

19ETPIC1
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x

2
3 IRVING PICARD,
3
4 Plaintiff,

5 v. 11 CV 4959 (JSR)

5
6 KARA FISHBEIN GOLDMAN, et al.,
6
7 Defendants.

7
8 -----x

8
9 September 14, 2011
9 7:40 p.m.

10 Before:

10
11 HON. JED S. RAKOFF,

11
12 District Judge

12
13 APPEARANCES

13
14 BAKER HOSTETLER
14 Attorneys for Plaintiff
15 BY: OREN J. WARSHAVSKY
15 DAVID SHEEHAN

16
16 SECURITIES INVESTOR PROTECTION CORPORATION
17 BY: LAUREN T. ATTARD

17
18 PRYOR CAHSMAN
18 Attorneys for Defendants
19 BY: DAVID C. ROSE
19 PATRICK SIBLEY

19ETPIC1

1 (In open court)

2 THE COURT: So this is Irving Picard versus Goldman,
3 et al., 11 Civ. 4959.

4 Would counsel please identify themselves for the
5 record.

6 MR. SHEEHAN: David Sheehan, your Honor, with Baker
7 Hostetler for the trustee.

8 MR. WARSHAVSKY: Oren Warshavsky with Baker Hostetler
9 for the trustee.

10 MS. ATTARD: Good evening, Lauren Attard, Securites
11 Investor Protection Corporation.

12 THE COURT: It's a pleasure to meet you all.

13 MR. WARSHAVSKY: Thank you, your Honor.

14 MR. ROSE: Good evening, your Honor, David Rose of
15 Pryor Cashman for the defendant movants.

16 MR. SIBLEY: Patrick Sibley of Pryor Cashman for the
17 defendant.

18 THE COURT: All right. So while I know that the court
19 reporter was looking forward to another at least two to three
20 hours of argument, all the issues that are presented here, as
21 near as I can tell, have been presented in other arguments
22 before this Court. So I think that of course while the
23 plaintiff is the same, the defendants are not. But I think
24 what I really want to hear is, since I have had the benefit of
25 your briefing, and given the time, what I really want to hear

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19ETPIC1

1 is if there's anything you think is special about this case
2 that is not presented in the other withdrawal motions already
3 before the Court. And there is one thing that is arguably
4 special here, which is the fact that there are multiple parties
5 seeking to join, so that maybe presents an issue that we need
6 to discuss.

7 But let me hear first from moving counsel and then
8 from responding counsel.

9 (Continued on next page)

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

19E5pic1 argument

1 MR. ROSE: Thank you, your Honor. I truly don't have
2 very much, if anything, to add to what is in our brief.

3 The argument you heard on multiple occasions,
4 obviously, on these issues. With regard to the question that
5 you just asked as to joinder, if there is something specific
6 that I can address for you before I just kind of summarize
7 briefly what our view is, I'm happy do that.

8 THE COURT: Go ahead. just summarize.

9 My question is the -- I guess I have two questions,
10 whether there has been a formal -- sufficiently formal request
11 for joinder and secondly whether there is anything in any of
12 these -- each case has its own little bit of nuances, if there
13 is anything I need to be aware of that would bear on the
14 pending motion.

15 MR. ROSE: No, not from our perspective. To answer
16 what you asked about first, each of the parties that is joining
17 in had filed separate adversary proceedings, civil cover sheet,
18 paid the fee and has filed a formal motion within our joinder.

19 THE COURT: Okay.

20 MR. ROSE: And with the second point, none of the
21 other actions raise issues that are any different than those
22 that we address in our motion.

23 THE COURT: So, let me hear from the trustee and SIPC
24 and then I will come back to you to respond.

25 MR. SHEEHAN: Your Honor, just on the joinder issue or
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 on the issues at large?

2 THE COURT: On both, yes.

3 MR. SHEEHAN: Fine.

4 THE COURT: Or anything you want to say.

5 MR. SHEEHAN: You know better than that, your Honor.

6 Well, now that you have opened the door...

7 But, seriously, I do want to share something different
8 with you tonight and I do want to share something that I did
9 read the transcript of last week's hearing with regard to these
10 issues -- and, quite frankly, I have read all of the
11 transcripts and have participated in many. In reading it I did
12 have something of an epiphany, that I feel as though I -- we,
13 collectively as counsel -- have somehow failed the trustee,
14 failed SIPC, and most importantly failed your Honor, because I
15 think what we've done is we have launched into the middle of a
16 lot of these issues without really going back and examining the
17 underpinnings or the basics, so to speak. So, sometime in the
18 course of the colloquy I was reading it struck me that we are
19 somehow not well-grounded -- our fault -- in the statute
20 itself -- the SIPA statute -- which has dominated these
21 discussions over the last several months.

22 So, if I can take a moment?

23 THE COURT: Sure.

24 MR. SHEEHAN: I know the lateness of the hour but I
25 will be brief.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 THE COURT: That's fine.

2 MR. SHEEHAN: I think it is very, very important to
3 recognize something that has been well stated, both Judge
4 Lifland and the Second Circuit and your Honor has acknowledged
5 this as well: That this is a hybrid statute.

6 So, we have component of it that is bankruptcy and one
7 component of it Title 15, and I think the origins of both of
8 those are very significant, have a direct bearing on what,
9 ultimately, our position is on constant dollar and the other
10 issues here tonight.

11 The bankruptcy side of this goes back to 1937, goes
12 back to the Chandler Act, goes back to the beginning of what
13 was then The Bankruptcy Act. And what Congress acknowledged
14 and history is replete, and I'm sure we have probably rifled
15 our briefs throughout that we have given to you is talked about
16 the fact that what we had was stock brokerage liquidations
17 taking place throughout the '30s, certainly, and what was
18 happening is that those folks, those customers who put stock
19 and cash into the hands of the broker, when they had a
20 brokerage liquidation back then they were treated like a guy
21 with the light bulb or the plumber or the landlord, they were
22 in the same sea of creditors and that didn't seem right. It
23 didn't seem right, something should be done, so what they did
24 is they created in 1937 the single and separate fund under 60E
25 of the statute and what they said in there was is this: What

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 we are going do in a stock brokerage liquidation, the trustee
2 will gather all the cash and securities that the customers put
3 in, create a separate fund, and only customers will be able to
4 participate in that fund, not the tinker, the tailor and the
5 sailor or any of those other folks, just those customers. And
6 that was the law for many, many years up until 1970. That's
7 the origins of it, right in the wheelhouse of the bankruptcy
8 statute. And they empowered that trustee with all the
9 authority of the ability to go through in Title 11, to gather
10 in estates, to put customer securities and cash into that fund
11 and to do all of those things. And that portion of the statute
12 resides today and has since 1970 in the SIPA statute. That's
13 the Title 11 side of it.

14 Why is Title 15 even a part of it then? How did Title
15 15 come up? Why is that there? Is there really disharmony
16 between the securities law and 60(e) that was somehow going to
17 be rectified by this? I submit to your Honor that's not true.
18 They're totally harmonious and here is the reason why: The
19 origins of Title 15 and the statute tell us this from the
20 history of it, that where does the money come from for the
21 fund?

22 Now, I want to talk about the fund and protection in a
23 minute, too, but the money comes from members; that's the
24 brokerage community. It is private money. It is not money
25 from the taxpayer or from any governmental organization and it

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 is a not-for-profit corporation so it is not an agency, it
2 can't regulate anything. In fact, SIPC proceedings only
3 happened when there is an insolvency. SIPC doesn't even get
4 triggered until there is an insolvency and 60(e) and all the
5 panoply that is associated with it comes into play.

6 So why under Title 15? Well, all of the members who
7 are kicking in all that dough, who are they regulated by? SEC.
8 Who should probably oversee the fact that there is this agency
9 that is going to have a lot of money -- currently over a
10 billion dollars of it -- who is going to oversee that? SIPA,
11 SEC is.

12 If you look through the statute beginning to end there
13 isn't anything in this statute other than that, in other words
14 you see it makes it very clear that it is regulated by the SEC,
15 it is very clear it is a not for profit, but it doesn't suggest
16 that somehow because we brought in Title 15 there is a
17 disharmony between the securities laws and the bankruptcy law.
18 The bankruptcy law was brought in in tact with all of its
19 history and all of its panoply.

20 The additional thing was what? Was protection. What
21 is the protection? There is the protection, some enhanced
22 standard in the securities law. Is the protection in the form
23 of some securities law encouraged into the 60(e) panoply? No.
24 The protection is 60(e). That is that your protection, is
25 you're going to get your cash and securities out there. There

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 is an added starter in the history of the SIPA statute and that
2 is what? To enhance people's confidence in the securities
3 markets. It says that.

4 How did they do that? They did it by creating an
5 advance, and it clearly is an advance, it is not insurance, I
6 know that gets tossed around casually here, but clear reading
7 of the statute is this: Judge Rakoff has his \$500,000 in
8 there, we look at it, we're pretty sure that's true, all right?
9 But we don't know that it is really true and we are --

10 THE COURT: Yes, I have been with you so far but the
11 analogy, if you know anything about Judge's salary --

12 MR. SHEEHAN: We will go with Warshavsky, put in a
13 million.

14 What happens is we have this fund and we're looking at
15 it, we're the trustee, we are looking at it under 60(e), now
16 SIPA, and we have to figure out everybody's cash and security.
17 In a typical brokerage what you have is a failed back office,
18 net capital violations and all kinds of stuff like that. And
19 there is in Lehman brothers a lot of cash and a lot of
20 securities but you have to sort it all out but, in the
21 meantime, you don't want that customer not in the marketplace.
22 Why? What is the incentive to the guys putting the money in
23 there, those brokerage guys that are members? What is their
24 incentive to get that guy in play to advance him \$500,000, to
25 give him confidence that he can get back into the marketplace?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 That, in a nutshell, is the entire statute. All
2 right? So now we are talking about constant dollar. We are
3 talking about net equity. What is net equity? Is that SIPA?
4 Is that Title 15? Is that securities? No. Net equity is
5 clearly a 60(e) concept, a concept that comes out of the
6 bankruptcy code, cash and securities owed to the customer less
7 whatever he owes the customer. Very simple, straight forward,
8 been around for a long time, 70 years at this point.

9 We figure that out and what made this case unique not
10 only in the magnitude of dollars but the fact we are dealing
11 with a Ponzi scheme there was no cash, no securities, no
12 transactions. Really, the sad, sad part of this is that there
13 are many, many victims of this some of whom admittedly, I
14 understand, feel as though we've sued them and made them double
15 victims; in other words people who got their money out then got
16 somebody else's money and now we're asking for it back. Why?
17 Because the zero sum game requires us to do that as was
18 contemplated by 60(e) and getting all the cash and back in
19 because in a Ponzi it is only that cash, there isn't anything
20 else.

21 So, that's what we are doing here. So, we say that
22 therefore what you are entitled to -- and the Second Circuit
23 has agreed -- what you are entitled to is what you put in. The
24 fact is if you sort of got more than you put in we have to get
25 it back so that the people who didn't get their money back can

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 get it back. All right?

2 So, where does the constant dollar fit into that?

3 Well, if the constant dollar is what, it is part of the claim,
4 it can't be part of anything else, it originates out of the
5 claim. The claim is what? Part of the bankruptcy proceeding.
6 Where is the tension here? And I note that my adversary
7 suggests it exists in the panoply of securities law. It
8 doesn't exist. There is none. It is a claim that Judge
9 Lifland and all of his colleagues throughout -- the colleagues
10 in the Bankruptcy Court deal with every day. It is nothing
11 new, nothing exciting. No substantial material interpretation
12 being required of non-Title 11 law. Can't be. It is a natural
13 extension of what the Judge deals with -- Judge Lifland and
14 others do every day: Is this part of the claim or not? Do
15 they get interest or not on this claim if they took their money
16 out. Judge Lifland does 20 of those a day. Not something that
17 requires non-Title 11 federal statutory interpretation, right?
18 Just not required.

19 With regard to the other issues we have already talked
20 extensively, you and I and others here, about 546(e). I have
21 suggested to your Honor at the hearing on Coswell Pound, and
22 Judge Marrero did an excellent, excellent job in Adler Coleman,
23 and I stand by that and I agree with the affirmance of Judge
24 Lifland's analysis of that statute as well but most
25 importantly -- most importantly -- it is the Bankruptcy Code,

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 it is 546(e) of the Bankruptcy Code, it is Title 11, it is not
2 part of Title 15. It is now somehow superseded and glossed
3 upon as a result of there being a SIPA statute, it remains
4 that.

5 Last but not least antecedent debt. Antecedent debt,
6 isn't that what we talk about every day in bankruptcy, whether
7 somebody owes you money or not? Whether you have a claim. It
8 is a fancy word for a claim. I got a claim because I have an
9 antecedent debt, you owe me money.

10 I'm not debating here the issues underneath all of
11 that in terms of what my colleagues are suggesting. I'm simply
12 saying that this is right in the wheelhouse of bankruptcy
13 courts not in the wheelhouse of -- and requires no Article III
14 interpretation of non-Title 11 federal law. It is something
15 that is dealt with every day.

16 And the reason I wanted to tell that little story is I
17 think it is very, very important to understand the historical
18 background and significance of this so that when we come in
19 here -- and this is where I think we failed you and others --
20 is when we come in and glibly say it is a garden-variety
21 bankruptcy, what does that mean? I don't know what that means.

22 So, I'm reading these transcripts and I'm saying I
23 don't know what that means but now I think I understand why,
24 you know, we haven't fully explicated the statute in front of
25 Judge Rakoff to let him know that from our perspective,

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 respectfully, we submit, that this is the way this statute
2 should be interpreted and it is particularly here and then
3 finishing with the notion of we have all these joinders, all
4 these folks -- I understand why they're concerned. They've got
5 fictitious profits, they got their money back and got somebody
6 else's and now we are suing them. That's who all these people
7 are. And I agree with my colleague that there is really no
8 factual differences, maybe it's here and there.

9 Generally speaking, that's the array that we are
10 dealing with. But that's all the kind of issues, again, that
11 Judge Lifland deals with routinely and therefore I would
12 respectfully submit, your Honor, that the motion here should be
13 denied.

14 THE COURT: Well, that's very helpful. I thought
15 actually --

16 MR. ROSE: May I respond briefly, your Honor?

17 THE COURT: Of course. I just wanted to compliment
18 Mr. Sheehan on a very helpful presentation.

19 So, let me hear from defense counsel.

20 MR. ROSE: Thank you, your Honor.

21 One thing that was notable about what Mr. Sheehan was
22 saying, in particular, is when he is talking about a claim, the
23 claim he was talking about, and the claim he kept bringing up
24 was a claim in the context of a SIPA proceeding or a bankruptcy
25 proceeding by a customer or a creditor there. He was not

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 addressing, as we are, here is a claim by a trustee back on the
2 other side of the line against a customer and that is where it
3 is in that context and in that universe where all of the issues
4 that we raise in our motion become relevant for purposes of
5 your determination as to where to draw the reference. And what
6 we would submit is that in this instance withdrawal is required
7 on the issues that we have identified because they require
8 substantial interpretation of non-bankruptcy law as it relates
9 to the claim being asserted by the trustee. They require the
10 substantial consideration of the interplay among SIPA whether
11 it is Title 15, and it is, or the Bankruptcy Code, Title 11, or
12 the securities law -- the securities law in Title 15 as well.
13 And I don't think that anything Mr. Sheehan said changes that
14 fact. I think we need to talk about the universe of the side
15 of the line, I will call it --

16 THE COURT: You are saying this goes beyond the
17 question of net equity to a further claim.

18 MR. ROSE: The net equity, frankly, doesn't come into
19 play, at least in my view, as it relates to our motion. Right
20 now net equity is something that -- and the Second Circuit's
21 decision with regard to net equity dealt solely with what a
22 customer is entitled to recover out of the customer property
23 pool. It didn't deal with or address at all what the trustee
24 could recover from customers in separate and subsequently
25 asserted adversary proceedings.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 THE COURT: Yes, although Mr. Sheehan's colleague last
2 time was making the argument, which I did regard with some
3 skepticism, that the Second Circuit had really decided the
4 constant dollar issue and they decided it so clearly that they
5 felt compelled to say that they hadn't decided it. But we are
6 not reaching that tonight, so.

7 MR. ROSE: And if I may continue to kind of, you know,
8 illustrate where this tension exists I'm happy to do that. I
9 mean, primarily the first issue we raise and for which
10 withdrawal is required is essentially the availability and
11 extent of a defense to the claim brought by the trustee which
12 defense is based upon a debt that BLMIS owed to the defendants
13 and that debt was owed under the securities law, as we contend,
14 and that debt arose years prior to the commencement of the SIPA
15 proceeding and it exists again on the other side of the line
16 and the interplay of the securities law with the avoidance
17 powers that the trustee --

18 THE COURT: One of the things that Mr. Sheehan is
19 saying, and this goes partly to substance but partly goes to
20 the withdrawal issue, is that that whole approach that you're
21 briefly summarizing doesn't make sense in a Ponzi scheme
22 context, that it is law that was developed in a totally
23 different context.

24 MR. ROSE: Well, I think if we can just -- I will
25 focus down a few points to 546(e) as an example to address your

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 point about the Ponzi scheme context. There you have the
2 statute, you have the safe harbor, but you have a limited
3 carve-out from that safe harbor for actual fraudulent
4 transfers. And so, if you look at the language of the statute
5 liberally and consistently you can say that the enactors of
6 that statute contemplated that there would be instances where
7 there would be fraud, fiction, lies -- certainly the types of
8 claims that are alleged by the trustee here.

9 So, for purposes of reconciling that tension whether
10 that statute was meant to apply to the Ponzi scheme context,
11 whether it is inconsistent with SIPA as the trustee contends,
12 that requires an assessment in consideration of how SIPA, which
13 I think your Honor had identified previously as part of the
14 securities law not part of the bankruptcy Code, how that
15 interacts with the bankruptcy code and whether there is an
16 inconsistency.

17 And again we are not talking about --

18 THE COURT: I'm not sure I quite said that. I said it
19 was placed in Title 15 for a reason. I don't think you can
20 ignore the fact that it incorporates, expressly, entire aspects
21 of the bankruptcy law. It is not as if the bankruptcy law in
22 existence was written in order to provide a, to handle a
23 special situation in the context of bankruptcy. So, I mean
24 it's -- I think it is wrong to speak of it as a hybrid because
25 I think the best way -- you can't talk about it in the abstract

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 and overall you have to look at each situation and see is it
2 operating here as a Title 15 -- Title 18 is left for Mr. Madoff
3 only -- Title 15 or Title 11.

4 But, anyway. I'm sorry. I keep interrupting you.

5 MR. ROSE: No, no. That's fine. And that is kind of
6 where I was getting to, the point that we have Title 11 and we
7 have SIPA in Title 15, it is a non-bankruptcy federal law in
8 that respect and because of that and because -- and just
9 focusing again on 546(e), just for purposes of the Ponzi scheme
10 aspect of things, there is an identified tension brought up by
11 the trustee between SIPA and the bankruptcy code as it relates
12 to the application of that statute to this case. That, of
13 itself, mandates withdrawal.

14 The first point, and I am just getting back into it
15 about the antecedent debt issue, again, you have heard the
16 argument multiple, multiple times, but when we are talking
17 about obligations and the relationship between a broker/dealer
18 and its customers prior to the filing of the SIPA proceeding
19 there are rights, there are entitlements that exist at that
20 time that existed at the time the transfers that are sought to
21 be avoided here were made, and those rights should not be --
22 and I'm getting a little bit into the merits here but I'm
23 pointing out -- those rights are established by the securities
24 laws and those rights should not be and there is nothing to
25 support their abrogation, upon the filing of a SIPA proceeding

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 and then undo -- undo everything that existed prior in terms of
2 people's reasonable expectations in the securities markets.
3 The Enron case, although it dealt with 546(e), illustrates the
4 point from a conceptual standpoint and that is finding a
5 balance between avoidance power on the one hand but confidence
6 in securities markets on the other hand such that you are not
7 going -- we are not going to find ourselves in situations
8 continually where billions of dollars of transactions involving
9 hundreds of investors are subsequently undone and reversed
10 because of the subsequent filing of a SIPA proceeding.

11 THE COURT: That's very helpful, too. I guess the
12 only person who hasn't been heard from is the representative
13 from SIPC. Do you want to say anything? Yes.

14 MS. ATTARD: Your Honor, the only thing I would like
15 to say is that SIPA does not provide any sort of conflict here,
16 especially with 546(e). As Mr. Sheehan mentioned Judge
17 Marrero's opinion in Adler Coleman was decided in a SIPA
18 context and completely under the Bankruptcy Code and he found
19 that 546(e) does not apply to a Ponzi scheme because of the
20 definition of a settlement payment. And I'm happy to get into
21 that but I don't think it is necessarily required right now.

22 To the extent your Honor has any questions about SIPA,
23 I'm happy to answer them.

24 THE COURT: I have many, many questions but I think I
25 have asked them all in the past.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 MS. ATTARD: Thank you, your Honor.

2 THE COURT: Yes, Mr. Sheehan?

3 MR. SHEEHAN: 30 seconds, your Honor.

4 THE COURT: Go ahead.

5 MR. SHEEHAN: The first 15: If Mr. Rose was right, we
6 would have lost in the Second Circuit. Simple as that.

7 No. 2, footnote 11, I know I talked to you about this
8 before but footnote 11 is there for this reason. There is no
9 dissonance between what we're doing here with avoidance actions
10 and the security statutes or SIPA, they're perfectly in
11 consonance so said the Circuit, so said Judge Lifland. None of
12 what was said here has anything to do with the avoidance
13 actions themselves, they're just part and parcel of a claim.
14 Maybe I'm missing something here but to trot out all of the
15 securities laws doesn't change the mere fact that what you're
16 talking about here is a Ponzi scheme where they have other
17 people's money and that's what the Second stripped of
18 everything. That's what the Second Circuit is saying. They're
19 not saying it is the best result. They're not saying that the
20 security law go one way or another. What they're saying is
21 this is the only thing that makes sense.

22 THE COURT: I don't know that they quite said that. I
23 thought they said that it was not unreasonable for you to take
24 that approach.

25 MR. SHEEHAN: Yes.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 THE COURT: I think they said it would have been
2 equally reasonable for to you have taken a different approach
3 but it wasn't out of bound for you to take the approach you did
4 take.

5 MR. SHEEHAN: But they also said that to go the other
6 way would have been to adopt Mr. Madoff's fraud and reinforce
7 it. The only way to not do that is to rectify and the only way
8 to do that is through the avoidance statutes.

9 THE COURT: Okay.

10 MR. SHEEHAN: Thank you.

11 THE COURT: Thank you all, very much.

12 MR. ROSE: Just one last point?

13 THE COURT: Yes.

14 MR. ROSE: I think it needs to be addressed, that is
15 the contention that if we were right as it relates to the
16 pre-SIPA situation they would have lost in the Second Circuit
17 just doesn't hold up because I think you need to examine, and
18 Mr. Sheehan, I think, would recognize this or at least
19 acknowledge this: What the Second Circuit was looking at was,
20 okay, you're a customer. What have you received? Are you
21 entitled to receive any more out of his customer property pool?
22 I think SIPA itself or actually Mr. Sheehan may have said it
23 himself in the context of the Second Circuit argument: To the
24 extent that there is ultimately a general estate outside of the
25 customer property pool, customers who have claims can

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

19E5pic1 argument

1 participate in that even if it goes beyond what their net
2 equity is. And so, the point that is being made by Mr. Sheehan
3 that the Second Circuit somehow determined whether the trustee
4 can recover from customers as opposed to customers recovering
5 from the estate, that just doesn't come out of the Second
6 Circuit opinion. It was never part of what they addressed.

7 THE COURT: Well, it seems to me -- I'm just a simple
8 District Judge, but I guess what I learned back when was I'm
9 bound by Second Circuit holding and that's as far as it goes.
10 I'm not bound by comments, I'm not bound by dictum, I'm not
11 bound by anything other than holding. I thought the Second
12 Circuit's holding was reasonably clear and its parameters were
13 reasonably clear and it seems to me that both sides, perhaps
14 very understandably, are trying to make more of the Second
15 Circuit's decision either by saying it did decide something
16 that it doesn't seem to me it did or by saying it, by
17 implication, suggested that it wasn't deciding something. So,
18 I'm sorry to deal in bromides and cliches, but what can you do
19 at 8:10?

20 So, anyway, I thank you all and we will get you a
21 decision promptly. Thanks very much.

22 ooo

23
24
25

