

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

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SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff,

Adv. Pro. No. 08-1789 (BRL)

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

SIPA LIQUIDATION

(Substantively Consolidated)

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In re:

BERNARD L. MADOFF,

Debtor.

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IRVING H. PICARD, Trustee for the Liquidation of  
Bernard L. Madoff Investment Securities LLC,

Plaintiff,

Adv. Pro. No. 09-1197 (BRL)

v.

JEFFRY M. PICOWER, individually and as trustee for  
the Picower Foundation, et al.,

Defendants.

Appeal No.

11-CV-01298 (JGK)

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**REPLY BRIEF OF APPELLANT SUZANNE STONE MARSHALL IN  
FURTHER SUPPORT OF APPEAL FROM ORDER ISSUING  
A PERMANENT INJUNCTION**

**Case No.**

**11-CV-01298 (JGK)**

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### PRELIMINARY STATEMENT

The Trustee<sup>1</sup> does not dispute that the Marshall class consists of approximately 3,000 Madoff victims who have suffered billions of dollars in compensable damages because of the Picower Defendants' participation in the Madoff fraud. Instead, the Trustee attempts to unfairly demonize the Marshall class members. The Trustee states repeatedly that, but for this appeal, Picower settlement money would be available for distribution "to the victims" of the Madoff fraud. This is a dishonest statement because the Picower Defendants irrevocably and unconditionally forfeited \$7.2 billion to the Government, of which \$5.2 billion was allocated to the settlement of the Trustee's litigation. The Government then announced that it would give the \$2.2 billion balance to the Trustee to distribute to the customers. The forfeiture of the funds was not even conditioned upon bankruptcy court approval of the settlement.

For his own reasons, Picard chose to provide that the settlement funds would not be distributed to customers until there was a final non-appealable order approving the settlement. Then, even though it was not a condition of the settlement, Picard asked the bankruptcy court to enjoin the Marshall and Fox lawsuits against the Picower Defendants and he submitted to the bankruptcy court **one** order approving the settlement and enjoining the Marshall and Fox suits, knowing that Fox and Marshall would have no alternative but to appeal the order. Thus, the delay in distributing the \$7.2 billion to the allowed claimants is totally of the Trustee's own making.

The Trustee's request for an injunction to protect Madoff's co-conspirators is incomprehensible and beyond the jurisdiction of the bankruptcy court. It is well recognized that:

[T]wo parties cannot agree to extinguish the claim of a third party not in privity with either of them—let alone the potential claims of third parties.

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<sup>1</sup> Capitalized terms have the same meaning as set forth in the Appellants' initial brief.

*In re Artra Group, Inc.*, 300 B.R. 699, 705-06 (B. N.D. Ill. 2003).

The Trustee incorrectly states that the Marshall class members are attempting to “re-litigate” the net equity ruling and recover the fictitious profits reflected on their BLMIS account statements. Marshall does not seek to recover the profits reflected on her BLMIS account statements. She seeks damages under state law causes of action for Picower’s criminal fraud. Her damages are personal to her: they include taxes she paid on non-existent profits, statutory interest on the funds deposited with BLMIS which were stolen by the Picower Defendants, and other personal damages that the Trustee lacks standing to claim.

The First Appeal and the order below present the same issue, namely whether Marshall’s claims can be enjoined on the theory that they belong to the Trustee. The Trustee does not seriously argue otherwise. Nor can the Trustee seriously contend that the bankruptcy court has jurisdiction to enjoin Marshall’s claims against the Picower Defendants. These claims do not belong to him and take nothing away from his settlement with the Picower Defendants. The Trustee cannot cite a single case permitting a bankruptcy court to enjoin independent claims against non-debtors in a liquidation. The Trustee cannot cite any case to support the language in the injunction barring “duplicative” claims, *i.e.*, claims based on a factual predicate similar to the Trustee’s fraudulent transfer claims against the Picower Defendants.

Therefore, the dispositive issue in this appeal is the same as in the First Appeal: Do Marshall’s claims belong to the Trustee? The Trustee’s brief offers virtually nothing new on this issue. Marshall’s claims do not belong to the Trustee because Marshall has asserted her own claims which the Trustee lacks standing to bring under the *Wagoner* Rule. *See Picard v. HSBC Bank PLC*, 2011 WL 1544494 \*3 (S.D.N.Y. April 25, 2011) (recognizing that Picard’s standing “may well be precluded by the so-called ‘*Wagoner*’ doctrine”).

**ARGUMENT**

**I. THE INJUNCTION ENTERED BELOW MUST BE VACATED AND REVERSED**

In entering the first injunction (at issue on the First Appeal), the bankruptcy court ruled that Marshall's claims are *void ab initio* because they "belong to" the Trustee. In entering the second permanent injunction in connection with approving the settlement, the bankruptcy court again ruled that it applied to Marshall because her claims were *void ab initio* and belong to the Trustee. (Co-Appellant Fox Br. at 13, Exhibit B thereto, 1/13/11 Hrg. Trans. at 36:15-12; 37:2-10.)

The bankruptcy court erred in holding that Marshall's claims belong to the Trustee and in enjoining Marshall's claims. The court lacked jurisdiction over those claims. See *In re Zale Corp.*, 62 F.3d 746, 765-66 (5<sup>th</sup> Cir. 1995) (vacating settlement where bankruptcy court had no power to enjoin creditors' independent third party claims); *In re Artra Group, Inc.*, 300 B.R. at 706-708 (holding settlement agreement void because it contained injunction of claims against settling non-debtor).

Courts cannot enjoin third party claims against a settling nondebtor unless such claims are owned by the estate, belong to the debtor, or are derivative of estate claims.<sup>2</sup> The Trustee cites no case—not a single one—where a bankruptcy court enjoined independent claims in a chapter 7 liquidation. In fact, cases cited in the Trustee's brief make Marshall's point precisely. For example, in *In re Artra Group, Inc.*, (Trustee's Br. at 41), the court refused to approve a settlement that included an injunction barring a creditor's claims against a nondebtor because the barred claims did not belong to the estate. The court recognized the validity of what Marshall

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<sup>2</sup> The statutory exception that allows a bankruptcy court to bar claims that do not belong to the estate in asbestos cases is inapplicable here.

has been saying all along: that it is improper for the Trustee to bargain away claims he does not own to achieve an inflated settlement for himself.

If A has a claim against B, it is easy to see why B would like to have a settlement that resolved not only its dispute with A but its dispute with C as well, and it is easy to see why A would be delighted to agree to such a provision since by making the settlement more valuable to B the provision would enable A to get a larger settlement. . . . **But two parties cannot agree to extinguish the claim of a third party not in privity with either of them—let alone the potential claims of 10,000 third parties.**

*Id.* at 705-06 (quoting *Fogel v. Zell*, 221 F.3d 955, 964-65 (7<sup>th</sup> Cir. 2000))(emphasis added).

The Trustee's repeated reliance on *In re Dreier LLP*, 429 B.R. 112 (B. S.D.N.Y. 2010) ("*Dreier I*")<sup>3</sup> is mis-placed because, in that case, the court properly held that it lacked subject matter jurisdiction to enjoin independent claims made by a creditor against the settling nondebtor. The injunction later approved by the court expressly carved out independent claims for independent injuries. *See In re Drier LLP*, 2010 WL 3835179 (S.D.N.Y. Sept. 10, 2010) ("*Dreier II*"). Judge Bernstein refused to enter an injunction barring claims alleging a non-debtor defendant's participation in the debtor's fraud – the very same kind of claims that Marshall has asserted against the Picower Defendants.<sup>4</sup>

*In re Johns-Manville*, 571 F.3d 52 (2d Cir. 2008), establishes that the Trustee lacks standing to assert Marshall's claims under the *Wagoner* Rule. (Marshall Br. at 8-9, 13-14, 15-21). *See HSBC Bank PLC*, 2011 WL 1544494, at \*3 (recognizing that Trustee may lack standing to

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<sup>3</sup> *See* Trustee's Br. at 33, 34, 36, 39, 40, 42.

<sup>4</sup> *See* Co-Appellant Fox Reply Br. (from First Appeal) at 6 and Exhibit B thereto. Other cases cited by the Trustee support Marshall's position. For example, *In re Mrs. Weinberg's Kosher Foods, Inc.*, 278 B.R. 358, 365 (B. S.D.N.Y. 2002), where the court refused to enjoin creditor claims "arising from the facts and transactions underlying" the trustee's claims if such claims do not implicate an injury to the estate. (See add'l discussion of *In re Mrs. Weinberg* in Marshall's Initial Brief at 20.) *Central Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 192 (2d Cir. 2003) (cited in Trustee Br. at 40), merely stands for the proposition that a court can enjoin creditors' "derivative or alter-ego claims." Such claims are not at issue here.

bring various state law claims).

The Trustee argues that Marshall's claims belong to him based primarily on the same five arguments that he raised in the First Appeal. He is wrong again.

*First*, the Trustee argues that the bankruptcy court had subject matter jurisdiction to bar Marshall's claims merely because it had "arising under," "arising in," and "related to" jurisdiction over the Trustee's adversary proceeding against the Picower Defendants and the resulting Settlement Agreement. (Trustee Br. at 33.) However, under *Johns-Manville*:

In assessing a court's jurisdiction to enjoin a third party dispute, the question is not whether the court had jurisdiction over the settlement, but whether it had jurisdiction over the attempts to enjoin the creditors' unasserted claims against the third party.

*In re Dreier*, 429 B.R. at 131 (citing *Johns-Manville*, 517 F.3d at 65). Although the bankruptcy court may have had jurisdiction to consider whether to approve the settlement, it did not have jurisdiction to bar Marshall's independent claims. *See id.*; *see also In re W.R. Grace & Co.*, 591 F.3d 164, 174-75 (3d Cir. 2009) (citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 305 (1995)) (rejecting argument that "bankruptcy court. . .[has] the power to enjoin any action, no matter how unrelated to the underlying bankruptcy it may be, so long as injunction motion was filed in an adversary proceeding."). Moreover, the United States Supreme Court recently held unconstitutional the Congressional delegation to the bankruptcy court of jurisdiction over "core" matters that are based on independent state law rights that are not necessary to determine a creditor's proof of claim. *See Stern v. Marshall*, 2011 WL 2472792 (June 23, 2011). Under *Stern*, the bankruptcy court clearly exceeded its jurisdiction in entering the injunction.

*Second*, the Trustee argues that Marshall's conversion, conspiracy, aiding and abetting, and RICO claims are really "disguised fraudulent transfer claims" that belong to the Trustee. Marshall respectfully refers the Court to her arguments in the First Appeal, including the binding

case law rejecting a trustee's attempt to re-label causes of action as fraudulent transfer claims. *See, e.g., Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042-43 (2d Cir. 1986) (holding that causes of action must be accepted as pled; dismissing trustee's argument that conspiracy claim was an "artful pleading" of a "violation of the fraudulent conveyance laws.").

*Third*, the Trustee again argues that Marshall's claims belong to him because "they assert generalized, not particularized harm to creditors." (Trustee Br. at 37.) As Marshall has already established in the First Appeal the test to determine whether Marshall's claims are independent is whether her harm is different from the harm *suffered by the debtor* (Madoff/BLMIS). *See e.g., In re Granite Partners L.P.*, 194 B.R. 318, 325 (B. S.D.N.Y. 1996); *In re Seven Seas Petroleum, Inc.*, 533 F.3d 575, 588 (5th Cir. 2008) ("[W]e also wish to dispel the notion that a claim belongs to the estate . . . merely because it could be brought by a number of creditors, instead of just one."); *Higgins v. N.Y.S.E.*, 806 N.Y.S.2d 339, 347-49 (N.Y. Sup. Ct. 2005) (holding that whether claim belongs to corporation or its shareholders depends on who suffered alleged harm, rejecting concept of "undifferentiated harm" among shareholders); *see also Johns-Manville*, 517 F.3d 52 (holding that bankruptcy court lacks subject matter jurisdiction over claims that allege injuries different than debtor's injuries).

Marshall's harm is clearly different from any harm suffered by BLMIS. BLMIS cannot claim damages because Marshall paid taxes on non-existent income. BLMIS cannot claim damages based upon Picower's theft of Marshall's money.

*Fourth*, the Trustee repeats his argument from the First Appeal that Marshall's claims are not independent because she has not alleged privity with the Picower Defendants. (Trustee Br. at 5.) Privity is not a prerequisite to stating an independent claim against the Picower Defendants. *See In re Granity Partners*, 194 B.R. at 325 (recognizing that independent claim can occur

“where the conduct causes an injury to the plaintiff distinct from any injury to the corporation” even if no separate independent duty to plaintiff is violated). Standing is about harm, not duty or privity. Marshall has asserted direct claims against the Picower Defendants under non-bankruptcy law that are not premised on the existence of privity with the Picower Defendants.

*Fifth*, the Trustee states that the *Wagoner* Rule does not apply to fraudulent transfer claims brought by a trustee under § 544 of the Bankruptcy Code. (Trustee Br. at 37.) Whether the *Wagoner* Rule applies to such claims is irrelevant because the Trustee’s standing to bring § 544 claims is not at issue. Here, the Trustee seeks to usurp Marshall’s *non-fraudulent transfer claims* (i.e., state law claims for aiding and abetting, civil conspiracy, RICO) as property of the debtor under § 541 of the Bankruptcy Code. The Trustee lacks standing to bring such claims under the *Wagoner* Rule, which is why Marshall’s claims cannot “belong to” the Trustee as a matter of law.<sup>5</sup> *In re Hampton Hotel Investors*, 289 B.R. 563, 567 (S.D.N.Y. 2003) (recognizing that debtor’s misconduct is imputed to the bankruptcy trustee and, in that case, “trustee lacks standing to assert claims on behalf of the estate against a third party). *HSBC Bank PLC*, 2011 WL 1544494, at \*3 (recognizing that *Wagoner* Rule may preclude Trustee from bringing various state law claims). Indeed, the *Wagoner* Rule has repeatedly been the basis for dismissing adversary proceedings brought by trustees, debtors, and creditor committees against parties who participated in illegal schemes with debtors. *See Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085 (2d Cir. 1995); *In re Mediators Inc.*, 105 F.3d 822, 826 (2d Cir. 1997); *In re Bennett Funding Group*,

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<sup>5</sup> The Trustee also claims without explanation that Judge Rakoff’s opinion *In re Saint Vincent’s Catholic Medical Centers of New York*, case no. 10 Civ. 8100, 2011 WL 1990797 (S.D.N.Y. May 23, 2011), “agree[d] with Judge Lifland’s decision to enjoin the [Marshall action].” (Trustee Br. at 38.) The opinion does no such thing. The district court affirmed a bankruptcy court order enjoining a creditor from obtaining discovery from a third party for the purpose of bringing fraudulent transfer claims, which do belong to the estate. The opinion discusses Judge Lifland’s order giving rise to the First Appeal, but the *In re St. Vincent’s* opinion never goes so far as to say that Judge Lifland’s first injunction was correct.

*Inc.*, 336 F.3d 94 (2d Cir. 2003); *CBI Holding Co. v. Ernst & Young*, 529 F.3d 432 (2d Cir. 2008).

The bankruptcy court lacked subject matter jurisdiction to enjoin Marshall's claims against the Picower Defendants because those claims do not belong to the Trustee. Therefore, the injunction must be vacated. *See In re Zale*, 62 F.3d at 765-66; *In re Artra Group, Inc.*, 300 B.R. at 708.

**A. Even if Marshall were a “customer” or creditor of the estate, the permanent injunction would still be beyond the bankruptcy court’s jurisdiction.**

The Trustee argues that the permanent injunction of Marshall's claims is proper because Marshall is a “customer” or creditor of the estate. (Trustee Br. at 39.) The Trustee claims that Marshall may be a general creditor of the estate who is entitled to *pro rata* distributions of whatever is left after paying all “net loser” claims in full. This is completely inconsistent with the Trustee's original position that Marshall would not receive anything from the estate beyond her small SIPC payment. There is no provision of the Securities Investor Protection Act (“SIPA”) which gives general unsecured status to a disallowed customer's claim. Moreover, it is irrelevant whether Marshall is a customer or creditor as a result of her SIPC payment; the Trustee lacks standing to assert her claims against the Picowers and the bankruptcy court lacked jurisdiction to enjoin them.

**B. The bankruptcy court’s permanent injunction is improper because it purports to enjoin “duplicative” claims.**

Settled Second Circuit law establishes that a bankruptcy court cannot enjoin Marshall's claims if they do not belong to the Trustee (*i.e.*, if they are independent). This is true even if Marshall's claims and the Trustee's fraudulent transfer claims both arise out of Madoff's fraud and both are based on similar factual allegations. By purporting to enjoin “duplicative” claims, the bankruptcy court improperly barred Marshall from pursuing her non-fraudulent transfer claims

merely because they include factual allegations similar to those giving rise to the Trustee's fraudulent transfer claims against the Picowers. (Marshall Br. at 11-13, 16-17.)

The Trustee's only response is that the injunction will not apply to Marshall's claims if they are "truly independent." (Trustee Br. at 35.) But that does not resolve the issue because the Trustee refuses to unequivocally state that "duplicative" claims do not include independent claims that happen to arise out of the same factual predicate as the Trustee's fraudulent transfer claims. To the contrary, the Trustee continues to vaguely assert that claims "that duplicate the Trustee's claims may be enjoined." (Trustee Br. at 34.)

The Trustee cites no cases barring "duplicative" claims, unless such claims actually belong to the estate.<sup>6</sup> By enjoining undefined "duplicative" claims, the injunction is not expressly limited to claims that belong to estate. Therefore, the injunction is improper and impermissibly broad and vague under Fed. R. Civ. P. 65(d). *See In re Artra Group, Inc.*, 300 B.R. at 706. ("[T]he order should state that only those claims which are the exclusive property of the [debtor's] estate . . . are enjoined.").

**C. The facts and circumstances of this case do not amount to the "unusual circumstances" necessary to permit the injunction.**

The Trustee argues that the permanent injunction is appropriate because the settlement is unprecedented in size. (Trustee Br. at 43.) However, an improper injunction does not become proper merely because the Picower Defendants agreed to make a contribution to the estate, no

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<sup>6</sup> The cases cited at page 34 and note 14 of the Trustee's brief are completely inapposite. *Curtis v. Citibank, N.A.*, 226 F.3d 133 (2d Cir. 2000), is a non-bankruptcy case dealing with whether a plaintiff was barred from bringing successive race discrimination litigations under the doctrines of claim and issue preclusion. *Rosenblatt v. Christie, Manson & Woods, Ltd.*, 2005 WL 269027, at \*9 (S.D.N.Y. 2005), is a non-bankruptcy case dealing with whether a claim for breach of good faith and fair dealing can create rights not contemplated in a written contract. In *In re Spring Grove Livestock Exch., Inc.*, 205 B.R. 149, 156 (B. D. Minn. 1997), two trustees filed identical fraudulent transfer claims against the same non-debtor, and the court ruled that both trustee's could not recover the same fraudulent transfers.

matter how large. *See In re Johns-Manville*, 517 F.3d at 66. The few cases cited by the Trustee at page 43 of his brief do not support his position. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005), merely holds that the bankruptcy court's order approving a settlement was properly reversed by the district court because a "material contribution" alone is not a sufficient basis upon which to enjoin creditor's claims against a settling nondebtor defendant. Similarly, in *In re Dow Corning Co.*, 280 F.3d 648, 658-659 (6<sup>th</sup> Cir. 2002), the court affirmed a district court order reversing the bankruptcy court's injunction because, among other things, the bankruptcy court failed to make detailed findings of fact supporting all seven factors necessary to support such an extraordinary injunction.

The Trustee's argument that the injunction of Marshall's claims is necessary to avoid interference with the administration of the liquidation is nonsense. (Trustee Br. at 46.) The Trustee failed to distinguish the bankruptcy court's holding in *Picard v. Cohmad Sec. Corp.*, 443 B.R. 291 (B. S.D.N.Y. Feb. 3, 2011), where the court denied issuance of a section 105 injunction in favor of a settling non-debtor defendant (like the Picower Defendants) because the settlement "leave[s] nothing for this Court to administer."<sup>7</sup> The fact that the non-debtor defendant in *Cohmad* sought an injunction in his favor after the settlement, instead of with the settlement, does not change the bankruptcy court's rationale for denying injunctive relief.

The Trustee provides no authority for the proposition that Marshall's claims against the Picowers can affect the estate, when he has given the Picowers a full release and is holding their irrevocably forfeited funds. The fact that the Trustee wants to shield the Picower Defendants from the victims of Picower's crimes is not grounds for entering an injunction.

## **II. THE INJUNCTION MUST BE VACATED BECAUSE IT IS NOT**

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<sup>7</sup> See Bench Memorandum Decision and Order Denying Motion for An Order . . . Enjoining the Continued Prosecution of the Third Party Actions, Case. No. 09-01305 (BRL), Doc. # 193 at 6.

**FAIR TO THE MARSHALL CLASS.**

**A. The bankruptcy court failed to assess the fairness of the injunction to the Marshall class.**

The Trustee argues that the bankruptcy court's order approving the Settlement Agreement is proper because the court considered the seven *Iridium* factors and concluded that the settlement "falls well above the lowest point in the range of reasonableness." (Trustee Br. at 30-31.) However, *Iridium* involved a settlement agreement in a chapter 11 reorganization plan; it did not involve a permanent injunction of claims against a nondebtor defendant in a liquidation. The Trustee cites no legal authority for his argument that the bankruptcy court could ignore the effect of the injunction on the Marshall class members. (Trustee Br. at 32.)

Generally, where judicial approval of a settlement is required, and "where the rights of one who is not a party to a settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval" and requires a determination the "no one has been set apart for unfair treatment." *In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1026, 1031 (2d Cir. 1992). This is especially the case where, as here, a bankruptcy court purports to enjoin claims against nondebtor defendants. "Looking only to the fairness of the settlement as between the debtor and the settling claimant contravenes a basic notion of fairness." *Zale*, 62 F.3d at 754; accord *In re Devon Capital Mgmt., Inc.*, 261 B.R. 619, 23-624 (B. W.D. Pa. 2001) ("Even if a settlement is fair and equitable to the parties to the settlement, approval is not appropriate if the rights of others who are not parties to the settlement will be unduly prejudiced."). The injunction must be vacated because the bankruptcy court violated this basic and fundamental principal of fairness.

**B. The Settlement Agreement is unfair to the Marshall class members.**

Contrary to the Trustee's argument at page 27 of his brief, Marshall has never taken in-

consistent positions regarding the amount of the settlement. She has always maintained that the Trustee took more from the Picower Defendants than he could recover in *bona fide* litigation, because he is limited to \$2.4 billion in fraudulent transfers under New York's six year statute of limitations. As a result, the Trustee was able to take advantage of the bankruptcy court's improper first injunction, bargain away Marshall's claims, and take money that should be available to satisfy Marshall's claims.

The Trustee argues that he has the right to recover all \$7.2 billion of the transfers BLMIS made to the Picower Defendants under New York's "discovery rule." (*See* Trustee Br. at 29.) Under the discovery rule, a plaintiff alleging actual fraudulent conveyance must bring his claim within six years of the fraud or within two years after he knows of or should have discovered the fraud, whichever is later. *See* N.Y.C.P.L.R. §§ 213(8), 203(g) (McKinney 2009). However, the Trustee does not explain why the discovery rule applies to his claims against the Picower Defendants, and he does cite no legal support for his argument.

Before the settlement, the Trustee painstakingly detailed the documented allegations of the Picower Defendants' criminal participation in the Madoff fraud in his complaint against them. In response to the Picower Defendants' motion to dismiss, the Trustee again affirmed in the strongest language that the Picowers engaged in fraud. The Trustee's allegations were surely well founded in light of the extensive and expensive investigation of the Picower Defendants' involvement in the fraud. The Trustee now claims publicly that the Picower Defendants probably did not engage in any fraud.<sup>8</sup> The Trustee's current assertion is astounding and it dooms his claim for more than \$2.4 billion against the Picower Defendants because the discovery rule applies only in cases of actual fraud. *See* N.Y.C.P.L.R. §§ 213(8), 203(g). Since the Trustee has

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<sup>8</sup> *See* Trustee's Memo. of Law in Support of Motion For an Entry of an Order . . . Approving the Settlement, Case No. 09-01197, Doc. # 25, at 8-9.

abandoned any claim that would warrant application of the discovery rule, he cannot *ex post facto* argue that he was legally entitled to recover more than \$2.4 billion.

Inventing provisions of SIPA that do not exist, the Trustee now contends that the Marshall class members are potential creditors for claims in excess of their SIPC payments. If the Trustee is correct, he is hoist with his own petard because the discovery rule will not apply. The Trustee has used § 544(b) of the Bankruptcy Code, which permits him avoid any transfer that a creditor could have voided under New York law, as a conduit to rely upon New York's discovery rule. *See, e.g., Lippe v. Bairnco Corp.*, 225 B.R. 846, 852 (S.D.N.Y. 1998). However, this district court has ruled that a trustee's standing to bring such claims is limited.

[A] trustee has standing to assert a cause of action under § 544(b) *only if* the benefits of the action inure to *all creditors ratably*.

*Id.* at 852 (citations and internal quotes omitted) (emphasis added); *see also In re Wingspread Corp.*, 178 B.R. 938, 945 (B. S.D.N.Y. 1995) (“[I]mplicit in the trustee’s avoidance powers is a limitation that the trustee may assert a cause of action under section 544(b) **only if the benefits of the action inure to all creditors ratably.**”)(Emphasis added.)

Since the Trustee’s § 544(b) claim for actual fraudulent transfers against the Picower Defendants will not benefit the Marshall class members, the Trustee has no standing to assert a § 544(b) fraudulent transfer claim against the Picower Defendants because the benefits of that action cannot “inure to all creditors ratably.” Hence, the Trustee cannot avail himself of New York’s discovery rule, which in turn limits his recovery to \$2.4 billion.

The Trustee admits what that “the bankruptcy court granted the Trustee priority to recover from the Picower Defendants’ assets.” (Trustee Br. at 45.) According to the Trustee, he is entitled to such a preference because, under SIPA, BLMIS “customers” with “net equity” are entitled to priority distributions from the fund of “customer property.” But the Trustee ignores the

fact that the Marshall class members are not attempting to recover “customer property.” The Trustee’s “customer property” recoveries are limited to the fraudulent transfers made to the Picower Defendants. Marshall is not seeking to recover those fraudulent transfers; she is seeking separate *damages* from the Picower Defendants based on non-fraudulent transfer state law tort claims. The SIPA priority scheme for distributing “customer property” does not trump non-SIPA law prohibiting the bankruptcy court from extinguishing Marshall’s independent claims against the Picower Defendants.

Even though the Picower Defendants’ forfeiture of \$7.2 billion was unconditional and irrevocable, the Trustee claims that the injunction was intended to let the Picower Defendants “buy” their peace from any all liability, including liability for billions of dollars in damages suffered by the approximately 3,000 members of the Marshall class. Including the injunction in the settlement was clearly a tremendous benefit to the settling parties, but it was grossly unfair to the Marshall class members. The injunction must be vacated.

### **CONCLUSION**

The bankruptcy court had no jurisdiction to enjoin Marshall’s claims and the injunction should be vacated.

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