UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendants.	12 Misc. 00115 (JSR)
In re MADOFF SECURITIES	
PERTAINS TO THE FOLLOWING CASE:	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. ERIC T. SCHNEIDERMAN, as successor to ANDREW M. CUOMO, Attorney General of the State of New York; BART M. SCHWARTZ, as Receiver for ARIEL FUND LTD. and GABRIEL CAPITAL, L.P.; DAVID PITOFSKY, as Receiver for ASCOT PARTNERS, L.P. and ASCOT FUND, LTD.; J. EZRA MERKIN; and GABRIEL CAPITAL CORPORATION, Defendants.	12 Civ. 06733 (JSR) Adv. Pro. No. 12-01778 (BRL)

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

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Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation of the estate of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"), and the estate of Bernard L. Madoff, individually ("Madoff"), by and through his undersigned counsel, respectfully submits this memorandum of law in opposition to the motion to withdraw the reference filed by defendants ("Motion") named in the above caption ("Defendants") with respect to the Trustee's Application for Enforcement of Automatic Stay and Related Stay Orders and Issuance of Preliminary Injunction ("Stay Application").

PRELIMINARY STATEMENT

Defendants circumvented the bankruptcy court's jurisdiction by settling with J. Ezra Merkin ("Merkin") in New York state court, all the while knowing that the Trustee sought the same funds from Merkin in bankruptcy court. With their Motion, Defendants now ask this Court to condone their end-run by finding that the issues presented by the Trustee's Stay Application are so far beyond the ken of the bankruptcy court that they require an Article III judge. However, the Stay Application presents issues that fall squarely within the bankruptcy court's core powers and its jurisdiction to enforce the automatic stay provisions of title 11 of the United States Code ("Bankruptcy Code"). Indeed, application of the automatic stay is a pure issue of bankruptcy law. *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (the automatic stay provision has been described as "one of the fundamental debtor protections provided by the bankruptcy law").

There is nothing new here. The relief sought by the Trustee mirrors that sought in other stay applications, as he seeks to protect estate assets from being dissipated through the proverbial "race to the courthouse" that Defendants already have won. The bankruptcy court has issued three decisions on similar stay applications filed by the Trustee, which have been affirmed on

appeal by three district court judges. *Picard v. Fox*, 429 B.R. 423 (Bankr. S.D.N.Y. 2010), *aff'd*, 848 F. Supp. 2d 469 (S.D.N.Y. 2012) (Koeltl, J.); *Picard v. Stahl*, 443 B.R. 295 (Bankr. S.D.N.Y. 2011), *aff'd* 2011 WL 7981599 (S.D.N.Y. Dec. 5, 2011) (Hellerstein, J.); *Picard v. Maxam Absolute Return Fund, L.P.*, 460 B.R. 106 (Bankr. S.D.N.Y. 2011), *aff'd*, 474 B.R. 76 (S.D.N.Y. 2012) (Oetken, J.). Not one of these cases questioned the bankruptcy court's powers to enforce the automatic stay or issue an injunction under the Bankruptcy Code in furtherance of the stay.

The instant Motion does not present any basis upon which to withdraw the reference. Defendants' arguments are predicated in large part on a false premise—that "the Bankruptcy Court already has found that the Trustee does not have a property interest in the assets of the Merkin Defendants." (Def. Br. at 12.) As an initial matter, the bankruptcy court found no such thing. Instead, the court held only that the Trustee could not rely on section 542 of the Bankruptcy Code to recover transfers until they are avoided. *Picard v. Merkin*, 440 B.R. 243, 272–73 (Bankr. S.D.N.Y. 2011). This is a far cry from a finding that the Trustee does not have any property interest at stake in his avoidance action prior to the time the action is determined and the transfers avoided. The bankruptcy court's determination of whether the Trustee may maintain a turnover count has no bearing whatsoever on what constitutes estate property within the meaning of section 541 of the Bankruptcy Code. In the context of the automatic stay, the law is clear that "property of the estate" includes interests that the Trustee *may* have, whether or not the property has been recovered, and that the automatic stay may be extended through a section 105 injunction to enjoin litigants who would interfere with the administration of the estate, regardless of whether the "property of the estate" has been recovered. *See, e.g., Kagan v. Saint Vincents Catholic Med. Ctrs. of N.Y. (In re Saint Vincents Catholic Med. Ctrs. of N.Y.)*, 449 B.R.

209, 216–17 (S.D.N.Y. 2011) ("Property of the estate, in turn, includes 'all legal or equitable interests of the debtor in property as of the commencement of the case,' 11 U.S.C. § 541(a)(1), 'wherever located and by whomever held,' 11 U.S.C. § 541(a), including causes of action possessed by the debtor at the time of filing. 'Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541.'" (citations omitted)). Were this not the case, the stay could never apply until there had been a final adjudication of a trustee's claims, rendering the automatic stay provision of the Bankruptcy Code meaningless.

In any event, an understanding of estate property does not require the substantial and material consideration of non-bankruptcy law. To the contrary, the application of the automatic stay and issuance of a related injunction require application of nothing but the bankruptcy laws. Defendants endeavor to tempt the Court to withdraw the reference through a bald contention that somehow the SIPA statute changes the calculus of what constitutes estate property. While SIPA outlines a subset of estate property, called "customer property," it does not re-define estate property for purposes of the automatic stay and related injunctive provisions of the Bankruptcy Code.

The Defendants next argue, based again on their mistaken premise that there must be a final determination as to whether Defendants' assets and claims are property of the estate for purposes of the automatic stay and related injunctive relief, that the application of the automatic stay is tantamount to *pendente lite* relief forbidden by the United States Supreme Court's decision in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), which precludes a freeze of assets until judgment. The question of whether *Grupo Mexicano* applies in the bankruptcy context is neither an issue of first impression nor an issue

requiring substantial and material interpretation of federal non-bankruptcy law, as it has been decided numerous times. *See, e.g.*, *Adelphia Commc'ns Corp. v. Rigas*, No. 02 Civ. 8495, 2003 WL 21297258, at *4–5 (S.D.N.Y. June 4, 2003); *In re Dow Corning Corp.*, 280 F.3d 648, 657–58 (6th Cir. 2002); *In re President Casinos, Inc.*, 419 B.R. 394, 406 (E.D. Mo. 2009). Nor does SIPA change that determination in any way, as that statute explicitly incorporates the automatic stay and injunctive provisions of the Bankruptcy Code.

Likewise, resolution of Defendants' *Barton* doctrine defense—that the Trustee cannot sue the receiver defendants ("Receivers") without leave of the New York state court—will not require substantial and material consideration of federal non-bankruptcy law, as the *Barton* doctrine is itself a creature of insolvency law. Indeed, the application of the *Barton* doctrine is considered a core bankruptcy matter. The issues before the court will involve whether the Receivers waived their ability to assert a *Barton* doctrine defense because of their funds' participation in the bankruptcy proceedings or the Receivers' participation in the Trustee's adversary proceeding against Merkin and related entities (the "Merkin Action"), or due to the Receivers' own neglect in seeking to lift the automatic stay prior to settling outside the purview of the bankruptcy court. Again, nothing here requires an examination of federal non-bankruptcy law.

Finally, Defendants call for permissive withdrawal of the reference based on their view that "determination of this action will have broad ramifications for the ability of state law enforcement and regulatory agencies to exercise their authority to prosecute violations of state laws." (Def. Br. at 21.) Significantly, under section 362(b)(4), the Bankruptcy Code provides an exception to the automatic stay when a government entity is truly exercising its police powers.

The determination of whether that exception applies falls squarely within the bankruptcy court's powers in determining the applicability of the automatic stay.

The Trustee respectfully requests that the Stay Application remain with the bankruptcy court in the first instance as there is nothing at issue in the Stay Application requiring a substantial and material determination of federal non-bankruptcy law.

BACKGROUND

The background of Madoff's Ponzi scheme is well-known, and need not be repeated here. *See, e.g.*, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-115 (JSR), 2012 WL 1505349 (S.D.N.Y. Apr. 30, 2012).

A. The Trustee's Litigation Against the Merkin Defendants and Merkin Funds

The Trustee commenced the Merkin Action against Merkin, Gabriel Capital Corporation ("GCC," and together with Merkin, the "Merkin Defendants"), Ascot Partners, L.P., Ascot Fund, Ltd. (together with Ascot Partners, L.P., the "Ascot Fund"), Ariel Fund Ltd. ("Ariel Fund"), and Gabriel Capital, L.P. ("Gabriel Fund," collectively with Ascot Fund and Ariel Fund, the "Merkin Funds") on May 6, 2009 in the bankruptcy court. *Picard v. Merkin*, Adv. Pro. No. 09-1182, (Bankr. S.D.N.Y. May 6, 2012), ECF No. 1. The Trustee seeks to avoid and recover more than $500 million in avoidable transfers to the Merkin Defendants and the Merkin Funds.

The Trustee alleges that Merkin, a sophisticated investment manager with close business and social ties to Madoff, steered hundreds of millions of dollars from the Merkin Funds into BLMIS through his solely held corporation, GCC, and that the Merkin Funds and Merkin Defendants withdrew more than $500 million from BLMIS from at least 1995 to 2008. (Complaint ¶ 2, Ex. B, *Picard v. Merkin*, Adv. Pro. No. 09-1182 (Bankr. S.D.N.Y. Dec. 23, 2009), ECF. No. 1 ("Merkin Complaint").) The Merkin Defendants knew or should have known that BLMIS was predicated on fraud, as they were on notice of myriad indicia of fraud, but failed

to diligently investigate. (*Id*. ¶¶ 2, 32, 34, 43.) The Merkin Defendants received substantial fees and commissions from BLMIS in connection with their management of the Merkin Funds. (*Id*. ¶¶ 42, 105, 106.)

The Trustee's Complaint seeks the recovery from the Merkin Defendants and the Merkin Funds of BLMIS customer property under SIPA, the Bankruptcy Code and applicable provisions of New York state law. The Trustee also seeks the imposition of a constructive trust and disallowance of claims. (*Id*. ¶¶ 110–13, Prayer ¶ xiii.)

On November 17, 2010, the bankruptcy court denied Defendants' motions to dismiss as to all counts, with the exception of claims for immediate turnover under Bankruptcy Code § 542. *Picard v. Merkin*, 440 B.R. 243 (Bankr. S.D.N.Y. 2011). The bankruptcy court held that the Trustee had alleged viable claims for actual fraudulent transfers, constructive fraudulent transfers, undiscovered fraudulent transfers, subsequent transfers to the Defendants, and general partner liability of Merkin, specifically holding that voidable transfers received by Ascot Fund could be recovered from Merkin as Ascot Fund's sole general partner. *Id.* at 249, 255–66, 268–71.

Bart M. Schwartz ("Schwartz"), as receiver for Ariel Fund and Gabriel Fund, filed a Motion for Leave to Appeal with the District Court on December 1, 2010. *Picard v. Merkin*, Adv. Pro. No. 09-01182, ECF No. 87, which was denied on August 31, 2011. *Picard v. Merkin*, No. 11-mc-0012 (KMW), 2011 WL 3897970 (S.D.N.Y. Aug. 31, 2011). In denying Schwartz's motion, Judge Kimba Wood of this Court held that there was no substantial ground for difference of opinion as to whether the bankruptcy court applied the correct legal standard when ruling that the Trustee had sufficiently pled fraudulent transfer claims against the Merkin Defendants. 2011 WL 3897970, at *5–8, 10–12.

B. The New York Attorney General's Settlement and the Third Party Actions

In April 2009, the New York Attorney General (the "NYAG") commenced an action in state court ("NYAG Action") against the Merkin Defendants to benefit investors in the Merkin Funds. The NYAG seeks restitution and compensatory damages on behalf of the Merkin Funds' investors, attorneys' fees, and other expenses. (Complaint at 53–54, *Schneiderman v. Merkin*, No. 450879/2009 (N.Y. Sup. Ct. Apr. 6, 2009), Dkt. No. l ("NYAG Compl.").) The NYAG also seeks an accounting and an injunction prohibiting the Merkin Defendants from engaging in the securities business in the State of New York. This latter relief is not the subject of the Stay Application.

Like the Trustee, the NYAG alleges that Merkin knew or should have known of the Ponzi scheme and that he failed to conduct proper due diligence over BLMIS. (*Id.* ¶¶ 101–14.) The NYAG's complaint does not specify the dollar amount sought by the NYAG beyond seeking "all restitution and damages" caused by the complained-of acts. However, prior to the NYAG Settlement, the NYAG asserted that he sought to recover nearly $729 million in fees from the Merkin Defendants (*id.* at 25–28), in addition to damages sought for fictitious profits, attorneys' fees or other expenses. Significantly, the Trustee has alleged in his Merkin Action that the fees paid to the Merkin Defendants in connection with the Merkin Funds' BLMIS investments were withdrawn from BLMIS. (Second Amended Complaint ¶¶ 42, 106, *Picard v. Merkin*, Adv. Pro. No. 09-1182 (Bankr. S.D.N.Y. Dec. 23, 2009), ECF No. 49.) The NYAG Action thus seeks the funds that allegedly were transferred by BLMIS to the Merkin Funds and Merkin Defendants—the same funds that the Trustee seeks to recover in his litigation for the benefit of all BLMIS customers and creditors. This recovery by the NYAG would significantly reduce the Merkin Defendants' assets, and possibly exhaust available reachable assets, rendering any victory by the Trustee in his litigation for the same transfers pyrrhic.

1. The Schwartz Action

Schwartz, as receiver for Ariel and Gabriel Funds, is also participating in the Settlement. Approximately twenty-one months after the collapse of BLMIS, Schwartz commenced an action ("Schwartz Action") against the Merkin Defendants in New York state court. In that action, Ariel Fund and Gabriel Fund seek unspecified compensatory, consequential and punitive damages, as well as attorneys' fees and other expenses and interest. (Complaint at Prayer ¶¶ A, F, G, *Schwartz v. Merkin*, No. 651516/2010 (N.Y. Sup. Ct. Sept. 16, 2010), Dkt. No. 3. The Schwartz Action also seeks "a constructive trust over *all assets, property, and/or cash currently in the custody and control of each Defendant*" (*id.* at Prayer B (emphasis added)), including, among other things, "all assets or compensation received by the Defendants in connection with the business of the Funds." (*Id.* ¶ 103; Prayer B.) The Schwartz Complaint therefore seeks control over the same $500 million in fraudulently transferred BLMIS customer property that the Trustee seeks in his Merkin Action.

Although David Pitofsky, as receiver for Ascot Fund, Ltd. and Ascot Partners, L.P., did not commence a formal lawsuit against the Merkin Defendants, he is participating in the Settlement. Ascot Fund, Ltd. was formed in 1992 to be a BLMIS feeder fund and was nearly entirely invested with BLMIS. (NYAG Compl. ¶ 2.)

2. The Settlement

As announced in the NYAG's June 25, 2012 press release, the NYAG "secured a $410 million settlement with J. Ezra Merkin," recovering the Merkin Defendants' management fees in connection with the Merkin Funds (the "Settlement"). (Press Release, New York State Office of the Attorney General, *A.G. Schneiderman Obtains $410 Million Settlement With J. Ezra Merkin In Connection With Madoff Ponzi Scheme* (June 25, 2012), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-obtains-410-million-settlement-j-ezra-

merkin-connection-madoff-ponzi (the "NYAG Press Release").) The Settlement seeks to compensate certain investors in these funds, paying "$405 million to compensate investors over a three-year period, and $5 million to the State of New York to cover fees and costs." (*Id.*) The Settlement purports to resolve the NYAG Action, the Schwartz Action and the claims of the Receiver for Ascot Fund Ltd. and Ascot Partners, L.P.[1]

The NYAG Press Release further states that the select investors who would benefit from the Settlement "are likely to receive additional payments at a future date when the Madoff Estate is able to distribute moneys recovered by Irving Picard." (*Id.*)

Through the Settlement, the NYAG seeks to: (1) obtain Merkin's assets to the detriment of the BLMIS estate; (2) for fraudulently transferred assets consisting of other people's money; (3) for distribution to select investors; (4) to the detriment of all other BLMIS customers; and (5) outside the jurisdiction of the bankruptcy court. The Settlement is nothing less than an out and out assault on the bankruptcy court's jurisdiction over the BLMIS estate and the equitable distribution scheme put into place by the bankruptcy court and affirmed by the Second Circuit.

ARGUMENT

I. THE MOTION DOES NOT SET FORTH GROUNDS FOR MANDATORY WITHDRAWAL

To prevail on their Motion, Defendants must demonstrate that the bankruptcy court's determination of the Stay Application requires "substantial and material" consideration of federal non-bankruptcy law, such that the bankruptcy judge would need to engage in significant interpretation, as opposed to simple application, of federal laws other than bankruptcy law. *See*

[1] The Trustee disagrees with the Merkin Defendants' characterization of the facts surrounding their discussions with the Trustee in connection with the Settlement. The only relevant fact is one as to which all parties agree: the NYAG was well aware of the Trustee's Merkin Action before entering the Settlement.

Shugrue v. Airline Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.), 922 F.2d 984, 995 (2d Cir. 1990); *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991); *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.)*, No. 12-mc-115 (JSR), 2012 WL 1981486, at *1, (S.D.N.Y. May 30, 2012). No such showing has been made.

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. *See Ionosphere Clubs*, 922 F.2d, at 994. 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 limited circumstances, as provided in section 157(d) of title 28. *See Ionosphere Clubs*, 922 F.2d at 994.

The Second Circuit has consistently held that section 157(d) must be "construed narrowly" (*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." *Ionosphere Clubs*, 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." *Exxon Corp.*, 932 F.2d at 1026; *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).

Further, section 157(d) compels withdrawal only when the matter requires consideration of a federal non-bankruptcy law that is necessary for the resolution of the proceeding, and not merely consideration of an application of non-bankruptcy law. *See In re Manhattan Inv. Fund Ltd.*, 343 B.R. at 66 (mandatory withdrawal applies only in cases "where substantial and material consideration of non-Bankruptcy Code federal statutes is necessary for the resolution of the proceeding.") (quoting *Ionosphere Clubs*, 922 F.2d at 995).

Here, no material interpretation of SIPA or any other federal non-bankruptcy law is required to address whether the Defendants have violated the automatic stay and whether an injunction is warranted under Bankruptcy Code section 105(a). Accordingly, the Motion should be denied.

B. The Stay Action Does Not Require Substantial and Material Consideration of Non-Bankruptcy Federal Law

1. The Stay Action Is a Core Proceeding Properly Before the Bankruptcy Court

The Stay Action is a core proceeding because it involves the enforcement of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a), against a non-debtor and extension of the stay through section 105(a). Section 362(a) is "one of the fundamental debtor protections provided by the bankruptcy law." *Midlantic Nat'l Bank v. N.J. Dep't. of Envtl Prot.*,

474 U.S. 494, 503 (1986) (citing S. Rep. No. 95-989, p. 54 (1978); H.R. Rep. No. 95-595, p. 340 (1977)); *see In re Dominguez*, 312 B.R. 499, 505 (Bankr. S.D.N.Y. 2004) ("Central to the bankruptcy case as to which exclusive Article I federal jurisdiction lies is the automatic stay imposed by 11 U.S.C. § 362(a).").

Defendants concede that a proceeding is core if it concerns the bankruptcy court's administration of the estate. (Def. Br. at 22.) The determination of the application of the automatic stay to the Settlement and underlying litigation sought by the Stay Action interferes with the administration of the BLMIS estate to customers "as further prosecution [of third party litigation] could ultimately result in another court's determining how potential estate funds are distributed among certain BLMIS customers" and "could result in multiple courts arriving at different and inconsistent rulings." *Fox*, 429 B.R. at 437; see also *Saint Vincents*, 449 B.R. at 217 (purpose of the automatic stay is "to prevent individual plaintiffs from pursuing claims . . . that could result in preferential recoveries or inconsistent verdicts"); *see St. Croix Condo. Owners v. St. Croix Hotel*, 682 F.2d 446, 448 (3d Cir. 1982).

2. There is No Dispute Over What Constitutes "Property of the Estate" for Purposes of a Stay Application

Defendants readily acknowledge that the automatic stay "applies in SIPA proceedings, enjoining actions against the debtor and its property, and actions to collect claims against the debtor." (Def. Br. at 14–15.) The Defendants also concede that the Stay Orders prohibit interference with assets or property owned, controlled or in the possession of the debtor. (*See id.*)

Despite these concessions, Defendants suggest that they need this Court to decide an "apparent conflict in the scope of property of the estate under the Bankruptcy Code and SIPA." (Def. Br. at 16.) However, there can be no conflict because bankruptcy law itself is clear as to

what constitutes property of the estate for purposes of applying the automatic stay and a section 105 injunction to further the reach of the stay. "Indeed, every *conceivable* interest of the debtor, future, non-possessory, *contingent*, speculative, and derivative, is within the reach of the term 'property of the estate.'" *Fox v. Picard*, 848 F. Supp. 2d 469, 478 (S.D.N.Y. 2012) (emphasis added); *see Saint Vincents*, 449 B.R. at 217 (acknowledging that property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case . . . including causes of action possessed by the debtor at the time of filing") (citations omitted).[2]

Defendants' argument that resolution of the Stay Application requires a substantial and material interpretation of SIPA § 78*lll*(4), which defines the term "customer property," likewise falls flat. (Def. Br. at 16–17.) Not only is customer property a sub-set of "property of the estate," but given that the breadth of the concept of property of the estate is well-settled in the context of the automatic stay, determination of the application of SIPA is unnecessary to determine whether the automatic stay applies to bar Defendants' third party actions. Tellingly, Defendants never describe the "conflict" between bankruptcy law and SIPA, and their conclusory argument cannot provide a basis for withdrawal of the reference.

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[2] The automatic stay bars any act to exercise control over property of the estate, the commencement or continuation of any action against the debtor to recover a claim against the debtor, and any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case. *See* 11 U.S.C. § 362(a)(1), (3), (6). Despite allegations of specific misconduct by the Merkin Defendants, the Settlement and the underlying litigations violate the stay because they seek to recover the same money, from the same defendants, for the same injury suffered by every other customer: the loss of funds invested into BLMIS and transferred from BLMIS to the Defendants. In addition to seeking to recover on the Trustee's claims, the Settlement also seeks to exercise control over customer property and interfere with the Trustee's ability to recover fraudulently transferred property on behalf of all customers. *See e.g., In re Colonial Realty Co.*, 980 F.2d 125, 131–32 (2d Cir. 1992); *Fox*, 848 F. Supp. 2d at 478; *Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Sys., Inc.)*, 108 F.3d 881, 884 (8th Cir. 1997).

Defendants further contend that the bankruptcy court's dismissal of the Trustee's count seeking the immediate turnover of funds from the Merkin Defendants under Bankruptcy Code section 542 creates a conflict in the law requiring substantial and material consideration of federal non-bankruptcy law. (Def. Br. at 16.) *See also Picard v. Merkin*, 440 B.R. 243 (Bankr. S.D.N.Y. 2011). Defendants are comparing apples and oranges. The effect of the bankruptcy court's prior ruling dismissing the section 542 turnover count is simply that the Trustee cannot require immediate and automatic return of the funds transferred. The decision has no bearing on what constitutes property of the estate under section 541 of the Bankruptcy Code. This is illustrated by the fact that in *Picard v. Fox*, decided before the bankruptcy court's ruling on section 542, and *Picard v. Stahl* and *Picard v. Maxam*, decided *after* this ruling, the outcome was the same: third party actions seeking recovery of the same funds at issue in the Trustee's pending avoidance action threatened the property of the estate and violated the automatic stay. *See Fox*, 429 B.R. at 430–35; *Stahl*, 443 B.R. at 311–15; *Maxam*, 460 B.R. at. 114–16.

Thus, the bankruptcy court's own actions demonstrate that the dismissal of the Trustee's turnover claim is not pertinent to the application of the automatic stay. As this Court has previously recognized, "'property of the estate' is sweeping in scope, and does not demand that a final determination have been made to receive the protection of the automatic stay." *Saint Vincents*, 449 B.R. at 217. If the case were otherwise, withdrawal of the reference would be warranted *in every case* where a trustee sought to enforce the automatic stay. In any event, one is hard-pressed to understand how a bankruptcy court decision on bankruptcy concepts of property creates a conflict requiring withdrawal of the reference.

3. The Trustee's Standing to Bring the Defendants' Claims Is Irrelevant and Is Not a Basis to Withdraw the Reference

Defendants further contend that whether a cause of action belongs to the Trustee under section 362(a) somehow will require the substantial and material consideration of "whether SIPA creates authority to stay a third party from bringing a claim the trustee cannot bring" (Def. Br. at 17), meaning, whether SIPA enables the trustee to bring those claims. Whether the Trustee could hypothetically bring the Defendants' causes of action is not pertinent to the enforcement of the automatic stay and issuance of an injunction in aid of that stay. As the district court found in another Madoff-related stay application: "Appellants cite no case that holds that the mere possibility that a claim might be barred or subjected to a meritorious defense if it were asserted by the trustee renders the claim independent and not the property of the estate for the purposes of an action by the trustee to enforce the § 362 automatic stay when a creditor brings that claim." *Fox*, 848 F. Supp. 2d at 484. More to the point, SIPA has no bearing on the Trustee's argument that Defendants' claims are disguised fraudulent transfer claims. *See id*. at 479–86 (applying automatic stay without interpreting SIPA).

4. *Grupo Mexicano* Is Not a Basis for Withdrawal of the Reference

Defendants argue that withdrawal of the reference is warranted because resolving the Trustee's Stay Application will require "substantial and material" consideration of the U.S. Supreme Court's decision in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, *Inc.*, 527 U.S. 308 (1999), and its application to this SIPA proceeding. However, Judge George Daniels of this Court previously ruled that no significant interpretation of *Grupo Mexicano* was required to determine a bankruptcy court's authority to issue an injunction under section 105(a) of the Bankruptcy Code. *See Adelphia*, 2003 WL 21297258, at *4–5.

In *Grupo Mexicano*, the U.S. Supreme Court held that a plaintiff who files a lawsuit for money damages is merely an unsecured money judgment creditor, whose rights in the defendant's property do not arise until judgment, and therefore a freeze against the assets pending the outcome of the plaintiff's lawsuit is not warranted unless the plaintiff has a lien or other equitable interest in the assets. 527 U.S. at 321–22.

In *Adelphia*, Judge Daniels reviewed the issue of whether withdrawal of the reference was required to determine the effect of *Grupo Mexicano* on a bankruptcy court's authority to issue injunctions pursuant to section 105(a).[3] In relevant part, the principals argued for mandatory withdrawal on the basis that *Grupo Mexicano* substantially and materially conflicted with the bankruptcy court's authority to issue a pre-judgment order freezing assets under section 105(a). *See Adelphia*, 2003 WL 21297258, at *4.

The Court ruled that the argument had "no merit." *Id.* Judge Daniels reasoned that section 105(a) conferred on the bankruptcy court a "broad range of equitable powers," including powers to issue all orders "necessary or appropriate to carry out the provisions of [the Bankruptcy Code.]" *Id.* The Court held that section 105(a) authorized the bankruptcy court to issue a prejudgment order preventing a party from disposing of assets. *Id.* (citing *In re Keene Corp.*, 168 B.R. 285, 292 (Bankr. S.D.N.Y. 1994)). The Court further held that withdrawal was not proper because "*Grupo Mexicano's* holding specifically applied to district courts, and therefore is inapplicable in the bankruptcy court context." *Id.* Finally, the Court held that the application of *Grupo Mexicano* did not involve a "complicated issue of first impression" because

[3] In *Adelphia*, former principals of the chapter 11 debtor, against whom the debtor had filed an action for, *inter alia*, alleged violations of the Racketeer Influenced and Corrupt Organizations Act and Securities Exchange Act and sought a constructive trust, moved to withdraw the reference.

where a plaintiff seeks equitable remedies, such as the debtor's claims for constructive trust, courts had held that *Grupo Mexicano* was inapplicable. *Id.* (citing *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 250 (S.D.N.Y. 2002); *CBS Holdings, Inc. v. Redisi*, 309 F.3d 988, 996 (7th Cir. 2002)).

The outcome should be no different here. No substantial and material consideration of *Grupo Mexicano* is required because as numerous courts have recognized, a bankruptcy court's authority to issue section 105(a) injunctions in furtherance of the automatic stay falls outside the scope of *Grupo Mexicano*'s prohibition. *See In re Dow Corning Corp.*, 280 F.3d at 657–58 (*Grupo Mexicano* does not apply to exercise of statutory grant of power to issue injunctions under section 105(a)); *In re Feit & Drexler, Inc.*, 760 F.2d 406, 414–15 (2d Cir. 1985) (affirming a pre-judgment freeze of assets under section 105(a)); *In re President Casinos, Inc.*, 419 B.R. 394, 406 (E.D. Mo. 2009) (a section 105(a) injunction to facilitate the court's administration of the debtor's bankruptcy estate was not improper under *Grupo Mexicano* because the *Grupo Mexicano* Court "specifically exempted from its holding cases where jurisdiction to issue such injunctions is conferred, as here, by statute.").

Likewise, it is well-settled that *Grupo Mexicano* does not apply to the Trustee's complaint against the Merkin Defendants, which was filed in the bankruptcy court and asserts fraudulent transfer claims as well as an equitable claim for constructive trust. Courts have "repeatedly (and uniformly, to date) held that *Grupo Mexicano* is inapplicable to requests for asset-freezing injunctions where plaintiffs seeking that relief have also made equitable claims." *In re Adelphia Comm'ns Corp.*, 323 B.R. 345, 360 n.18 (Bankr. S.D.N.Y. 2005) (collecting cases, including *Motorola Credit Corp.*, 202 F. Supp. 2d 239; *Redisi*, 309 F.3d 988; *United States ex rel. Rahman v. Oncology Assocs., P.C.*, 198 F.3d 489, 496–97 (4th Cir. 1999);

Quantum Corporate Funding, Ltd. v. Assist You Home Health Care Servs. of Va., 144 F. Supp. 2d 241, 249–50 & n. 9 (S.D.N.Y. 2001); *Wishnatzki & Nathel, Inc. v. H.P. Island-Wide, Inc.*, No. 00 Civ. 8051, 2000 WL 1610790, at *1 (S.D.N.Y. Oct. 27, 2000)).

Multiple courts have found that fraudulent transfer actions are equitable in nature and hence, not subject to *Grupo Mexicano*. *See, e.g.*, *Rubin v. Pringle (In re Focus Media, Inc.)*, 387 F.3d 1077, 1085 (9th Cir. 2004), *cert. denied*, 544 U.S. 923 (2005) ("[W]e hold that where, as here, a party in an adversary bankruptcy proceeding alleges fraudulent conveyance or other equitable causes of action, *Grupo Mexicano* does not bar the issuance of a preliminary injunction freezing assets."); *In re SK Foods, L.P.*, No. S-10-810, 2010 WL 5136187, at *5 (E.D. Cal. 2010) (affirming preliminary injunction and finding that bankruptcy court did not err in deciding that avoidance action was equitable and hence, not subject to *Grupo Mexicano*); *In re Big Springs Realty LLC*, 426 B.R. 860, 866 (Bankr. D. Mont. 2010) (preliminary injunction was appropriate where plaintiff asserted fraudulent conveyance claims along with other closely related claims); *In re Woodside Grp., LLC*, 427 B.R. 817, 836 (Bankr. C.D. Cal. 2010) (*Grupo Mexicano* was not a bar to granting preliminary injunction requested in connection with fraudulent conveyance action in an adversary proceeding); *In re Ball*, 362 B.R. 711 (Bankr. N.D.W.V. 2007) (fraudulent transfer action was an equitable cause of action to which *Grupo Mexicano* did not apply) (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 44 (1989)).

Defendants also contend that the Trustee's fraudulent transfer action against the Merkin Defendants somehow is an action seeking money damages and hence, is within the reach of *Grupo Mexicano*'s proscription against pre-judgment injunctive relief. (Def. Br. at 12–13.) They contend that the U.S. Supreme Court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011) and *Granfinancieria, S.A. v. Nordberg*, 492 U.S. 33 (1989) held that fraudulent transfer actions are

"quintessentially suits at common law." (Def. Br. at 13, citing *Stern*, 131 S. Ct. at 2598.) Not only have courts squarely rejected this argument, holding that fraudulent transfer actions were equitable claims to which *Grupo Mexicano* does not apply, but the Second Circuit has dispelled the notion that *Stern* cabins a bankruptcy court's jurisdiction to enjoin third party actions that threaten the administration of the estate. *See Quigley Co. v. Law Offices of Peter G. Angelos (In re Quigley Co.)*, 676 F.3d 45, 52 (2d Cir. 2012) ("Enjoining litigation to protect bankruptcy estates during the pendency of bankruptcy proceedings, unlike the entry of the final tort judgment at issue in *Stern*, has historically been the province of the bankruptcy courts.").[4]

The application of SIPA to the Trustee's actions does not alter this result. SIPA expressly incorporates provisions of the Bankruptcy Code, including section 105(a). 15 U.S.C. § 78fff(b). On three prior occasions, the district court has extended the automatic stay and affirmed the bankruptcy court's issuance of section 105(a) injunctions on substantially similar grounds as the Trustee's request for relief against the Defendants. *See Fox*, 848 F. Supp. 2d 469; *In re Bernard L. Madoff Inv. Sec. LLC*, No. 11 CV 2392 (AKH), 2011 WL 7975167 (S.D.N.Y. Nov. 17, 2011); *Picard v. Maxam Absolute Fund, L.P.*, 474 B.R. 76 (S.D.N.Y. 2012). At no time did the Court find that the SIPA overlay changed its analysis of the governing case law in a manner requiring substantial or material interpretation of SIPA. The Court need not do so now.[5]

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[4] Defendants alternatively urge that permissive withdrawal of the reference is proper solely to determine the "applicability and meaning" of *Grupo Mexicano* in connection with the Stay Action. (Def. Br. at 14). However, in addressing this very issue, Judge Daniels did not *sua sponte* withdraw the reference on this basis in *Adelphia*, and discretionary withdrawal is likewise unwarranted here. *See Adelphia*, 2003 WL 21297258, at *1–2. As discussed more fully below, the bankruptcy court's adjudication of the Stay Action furthers the interests of judicial efficiency and uniformity of bankruptcy administration, as that court is well-suited to resolve the matter, having already considered and issued four similar decisions in these proceedings.

[5] The cases relied on by Defendants are not to the contrary. (*See* Def. Br. at 13 (citing *Serio v. Black, Davis & Shue Agency Inc.*, No. 05-15, 2005 U.S. Dist. LEXIS 39018, at *19 (S.D.N.Y.

Accordingly, no "substantial and material" consideration is required by the district court and there are no grounds for mandatory withdrawal of the reference under *Grupo Mexicano*.

5. The *Barton* Doctrine Is Not a Basis for Withdrawal

Defendants contend that the Stay Action as against the two Receivers is precluded by the *Barton* doctrine, which prohibits suits against receivers, and that withdrawal is required because their *Barton* doctrine defense requires substantial and material consideration of non-bankruptcy law. (Def. Br. at 18–19.) They are mistaken. Whether the *Barton* doctrine applies to preclude the Trustee's action against the Receivers from going forward (which it does not) is an issue that is squarely within the purview of the bankruptcy court, does not require consideration—much less substantial and material consideration—of federal non-bankruptcy law and therefore, cannot provide a basis for mandatory withdrawal of the reference.

The Receivers contend that the Trustee's lawsuit against them cannot progress because, under the *Barton* doctrine, the Trustee was required to seek leave from the state court that appointed them before commencing his lawsuit against them. When this substantive issue is eventually litigated, the Trustee will argue, for instance, that because the Receivers violated the Bankruptcy Code's automatic stay in failing to seek relief from the stay from the bankruptcy court before they proceeded with their actions against Merkin, they cannot now belatedly seek

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Jan. 11, 2006); *Nanjing Textiles Imp/Ex Corp. Ltd. v. NCC Sportswear Corp.*, No. 06-52, 2006 U.S. Dist. LEXIS 56111, at *20 (S.D.N.Y. Aug. 11, 2006) (Koeltl, J.); *JSC Foreign Econ. Assoc. Technostyroyexport v. Int'l. Dev. & Trade Servs, Inc.*, 295 F. Supp. 2d. 366, 386 (S.D.N.Y. 2003)).) None of these cases involved preliminary injunctions issued under section 105(a) of the Bankruptcy Code. Likewise, while these cases recognize the unremarkable principle that *Grupo Mexicano* may apply even to equitable claims if they are incidental to claims that primarily seek monetary relief, *see Nanjing*, 2006 U.S. Dist. LEXIS 56111, at *20, the Trustee's Merkin Action asserts only equitable claims (constructive trust and fraudulent transfer claims) or closely-related claims. *See Serio*, 2005 U.S. Dist. LEXIS 39018, at *23–27 (granting preliminary injunction to preserve assets for action "plainly" seeking equitable relief).

refuge under the *Barton* doctrine. Resolution of this issue requires nothing more than consideration of the automatic stay provisions of the Bankruptcy Code and cannot provide a means for mandatory withdrawal of the reference.

Moreover, application of the *Barton* doctrine (especially in the context of an automatic stay violation) is considered a "core" matter upon which the bankruptcy court may enter a final determination. *See, e.g., In re VistaCare Grp. LLC*, 678 F.3d 218, 224 (3d Cir. 2012) (finding that bankruptcy court's grant of leave to sue bankruptcy trustee in state court was a "core proceeding" over which the bankruptcy court had jurisdiction under 28 U.S.C. § 157(b)); *Katz v. Kucej (In re Biebel)*, 2009 Bankr. LEXIS 1544, at *2 (Bankr. D. Conn. May 19, 2009); *In re Lambert*, 438 B.R. 523, 526 (Bankr. M.D. Pa. 2010). Thus, a determination of whether the *Barton* doctrine applies—which courts have routinely found to be within the power of the bankruptcy court—cannot provide a basis for mandatory withdrawal.

Finally, in considering whether the doctrine applies, the bankruptcy court may consider whether the Receivers waived any immunity to suit they might have enjoyed under the *Barton* doctrine by participating in the claims process before the bankruptcy court respecting the claims in the BLMIS liquidation filed by the Merkin Funds and actively litigating the Merkin Action before the bankruptcy court. Bankruptcy courts have routinely considered the issue of such waivers and the issue does not implicate substantial and material consideration of non-bankruptcy law. *See Seitz v. Freeman (In re CITX Corp.)*, 302 B.R. 144, 158–59 (Bankr. E.D. Pa. 2003) (denying immunity to bankruptcy suit on any actions "related to the claim [the state-appointed receiver] asserted" where receiver had filed a proof of claim); *In re Best Prods. Co., Inc.*, No. 93 Civ. 1115, 1994 WL 141970 (S.D.N.Y. Apr. 20, 1994) (denying motion to withdraw the reference brought by receiver sued by bankruptcy trustee where receiver was found to have

submitted itself to the equitable jurisdiction of the bankruptcy court by submitting a proof of claim).

Accordingly, the Receivers' *Barton* doctrine defense does not require the substantial and material interpretation of federal non-bankruptcy law, but rather, involves the mere application of well-established bankruptcy law. It furnishes no basis upon which the reference can or should be withdrawn.

II. COLLATERAL COMMON BRIEFING IS NOT GROUNDS TO WITHDRAW THE STAY APPLICATION

Defendants argue that because this Court is considering various common issues related to the Trustee's Merkin Action, the Court must withdraw the Stay Application. (Def. Br. at 19.) Reading their argument makes it clear that the exact opposite result is warranted. This Court already has the specific issues raised by Defendants under common briefing, and the relevant Defendants are participating in that briefing. The results of those decisions will ultimately inform the litigation and resolution of the Trustee's claims. There is no need to withdraw the Stay Application just because certain discrete issues arising from the Merkin Action are before the Court.[6]

[6] Defendants maintain that resolving the Stay Application will require the court to determine the likelihood of success on the merits of the Trustee's Merkin Action pursuant to Federal Rule of Civil Procedure 65. (Def. Br. at 19.) They are incorrect. Courts in this district have held that Rule 65 does not apply to injunctions issued pursuant to section 105(a) of the Bankruptcy Code. *See In re Chateaugay Corp., Reomar, Inc.*, 93 B.R. 26, 29 (S.D.N.Y. 1988); *LaMonica v. N. of Eng. Protecting & Indemn. Ass'n (In re Probulk Inc.)*, 407 B.R. 56, 63 (Bankr. S.D.N.Y. 2009). *Nevada Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401 (S.D.N.Y. 2007), cited by Defendants, is not to the contrary. *Calpine* concerned a request for injunctive relief in the context of a chapter 11 reorganization case and applied a modified preliminary injunction standard requiring review of the likelihood of a successful reorganization. *See* 365 B.R. at 409.

III. THE DEFENDANTS HAVE FAILED TO DEMONSTRATE CAUSE FOR PERMISSIVE WITHDRAWAL OF THE REFERENCE

The permissive withdrawal provision states, in relevant part, that "[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section . . . for cause shown." 28 U.S.C. § 157(d). To determine whether there is "cause" to withdraw the reference, this Court must 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). These factors make clear that this Court should not withdraw the reference on a discretionary basis.

Based on the clear mandate set forth in the recently entered Amended Standing Order of Reference, the Stay Action should proceed before the bankruptcy court. The order specifically provides that for any proceeding referred to the bankruptcy court and "determined to be a core matter, the bankruptcy judge *shall* . . . hear the proceeding and submit proposed findings of fact and conclusions of law to the district court." Amended Standing Order of Reference, *In re Standing Order of Reference Re: Title 11*, 12 Misc. 00032 (S.D.N.Y. Feb. 2, 2012), ECF No. 1 (emphasis added).

Judicial efficiency is a critical factor in determining whether to withdraw the reference on permissive withdrawal grounds. *See In re Orion Pictures Corp*., 4 F.3d at 1100; *Mishkin v. Ageloff*, 220 B.R. 784, 800 (S.D.N.Y. 1998). Here, the interests of judicial efficiency do not warrant withdrawal of the reference. The bankruptcy court is best suited to determine whether the automatic stay and injunctive provisions of the Bankruptcy Code apply here, and indeed, has considered and issued decisions in similar circumstances four times in these proceedings. *See,*

e.g., *Fox*, 429 B.R. 423; *Stahl*, 443 B.R. 295; *Maxam*, 460 B.R. 106; *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, __ B.R. __, Adv. Pro. No. 08-01789, 2012 WL 2377787 (Bankr. S.D.N.Y. June 20, 2012).

One of the other important *Orion* factors is the prevention of possible forum shopping by parties who perceive the bankruptcy court as an unfavorable forum in which to litigate their claims. Here, the Defendants have been avoiding the jurisdiction of the bankruptcy court from the start, bringing and settling their claims in New York state court and never having sought leave from the bankruptcy court to pursue the settlement of claims which indisputably will impact the administration of the estate as it diminishes, if not eviscerates, assets held by Merkin Defendants to satisfy the Trustee's claims. Indeed, the basis of the Stay Action is precisely to bring the NYAG's settlement within the purview of the bankruptcy court. They should not be allowed to avoid that court's jurisdiction.

In addition, Defendants' assertion that withdrawal of the reference will not cause prejudice or delay is predicated on the mistaken notion that the bankruptcy court cannot finally adjudicate the Stay Action. (*See* Def. Br. at 24). However, as set forth above, the Second Circuit has determined that a bankruptcy court has jurisdiction to issue final orders enjoining third party actions that threaten the orderly administration of the estate. *See In re Quigley Co., Inc.*, 676 F.3d at 52.

In the face of these considerations, Defendants argue that the outcome of the Stay Application will have implications for other state law enforcement and regulatory actions. (Def. Br. at 21.) However, as the Trustee has argued, the Settlement arising from the NYAG Action is not an exercise of regulatory or police power, but rather is an attempt to recover monetary relief to enrich private parties and the State's coffers from the same pool of fraudulently-transferred

assets sought by the Trustee. Granting the relief requested by the Trustee would not impact state law enforcement and regulatory actions legitimately exercising police power outside the unique circumstances of this case. In any event, the bankruptcy court is specifically empowered under section 362(b)(4) of the Bankruptcy Code to determine whether the NYAG is exercising its police powers and thus excepted from the automatic stay.

CONCLUSION

For the reasons set forth above, the Defendants' Motion should be denied.

Date: New York, New York
October 3, 2012

/s/ David J. Sheehan

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendants.	Adv. Pro. No. 08-01789 (BRL) Civil Action No. 12-mc-0115 (JSR) 12 Civ. 06733
In re: MADOFF SECURITIES	

Affidavit of Service

STATE OF NEW YORK)

SS.:

COUNTY OF NEW YORK

KERIN DONAHUE, being duly sworn, deposes and says: I am not a party to the action, am over 18 years of age and am employed by the law firm of Baker Hostetler.

On the 3rd day of October 2012, I served a true and correct copy of the Trustee's Memorandum of Law in Opposition to Defendants' Motion to Withdraw the Reference by emailing the interested parties via electronic transmission to the email addresses designated for delivery to those parties as set forth on the attached Service List.

TO: See Service List

In addition, I hereby served a true and correct copy of the Trustee's Memorandum of Law in Opposition to Defendants' Motion to Withdraw the Reference via Federal Express upon the attorneys listed below at their address designated for service.

TO: David N. Ellenhorn
Daniel Sangeap
Office of the Attorney General
120 Broadway
New York, NY 10271

Dated October 3, 2012

Kerin Donahue
Court Clerk

Sworn to me this
3rd day of October, 2012

Notary Public

Theresa Blaber
Notary Public, State of New York
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Qualified in Queens County
Commission Expires 7/01/13

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