UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO TRUSTEE'S MOTION FOR ENTRY OF FINAL JUDGMENT AND FOR CERTIFICATION OF INTERLOCUTORY APPEAL

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Defendants respectfully submit this memorandum of law in opposition to the Trustee's motion ("Motion"), supported by the Securities Investor Protection Corporation ("SIPC"), to Direct Entry of Final Judgment Under Federal Rule of Civil Procedure 54(b) and for Certification Under 28 U.S.C. § 1292(b) of this Court's Opinion and Order ("Order") in *Picard v. Katz*, No. 11 Civ. 3605, 2011 U.S. Dist. LEXIS 109595 (S.D.N.Y. Sept. 27, 2011). For the reasons set forth below, the Motion should be denied.

BACKGROUND

Defendants' Motion and This Court's Order

On March 20, 2011, Defendants moved to dismiss, or, in the alternative, for entry of summary judgment dismissing, the Trustee's amended complaint ("Complaint"). The Trustee and SIPC opposed the motion. On September 27, 2011, after the motion was fully briefed and withdrawn from the Bankruptcy Court to this Court, this Court issued the Order.

The Order granted in part, and denied in part, Defendants' motion.

The Court granted the motion to dismiss Counts Two through Nine of the Trustee's Complaint. These counts asserted initial and subsequent transfer claims, predicated on the preference or constructive fraud provisions of the Bankruptcy Code and on New York's Debtor and Creditor Law. Dismissal was predicated upon 11 U.S.C. § 546(e) and the Second Circuit's recent decision in *In re Enron Creditors Recovery Corp.*, 651 F.3d 329 (2d Cir. 2011). *Order,* 2011 U.S. Dist. LEXIS 109595, at *9-11. The Court also dismissed Count Ten, which sought disallowance under 11 U.S.C. § 502(d) of Defendants' claims against the BLMIS estate. *Id.* at *23-24.

The Court denied Defendants' motion in two respects.

First, the Court found that Count One, asserting intentional fraudulent transfer claims under 11 U.S.C. § 548(a)(1)(A), was adequately stated based on allegations that BLMIS was engaged in a Ponzi scheme during the two-year period preceding its SIPA filing. *Id.* at *14. The Court noted, however, that, because the allegedly fraudulent transfers were made by a broker to its customers, the relevant standard for the "good faith" defense afforded a transferee by 11 U.S.C. § 548(c) is "willful blindness." *Id.* at *23 & n.9. The Court also held that transfers within the two years that were in excess of principal and were not given "for value" may be avoided regardless of good faith. *Id.* at *15. The Court has requested additional briefing as to the calculation of "value" with regard to such transfers. (Order, Sept. 28, 2011, doc. no. 41.)

Second, the Court denied Defendants' motion to dismiss the Trustee's demand under 11 U.S.C. § 510(c) for equitable subordination of Defendants' claims against the estate. *Order,* 2011 U.S. Dist. LEXIS 109595, at *25.

Additionally, the Court declined Defendants' invitation to convert their motion to dismiss into one for summary judgment, instead granting the Trustee's request for additional discovery. *Id.* at *19-20 n.8. That discovery, which began before the Order was issued, is ongoing and will conclude by mid-January. Summary judgment will be fully briefed and argued by February 23, 2012, and trial, if necessary, is to begin on March 19, 2012.

The Trustee's Motion to Enter Judgment or Certify Interlocutory Appeal

In the face of this schedule, and despite the fact that additional briefing is already underway to address one issue raised by the Order, the Trustee and SIPC ask this Court to enter partial final judgment or to certify certain of this Court's rulings, so that they may seek immediate appeal to the Second Circuit. These rulings include: (i) the Court's conclusion that Section 546(e) applies to this case; (ii) the dismissal of the Trustee's claims for subsequent transfers; (iii) the dismissal of the Trustee's demand for disallowance of Defendants' claims against BLMIS; and (iv) the Court's conclusion that, in connection with Count One, establishing "good faith" in this proceeding requires showing an absence of "willful blindness."

The Trustee and SIPC do not seriously contend that an immediate appeal will materially advance the termination of the ongoing litigation in this case. No matter how the Second Circuit were to rule, the litigation would continue, and will likely reach judgment long before any appeal could be decided. Instead, they argue that this Court's ruling will have a negative effect upon the *other* cases brought by the Trustee. Even were that a basis for permitting interlocutory appeal or partial final judgment, which it is not, piecemeal appeal is not warranted.

ARGUMENT

THERE IS NO BASIS FOR IMMEDIATE APPEAL

The Trustee, supported by SIPC, has moved for an order certifying specific issues for interlocutory appeal under 28 U.S.C. § 1292(b) or for the entry of partial final judgment under Rule 54(b), so that he may take an immediate appeal. No basis exists for the grant of such relief.

I. CERTIFICATION OF THE COURT'S ORDER FOR INTERLOCUTORY REVIEW UNDER 28 U.S.C. § 1292(b) IS UNWARRANTED

Section 1292(b) provides:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such 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 ultimate termination of the litigation, he shall so state in writing in such order."

The standards for certifying an interlocutory appeal under Section 1292(b) are stringent and have not been met by the Trustee and SIPC.

A. Certification Is Rarely Granted

Section 1292(b) certification requires a showing that (1) the order certified for interlocutory appeal involves a "controlling question of law," (2) there is "substantial ground for difference of opinion" as to the legal issues presented, and (3) granting an appeal may "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Even in the rare case where the strict criteria of Section 1292(b) are met, "a district judge has 'unfettered discretion to deny certification.'" *United States ex rel.*

Assocs. Against Outlier Fraud v. Huron Consulting Group, Inc., No. 09 Civ. 1800, 2011 U.S. Dist. LEXIS 54938, at *5 (S.D.N.Y. May 16, 2011).[1]

Federal practice is "'strongly biased'" against interlocutory appeals. *Id.* at *4. "'Appeals from interlocutory orders prolong judicial proceedings, add delay and expense to litigants, burden appellate courts, and present issues for decisions on uncertain and incomplete records, tending to weaken the precedential value of judicial opinions.'" *Id.* at *4-5 (citation omitted) (quoting *In re Sept. 11 Litig.*, No. 21 MC 97, 2003 U.S. Dist. LEXIS 17105, at *2-3 (S.D.N.Y. Oct. 1, 2003)). Consequently, courts rarely grant interlocutory review, and district courts must "exercise great care in making a § 1292(b) certification." *Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992); *see also Casey v. Long Island R.R. Co.*, 406 F.3d 142, 145-47 (2d Cir. 2005) (refusing to consider appeal because Section 1292(b) criteria not met); *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 866-67 (2d Cir. 1996) (denying Section 1292(b) certification and noting that the Second Circuit accepted only eight Section 1292(b) appeals in the preceding two years).

This case should be no exception.

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[1] As the Trustee himself has argued recently in opposing a certification motion, "leave to appeal is granted only in exceptional circumstances . . . [which] serves the judicial policy of discouraging interlocutory appeals and avoiding the resulting disruption and delay which is caused by piecemeal litigation." (Tr.'s Opp. to Mot. of Bart M. Schwartz, as Receiver of Defs. Gabriel Capital, L.P. and Ariel Fund Ltd., for Leave to Appeal the Nov. 17, 2010 Mem. and Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss the Tr.'s Compl., *Picard v. Merkin*, No. 11 MC 012, doc. no. 3., at 6 (S.D.N.Y. Jan. 14, 2011).) Thus, interlocutory review is "limited to 'extraordinary cases where appellate review might avoid protracted and expensive litigation,' and its purpose is not to provide early review of difficult rulings in hard cases." (*Id.* at 7.)

B. Interlocutory Review Will Not Advance the Ultimate Termination of the Litigation

The "most important" of the three criteria for Section 1292(b) certification is whether interlocutory appeal will "materially advance the ultimate termination of the litigation." *In re MTBE Prods. Liab. Litig.*, No. 00-1898, MDL 1358, 2005 U.S. Dist. LEXIS 225, at *9 (S.D.N.Y. Jan. 6, 2005); *see also Koehler*, 101 F.3d at 866 (noting view that "Congress only aimed to vindicate the final [goal] of saving trial court time by avoiding fruitless litigation"); *In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2d Cir. 1978) (deeming "critical" the requirement that interlocutory appeal "have the potential for substantially accelerating the disposition of the litigation").

The Trustee and SIPC virtually ignore this requirement and cannot meet it. Unlike the cases relied upon by the Trustee and SIPC where an appellate decision could end the case, that cannot be the result here regardless of any ruling by the Second Circuit. *Cf., e.g.*, *Brown v. Bullock*, 294 F.2d 415, 417 (2d Cir. 1961) (granting interlocutory review of jurisdictional issue where resolution was desirable "to avoid a lengthy trial which would be futile if such jurisdiction did not exist").

For the same reason, cases in which the parties agreed that interlocutory appeal was appropriate are particularly inapposite. *See, e.g.*, *Consol. Edison, Inc. v. Ne. Util.*, 318 F. Supp. 2d 181, 196-97 (S.D.N.Y. 2004); *Romea v. Heiberger & Assocs.*, 988 F. Supp. 715, 716 (S.D.N.Y. 1998). Review now could only risk waste or delay, which is antithetical to the objectives of Section 1292(b). *See, e.g.*, *Analect LLC v. Fifth Third Bancorp*, No. 06-CV-891, 2009 U.S. Dist. LEXIS 73590, at *19 (E.D.N.Y. Aug. 19, 2009) (denying plaintiff's motion for Section 1292(b) certification and finding that "[a]dding an additional layer of appeal (and the accompanying delay) would hardly serve

to materially advance the termination of this litigation"); *Flaherty v. Filardi*, No. 03 Civ. 2167, 2007 U.S. Dist. LEXIS 45905, at *12-13 (S.D.N.Y. June 26, 2007) (denying Section 1292(b) certification because "the efficient resolution of this litigation would not be served by authorizing an interlocutory appeal").

C. The Trustee and SIPC Raise No Issue That Satisfies the Section 1292(b) Criteria

The Trustee and SIPC have also failed to present any controlling question of law as to which there is a substantial ground for difference of opinion that warrants the extreme remedy of certification. Nor is any issue they have identified one as to which an appellate ruling now would materially advance the termination of this litigation.

A question of law is controlling where "reversal of the district court's order would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) (finding Section 1292(b) satisfied because reversal of district court's finding of personal jurisdiction necessarily would terminate the actions immediately). A "substantial ground for difference of opinion" is demonstrated where there exists "genuine doubt as to whether the district court applied the correct legal standard in its order." *Consub Del. LLC v. Schahin Engenharia Limitada*, 476 F. Supp. 2d 305, 309 (S.D.N.Y. 2007). Genuine doubt may be established "when (1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." *In re Lloyd's Am. Trust Funds Litig.*, No. 96 Civ. 1262, 1997 U.S. Dist. LEXIS 11937, at *13 (S.D.N.Y. Aug. 12, 1997).

The Trustee and SIPC put forward four issues for which the Trustee seeks Section 1292(b) certification: (i) the application of Section 546(e) to this case; (ii) the dismissal

of the Trustee's claims for subsequent transfers; (iii) the dismissal of the Trustee's demand for disallowance of Defendants' claims against BLMIS; and (iv) the conclusion that the relevant "good faith" standard is lack of "willful blindness." None meets the Section 1292(b) standards.

1. There Is No Substantial Ground for Difference of Opinion As to the Application of Section 546(e) to This Case

The Trustee and SIPC argue first that the Court's application of Section 546(e) to the Trustee's preference and fraudulent transfer claims warrants immediate appeal because it conflicts with Second Circuit precedent and the decisions of other courts in this Circuit. (Trustee Br. at 11-16; SIPC Br. at 8-10.[2]) They are wrong.

On its face, Section 546(e) applies where a transfer is made to settle a securities transaction or in connection with a securities contract. 11 U.S.C. § 546(e). Long before the Trustee filed any of his more than 900 cases, several circuit courts had held that the scope of Section 546(e) is broad and that it must be afforded its plain meaning. The Second Circuit adopted the reasoning of those circuits in its recent *Enron* decision affirming the breadth of Section 546(e). *Enron*, 651 F.3d at 334-35 (citing cases). Further adopting those precedents, the Second Circuit held that the definition of "settlement payment" was to be construed broadly and declined to read a purchase or sale requirement into Section 546(e). *Id.* at 336-38; see also id. at 338 ("[W]e find no basis in the Bankruptcy Code or the caselaw for a purchase or sale requirement[.]").

The *Enron* decision interpreted the previous iteration of Section 546(e). This Court, addressing Section 546(e)'s current language, the scope of which is even broader,

[2] References to "Trustee Br." and "SIPC Br." are to briefs filed by the Trustee and SIPC, respectively, in support of the Trustee's Motion.

also found that "any payment by Madoff Securities to its customers that somehow does not qualify as a 'settlement payment' qualifies as a 'transfer' made 'in connection with a securities contract.'" *Order*, 2011 U.S. Dist. LEXIS 109595, at *11. Although the Trustee and SIPC now contend that this Court's Section 546(e) ruling is novel, its conclusion derives from the *Enron* Court's decision.

Moreover, that Section 546(e) applies is clear from the face of the Trustee's Complaint. The Complaint alleges that the "Sterling BLMIS Account Agreements were to be performed . . . through securities trading activities . . . [and] a number of the Sterling Defendants . . . sent funds to BLMIS and/or to BLMIS' account at JPMorganChase & Co, Account # XXXXXX1703, . . . for application to the Sterling BLMIS Accounts and the conducting of purported trading activities." (Compl. ¶ 1104.) Further, "Madoff purported to invest BLMIS customer funds in a basket of common stocks within the S&P 100 Index—a collection of the 100 largest publicly traded companies," and BLMIS' customers "received fabricated monthly or quarterly statements showing that securities were held in, or had been traded through, their accounts." (*Id.* ¶¶ 30-31.) The Trustee himself thus alleges that the challenged payments were made in connection with a contract to buy or sell securities.

Similarly, although the Trustee and SIPC lament this Court's conclusion that BLMIS was a "stockbroker" (Trustee Br. at 12-13; SIPC Br. at 9-10), again, the allegations of the Complaint itself mandate that conclusion. The Complaint alleges that "BLMIS was registered with the SEC as a securities broker-dealer under Section 15(b) of the [Exchange Act]," by virtue of which it was a member of SIPC. (*See, e.g.*, Compl. ¶¶ 29, 884, 889). The Trustee and SIPC also do not dispute the fact that, if BLMIS had

not been a stockbroker, it could not be a SIPA debtor. Indeed, the Second Circuit in *In re Bernard L. Madoff Inv. Sec. LLC*, No. 10-2378-bk, 2011 U.S. App. LEXIS 16884 (2d Cir. Aug. 16, 2011) ("Net Equity Decision"), found that "[b]y virtue of its *registration with the SEC as a broker-dealer*, BLMIS is a member of SIPC."[3] *Id.* at *9 n.4 (emphasis added).

The Trustee and SIPC cite no authority to the contrary. *See, e.g.*, *In re Slatkin*, 525 F.3d 805, 817-18 (9th Cir. 2008) (finding that debtor was not a stockbroker where he was *not* licensed and did not hold himself out as able to effect securities trades); *Wider v. Wootton*, 907 F.2d 570, 571-73 (5th Cir. 1990) (providing that debtor was not a stockbroker because *no customers deposited cash* with him); *In re Adler, Coleman Clearing Corp.*, 263 B.R. 406, 478-81 (S.D.N.Y. 2001) (addressing whether transactions were "settlement payments" without regard to whether debtor was a stockbroker where debtor was SEC-registered and a member of SIPC); *In re Enron Corp.*, No. 03-92677, 2008 U.S. Dist. LEXIS 7340, at *11-18 (S.D.N.Y. Jan. 25, 2008) (denying interlocutory appeal of bankruptcy court order without discussing whether debtor was a stockbroker).

Nor do they cite any authority—other than the Bankruptcy Court—suggesting that customers of an entity that was a broker for SIPA purposes could be deprived of the Section 546(e) safe harbor because no trading on the securities markets occurred, even though the broker issued statements showing that securities had been "held in," or "traded

[3] The Complaint also alleges that payments were made to and from "BLMIS' account at JPMorganChase & Co, Account # XXXXXX1703." (Compl. ¶ 1104.) The safe harbor of Section 546(e) extends to "a transfer made by or to . . . a financial institution . . . in connection with a securities contract." JPMorganChase is indisputably a "financial institution." The safe harbor, therefore, would apply regardless of BLMIS' stockbroker status.

through, their accounts." Although the Trustee and SIPC point to the decision in *Picard v. Merkin*, 11 MC 0012, 2011 U.S. Dist. LEXIS 97647 (S.D.N.Y. Aug. 31, 2011), that was not a decision on the merits of any issue. There, the Court declined to certify an interlocutory appeal from the Bankruptcy Court's decision, issued before *Enron*, questioning whether BLMIS was a stockbroker. *Id.* at *38-39. The *Merkin* decision cites no contrary substantive precedent with regard to stockbroker status, remarking only that no "substantial ground for difference of opinion" was raised by the contention that the Bankruptcy Court's holding was "untenable." *Id.* Thus, there can be no "genuine doubt" that "the correct legal standard" was applied in the Order.[4]

Finally, the Second Circuit's Net Equity Decision has nothing to do with the Trustee's avoidance claims or with the application of Section 546(e). The Net Equity Decision addressed the priority of, and distribution on, claims against BLMIS, holding that BLMIS claimants were customers with claims for securities and that SIPA permitted priority distributions to be granted to some of those claimants based upon the Trustee's Net Investment Method. *See* 2011 U.S. App. LEXIS 16884, at *19, 27. The Second Circuit neither addressed the standards for avoidance nor held that the rules for granting priority to a claim against BLMIS were relevant to the rules governing avoidance of claims brought by BLMIS' Trustee. In particular, contrary to the Trustee's contention, the Second Circuit did not rule that "[i]f an account has a positive cash balance, that

[4] Similarly, the Trustee and SIPC's contention that the Court failed to consider Section 546(e)'s plain language in the context of the "overall structure and operation" of SIPA and the Bankruptcy Code provides no basis for certification. (Trustee Br. at 13-14; SIPC Br. at 9-10.) The Court squarely addressed Section 546(e) in this context, noting that the "safe harbor stands 'at the intersection of two important national legislative policies on a collision course—the policies of bankruptcy and securities law.'" *Order*, 2011 U.S. Dist. LEXIS 109595, at *9 (quoting *Enron*, 651 F.3d at 334).

accountholder is owed money from the estate. If an account has a negative cash balance, the accountholder owes money to the estate."[5] (Trustee Br. at 2.)

Accordingly, there is no difference of opinion as to this Court's Section 546(e) ruling. It is consistent with, and indeed mandated by, the Second Circuit's *Enron* decision, which itself is consistent with prior rulings in other Circuits that do not support the Trustee's efforts to avoid transfers beyond the two-year period prescribed by Section 548(a)(1)(A).

2. The Dismissal of Subsequent Transfer Claims Does Not Raise a Question of Law and Certification Will Not Materially Advance the Termination of the Litigation

The Trustee also seeks immediate review of this Court's dismissal of Count Nine of the Complaint, which sought avoidance of subsequent transfers under Section 544 of the Bankruptcy Code and under New York law. The Trustee contends that his right to seek subsequent transfers from entities as to which transfers are avoided under Section 548(a)(1)(A) has been compromised. (Trustee Br. at 16-17.) But the Trustee's Complaint never sought recovery of such transfers. Count One, which addresses avoidance under Section 548(a)(1)(A), seeks avoidance only of "initial transfers." (Compl. ¶¶ 1330-1335.) Count Nine does not invoke Section 548(a)(1)(A) as its basis for subsequent transfer avoidance. (*Id.* ¶¶ 1387-1392.)

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[5] Indeed, the Second Circuit's only reference to avoidance is entirely consistent with this Court's Order. In footnote 11 of its decision, the Second Circuit referenced Bankruptcy Code Section 548(a)(1)(A)—the only relevant fraudulent transfer provision *excluded* from Section 546(e)'s safe harbor—in the context of avoiding fraudulent transactions that occurred immediately prior to a SIPA filing so that some "net equity" claims were not placed unfairly ahead of others. *Net Equity Decision*, 2011 U.S. App. LEXIS 16884, at *36-37 n.11.

No legal issue, therefore, is presented, and certainly not a "controlling" one about which there is substantial ground for difference of opinion. And under no circumstances would interlocutory appeal materially advance this litigation. In fact, it would be entirely premature. Consistent with Section 550(a)'s plain language, the Trustee cannot avoid a subsequent transfer until an initial transfer is "avoided." The Trustee has not yet obtained a judgment avoiding *any* transfer—in this case or in any other—so any proffered need for expedited review is illusory.

3. Interlocutory Appeal of the Dismissal of Section 502(d) Claims Will Not Materially Advance the Termination of the Litigation

Similarly premature would be interlocutory appeal of this Court's dismissal of the Trustee's claims under Section 502(d), which seek the disallowance of Defendants' claims against BLMIS on the ground that the Trustee seeks to avoid transfers to them. (Compl. ¶¶ 1393-1397.) Section 502(d) mandates disallowance of claims by transferees of avoidable transfers who have refused to turn assets over to the trustee. Here, there have been no judgments that any transfers to Defendants are avoidable. Indeed, the Trustee has not obtained a judgment against any avoidance defendant in the entire bankruptcy case. The Trustee can show no basis whatsoever for an expedited, interlocutory appeal before he obtains even a single judgment that might be the basis for an order under Section 502(d). *See In re Atl. Computer Sys.*, 173 B.R. 858, 862 (S.D.N.Y. 1994) (Section 502(d) "clearly envisions some sort of determination of the claimant's liability before its claims are disallowed").

4. Interlocutory Appeal of the Court's "Willful Blindness" Holding Is Particularly Inappropriate

Finally, notwithstanding that he prevailed on Count One, the Trustee seeks certification of the Court's direction that, in future proceedings in this case, "good faith" requires a showing that Defendants were not "willfully blind." (Trustee Br. at 21-24; *see also* SIPC Br. at 12-13.) There is no basis for such relief.

First, appeal of this ruling would be premature. The parties are engaged in discovery with respect to the question of Defendants' alleged "willful blindness"—an allegation made by the Trustee in his Complaint long before the Order was issued. The Court will consider the application of this standard to the evidence in the course of the upcoming motion practice and/or trial, after which the Second Circuit will have the entirety of the Court's thinking on the issue. *See Koehler*, 101 F.3d at 864 (rejecting interlocutory appeal because "[i]t does not serve § 1292(b)'s intended purpose to rule on an ephemeral question of law that may disappear in the light of a complete and final record"); *N.Y. Health & Hosps. Corp. v. Blum*, 678 F.2d 392, 398 (2d Cir. 1982) (denying interlocutory appeal where further proceedings on remand "will more fully crystallize the question, create a better record, and give us the benefit of the trial court's thinking"); *Huron Consulting Group*, 2011 U.S. Dist. LEXIS 54938, at *4 (noting that interlocutory appeals are disfavored because they "present issues for decisions on uncertain and incomplete records").

Second, the Court's conclusion that, where an avoidance claim targets withdrawals from a brokerage account, the customer's "good faith" defense under Section 548(c) must be measured under a "willful blindness" standard is well supported

by precedent. As this Court previously held, SIPA is a securities statute, codified under Title 15 of the United States Code. *Picard v. HSBC Bank PLC*, 450 B.R. 406, 410 (S.D.N.Y. 2011). A broker's liquidation is to be conducted as though under the Bankruptcy Code, but only to the extent consistent with Title 15. 15 U.S.C. § 78fff(b).

Under various provisions of Title 15 and the rules promulgated thereunder, a securities customer has no duty to investigate the origin of payments from his broker to assure that they are not the product of fraud, and the Trustee and SIPC can point to no case so holding. The measure of "good faith" in this context must therefore be founded on this well-settled law, which governed the broker-customer relationship at the time of the transactions at issue and forms the foundation for this Court's opinion:

> "Just as fraud, in the context of federal securities law, demands proof of scienter, so too 'good faith' in this context implies a lack of fraudulent intent. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 215 (1976) (holding that scienter requires 'proof of more than negligent nonfeasance'). A securities investor has no inherent duty to inquire about his stockbroker, and SIPA creates no such duty. *See generally In re New Times Sec. Servs.*, 371 F.3d 68, 87 (2d Cir. 2004)." *Order*, 2011 U.S. Dist. LEXIS 109595, at *22.

Third, the Trustee and SIPC have not cited, because they cannot, any case in which a trustee sought to avoid transfers by a broker to a customer, on account of what the customer was owed by the broker, and the customer was denied a "good faith" defense on the ground that the customer was on inquiry notice, or "should have known," of the broker's fraud.

Again, there can be no "genuine doubt as to whether the district court applied the correct legal standard in its order." *Consub Del.*, 476 F. Supp. 2d at 309. Therefore, even were this a matter of first impression, "that fact, 'standing alone, is insufficient to'

warrant an immediate appeal." *SEC v. Goldman Sachs & Co.*, No. 10 Civ. 3229, 2011 U.S. Dist. LEXIS 119544, at *3 (S.D.N.Y. Oct. 17, 2011) (quoting *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996)).

D. The Purported Impact of the Order on *Other* Cases Is Not a Basis for Section 1292(b) Certification

In an attempt to write into Section 1292(b) a basis for interlocutory appeal that does not exist, the Trustee argues that the Court should certify the legal issues in its Order for immediate appeal because of the "unusual significance" of the Court's Order and its impact on the more than 900 other litigations the Trustee has commenced. (Trustee Br. at 20-21.) In particular, the Trustee asserts that certainty on these issues from the Second Circuit is necessary or else litigants in other cases will continue to invoke the Order in defense of the Trustee's claims against them. (*See id.*) Although this is a natural consequence of litigation, the Trustee could have avoided what he perceives as his troubled state of affairs.

On August 27, 2009, the Trustee moved the Bankruptcy Court to establish a process by which to address a legal issue of relevance to all customers: the proper construction of SIPA's "net equity" definition. More than two years ago, on September 16, 2009, the Bankruptcy Court issued an order granting omnibus briefing of the "net equity" issue and noting that other legal issues might qualify for similar treatment, including "any avoidance power or other claims the BLMIS trustee may have against a customer[.]" (Order Scheduling Adjudication of "Net Equity" Issue at 2, *In re Madoff*, No. 08-01789, doc. no. 437.) The Bankruptcy Court:

> "ORDERED, that the Trustee shall confer with counsel regarding the other issues that should be the subject of separate scheduling orders, and

> shall propose a conference or hearing to set a schedule for such issues[.]" *Id.* at 6.

For over two years the Trustee has failed to set any other topics for omnibus briefing—including the question of whether Section 546(e) applies in this and his hundreds of other avoidance cases. If it does, as this Court has ruled, broad swaths of the Trustee's claims are without legal foundation. Inexplicably, the Trustee filed over 900 lawsuits without ever attempting to get a ruling on the issue. Having brought all of his lawsuits without availing himself of such a process, the Trustee cannot now suddenly claim that review is urgently needed.

II. THERE IS NO BASIS FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b)

Alternatively, the Trustee seeks an expedited appeal through entry of partial final judgment under Federal Rule of Civil Procedure 54(b), which provides, in relevant part:

> "When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."

Like certification under Section 1292(b), entry of partial final judgment under Rule 54(b) should be granted only in the rare cases where "there are interests of sound judicial administration and efficiency to be served, or, in the infrequent harsh case, where there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal." *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 629 (2d Cir. 1991) (citations and internal quotation marks omitted); *see also Cullen v. Margiotta*, 618 F.2d 226, 228 (2d Cir. 1980) (per curiam). In rare instances, Rule 54(b) can aid in avoiding duplicative trials, but only if an appeal can be taken "*without delaying*

prosecution of the surviving claims [and] a dismissed claim [could be] reversed in time to be tried with the other claims." *Cullen v. Margiotta*, 811 F.2d 698, 711 (2d Cir. 1987) (emphasis added); *see also Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 16 (2d Cir. 1997).

Because of the "historic federal policy against piecemeal appeals," Rule 54(b) authority should be exercised sparingly. *Hogan v. Consol. Rail Corp.*, 961 F.2d 1021, 1025 (2d Cir. 1991) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980)). Otherwise, Rule 54(b) would have near-universal application and result in constant piecemeal appeals. *See Hogan*, 961 F.2d at 1026; *see also Arar v. Ashcroft*, CV-04-0249, 2006 U.S. Dist. LEXIS 45550, at *6-7 (E.D.N.Y. July 5, 2006) ("[P]laintiff's argument that an expedited appeal on counts 1-3 would allow a consolidated trial on all counts does not differentiate this case from any other case with multiple claims in which some, but not all, are dismissed before trial.").

A. There Is Just Reason to Delay Entry of Partial Final Judgment

To succeed on his Rule 54(b) motion, the Trustee must show that there is "no just reason for delay" in the entry of partial final judgment. This he cannot do. Although he argues that entry of partial final judgment now will further judicial efficiencies so that he can appeal those issues and avoid duplicative trials (Trustee Br. at 7-8), this is true of any litigation where part, but not all, of a case is dismissed. In addition, no judicial efficiencies will result unless the Trustee can obtain an appellate ruling before, and without delaying, trial of the remaining claims. *See Cullen*, 811 F.2d at 711; *see also Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 73 F. Supp. 2d 345, 347-48 (S.D.N.Y. 1999)

(denying Rule 54(b) certification because there was no basis to delay trial). That would require resolution of the Trustee's appeal in less than six months.

B. No Hardship or Injustice Will Result If Appeal Is Taken from a Final Judgment

No party to this litigation will suffer any hardship or injustice if partial final judgment is not entered at this time. Nor does the Trustee or SIPC argue that they would. Rather, the Trustee argues that entry of final partial judgment is necessary to avoid a "multiplication of errors" and to prevent "injustice on *all parties* to the larger liquidation proceeding, of which this particular case is only one piece."[6] (Trustee Br. at 8 (emphasis added).) But that is no basis for entry of final partial judgment in *this* case. Moreover, the Trustee soon will have a right to appeal, likely long before any Second Circuit ruling would issue. His motion raises only the timing of his appeal of the Order, not whether the Order's rulings ever will be subject to appellate review. Under such circumstances, there is no hardship or injustice that would result from waiting another six months to raise any and all appealable issues at one time and on as fully developed a record as possible. *See, e.g.*, *Harman v. City of New York*, No. 96 Civ. 846, 1997 U.S. Dist. LEXIS 1805, at *4 (S.D.N.Y. Feb. 24, 1997) (noting that an expedited trial would make all claims "available for appellate review on a full record" with "little further delay").

Accordingly, entry of partial final judgment is no more warranted than certification under Section 1292(b).

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[6] The Trustee does not appear to be inhibited by this Court's decision in any event. For example, he has recently filed a $5 million complaint against the Jewish Association for Services for the Aged, seeking to avoid constructively fraudulent transfers over six years, despite this Court's ruling that the law does not support such a claim. *See Picard v. Jewish Ass'n for Servs. for the Aged*, No. 11-ap-02773 (Bankr. S.D.N.Y.).

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny the Trustee's Motion to Direct Entry of Final Judgment under Rule 54(b) and for Certification under 28 U.S.C. § 1292(b).

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