UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING H. PICARD, Plaintiff, - against - SAUL B. KATZ, et al., Defendants.	11-CV-03605 (JSR)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' OPPOSITION TO TRUSTEE'S REQUEST FOR A JURY TRIAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES & RULES

Defendants respectfully submit this memorandum of law in response to the Trustee's memorandum in support of his jury trial demand. The Trustee has failed to address the fundamental question: Does the Seventh Amendment or the Bankruptcy Code grant a jury trial right to a trustee for a claim, arising exclusively under the Code, that is brought for the benefit of creditors? The answer is no. No authority supports the existence of any such right in this case.

ARGUMENT

THE TRUSTEE IS NOT ENTITLED TO A JURY TRIAL

The Trustee proclaims the sanctity of jury trial rights, but, recognizing that neither the Seventh Amendment nor the Bankruptcy Code grants him a jury trial right as to *every* claim he may assert, he offers no support for his jury demand as to his equitable subordination claim under 11 U.S.C. § 510(c). (Mem. of Law in Support of the Tr.'s Right to a Jury Trial ("Trustee Br.") at 2.) The question, then, is whether the Trustee has a right to a jury with regard to his claim for intentional fraudulent conveyance under 11 U.S.C. § 548(a)(1)(A).

In their opening brief, Defendants explained why he does not.

In his opening brief, the Trustee first argues, based on *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), that a jury trial right automatically attaches to a fraudulent conveyance action because it is an action at law. (Trustee Br. at 3.) But the *Granfinanciera* Court found such a right, not for the *debtor*, but for a non-debtor, non-creditor defendant that had not submitted to bankruptcy jurisdiction by filing a claim, based in part on the theory that the *defendant* could have been subjected to a fraudulent

conveyance claim, at law, 200 years ago in England. *See id.* at 43. Of course, any such claim could have been asserted only by a creditor, in a "private" litigation.

Here, in contrast, the Trustee has submitted to bankruptcy jurisdiction, and all of the claims he asserts in this case arise from the Bankruptcy Code—not from any right granted *to BLMIS* by common law. BLMIS, the transferor, did not have any right 200 years ago to assert a fraudulent conveyance claim, at law or in equity, as to its own transfers. The Trustee's claim under 11 U.S.C. § 548(a)(1)(A) is granted to the Trustee for the benefit of creditors, not for BLMIS, and it is purely a creation of federal law. *Cf. Stern v. Marshall*, 131 S. Ct. 2594, 2614 (2011) (state-law rights at issue were not "completely dependent upon" a claim created by federal law). *Granfinanciera* therefore provides no support for the Trustee's jury demand with regard to his claims under 11 U.S.C. § 548(a)(1)(A), particularly as this case is one of hundreds of adversary proceedings that collectively constitute an endeavor—undertaken by a Trustee who has claimed to have "quasi-governmental" duties and obligations—quite distinct from a "private" lawsuit.

The Trustee then turns to an entirely different argument, at odds with his posture in opposition to withdrawal. The Trustee notes that thirty-nine of the many Defendants in this case are not creditors, having filed no proofs of claim, so as to them the claims administration process will never be invoked. (Trustee Br. at 8.) Based upon *Katchen v. Landy*, 382 U.S. 323 (1966), the Trustee claims that he is entitled to a jury trial, even though none of these Defendants has asked for a jury. (Trustee Br. at 4-6.)

His argument is unfounded.

The Trustee cannot seriously argue that he has a jury trial right because, as to some Defendants, he has *no* live claim at all—jury or non-jury. Defendants who did not file claims have no claims subject to equitable subordination. Of the thirty-nine in that category, the Trustee asserts that thirty-five are not targets under Section 548(a)(1)(A). (Trustee Br. at 8.) The Trustee has no jury trial right as to *every other* Defendant because he has no claim against some Defendants.

More importantly, *Katchen* does not give the Trustee a jury trial right just because a defendant may have one—especially where the defendant asserts no such right. If BLMIS possessed a claim under non-bankruptcy law as to which a jury trial right existed, the filing of this case under the Securities Investor Protection Act might not deprive the Trustee of that existing right. *See Germain v. Conn. Nat'l Bank*, 988 F. 2d 1323, 1328-29 (2d Cir. 1993). But no such claim is asserted in this case. Neither *Katchen* nor *Germain* supports the finding of a jury trial right where one does not otherwise exist.

The Trustee then suggests that because this case is now pending in an Article III court, a jury trial right arises in his favor. "Because the Trustee asserts fraudulent transfer causes of action in an Article III court, he has an absolute right to a jury trial." (Trustee Br. at 4.) But withdrawal to this Court does not confer jury trial rights where none previously existed. The Trustee confuses Article III with the Seventh Amendment. They are not the same.

Article III creates the federal judiciary. *See* U.S. Const. art. III, § 1. Jurisdiction over bankruptcy cases is granted to the District Court under Article III pursuant to 28 U.S.C. § 1334. *See* U.S. Const. art. III, § 2 ("The judicial power shall extend to all cases, in law and equity, arising under . . . the laws of the United States . . . ."). The

District Court may refer cases falling within that jurisdiction to the Bankruptcy Court. *See* 28 U.S.C. § 157(a). However, the District Court's ability to refer such cases is limited by the constitutional rights of non-debtor parties to Article III courts. *See Stern*, 131 S. Ct. 2594; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

When a bankruptcy case is withdrawn to the District Court because a defendant has a constitutional right to adjudication in an Article III court, the jurisdiction of the case remains unchanged—the District Court simply exercises its bankruptcy jurisdiction. Here, the jurisdictional bases for the Trustee's lawsuit against Defendants are 11 U.S.C. § 1334(b) and 15 U.S.C. §§ 78eee(b)(2)(A), (b)(4), the latter of which grants jurisdiction under SIPA and provides for referral to a Bankruptcy Court. (*See* Compl. ¶ 14.) The Trustee alleges that this is a "core" bankruptcy matter. (*Id.* ¶ 16.) Withdrawal to this Court did not change these essential jurisdictional characteristics and does not spontaneously generate a jury trial right for the Trustee.

Finally, the Trustee ignores *Germain*'s direction that a matter cannot be tried to a jury, and the verdict then used as a basis for equitable subordination of a creditor's claim—indeed, it is apparent that the Trustee intends exactly that result. Although courts generally permit a jury trial in tandem with a non-jury trial, *Germain* suggests that, at least where the Trustee contemplates leveraging a jury verdict, rendered in connection with a claim against a non-debtor defendant, as the basis for subordination of the claims of that defendant against the estate, no such process is appropriate. *See Germain*, 988 F.2d at 1332.

CONCLUSION

For the reasons set forth above, and in their opening memorandum, Defendants respectfully request that the Court find the Seventh Amendment inapplicable to the Trustee's two remaining claims in this action.

Dated: New York, New York
October 21, 2011

DAVIS POLK & WARDWELL LLP

By: /s/ Karen E. Wagner

Karen E. Wagner
Dana M. Seshens
Andrew Ditchfield

450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 701-5800

Attorneys for Defendants

Of Counsel:
Robert B. Fiske, Jr.
Robert F. Wise, Jr.