

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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. 08-01789 (BRL)

SIPA LIQUIDATION

(Substantively Consolidated)

Adv. Pro. No. 10-5287 (BRL)

Case No. 11 Civ. 03605 (JSR)

**MEMORANDUM OF LAW IN FURTHER SUPPORT OF
THE TRUSTEE'S RIGHT TO A JURY TRIAL**

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	1
I. THE TRUSTEE HAS A SEVENTH AMENDMENT RIGHT TO A JURY.....	1
II. THE TRUSTEE DID NOT WAIVE HIS JURY TRIAL RIGHT BY COMMENCING HIS ACTION IN BANKRUPTCY COURT	3
III. THE TRUSTEE’S RIGHT TO A JURY TRIAL IS UNAFFECTED BY HIS EQUITABLE SUBORDINATION COUNT	4
CONCLUSION.....	5

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Aetna Ins. Co. v. Kennedy to the Use of Bogash</i> , 301 U.S. 389 (1937).....	3
<i>Beacon Theatres, Inc. v. Westover</i> , 359 U.S. 500 (1959).....	5
<i>Billing v. Ravin, Greenberg & Zackin, P.A.</i> , 22 F.3d 1242 (3d Cir. 1994).....	1
<i>Brown v. Sandimo Materials</i> , 250 F.3d 120 (2d Cir. 2001).....	5
<i>Cage v. Hardy Rawls Enters. LLC (In re Moye)</i> , No. 09-3265, 2009 WL 4823998 (Bankr. S.D. Tex. Dec. 9, 2009).....	1, 2
<i>In re Crown Vantage, Inc.</i> , No. C 02-03836, 2002 WL 32872440 (N.D. Cal. Dec. 16, 2002).....	1, 2
<i>In re Enron</i> , 319 B.R. 122 (Bankr. S.D. Tex. 2004).....	3
<i>Galluzzo v. Holder</i> , 633 F.3d 111 (2d Cir. 2011).....	3
<i>Germain v. Conn. Nat’l Bank</i> , 988 F.2d 1323 (2d Cir. 1993).....	1, 2, 3, 4
<i>Gowan v. Wachovia Bank, N.A. (In re Dreier LLP)</i> , 453 B.R. 499 (Bankr. S.D.N.Y. 2011).....	4
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989).....	1, 2, 3
<i>Gulf Coast Lift Truck Co. v. Toyota Material Handling, U.S.A., Inc. (In re Gulf Coast Lift Truck Co.)</i> , 319 B.R. 20 (Bankr. M.D. Fla. 2004).....	1
<i>In re Hallahan</i> , 936 F.2d 1496 (7th Cir. 1991).....	3
<i>Hays v. Equitex, Inc. (In the Matter of RDM Sports Grp., Inc.)</i> , 260 B.R. 915 (Bankr. N.D. Ga. 2001).....	2
<i>Heyman v. Kline</i> , 456 F.2d 123 (2d Cir. 1972).....	1

TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>In re Jensen</i> , 946 F.2d 369 (5th Cir. 1991)	1
<i>Katchen v. Landy</i> , 382 U.S. 323 (1966).....	1, 2, 3, 5
<i>Motorola Credit Corp. v. Uzan</i> , 388 F.3d 39 (S.D.N.Y. 2004).....	4
<i>Quarles v. Wells Fargo Home Mortg., Inc. (In re Quarles)</i> , 294 B.R. 729 (Bankr. E.D. Ark. 2003)	2
<i>Ramirez v. Rodriguez (In re Ramirez)</i> , 434 B.R. 446 (Bankr. S.D. Tex. 2010)	1
<i>Sobel v. Weinstein (In re Weinstein)</i> , 237 B.R. 567 (Bankr. E.D.N.Y. 1997).....	2
<i>Thomas v. Chrysler Credit Corp. (In re Ozier)</i> , 132 B.R. 595 (Bankr. E.D. Ark. 1991)	2, 4
<i>WSC, Inc. v. The Home Depot, Inc. (In re WSC, Inc.)</i> , 286 B.R. 321 (Bankr. M.D. Tenn. 2002)	2, 3
 STATUTES	
11 U.S.C. § 548.....	1
 RULES	
Fed. R. Civ. P. 38.....	4
Fed. R. Civ. P. 39.....	4

PRELIMINARY STATEMENT

The Trustee’s timely jury demand entitles him to a jury trial here. The Supreme Court has determined that an action under section 548 of the Bankruptcy Code—like the Trustee’s action—is protected by the Seventh Amendment because it is an action at law. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64-65 (1989). Defendants’ liability for receiving hundreds of millions of dollars of other people’s money must be determined by a jury.

Defendants ask this Court to ignore Supreme Court precedent and impermissibly extend the *Katchen*¹ exception to the Seventh Amendment. But *Katchen* is inapposite because several Defendants have not filed proofs of claim. Moreover, Defendants’ withdrawal of the reference vitiated whatever limited applicability the *Katchen* exception had here. This Court should not create new exceptions to this fundamental right or expand preexisting ones. “The right to a jury trial is too important.” *Heyman v. Kline*, 456 F.2d 123, 129 (2d Cir. 1972).

ARGUMENT

I. THE TRUSTEE HAS A SEVENTH AMENDMENT RIGHT TO A JURY

Fraudulent transfer actions are actions at law and thus entail a right to a jury trial. *Granfinanciera*, 492 U.S. at 64-65. The fact that the Trustee (rather than Defendants) seeks a jury is of no legal import.² Nor does the Trustee lose this right merely because he brings bankruptcy causes of action.³

¹ *Katchen v. Landy*, 382 U.S. 323 (1966).

² The Seventh Amendment does not discriminate—trustees and debtors have the right to a jury trial in this Circuit and elsewhere. *See Germain v. Conn. Nat’l Bank*, 988 F.2d 1323, 1329-30 (2d Cir. 1993); *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242, 1250-53 (3d Cir. 1994); *In re Jensen*, 946 F.2d 369, 373-74 (5th Cir. 1991); *In re Crown Vantage, Inc.*, No. C 02-03836, 2002 WL 32872440, at *3-4 (N.D. Cal. Dec. 16, 2002); *Ramirez v. Rodriguez (In re Ramirez)*, 434 B.R. 446, 451-52 (Bankr. S.D. Tex. 2010); *Cage v. Hardy Rawls Enters. LLC (In re Moye)*, No. 09-3265, 2009 WL 4823998, at *1-2 (Bankr. S.D. Tex. Dec. 9, 2009); *Gulf Coast Lift Truck Co. v. Toyota Material Handling, U.S.A., Inc. (In re Gulf Coast Lift Truck Co.)*, 319

Defendants attempt to manufacture limitations on the Seventh Amendment. First, they suggest that the Seventh Amendment applies only if Congress writes it into a statute. Def. Mem. 4. But the Supreme Court rejected this argument in *Granfinanciera*. 492 U.S. at 64-65. Next, Defendants argue that a trustee has a jury right only as to pre-petition claims. Def. Mem. 3. But the Second Circuit has held otherwise. *Germain v. Conn. Nat'l Bank*, 988 F.2d 1323, 1330 (2d Cir. 1993) (trustee has right to jury trial on claims arising post-petition). Finally, Defendants suggest that *Granfinanciera* is inapposite because the fraudulent transfer claims there were not the “focal point” of the action. Def. Mem. 5. But Defendants cite no authority for this argument, and the Trustee is not aware of any authority that limits *Granfinanciera* in this way.

Nor can Defendants extend the *Katchen* limitation to apply here. That some Defendants filed proofs of claim does not lessen *Granfinanciera*'s applicability.⁴ This is because the withdrawal of the reference divorced this legal action from the claims determination process before the Bankruptcy Court. This action is more like *Granfinanciera* than *Katchen*.⁵

B.R. 20, 22 (Bankr. M.D. Fla. 2004); *Quarles v. Wells Fargo Home Mortg., Inc. (In re Quarles)*, 294 B.R. 729, 730-31 (Bankr. E.D. Ark. 2003); *WSC, Inc. v. The Home Depot, Inc. (In re WSC, Inc.)*, 286 B.R. 321, 327-32 (Bankr. M.D. Tenn. 2002); *Hays v. Equitex, Inc. (In the Matter of RDM Sports Grp., Inc.)*, 260 B.R. 915, 924-25 (Bankr. N.D. Ga. 2001); *Sobel v. Weinstein (In re Weinstein)*, 237 B.R. 567, 574-76 (Bankr. E.D.N.Y. 1997); *Thomas v. Chrysler Credit Corp. (In re Ozier)*, 132 B.R. 595, 602-03 (Bankr. E.D. Ark. 1991).

³ See *Moye*, 2009 WL 4823998, at *1-2 (debtor had right to jury on fraudulent conveyance action); *RDM*, 260 B.R. at 924-25 (trustee had right to jury trial on preference claim); *Crown Vantage*, 2002 WL 32872440, at *3-4 (debtor had right to jury on fraudulent conveyance action).

⁴ The Trustee disagrees with this Court's dismissal of the Trustee's section 502(d) objection to Defendants' proofs of claim. Nevertheless, this dismissal negates any connection between the Trustee's fraudulent transfer action and the claims determination process.

⁵ *Katchen*'s holding rests, in part, upon preventing a creditor-defendant that filed a proof of claim from later seeking refuge in an Article III court by demanding a jury trial. 382 U.S. at 333 n.9. Where, as here, a trustee-plaintiff demands a jury, a creditor-defendant's submission to the bankruptcy court does not affect the former's Seventh Amendment rights. See *Crown Vantage*, 2002 WL 32872440, at *3 n.1 (“The Supreme Court's holdings in . . . *Katchen* . . . and *Langenkamp* . . . concern the rights of creditors, not debtors.”). The fact that some Defendants at

Defendants cannot escape *Granfinanciera*'s holding by relying on *In re Enron Corp.*, 319 B.R. 122 (Bankr. S.D. Tex. 2004).⁶ Def. Mem. 4. *Enron* held that the plaintiff's fraudulent conveyance action was equitable in nature because it arose from the Bankruptcy Code. *Id.* at 126. But the Supreme Court has held precisely the opposite. *See Granfinanciera*, 492 U.S. at 64-65. Moreover, the fraudulent transfer action in *Enron* was pending in the bankruptcy court alongside the claims allowance process. Any similarities between this action and *Enron* disappeared when the reference was withdrawn. Defendants cannot now seek refuge in the equitable powers of the Bankruptcy Court.⁷

II. THE TRUSTEE DID NOT WAIVE HIS JURY TRIAL RIGHT BY COMMENCING HIS ACTION IN BANKRUPTCY COURT

A court must "indulge every reasonable presumption *against* waiver of fundamental constitutional rights." *Galluzzo v. Holder*, 633 F.3d 111, 115 (2d Cir. 2011); *see also Aetna Ins. Co. v. Kennedy to the Use of Bogash*, 301 U.S. 389, 393 (1937). Defendants look to case law expressly rejected by this Circuit to support their argument that BLMIS's bankruptcy petition vitiates the Trustee's constitutional right to a jury trial. *Compare Germain*, 988 F.2d at 1329-30 (holding that a debtor does not lose the right to a jury trial by filing a petition in bankruptcy court) *with In re Hallahan*, 936 F.2d 1496, 1503-06 (7th Cir. 1991) (holding that a debtor loses the right to a jury trial by filing a voluntary petition in bankruptcy court).⁸ Because the Trustee

one point submitted to the Bankruptcy Court is no longer important. The Trustee's legal cause of action was divorced from the claims allowance process by the withdrawal of the reference.

⁶ No court has approved *Enron*'s analysis of the equitable nature of the fraudulent conveyance action. *Enron* is without precedential value here.

⁷ Even were this Court to apply *Katchen* to those who filed proofs of claim, the practical result will be the same. Common issues of fact underlie all fraudulent transfer claims against all Defendants. All such issues must be tried to a jury first. *See WSC*, 286 B.R. at 334.

⁸ In any case, *Hallahan* expressly applies only to voluntary petitions. 936 F.2d 1496, 1505-06 (7th Cir. 1991); *see also WSC*, 286 B.R. at 326 (*Hallahan* is limited to voluntary bankruptcies).

has filed a timely demand, he can waive his right to a jury trial only by express consent. *See* Fed. R. Civ. P. 38 and 39.

III. THE TRUSTEE’S RIGHT TO A JURY TRIAL IS UNAFFECTED BY HIS EQUITABLE SUBORDINATION COUNT

Defendants argue that the Trustee must waive either his equitable subordination count or his right to a jury trial because it would be unfair to use a jury’s determinations against them for equitable subordination. Def. Mem. 6. However, the jury’s determinations could not prejudice Defendants, because an equitable remedy is available only to the extent that legal remedies are inadequate. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 60 (S.D.N.Y. 2004) (“[A]n equitable remedy[] is appropriate only if . . . remedies at law are incomplete and inadequate to accomplish substantial justice.”).⁹

Moreover, the equitable subordination and fraudulent transfer claims require determination of different factual issues and seek to redress different wrongful conduct. *See* Trustee’s Opp. to Def. Mot. to Dismiss 114-15, May 19, 2011. Equitable subordination involves showing that the transferees harmed other creditors by engaging in “gross and egregious conduct tantamount to fraud, misrepresentation, overreaching or spoliation.” *See Gowan v. Wachovia Bank, N.A. (In re Dreier LLP)*, 453 B.R. 499, 516 (Bankr. S.D.N.Y. 2011). By contrast, fraudulent transfer claims require proof as to receipt of transfers, value provided, good faith, and the fraudulent intent of the debtor. Either of the Trustee’s claims could be adjudicated without resolving the other.

when the debtor is a defendant, not a plaintiff). It also does not apply to trustees. *Ozier*, 132 B.R. at 603 (a trustee’s right to a jury should be treated differently than a debtor’s).

⁹ Unlike *Germain*, upon which Defendants rely, Defendants have filed multiple claims based on multiple accounts, some of which are “net losers.” Therefore, a money judgment based only upon their receipt of transfers from certain accounts may be inadequate to redress all of Defendants’ harmful conduct.

Even to the extent that the same conduct could underlie both claims, the Trustee is still entitled to a jury trial on his fraudulent transfer claim. The right to a jury trial on legal claims cannot be destroyed by the presence of a related equitable claim. *Brown v. Sandimo Materials*, 250 F.3d 120, 127-28 (2d Cir. 2001) (“[Equitable] relief may be awarded . . . after the jury has had an opportunity to consider plaintiffs’ legal claims and any factual determinations common to plaintiffs’ legal and equitable claims.”). Defendants effectively ask for a *Katchen*-type exception when a trustee seeks equitable subordination. Def. Mem. 7. *Katchen*, however, was based on extraordinary judicial economy concerns; it did not hold that the jury trial right is destroyed whenever equitable issues are involved. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959) (exceptions to the Seventh Amendment should be permitted “only under the most imperative circumstances.”).

CONCLUSION

For the foregoing reasons the Trustee is entitled to a jury trial in this action.

Dated: New York, New York
October 21, 2011

BAKER & HOSTETLER LLP

/s/ David J. Sheehan
Baker & Hostetler LLP
David J. Sheehan
Fernando A. Bohorquez, Jr.
Regina L. Griffin
Geoffrey A. North

45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201

*Attorneys for Irving H. Picard, Trustee for
the Substantively Consolidated SIPA
Liquidation of Bernard L. Madoff Investment
Securities LLC and Bernard L. Madoff*