POINT V

WHETHER CITIBANK SWITZERLAND CAN BE BOUND BY THE TRUSTEE'S CONSENT JUDGMENT AGAINST FAIRFIELD SENTRY, TO WHICH CITIBANK SWITZERLAND WAS NOT A PARTY, REQUIRES SIGNIFICANT INTERPRETATION OF NON-BANKRUPTCY FEDERAL LAW

As noted above, section 550 of the Bankruptcy Code permits the Trustee to recover property or its value from a subsequent transferee only "to the extent that [the] transfer [to the initial transferee] *is avoided*." 11 U.S.C. § 550(a) (emphasis added). The Trustee commenced an avoidance action against Fairfield Sentry, the entity alleged to be the largest initial transferee in this action. However, that suit has not been pursued to judgment and none of the transfers alleged have been "avoided," because the Trustee elected to settle the action without avoiding the transfers. Livshiz Decl. Ex. A (Compl. ¶ 47); *see also* Livshiz Decl. Ex. B (Consent Judgment, *Picard v. Fairfield Sentry Ltd.*, No. 09-1239 (BRL) (Bankr. S.D.N.Y. July 13, 2011) ECF No. 109 (the "Consent Judgment")).

Citibank Switzerland was not a party to the Trustee's action against Fairfield Sentry, the settlement agreement terminating that action or the Consent Judgment. Livshiz Decl. Ex. B (Consent Judgment); *see also* Livshiz Decl. Ex. C (Settlement Agreement, *Picard v. Fairfield Sentry Ltd.*, No. 09-1239 (BRL) (Bankr. S.D.N.Y. May 9, 2011), ECF No. 69, Ex. A). The Consent Judgment did not avoid the initial transfers of approximately $3 billion from BLMIS to Fairfield Sentry under the Bankruptcy Code, the NYDCL or SIPA. *Id.*

Although this failure should doom the complaint under section 550, it appears that the Trustee nevertheless may intend to rely on the Consent Judgment as a proxy for the statutory

requirement that he has "avoided" the initial transfers.[3] *See* Livshiz Decl. Ex. A (Compl. ¶ 54). The merits of that tactic aside, establishing a critical element of the Trustee's claim against Citibank Switzerland on the basis of the Consent Judgment, to which it was not a party, would violate the constitutional guarantee that no person shall be deprived of property without due process of law. U.S. Const. Amend. V; *see also Dye v. Sachs (In re Flashcom, Inc.)*, 361 B.R. 519, 524 (Bankr. C.D. Cal. 2007). At a minimum, the Trustee's reliance on the Consent Judgment raises a serious due process concern that will require substantial consideration of non-bankruptcy law, and therefore mandates withdrawal of the reference.

Furthermore, this Court has already withdrawn the reference on this issue in numerous cases, and therefore Citibank Switzerland respectfully requests that the Court grant withdrawal of the reference and allow Citibank Switzerland to join in and adopt the consolidated briefing. Order at 2-6, *Picard v. Citibank, N.A. et al.*, No. 12-mc-00115 (JSR) (S.D.N.Y. July 3, 2012), ECF No. 214; Order, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y. Aug. 22, 2012), ECF No. 314.

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[3] The plain language of section 550 establishes that recovery is dependent on an initial transfer that was actually "avoided," not merely one that is theoretically "avoidable." Although some courts have relaxed the standard, the statute's plain meaning has been faithfully applied in a line of decisions holding that "in order to recover from a subsequent transferee the trustee must first have the transfer of the debtor's interest to the initial transferee avoided under § 548." *In re Slack-Horner Foundries Co.*, 971 F.2d 577, 580 (10th Cir. 1992); *accord In re Allou Distribs. Inc.*, 379 B.R. 5, 19 (Bankr. E.D.N.Y. 2007); *In re Furs by Albert & Marc Kaufman, Inc.*, No. 03-41301, 2006 WL 3735621, at *8 (Bankr. S.D.N.Y. Dec. 14, 2006). *But see, e.g., In re Int'l Admin. Servs., Inc.*, 408 F.3d 689, 706 (11th Cir. 2005); *In re AVI, Inc.*, 389 B.R. 721, 735 (9th Cir. 2008); *In re M. Fabrikant & Sons, Inc.*, 394 B.R. 721, 741-43 (Bankr. S.D.N.Y. 2008) (noting split of authorities).

POINT VI

PERMISSIVE WITHDRAWAL OF THE REFERENCE IS ALSO WARRANTED

In addition to the above grounds for mandatory withdrawal, this action also meets the standard for permissive withdrawal. *See* 28 U.S.C. § 157(d). The relevant post-*Stern* inquiry as to withdrawal for cause is whether a bankruptcy court has authority to finally adjudicate the claims. *See Dev. Specialists, Inc.*, 462 B.R. at 466-67. This Court has already withdrawn the reference on this issue and ruled that the Bankruptcy Court does not have the authority under the Constitution to render final judgments as to claims that only seek to augment the bankruptcy estate without implicating the claims adjudication process. *See In re Refco*, 2012 WL 1622496, at *4; *see also Flinn Invs.*, 463 B.R. at 287-88 n.3 (on the issue of whether the bankruptcy court has authority to enter a final judgment, "the Court finds that the litigants' interest in having an Article III court resolve a difficult constitutional issue constitutes adequate cause."); *Avellino*, 469 B.R. at 412-13 (following *Flinn*). After that threshold determination, the prudential factors in *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1101 (2d Cir. 1993), of which "efficiency and uniformity" are of primary significance, likewise support withdrawal of the reference.

This Court has withdrawn the reference in hundreds of cases raising the same issues Citibank Switzerland raises here, and has ordered consolidated briefing on these issues in light of the number of parties raising them. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, 2012 WL 1276383. Withdrawing the reference as to Citibank Switzerland would not add any additional briefing of these issues, as Citibank Switzerland intends to join the consolidated briefing. The interests of efficiency and uniformity resoundingly support withdrawing the reference of this related action to the district court so that these issues

can be resolved in the same forum. *See Mishkin*, 220 B.R. at 800; *LTV Steel Co. v. City of Buffalo (In re Chateaugay Corp.)*, No. 00-9429 (SHS), 2002 WL 484950, at *8 (S.D.N.Y. Mar. 29, 2002); Order at 4-5, *Picard v. Citibank, N.A. et al.*, No. 12-mc-00115 (JSR) (S.D.N.Y. July 3, 2012), ECF No. 214 ("[O]ne court should resolve the defendants' motion, and the fact that this Court must withdraw some of the issues that defendants raise . . . means that resolution of the entirety of the defendants' motion can occur only here"); Order, *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-00115 (JSR) (S.D.N.Y. Aug. 22, 2012), ECF No. 314 (adopting *Picard v. Citibank, N.A. et al.* to withdraw the reference from the Bankruptcy Court in 42 actions).

Because the bankruptcy court may not finally adjudicate these claims, withdrawing the reference would avoid duplicative *de novo* review of the bankruptcy court's proposed findings of fact and conclusions of law. Therefore, this Court should withdraw the reference for cause. Permissive withdrawal is also justified because the Trustee's claims are subject to a jury trial right, *see Granfinanciera v. Nordberg*, 492 U.S. 33, 36 (1989), and bankruptcy judges are constitutionally prohibited from holding jury trials in matters in which they cannot enter a final judgment. *Orion*, 4 F.3d at 1101; *see also M. Fabrikant & Sons Inc. v. Long's Jewelers Ltd.*, No. 08-cv-1982, 2008 WL 2596322, at *3 (S.D.N.Y. June 26, 2008).

CONCLUSION

This action raises numerous issues that require significant interpretation of federal and constitutional law regarding subject matter jurisdiction, SIPA, and their relationship to the Bankruptcy Code. Accordingly, this Court should withdraw the reference of this action to the bankruptcy court for the resolution of these issues.

Dated: September 24, 2012
New York, New York

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: _____
Carmine D. Boccuzzi, Jr.

One Liberty Plaza
New York, New York 10006
(212) 225-2000
(212) 225-3999 (facsimile)
cboccuzzi@cgsh.com

Attorneys for Citibank (Switzerland) AG

Of Counsel:

David Y. Livshiz
Kerrin T. Klein