UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendants.	Adv. Pro. No. 08-1789 (BRL) SIPA LIQUIDATION (Substantively Consolidated)
In re BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. TROTANOY INVESTMENT COMPANY LTD., ACCESS INTERNATIONAL ADVSIORS LTD. (f/k/a/ ALTERNATIVE ADVISORS LIMITED), HYPOSWISS PRIVATE BANK GENÈVE S.A. (f/k/a ANGLO-IRISH BANK (SUISSE) S.A., f/k/a MARCUARD COOK & CIE S.A.), and PALMER FUND MANAGEMENT SERVICES LIMITED, Defendants.	Adv. Pro. No. 10-05208 (BRL) 11 Civ. 07112 (JSR)

TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO TROTANOY'S MOTION TO WITHDRAW THE REFERENCE

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Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act ("SIPA"),[1] 15 U.S.C. §§ 78aaa *et seq.*, and the estate of Bernard L. Madoff ("Madoff," and together with BLMIS, each a "Debtor" and collectively, the "Debtors"), by and through his undersigned counsel, hereby submits this memorandum of law in opposition to the Motion to Withdraw the Reference (the "Motion") and accompanying Memorandum of Law ("Mem. of Law") filed in the following action: *Picard v. Trotanoy Investment Company Ltd., et al.*, Adv. Pro. No. 10-05208 (Bankr. S.D.N.Y.) (BRL)[2], No. 11 Civ. 07112 (JSR) (S.D.N.Y.) (ECF No. 1).[3]

PRELIMINARY STATEMENT

Through this Motion, the defendant Trotanoy Investment Company Ltd. ("Trotanoy" or "Defendant") has inappropriately sought to invoke this Court's jurisdiction while seeking to deprive the bankruptcy court of its central role of ensuring the ratable distribution of customer property to all customers—who have filed over 16,000 customer claims—in the largest SIPA liquidation in history. The "copycat" nature of the Motion demonstrates that it is nothing more than a transparent attempt at forum shopping and entirely without merit. To escape the fact that

[1] The Securities Investor Protection Act ("SIPA") is found at 15 U.S.C. §§ 78aaa *et seq*. For convenience, subsequent references to SIPA will omit "15 U.S.C."

[2] A copy of the complaint (cited as "Compl.") filed by the Trustee against the Defendant is annexed to the Warshavsky Decl. as Exhibit 2.

[3] Pursuant to an Order dated December 6, 2011 (the "December 6 Order," a copy of which is annexed as Exhibit 1 to the Declaration of Oren J. Warshavsky, Esq. ("Warshavsky Decl."), the Court stayed the Motion to Withdraw the Reference as to three defendants in the above-captioned action, Access International Advisors Ltd. (f/k/a Alternative Advisors Limited) ("Access"), Hyposwiss Private Bank Geneve S.A. (f/k/a Anglo-Irish Bank (Suisse), f/k/a Marcuard Cook & Cie S.A. ("Hyposwiss"), and Palmer Fund Management Services Limited ("Palmer"), and directed the Trustee to file a brief in opposition only as to defendant Trotanoy Investment Company Ltd.

they cannot manufacture a basis for withdrawal, Trotanoy urges that the *in pari delicto* doctrine and SLUSA bars the Trustee from proceeding with his avoidance action. Trotanoy recycles the arguments made in support of a prior application by HSBC.

As applied here, these arguments are frivolous. The *in pari delicto* doctrine has only been invoked in case law involving a debtor's *common law claims* against *third parties* and SLUSA, on its face, only applies to actions where a defendant is accused of a tortious conduct (such as a misrepresentation, omission or deception) in connection with the purchase or sale of a covered security. In the HSBC action, the HSBC defendants were moving against the Trustee's common law claims (*i.e.* the non-core bankruptcy claims). Here, by contrast—and as Trotanoy acknowledged several times in its Motion—only core bankruptcy claims are being asserted against Trotanoy. *See* Mem. of Law at 33, 40. Trotanoy merely copied an argument made by another defendant in an unrelated action—and that argument is flatly inappropriate here.

Indeed, Trotanoy's conduct in connection with the filing of its Motion demonstrates its blatant forum shopping. During the pendency of the above-captioned action, the Trustee has also been litigating the proceeding captioned *Picard v. UBS AG, et. al.*, Adv. Pro. No. 10-04285 (BRL), No. 11 Civ. 4212 (CM) ("the Luxalpha Action") before Judge Lifland and Judge McMahon. The Luxalpha Action shares a key common defendant—Access—with this action, which along with its related corporate entities was of central importance to the creation, monitoring, and management of both the Trotanoy and Luxalpha feeder funds at issue in the two proceedings. In fact, Access faces virtually identical factual allegations in each complaint. Additionally, the Trustee has asserted the same legal claims against Access in both complaints, and Access has moved to dismiss the Luxalpha action under the same standing and SLUSA grounds as it has so moved in this proceeding. Despite the common defendant and overlapping

factual and legal allegations shared with the Luxalpha Action, Trotanoy did not acknowledge the relatedness of the Luxalpha Action in connection with its Motion. Rather, in its civil cover sheet, Trotanoy only specified that this action was related to the HSBC action, although the actions share no common defendants or specific facts. *See* Civil Cover Sheet, *Picard v. Trotanoy Investment Company, Ltd., et al.*, Adv. Pro. No. 10-05028 (Bankr. S.D.N.Y. Oct. 12, 2011) (ECF No. 30), a copy of which is annexed to the Warshavsky Decl. at Exhibit 3.

Through this procedural gamesmanship, the Defendant is perverting section 157(d). Indeed, this is precisely the type of conduct against which courts in this Circuit have routinely cautioned. This should not be permitted in the face of clear Second Circuit precedent narrowly construing section 157(d) and giving deference to bankruptcy courts to address purely core matters. None of the issues raised in the Motion require *substantial and material consideration* of non-bankruptcy federal law.

In short, the bankruptcy court is the proper forum for litigating questions of bankruptcy law and claims against the Debtor in this SIPA proceeding.[4] And it is the bankruptcy court that should determine, in the first instance, the meaning and scope of the provisions of the Bankruptcy Code as applied in this SIPA bankruptcy liquidation proceeding—fundamental questions of bankruptcy law that require nothing more than construction and application of the Bankruptcy Code. Accordingly, the Motion should be denied.

[4] Here, the Trustee seeks to avoid and recover fraudulent transfers that the Defendant received from BLMIS preceding the commencement of the SIPA proceeding. SIPA § 78fff-2(c)(3) expressly incorporates the Bankruptcy Code and specifies that a SIPA proceeding is to "be conducted in accordance with, and as though it were being conducted under" the Bankruptcy Code and governed by relevant provisions of title 11. Moreover, SIPA § 78eee-(b)(4) specifically requires that "[u]pon the issuance of a protective decree and appointment of a trustee … the court *shall* forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11." SIPA § 78eee-(b)(4).

ALLEGATIONS IN THE COMPLAINT

Trotanoy is not an innocent bystander to Madoff's Ponzi scheme. Trotanoy is a highly sophisticated investment company—a feeder fund, that funneled money into the Madoff Ponzi scheme despite glaring indicia of fraud. Trotanoy, through its investment manager Access, touted that the fund was well-scrutinized and protected against the "[r]isk of fraud by doing extensive due diligence" and against "[r]isk of drift by the implementation of an ongoing qualitative, operational and quantitative monitoring." Compl. ¶ 49. However, that rigorous process as advertised was never applied to Madoff or BLMIS. *Id.* ¶ 50. For example, Madoff was not required to complete any of the extensive background questionnaires or handwriting analyses required of Access's potential managers—and upon information and belief, *no* other asset manager was excused from the questionnaire requirement. *Id.* ¶¶ 51-53. In addition, while Access touted as part of its due diligence and monitoring process, that each fund manager was required to accept monthly visits from Access staff, Madoff and BLMIS were never subject to these visits and in fact, the due diligence team never met with Madoff or anyone from BLMIS. *Id.* ¶¶ 54-55.

Access was fully aware of the indicia of fraud surrounding BLMIS, especially after hiring Chris Cutler ("Cutler"), a consultant that specialized in providing due diligence services on hedge funds, to examine BLMIS. *Id.* ¶ 59. Within four days, Cutler determined there were serious problems with BLMIS, including (i) the discrepancies in the reported volume of BLMIS's options trades, (ii) the unfeasibility of Madoff's strategy, (iii) the lack of any independent verification of trades or assets, (iv) the opportunity for fraud caused by the delayed paper confirmations. *Id.* ¶¶ 60-61. Cutler came to the conclusion that Access should exit all of its investments with BLMIS, and while not asked to produce a final written report, sought to

convey his findings verbally at a lunch meeting in New York with Access's inner circle in late April or early May 2006. *Id.*

However, Access's team dismissed Cutler's findings in light of the fact that the BLMIS business was "going well," and further asserted that Cutler was incorrect because BLMIS was supposedly audited on a regular basis by the SEC and FINRA and that there could not be a problem. *Id.* ¶ 64. That lunch meeting was the beginning and end of the discussion concerning Cutler's findings and recommendations. Upon information and belief, Cutler's findings were purposely not shared with anyone else at Access, including its research and marketing staff, or even its due diligence team. *Id.* ¶ 68. Access, and thereby Trotanoy were on actual notice of serious problems with the trades reported by BLMIS, and, in bad faith, Trotanoy willfully chose to ignore and conceal that problem in order to unjustly benefit from its relationship with BLMIS. *Id.* ¶ 69.

BACKGROUND

A. Commencement of the SIPA Liquidation

Having adjudicated various Madoff liquidation matters, this Court's familiarity with the background of this matter is presumed.

B. SIPA Authorizes the Trustee to Pursue Avoidance Actions

SIPA § 78fff(b) grants the Trustee authority to conduct a SIPA liquidation proceeding "in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11." SIPA § 78fff(b); *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 231 (2d Cir. 2011) (the "*Second Circuit Net Equity Decision*") ("Pursuant to SIPA, Mr. Picard has the general powers of a bankruptcy trustee, as well as additional duties, specified by the Act, related to recovering and distributing customer property.") (citing SIPA § 78fff-1). SIPA § 78fff-2(c)(3) expressly incorporates the Bankruptcy Code and authorizes a

SIPA Trustee to recover any fraudulent transfers, including those to customers. SIPA § 78fff-2(c)(3); *Second Circuit Net Equity Decision*, 654 F.3d at 241 n.10 ("SIPA and the Code intersect to . . . grant a SIPA trustee the power to avoid fraudulent transfers for the benefit of customers.") (quoting *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. (In re Bernard L. Madoff Inv. Sec. LLC)*, 424 B.R. 122, 136 (Bankr. S.D.N.Y. 2010) (the "*Net Equity Decision*").

C. Trotanoy's Customer Claim

On or about June 24, 2009, Trotanoy filed a customer claim with the Trustee for Account No. 1FR109, which the Trustee has designated as claim no. 010955.[5] The customer claim, which is being litigated in this action, is seeking a total of $153,819,492.39. All of these issues remain in this action.

D. The Trustee's Avoidance Litigation Against Trotanoy

The Trustee's complaint against Trotanoy (the "Trotanoy Action") alleges ten bankruptcy causes of action, all "core" matters arising under the Bankruptcy Code or the New York Fraudulent Conveyance Act (New York Debtor and Creditor Law § 270 *et seq.* (McKinney 2001) ("DCL")).[6] *See* Warshavsky Decl. at Exhibit 2. Specifically, the Trustee seeks to avoid the certain transfers as (i) actual fraudulent transfers under Bankruptcy Code sections 544, 548(a)(1)(A), 550(a), and 551 and the DCL; (ii) constructive fraudulent transfers under Bankruptcy Code sections 544, 548(a)(1)(B), 550(a), and 551 and the DCL; and (iii) preferential transfers under sections 547(b), 550 and 551. The Trustee also seeks to disallow and/or subordinate Trotanoy's customer claim, all as provided for in the Bankruptcy Code. *See* Warshavsky Decl. at Exhibit 2. Specifically, the Trustee seeks to avoid from Trotanoy, transfers

[5] A copy of Trotanoy's customer claim is annexed as Exhibit 4 to the Warshavsky Decl.

[6] The complaint alleges a total of 15 causes of action, but only 10 "core" bankruptcy counts were asserted against Trotanoy. *See* Exhibit 2.

of $150,752,402, the entirety of which are avoidable and recoverable as fraudulent and preferential transfers of customer property under the Bankruptcy Code.

ARGUMENT

I. THE DEFENDANT'S MOTION TO WITHDRAW THE AVOIDANCE ACTION CANNOT MEET THE REQUIREMENTS FOR MANDATORY WITHDRAWAL

Trotanoy contends that this Court must withdraw the reference pursuant to section 157(d), but does not and cannot demonstrate any of the exceptional circumstances required for mandatory withdrawal. Rather, the Trotanoy Action requires nothing more than adjudication of avoidance actions under the Bankruptcy Code to recover customer property. In pursuing these bankruptcy claims against the Defendant, the Trustee is not violating SIPA.[7] Rather, SIPA expressly authorizes the Trustee to avoid transfers that are void and voidable pursuant to title 11. There is no exception in SIPA that precludes avoidance of transfers to customers; to the contrary, the recovery of transfers "to or on behalf of customers" is expressly contemplated in SIPA § 78fff-2(c)(3). *See also Second Circuit Net Equity Decision*, 654 F.3d at 242, n. 10.

A. Section 157(d) Has Been Narrowly Construed in the Second Circuit

The scope of bankruptcy jurisdiction over all matters affecting a debtor and its property is broadly construed. *Shugrue v. Airline Pilots Ass'n, Int'l* (*In re Ionosphere Clubs, Inc.*), 922 F.2d 984, 994 (2d Cir. 1990). All cases and proceedings arising under, arising in, or related to a bankruptcy case, including SIPA liquidations, are automatically referred to the bankruptcy court. *See* 28 U.S.C. § 157(a). For the bankruptcy court to proceed efficiently and within the bounds of its broad grant of jurisdiction, the reference to the bankruptcy court may be withdrawn only in

[7] *See* Background, Section B *supra*. The Second Circuit noted "[a] SIPA liquidation is a hybrid proceeding" and that a SIPA trustee is conferred with the general powers of a bankruptcy trustee, as well as additional duties, including the ability to pursue fraudulent transfer actions on behalf of customers. *Second Circuit Net Equity Decision*, 2011 WL 3568936, at *1 and *12 n. 10.

limited circumstances, as provided in section 157(d) of title 28. *In re Ionosphere Clubs, Inc.*, 922 F.2d. at 993. The Second Circuit has consistently held that section 157(d) must be "construed narrowly," *see, e.g., id.* at 995, and is not to be used as an "escape hatch through which most bankruptcy matters [could] be removed to a district court." *Gredd v. Bear, Stearns Sec. Corp. (In re Manhattan Inv. Fund Ltd.)*, 343 B.R. 63, 66 (S.D.N.Y. 2006) (quoting *Carter Day Indust., Inc. v. EPA (In re Combustion Equip. Assoc.)*, 67 B.R. 709, 711 (S.D.N.Y. 1986)) (internal quotation omitted). A narrow reading of the mandatory withdrawal provisions is necessary so as not to "eviscerate much of the work of the bankruptcy courts." *Houbigant, Inc. v. ACB Mercantile, Inc. (In re Houbigant, Inc.)*, 185 B.R. 680, 683 (S.D.N.Y. 1995).

Mandatory withdrawal "is not available merely because non-Bankruptcy Code federal statutes will be considered in the bankruptcy court proceeding." *In re Ionosphere Clubs, Inc.*, 922 F.2d at 995. Rather, as the Second Circuit has held, mandatory withdrawal "is reserved for cases where *substantial and material consideration* of non-Bankruptcy Code federal statutes is necessary for the resolution of the proceeding." *Id.* at 995 (emphasis added). "Substantial and material consideration" requires a bankruptcy judge to "engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes." *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991); *Enron Corp. v. J.P. Morgan Sec.* (*In re Enron Corp.*), 388 B.R. 131, 136 (S.D.N.Y. 2008). Indeed, the "substantial and material consideration" standard excludes from mandatory withdrawal those cases that involve only the routine application of non-title 11 federal statutes to a particular set of facts. *See In re Johns-Manville Corp.*, 63 B.R. 600, 602 (S.D.N.Y. 1986).

Trotanoy cannot meet the standard for withdrawal of the reference to resolve the Trustee's claims because no material interpretation of non-bankruptcy federal statutes is required

to resolve the issues at hand, nor is there any potential conflict between the Bankruptcy Code and other non-bankruptcy federal statutes. On its face, SIPA mandates removal to the bankruptcy court in the first instance. SIPA is routinely interpreted by bankruptcy courts, as it was originally derived from a bankruptcy statute and specifically incorporates the Bankruptcy Code. Trotanoy's allegation that SIPA cannot be analyzed and applied by the Bankruptcy Court is simply wrong, as evidenced by, *inter alia*, the *Net Equity Decision* and the Second Circuit's determination thereof.

B. The Trustee Has Standing to Assert Bankruptcy Causes of Action

All of the claims at issue in this case are either brought under bankruptcy law or the DCL which is incorporated therein. There is no need to look beyond SIPA and bankruptcy law for the Trustee's standing to bring each of the claims which the Trustee asserted against Trotanoy in the case at bar.

1. The Second Circuit Made Clear The Trustee Has Standing to Bring Avoidance Actions

In its Net Equity decision, the Second Circuit recognized that SIPA grants the Trustee the power to avoid fraudulent transfers. *See Second Circuit Net Equity Decision*, 654 F.3d at 241 n.10. The Second Circuit emphasized that a SIPA liquidation is "a hybrid proceeding" and a SIPA trustee "shall be vested with the same powers and title with respect to the debtor and the property of the debtor, including the same rights to avoid preferences, as a trustee in a case under Title 11." *Id.* citing 15 U.S.C. § 78fff-1(a). *See also In re Housecraft Indus. USA, Inc.*, 310 F.3d 64, 71 (2d Cir. 2002) (stating bankruptcy trustee may avoid fraudulent transactions). The Second Circuit further stated, "SIPA and the [Bankruptcy] Code intersect to . . . grant a SIPA trustee the power to avoid fraudulent transfers for the benefit of customers." *Id.* quoting *Net Equity Decision*, 424 B.R. at 136.

2. The *In Pari Delicto* Defense Does Not Apply to Avoidance Actions

Trotanoy's desperate invocation of the *in pari delicto* doctrine to contest the Trustee's standing to bring avoidance actions relies on an inapposite line of case law where a debtor was barred from bringing common law claims against third parties. *See, e.g., Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972) The doctrine clearly "does not apply to causes of action that the Bankruptcy Code specifically confers on a trustee or a debtor in possession." *Picard v. Taylor (In re Park S. Sec., LLC),* 326 B.R. 505, 513 (Bankr. S.D.N.Y. 2005) citing *Tese-Milner v. Beeler (In re Hampton Hotel Investors, L.P.),* 289 B.R. 563, 580 (Bankr. S.D.N.Y. 2003) ("The rights to avoid such transfers, and to recover them for the benefit of the estate, are expressly conferred by federal law on the trustee. . . It would be turning the *Wagoner* Rule and concepts of *in pari delicto* on their heads to hold that the trustee lacks standing to recover such payments.").

Indeed, courts do not recognize state law equitable defenses to actions to avoid preferential transfers and fraudulent transfers under sections 547 and 548 of the Bankruptcy Code, respectively. *In re Personal and Bus. Ins. Agency,* 334 F.3d 239, 245-47 (3d Cir. 2003) (ruling the *in pari delicto* doctrine does not apply to a trustee bringing an action under § 548)*; In re Verestar*, 343 B.R. 444, 480 (Bankr. S.D.N.Y. 2006) (noting *in pari delicto* is not a defense to a fraudulent conveyance); *Terlecky v. Abels*, 260 B.R. 446, 453 (S.D. Ohio 2001) (explaining avoidance claims are not subject to *in pari delicto* defense because those claims are brought under the trustee's statutory avoidance powers).

C. Substantial Consideration of SLUSA is Neither Required Nor Applicable in the Trotanoy Action

Trotanoy also argues that mandatory withdrawal is necessary because this action involves "significant interpretation" of federal securities law, including the Securities Litigation Uniform

Standards Act of 1998 ("SLUSA"). *See* Mem. of Law at 22-24. This is a gross exaggeration and misrepresentation. Despite Trotanoy's contentions, SLUSA simply does not preclude the Trustee's fraudulent and preferential transfer claims, and has no applicability here. Notwithstanding, the determination of whether or not SLUSA applies does not rise to a "substantial" level of consideration compelling mandatory withdrawal.

SLUSA was enacted in 1998 to prevent claims based on state securities laws from circumventing the strict pleading requirements of the federal securities laws set forth in the PSLRA. *LaSala v. UBS, AG*, 510 F. Supp. 2d 213, 234 (S.D.N.Y. 2007). SLUSA requires the dismissal of: (i) a "covered class action"; (ii) based on state law; and (iii) alleging "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or that "the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p; *see also LaSala*, 510 F. Supp. 2d at 234.

The plain language of SLUSA, as well as all salient case law, dictates that SLUSA has no bearing on the core bankruptcy causes of action that the Trustee has asserted against Trotanoy. First, the Trotanoy Action is not a "covered class action" under SLUSA.[8] Second, that more than

[8] SLUSA, itself states that:

> a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

15 U.S.C. § 78bb(f)(5)(D) (emphasis added). Both the plain language and legislative history of SLUSA confirm the Trustee is an "entity" exempt from the preemptive reach of the statute. *Lee v. Marsh & McLennan Cos., Inc.*, No. 06 Civ. 6523, 2007 WL 704033, at *4 (S.D.N.Y. March 7, 2007) (citing *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1008 (9th Cir. 2005)); S. Rep. 105-182, 1998 WL 226714 at *7 (May 4, 1998) (explaining preclusion of a trustee's claims pursuant to SLUSA "could potentially deprive many bankruptcy trustees of the ability to pursue state-law securities fraud claims on behalf of an estate. Nothing in SLUSA suggests that Congress intended to work such a radical change in the bankruptcy laws").

fifty persons may receive distributions of customer property does not transform the Trotanoy Action into a covered class action.[9] Finally, the allegations made against Trotanoy are not preempted by SLUSA because they are not based on untrue statements or omissions of material fact in connection with the purchase of covered securities. The Trustee's allegations are instead based on Trotanoy's receipt of customer property as a result of fraudulent and/or preferential transfers. As such, SLUSA is inapplicable.

The minimal analysis—if any—of SLUSA required by Trotanoy's assertions presents neither a conflict with the Bankruptcy Code nor a novel issue of first impression. There is no conflict between SLUSA and the Bankruptcy Code. Trotanoy does not and cannot point to a "conflict" between SLUSA and title 11, nor does it point to anything requiring "interpretation" of SLUSA.

D. Interpretation of Section 546(e) of the Bankruptcy Code Does Not Warrant Mandatory Withdrawal

Trotanoy asserts that the Court should withdraw the reference because the Trustee and SIPC are interpreting Bankruptcy Code section 546(e) in a manner that conflicts with SIPA. *See* Mem. of Law at 24-27. However, withdrawal of the reference is not appropriate as to this issue because its resolution involves only straightforward application and interpretation of Bankruptcy

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[9] The fact that the Trustee's efforts will ultimately benefit the many customers of BLMIS does not transform the Trustee's efforts on behalf of BLMIS into a class action on behalf of BLMIS's customers. BLMIS's SIPA liquidation was not designated for the sole purpose of initiating litigation: the Trustee has been involved in liquidating the BLMIS estate determining over 16,000 customer claims, bringing more than 1,000 other actions, resolving many thousands of claims for billions of dollars, and administering the allocation of customer property among the customers and, ultimately, the general creditors of the consolidated BLMIS estate. As such, the Trustee is not an "entity" and the Trotanoy Action is not a class action "on behalf of more than 50 people."

Code provisions.[10] This issue presents no interpretive or complicated issues of first impression under non-title 11 federal laws, nor does Trotanoy try to assert one.

As indicated above, Trotanoy is not an innocent bystander to Madoff's Ponzi scheme, and thus the application of 546(e) is at least a question of fact—not a question of law. Trotanoy knowingly funneled money into the Madoff Ponzi Scheme to reap unparalleled profits. Trotanoy, a sophisticated and professional investment company, managed by Access—which is equally sophisticated and knowledgeable—cannot credibly maintain that it was unaware of the numerous red flags contrary to industry standards, including questions about Madoff's reported options volume, the delays in receiving printed trade confirmations, and the lack of any access to Madoff himself. There are other indicia of fraud noted in the complaint, but these alone demonstrate that Trotanoy received fraudulent and preferential transfers in the face of various indicia that BLMIS was not engaged in legitimate securities trading and show that Trotanoy cannot assert that there is not, at the very least, a factual issue as to whether it could have reasonably believed that BLMIS was engaged in legitimate trading activity.

[10] The Trustee continues to preserve and assert his position that the mere invocation of Bankruptcy Code section 546(e) by defendants such as Trotanoy does not provide a proper basis for mandatory withdrawal of the reference. Likewise, the Trustee reasserts his position that the same section of the Bankruptcy Code is inapplicable here, notwithstanding this Court's ruling in *Picard v. Katz*, No. 11 Civ. 3605, 2011 WL 4448638 at *2-3 (S.D.N.Y. Sept. 27, 2011). No other court has found that section 546(e) provides a basis for mandatory withdrawal of the reference under 28 U.S.C. § 157(d), *see Walker, Truesdell, Roth & Assocs. v. The Blackstone Group, L.P. (In re Extended Stay, Inc.)*, 2011 WL 5532258, at *7 (S.D.N.Y. Nov. 10, 2011), or that section 546(e) is properly extended to fictional transactions pursuant to a Ponzi scheme. *See, e.g.*, *See Johnson v. Neilson (In re Slatkin)*, 525 F.3d 805, 819 (9th Cir. 2008); *Kipperman v. Circle Trust F.B.O. (In re Grafton Partners)*, 321 B.R. 527, 541 (9th Cir. BAP 2005) (applying section 546(e) to payments made in connection with a Ponzi scheme "would amount to an absurd contradiction of the securities laws"); *Wider v. Wooton*, 907 F.2d 570, 573 (5th Cir. 1990) (rejecting application of section 546(e) defense in a Ponzi scheme context so as not to "implicitly authorize fraudulent business practices through an unjustified extension of the stockbroker defense"); *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC)*, 2011 WL 3897970, at *12 (S.D.N.Y. Aug. 31, 2011); *Picard v. Madoff*, Adv. Pro. No. 09-1503, 2011 WL 4434632, at *15-16 (Bankr. S.D.N.Y. Sept. 22, 2011).

Clearly then, this is nothing more than a transparent attempt to "escape" the Bankruptcy Court's prior decisions holding that, *inter alia*, section 546(e) is inapplicable in the context of a Ponzi scheme—especially when applied to bad-faith actors that knowingly participated in the fraud such as Trotanoy, who should not be granted the "safe harbor" of section 546(e). *See e.g.*, *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC)*, 440 B.R. 243 (Bankr. S.D.N.Y. 2010), *leave to appeal denied*, 2011 WL 3897970 (S.D.N.Y. Aug. 31, 2011), *aff'd*, 2011 WL 3897970 (S.D.N.Y. Aug 31, 2011); *In re Bernard L. Madoff Inv. Sec. LLC*, 2011 WL 4434632, at *16 (Bankr. S.D.N.Y. Sept. 22, 2011) (holding that "the application of section 546(e) must be rejected as contrary to the purpose of the safe harbor provision"). As a Court in this District recently explained in another case involving the securities industry, "avoiding an unfavorable decision is a not a proper basis for withdrawal of the reference." Transcript of Oral Argument, *Michigan State Hous. Dev. Auth. v. Lehman Brothers, et al.*, No. 11 Civ. 3392 (JGK) (S.D.N.Y., Sept. 14, 2011), at 65 (annexed to the Warshavsky Decl. as Exhibit 5).

In another recent case in this district, the Court found that the application of an affirmative defense under section 546(e) did not warrant mandatory withdrawal of the reference. *In re Extended Stay, Inc.*, 2011 WL 5532258, at *7. In particular, the *In re Extended Stay* court noted that the issue of whether or not section 546(e) of the Bankruptcy Code precluded certain claims under the Fair Debt Collections Practices Act or certain securities laws could not overcome "the 'narrow' scope this Circuit gives to mandatory withdrawal under section 157(d)" because the movants failed to point to any federal statute requiring "significant interpretation" rather than mere application to a particular set of facts. *Id.* (citations omitted).

Finally, Trotanoy urges that the "securities laws" must be considered in connection with the application of section 546(e). Yet, Trotanoy has not pointed to a single securities law at

issue. In fact, in support of its argument, Trotanoy cited to no statute other than Bankruptcy Code section 546(e), and only relied on the terms defined in the Bankruptcy Code. *See* Mem. of Law at 25 (relying on Bankruptcy Code section 741(7) defining "securities contract" and section 741(8) defining settlement payment). Bankruptcy Code section 546(e) *explicitly refers* to definitions in the Bankruptcy Code itself. Simply put—and as demonstrated in Trotanoy's moving papers—no additional law needs to be interpreted outside of the Bankruptcy Code. As such, the determination of whether and how Bankruptcy Code section 546(e) should be applied requires only simple interpretation and application of the Bankruptcy Code. Accordingly, mere application of title 11 is not a basis for mandatory withdrawal of the reference to the Bankruptcy Court pursuant to 28 U.S.C. § 157(d).

E. The Bankruptcy Court's Interpretation of Bankruptcy Code Section 548(c) Does Not Warrant Mandatory Withdrawal

Attempting to exempt itself from the fraudulent conveyance laws and its obligation to demonstrate good faith to retain the fraudulent transfers they received from Madoff, Trotanoy claims that the Court must withdraw the reference to determine what it characterizes as the Trustee's novel interpretation of SIPA to retroactively impose a due diligence obligation on brokerage customers. *See* Mem. of Law at 27-28. Trotanoy's attempt to manufacture a conflict between the Bankruptcy Code and SIPA wholly misses the mark. First, Trotanoy is not an innocent investor, but rather is a sophisticated and professional investor. Second, any due diligence obligation that Trotanoy had upon becoming aware of facts that imputed inquiry notice of Madoff's fraud has nothing at all to do with any interpretation of SIPA or other non-bankruptcy federal law.

Rather, Trotanoy's due diligence (or, in this case, lack thereof) is relevant only in the context of whether Trotanoy can establish a good faith defense to the Trustee's avoidance claims

under section 548(c) of the Bankruptcy Code and analogous state fraudulent conveyance laws. It is *not* a pleading requirement. As such an analysis requires nothing more than a straight-forward application of the Bankruptcy Code itself, as well as established case law interpreting the good faith defense under the Bankruptcy Code.

F. *Stern v. Marshall* Does Not Require or Otherwise Warrant Withdrawal

Trotanoy also seeks refuge in the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Trotanoy attempts to draw a parallel between the Trustee's avoidance action and the counterclaim addressed by the *Stern* Court, arguing that the bankruptcy court would be limited and could not issue a final judgment against Trotanoy. Mem. of Law at 28-32. However, the Defendants wildly misconstrue *Stern*'s "narrow" ruling which makes clear that it does not "meaningfully change[ ] the division of labor" between bankruptcy courts and district courts. *Stern*, 131 S. Ct. at 2620.

Stern did not involve straightforward bankruptcy law claims for fraudulent transfers but instead concerned a creditor's claim for defamation and a state law counterclaim by the debtor for tortious interference. Moreover, *Stern* did not interpret 28 U.S.C. §§ 157(b)(2)(F) or 157(b)(2)(H), which identify as core proceedings those that "determine, avoid or recover" preferences and fraudulent conveyances, respectively.

Trotanoy's effort to relate these two completely distinct matters fails. *Stern* does not hold, or even suggest, that actions seeking to avoid and recover fraudulent and/or preferential transfers are not properly to be decided by non-Article III judges. To the contrary, as recently recognized in this district:

> *Stern* is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case, and the ruling does not remove from the bankruptcy court its jurisdiction over matters directly related to the estate that can be finally decided in connection with restructuring debtor and creditor relations. . .

In re Salander O'Reilly Galleries, 453 B.R. 106, 115-16 (Bankr. S.D.N.Y. July 18, 2011). *See, e.g., Stern*, 131 S. Ct. at 2611 ("Here Vickie's claim is a state law action independent of the federal bankruptcy law"); *id*. at 2620 ("We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute . . . the question presented here is a 'narrow' one"); *Kirschner v. Agoglia (In re Refco Inc.)*, 2011 WL 5974532, at *4 (Bankr. S.D.N.Y. Nov. 30, 2011) ("Clearly several of [the Court's] rationales argue that *Stern* does not preclude the bankruptcy court from issuing a final judgment on a fraudulent transfer claim").

Throughout its Motion, Trotanoy relies heavily on *Samson v. Blixseth (In re Blixseth)*, 2011 WL 3274042, at *12 (Bankr. D. Mont. Aug.1, 2011) in support of its argument that following *Stern*, bankruptcy courts cannot constitutionally hear and determine fraudulent transfer actions. However, it should be noted that *Blixseth* has been severely criticized and called into doubt. *See, e.g., RES-GA Four LLC v. Avalon Builders of GA LLC*, 2012 WL 13544, at * 10 (M.D. Ga. Jan. 4, 2012) (disagreeing with *Blixseth* while holding that "bankruptcy courts have authority to hear and submit proposed findings of fact and conclusions of law in proceedings related to title 11 cases, regardless of whether they are classified as core or non-core."); *McCarthy v. Wells Fargo Bank, N.A. (In re El–Atari)*, 2011 WL 5828013, at *4 (E.D. Va. Nov.18, 2011) ("[T]he Blixseth conclusion fails to consider properly the text of the Bankruptcy Act as well as the limiting language of *Stern*."). Indeed, courts considering *Stern* have routinely declined to give it the expansive scope that Trotanoy requests.[11]

In contrast to the state law tortious interference counterclaim at issue in *Stern*, the Trustee

[11] *See In re Extended Stay*, 2011 WL 5532258 at *6; *In re Ambac Fin. Grp., Inc.*, 2011 WL 4436126, at *8 (Bankr. S.D.N.Y. Sept.23, 2011); *In re Safety Harbor Resort and Spa*, 2011 WL 3240596, at *10 (Bankr. M.D. Fla. Aug. 30, 2011); *In re Olde Prairie Block Owner, LLC*, 2011 WL 3792406, at *5 (Bankr. N.D. Ill. Aug. 25, 2011); *In re Am. Bus. Fin. Servs., Inc.*, 2011 WL 3240596, at *2 (Bankr. D. Del. July 28, 2011).

has brought traditional avoidance actions against Trotanoy that the Bankruptcy Code specifically and exclusively authorizes bankruptcy trustees to pursue under Bankruptcy Code sections 544, 547, and 548. *See, e.g.*, *In re Extended Stay*, 2011 WL 5532258 at *7-8; *Kelley v. JPMorgan Chase & Co., et al.*, 2011 WL 4403289, at *6 (D. Minn. Sept. 21, 2011); *Michigan State Hous. Dev. Auth. v. Lehman Brothers, et al*., No. 11 Civ. 3392 (JGK) (S.D.N.Y., Sept. 14, 2011). In short, *Stern* is fairly read as limited to state law counterclaims with no relationship to federal bankruptcy law. *Id*. at 2611.

Despite the narrow holding of *Stern*, Trotanoy claims that the Bankruptcy Court may no longer be permitted to hear fraudulent conveyance claims like those asserted in the complaint. *See* Mem. of Law at 28-32. This sweeping interpretation of *Stern* is inconsistent with the decision itself, would deprive district courts of bankruptcy courts' specialized expertise to handle such claims, and would have the practical effect of permanently eliminating bankruptcy courts. As Justice Roberts observed, the bankruptcy court's specialized expertise was not needed in the adjudication of the common law tort counterclaim addressed in *Stern*. *See Stern*, 131 S. Ct. at 2615 ("The 'experts' in the federal system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay."). However, specialized bankruptcy expertise is critical to the efficient administration of fraudulent transfer actions brought under the Bankruptcy Code, especially in this case where the bankruptcy court is administering over 1,000 related cases, and thousands of objections.

In fact, the "[t]rustee's fraudulent transfer cause of action [is] expressly provided by the Bankruptcy Code . . . [and] Congress placed [11 U.S.C. § 544], as well as other statutory avoidance powers under 11 U.S.C. §§ 547, 548, 549 and 553, within a unique statutory framework" where many of the provisions are dependent on one another. *In re Refco Inc.*, 2011

WL 5974532, at *4. The importance of this particularized framework is magnified in a Ponzi scheme case, such as this, where the majority of the debtor's assets were fraudulently transferred to third parties before BLMIS's bankruptcy. This distinctive relationship is more fully explained in Judge Drain's opinion, wherein he stated that:

> Since the enactment of the Bankruptcy Code, the management and determination of statutory avoidance claims has been a primary function of the bankruptcy courts. Such claims often play a prominent role in bankruptcy cases, either because of their sheer numbers or because of the effect that the potential avoidance of a transfer, lien, or obligation may have on creditors' recoveries. This is particularly so in cases where most, if not all, of the debtor's estate was transferred to third parties pre-bankruptcy, such as the many Ponzi-scheme driven cases of recent years, requiring a coordinated response overseen by one judge on behalf of a host of creditor-victims. The ability to manage efficiently the investigation and litigation of such claims, and their possible global settlement, decreases if handled on a piecemeal basis by different judges no matter how talented.

Id. at *5. Judge Drain emphasizes the necessity in maintaining ties between the recovery action against the Defendants and BLMIS's bankruptcy proceeding. Therefore, *Stern's* treatment of a generic state law tort counterclaim, which was "in no way derived from or dependent upon bankruptcy law," but rather was "a state law tort action that exists without regard to any bankruptcy proceeding" *(Stern,* 131 S. Ct. at 2618) is inapplicable to the Trustee's recovery actions which "flow from a federal statutory scheme" and is "completely dependent upon adjudication of a claim created by federal law." *In re Refco Inc.*, 2011 WL 5974532, at *4 quoting *Stern,* 131 S.Ct. at 2614.

II. THE DEFENDANT HAS FAILED TO DEMONSTRATE CAUSE FOR PERMISSIVE WITHDRAWAL

This Court may permissively withdraw the reference to Bankruptcy Court pursuant to section 157(d), but the Defendant must show "cause" for such withdrawal. To determine whether such "cause" exists, this Court must first evaluate whether the claim is core or non-core,

and then "weigh questions of efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors." *Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1101 (2d Cir. 1993). As the movant, the Defendant bears the burden of proving "cause" to warrant withdrawal. *See In re Ames Dep't Stores*, 1991 WL 259036, at *2 (S.D.N.Y. Nov. 25, 1991). Trotanoy has failed to meet its burden to warrant permissive withdrawal.

A. The Trustee's Action Against Trotanoy is a Core Proceeding

All of the Trustee's claims as filed against Trotanoy are core. Pursuant to section 157, a proceeding may be core if it is "unique to or uniquely affected by the bankruptcy proceedings" or "directly affect[s] a core bankruptcy function." *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. and Indem. Ass'n., (In re U.S. Lines, Inc.)*, 197 F.3d 631, 637 (2d Cir. 1999). In enacting section 157, Congress intended core proceedings to be interpreted broadly and that "95 percent of the proceedings brought before bankruptcy judges would be core proceedings." *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398 (2d Cir. 1990). A finding that claims are core "weighs against permissive withdrawal." *In re Leslie Fay Cos., Inc. v. Falbaum*, 1997 WL 555607, at *2 (S.D.N.Y. Sep. 4, 1997).

1. The Ten Bankruptcy Counts Asserted Against Trotanoy Are Core

Here, all ten of the Trustee's fraudulent conveyance and preference transfer claims against Trotanoy are brought pursuant to 11 U.S.C. §§ 544, 547, and 548, and therefore "arise under" title 11.[12] *See Rahl v. Bande*, 316 B.R. 127, 131 (S.D.N.Y. 2004) (holding that claims under § 544(b) "arise under" title 11 and are therefore core). Such avoidance actions are core claims according to the non-exhaustive list of core proceedings set forth in sections 157(b)(2)(F)

[12] *See* Exhibit 2.

and (b)(2)(H) of the Bankruptcy Code. *See* 28 U.S.C. §§ 157(b)(2)(F) (defining core matters to include "proceedings to determine, avoid, or recover preferences.") and 157(b)(2)(H) (defining core matters to include "proceedings to determine, avoid, or recover fraudulent conveyances."). The Trustee's claim under Bankruptcy Code section 502(d) (Compl. Count 11), which seeks to disallow Trotanoy's customer claim, is also core pursuant to section 157(b)(2)(B). Additionally, Trotanoy has explicitly acknowledged that the Trustee's claims against the Defendant are "core." *See* Mem. of Law at 40 ("the Trustee has asserted "core" preference and fraudulent transfer claims against Trotanoy in this action"); and at 33 (citing "the Trustee's core avoidance claims").[13]

2. Trotanoy Submitted to the Jurisdiction of the Bankruptcy Court by Filing a Proof of Claim

That prior to being sued by the Trustee, Trotanoy filed a customer claim[14] in the BLMIS liquidation proceeding,[15] reinforces the conclusion that the bankruptcy court is the appropriate court for the adjudication of the actions against it. The Supreme Court, as well as the Court of Appeals for the Second Circuit, has made clear that the bankruptcy court is the proper forum to

[13] The Trustee's equitable subordination claim is also "core" (Compl. Count 12). *See In re S.G. Phillips Constructors, Inc.*, 45 F.3d at 705 ("Nothing is more directly at the core of bankruptcy administration . . . than the quantification of all liabilities of the debtor."); *In re Danbury Square Assocs., Ltd. P'ship*, 153 B.R. 657, 661 (Bankr. S.D.N.Y. 1993) (the bankruptcy court "has never questioned that the trustee may bring an action under 11 U.S.C. § 510(c) in this court" and that "equitable subordination is . . . a remedy in a bankruptcy court if a trustee has funds to distribute."); *Aetna Life Ins. Co. v. Danbury Square Assoc., Ltd. P'ship*, 150 B.R. 544, 547 (S.D.N.Y. 1993) ("Equitable subordination pursuant to 11 U.S.C. § 510(c) is a bankruptcy remedy peculiar to the equitable jurisdiction of the bankruptcy court.").

[14] *See* Background, Section C *supra*; Warshavsky Decl. at Exhibit 4.

[15] The filing of a customer claim in a SIPA action is the equivalent of filing a proof of claim in a typical bankruptcy proceeding for purposes of submission to jurisdiction. *SIPC v. Bernard L. Madoff Inv. Sec. LLC*, 443 B.R. 295, 310 (Bankr. S.D.N.Y. 2011) (citing *Keller v. Blinder (In re Blinder Robinson & Co., Inc.)*, 135 B.R. 892, 896–97 (D. Col. 1991)).

adjudicate a proof of claim and matters directly related to that claim that are integral to the "restructuring of the debtor-creditor relationship." *See Stern v. Marshall*, 131 S.Ct. 2594, 2616 (2011); *see also Langenkamp v. Culp*, 498 U.S. 42, 45 (1990) (per curiam) ("[B]y filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power"); *In re Bally Total Fitness of Greater N.Y.*, 411 B.R. 142, 145 (S.D.N.Y. 2009) (finding that "plaintiffs waived their ability to seek withdrawal of the reference when they filed a proof of claim and two motions before the Bankruptcy Court.") (quoting *Bankr. Servs. Inc. v. Ernst & Young (In re CBI Holding Co., Inc.)*, 529 F.3d 432, 466-67 (2d Cir. 2008) ("[f]iling a proof of claim against a bankruptcy estate triggers the process of allowance and disallowance of claims, and, therefore, a creditor who files such a claim subjects itself to the bankruptcy court's equitable jurisdiction in proceedings affecting that claim"); *see also In re Extended Stay*, 2011 WL 5532258 at *6 (finding that withdrawal of the reference of causes of action against defendants that would likely be "resolved in the process of ruling on [their] proof[s] of claim… would be contrary to the language of *Stern*, which categorizes itself as a "narrow" decision that does not "meaningfully change[ ] the division of labor" between bankruptcy courts and district courts.") (citations omitted).

By filing a claim in the BLMIS liquidation proceeding, Trotanoy has submitted to the bankruptcy court's equitable jurisdiction for the adjudication of matters related to its claim, and cannot now argue that the bankruptcy court should not have jurisdiction over matters related to such claim. *See, e.g., First Fid. Bank N.A., N.J. v. Hooker Invs. Inc. (In re Hooker Invs., Inc.)*, 937 F.2d 833, 838 (2d Cir. 1991) ("[A] creditor who invokes the bankruptcy court's equitable jurisdiction to establish a claim against a debtor's estate is also subject to the procedures of

equity in the determination of preference actions brought on behalf of the estate."). In fact, Trotanoy has expressly acknowledged that it filed a claim and "the bankruptcy court thus has jurisdiction to determine the claims asserted against it in the adversary proceeding through the claims process." *See* Mem. of Law at 11, n. 6. This is a straightforward avoidance action; all relevant counts in the complaint are typical fraudulent conveyance and preferential transfer actions derived from the Bankruptcy Code and the DCL. As such, Trotanoy's filing of a proof of claim brings its claims and matters related to resolving such a claim clearly within the jurisdiction of the bankruptcy court. The bankruptcy court is well-suited to handle these sorts of claims and routinely does so.

B. Defendant's Motion is Nothing More than Blatant Forum Shopping

As previously indicated, one of the important *Orion* factors is the curtailing of possible forum shopping by parties who perceive the bankruptcy court as an unfavorable forum in which to litigate their claims. This Court previously noted in *Schneider v. Riddick (In re Formica Corp.)* that "courts should employ withdrawal 'judiciously in order to prevent it from becoming just another litigation tactic for parties eager to find a way out of bankruptcy court.'" 305 B.R. 147, 151 (S.D.N.Y. 2004) (quoting *Kenai Corp. v. Nat'l Union Fire Ins. Co. (In re Kenai Corp.)*, 136 B.R. 59, 61 (S.D.N.Y. 1992)); *see also In re Fairfield Sentry Ltd.*, 2010 WL 4910119, at *4 (S.D.N.Y. Nov. 22, 2010) (to "allay" concerns of forum-shopping "'courts in this Circuit have construed section 157(d) narrowly in order to prevent an 'escape hatch' out of bankruptcy court'" (quoting *Enron Power Mktg., Inc. v. Holcim, Inc. (In re Enron Corp.)*, 2004 WL 2149124, at *5 (S.D.N.Y. Sept. 23, 2004)).

Trotanoy's conduct—in which it disclosed only the unrelated HSBC action, and not the related Luxalpha proceeding in connection with the filing of its Motion—demonstrates its overt forum shopping. Given the Bankruptcy Court's prior rulings on many of the issues that raised in

the Motion—including finding that section 546(e) does not apply—Trotanoy is seeking to transfer its case to this Court, which it perceives to be a more favorable forum, in the hope of getting a better outcome than in the bankruptcy court. Such outright forum shopping should not be countenanced.

C. Judicial Economy and Uniformity Weigh In Favor of Denying Withdrawal of the Reference[16]

Similarly, the Bankruptcy Court has been administering the SIPA bankruptcy proceeding for nearly three years. Judicial economy would only be promoted by allowing the specialized Bankruptcy Court, already familiar with the extensive record and proceedings in the BLMIS case, to initially adjudicate this case. *See In re Wedtech Corp*., 94 B.R. at 296; *In re Laventhol & Horwath*, 139 B.R. 109, 116 (S.D.N.Y.1992). It is the more efficient and appropriate course, as "[a]llowing the bankruptcy courts to consider complex questions of bankruptcy law before they come to the district court for de novo review promotes a more uniform application of bankruptcy law." *In re Extended Stay*, 2011 WL 5532258 at *10 (finding that preserving bankruptcy court's ability to determine claims that implicated section 546(e) of the Bankruptcy Code weighed against withdrawal of the reference).

[16] Palmer, Hyposwiss and Access have made additional arguments in support of permissive withdrawal of the reference including, but not limited to, the asserted right of Palmer and Hyposwiss to a jury trial. However, pursuant to the December 6 Order, the Trustee has only responded to Trotanoy's arguments and the Trustee hereby preserves his right to oppose all arguments asserted by Palmer, Hyposwiss and Access when those arguments are appropriately before this Court.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests the court deny the Motion.

Date: New York, New York
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