

# BakerHostetler

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February 1, 2019

Honorable Paul A. Engelmayer  
United States District Court  
Southern District of New York  
40 Foley Square  
New York, NY 10007

Re: *Picard v Lowrey, et al.*, No. 18 Civ. 05381 (PAE)  
*Picard v. South Ferry Bldg. Co., et al.*, No. 18 Civ. 05430 (PAE)  
*Picard v. South Ferry #2, et al.*, No. 18 Civ. 05452 (PAE)  
*Picard v. United Congregations of Mesora*, No. 18 Civ. 05453 (PAE)

Dear Judge Engelmayer:

We are counsel to Irving H. Picard, trustee (the “Trustee”) for the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC and the consolidated chapter 7 estate of Bernard L. Madoff under the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.* (“SIPA”).

We write in response to a letter filed on January 28, 2019 by Defendants in the above-referenced adversary proceedings submitting *Kirshner v. Fitzsimons (In Re Tribune Co. Fraudulent Conveyance Litig.)*, No. 11-MD-2296 (DLC), 2019 WL 294807 (S.D.N.Y. Jan 23, 2019) issued by District Judge Denise L. Cote as supplemental authority. Defendants also previously submitted a decision by then-District Judge Richard Sullivan in the *Tribune* litigation,<sup>1</sup> which the Trustee responded to in a letter dated December 7, 2018 (ECF No. 23).

As with Judge Sullivan’s decision, the recent decision by Judge Cote does not support the Defendants’ arguments. To the contrary, both decisions are more appropriately used to factually and legally distinguish the *Tribune* case from the issues before this Court and bolster the Trustee’s position.<sup>2</sup>

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<sup>1</sup> *In Re Tribune Co. Fraudulent Conveyance Litig.*, No. 11-MD-2296 (RJS), 2018 WL 6329139 (S.D.N.Y. Nov. 30, 2018) (the “November 2018 Opinion”).

<sup>2</sup> *Tribune* is also substantively distinguishable because it is not a SIPA liquidation, and the provisions of SIPA do not apply.

In *Tribune*, the trustee was seeking to avoid Tribune’s indemnification obligations to its outside directors, as provided for in Article Twelfth of Tribune’s Amended and Restated Certificate of Incorporation, dated June 12, 2000. 2019 WL 294807, at \*21. As to the independent directors, each of whom was a director more than two years prior to Tribune’s bankruptcy, Judge Cote determined that the company’s indemnification obligations arose prior to the two-year avoidance period, and therefore the Trustee could not state a claim to avoid them.<sup>3</sup> *Id.* (citing November 2018 Opinion, 2018 WL 6329139, at \*15).

Defendants are not in a comparable situation here. For the reasons set forth in our December 7, 2018 letter, and as set forth in the underlying briefing, Defendants have no viable defenses to the Trustee’s actual fraudulent transfer claims under Bankruptcy Code section 548(a)(1)(A). The *Tribune* decisions have no application here.

The Securities Investor Protection Corporation (“SIPC”) has authorized the Trustee to represent to this Court that SIPC joins in this letter.

Respectfully submitted,

/s/ Keith R. Murphy

Keith R. Murphy

cc (via email): Richard Kirby

David J. Sheehan

Nicholas J. Cremona

Kevin H. Bell

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<sup>3</sup> Defendants incorrectly assert that Judge Cote held that Bankruptcy Code section 548(a) is a “statute of repose.” (Letter at 1).