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. SAUL B. KATZ, *et al.*, Defendants.	Adv. Pro. No. 10-05287 (BRL) Case No. 1:11-cv-03605-JSR

MEMORANDUM OF LAW OF
THE SECURITIES INVESTOR PROTECTION CORPORATION
IN SUPPORT OF TRUSTEE'S MOTION FOR CERTIFICATION OF ORDER FOR INTERLOCUTORY APPEAL OR FOR ENTRY OF SEPARATE FINAL JUDGMENT

SECURITIES INVESTOR PROTECTION CORPORATION
805 Fifteenth Street, N.W., Suite 800
Washington, D.C. 20005
Telephone: (202) 371-8300
JOSEPHINE WANG
General Counsel
KEVIN H. BELL
Senior Associate General Counsel for Dispute Resolution
CHRISTOPHER H. LAROSA
Associate General Counsel
LAUREN T. ATTARD
Staff Attorney

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

TABLE OF AUTHORITIES
(cont.)

CASES: **PAGE**

TABLE OF AUTHORITIES
(cont.)

STATUTES AND RULES: **PAGE**

PUBLICATIONS AND TREATISES:

Pursuant to Section 78eee(d) of the Securities Investor Protection Act, 15 U.S.C. §§78aaa et seq. ("SIPA"), the Securities Investor Protection Corporation ("SIPC") submits this memorandum of law in support of the motion ("Motion") of Irving H. Picard, trustee for the consolidated liquidation of Bernard L. Madoff Investment Securities, Inc. ("BLMIS") and Bernard L. Madoff, for entry of an order under 28 U.S.C. § 1292(b) specifying that this Court's September 27, 2011 Opinion and Order, Dkt. No. 40 ("Order of Partial Dismissal"), dismissing Counts 2 – 10 of the Amended Complaint "involves a controlling question of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal from the order may materially advance the ultimate termination" of this litigation; or, in the alternative, for entry, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, of a final judgment as to Counts 2 – 10 of the Amended Complaint.

STATEMENT OF THE ISSUES

The Trustee's Motion raises the following issues:

1. Whether the Court should enter an order providing that, for purposes of 28 U.S.C. § 1292(b), its September 27, 2011 Order of Partial Dismissal involves a controlling question of law as to which there is substantial ground for difference of opinion and from which an immediate appeal from the order may materially advance the ultimate termination of this litigation, where: (1) the Court's decisions regarding the applicability in this action of Sections 502(d) and 546(e) of the Bankruptcy Code (11 U.S.C.), and regarding the "good faith" standard applicable under Bankruptcy Code Section 548(c) (11 U.S.C.), are inconsistent with other decisions of this Court and of other courts in and outside of this jurisdiction; and (2) reversal of this Court's order would enable the Court to try Counts 1 – 11 of the Amended Complaint in a single proceeding, and thus would avoid the need for two expensive and duplicative trials.

2. Whether, in the alternative, and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court should enter a final judgment as to Counts 2 – 10 of the Amended Complaint, where each of the causes of action asserted through each of those counts constitutes a separate

"claim" within the meaning of Rule 54(b) and where there is no just reason for delay in the entry of final judgment as to those claims.

STATEMENT OF THE FACTS

The facts pertinent to the Trustee's Motion are summarized in the Trustee's memorandum in support of his Motion.

SUMMARY OF THE ARGUMENT

The Court's Order of Partial Dismissal has created substantial uncertainty in the law affecting the hundreds of avoidance suits brought by the Trustee as part of the BLMIS liquidation. The Order has led to confusion as to what customer property the Trustee can recover, disrupted the claims review process in the BLMIS liquidation proceeding by injecting uncertainty into the calculation of the amounts that customers now are owed, and created disarray in the timing of the distribution of customer property. The disruption to the administration of the BLMIS liquidation proceeding is real, palpable, and immediate. To correct this situation, and to enable the Second Circuit to provide finality as to this Court's decision, SIPC respectfully requests that the Court either certify its Order of Partial Dismissal for interlocutory review pursuant to 28 U.S.C. § 1292(b), or enter a final judgment pursuant to Rule 54(b) as to Counts 2 through 10 of the Trustee's Amended Complaint.

The Order of Partial Dismissal satisfies all of the criteria necessary for certification under 28 U.S.C. § 1292(b). The questions decided by the Court – involving the application, as a matter of law, of Bankruptcy Code Sections 546(e) and 502(d) in a SIPA proceeding, and the standard to be applied in determining "good faith" under requirements of Code Section 548(c)'s "good faith" defense in a SIPA proceeding – are "pure" questions of law, which can be resolved without extensive study of the record in this case. A reversal of the Court's Order, which would reinstate the claims asserted through Counts 2 through 10 of the Amended Complaint, would

have a significant impact on the conduct of this litigation. There is also substantial ground for a difference of opinion as to those questions. The Court's Order is in conflict with other decisions of this Court, of the Bankruptcy Court, and of other courts around the country. Finally, should the Court's Order be reversed on appeal, the resolution on appeal could allow the claims asserted through Counts 2 through 10 to be tried together with those asserted through Counts 1 and 11, thereby shortening the overall time for trial and avoiding expensive and duplicative proceedings.

The Court's Order of Partial Dismissal also would support the entry of a separate final judgment pursuant to Rule 54(b). Through its Order, the Court dismissed Counts 2 through 10, an unquestionably final disposition. Further, as the Court's dismissal of Counts 2 through 9 was predicated upon Bankruptcy Code Section 546(e), a provision not applicable by its express terms to the remaining claims (Counts 1 and 11) before the Court, appellate review of the Court's Order would not be affected by, or interfere with, the Court's disposition of the latter claims.

Finally, there is no just reason for delay in the entry of final judgment as to Counts 2 through 10, and instead, substantial harm to be had in the absence of an immediate appeal. As noted, a delayed appeal would put the Trustee and the Court at risk of duplicative trials, and would delay any potential recovery by the Trustee on Counts 2 through 10 for the benefit of customers. More significantly, delay would leave in limbo the legal status of most of the avoidance claims asserted by the Trustee in literally hundreds of other lawsuits, creating uncertainty concerning the scope of the Trustee's prospective recoveries, to the detriment of the customer/victims of BLMIS and Madoff. Rather than perpetuate that state of affairs, the Court respectfully is urged to enter a final judgment as to Counts 2 through 10 pursuant to the authority conferred under Rule 54(b).

ARGUMENT

I. THE ORDER OF PARTIAL DISMISSAL SATISFIES THE CONDITIONS NECESSARY FOR INTERLOCUTORY REVIEW UNDER 28 U.S.C. § 1292(b)

A. Applicable Law

28 U.S.C. § 1292(b) provides that a federal court of appeals may accept for immediate review an interlocutory order entered by a federal district court where the latter court certifies that the subject interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the termination of the litigation." See 28 U.S.C. § 1292(b). See also Weber v. United States Trustee, 484 F.3d 154, 159 (2d Cir. 2007) ("Weber"). Congress passed Section 1292(b) in order to ensure that the courts of appeals would be able to rule on "ephemeral questions of law" that might otherwise escape appellate review, and to ensure "prompt resolution of knotty legal problems" and to mitigate the risk of protracted litigation. See Weber, 484 F.3d at 159; Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 864-66 (2d Cir. 1996); Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 23-24 (2d Cir. 1990).

Consistent with the foregoing, an order qualifies under Section 1292(b) for certification for interlocutory review if it: (1) involves a "question of law" which is "controlling;" (2) there is a "substantial ground for difference of opinion" as to that question; and (3) an immediate appeal would materially advance the ultimate termination of the litigation. See, e.g., Consub Delaware, LLC v. Schahin Engenharia Limitada, 476 F.Supp.2d 305, 309 (S.D.N.Y. 2007), aff'd, 543 F.3d 104 (2d Cir. 2008) ("Consub Delaware"). For purposes of Section 1292(b), a "question of law" is a "pure question of law that the reviewing court could decide quickly and cleanly without having to study the record." See, e.g., In re Worldcom, Inc., 2003 WL 21498904, at *10

(S.D.N.Y. June 30, 2003). See also Baumgarten v. County of Suffolk, 2010 WL 4177283, at *1 (E.D.N.Y. October 15, 2010) ("Baumgarten"). That question is "controlling," inter alia, if reversal of the district court's order could significantly affect the conduct of the action. See, e.g., Consub Delaware, 476 F.Supp.2d at 309; S.E.C. v. Credit Bancorp, Ltd., 103 F.Supp.2d 223, 227 (S.D.N.Y. 2000) ("Credit Bancorp."). The impact that an appeal may have on other cases is also a factor that a court may take into account in deciding whether a question is "controlling." See Klinghoffer, 921 F.2d at 24; Brown v. Bullock, 294 F.2d 415, 417 (2d Cir. 1961) (Friendly, J.).

A "substantial ground for difference of opinion" exists when there is "genuine doubt as to whether the district court applied the correct legal standard in its order." See, e.g., Consub Delaware, 476 F.Supp.2d at 309. See also Santiago v. Pinello, 647 F.Supp.2d 239, 243 (E.D.N.Y. 2009) ("Pinello"). Such doubt may exist where, e.g., "(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." See In re Lloyd's American Trust Fund Litig., 1997 WL 458739, at **4-5 (S.D.N.Y. Aug. 12, 1997); Baumgarten, 2010 WL 4177283, at *1; Pinello, 647 F.Supp.2d at 243.

Finally, although, technically, the question of whether there is a controlling question of law is distinct from the question of whether certification would advance the ultimate termination of the litigation, in practice, the two questions are closely related. See Credit Bancorp, 103 F.Supp.2d at 227. Where reversal of the district court's order would have a significant effect on the action, it is likely that one such effect would be either to "advance the time for trial or shorten the time required for trial," as this third prong of the Section 1292(b) certification test requires. See, e.g., Consub Delaware, 476 F.Supp.2d at 310; Transp. Workers Union of Am., Local 100, AFL-CIO v. New York City Transit Auth., 358 F.Supp.2d 347, 350 (S.D.N.Y. 2005).

B. Analysis

Application of the foregoing test to the Court's Order of Partial Dismissal is straightforward, and the Court's decisions regarding the applicability of Bankruptcy Code ("Code") Sections 546(e) and 502(d) to this proceeding, and its construction of the "good faith" standard under Code Section 548(c), satisfy all of the elements necessary to certify that order for interlocutory review.

1. Controlling Question of Law

There is no doubt that each of the issues decided by the Court under these Code sections presents a pure question of law and that reversal of the Court's Order of Partial Dismissal would have a substantial effect on the conduct of this action.

The Court dismissed the Trustee's preference and fraudulent transfer claims in Counts 2 through 9 of the Amended Complaint on the ground that those claims are barred by the "safe harbor" created through Code Section 546(e). The Court predicated its decision exclusively on its reading of the "literal language" of that section. (See Order of Partial Dismissal at 5-6.)

Moreover, although the Court found that BLMIS never actually placed any securities trades, the Court nevertheless concluded, without analysis, that the transfers in question were "settlement payments" made in connection with such trades. (Id. at 7). In like manner, although the Court found that, *at all times relevant to the Amended Complaint*, BLMIS and Madoff were engaged in "the special kind of fraud known as a 'Ponzi scheme,' by which the customers of Madoff Securities … were paid their profits from new monies received from customers, without any actual securities trades taking place," the Court found, again without comment or analysis, that BLMIS was a "stockbroker" and that the subject transfers were made in connection with "securities contracts" within the meaning of Section 546(e), even though the "securities

contracts" were non-existent. (See Order of Partial Dismissal at 4, 6). Finally, despite the lack of clarity as to how the terms "stockbroker," "settlement payment," and "securities contract" could be made to apply to fictitious, non-existent activity, the Court refused to countenance any resort to legislative history to illuminate either the meaning of the terms in this context or of the purposes underlying Section 546(e) as a whole, and declined to read those terms in their full statutory context or in light of the statutory purpose. Cf., Grafton, 321 B.R. at 532 ("[A]scertaining the meaning of 'settlement payment' is a 'holistic endeavor' that requires us to consider the entire statutory scheme associated with its enactment and to reject plausible readings of isolated terms that are not compatible with the rest of the law" (citing Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60, 125 S.Ct. 460, 466-67 (2004)).

All of the foregoing issues are "pure" questions of law, whose resolution would not require the Court of Appeals to study any part of the record beyond the Trustee's Amended Complaint and this Court's Order of Partial Dismissal. Further, should the appellate court reverse this Court's decision regarding the applicability of Section 546(e), Counts 2 through 9 of the Amended Complaint would be reinstated, and thereby have a substantial impact on the conduct of this lawsuit. The Section 546(e) issues thus constitute "controlling" questions of law for purposes of 28 U.S.C. § 1292(b).

The same is true of the Court's dismissal of Count 10 of the Amended Complaint. The Court dismissed that count on the ground that Bankruptcy Code Section 502(d) does not apply in this lawsuit because it is inconsistent with, and therefore overridden by, Section 78fff-2(c)(3) of SIPA. Without doubt, that issue is purely one of law, and does not require any consultation of the record to resolve. Here too, a reversal of the Court's dismissal of Count 10 would reinstate that count, and thus have a substantial impact on this suit.

The Court's decision regarding the effect of SIPA and the securities laws on the applicable "good faith" standard under Bankruptcy Code Section 548(c) is also a pure question of law requiring no reference to the record for resolution. Further, as the Court substituted a "willful blindness" standard for the "inquiry notice" standard otherwise applicable under Section 548(c) – distinct standards whose difference, according to the Court, "is essentially the difference between an objective standard and a subjective standard" (Order of Partial Dismissal at 13) – a reversal of the Court's decision would restore the "inquiry notice" standard, and thus affect significantly the evaluation of evidence of the Defendants' intent. That impact is more than sufficient to render "controlling" the legal questions decided by the Court under Code Section 548(c).

2. Substantial Ground for Difference of Opinion

There is also a substantial ground for difference of opinion as to the Court's decisions under all of the foregoing Bankruptcy Code sections.

A. Section 546(e)

The Court's finding that, as a matter of law, Code Section 546(e) may bar avoidance claims brought by a SIPA trustee is unsupported by prior precedent, and has been rejected by another division of this Court and by the Bankruptcy Court in this jurisdiction. See In re Adler, Coleman Clearing Corp., 263 B.R. 406, 480 (S.D.N.Y. 2001) (Marrero, J.) ("Adler Coleman"); Picard v. Merkin (In re Bernard L. Madoff Inv. Secs., Inc.), 440 B.R. 243, 267 (Bankr. S.D.N.Y. 2010) (Lifland, J.) ("Merkin").[1] Likewise, the same courts, along with others outside this

[1] Indeed, in a different case, this District Court even saw fit to leave safe harbor questions to the Bankruptcy Court for at least initial resolution, in acknowledgment of the fact that "the bankruptcy court has well-recognized expertise in interpreting the Code that would be useful to this court in analyzing … safe harbor provisions at issue …." See Michigan State Housing

jurisdiction, have rejected the application of the Section 546(e) bar/safe harbor in cases where a putative "stockbroker" was actually operating a Ponzi scheme. See Picard v. Merkin (In re Bernard L. Madoff Investment Securities LLC), 2011 WL 3897970, at *12 (S.D.N.Y. 2011) (Wood, J.); Adler Coleman, 263 B.R. at 474-85; Merkin, 440 B.R. at 266-68; Johnson v. Neilson, (In re Slatkin), 525 F.3d 805, 817 (9th Cir. 2008); Wider v. Wootton, 907 F.2d 570, 573 (5th Cir. 1990) ("Wider"); In re Grafton Partners, L.P., 321 B.R. 527 (9th Cir. BAP 2005) ("Grafton"). In so doing, the courts have often found that the terms "stockbroker," "settlement payment," and "securities contract" in Section 546(e) are ambiguous; that resort to legislative history is appropriate to resolve that ambiguity; and that the legislative history to Section 546(e) demonstrates that Congress did not intend those terms to encompass Ponzi scheme operators or transfers made in connection with such schemes. See Adler Coleman, 263 B.R. at 474-85; Merkin, 440 B.R. at 266-68. See also Johnson, 525 F.3d at 817; Wider, 907 F.2d at 573; Grafton, 321 B.R. at 527-41. In fact, in an avoidance suit arising out of the BLMIS liquidation, this Court went even further, finding not only that the terms "stockbroker" and "securities contract" do not encompass Ponzi scheme operators and investments, respectively, but that there could be no substantial difference of opinion on that point. See Merkin, 2011 WL 3897970 at *12. In this regard, the language of some of the decisions from the courts in this jurisdiction bears emphasis:

> [N]othing in the language, legislative history or statutory intent of § 546(e) may reasonably be construed to countenance the use of the stockholder defense…[where]…the effect…would be to apply the statute, not as a shield to protect truly bona fide trades of parties uninvolved in any misconduct, but as a device employed by the perpetrator, and/or its principals or beneficiaries, to affirm and

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Development Authority v. Lehman Brothers Holdings Inc., Case No. 11-cv-3392 (JGK) (S.D.N.Y.), Transcript of September 14, 2011 Hearing, at 62-63.

> enforce a fraud the existence of which depends, as an integral component of the scheme, upon payments that are sought to be immunized as "settlement" or "margin" payments. Courts confronted with claims to extend the application of § 546(e) so as to give effect to fraudulent schemes have rejected the effort.

Adler Coleman, 263 B.R. at 485. And, as stated by the court in Merkin, 440 B.R. at 267-268 (internal citations omitted):

> [A]pplication of section 546(e) to the Initial Transfers must be rejected as contrary to the purpose of the safe harbor provision and incompatible with SIPA. Section 546(e) was intended to promote stability and instill investor confidence in the commodities and securities markets. Courts have held that to extend safe harbor protection in the context of a fraudulent securities scheme would be to "undermine, not protect or promote investor confidence…[by] endorsing a scheme to defraud"…and therefore contradict the goals of the provision. Further, in the context of a SIPA proceeding, applying the safe harbor provision would eliminate most avoidance powers granted to a trustee under SIPA, negating its remedial purpose… Simply stated, the transfers sought to be avoided emanate from Madoff's massive Ponzi scheme, and the safe harbor provision "does not insulate transactions like these from attack."

Moreover, the courts also insist that the scope of the terms "stockbroker," "settlement payment," and "securities contract" can only be understood in the full statutory context and in light of Section 546(e)'s statutory purpose. See Adler Coleman, 263 B.R. at 474-85; Merkin, 440 B.R. at 266-68; Grafton, 321 B.R. at 527-41. These conflicting precedents are more than sufficient to create a "substantial ground for difference of opinion" under the law of this jurisdiction.[2] See Lloyd's American, 1997 WL 458739, at **4-5; Baumgarten, 2010 WL 4177283, at *1; Pinello, 647 F.Supp.2d at 243.

[2] For the reasons discussed in the Trustee's memorandum, the Court's dismissal of the Trustee's claims based on Bankruptcy Code Section 550(a) also should be the subject of interlocutory review. As it now stands under the Court's order, the Trustee may recover fraudulent transfers from an initial transferee under Section 548(a)(1)(A), but cannot avoid a subsequent transfer of

B. Section 78fff-2(c)(3)

SIPC respectfully submits that this Court's decision that Section 78fff-2(c)(3) overrides Bankruptcy Code Section 502(d) is based on a misreading of Section 78fff-2(c)(3). According to the Court, Section 78fff-2(c)(3) provides that "[s]ecurities *customers* who have received avoidable transfers may still seek to pursue those transfers as creditors of the SIPA estate" (see Order of Partial Dismissal at 16 [emphasis added]), and is therefore inconsistent with Code Section 502(d), which provides for the automatic disallowance of the claim of a creditor who received an avoidable transfer and who has not returned the transferred property to the bankruptcy estate. But Section 78fff-2(c)(3) says nothing about customers, and instead provides that *the trustee* may recover avoidable transfers. See SIPA § 78fff-2(c)(3).

Moreover, the purpose of Section 78fff-2(c)(3) was to expand, not limit, the trustee's avoidance powers by deeming "customer property" to have been property of the debtor, regardless of its characterization under state law. As one commentator has explained:

> A customer receiving a voidable transfer is deemed to be a creditor for purposes of avoidance, and the property so transferred is deemed to have been property of the debtor. The customer is not an actual creditor, and, under virtually all state and federal securities laws, the property does not belong to the debtor prior to transfer. The purpose of this legal fiction is to enable the trustee to fit the transfer into the provisions of the avoidance sections of the [Bankruptcy] Code. The legal fiction prevents a customer from using a technical reading of the avoidance provisions of the [Bankruptcy] Code to retain securities that would otherwise be recoverable by the trustee. The overall purpose of…15 U.S.C. § 78fff-2(c)(3) is to prevent one or more customers from depriving other customers of assets by keeping these assets out of the pool available for distribution to customers on a ratable basis.

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the same property under Section 550, a result that contravenes both the plain language and clear purposes of those provisions.

6 Collier on Bankruptcy, ¶ 749.02[1] at p. 749-4 (16th ed. 2011). See also Picard v. Taylor (In re Park South Securities, LLC), 326 B.R. 505, 512-13 (Bankr. S.D.N.Y. 2005) (SIPA trustee had standing to pursue avoidance actions against customers to whom debtor transferred funds from other customers' accounts); In re Bevill, Bresler & Schulman, Inc., 94 B.R. 817, 825-26 (D.N.J. 1989) (granting summary judgment to SIPA trustee in action to avoid transfer of securities from debtor's common safekeeping account to customers' individual accounts at other institutions). The absence of support for the Court's decision, and the existence of substantial contrary authority, create a substantial ground for difference of opinion.

C. Section 548(c)

The Court's decision under Code Section 548(c) falls into the same category. In electing to substitute a "willful blindness" standard for the "inquiry notice" standard otherwise applicable in determining "good faith" under Section 548(c), the Court relied on the securities laws, explaining that "a securities investor has no duty to inquire about his stockbroker, and SIPA creates no such duty." (See Order of Partial Dismissal at 14.) But the Court ignored the fact that SIPA expressly incorporates the avoidance provisions of the Bankruptcy Code by reference, to the extent consistent with SIPA, and also provides that SIPA shall be treated as part of the Securities Exchange of 1934 – in effect, as part of the securities laws – "except as otherwise provided" in SIPA. See SIPA §§ 78bbb, 78fff(b). By incorporating the avoidance provisions, SIPA effectively displaces any securities law inconsistent with those provisions.[3]

[3] As both the Trustee and SIPC discussed in detail in the supplemental memoranda in opposition to the Defendants' motion to dismiss, the securities laws *do* impose duties upon securities investors not meaningfully different from those created by Section 548(c)'s "inquiry notice" standard.

Further, there is no support in the case law for the Court's decision. On the contrary, another division of this Court recently reaffirmed the applicability of the "inquiry notice" standard in determining good faith in another avoidance suit brought by the Trustee is the BLMIS liquidation. See Picard v. Merkin (In re Bernard L. Madoff Investment Securities LLC), 2011 WL 3897970, at *10 (S.D.N.Y. 2011) (upholding the Bankruptcy Court's construction of "good faith" because "the Trustee pleaded facts allowing the reasonable inference that the Funds (defendants) 'knew or *should have known* of the Madoff fraud and helped to perpetuate it'" (emphasis added)). The conflict between the decisions of this Court in the same liquidation proceeding creates a substantial ground for a difference of opinion.

3. Ultimate Termination of Litigation

Finally, it is equally clear that immediate review of the Court's Order of Partial Dismissal would materially advance the ultimate termination of this litigation. Should the Order be reversed, Counts 2 – 10 of the Amended Complaint would be reinstated and the claims asserted therein could be tried together with the claims asserted in Counts 1 and 11. By enabling the Court to conduct a single trial, and to avoid expensive and duplicative trials involving many of the same facts, immediate review would "shorten the time for trial" and thus materially contribute to the early resolution of this case.

II. THE COURT'S ORDER OF PARTIAL DISMISSAL SATISFIES ALL OF THE CRITERIA NECESSARY UNDER FEDERAL RULE 54(b) FOR ENTRY OF FINAL JUDGMENT AS TO COUNTS 2 THROUGH 10

A. Applicable Law

When an action presents more than one claim, Rule 54(b) of the Federal Rules of Civil Procedure permits a federal district to enter a separate final judgment as to one or more of those claims "if the court expressly determines that there is no just reason for delay." See Fed R. Civ.

P. 54(b). Specifically, the rule requires as conditions of entry of such a judgment that: (1) there are multiple claims or parties; (2) at least one of the claims or the rights and liabilities of at least one party has been finally determined; and (3) there is no just reason for delay. See Grand Rivers Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 164-65 (2d Cir. 2005); Info. Res. Inc. v. Dun & Bradstreet Corp., 294 F.3d 447, 451 (2d Cir. 2002); In re Bayou Hedge Fund Litig., 2007 WL 2363622, at *3 (S.D.N.Y. August 16, 2007) ("Bayou Hedge Fund"). The rule was adopted as part of an effort to mitigate some of the adverse effects of the liberal joinder provisions, enabling the district courts in complex cases with multiple claims and parties to avoid the unnecessary prejudice to the parties that otherwise would be caused by forcing a deferral of appeal until the conclusion of all proceedings in the trial court. See Ginnett v. Computer Task Group, Inc., 962 F.2d 1085, 1094-95 (2d Cir. 1992) ("Ginett").

In this jurisdiction, a cause of action may be the subject of a separate final judgment under Rule 54(b) only if it constitutes a separate "claim" within the meaning of the rule. See Bayou Hedge Fund, 2007 WL 2363622, at *7. A cause of action generally qualifies as a separate "claim" if resolution of the remaining claims before the district court could not affect appellate review of the dismissed claim. See, e.g., Ginett, 962 F.2d at 1095 (noting that claims are inseparable where, in reviewing the appealed claim, the appellate court "would necessarily have to reach the merits of one or more of the claims not appealed" or where the "district court's disposition of one or more of the remaining claims could render [the appellate court's] opinion advisory or moot"); Hogan v. Consol. Rail Corp., 961 F.2d 1021, 1026 (2d Cir. 1992); Bayou Hedge Fund, 2007 WL 2363622, at *4.

In determining whether "there is no just reason for delay" within the meaning of Rule 54(b), the "proper guiding star is…'the interest of sound judicial administration.'" Ginett, 962

F.2d at 1095 (quoting Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8 (1980)). In this regard, the Second Circuit has explained that, "[g]enerally, a district court may properly make a finding that 'there is no just reason for delay'…where a plaintiff might be prejudiced by a delay in recovering a monetary award…or 'where an expensive and duplicative trial could be avoided if, without delaying prosecution of the surviving claims, a dismissed claim were reversed in time to be tried with the other claims.'" Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 16 (2d Cir. 1997). See also Bayou Hedge Fund, 2007 WL 2363622, at *6.

B. Analysis

The dismissal of Counts 2 through 10 of the Amended Complaint should be entered as a separate, final judgment pursuant to Rule 54(b). Adjudication of Counts 1 and 11 will not affect appellate review of Counts 2 through 10, and no purpose would be served by delaying final resolution of these important claims.

1. Separate Claims

Counts 2 through 10 are separate "claims" from the remaining claims – Counts 1 and 11 – because the resolution of these remaining claims could not affect appellate review of Counts 2 through 10. See, e.g., Ginett, 962 F.2d at 1095. Counts 2 through 9 were dismissed on the basis of Bankruptcy Code Section 546(e), which, on its face, does not pertain to Count 1 (actual fraudulent transfers under Bankruptcy Code section 548(a)(1)(A)) or Count 11 (equitable subordination of claims under Bankruptcy Code section 510(c)). See Bankruptcy Code § 546(e) (stating that the safe harbor applies to avoidable transfers except those "under section 548(a)(1)(A) of this title"); see also Order of Partial Dismissal, at 8, n.4 (explaining that after finding that the safe harbor of 546(e) is applicable, the only remaining claims are Counts 1, 10 and 11). As appellate review of Counts 2 through 9 would require only an examination of

Section 546(e) and its relationship to SIPA, and as those issues cannot arise in connection with Counts 1 and 11, resolution of the latter counts can have no impact on appellate review of the former.

Appellate review of Count 10 also would not be affected by disposition of Counts 1 and 11. Through Count 10, the Trustee asserts a claim for the disallowance, pursuant to Bankruptcy Code Section 502(d), of the Defendants' customer claims. Again, Appellate review of the Court's dismissal of that claim would require the Court of Appeals to consider the relationship between Section 502(d) and SIPA. As the Trustee's Section 502(d) claim is *not* an avoidance claim or a claim for equitable subordination, however – and raises none of the issues presented by those claims – appellate review of this Court's dismissal of the Section 502(d) claim could not be affected by this Court's disposition of the Trustee's avoidance and equitable subordination claims.

2. Final Determination of Claims

Pursuant to this Court's Order of Partial Dismissal, Counts 2 through 10 were dismissed. See Order of Partial Dismissal at 17. Accordingly, these claims have been finally determined for purposes of Rule 54(b).

3. No Just Reason for Delay

The impact of the Court's Order of the instant litigation, along with numerous other avoidance actions brought by the Trustee, collectively involving billions of dollars, makes clear that there is no just reason for delay in the entry of a final judgment as to Counts 2 through 10, followed by an immediate appeal of that judgment, and indeed, that substantial prejudice will result if such action is not taken.

In this case, absent entry of a separate final judgment, or a certification for interlocutory review, the parties will be put to the expense, and the Court, to the inconvenience and misuse of its resources, of two duplicative trials if the Court's dismissal of Counts 2 through 10 is reversed. Any monetary recovery by the Trustee – and, through the Trustee, by the customers victimized by BLMIS - on the claims asserted in those counts would be delayed, causing significant prejudice to the Trustee and, more importantly, to customers.

That prejudice would be enormously magnified by the scope of the BLMIS liquidation and the related avoidance actions brought by the Trustee. Recoveries by the Trustee, and distributions to the customer/victims of BLMIS and Madoff, depend upon resolution of those avoidance actions, numbering over 900 according to the Trustee's most recent Interim Report. Of these 900-plus actions, at least 95% are directed at customers who received fictitious profits[4] and, under well-established law, were clearly required to return those profits to the Trustee. Until the Order of Partial Dismissal was entered, the law of this jurisdiction regarding the applicability of Sections 546(e) and 502(d) in SIPA liquidations was settled. See, e.g., Adler Coleman, 263 B.R. at 474-85; Park South, 326 B.R. at 512-13.

That situation has now changed dramatically. Section 546(e), if applicable, destroys every preference action, every constructive fraud action, and every avoidance action under state law brought by the Trustee in this case. Similarly, if section 502(d) does not apply in this case, the pool of allowed claims may increase significantly, thus raising the aggregate amount of those claims, and lowering the ratable share of the fund of "customer property" allocable to each

[4] See Trustee's Fifth Interim Report for the Period Ending March 31, 2011, dated May 16, 2011, Case No. 08-01789, Docket No. 4027, at ¶¶ 95, 99 (Bankr. S.D.N.Y.).

customer claimant. The Trustee may not be able to distribute funds that he has collected until there is certainty as to the value of the claims eligible to share in a distribution.

In the absence of clarity on these issues – which can only be provided by the Second Circuit - the Court's Order creates enormous uncertainty concerning the law applicable to the Trustee's avoidance suits and to the Trustee's prospects for recovery for the benefit of customers. At this point, no one – not the Trustee, and certainly not the BLMIS victims – can predict the amount of customer property available for distribution, and that is a situation that should not be permitted to persist to the detriment of customers and the administration of the liquidation proceeding. Indeed, prompt appellate review of these issues could result in allowing any dismissed claims to be "reversed in time to be tried with the other claims" not only in this litigation, but in the litigation of the other 900-plus avoidance actions. See Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d at 16. Accordingly, no just cause exists for delaying final disposition of Counts 2 through 10.

CONCLUSION

For the foregoing reasons, the Court should enter an order under 28 U.S.C. § 1292(b) providing that its Order of Partial Dismissal involves a controlling question of law as to which there is substantial ground for difference of opinion and from which an immediate appeal from the order may materially advance the ultimate termination of this litigation. In the alternative, pursuant to Federal Rule 54(b), the Court should enter an order directing the Clerk to enter final judgment as to Counts 2 – 10 of the Amended Complaint on the grounds that each of those counts asserts a "claim" separate from the remaining claims made through the Amended

Complaint, and that there is no just reason for delay in the entry of final judgment as to the claims made through Counts 2 – 10.

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Washington, D.C.

Respectfully submitted,

JOSEPHINE WANG
General Counsel

/s/ Kevin H. Bell
KEVIN H. BELL
Senior Associate General Counsel for Dispute Resolution

CHRISTOPHER H. LAROSA
Associate General Counsel

LAUREN T. ATTARD
Staff Attorney

SECURITIES INVESTOR
PROTECTION CORPORATION
805 15th Street, N.W. - Suite 800
Washington, D.C. 20005
Telephone: (202) 371-8300
E-mail: jwang@sipc.org
kbell@sipc.org
clarosa@sipc.org
lattard@sipc.org