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 Bankruptcy Code Section 546(g))
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), et al., Defendants.	Case No. 11-cv-06878 (JSR)

MEMORANDUM OF LAW OF THE
SECURITIES INVESTOR PROTECTION CORPORATION
IN OPPOSITION TO DEFENDANT ABN AMRO BANK N.V.'S MOTION TO DISMISS
BASED ON SECTION 546(g) OF THE BANKRUPTCY CODE

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Pursuant to this Court's Orders of May 15, 2012 and May 31, 2012, and to Section 78eee(d) of the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa et seq., the Securities Investor Protection Corporation ("SIPC") submits this memorandum of law in opposition to the motion to dismiss of Defendant ABN Amro Bank N.V. (presently known as the Royal Bank of Scotland) ("ABN/RBS") based on Section 546(g) of the Bankruptcy Code (11 U.S.C.).

STATEMENT OF THE ISSUE

Whether Section 546(g) of the Bankruptcy Code (11 U.S.C.) - which applies only to transfers made "under or in connection with any swap agreement" and, by its express terms, does not apply to the recovery of avoided transfers under Bankruptcy Code Section 550 - has any application to the recovery claims against ABN of Irving H. Picard ("Trustee"), as trustee for the consolidated liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") and Bernard L. Madoff ("Madoff"), where: (1) none of the initial transfers that the Trustee seeks to avoid was made under or in connection with a swap agreement; and (2) the Trustee's claims for the recovery of subsequent transfers arise under Section 550, and are therefore exempt from Section 546(g)?

BACKGROUND AND SUMMARY OF THE ARGUMENT

Bankruptcy Code Section 546(g) creates a safe harbor that limits a bankruptcy trustee's power to avoid initial transfers made "under or in connection with any swap agreement" by or to a "swap participant" or a "financial participant." The section does not apply outside the stated context, however, and thus provides no relief with respect to transfers not connected with swap agreements. In addition, Section 546(g) does not limit a trustee's power under Section 550(a)(2) to recover an avoided transfer from a subsequent transferee. Thus, if Section 546(g) imposes no

barrier to the Trustee's avoidance of an initial transfer, then Section 546(g) imposes no barrier to his recovery of the transferred property, or the value thereof, from subsequent transferees.

In the present case, customer property stolen by BLMIS reached ABN through several distinct pathways. In one pathway, Rye Select Broad Market Prime Fund LP ("Prime Fund") and Rye Select Broad Market Fund LP ("Broad Market"), BLMIS feeder funds with accounts at BLMIS, withdrew substantial sums from those accounts. (See Amended Complaint ¶¶ 37, 38, 60, 62, 63.) BLMIS funded the withdrawals with stolen customer property, and both Prime Fund and Broad Market were thus initial transferees of such property. (Id. ¶¶ 60, 63.) Both Prime Fund and Broad Market used some of this stolen customer property to invest in Rye Select Broad Market XL Fund, LP ("Rye XL LP"), which never had an account with BLMIS. (Id. ¶¶ 34, 59-63.)

Rye XL LP made independent decisions to use proceeds from its investors, including, but not limited to, Prime Fund and Broad Market to fund swap agreements with third party leverage providers, including, but not limited to, ABN. (Amended Complaint ¶ 70.) On November 1, 2007, Rye XL LP and ABN entered into one such swap agreement ("Onshore Swap"), under the terms of which Rye XL LP was entitled to three times the return on a hypothetical investment in Broad Market, the swap agreement's reference fund. (Id. ¶¶ 70, 71.) As part of the agreement, Rye XL LP transferred to ABN a total of $87.5 million worth of collateral on various dates from the inception of the agreement through August 2008, and the amount of the hypothetical investment in Broad Market used to compute ABN's obligations under the agreement was fixed at the aggregate amount of the collateral provided by Rye XL LP. (See id. ¶¶ 70-73, 80-81.) Rye XL LP used stolen BLMIS Customer Property it received from Prime Fund and/or Broad Market to make these collateral transfers. (Id. ¶¶ 79-81.)

ABN was free to generate the funds necessary to meet its obligations under the Onshore Swap however it saw fit and, accordingly, could have invested the collateral that it received under the swap in other hedge funds, other securities, or even its own operations. (Amended Complaint ¶ 74.) ABN elected to attempt to generate the necessary funds, however, by using the collateral, together with its own funds in twice the amount of that collateral, to purchase partnership interests in Broad Market. (Id. ¶¶ 75, 76.) This investment in Broad Market created for ABN a perfect hedge ("Onshore Hedge") against its obligations to Rye XL LP under the Onshore Swap. (Id. ¶ 76.) On November 3, 2008, ABN made an independent decision, not required by, the Onshore Swap, to liquidate part of its Onshore Hedge by redeeming $1.4 million worth of its investment in Broad Market. (Id. ¶¶ 77, 82.) In order to fulfill ABN's redemption request, Broad Market used stolen customer funds that it withdrew from its BLMIS account. (Id. ¶ 82) ABN received those funds in a subsequent transfer from Broad Market. (Id.)

Transactions involving two other BLMIS feeder funds – Rye Select Broad Market Portfolio Limited ("Portfolio Limited Fund") and Rye Select Broad Market Insurance Portfolio, LDC ("Insurance Portfolio Fund") – followed a similar pattern. (Amended Complaint ¶¶ 39, 40.) These funds held accounts at BLMIS and made withdrawals therefrom. BLMIS funded these initial transfers with stolen customer property. (Id. ¶¶ 64-69.) Portfolio Limited Fund and Insurance Portfolio Fund then made independent decisions to use these stolen customer funds to invest in Rye Select Broad Market XL Portfolio, LP ("Rye XL Portfolio") and, toward that end, made transfers to Rye XL Portfolio on the dates and in the amounts alleged in the Amended Complaint. (See id.)

Like Rye XL LP, Rye XL Portfolio also made independent decisions at various times through December 11, 2008 to use proceeds from its investors, including, but not limited to,

Portfolio Limited Fund and Insurance Portfolio Fund, to fund swap agreements with third party leverage providers, including, but not limited to, ABN/RBS. (Amended Complaint ¶ 84.) Under the terms of these agreements, Rye XL Portfolio's swap counterparties were required to provide it with three times the return on a hypothetical investment in Portfolio Limited Fund. (Id.) On September 1, 2006, Rye XL Portfolio entered into such an agreement ("Offshore Swap") with ABN and, by amendment entered on September 1, 2007, extended the termination date of the agreement to September 30, 2009. (Id. ¶¶ 85, 98.) The Offshore Swap obligated ABN to provide Rye XL Portfolio three times the return on a hypothetical investment in Portfolio Limited Fund and fixed the amount of that hypothetical investment as the amount of collateral supplied by Rye XL Portfolio. (See id. ¶ 87.) Unlike the Onshore Swap, the Offshore Swap explicitly required ABN to generate the returns owed to Rye XL Portfolio by investing in Portfolio Limited Fund. (Id. ¶ 90.)

Over the life of the Offshore Swap, Rye XL Portfolio transferred $141 million in collateral to ABN, of which $74.6 million was stolen customer property fraudulently transferred from BLMIS to Portfolio Limited Fund. (Amended Complaint ¶ 97.) ABN used these funds, plus twice that amount of its own funds, to invest in Portfolio Limited Fund. (See id. ¶ 91.) Between October 1, 2008 and December 1, 2008, ABN redeemed $74.464 million worth of its investment in Portfolio Limited Fund. In order to fund these redemptions, Portfolio Limited Fund made withdrawals from its BLMIS account, withdrawals that were funded with stolen BLMIS customer property. Portfolio Limited Fund then transferred these stolen funds to ABN. (Id. ¶ 101.)

None of the initial transfers in the foregoing transactions – the transfers of stolen customer property by BLMIS to the feeder funds - were made under or in connection with any

swap agreement, and therefore none of them enjoy the protection of Section 546(g). The subsequent transfers of that property, including all of the transfers to ABN, are recoverable under Section 550(a)(2), and therefore also fall outside the protection of Section 546(g). Further, there is no basis for collapsing the initial and subsequent transfers in issue, and the only way to do so that would bring them within the Section 546(g) safe harbor would require the substitution of BLMIS for Rye XL LP or Rye XL Portfolio in the swap agreements with ABN. BLMIS was not a party to those agreements and may not even have known of them, and collapsing the initial and subsequent transfers thus would not reflect either the substance of the transactions or the knowledge and intent of the parties.

ARGUMENT

I. Summary of applicable law

A. Section 550(a) – recovery of property from a subsequent transferee

Bankruptcy Code Section 550(a) authorizes a bankruptcy trustee to recover property that is the subject of a transfer avoided under various provisions of the Bankruptcy Code, including Sections 544, 547, and 548. See 11 U.S.C. § 550(a). Under Section 550(a), once a trustee has avoided an initial transfer of property – which the trustee can do through one of the Bankruptcy Code's avoidance provisions – the trustee can then recover the transferred property, or its value, from either the initial transferee or "any immediate or mediate transferee of such initial transferee." Id.; Official Committee of Unsecured Creditors v. JP Morgan Chase Bank (In re Fabrikant & Sons, Inc.), 394 B.R. 721, 741 (Bankr. S.D.N.Y. 2008) ("The Bankruptcy Code separates the concepts of avoidance and recovery"). Section 550(a)(2) thus enables the trustee to reach property in the hands of a subsequent transferee without having to avoid each transfer in the chain of transactions through which the subsequent transferee acquired the property. See 11

U.S.C. § 550(a)(2). On the contrary, the trustee need only avoid the initial transfer, after which the trustee is then empowered by Section 550(a)(2) to recover that property from subsequent transferees. Cf., H.R. Rep. No. 95-595 at 375 (1977) ("Section 550 prescribes the liability of a transferee of an avoided transfer, and enunciates the separation between the concepts of avoiding a transfer and recovering from the transferee").

B. Section 546(g) – safe harbor from avoidance of initial transfer

Bankruptcy Code Section 546(g) exempts from the avoidance provisions of Sections 544, 545, 547, 548(a)(1)(B) and 548(b), transfers made to, or for the benefit of, swap or financial participants "under or in connection with any swap agreement." See 11 U.S.C. § 546(g). Congress enacted the provision in 1990, and broadened it in 2005 and 2006, for the same reason that it enacted Section 546(e) and the other safe harbors set forth in Section 546 – to protect the financial system from the potential for cascading insolvencies caused by the avoidance of transfers made pursuant to systemically-important financial contracts. See, e.g., In re Nat'l Gas Distrib., LLC, 556 F.3d 247, 252-54 (4th Cir. 2009); Edward R. Morrison & Joerg Riegel, Financial Contracts and the New Bankruptcy Code: Insulating Markets From Bankrupt Debtors and Bankruptcy Judges, 13 Am. Bankr. Instit. L. Rev. 641, 642 (2005) ("Morrison & Riegel").

Congress, however, never intended the safe harbors, including Section 546(g), to "protect transactions that themselves were assaults on the securities markets, as that would be a perversion of the statute's purpose." See Geltzer v. Mooney (In re MacMenamin's Grill Ltd.), 450 B.R. 414, 425 (Bankr. S.D.N.Y. 2011). Moreover, Congress limited the scope of the Section 546(g) safe harbor in ways of importance here. For instance, Section 546(g) has no application to claims brought under Section 548(a)(1)(A), which allows a bankruptcy trustee to avoid, inter alia, transfers of an interest of the debtor in property made within two years prior to the filing

date "with actual intent to hinder, delay or defraud" creditors of the debtor. See 11 U.S.C. §§ 546(g), 548(a)(1)(A).

Further, Section 546(g) applies only to transfers made under or in connection with a "swap agreement" by or to a "swap participant" or a "financial participant." See 11 U.S.C. § 546(g). These terms, all defined in the Bankruptcy Code, impose significant limitations on the scope of the section. See 11 U.S.C. §§ 101(22A), (53B), and (53C). Congress defined the term "swap agreement" by listing a host of instruments that qualify as such. See 11 U.S.C. § 101(53B). Although this definition is expansive, it is not without limit. As the Bankruptcy Court has noted on several occasions, the definition encompasses only bilateral agreements "whereby cash payments are exchanged periodically (or a lump sum at termination) between the parties based upon changes in the price of…[an] underlying asset or index as determined by an agreed-upon benchmark." Nisselson v. Empyrean Investment Fund, L.P. (In re Marketxt Holdings Corp.), 376 B.R. 390, 423 (Bankr. S.D.N.Y. 2007) (quoting J. Francis, W. Toy, and J. Whittaker, The Handbook of Equity Derivatives 527 (1995) (emphasis added)); Interbulk Ltd. v. Louis Dreyfus Corp. (In re Interbulk, Ltd.), 240 B.R. 195, 201 (Bankr. S.D.N.Y. 1999). A "swap agreement" is thus a classic derivatives contract, not an ordinary securities contract between a securities broker-dealer and its customer.

Likewise, an entity qualifies as a "swap participant" only if party to a "swap agreement" with the debtor, while the term "financial participant" extends only to clearing corporations and institutions with exceptionally large positions in financial contracts outstanding at any time during the 15-month period immediately preceding the filing date of the debtor's bankruptcy.[1]

[1] Section 546(f) provides the same defense with respect to repurchase transactions, while the definitional sections of the Code impose the same limitations on "repo participants" and

See 11 U.S.C. §§ 101(22A), (53C). In order to qualify as a financial participant, an entity must have had, within the 15-month period prior to the filing date, contracts or transactions with a total gross value of not less than $1 billion or gross mark-to-market positions of not less than $100 million. See 11 U.S.C. § 101(22A). Thus, with regard to transfers not made to or by the debtor, the definition reflects Congress's intent to confine the application of the Section 546(g) defense to parties and transactions of a magnitude sufficient to present risks to the financial system as a whole. Cf., Nat'l Gas Distrib., 556 F.3d at 252-254.

In the same vein, Section 546(g) shelters only those transfers made "under or in connection with" a swap agreement. See 11 U.S.C. § 546(g). While this language has been read broadly, it nonetheless imposes a critical limitation on the scope of Section 546(g); namely, that the section reaches only those transfers effectively between the parties to the relevant swap agreement, although formal transfer may be made by a third party custodian holding assets owned by one of those parties. See, e.g., Peterson v. Enhanced Investing Corp. (Cayman) Ltd. (In re Lancelot Investors Fund, L.P.), 467 B.R. 643, 655-56 (Bankr. N.D. Ill. 2012) (assets purchased by, and held by custodian for, "funds of funds" entities that were parties to equity option/swap agreements transferred to option/swap agreement counterparties to fund purchase of basket of securities made available through the agreement);[2] Casa de Cambrio Majapara S.A. de C.V. v. Wachovia Bank (In re Casa de Cambio Majapara S.A. de C.V.), 390 B.R. 595, 599 (Bankr. N.D. Ill. 2008) (prejudgment attachment by one swap party applied to assets owned by

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"financial participants," to whom the defense is available. See 11 U.S.C. §§ 101(22A), (46), (47), and 546(f).

[2]The Lancelot decision contains only limited information concerning the transactions at issue in the case. Further detail regarding those transactions is available in the document cited in the decision – the Memorandum in Support of KBC's Motion for Summary Judgment, Adv. No. 10-1980 (ECF No. 58) (Bankr. N.D. Ill.).

other swap party and held by third party custodians); Interbulk, Ltd. v. Louis Dreyfus Corp. (In re Interbulk, Ltd.), 240 B.R. 195, 202 (Bankr. S.D.N.Y. 1999) (same as Majapara). Cf., Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N.A. (In re Lehman Bros. Holdings Inc.), 469 B.R. 415, 442 (Bankr. S.D.N.Y. 2012) ("LBHI") (Section 546(e) safe harbor protected the use by one party to "securities contract" of collateral posted by the other party to cover that party's obligations under the contract). While such transfers may occur through the action of non-parties, ownership of the transferred assets moves from one swap party to the other as a result of the transfer. See Lancelot, 467 B.R. at 655-56; Majapara, 390 B.R. at 599; Interbulk, 240 B.R. at 202; LBHI, 469 B.R. at 442.

Further, the exclusion from the scope of Section 546(g) of transfers of the kind at issue here is fully consistent with the language and purpose of that section. When originally enacted in 1990, Section 546(g) applied only to transfers made "under" and "in connection with" a swap agreement. See Interbulk, 240 B.R. at 202 (1999); H.R. Rep. No. 101-484, at 5 (1990), reprinted in 1990 U.S.C.C.A.N. 223, 227 ("Section 103 of the bill amends section 546 of the Bankruptcy Code by adding a new subsection g, to prohibit a bankruptcy trustee from avoiding a transfer under a swap agreement entered into before the bankruptcy petition was filed" (emphasis added)); Eleanor Heard Gilbane, Testing the Bankruptcy Code Safe Harbors in the Current Financial Crisis, 18 Am. Bankr. Inst. L. Rev. 241, 270-71 (2010) ("Gilbane"). In this content, "'[u]nder' meant 'according to the method [specifically] prescribed' in the swap" agreement. Gilbane at 270. Thus, "if a transfer was not 'under,' or [made according to the method] *specifically prescribed in the swap* [agreement], it was not protected by section 546(g)." Id. (emphasis in original).

In 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (2005), Congress amended Section 546(g) by extending its protection to transfers made "under" or "in connection with" a swap agreement. In light of the limitation imposed by the language in the earlier version of Section 546(g), Congress's revision of that language in BAPCPA suggests that it merely intended to bring within the protection of Section 546(g) not only those transfers made using the mechanism contemplated in the swap agreement, but also those made using alternative methods, but having the same effect. In keeping with the narrowness of this revision, the cases decided under revised Section 546(g), at most, have extended the section to novel transfer methods, e.g., prejudgment attachment, not to transfers of assets not owned by one of the parties to the relevant swap agreement. See, e.g., Majapara, 390 B.R. at 599 (prejudgment attachment); cf., Interbulk, 240 B.R. at 202 (same). In short, Section 546(g) was designed to protect transfers made by swap parties for the purpose of fulfilling obligations imposed by the swap agreement between them, not transfers made by a non-party—here BLMIS—with no knowledge of, and no obligations under, such an agreement. For this reason, transfers of the latter kind are not made "under or in connection with" a swap agreement for purposes of Section 546(g), and therefore cannot be sheltered by that section.

Finally, Section 546(g) plainly does not include Bankruptcy Code Section 550 among the sections to which it provides a defense, and therefore cannot bar an action by a trustee to recover under Section 550(a)(2) from a subsequent transferee. 11 U.S.C. § 546(g). Thus, if the initial transfer of the subject property by the debtor is avoidable, Section 546(g) offers no protection to "any immediate or mediate transferee of such initial transferee." See 11 U.S.C. § 550(a)(2).

C. Collapsing doctrine

Under some circumstances, multiple transactions may be collapsed and treated as a single transaction for purposes of analysis under fraudulent transfer law. See, e.g., HBE Leasing Corp. v. Frank, 48 F.3d 623, 635 (2d Cir. 1995). The collapsing doctrine is nearly always applied in aid of a fraudulent transfer claim, not as the basis for an otherwise unavailable statutory defense. See, e.g., HBE Leasing, 48 F.3d at 635; Orr v. Kinderhill Corp., 991 F.2d 31, 35-36 (2d Cir. 1993); Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 206, 213 (3d Cir. 1990); Gowan v. Wachovia Bank, N.A. (In re Dreier LLP), 453 B.R. 499, 509 (Bankr. S.D.N.Y. 2011); Buchwald Capital Advisors LLC v. JPMorgan Chase Bank (In re M. Fabrikant & Sons, Inc.), 447 B.R. 170, 187 (Bankr. S.D.N.Y. 2011); Silverman v. K.E.R.U. Realty Corp. (In re Allou Distribs., Inc.), 379 B.R. 5, 21 (Bankr. E.D.N.Y. 2007). In fact, those few instances where the doctrine has been successfully invoked defensively all involved attacks on the existence of fraudulent transfer in the first instance, not the assertion of a statutory defense applicable only after the subject transfer was shown to be fraudulent. See Devon Mobile Communications Liquidating Trust v. Adelphia Communications Corp. (In re Adelphia Communications Corp.), 2006 WL 687153, at ** 14, 15 (Bankr. S.D.N.Y. March 6, 2006); Morse Operations, Inc. v. Goodway Graphics of Va., Inc. (In re Lease-A-Fleet, Inc.), 155 B.R. 666, 672, 676-77 (Bankr. E.D. Pa. 1993); Freehling v. Garson (In re Top Sports Distribs., Inc.), 41 B.R. 235, 239 (1984).

Further, application of the collapsing doctrine most frequently involves fact patterns not present here. See, e.g., HBE Leasing, 48 F.3d at 635; Orr, 991 F.2d at 35-36; Voest-Alpine, 919 F.2d at 213; Dreier, 453 B.R. at 509; Fabrikant, 447 B.R. at 187; Allou Distribs, 379 B.R. at 21. In this regard, the doctrine has most often been employed in the context of a multi-step leveraged buyout ("LBO") of the debtor, where the debtor stands in the center of a series of related

transfers – e.g., where the debtor takes out a loan, but reconveys the loan proceeds for less than fair consideration – not where, as here, the debtor's transfer is the first in a series of transactions made at the discretion of the transferor at each stage. See, e.g., HBE Leasing, 48 F.3d at 635; Dreier, 453 B.R. at 508. As the Second Circuit has explained:

> The paradigmatic scheme is similar to that alleged here: one transferee gives fair value to the debtor in exchange for the debtor's property, and the debtor then gratuitously transfers the proceeds of the first exchange to a second transferee. The first transferee thereby receives the debtor's property, and the second transferee receives the consideration, while the debtor retains nothing.

HBE Leasing, 48 F.3d at 635.

As a consequence of the foregoing, the specific collapsing tests invoked in other cases are of little use here. See, e.g., HBE Leasing, 48 F.3d at 35 (outlining a test under which "the consideration received from the first transferee must be reconveyed by the debtor for less than fair consideration…"). See also, e.g., Dreier, 453 B.R. at 508; Fabrikant, 447 B.R. at 186-87. Assuming, arguendo, that the collapsing doctrine is applicable to a fraudulent transfer defense at all, general principles regarding the doctrine provide a better guide for present purposes. Under these principles, "[c]ourts have 'collapsed' a series of transactions into one transaction when it appears that despite the formal structure erected and the labels attached, the segments, in reality, comprise a single integrated scheme when evaluated focusing on the knowledge and intent of the parties involved…" Official Committee of Unsecured Creditors of Sunbeam Corporation v. Morgan Stanley & Co. (In re Sunbeam Corp.), 284 B.R. 355, 370 (Bankr. S.D.N.Y. 2002), appeal dismissed, 287 B.R. 861 (S.D.N.Y. 2003). In assessing collapsing claims, courts focus on whether the transactions were interdependent and, if so, whether the parties knew or should have known that no one transaction would occur unless all of the other transactions also occurred. See

Orr, 991 F.2d at 35-36; Voest-Alpine, 919 F.2d at 213; Dreier, 453 B.R. at 508; Fabrikant, 447 B.R. at 186-87. Where these conditions have not been met, a collapsing claim must be denied. See, e.g., Wieboldt Stores, Inc. v. Schottenstein, 94 B.R. 488, 500-04 (N.D. Ill. 1988) (refusing to collapse LBO transactions as to non-insider shareholders without knowledge of structure and purpose of transactions).

II. None of the transfers in question is protected by Section 546(g)

The final transfers to ABN constitute subsequent transfers recoverable under Section 550(a)(2), to which the Section 546(g) safe harbor, by its express terms, does not apply. 11 U.S.C. § 546(g). As discussed above, stolen BLMIS customer property reached ABN only after one or more prior transfers, which the Trustee has sought to avoid or has already avoided. None of the transferors in these prior transfers – i.e., BLMIS, Prime Fund, Broad Market, Portfolio Limited Fund, and Insurance Portfolio Fund- was a party to the Onshore or Offshore Swaps, and, when those prior transfers were made, none of the assets transferred belonged to any of the parties to those agreements. Accordingly, for the reasons explained in detail above, these transfers were not made "under or in connection with" that swap agreement, and thus are not protected by Section 546(g). See infra, and 11 U.S.C. § 546(g).

ABN attempts to overcome the inapplicability of Section 546(g) to both the initial and subsequent transfers at issue by collapsing those transactions and treating them as a simple transfer of stolen customer funds by BLMIS to ABN. But there is no basis for doing so. Nothing about these transactions reflects a single, integrated scheme, as the collapsing doctrine requires. See, e.g., HBE Leasing, 48 F.3d at 635; Sunbeam, 284 B.R. at 370. On the contrary, each step in the transfer of stolen customer funds from BLMIS to ABN featured independent decision-making by the transferor that, in most instances, was unrelated to the swap agreements

in issue. Thus, Broad Market, Prime Fund, Portfolio Limited Fund, and Insurance Portfolio Fund made independent decisions to order withdrawals from their BLMIS accounts. In the same vein, Rye XL LP and Rye XL Portfolio made independent decisions concerning how to invest the subscription funds received from Prime Fund, Broad Market, Portfolio Limited Fund, and Insurance Portfolio Fund. Further, at least under the Onshore Swap Agreement, ABN was not obligated to hedge its risk by investing in Broad Market. It made an independent decision to do so. Likewise, ABN was under no obligation to redeem its investments in Broad Market or Portfolio Limited Fund. Its decisions to do so were purely discretionary.

Collapsing the initial and subsequent transfers also would not reflect their substance or the knowledge and intent of the parties. In order to bring the transactions within the Section 546(g) safe harbor, ABN must demonstrate that, when collapsed, those transactions really constitute initial, not subsequent, transfers made "under or in connection with" a swap agreement. See 11 U.S.C. § 546(g). To meet these conditions, ABN/RBS would have to substitute BLMIS for Rye XL LP or Rye XL Portfolio as a party to the swap agreements and eliminate all of the payments made to and from the intermediate parties, so that the transfer of stolen customer funds would be deemed to have been made directly by BLMIS to ABN.

But neither BLMIS nor the initial transferees were parties to either of the swap agreements in issue, and BLMIS made no transfers pursuant to those agreements. Instead, BLMIS made all of the initial transfers at issue pursuant to its customer relationships with the initial transferees. In fact, BLMIS may not have even known of the swap agreements and, in any event, had no assurance that implementation of those agreements would yield a net inflow of funds into BLMIS. In this regard, BLMIS received no inflow of funds from ABN except

indirectly through ABN's hedging investments. Those investments could have been liquidated by ABN at any time and, in fact, were partly liquidated in the exercise of ABN's discretion.

Thus, the transactions that ABN insists should be collapsed do not form part of an integrated scheme, as the behavior of the parties to those transactions reflects. They therefore cannot be collapsed under applicable law. See, e.g., HBE Leasing, 48 F.3d at 635; Sunbeam, 284 B.R. at 370. Considered in isolation, as they must be, all of these transactions fall outside the plain language of Section 546(g), and therefore cannot enjoy the protection of that safe harbor.

CONCLUSION

For the aforementioned reasons, the Court should enter an order denying ABN's motion to dismiss on the basis of Bankruptcy Code Section 546(g).

DATED: September 25, 2012

Respectfully submitted,

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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 Bankruptcy Code Section 546(g))
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), et al., Defendants.	Case No. 11-cv-06878 (JSR)

CERTIFICATE OF SERVICE

I, Kevin H. Bell, hereby certify that on September 25, 2012 I caused true and correct copies of the Memorandum Of Law Of The Securities Investor Protection Corporation In Opposition To Defendants' Motion To Dismiss The Complaint Based On Section 546(g) Of The Bankruptcy Code 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

Picard v. ABN AMRO BANK N.V.
(presently known as THE ROYAL BANK OF SCOTLAND), et al.,
12-mc-00115 (JSR)

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