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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
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3 IRVING H. PICARD, Trustee for
3 the Liquidation of Bernard L.
4 Madoff Investment Securities
4 LLC,
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5 Plaintiff,
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6 v. 11 CV 5513 (JSR)
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7 KELMAN PARTNERS LIMITED
8 PARTNERSHIP, a Delaware
8 Limited Partnership, et al.,
9
9 Defendants.
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10 ------------------------------x
11 New York, N.Y.
11 October 3, 2011
12 4:30 p.m.
12
13 Before:
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14 HON. JED S. RAKOFF,
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15 District Judge
15
16 APPEARANCES
16
17 BAKER HOSTETLER
17 Attorneys for Plaintiff
18 BY: OREN J. WARSHAVSKY
18 NICHOLAS CREMONA
19
19 SONNENSCHEIN NATH & ROSENTHAL LLP
20 Attorneys for Defendants
20 BY: CAROLE NEVILLE
21
21 Securities Investor Protection Corporation
22 BY: LAUREN T. ATTARD
22
23
24
25

1 (Case called)
2 MR. WARSHAVSKY: Oren Warshavsky of Baker Hostetler,
3 for the plaintiff Irving Picard.
4 THE COURT: Where is your sidekick, Mr. Sheehan?
5 MR. WARSHAVSKY: He'd probably say that I'm his
6 sidekick.
7 THE COURT: Probably at a press conference. But
8 anyway, I'm delighted you're here.
9 MR. CREMONA: Good afternoon, your Honor. Nicholas
10 Cremona, also of Baker & Hostetler, on behalf of the trustee.
11 MS. ATTARD: Good afternoon, your Honor. Lauren
12 Attard from Securities Investor Protection Corporation.
13 MS. NEVILLE: Good afternoon, your Honor. Carole
14 Neville from SNR Denton on behalf of Mr. Hine and the Kelman
15 family.
16 MR. HIRSHON: Your Honor, Sheldon Hirshon, Proskauer
17 Rose, and I appear for the Kelmans.
18 THE COURT: I just want to be sure before we get
19 started with the argument that the only party that has sought
20 to join in the Hine motion is the Kelman Partners. Correct?
21 MS. NEVILLE: Yes, your Honor.
22 THE COURT: I'm happy to hear argument on anything.
23 This is just, of course, a motion to withdraw the reference,
24 not a motion to address the merits, although the two sometimes
25 are interactive. But I'm mostly interested in this issue

1 regarding the withdrawal from the IRA. So I'll ask both
2 parties to focus on that and on the issue of whether that is a
3 withdrawable issue.
4 Let me hear from moving counsel first.
5 MS. NEVILLE: Your Honor, I was here when your Honor
6 heard argument on the Picard v. Blumenthal matter, which is a
7 similar case, an IRA with mandatory withdrawals from the IRA,
8 and Mr. Landers, during that hearing, struggled with the idea
9 of retroactivity, the retroactive application of SIPA to the
10 withdrawal payments that were mandated by the Internal Revenue
11 Code. So I spent a fair amount of time looking at the idea of
12 retroactivity, which seems to be kind of a mushy area in
13 Supreme Court jurisprudence. But what came out much more
14 clearly was the idea that this fell within the takings clause
15 of the Constitution, so that what you have is the Internal
16 Revenue Code creating a proprietary --
17 THE COURT: I'm skeptical of that latter argument on
18 the merits, but, as I say, I'm not addressing the merits here
19 today, but you only raise that in your reply brief. Don't you?
20 MS. NEVILLE: Yes, your Honor. And that's largely
21 because the way this case is evolving, I filed a motion that
22 was fairly close to what everyone has filed that your Honor has
23 already heard before, the Greif, the Katz, the Blumenthal, and
24 Goldman cases, and when I got the replies that the Internal
25 Revenue Code did not really address the issue, wasn't really in

1 conflict or went beyond that, and I think Mr. Landers in
2 Blumenthal did the same in looking at retroactivity.
3 THE COURT: I think it's only fair that if the trustee
4 wants to put in further papers on that issue, he be allowed to
5 do so and SIPC as well if they want to because they only got
6 that argument in your reply papers. But maybe I don't
7 understand the argument.
8 You're relying on Enterts v. Apfel.
9 MS. NEVILLE: Correct.
10 THE COURT: The holding there was that a statute that
11 required the employer make retroactive contributions to a
12 retirement fund violated the takings clause. But the statute
13 we're talking about here is SIPA, yes?
14 MS. NEVILLE: Yes, your Honor.
15 THE COURT: Enacted in, what, the 1970s?
16 MS. NEVILLE: Correct, your Honor.
17 THE COURT: So where is the retroactivity as it
18 applies to you?
19 MS. NEVILLE: It is retroactive in that it turns the
20 mandatory withdrawal into a liability. It is an application of
21 the law under new circumstances, and there's another case,
22 United States v. Security Industrial Bank.
23 THE COURT: You said the Supreme Court was mushy.
24 MS. NEVILLE: I'm losing you?
25 THE COURT: With all due respect, I'm finding your

1 argument perhaps not as hard as one might like.
2 MS. NEVILLE: In United States v. Security Industrial
3 Bank, another Supreme Court case, 459 U.S. 70, the
4 retroactivity there was the application of Section 522 to
5 exemptions and liens that were on property that was otherwise
6 exempt under the Bankruptcy Code. It wasn't a new statute. It
7 was the circuit application of Section 522.
8 THE COURT: Is this a case you're citing now for the
9 very first time today?
10 MS. NEVILLE: I don't think so, your Honor.
11 THE COURT: Was it in your papers? I must have missed
12 it.
13 Go ahead.
14 MS. NEVILLE: So that was a new application of the law
15 by the Circuit Court to the exemptions and the liens created on
16 property by banks, on property that's otherwise exempt under
17 the Bankruptcy Code. So I think that retroactive application
18 of the law would fit within the takings clause.
19 THE COURT: In what respect is this retroactive to
20 your client?
21 MS. NEVILLE: Your Honor, as I think I pointed out
22 here, there is no other case in 40 years of SIPA where the
23 trustee was able to go back and recapture payments that were
24 legitimately made to a customer. So this is going back now on
25 Mr. Hine's case for ten or 20 years of withdrawals that he made

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1 legitimately.
2 THE COURT: But subsequent to the enactment of the
3 statute that you're saying violates the takings clause.
4 MS. NEVILLE: Yes, but it could not have been
5 anticipated by him that that wouldn't have been the case. It
6 could not have been anticipated in taking out his money,
7 because he was required to do that, that five years down the
8 road, or whenever it is, that he would be sued for recoverables
9 payment.
10 THE COURT: All right. Was there anything else you
11 wanted to add?
12 MS. NEVILLE: On that particular argument, no. But I
13 did want to add one other point on the antecedent debt issue.
14 THE COURT: Okay.
15 MS. NEVILLE: Your Honor shamed us all by pointing out
16 that Sharp is really not an intentional fraud case. Mea culpa.
17 But value is defined to include antecedent debt under Section
18 548(d), and it is value as an element of the defense to actual
19 fraud under 548(c). So there are cases, although not Sharp,
20 that do look at antecedent debt as a defense to actual fraud,
21 and one of them, which I particularly liked, is the Unified
22 Commercial Capital case, 260 B.R. 343. I sent it to Mr.
23 Warshavsky this morning. It was cited in one of the Goldman or
24 Blumenthal briefs, and it is a case where the court recognized
25 a contract in an actual fraud case as legitimate antecedent

1a3WpicC
1 debt.
2 Here, we've been arguing that the securities laws
3 created a contract which stood as an antecedent debt whether or
4 not the Second Circuit agreed with us.
5 THE COURT: Again, I will certainly look at that case
6 which you're just bringing to my attention now, but, of course,
7 the only issue before me now is withdrawal, not the merits.
8 MS. NEVILLE: Right.
9 THE COURT: But I don't understand how someone who
10 actually participated in the fraud, which was not the situation
11 in Sharp, could say I'm not liable because there's this piece
12 of paper out there that, if I wasn't actually involved in the
13 fraud, would give me an antecedent debt that I could rely upon.
14 I don't understand that argument at all.
15 MS. NEVILLE: I agree with you, your Honor. And the
16 reason that we could say it here is because the trustee has
17 already conceded that my clients are not participants. We
18 already have a good faith defense.
19 THE COURT: I see. You're just saying you think there
20 is independent authority, even if Sharp is distinguishable from
21 the argument you are making as independent authority.
22 MS. NEVILLE: Exactly.
23 THE COURT: Very good. Before I hear from plaintiffs,
24 let me see if there's anything that counsel for the would-be
25 joinder wants to say.

1 MR. HIRSHON: Your Honor, I simply rise to adopt the
2 arguments already made by my cocounsel with respect to
3 withdrawal of the reference in the Kelman cases under 546 and
4 related matters. There's no need to burden the Court with
5 further argument.
6 THE COURT: Very good. Thank you so much.
7 MR. HIRSHON: Thank you, your Honor.
8 THE COURT: Let me hear from the trustee.
9 MR. WARSHAVSKY: Actually, I'm going to step up to the
10 podium, your Honor, because I do want to read something.
11 THE COURT: Yes.
12 MR. WARSHAVSKY: Your Honor, I wanted to take a step
13 back maybe because I think the last few times we've been here,
14 as you started mentioning today, we started focusing on the
15 merits of the argument a little bit more than the standard for
16 withdrawal and what withdrawal is supposed to be and what it's
17 not. I'd like to take, with the Court's indulgence, a slight
18 step backward, and remember that the SIPA statute itself does
19 put everything in the bankruptcy court. The standard for a
20 motion to withdraw the reference --
21 THE COURT: This withdrawal motion raises issues that
22 I withdrew the reference to in Katz I've really decided
23 previously that there were in my view substantial undecided
24 issues not involved in the bankruptcy law that this Court had
25 to decide, which I've now decided. Now, I'm not sure that the

1 fact that I've decided it necessarily ends the issue of
2 withdrawal because you're contesting my decision, and you're
3 right. Also there was, at least I saw in some of the comments,
4 some suggestion, which I have a different view of, but there
5 was some suggestion that there was competing authority on this
6 issue. So why shouldn't I withdraw the reference here for the
7 same reasons I withdrew it in Katz other than this new issue
8 which was not before me in Katz involving the IRA?
9 MR. WARSHAVSKY: I was going to get to that
10 afterwards, but I'll jump ahead.
11 THE COURT: Okay.
12 MR. WARSHAVSKY: I think the short answer to that
13 would be, your Honor, your decision on, let's take the 546
14 issue in Katz Wilpon, all you did was apply the law. We may
15 like your decision, we may not like it. They may like your
16 decision, they may not. I'm pretty sure you can figure out
17 where both sides stand on it, but you took the law. You took
18 the Bankruptcy Code, 546, which is supposed to be decided by a
19 bankruptcy court, and you applied it to the facts of the case,
20 and I bring that up, and, frankly, I can reverse now, where I
21 was going to go before is what these motions to withdraw the
22 reference have become.
23 I think what we have here is a little bit of forum
24 selection, and I think that's what troubles me and that's why I
25 started down this path. Before the HSBC case, these issues

1 were all argued. These issues were argued in net equity; they
2 were used to challenge every fee application came. Every fee
3 application came and said that the trustee was breaching his
4 fiduciary duty by not recognizing the antecedent debt. People
5 brought up 546. These issues were all discussed.
6 THE COURT: There must have been a lot of fee
7 applications, since I think it's, what, $242 million?
8 MR. WARSHAVSKY: I don't know what the number is, but
9 I know it's ten and a half million recovered, but every three
10 months, we have to apply it.
11 THE COURT: What was the distribution that I saw your
12 colleague said had to be put on hold, 272 million?
13 MR. WARSHAVSKY: Yes.
14 THE COURT: Was there put on hold the 242 million in
15 attorney's fees?
16 MR. WARSHAVSKY: I don't believe there was, your
17 Honor, but SIPA could speak to that. But I think it's two
18 separate issues.
19 THE COURT: Let's go back to where you were.
20 MR. WARSHAVSKY: The point was that prior to HSBC,
21 these issues were always in the bankruptcy court. Everybody
22 was fighting in the bankruptcy court, and, frankly, they were
23 losing on the issue. And what happened was every decision came
24 up and it went through and there was a rotation of the wheel
25 and different people got chosen, Judge Buchwald, Judge Chin,

1 Judge Koeltl, Cedarbaum, Hellerstein, Batts, Cote, Daniels,
2 Scheindlin, Berman, Griesa, Daniels, and we're going through
3 and basically different judges were appointed at different
4 times.
5 After the HSBC decision, after you withdrew the
6 reference, what happened was we started getting more and more
7 motions to withdraw the motion, as you know.
8 THE COURT: I'm sorry. You apparently don't
9 understand, and I must say I'm quite taken aback by this
10 argument.
11 The Southern District of New York, through its
12 assignment rules and assignment committee, determines the rules
13 for when cases are related and when they are not. There is
14 nothing that would prevent the judges of the Second Circuit
15 saying that all bankruptcy appeals relating to a particular
16 matter should go to a particular judge. But years ago, the
17 court made the decision that, in terms of bankruptcy appeals,
18 even though it was probably a certain duplication of effort,
19 they would not be treated as related even if they came out of
20 the same bankruptcy.
21 At the same time, the decision was made that a
22 withdrawal motion, which takes the form of not of an appeal but
23 a de novo claim, would be treated like all other de novo claims
24 and subject to the related case rule. And it was in this case
25 when the first de novo claim was filed, which was by HSBC, they

1 marked it as related to the case before Judge Berman. Judge
2 Berman declined, and that's also consistent with the rules,
3 saying it was not related to his case. It then went into the
4 wheel, which is actually a computer that randomly assigns
5 cases, and it was assigned to me, and thereafter, under the
6 rules of a Southern District of New York, all other related
7 withdrawal motions should come to me.
8 Now, because the parties did not check the box that
9 they should have in the next case, which was the working case,
10 that was randomly assigned to Judge McMahon. Judge McMahon and
11 I talked it over and decided we would just leave it there, and
12 so that was again because the individual judges can work this
13 out. But it would be a flagrant violation of the rules of the
14 Southern District of New York for someone who is filing a
15 withdrawal motion not to mark it as related to the withdrawals
16 that this judge has taken. So I don't understand this argument
17 at all.
18 Are you saying the lawyers should not follow the rules
19 of the Southern District, or are you saying you just are not
20 happy with the assignment?
21 MR. WARSHAVSKY: I wasn't saying either. I was
22 actually saying that what's happened is quite different.
23 Frankly, your Honor the first withdraw motion was in front of
24 Judge Stanton, actually, because it was a case that he did
25 decide.

1 THE COURT: Right. And he also decided not to take
2 this.
3 MR. WARSHAVSKY: Right.
4 No, I wasn't suggesting that at all. I wasn't
5 suggesting that the lawyers were doing anything but their job.
6 But what I was saying was that now we have these issues
7 ultimately and I think you actually jumped to the point that I
8 was going to get, which is that what we really have is
9 reargument of the same issues. Now they're coming up in the
10 context of adversary proceedings.
11 THE COURT: I don't think any of these issues, or at
12 least the ones I've been deciding in both Katz and before that
13 the HSBC, have been decided before -- I don't see how you can
14 maintain that with a straight face -- certainly not by any
15 district judge. Judge Wood's decision, which I don't view as
16 inconsistent with my decision, but perhaps these can be
17 distinguished, is about the only thing that remotely touches on
18 that. Most of what I was dealing with I would have been
19 provided with by the district court or the Court of Appeals
20 that dealt with some of these issues so that I would have had
21 more guidance. But that's exactly why I withdrew the
22 reference. So I don't understand this argument.
23 MR. WARSHAVSKY: Judge Lifland did rule on 546. He
24 ruled on it more than once, and I guess it doesn't change from
25 the fact that these arguments have been proffered more than

1 once and he certainly ruled on the issue of antecedent debt in
2 the net equity decision. And I guess that's really my point, I
3 guess to fast forward again because I think we're speaking past
4 each other and I can tell you're not happy with my argument.
5 But the point is 546, whether or not you withdrew it in Katz
6 Wilpon in rendering your decision, an antecedent debt, which it
7 doesn't appear as addressed in the Katz Wilpon brief, but I
8 know that's an issue that remains in that case, but bankruptcy
9 law issues, when every defendant now comes in here, now we have
10 250 or so cases that are now in this court instead of in
11 bankruptcy on these issues, what they're really doing is
12 they're trying to get around Judge Lifland and get around
13 litigating in bankruptcy court. And what that is, frankly,
14 that is forum selection, and 546 isn't an issue for mandatory
15 withdrawal. I don't think your Honor's decision last week in
16 Katz Wilpon suggested that 546 was in conflict or required
17 significant interpretation at all.
18 THE COURT: Again, I don't really understand this at
19 all. The Second Circuit, just a few weeks before I rendered my
20 decision, rendered its decision on 546 in the Enron case. In
21 the Enron case, Judge Walker, speaking for the court, said that
22 it represented a collision course, those were his exact words,
23 between the bankruptcy laws and the securities laws, and if
24 that's not a clear statement of a need for withdrawal, I don't
25 know what is.

1 So I'm sorry that you're viewing this in a different
2 way from Judge Walker of the Second Circuit, but I don't find
3 your argument very persuasive.
4 MR. WARSHAVSKY: I guess I'll end where I started, on
5 546 then, which is it's part of the Bankruptcy Code, and I'm
6 not sure how it's any different than any other part of the
7 Bankruptcy Code and whether that warrants, whether that or
8 antecedent debt or this issue of a taking, which I have to be
9 frank, I don't fully understand yet.
10 THE COURT: I'm with you on that one.
11 MR. WARSHAVSKY: At least we've agreed once today.
12 But I guess my point in raising it is not that they're not
13 serious issues, not that they don't warrant attention, but
14 these are decisions that are undertaken by bankruptcy courts
15 all the time. 546 is part of the Bankruptcy Code.
16 THE COURT: Essentially, the argument that was made in
17 this court, and I'm inferring to the extent that Judge Lifland
18 dealt with it, you can take it up with Judge Lifland, was that
19 the plain language of Section 546 should be disregarded because
20 that were unique aspects to the Madoff case that made the
21 statute inapplicable. And that in itself is a rather novel
22 issue, but arguably a bankruptcy issue. But the argument that
23 was made to the contrary, one that was very much on the mind of
24 the Second Circuit in Enron, was that there were two competing
25 policies here: one, the policies expressed throughout much of

1 the Bankruptcy Code and the other the policies expressed
2 throughout much of the securities law, and the Congress had
3 tried to insert into the bankruptcy law substantial issues
4 relating to securities law policies when they enacted 546. And
5 that, therefore, the challenge for a court in interpreting the
6 plain language of 546 and in dealing with the claim made by the
7 trustee, for example, that 546 should not be taken literally,
8 involves a reconciliation of those competing policies.
9 Now, that is a classic issue for the district court on
10 withdrawal. It is distinctly not an issue that the bankruptcy
11 court is ideally situated to deal with because the bankruptcy
12 court, of course, deals with the policies of the bankruptcy
13 law. So the withdrawal, so far as that particular issue is
14 concerned, was, to be frank, a no-brainer.
15 I tremendously respect the trustee and your colleagues
16 from SIPC, and I'm so glad that you as always bring interesting
17 arguments to bear, but this one doesn't seem to me to be one
18 that is at all persuasive and I to find it troubling because
19 it's natural when a decision doesn't go a party's way to feel
20 less than thrilled.
21 I wasn't surprised when, for example, Mr. Sheehan held
22 a press conference, and I was a little worried because of
23 DR7107, he had asked for a jury trial, which he may well get,
24 and yet thereafter he held a press conference where once he
25 asked for a jury trial, of course, the disciplinary rules

1 restraining commentary come into play, that's DR7107, but I'm
2 sure he's cognizant of that and he's going to be very careful
3 about not intruding on that.
4 Human nature being what it is, he and you would now be
5 jumping for joy, but the notion that there is not in these
6 cases, the ones I've withdrawn so far, a plain and, in my view,
7 obvious basis for withdrawal seems to me to be seriously
8 misplaced. In several cases where I found not all the issues
9 should be withdrawn, I said I'll be withdrawing as to issues X,
10 Y, and Z, and not as to Q and R. And in other cases I could
11 just as easily see where I thought the only issues that had to
12 be resolved now had been, I sent the case back to Judge
13 Lifland, who, as I said many times, is one of the great judges
14 on this or any other bankruptcy court. But I think you are,
15 with apologies, taking a much too narrow view of what's at
16 stake in the game with some of the issues that are being
17 raised, which are serious and to some substantial degree unique
18 issues, about the interplay of bankruptcy law with other
19 important bodies of law, obviously the securities law.
20 MR. WARSHAVSKY: If I could just respond, there's a
21 lot packed into what you just said; I'm going to respond to
22 some of it. The first is I'd be remiss, I don't think our
23 position has ever been to ignore 546 at all or to ignore the
24 words of it. I think our position has always been that what's
25 at issue here is not a securities contract, and I think those

1 are different positions.
2 THE COURT: Is that determined as a matter of
3 bankruptcy law or a matter of securities law, especially when
4 the statute itself refers to what's common practice in the
5 securities industry.
6 MR. WARSHAVSKY: I think that's right, your Honor. I
7 think you would look to that. You would absolutely look to the
8 securities law. But, again, for a mandatory withdrawal, and I
9 guess this is what I keep going back to, it's not just because
10 we have to apply another law. As I mentioned, I'm not a
11 bankruptcy lawyer by trade. I do look at them now. A lot of
12 them deal with securities issues all the time. Enron did come
13 out of the bankruptcy court. The other cases that were cited
14 throughout Katz Wilpon came out of the bankruptcy court. I
15 agree that 546, I absolutely agree, and I'm not sure what I
16 said to make you think that I disagree with the proposition
17 that 546 does not deal with competing interests. I think it
18 does on its face though. I guess my ultimate point here is
19 that for withdrawal of the reference, you have to show that
20 there is a significant interpretation of the statute, a
21 significant interpretation of the law. And what I'd submit to
22 you is that 546 and what we have in this case is simply an
23 application of that law.
24 That was really the point I was striving to, at the
25 beginning, we're seeing withdrawal of the reference on all of

1 these issues because all that needs to be done here is apply
2 546. It either applies or it doesn't. There's no reason to
3 think that Judge Lifland can't reach that determination. In
4 particular, I'm not sure what the result is after you've
5 rendered the decision in Katz Wilpon. Frankly, I researched
6 the issue, and we found no line of what happens after an issue
7 has been decided in one case whether every case has to be
8 withdrawn. So I don't know.
9 THE COURT: That's an interesting issue. If it were
10 simply a case of Judge Lifland was bound by my decision in Katz
11 in all these cases, then there not might be a basis for
12 withdrawal, but I don't think that's your position.
13 MR. WARSHAVSKY: I don't think it would be, your
14 Honor.
15 THE COURT: Then I think withdrawal has to follow.
16 MR. WARSHAVSKY: I guess the assumption is that he --
17 okay.
18 THE COURT: One of the reasons that the Southern
19 District has the related case rule is so that these decisions
20 on matters where there is withdrawal can be consistent. So
21 every case is different, but the likelihood is very high, as
22 I'm sure you recognize, that I will follow the Katz decision on
23 similar issues being presented in other cases. I don't think
24 I'll spend much time on it, and I don't think you'll spend much
25 time on it. I think that the reason I asked for argument in

1 this case this afternoon on the IRA issue is that's the one
2 issue that's, if you will, not covered by it.
3 But if the position of the trustee and SIPC was that
4 the bankruptcy court is bound by this Court's decision in Katz
5 in all the cases in which it's raised, subject, of course, to
6 whatever the Court of Appeals may do, you can either certify or
7 if it's not certified bring this up on appeal, that would be
8 one thing, but I know that's not your position. I'm not
9 surprised that it's not, but then that all the more argues for
10 consistency at the district court level.
11 MR. WARSHAVSKY: I'm not going to argue with
12 inconsistency, your Honor. I will go to the other two issues
13 though, and I guess I'd be remiss if I didn't say I don't know
14 why it wouldn't be consistent across the board, but I do
15 understand that it's factual issues and different judges can
16 reach different decisions on it. But in terms of antecedent
17 debt, again, I would say that this is an issue which has been
18 briefed and discussed before Judge Lifland, it was up at the
19 Second Circuit.
20 THE COURT: The antecedent debt there, of course, I
21 ruled your way, but I don't think it was again an issue that
22 didn't involve two different bodies of law in a way that was,
23 in Sharp, I distinguish Sharp, but the language in Sharp is
24 very strong language in a way that is inconsistent with how the
25 bankruptcy law looks at the those kinds of situations, or

1 arguably so.
2 Your worthy adversary just tells me that there's
3 another case now which she's just brought to everyone's
4 attention that may make that issue still live. I'm not certain
5 whether that's true or not. But just as in the 546, there were
6 important clashes of two different bodies of law, that when I
7 resolved against you, but here are where I resolved it in your
8 favor, once again there are important clashes of different
9 bodies of law. Sharp is premised on nonbankruptcy law and has
10 language that, had the case not been distinguishable in ways
11 that you could view as persuasive, would it have been flatly
12 contrary to the approach typically taken in the bankruptcy
13 context. So those are difficult issues involving different
14 bodies of law. Once again, this is the whole point of
15 withdrawal.
16 MR. WARSHAVSKY: I think those cases are
17 distinguishable without getting into the merits. But what I
18 will say is that in terms of antecedent debt, they're not
19 citing a federal statute. There's no federal statute that's
20 cited, so it's not mandatory withdrawal. It could be
21 permissive, and if it is permissive we do look to the factors
22 that I was talking to before: is this forum selection, this has
23 been argued before. And, frankly, I've taken the position
24 before that the Second Circuit has already dealt with this
25 issue in the context of this case and in the context of

1 resolving the claims, so I'm not sure how you'd reach a
2 different result. But the point is that no matter what, it
3 would be mandatory withdrawal for determining whether or not
4 there's an antecedent debt.
5 THE COURT: We don't need to discuss here whether it's
6 mandatory or "permissive" because on that particular issue
7 there might be a pretty good argument for permissive
8 withdrawal, in any event. But my only point is that if you
9 take, and it's so hard for litigants to step back and look at
10 the broader perspective, and it should be, you have a client to
11 represent, your adversaries have clients to represent, and it's
12 natural that you focus narrowly, and I don't in any way hold
13 that against anyone. But the obligation of this Court is to
14 take a broader view. The bankruptcy court is a specialized
15 court. In that respect, it's like the tax court, it's like the
16 Court of International Trade, it's like the Federal Circuit.
17 It is created because those bodies of law require a lot of
18 expertise. But the danger, of course, is that those
19 specialized courts will have a kind of tunnel vision because
20 they deal on a day-to-day basis with just one body of law, and
21 when you have situations where entire different bodies of law
22 interact with the bankruptcy law or the same could be true with
23 the tax law, the same could be true with any specialized area
24 of law, then Congress in a hundred different ways has indicated
25 its desire to have a generalist court take a look at the clash

1 because it's a generalist court that brings to bear perspective
2 from all the bodies of law.
3 A classic case of this is in the Federal Circuit. The
4 Federal Circuit deals with patent law. It has very frequently
5 been reversed by the Supreme Court not because the judges of
6 the Federal Circuit aren't great judges but because they tend
7 to look at it narrowly in terms of the patent law. And often
8 there are hard clashes and virtually all the reversals of the
9 Supreme Court in the last decade had been of the nature of
10 you're looking too narrowly at the patent law or the patent
11 procedure, you're ignoring the broader perspectives of the
12 general law.
13 So in this situation involving this terrible crime by
14 Mr. Madoff, which all sides agree tends to pit innocent parties
15 against each other, a most unfortunate situation, in that
16 sense, we are all victims of Mr. Madoff, there may well be many
17 issues that involve interaction of two or more bodies of law,
18 and those are situations where within the limits set by
19 Congress a generalist court can bring a perspective to bear
20 that's important to be brought to bear in these situations.
21 MR. WARSHAVSKY: Obviously I don't disagree with any
22 of what you said, in particular the patent issues, being a
23 predominantly patent litigator most of my life, but I do think
24 that when we talk about antecedent debt, that is something that
25 the bankruptcy court does deal with all the time and, frankly,

1 it's dealt with in this case, and when we talk about
2 consistency and everything we're looking at with permissive
3 withdrawal, the antecedent debt is part of what informs Judge
4 Lifland's determination of all the claims and the entire claims
5 process. You brought up distributions earlier. That informs
6 the entire distribution process. It determines, because,
7 ultimately, we're looking at two sides of the same coin.
8 Ultimately when we talk about the claims or the antecedent debt
9 or the trustee avoidance action against defendants such as
10 Mr. Hine, what we're talking about is an account
11 reconciliation. Ultimately, that's all we're talking about,
12 who owes who the money and how much.
13 That's what the bankruptcy court deals with and that's
14 where I think that if we turn to the factors for permissive
15 withdrawal on the antecedent debt, it does not favor withdrawal
16 of the reference. Not only has Judge Lifland already dealt
17 with this issue a few times, but it's part and parcel of the
18 claims process that he continues to deal with, as well as the
19 objections to that. Likewise -- I guess that's it on that
20 point.
21 THE COURT: Did you want to say anything else?
22 MR. WARSHAVSKY: Yes, I would.
23 This is the same struggle we had last time. There's
24 nothing in the Internal Revenue Code that suggests people get
25 to keep money. The Internal Revenue Code says to individuals

1 like Mr. Hine or Mr. Blumenthal last time, you get tax-deferred
2 growth for a long time, you have to stop at a certain point.
3 When you stop, you're going to have to take your money out
4 because you're not allowed to keep getting the tax-deferred
5 growth. In a nutshell, that's what it is. There's nothing, I
6 guess the way it's being pitched by other side is, Well, the
7 Internal Revenue Code says you must take it out and because of
8 that you have a belief that you can keep it. Mr. Hine or any
9 other investor can invest in whatever they want. They can do
10 what they want with their money after they take it out.
11 The point here, not unlike the point I just made, is
12 that ultimately it's whether or not you took out more than you
13 put in. All we're looking at is how much did you put in, how
14 much do you get to take out, regardless of the reason. I'm not
15 suggesting at all that Mr. Hine proceeded in bad faith. He is,
16 as we call him, an innocent investor. He took it out because
17 he was required to. Likewise, there are people who took money
18 out, I think I said last time people take money out to send
19 their kids to college.
20 THE COURT: So you're saying that, A, you don't think
21 it's a substantial issue and, B, you don't think it's, in any
22 event, one that warrants mandatory withdrawal.
23 MR. WARSHAVSKY: I think that's right, and I think
24 that, again, I would say that this would be permissive
25 withdrawal because it's not part of the trustee's complaint and

1 the trustee doesn't accuse Mr. Hine of proceeding in bad faith.
2 Therefore, the fact that he took it out because he was being a
3 good citizen doesn't factor into the equation because we're
4 only talking about fictitious profits here. What I would
5 submit is there's no conflict at all, your Honor.
6 In terms of retroactivity, I've read the cases, and I
7 think the struggle I'm having, I sensed a little bit with my
8 adversary's explanation, is that, frankly, any time you come
9 into court, you're retroactive unless there's a declaration
10 judgment, there was a wronged committee, and in this case, I
11 think the defense here is we were in good faith, and that's why
12 it's retroactive, whether we were preferenced, which, under
13 546, we couldn't bring or we didn't bring here anyhow, but I
14 think one of the cases that was cited had to do with whether or
15 not a preference was an unconstitutional taking, or going
16 against somebody's reasonable expectations of what they thought
17 they had in their account, that we're take applying it
18 retroactively. But, again, turning to the mens rea, the term
19 used before was damages. This isn't a case about damages.
20 Last time we were here, I mentioned I think it's an
21 equitable thing. All we're doing is we're coming back and
22 we're taking back and we're leveling the playing field, whether
23 it's two years or your Honor reconsiders and it's six years,
24 either way all it is, it's leveling. There is not a damages
25 component there and, therefore, the reasons that were withdrawn

1 don't come into play. So regardless of what the reason was,
2 whether it was to comply with the statute or something else, it
3 doesn't come into play since we're only applying the Second
4 Circuit's methodology as to their efforts.
5 THE COURT: Thank you very much. Let me hear from
6 your colleague. I think we've just covered every issue known
7 to mankind, but if you have anything to add, I'd be happy to
8 hear you.
9 MS. ATTARD: That's what I was going to say, your
10 Honor. SIPC is happy to rest on its papers, but if you have
11 any questions, I'm happy to answer them.
12 THE COURT: Thanks very much.
13 Rebuttal.
14 MS. NEVILLE: Your Honor, the analysis that you gave
15 about the role of the generalist court reminds me a little bit
16 of what the Supreme Court has just said in Stern v. Marshall,
17 those things that are routinely before the bankruptcy court may
18 not be so routinely before the bankruptcy court much longer
19 because what Stern v. Marshall said was where you have a
20 private right, even if you filed a claim, the bankruptcy court
21 has no jurisdiction under the Constitution unless it arises
22 directly in the resolution of the claim, and that's not the
23 case here.
24 Antecedent debt was not decided by the Second Circuit
25 because it's a defense to an adversary proceeding. What was

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1 decided was simply what reliance you could have on your
2 statement to assert a claim to get money from SIPC and to share
3 in the common fund. This is a different story. This is about
4 defenses to a claw back.
5 I raised one more point which I think wasn't raised
6 previously by any of the other motions for your Honor, the
7 withdrawal of the reference, which is that I really question
8 whether under SIPC the trustee has authority to bring these
9 broad-based claims against innocent customers. I traced out
10 the statutory scheme for your Honor in my reply. It was raised
11 in my opening brief as well.
12 THE COURT: I'm sorry. Hold on.
13 Another judge in my court has a matter that he needs
14 to speak with me about. If you're just going to be a minute or
15 two, I'll let you finish. If not, I need to take this call.
16 MS. NEVILLE: I'll be very brief.
17 THE COURT: Yes.
18 MS. NEVILLE: There is the statutory scheme, which
19 I've gone through, which very much narrows the trustee's
20 authority. There has never been a case in the history of SIPC
21 where a trustee had the authority to go after innocent
22 customers for return of their money. Agnes Coleman is a case
23 which is a disallowance of the claim. It avoided trades so
24 that the customers could not assert a claim against SIPC. It
25 is not a case where the trustee sought to claw money back.

1 The only case that is cited by either SIPC or by the
2 trustee is this one little case, Picard v. Taylor, which is a
3 case where money was transferred from two accounts to one other
4 account, very traceable, classic fraudulent conveyance.
5 Nothing like this other people's money giving you the
6 broad-based authority to sue everybody. And I think I've
7 traced that out pretty much in the papers.
8 THE COURT: With apologies, I'm going to need to take
9 this call. I will say this. If nothing else, it is clear to
10 me that if you now go to the list of names on reported cases in
11 the United States, the singlemost common name is John Doe. But
12 I think it's going to be in the future Irving Picard.
13 Anyway, thanks very much. I'll take the matter under
14 advisement.
15 MS. NEVILLE: Thank you, your Honor.
16 (Proceedings adjourned)
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