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**UNITED STATES BANKRUPTCY COURT**

**SOUTHERN DISTRICT OF NEW YORK**

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|---|---|
| SECURITIES INVESTOR PROTECTION CORPORATION,<br>Plaintiff-Applicant,<br><br>v.<br><br>BERNARD L. MADOFF INVESTMENT SECURITIES LLC,<br>Defendant. | Adv. Pro. No. 08-01789 (BRL)<br><br>SIPA LIQUIDATION<br><br>(Substantively Consolidated) |
| In re:<br><br>BERNARD L. MADOFF,<br>Debtor. | |
| IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,<br>Plaintiff,<br><br>v.<br><br>DOUGLAS HALL; STEVEN HEIMOFF; BOTTLEBRUSH INVESTMENTS, L.P.; LEGHORN INVESTMENTS LTD.; and KAMALA D. HARRIS, solely in her capacity as Attorney General for the State of California,<br>Defendants. | Adv. Pro. No. 12-01001 (BRL) |

**MEMORANDUM OF LAW IN SUPPORT OF CALIFORNIA ATTORNEY GENERAL KAMALA D. HARRIS'S OPPOSITION TO TRUSTEE'S APPLICATION FOR ENFORCEMENT OF AUTOMATIC STAY AND PRELIMINARY INJUNCTION**

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## PRELIMINARY STATEMENT

The California Attorney General Kamala D. Harris (the "Attorney General"), respectfully submits this Opposition to the application of Irving H. Picard (the "Trustee") for enforcement of the automatic stay and an injunction barring the People's state law enforcement proceeding against Pamela Chais, as executor of the estate of Stanley Chais ("Chais") (*People v. Chais*, Case No. BC422257 (Los Angeles County Superior Court)).[1] Most of the Trustee's arguments essentially dissolve into the notion that because a judgment in the "Third Party Actions" may implicate funds that the Trustee believes should be his to distribute, but are not, these actions are stayed automatically and/or should be enjoined pursuant to the Court's equitable powers. While the Trustee's desire to maximize the amount of money available to the victims of Bernard Madoff is laudable, his attempt to interfere with the People's action[2] in order to achieve that goal finds no support in the Bankruptcy Code, and thus, must be rejected.

The Attorney General is not a creditor and Chais is not a debtor. The People's action does not seek to recover a claim against or belonging to the debtor, Bernard L. Madoff Investment Securities LLC ("BLMIS" or "Madoff"), nor does it seek to control property of the debtor. Rather, the People assert only independent, direct claims against the third-party non-debtor Chais for violations of state securities and consumer protection laws. This being the case, the automatic stay simply does not apply to the People's enforcement action. The Trustee's attempt to apply and/or extend the automatic stay because the People *might* recover funds from a non-debtor, some of which *could* become part of the BLMIS estate stretches section 362(a) of

[1] By filing this opposition, the Attorney General is making a special and limited appearance, and does not submit, voluntarily or otherwise, to the jurisdiction of the Bankruptcy Court. The Attorney General does not waive any objections or defenses that it or any other agency, unit or entity of the State of California may have, all of which are reserved.

[2] As discussed more fully herein, the Attorney General's action against Chais is brought, pursuant to her police and regulatory authority, on behalf of the People of the State of California. Accordingly, the Attorney General's enforcement action against Chais is variously referred to as "the People's."

the Bankruptcy Code well beyond its express terms and purposes, and is unsupported by the case law.

Moreover, even assuming that the automatic stay applied, the People's action would be excepted from it pursuant to section 362(b)(4), which explicitly allows for the continued prosecution of governmental police and regulatory actions even as against a debtor. Although the Trustee does not meaningfully differentiate between the various "Third Party Actions" against Chais, the People's action, an exercise of the State of California's police and regulatory power on behalf of the public, is significantly and fundamentally different from private lawsuits. In enacting 362(b)(4), Congress recognized that the purposes of the automatic stay are generally secondary to a state's need to protect the public through the enforcement of its laws and, thus, that interference with a sovereign's exercise of police power should be rare. For this reason, courts have been reluctant to enjoin state law enforcement actions under section 105(a) of the Bankruptcy Code, and have done so only in exigent circumstances not present here.

Indeed, while the use of the Court's equitable powers to stay a private lawsuit against a third party non-debtor is an "extraordinary exercise of discretion," and to stay a government action is "exceptional," it does not appear that any court has *ever* enjoined a government police power action against a non-debtor. The Trustee has not demonstrated, and nothing about the People's enforcement action against Chais suggests, that such unprecedented relief is justified here. Because the automatic stay does not apply and equitable relief is inappropriate, the Trustee's application should be denied in its entirety.

## STATEMENT OF FACTS

### I. THE PEOPLE'S COMPLAINT

The Attorney General, on behalf of the People of the State of California, filed a civil enforcement action against Stanley Chais on September 22, 2009, in the Los Angeles County Superior Court, alleging violations of California's securities and consumer protection laws. (Declaration of Alexandra Robert Gordon (Gordon Decl.) at Ex. 1.) The People's Complaint for

Restitution, Civil Penalties, Permanent Injunction and Other Equitable Relief ("People's Complaint") alleges that for more than 30 years, Chais passed himself off as an "investment wizard" and collected enormous fees – 25 percent of annual profits – supposedly in consideration for exercising his skill and judgment in managing investments. In fact, all Chais did was turn over the entirety of his investors' funds to Bernard Madoff without their knowledge or authorization and despite numerous indicia of fraud. Between 1995 and 2008, Chais collected almost $270 million in fees for doing nothing more than funneling all of his investors' capital into an epic Ponzi scheme. (Gordon Decl. Ex. 1, ¶¶ 1-3.) The People's Complaint asserts four causes of action: (1) Chais offered or sold securities by means of written or oral communications which included an untrue statement of material fact or an omission of a material fact, in violation of California Corporations Code section 25401 (*id.* at ¶¶ 36-43); (2) Chais, while acting as an investment adviser, engaged in acts, practices or a course of business that were fraudulent, deceptive or manipulative, in violation of California Corporations Code section 25235 (*id*. at ¶¶ 44-47); (3) Chais made or caused to be made untrue or misleading statements, in violation of California Business and Professions Code section 17500 ( *id*. at ¶¶ 48-51); and (4) Chais engaged in acts or practices that constitute unfair competition, in violation of California Business and Professions Code section 17200 (*id*. at ¶¶ 52-53). The People's Complaint seeks an injunction, disgorgement of ill-gotten profits, restitution, civil penalties, and costs. (*Id.* at 14-16:1-8.)

## II. RELEVANT PROCEEDINGS IN THE SUPERIOR COURT

### A. Relation of Cases and Chais's Demurrer

On October 14, 2009, the People's action was deemed related to cases brought by private plaintiffs against Chais: *Bottlebrush Investments LP v. The Lambeth* Company, Case No. BC407697; *Leghorn Investments LTD v. Brighton Investments*, Case No. BC408661; *Hall v. Chais*, Case No. BC413820; and *Heimoff v. Chais*, Case No. BC413821 (collectively "the Private Plaintiffs"), and transferred to the Honorable Elizabeth Allen White. (Gordon Decl. Ex.

2.) Judge White subsequently ordered that the People and the Private Plaintiffs coordinate all discovery to increase efficiency and conserve resources. (Gordon Decl. at ¶5 and Ex. 3.) In all other respects, the People's enforcement action and the Private Plaintiffs' actions have proceeded separately. (*Id.*)

Although the Trustee does not distinguish between the procedural history of the People's enforcement action and the actions of the Private Plaintiffs, (*see* Memorandum of Law in Support of Trustee's Application for Enforcement of Automatic Stay and Preliminary Injunction (Trustee Memorandum) at pp. 18-22), they are significantly different. Unlike in the *Hall* and *Bottlebrush* actions, Chais did not demur to the People's Complaint on the grounds that it violated the automatic stay. On November 23, 2009, Chais filed an unsuccessful demurrer to the People's Complaint on the grounds that: (1) that California Business and Professions Code section 17200 did not apply to the conduct alleged in the People's Complaint; and (2) that the People had failed to properly plead claims under California Corporations Code sections 25401 and 25235. On January 7, 2010, the Superior Court overruled Chais's demurrer in its entirety. (Gordon Decl. Exs. 4, 5 & 6.) At no time during the course of the state court proceedings has it ever been suggested, by the Trustee or any one else, that the automatic stay has any application to the People's enforcement action. In fact, it has been understood by the trial court and all the parties that the automatic stay does *not* apply. (*See, e.g., id.* at Exs. 10; Transcript at 31:13-32:21 & 12; Transcript at 19:12-21.)

**B. Subsequent Proceedings and Settlement Discussions**

Chais passed away on September 25, 2010. Following his death, the People and the Private Plaintiffs agreed to a stay of litigation for sixty days. (*Id.* at Ex. 7.) On June 27, 2011, Pamela Chais, as Personal Representative of the Estate of Stanley Chais, was substituted for defendant Stanley Chais in the People's action. (*Id.* at Ex. 8.) On September 9, 2011, the People filed an amended complaint to effect this substitution. (*Id.* at Ex. 9.)

In May of 2011, counsel for Chais indicated that Mrs. Chais and the Chais Related Entities were attempting to negotiate a "global settlement" that would include, inter alia, the Trustee and the People. Counsel proposed to begin discussions with the Trustee first and then bring the People "to the table." The People agreed to this arrangement and to an informal stay of discovery in order to minimize litigation expenses and conserve assets.[3] (*Id.* at Ex. 10.) In or around November 2011, Chais and the People began their own settlement discussions. (*Id.* at ¶ 12.) The Trustee filed his complaint against the Attorney General and the instant application shortly thereafter.

## ARGUMENT

### I. THE AUTOMATIC STAY UNDER 11 U.S.C. § 362(A) DOES NOT APPLY TO THE PEOPLE'S ENFORCEMENT ACTION AGAINST CHAIS

#### A. The Automatic Stay Does Not Apply to Actions Against a Third-Party Non-Debtor

As a general rule, the automatic stay of section 362(a) only applies to debtors and property of the estate and does not apply to actions against non-debtor third parties. *See* 11 U.S.C. § 362; *see also Teachers Ins. & Annuity Ass'n of America v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986) ("It is well-established that stays pursuant to § 362(a) are limited to debtors and do not encompass non-bankrupt co-defendants."); *Nevada Power Co. v. Calpine Corp*. (*In re Calpine*), 365 B.R. 401, 408 (S.D.N.Y. 2007). Similarly, the automatic stay typically does not apply to a non-creditor third party, such as the Attorney General of California. *See In re Siskin*, 231 B.R. 514, 519 (Bankr. E.D.N.Y. 1999). The Trustee does not dispute that the People's enforcement action is not against the debtor, Bernard L. Madoff Investment Securities LLC, but rather against Chais, a non-debtor. Instead, the Trustee makes a variety of arguments based on the erroneous premise that the People's claims against Chais involve claims belonging to and/or property of the BLMIS estate and thus violate sections 362(a)(1), (3), and (6). (*See* Trustee's Memorandum at

[3] The People also contacted counsel for the Trustee to verify that the Trustee was amenable to a global settlement. Counsel for the Trustee indicated that he was theoretically agreeable although no details were discussed. (Gordon Decl. at ¶ 11.)

pp. 33-42.) Because the Trustee's arguments are contrary to controlling law and to the facts of this case, his attempt to apply the automatic stay to the People's enforcement action must fail.

**1. The People's Enforcement Action Does Not Seek to Recover a Claim Against the Debtor and Thus Is Not Barred by Section 362(a)(1)**

The Trustee asserts that the "Third Party Actions seek the recovery of funds fraudulently transferred by BMLIS to Chais Defendants," (Trustee's Memorandum at p. 33), and that such actions to recover fraudulently transferred property are stayed by section 362(a)(1). (*Id.* at pp. 35-36.) In support of this assertion, the Trustee notes that both the *Hall* and *Bottlebrush* Plaintiffs have alleged claims for fraudulent conveyance and unjust enrichment and that the Superior Court sustained a demurrer to these claims because they violated the automatic stay of the BMLIS bankruptcy. (*Id.* at pp. 33-35.) Notably absent from the Trustee's argument regarding section 362(a)(1) is any mention of the People's Complaint. Also missing is the critical fact that the People have not alleged any causes of action for, or in any way pertaining to, fraudulent transfers.

As indicated above, the People's Complaint asserts four causes of action: (1) Chais offered or sold securities by means of written or oral communications which included an untrue statement of material fact or an omission of a material fact, in violation of California Corporations Code section 25401 (Gordon Decl. Ex. 1, ¶¶ 36-43); (2) Chais, while acting as an investment adviser, engaged in acts, practices or a course of business that were fraudulent, deceptive or manipulative, in violation of California Corporations Code section 25235 (*id*. at ¶¶ 44-47); (3) Chais made or caused to be made untrue or misleading statements, in violation of California Business and Professions Code section 17500 ( *id*. at ¶¶ 48-51); and (4) Chais engaged in acts or practices that constitute unfair competition, in violation of California Business and Professions Code section 17200 (*id*. at ¶¶ 52-53). The Trustee has not, and cannot, demonstrate that these causes of action brought by the People pursuant to California's securities

and consumer protection laws, are brought "to recover a claim against the debtor, [BLMIS]" and thus implicate section 362(a)(1).

Unlike in the cases relied upon by the Trustee, all of which involve fraudulent transfer actions, *see, e.g.*, *FDIC v. Hirsch* (*In re Colonial Realty*), 980 F.2d 125 (2d Cir. 1992); *In re Keene Corp*., 164 B.R. 844 (Bankr. S.D.N.Y. 1994), the People's enforcement action against Chais is in no way derivative of a claim against Madoff. The People do not allege that Chais is liable based on actions he (or Madoff) took with respect to BLMIS property. Rather, the People allege that Chais violated state law by illegal acts and practices, including making or causing to be made material misrepresentations and omissions, that he engaged in while purporting to act as an investment advisor. (Gordon Decl. Ex. 1.) The People's law enforcement action against Chais, brought under California's consumer protection and securities laws, is based on wrongdoing committed by Chais and alleges particular harms that are "significantly different" from the injuries to BLMIS creditors in general. *See Picard v. Stahl*, 443 B.R. 295, 312 (Bankr. S.D.N.Y. 2010). The People's claims against Chais are entirely independent of injury to BLMIS and therefore "could not have been asserted by the debtor as of the commencement of the case, and thus [are] not property of the estate." *Id.* (citing *Schertz–Cibolo–Universal City, Indep. Sch. Dist. v. Wright* (*In re Educators Group Health Trust*), 25 F.3d 1281, 1284 (5th Cir. 1994)).[4] Accordingly, the People's causes of action are not subject to the automatic stay. *In re Granite Partners, L.P.*, 194 B.R. 318, 327-28 (Bankr. S.D.N.Y. 1996); *see also McHale v. Alvarez* (*In re The 1031 Tax Group, LLC*), 397 B.R. at 680, 682 (Bankr. S.D.N.Y. 2008).[5]

[4] For this reason, *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1101 (2d Cir. 1990), cited by the Trustee, which held that an attempt by a creditor to bring a tort action that was the exclusive property of a bankruptcy estate was barred by section 362(a)(6), is inapposite. *See Bank Brussels Lambert v. Credit Lyonnais*, 192 B.R. 73, 78 (S.D.N.Y. 1996) (discussing *In re Crysen* and holding that because conversion claim was "not the exclusive property of Debtors' estate," it was not precluded by section 362(a)(6)).

[5] The reasoning of the cases discussed in this section, all of which involve independent direct claims brought by creditors, apply with even greater force where, as here, independent claims are being asserted by a *non-creditor* against a non-debtor.

The People's action is thus distinguishable from *In re Colonial Realty* and its progeny. At issue in *In re Colonial Realty* was whether an avoidance action by the FDIC to recover assets that had been fraudulently conveyed by a debtor to a third party fell within the scope of the automatic stay provided by section 362(a). *See In re Colonial Realty*, 980 F.2d at 131-32. The Second Circuit found that, while the fraudulent conveyance action did not seek to recover "property of the estate" within the scope of section 362(a)(3),[6] it did constitute an attempt "to recover a claim against the debtor" that was stayed by section 362(a)(1). *Id*. Two characteristics of the FDIC action underpinned the Court's conclusion. First, the court determined that "[a]bsent a claim against the debtor, there is no independent basis for the action against the transferee." *Id*. at 132. Second, the court noted that "the creditor can only recover property or value thereof received from the debtor sufficient to satisfy the creditor's claim against the debtor." *Id*. (quoting *In re Saunders*, 101 B.R. 303, 305 (Bankr. N.D.Fla. 1989)). Neither of these findings applies here.

The People have brought only direct claims against Chais that are entirely independent from any claims against Madoff or belonging to his estate. "The government's right to pursue a cause of action under section 17200 is separate from, and not derivative of, the [debtor's] right to assert an action ... The government's right of action under section 17200 is not part of the bankruptcy estate under section 541." *San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1127 (9th Cir. 2006); *see also In re The 1031 Tax Group*, 397 B.R. at 680, 682 (determining that claims brought pursuant to Colorado Consumer Protection Act and state law fraud claims are "direct and belong to the Plaintiffs and not to the Trustee"). Moreover, the value of any property transferred between Chais and BLMIS has no bearing on the various remedies, including an injunction, disgorgement of ill-gotten profits, restitution, civil penalties, and costs, sought by the People's action and authorized by California law. *See* CAL. BUS. & PROF. CODE §§ 17203, 17206, 17535, 17536; CAL. CORP. CODE §§ 25530 & 25535. *In re Colonial* is thus inapposite, as

[6] In light of this holding in *In re Colonial*, and as discussed more fully below, the Trustee's contention that section 362(a)(3) bars the People's enforcement action is also without merit.

are *In re Keene Corp*., 164 B.R. 844 (Bankr. S.D.N.Y. 1994) and *In re AP Industries, Inc.*, 117 B.R. 798 (Bankr. S.D.N.Y. 1990), all of which involved fraudulent transfer claims.

Because the People do not assert claims against Madoff or belonging to his estate, the People's enforcement action is not stayed pursuant to section 362(a)(1).[7] *See Hall Chemical Co. v. Anker-Holth Ltd.*, No. 96 CV 746, 2000 WL 839996, *5 & n.1 (D. Conn. March 31, 2000) (distinguishing *In re Colonial Realty*, holding that independent claims against a third party were not stayed under section 362(a)(1), and stating that based upon the legislative history, "it is not clear that the reach of the clause in § 362(a)(1), "to recover against the debtor," extends beyond fraudulent transfer actions").

**2. Because the People Assert Independent, Direct Claims Against Chais, the People's Action Does Not Seek to Collect or Recover on Claims Against the Debtor, and Thus, Section 362(a)(6) Is Not Implicated**

Section 362(a)(6) operates to stay "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6). While the scope of section 362(a)(6) is broader than that of section 362(a)(1), section 362(a)(6) only applies to acts to collect on prepetition claims *against the debtor*. *Id*. (emphasis added); *see also* Benjamin Weintraub & Alan N. Resnick, BANKRUPTCY LAW MANUAL § 7:10 (5th ed. 2008). The stay pursuant to section 362(a)(6) does not apply to acts against non-debtors or to the collection of claims out of property that is not property of the estate. 3 COLLIER ON BANKRUPTCY ¶¶ 362.03(8)(b)&(c) (16th ed. 2010).

[7] The Trustee makes a related argument that the Third Party Plaintiffs, this time barely including the People, are seeking recovery of "disguised fraudulent transfers" because "all of the Chais Defendants' assets are recoverable by the Trustee" and, ostensibly, any remedies obtained by the People will include the proceeds of fraudulent transfers. (Trustee's Memorandum at pp. 36-37.) If the Trustee is contending that the People's causes of action are somehow masked fraudulent transfer claims, this argument fails for the reasons stated above and in the discussion herein regarding section 362(a)(6). To the extent that the Trustee is suggesting that the People's claims implicate property of the BLMIS estate pursuant to section 362(a)(3), and/or "customer property" under SIPA section 78 *lll*(4), as more fully addressed herein, this argument is equally unfounded. *See In re Colonial*, 980 F.2d at 131; *Picard v. Merkin*, 440 B.R. 243, 271-73 (Bankr. S.D.N.Y. 2010).

In support of his contention that despite the explicit limitations contained in section 362(a)(6), it applies to the People's enforcement action against Chais, the Trustee relies heavily on *Sosne v. Reinert & Duree, P.C.* (*In re Just Brakes Corporate Sys., Inc.*), 108 F.3d 881 (8th Cir. 1997) (Trustee's Memorandum at p. 37).[8] *Just Brakes*, in which the Eighth Circuit held that section 362(a)(6) stayed an action to collect on a judgment on a prepetition fraudulent conveyance claim, is not controlling here. The basis of the court's holding in *Just Brakes* is that a cause of action for fraudulent transfer belongs to the estate and that only the trustee can assert a post-petition avoidance claim. *Id.* at 884. *Just Brakes* has no application where, as here, the People, a non-creditor, do not allege fraudulent transfer claims, but rather entirely independent direct claims against a non-debtor. Indeed, the *Just Brakes* court explicitly distinguished an act to collect on a claim that belongs to the debtor's estate from acts to collect on independent claims: "This factor, [a 'competing avoidance claim'], distinguishes this case from cases holding that § 362(a)(6) does not automatically stay post-petition acts to collect creditors' *independent* claims against debtors' guarantors." *Id.* at n. 3 (citations omitted) (emphasis in original).

The People's case against Chais is not an avoidance action, competing or otherwise. Contrary to the Trustee's characterization of them, the People's claims against Chais involve fundamentally distinct claims and operative facts than the Trustee's action against Chais. While there may be some overlap in background facts between the People's Complaint and that of the Trustee, the existence of common parties or "shared facts" does not transform the People's claims into ones belonging to the Trustee. *See In re Seven Seas Petroleum Inc.*, 522 F.3d 575, 585 (5th Cir. 2008) (the existence of common parties or "shared facts" between a bankruptcy and

[8] The Trustee also cites to the district court transcript in *Picard v. Stahl*. (Trustee's Memorandum at p. 38). The portion of the transcript referenced by the Trustee, however, has nothing to do with the applicability of section 362(a)(6). Instead, the district court referred to *Just Brakes* during its discussion of whether, under different circumstances than exist here, to grant an injunction pursuant to 11 U.S.C. section 105. (Cole Decl. Exh. N at 30:2-35:2.) Earlier in the hearing and with respect to section 362(a), the district court did, however, note that "if a plaintiff recovers on an independent claim against someone else, they're not holding assets that belong to the estate." (*Id.* at 12:14-16.)

a bondholders' suit does not mean that the bondholder's claims belonged to the estate; "[i]t is entirely possible for a bankruptcy estate and a creditor to own separate claims against a third party arising out of the same general series of events and broad course of conduct") (citations omitted).

The People allege that Chais, through material misrepresentations and omissions, defrauded investors into believing that he was an "investment wizard" who was personally executing a complex proprietary investment strategy that consistently yielded high returns, and was therefore deserving of exorbitant fees, when, in fact, he was not. (*See* Gordon Decl. Ex. 1.) This involves quite different conduct and harm than the Trustee's claims of preferential and fraudulent transfers from BLMIS to Chais, (*see* Cole Decl. Ex A.),[9] and does not, as the Trustee suggests, "explicitly rely" on his allegations. Indeed, the Trustee does not address the wrongdoing that is at issue in the People's action and does not, and cannot, assert the securities and consumer protection claims brought by the People against Chais. *See In re Granite Partners, L.P.*, 194 B.R. at 324–25, 327; *see also Picard v. HSBC Bank PLC*, 454 B.R. 25, 29-32 (S.D.N.Y. 2011); *Picard v. JP Morgan Chase & Co.*, 460 B.R. 84, 91 (S.D.N.Y. 2011); *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223, 228 (2006).

In sum, the Trustee's arguments with respect to section 362(a)(6) suffer from the same defects as those regarding section 362(a)(1). Specifically, because the People's direct, independent action against Chais does not seek to recover a claim against BLMIS, nor does it assert or seek to recover on claims that belong to BLMIS or the Trustee, section 362(a)(6) does not apply. Despite the Trustee's repeated and unsupported insistence to the contrary, the fact that the satisfaction of a judgment in the People's action *could* possibly involve some money that the Trustee alleges,[10] but has not proven, is the proceeds from fraudulent transfers to Chais does

[9] *See generally Picard v. Chais*, 445 B.R. 206, 217-18 (Bankr. S.D.N.Y. 2011).

[10] While the Attorney General does not, as the Trustee states, "essentially concede" this issue, it is irrelevant to the question of whether section 362(a)(6) applies.

not place the People's enforcement action within the purview of section 362(a). *Cf. In re Colonial*, 980 F.2d at 131; *Picard v. Merkin*, 440 B.R. at 271-73. Accordingly, neither section 362(a)(1) nor (a)(6) applies to the People's enforcement action.

**3. Section 362(a)(3) Does Not Apply Because The People's Action Does Not Seek or Seek to Control Property of the Estate or Customer Property**

The Trustee argues that because "[i]f the Third Party Plaintiffs succeed in their actions, they will be obtaining potential estate assets," section 362(a)(3) bars the Third Party Actions. (Trustee Memorandum at pp. 40-42.) However, the Trustee's theory ignores the crucial distinction between allegedly fraudulently transferred property that is a "*potential*" asset of an estate and property of the estate under section 362(a)(3) and/or "customer property" under SIPA. In *In re Colonial Realty*, the Second Circuit held that fraudulently transferred property does not become property of the bankruptcy estate until there has been a judicial determination that the property was fraudulently transferred and it has been recovered by the trustee. 980 F.2d 130-31. Thus, it "is the recovery of funds involved in an avoided transfer, *not the potential for recovery*, that causes funds to be considered part of the estate." *Klingman v. Levinson*, 154 B.R. 109, 113 (N.D. Ill. 1993) (discussing *In re Colonial* and its progeny) (italics added). Similarly, this Court has held that transferred property becomes "customer property" only following a successful avoidance action. *Picard v. Merkin*, 440 B.R. 243, 271-73 (Bankr. S.D.N.Y. 2010). Although the Trustee baldly asserts that all of Chais's assets were derived from fraudulent transfers from BLMIS, he has yet to prove and/or recover on these claims. Under governing authority, the funds at issue are not property of the estate or customer property. *See In re Colonial*, 980 F.2d at 131; *Picard v. Merkin*, 440 B.R. at 273.

The Trustee attempts to circumvent these restrictions on the definition of "customer property" by stating, without explanation, that the Third Party actions "necessarily implicate" property of the BMLIS estate and "have the effect" of exercising control over that property. (Trustee Memorandum at pp. 41-42.) In support of this argument, the Trustee cites language

from a number of inapposite cases involving actions by creditors that threatened immediate and real harm to property of a bankruptcy estate. (*See id*.) For example, the Trustee quotes *48th Street Steakhouse, Inc. v. Rockefeller Group, Inc.* (*In re 48th Street Steakhouse, Inc.*), 835 F.2d 427, 431 (2d Cir. 1987), for the proposition that "[i]f action taken against the non-bankrupt party would inevitably have an adverse impact on property of the bankrupt estate, then such action should be barred by the automatic stay." (Trustee Memorandum at p. 41.) The facts of *In re 48th Street Steakhouse*, however, bear no resemblance to the instant case. In *In re 48th Street Steakhouse*, the debtor was a sublessee of premises in which it was operating a restaurant. After the debtor had filed for bankruptcy, the landlord sought to terminate the primary tenant (lessee)'s lease, an act that under New York law would necessarily terminate the debtor's sublease. By doing so, the landlord was attempting to recapture the premises through indirect means by accelerating the termination of the lease between the landlord and the lessee. The Second Circuit held that the debtor held a "possessory interest" in the premises and this act by the landlord would have an adverse impact on the debtor's interest and thus violated the automatic stay. 835 F.2d at 430-31.[11] Here, by contrast, the Trustee does not have a possessory interest in the Chais Estate's funds. At this point, the Trustee's interest is purely speculative and depends on his prosecuting (successfully) his avoidance action against Chais. As discussed above, until the Trustee has done so, the funds at issue are not property of the estate and/or customer property. *In re Colonial*, 980 F.2d at 131; *Picard v. Merkin*, 440 B.R. at 273.[12]

[11] The Bankruptcy Court in *48th Street Steakhouse* distinguished this situation from those of the other non-debtor co-defendants where the debtor's property was not in jeopardy. *In re 48th Street Steakhouse*, 61 B.R. 182, 189 (Bankr. S.D.N.Y. 1986).

[12] Also of significance is the fact that unlike *In re 48th Street Steakhouse*, where the landlord's attempt to terminate the lease would have immediately and definitely affected the debtor's property, the People's continued litigation of their claims against Chais does not "inevitably" impact the Madoff bankruptcy estate. At this point, the People's recovery against Chais is (also) hypothetical. The People do not even have a trial date, let alone a judgment. (Gordon Decl. at ¶ 13.) Assuming that both the Trustee and the People obtain a judgment against Chais, it is unclear how much, if any, overlap there will be between them. Although the Trustee does not acknowledge this, even if he does prevail in his avoidance action against the Chais Estate, his ability to recover, and thus the amount of potential overlap with the People's putative recovery,

The other cases cited by the Trustee in support of his section 362(a)(3) argument are also inapposite. In *In re Adelphia Communications Corp.*, No. 06–01528, 2006 WL 1529357 (Bankr. S.D.N.Y. June 5, 2006), the court held that a state court action to enjoin Adelphia from selling its assets (and, as or more importantly, receiving payment for its assets), without naming Adelphia as a defendant violated the automatic stay. 2006 WL 1529357, at *3. Unlike the People's action, the state court action in *In re Adelphia* would have interfered directly with the debtor estate's "ability to dispose of its property, or, for that matter, with its contractual right to secure the $17 billion in cash and stock that it will obtain on the closing of the [challenged] deal." *Id.* *In re MCEG Products, Inc.*, 133 B.R. 232 (Bankr. C.D. Cal. 1991), involved an action seeking an injunction prohibiting the completion of a sale transaction that had been approved already by the bankruptcy court. The *MCEG* court's determination that the injunctive action "clearly affected MCEG's interest in the compromise and sale agreement" and that it was "nothing more than [a] thinly disguised attempt to circumvent the automatic stay," has no bearing here where, by contrast, the Trustee seeks to protect only a potential asset and the People's law enforcement action has no concrete effect on the debtor's property. 133 B.R. at 235.

These cases do not support, and the Trustee does not cite any authority for, his notion that where a non-creditor might eventually recover property from a non-debtor that theoretically could become property of the bankruptcy estate, section 362(a)(3) applies to the non-creditor's action. Indeed, many courts have admonished against such attempts to overextend the parameters of the automatic stay. *See In re Spaulding Composites Co., Inc.*, 207 B.R. 899, 908 (9th Cir. BAP 1997) ("While seemingly broad in scope, the automatic stay provisions should be construed no more expansively than is necessary to effectuate legislative purpose [of preventing dismemberment of the estate and enabling an orderly distribution of the debtor's assets]") (citations omitted); *see also U.S. v. Inslaw, Inc.*, 932 F.2d 1467, 1473 (D.C. Cir. 1991) (the

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is circumscribed by Judge Rakoff's ruling in *Picard v. Katz*, No. 11 CV 3602, 2011 WL 4448638 (S.D.N.Y. Sept. 27, 2011).

purpose of the automatic stay does not require that every party who acts in resistance to the debtor's view of its rights violates section 362(a)); *In re Edgins*, 36 B.R. 480, 484 (9th Cir. BAP 1984) (shield of section 362 should not be used as a sword to divest other parties of legitimate interests in property); *In re HSM Kennewick, L.P.*, 347 B.R. 569, 572 (Bankr. N.D. Tex. 2006). The Trustee's baseless attempt to shoehorn the People's claims within section 362(a)(3) thus must fail.

**B. There is No Justification for an Extension of the Automatic Stay**

Where, as here, the bankruptcy stay does not apply automatically, the debtor bears the burden of demonstrating that circumstances warrant extending the stay. *In re Adelphia Communications Corp.*, 298 B.R. 49, 54 (S.D.N.Y. 2003) (citing *In re Third Eighty–Ninth Assocs*., 138 B.R. 144, 146 (S.D.N.Y. 1992)). The Trustee has not met his burden to do so. While the Trustee is correct that courts have extended the application of section 362(a) to non-debtors,[13] they have only done so under "special circumstances" not present here.[14] *Queeenie Ltd v. Nygard Int'l*, 321 F.3d 282, 287 (2d Cir. 2003). Specifically, the Second Circuit has held that "the automatic stay can apply to non-debtors, but normally only does so when a claim will have an immediate adverse economic consequence for the debtor's estate." *Id.* at 286 (2d Cir. 2003). Examples of immediate adverse economic consequences include: (1) a claim against a

[13] There is some disagreement as to whether the 362(a) stay applies automatically to non-debtors in "special circumstances" or whether it must be extended by court order. *Compare In re Biderman Industries USA, Inc.*, 200 B.R. 779, 782 (Bankr. S.D.N.Y. 1996) (holding extension of automatic stay to non-debtor codefendants does not occur automatically but rather requires court order under section 105), *with North Star Contracting Corp. v. McSpedon*, 125 B.R. 368, 370 (S.D.N.Y. 1991) (holding extension of stay because of "unusual circumstances" under 362(a)(1) occurs automatically and does not require the procurement of a court order).

[14] Pursuant to their authority under section 105, courts have stayed creditor actions against non-debtor third parties where they have found that the estate will be adversely affected because the action will impede the non-debtor third party from injecting funds into the reorganization, because the action would detract from the invaluable time and attention the non-debtor third party would otherwise devote to the continued operation of the debtor's business or the reorganization effort, or because the claims against the non-debtor third parties are really claims against the debtor and therefore impair the automatic stay. *In re Third Eighty–Ninth Assocs*., 138 B.R. at 147. None of these factors is present here.

non-debtor for an obligation for which the debtor was a guarantor; (2) a claim against a debtor's insurer; and (3) actions where there is an identity between the debtor and third-party defendant that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. *Id.* (citations omitted).

The People's action against Chais presents no "immediate adverse consequence" to the BLMIS estate that would justify extending the automatic stay. Unlike in *Queenie*, in which the court extended a debtor's stay to his fully-owned corporation, or *Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998), which involved "the same limited pool of money, in the possession of the same defendants, as a result of the same acts, performed by the same individuals, as part of the same conspiracy," there is no "identity" between Madoff and Chais. It is Chais, and not Madoff, who is the real party in interest in the People's enforcement action. Because, and as discussed above, the People bring direct, independent claims against Chais, *see In re The 1031 Tax Group, LLC*, 397 B.R. at 680, 682, any judgment the People obtain against Chais is not a judgment, effectively or otherwise, against BLMIS. Thus, the "special circumstances" extension of section 362(a) does not apply. *See CAE Industries Ltd. v. Aerospace Holdings Co.*, 116 B.R. 31, 33 (S.D.N.Y. 1990) (suit by creditor allowed to proceed against debtor's former chairman for tortious interference with contract; automatic stay not extended to former chairperson because claim resulted from direct, not derivative, activities, and no special circumstances existed); *In re McCormick*, 381 B.R. 594, 600-02 (Bankr. S.D.N.Y. 2008); *In re Biderman Industries USA, Inc.*, 200 B.R. at 783-85.

Where, as here, the claims asserted against a non-debtor are not derivative, but rather direct, in the absence of compelling evidence that there will be a significant impact on the debtor's possibility of reorganization or liquidation, the request for an extension of a stay should be denied. *See* 1991 NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 29, Section 362-Automatic Stay (2011); *see also CAE Indus. Ltd.*, 116 B.R. at 34 ("In the absence of evidence which demonstrates any impact upon the debtor's reorganization effort, the stay cannot be extended to a solvent co-defendant"). Beyond repeatedly asserting that once the People

eventually obtain a judgment against Chais, satisfaction of it will implicate funds that he intends to secure, the Trustee has not explained how the continuation of the People's police and regulatory power action will have a "material effect" on the liquidation of BLMIS. *CAE Indus. Ltd.*, 116 B.R. at 34. Such speculative prospective harm does not rise to the level of a "special circumstance" that would justify an extension of section 362(a). *See In re Granite Partners, L.P.*, 194 B.R. at 337-38 (trustee's "conclusory" assertions that estate would suffer irreparable injury did not establish entitlement to an injunction); *see also In re Adelphia Communications Corp.*, 298 B.R. at 55 (speculation regarding adverse effect on estate insufficient "to show to show that a stay under § 362(a) can be extended pursuant to § 105(a)"); *cf. Kaplan v. Board of Educ.*, 759 F.2d 256, 259 (2d Cir. 1985) (denying injunctive relief where "predictions of havoc and unrest too speculative to constitute a clear showing of immediate irreparable harm").[15]

### C. The Stay Orders Do Not Apply to the Attorney General

None of the district court stay orders cited by the Trustee applies to the Attorney General. (Trustee Memorandum at p. 33.) The December 18, 2008 and the February 9, 2009 consent orders expressly bar only "creditors and claimants of BLMIS," and those acting on their behalf, from taking action against BLMIS assets. The Attorney General indisputably is not a creditor or claimant of BLMIS, and, even assuming that any of Chais's individual victims are, the People's enforcement action is not brought on behalf of these individuals, but rather in the Attorney General's sovereign capacity to protect all California citizens. *See, e.g., People v. Pacific Land*

[15] Moreover, even assuming that the People eventually will recover some BMLIS assets, this would not warrant an extension of the stay to include the People's action. "By creating the regulatory and police powers exception to the automatic stay, Congress expressly indicated that in most cases the concerns addressed by [police and regulatory] actions are more important than the goals of efficiency and maximizing the estate." *In re First Alliance Mortgage Co.*, 264 B.R. 264 B.R. 634, 654 (C.D.Cal. 2001); *see also In re Emerald Casino, Inc.*, No. 03–CV–05457, 2003 WL 23147946, * 9 (Dec. 24, 2003) (bankruptcy court was correct to except governmental proceeding even though it would result in a "a dramatic depletion of the debtor's estate" because "Congress has expressly provided for that result when the State … exercises its regulatory and police power").

*Research Co.*, 20 Cal.3d 10, 17 (1977); *see also People v. Keating*, 21 Cal. App. 4th 145, 152 (1993). With regard to the December 15, 2008 order, as the Trustee himself highlights, it simply reinforces the automatic stay and applies only to "assets or property owned, controlled or in the possession of [BLMIS]." As discussed above, the People's action does not implicate any "assets or property owned, controlled or in the possession of [BLMIS]." Finally, the Attorney General never received notice of the district court orders and therefore cannot be bound by them. *See Picard v. Fox*, 429 B.R. 423, 433 (Bankr. S.D.N.Y. 2010) ("All parties herein received notice of, and are bound by, the District Court's order entered December 15, 2008 . . . ").[16] It is axiomatic that the People's action cannot violate an order that has no application to it.

## II. EVEN IF THIS COURT SHOULD DETERMINE THAT SECTION 362(A) APPLIES, THE PEOPLE'S ENFORCEMENT ACTION, A POLICE AND REGULATORY ACTION BROUGHT BY A GOVERNMENTAL UNIT, IS EXCEPTED FROM THE AUTOMATIC STAY PURSUANT TO SECTION 362(B)(4)

Even assuming, *arguendo*, that the automatic stay somehow applies here, the People's action would be excepted under section 362(b)(4), which provides:

> The filing of a petition under section 301, 302, or 303 of this title … ***does not operate as a stay*** … ***of the commencement or continuation of an action or proceeding by a governmental unit*** … to enforce such governmental unit's … police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(b)(4) (emphasis added). As the Second Circuit has explained, "the purpose of this exception is to prevent a debtor from frustrating necessary governmental functions by seeking refuge in bankruptcy court." *SEC v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000) (quoting *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1024 (2d Cir. 1991)). "Thus, 'where a

[16] To the extent that any of the district court's orders could be construed as barring third-party actions against non-debtor parties, the Attorney General submits that the district court acted outside any authority conferred upon it under the Bankruptcy Code. Given that the Attorney General never received notice of these orders, she has been deprived of the opportunity to contest any such interpretation. The Attorney General thus reserves all rights with respect to such arguments.

governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.'" *Brennan*, 230 F.3d at 71 (quoting H.R.Rep. No. 95–595, at 343 (1977)).[17]

In applying the police powers exception of section 362(b)(4), courts look to the purposes of the law that the government seeks to enforce, distinguishing between situations where the "state acts pursuant to its police and regulatory power, and where the state acts purely to protect its status as a creditor." *U.S. ex. rel. Fullington v. Parkway Hosp.*, 351 B.R. 280, 283 (E.D.N.Y. 2006). Courts generally apply two tests to determine whether an action falls within the police or regulatory exception: the pecuniary purpose test, which focuses on whether the governmental action "relates primarily to the protection of the government's pecuniary interest in the debtor's property" rather than to public safety,[18] and the public policy test, which focuses on "whether proceedings seek to effectuate public policy, or merely are being brought to adjudicate private rights." *EEOC v. Le Bar Bat Inc.*, 274 B.R. 66 (S.D.N.Y. 2002) (quoting *Ngan Gung Restaurant, Inc. v. People of State of New York*, 183 B.R. 689 (Bankr. S.D.N.Y. 1995)). In order for the section 362(b)(4) exception to apply, a government action need only

[17] As a threshold matter, and as the Trustee apparently concedes, the Office of the Attorney General of California is a "governmental unit." The Bankruptcy Code defines a governmental unit to include "a State." 11 U.S.C. § 101(27). The Attorney General is the chief law enforcement officer of the State of California, CAL. CONST. art. 5, §13, and has the authority "to file any civil action for the enforcement of the laws of the state … which in the absence of legislative restriction [s]he deems necessary for the protection of public rights and interests." *People ex rel. Lynch v. Superior Court*, 1 Cal.3d 910, 910 n.1 (1970). She is also expressly authorized to enforce California's securities and consumer protection laws and to seek remedies including, but not limited to injunctive relief, civil penalties, disgorgement, and restitution. CAL. GOV'T CODE §§ 12658 & 12660; CAL. BUS. & PROF. CODE §§ 17204 & 17535.

[18] Some courts have modified this test and adopted the "pecuniary advantage test," which asks not whether the governmental unit seeks property of the debtor's estate, but rather whether the specific acts that the government wishes to carry out would create a pecuniary advantage for the government vis-à-vis other creditors. *Fullington v. Parkway Hosp.*, 351 B.R. at 283. The Trustee has not explained, and it is unclear, how the People's litigation against Chais would create a pecuniary advantage for the State of California.

satisfy one of these tests. *In re Pollock*, 402 B.R. 534, 536 (Bankr. N.D.N.Y. 2009). The Second Circuit has yet to rule on the validity of any particular test. *See In re Methyl Tertiary Butyl Ether (MBTE) Prods. Liab. Litig.*, 488 F.3d 112, 133 (2d Cir. 2007). However, under any test, the People's enforcement action against Chais is well within the exception to the automatic stay. *See San Francisco v. PG&E Corp.*, 433 F.3d at 1125 (determining that an action pursuant to California Business and Professions Code section 17200 and brought by California Attorney General and the City and County of San Francisco "clearly" passed both the pecuniary purpose and the public policy tests)[19]; *see also City of New York v. Exxon Corp.*, 932 F.2d 1020; *Ngan Gung Restaurant, Inc.*, 183 B.R. 689; *In re First Alliance Mortgage Co.*, 263 B.R. 99, 108-11 (9th Cir. B.A.P. 2001); *In re Gerald Nelson*, 240 B.R. 802 (Bankr. Me. 1999).

The Trustee argues that because the Attorney General is "acting on behalf of certain private litigants," and that the People's enforcement action has been brought "for the primary purpose of obtaining restitution, disgorgement and civil penalties," section 362(b)(4) does not apply.[20] (Trustee Memorandum at p. 43.) This argument, which has no basis in fact or in law, is unsupportable. First, the Attorney General does not, as the Trustee states, "purport to represent" private litigants; she represents the People of the State of California and she has filed an action, pursuant to her police and regulatory authority, on the People's behalf. *See* CAL. GOV'T CODE §§ 12658 & 12660; CAL. BUS. & PROF. CODE §§ 17204 & 17535. The California Supreme Court has held that such an action is "fundamentally a law enforcement action designed to protect the

[19] Although *San Francisco v. PG&E Corp.* involved the question of whether removal to Bankruptcy Court of an action by the Attorney General was proper pursuant to 28 U.S.C. § 1452, the "language of the police and regulatory power exceptions in the automatic stay context and in the removal context is virtually identical, and the purpose behind each exception is the same. Section 1452 and 11 U.S.C. § 362(b)(4) were designed specifically to work in tandem. Therefore, interpretation of these two provisions should be consonant." 433 F.3d at 1123 (citations omitted).

[20] The Trustee does not challenge the injunctive relief sought by the People's action. (Trustee Memorandum at p.44.)

public and not to benefit private parties." *People v. Pacific Land Research Co.*, 20 Cal.3d at 17; *see also People v. Keating*, 21 Cal. App. 4th at 152.

Second, it is well settled that law enforcement actions seeking monetary relief such as restitution, disgorgement and/or civil penalties fall within the police powers exception. *See SEC v. Brennan*, 230 F.3d at 71-72 (section 362(b)(4) applies to action against debtor by SEC seeking disgorgement of illicit profits; "the police powers exception permits entry of a money judgment against a debtor so long as the proceeding in which the judgment is entered is one to enforce the governmental unit's police or regulatory power"); *City of New York v. Exxon Corp.*, 932 F.2d at 1024 ("governmental actions under CERCLA to recover costs expended in response to completed environmental violations are not stayed by the violator's filing for bankruptcy"); *see also San Francisco v. PG&E Corp.*, 433 F.3d at 1125 (punishment in the form of civil penalties, disgorgement, and restitution serves a public not a pecuniary purpose); *In re Universal Life Church*, 128 F.3d 1294, 1298 (9th Cir. 1997) (government actions may fall within the exception even when they seek only money damages); *In re Commonwealth Cos.*, 913 F.2d 518, 522-23 (8th Cir. 1990) (same). In addition to preventing future illegality, the regulatory and police powers exception to the automatic stay allows the government to punish past wrongs. *See, e.g., City of New York v. Exxon Corp.*, 932 F.2d at 1024. Thus, the government is entitled to seek disgorgement, restitution, and civil penalties for conduct that violates the law. *In re First Alliance Mortgage Co.*, 264 B.R. 634, 649 (C.D.Cal. 2001), *aff'd*, 263 B.R. 99, 108-11 (9th Cir. B.A.P. 2001). Such monetary remedies serve an important deterrent function by making violations of the law "unprofitable." *SEC v. Towers Financial Corp.*, 205 B.R. 27, 30 (S.D.N.Y. 1997); *see also Hale v. Morgan*, 22 Cal.3d 388, 398 (1978) (the purpose of civil penalties under California law is to secure "obedience to statutes validly enacted under the police power" and provide a means by which the California Legislature implements statutory policy).

The pecuniary purpose test "bars governmental actions *solely* when the government acts to further a pecuniary interest *alone*, not when it seeks, through the imposition of fines or damages or even disgorgement, to punish wrongful conduct." *In re First Alliance Mortgage Co.*,

264 B.R. at 649 (emphasis added). The fact that (a portion of) the relief sought may benefit private parties does not remove a governmental police power action from the purview of section 362(b)(4). As the Ninth Circuit has held:

> The request for restitution on behalf of vendees in a [California Business and Professions Code section 17200] action is only ancillary to the primary remedies sought for the benefit of the public. While restitution would benefit the vendees by the return of the money illegally obtained, such repayment is not the primary object of the suit, as it is in most private class actions. *In this case, as in every case involving restitution, a successful result for the governmental entities may well result in money being paid to private parties*, either indirectly, through the bankruptcy court, or through direct payments. However, *the section 17200 restitution claims filed by the governmental entities in this case are fundamentally law enforcement actions designed to protect the public*. As such, the restitution claims also satisfy the "public policy test."

*San Francisco v. PG&E Corp.*, 433 F.3d at 1126 (citing *People v. Superior Ct.* (*Jayhill*), 9 Cal.3d 283, 286 (1973)) (emphasis added); *see also SEC v. Towers Financial Corp.*, 205 B.R. at 30-31 (rejecting argument that SEC action essentially was one "to collect money damages for the benefit of investors" and holding that "disgorgement is an equitable remedy that is uniquely suited to redress or cancel unfairness and promote investor confidence in securities transactions"); *Ngan Gung Restaurant, Inc.*, 183 B.R. at 691-94 ("that the government seeks to liquidate employee wage claims or to compel employers to make restitution of unpaid funds, does not alter the fact that it is acting pursuant to its police and regulatory authority. Those enforcement measures further public policy by protecting employees and the markets from the harmful effects of unfair labor practices"). The People's action against Chais, including the remedies sought, falls squarely within section 362(b)(4).

In support of his conclusion that section 362 (b)(4) does not apply to the People's action, the Trustee relies primarily on *Enron Corp. v. California* (*In re Enron*), 314 B.R. 524 (Bankr. S.D.N.Y. 2004). *In re Enron* involved a lawsuit brought by the California Attorney General under California's Unfair Competition Law and Commodity Law, seeking an injunction, disgorgement, restitution, damages, and civil penalties and alleging the unlawful manipulation of California's energy markets. 314 B.R. at 531. The court found that the bankruptcy stay was applicable because the primary purpose of the Attorney General's lawsuit was "to seek money

damages or other monetary relief for past conduct, and not to prevent future conduct that could harm the public health or safety." 314 B.R. at 538 (citing *United States v. Seitles*, 106 B.R. 36, 39 (S.D.N.Y. 1996); *In re Chateaugay*, 115 B.R. 28, 31–33 (Bankr. S.D.N.Y.1988)).[21] *In re Enron*, however, is factually distinguishable. In particular, in *Enron*, the State of California was a creditor and had filed proofs of claim in the Enron debtors' bankruptcies that "contain allegations that are substantially similar to the allegations contained in, and by their express terms include all of the monetary relief sought by the [subsequent] California Complaint." 314 B.R. at 530. The bankruptcy court attached particular importance to the fact that before filing the state court action, the Attorney General supposedly "made clear that the purpose of the lawsuit was to seek 'separate damages to compensate the State for Enron's alleged market manipulation.'" *Id.* at 531. Here, the State of California is not a creditor of the non-debtor, Chais, or of Madoff, and the purpose of the People's action is not to seek damages on the state's behalf, but to protect the public by enforcing California law and deterring wrongdoing. *See San Francisco v. PG&E Corp.*, 433 F.3d at 1125-26; *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975).

Perhaps of even greater significance, much of the court's reasoning in *Enron* is at odds with Second Circuit precedent as well as that of other courts regarding the reach of section 362(b)(4). *See Fullington v. Parkway Hosp.*, 351 B.R. at 285 (finding *In re Enron* and *In re Chateaugay* and *Seitles* unpersuasive "as they are all based on reasoning that no longer appears applicable, given developing precedent regarding the application of the § 362(b)(4) exception"). For example, the *Enron* court rejected the government's argument that its lawsuit served deterrence purposes because, inter alia, the entities involved were no longer committing fraud. *In re Enron*, 314 B.R. at 538-40. The Second Circuit has held that "[w]hen the government

[21] *United States v. Seitles*, 106 B.R. 36, *vacated by* 742 F.Supp. 1275 (S.D.N.Y. 1990) and *In re Chateaugay*, 115 B.R. 28, on which the *Enron* court relied, involved claims brought under the False Claims Act where the government, a creditor, was seeking, inter alia, money owed to it by a debtor. *Seitles* and *Chateaugay* are thus distinguishable from the People's action against Chais.

seeks to impose financial liability on a party, it is plainly acting in its police or regulatory capacity – it is attempting to curb certain behavior (such as defrauding investors, or polluting groundwater) by making the behavior much more expensive. … It is burdening certain conduct so as to deter it." *SEC v. Brennan*, 230 F.3d at 72-73. There is no requirement that a fraud must be ongoing for a government action to serve a deterrence function and for section 362 (b)(4) to apply. *See, e.g.*, *City of New York v. Exxon Corp.*, 932 F.2d at 1024; *FTC v. Consumer Health Benefits Association*, No. 10–CV–3551, 2011 WL 2341097, *3 (E.D.N.Y. June 8, 2011) (effort by FTC to fix amount of damages for past violations of consumer laws falls squarely within parameters of exception to automatic stay); *In re Wolf Financial Group, Inc.*, No. 94B44009, 1994 WL 913278, * 8 (Dec. 15, 1994) (applying section 362(b)(4) and rejecting debtor's argument that the government's actions can serve any continuing regulatory function because debtors have withdrawn from the securities industry); *In re First Alliance Mortgage Co.*, 264 B.R. at 649 ("the regulatory and police powers exception applies even when it is clear that the offending behavior has stopped, because even an action to fix damages for past misconduct falls within the exception"); *In re Luskin's, Inc.*, 213 B.R. 107, 111 (D.Md. 1997) (holding that section 362(b)(4) applies to Maryland Attorney General's action against debtor alleging unfair trade practices even though action sought a money judgment for activity that the debtor already had ceased).

More fundamentally, the *Enron* court, in contradiction to the Supreme Court's directive in *Board of Governors v. MCorp Financial, Inc.* 502 U.S. 32, 40 (1991), and its own articulation of the correct standard, performed a subjective analysis into the legitimacy and efficacy of the Attorney General's action. *See Fullington v. Parkway Hosp.*, 351 B.R. at 290 n. 8 (noting that despite "citing the proper objective standard, *Enron* itself curiously invoked the subjective analysis"). The *Enron* court weighed the merits of the Attorney General's claims, his motivation in bringing the lawsuit and the necessity of the lawsuit in light of other parallel law enforcement actions. *See In re Enron*, 314 B.R. at 537-40. However, following *MCorp*, in determining the applicability of section (b)(4), the bankruptcy court may not adjudicate the legitimacy or merits

of an exercise of police or regulatory power, but rather may only examine the purpose of the law that the governmental unit is attempting to enforce. *MCorp Financial, Inc.*, 502 U.S. at 40; *In re Commonwealth Cos.*, 913 F.2d at 523 n.6.

Here, a proper objective analysis of the purposes of the laws that the Attorney General seeks to enforce demonstrates that section 362(b)(4) applies to the People's claims against Chais. *See San Francisco v. PG&E Corp.*, 433 F.3d at 1125. The People assert claims pursuant to the Unfair Competition Law, California Business and Professions Code section 17200 (the UCL) and the False Advertising Law, Business and Professions Code section 17500, which promote the public welfare by protecting "unwary consumers from being duped by unscrupulous sellers," an "exigency of the utmost priority in contemporary society." *Vasquez v. Superior Ct.*, 4 Cal.3d 800, 808 (1971). The purpose of the UCL "is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *Barquis v. Merchants Collection Assn.*, 7 Cal.3d 94, 110 (1972). Claims brought pursuant to such consumer protection laws "exemplify classic exercises of the police power, for [the] regulation of the public good." *In re Adelphia Communications Corp.*, 359 B.R. 65, 79 (Bankr. S.D.N.Y. 2007). The People also bring claims under the Corporate Securities Law, the purpose of which is to protect the integrity of the securities market and to "give greater protection to California residents [from securities fraud] than available under the prior law or federal law." *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal.4th 1036, 1055 (1999). "The entire purpose and thrust of [a securities] enforcement action is to expeditiously safeguard the public interest by enjoining securities violations. The claims asserted in such an action stem from, and are colored by, the intense public interest in enforcement of those laws." *In re Wolf Financial Group, Inc.*, 1994 WL 913278 at *8 (quoting *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993)).

In bringing its claims against Chais, the People have exercised its police and regulatory power to enforce laws designed to protect the citizens of the State of California from fraud and deceit, and unfair business practices. The People's action against Chais does not advance the interests of California as a creditor nor does it seek to adjudicate private rights. Rather, it is

brought on behalf of the people of California to vindicate the public interest, punish illegal conduct, and deter future violations of the state securities and consumer protection laws. *See San Francisco v. PG&E Corp.*, 433 F.3d at 1125-26. Thus even if the automatic stay applied, which it does not, the People's action is excepted pursuant to section 362(b)(4). *See SEC v. Brennan*, 230 F.3d at 71-72.

## III. THE TRUSTEE IS NOT ENTITLED TO AN EQUITABLE STAY UNDER 11 U.S.C. SECTION 105(A) OF THE PEOPLE'S POLICE AND REGULATORY ACTION

In the event that this Court finds, as it should, that the automatic stay does not apply to the People's action, the Trustee asks that it enjoin the People's case pursuant to its equitable powers under section 105(a) of the Bankruptcy Code. (Trustee Memorandum at pp. 44-52.) In relevant part, section 105(a) provides that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." However, although section 105(a) grants courts general equity powers, "[b]y its very terms, Section 105(a) limits the bankruptcy court's equitable powers, which must and can only be exercised within the confines of the Bankruptcy Code, and cannot be used in a manner inconsistent with the commands of the Bankruptcy Code." *In re Colonial Realty*, 966 F.2d at 59 (quoting *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988)). It does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (citation omitted). The equitable power conferred on the bankruptcy court by section 105(a) is "the power to exercise equity in carrying out the provisions of the Bankruptcy Code, rather than to further the purposes of the Code generally, or otherwise to do the right thing. This language 'suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective.'" *Id.* (quoting 2 COLLIER ON BANKRUPTCY ¶ 105.01(1) (15th ed.1983)).

Although the Trustee treats all Third Party Actions generically in his discussion of section 105(a), (*see* Trustee Memorandum at pp. 44-52), there is an enormous difference

between using the extraordinary relief provided by section 105(a) to enjoin a private lawsuit and using it to enjoin a regulatory and police power action brought by a state government. *See generally In re First Alliance Mortgage Co.*, 264 B.R. at 652; *In re Brennan*, 198 B.R. 445, 450-52 (D.N.J. 1996). In enacting section 362(b)(4), Congress expressly recognized the importance of governmental police and regulatory actions, and directed that they be exempted from section 362(a). *See SEC v. Brennan*, 230 F.3d at 71 (quoting H.R.Rep. No. 95–595, at 343 (1977)). Using section 105(a) to enjoin a law enforcement action thus appears impermissibly "inconsistent with the commands of the Bankruptcy Code." *In re Colonial Realty*, 966 F.2d at 59. To the extent that section 105(a) conflicts with section 362(b)(4) it should not be used to override the explicit exception for regulatory and police powers actions from the scope of the automatic stay.

Adopting this reasoning, some courts have determined that section 105(a) does not give a bankruptcy court the power to enjoin law enforcement actions. For example, in *In re 1820–1838 Amsterdam Equities, Inc*., 191 B.R. 18, 21 (S.D.N.Y. 1996), the court held that section 105 was not available to enjoin a regulatory or police powers action: "The protection afforded by the bankruptcy laws is not intended to prevent local governments from bringing valid enforcement actions against debtors-in-possession. The actions which the Order enjoined the City from pursuing, enforcement of the City's fire and building codes, are fundamental powers of a local government, which serve the interests of the local government in protecting its citizens and should not be disturbed by a bankruptcy court." *See also In re First Alliance Mortgage Co.*, 264 B.R. at 652 n.18 (noting that "the plain language of the bankruptcy code itself certainly does not suggest that § 105 creates an exception to the regulatory and police powers exception" and expressing "some doubts as to whether § 105 truly authorizes an injunction of an otherwise excepted regulatory or police powers action").

Other courts, which have found that a regulatory and police power action may be enjoined under section 105(a), have cautioned that such injunctions are a "rare remedy, appropriate only in exigent circumstances where the state regulatory action seriously threatens

the bankruptcy process." *In re Brennan*, 198 B.R. at 451; *see also In re Corporacion de Servicios Medicos Hospitalarios de Fajardo*, 805 F.2d 440, 449 n. 14 (1st Cir. 1986) ("bankruptcy court does possess the power, in *exceptional* circumstances, to enjoin even administrative proceedings that are exempt from the automatic stay pursuant to section 362(b)(4)") (emphasis in original); *Penn Terra Ltd. v. Department of Envtl. Res.*, 733 F.2d 267, 273 (3d Cir. 1984) (stating that a section 105(a) injunction of a police powers action could be warranted when the action "run[s] so contrary to the policy of the Bankruptcy Code that it should not be permitted").

While section 105(a) injunctions of a governmental police power action are "rare," if not prohibited, injunctions of a governmental police power action against a non-debtor third party appear to non-existent.[22] The Trustee has not cited, and independent research has not revealed, a single case where a section 105(a) injunction has been granted to prevent an exercise of the State's police and regulatory power against a non-debtor.[23] The Trustee has not demonstrated, and nothing about the People's case against Chais suggests, that such extraordinary, unprecedented relief is warranted.

The Trustee contends that a section 105(a) injunction is necessary to protect this Court's jurisdiction and to preserve and protect the BLMIS estate. (Trustee Memorandum at pp. 46-51.) The Trustee asks that this Court enjoin attempts by the Third Party Actions to "race to the courthouse" and "leap frog over other creditors" and asserts that "the Third Party Plaintiffs' conduct is just the sort of behavior courts in this and other jurisdictions have prohibited time after time." (*Id.* at pp. 46-47.) Such rhetoric is inapplicable to the Attorney General's exercise

[22] Given that even with respect to private lawsuits, "it is an extraordinary exercise of discretion to use [the] power [of section 105(a)] to stay a third party action not involving the debtor," this lack is not surprising. *In re Brentano's Inc.*, 36 B.R. 90, 92 (S.D.N.Y. 1984).

[23] In the one case cited by the Trustee that involves an action by the government and a non-debtor, *United States v. Seitles*, 106 B.R. 36, this Court found that the government's action under the False Claims Act was not an exercise of its police and regulatory power. 106 B.R. at 39-40; *compare Fullington v. Parkway Hosp.*, 351 B.R. at 285. As noted above, *Seitles*, in which the government was found to be acting as a creditor, is inapposite here.

of police and regulatory power to protect the public, punish illegal conduct, and deter future violations of California's laws.

Similarly, the cases relied upon by the Trustee that involve section 105(a) injunctions of actions by discrete groups of disgruntled creditors attempting to circumvent the Bankruptcy Code are immaterial to whether an injunction is appropriate here. The People's action bears no resemblance to that in *Picard v. Stahl*, 443 B.R. 295, in which customers, and some former employees, of BLMIS who had filed claims with the Trustee subsequently brought suit against Madoff's family members "that parrot the Trustee's Madoff Complaints almost word-for-word, [and] also seek the same funds from the Madoff Defendants that they should be seeking—and are currently seeking—from the BLMIS estate." 443 B.R. at 310. It is also entirely dissimilar from *Picard v. Fox*, 429 B.R. at 429, 431, which was a class action on behalf of some creditors "who have not received the net account value scheduled in their BLMIS accounts as of the day before the … SIPA Liquidation" seeking to "redress the depletion of the BLMIS customer property fund, a harm that derivatively injures all customer claimants in the BLMIS liquidation." These cases involve the use of this Court's equitable powers to prevent the "disfavored litigation strategy" of avaricious creditors attempting to "end run" the automatic stay by asserting dressed up, but generalized claims that belong to the Trustee. *See Picard v. Stahl*, 443 B.R. at 313, 319 ("Stahl and Abend seek to *end-run* the automatic stay, which prevents them from suing BLMIS directly, by asserting actions against Mark and Andrew Madoff as "employers" standing in the shoes of BLMIS in their roles as supervisors at BLMIS") (emphasis added); *Picard v. Fox*, 429 B.R. at 432 n.12 ("Accordingly, taken in combination with the Florida Plaintiffs' other claims, the RICO claims aggregate to nothing more than an attempt to *end run* the automatic stay and the Net Equity Decision of this Court that was perhaps unpalatable to the Florida Plaintiffs") (emphasis added); *In re AP Industries, Inc.*, 117 B.R. at 804 (issuing injunction and sanctioning creditors for willfully bringing claims that belonged to the estate).

By contrast, the People's enforcement action against a non-debtor is not impacted by the automatic stay, and even if it were, it is expressly excepted from it. *See SEC v. Brennan*, 230

F.3d at 71; *In re Granite Partners, L.P.*, 194 B.R. at 327-28. It cannot be credibly maintained that the People's action is "an attempt by feeder fund investors to cut ahead of other creditors to obtain a greater share of customer property than they would otherwise receive." (Trustee Memorandum at p. 52.)[24] The Attorney General is not a creditor of BLMIS and nor does she represent particular creditors. Rather, the Attorney General has filed suit on behalf of *all* the people of California to vindicate the public interest, punish illegal conduct, and deter future violations of the state securities and consumer protection laws.

It is also not obvious that the continued litigation of the People's action against Chais necessarily threatens the BLMIS estate or impairs the jurisdiction of this Court. Unlike the cases cited by the Trustee, the People's claims against Chais are independent and direct and are not identical or similar to those brought by the Trustee. *Compare Picard v. Stahl*, 443 B.R. at 310, *and Picard v. Fox*, 429 B.R. at 431; *In re The 1031 Tax Group, LLC*, 397 B.R at 685-86 (granting section 105(a) injunction based, inter alia, on "overlap" between "closely related" claims), *and Fisher v. Apostolou*, 155 F.3d at 882 (enjoining action where claims were "to the same limited pool of money, in the possession of the same defendants, as a result of the same acts, performed by the same individuals, as part of the same conspiracy" as those brought by the trustee), *and In re Calpine Corp.*, 354 B.R. 45, 50 (Bankr. S.D.N.Y. 2006) (claims against debtor and non-debtor are "inextricably" linked), *and In re Johns–Manville Corp.*, 26 B.R. 420, 425 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 B.R. 219 (S.D.N.Y.), *rev'd in part*, 41 B.R. 926 (S.D.N.Y. 1984) (granting injunction where debtor established that "in great measure the suits being pursued against Manville's officers and employees are in reality derivative of identical claims brought against Manville"), *with In re Reliance Acceptance Group*, Inc., 235 B.R. 548, 560-61 (D.Del. 1999) (no section 105(a) injunction against personal claims that were not the same as those asserted by estate's creditors), *and Phar-Mor Securities Litigation*, 164 B.R. 903, (W.D.Pa.

[24] The notion that allowing the People's action to continue would "compel" creditors to initiate their own "self-help" police power actions is similarly implausible. (Trustee Memorandum at p.

1994) (no section 105(a) injunction where securities claims against non-debtor were personal and were not derivative of debtor's claims). Because the People's claims against Chais are entirely distinct from those brought by the Trustee, there is no possibility of "inconsistent judgments" regarding Chais's liability. With respect to the People's putative recovery, it should not be assumed that a judgment by the state court would be inconsistent with the claims administration process. The trial court has broad equitable power to fashion relief. *See, e.g.*, CAL. BUS. & PROF. CODE § 17203; *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 173-76 (2000); *People ex rel. Mosk v. National Research Co. of Cal.*, 201 Cal.App.2d 765, 775 (1962). In this case, the state trial court is well aware of the "Net Equity Decision" and has expressed a considerable reluctance to run afoul of the claims process. (*See, e.g.*, Gordon Decl. Ex. 11 at 16:8-23.) It is thus entirely likely that the trial court's judgment would be consistent with (at least some of) the principles articulated by this Court. Moreover, the Consent Order freezing Chais's assets provides a considerable safeguard against "races to the courthouse," as this Court likely would have to authorize the payment of funds to satisfy any judgment the People may obtain. (S*ee* Cole Decl. Ex C.)

Of greater significance is that even if the People's action does impact the estate or the jurisdiction of this Court, Congress has sanctioned such a result for governmental police and regulatory actions. *See MCorp Financial, Inc.*, 502 U.S. at 41 ("It is possible, of course, that the Board proceedings, like many other enforcement actions, may conclude with the entry of an order that will affect the Bankruptcy Court's control over the property of the estate, but that possibility cannot be sufficient to justify the operation of the stay against an enforcement proceeding that is expressly exempted by § 362(b)(4). To adopt such a characterization of enforcement proceedings would be to render subsection (b)(4)'s exception almost meaningless."). As the court in *In re First Alliance Mortgage Co.* acknowledged:

> The bankruptcy court and First Alliance are undoubtedly correct that there will be more money to distribute to borrowers in this case if the separate actions are not allowed to proceed. However, the governmental units are entitled to make the choice that, over time, similarly situated borrowers and consumers benefit more

> when companies do not violate the law in part because they know that bankruptcy will not provide a way out when their wrongs are discovered. In any given case, reasonable minds could disagree about the marginal costs and the marginal benefits of different approaches and which will maximize the wealth and happiness of the greatest number of people. The point is that it is the governmental units charged with enforcing consumer protection laws, governmental units that are responsive to the political will of the people, that should be the ones to make the choice, not the bankruptcy court.

264 B.R. at 657; *see also U.S. v. Nicolet*, 857 F.2d 202, 207 (3d Cir. 1988) ("These provisions [11 U.S.C. § 362(b)] embody Congress' recognition that enforcement of the environmental protection laws merits a higher priority than the debtor's rights to a 'cease fire' or the creditors' rights to an orderly administration of the estate"); *Cournoyer v. Town of Lincoln*, 53 B.R. 478, 483 (D.R.I. 1985) ("it is clear that Congress meant to exempt from the stay governmental acts necessary to end a continuing violation of valid regulatory laws even where the estate is forced to cede possession of some of its property").[25]

There is no provision of the Bankruptcy Code that would be effectuated by enjoining the People's enforcement action against Chais. *See In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d at 91 ("Because no provision of the Bankruptcy Code may be successfully invoked in this case, section 105(a) affords [appellant] no independent relief"). Conversely, enjoining the People's enforcement action would contravene the clear mandate of the Bankruptcy Code that allows for the continued prosecution of actions where a governmental unit is suing to prevent or stop violation of fraud, consumer protection, or similar police or regulatory laws. "The police power of the several States embodies the main bulwark of protection by which they carry out

[25] The Trustee suggests the need to avoid litigation costs militates in favor of an injunction. (Trustee Memorandum at p. 51.) However, "Congress by excepting certain actions from the automatic stay provision recognized that the debtor would likely incur litigation expenses as a result of any excepted lawsuit." *EEOC v. Rath Packing Co.*, 787 F.2d 318, 325 (8th Cir.1986). Moreover, it is unclear to what litigation costs the Trustee is referring. In the nearly two and half years between the time that the People filed their action against Chais and the Trustee filed the instant application, the Trustee has not been required to expend any material resources. To the contrary, the Trustee has actually asked for the discovery conducted in the Third Party Actions. (Gordon Decl. Ex. 13.) Moreover, for most of the past year, the People have agreed to an informal stay of most litigation proceedings in order to minimize expenses and conserve assets. (*Id.* at Exs. 7 & 10.)

their responsibilities to the People; its abrogation is therefore a serious matter." *Penn Terra Ltd. v. Department of Envtl. Res.*, 733 F.2d at 273; *see also Brock v. Morysville Body Works, Inc.*, 829 F.2d 383,387 n.5 (3d Cir. 1987) ("By exempting these State actions from the scope of the automatic stay, the court will be required to examine the State actions more carefully, and with a view to protecting the legitimate interests of the State as well as of the estate, before it may enjoin actions against the debtors or the estate")(quoting H.R.Rep. No. 595, 95th Cong., 2d Sess. 175). The Trustee has not demonstrated that the People's action against Chais presents an exigent, if not singular, circumstance where a non-creditor should be prevented from enforcing state consumer protection and securities laws on behalf of the public against a non-debtor. Accordingly, the Trustee's application for a section 105(a) injunction should be denied. *See In re Compton Corp.*, 90 B.R. 798, 806–07 (N.D.Tex. 1988) ("Having concluded that the [agency] proceeding is not only consistent with the provisions of the Code but indeed expressly exempted from automatic stay via subsections 362(b)(4) and (b)(5), it can hardly be said that section 105 was employed in the instant case to carry out the Code's provisions").

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## CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the Court deny the Trustee's application in its entirety.

Dated: San Francisco, CA
February 29, 2012

/s/ Alexandra Robert Gordon
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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC v. Douglas Hall et al.
No.: **USBC, So Dist of NY, Adv Pro No. 12-01001 (BRL)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 29, 2012, I served the attached
**MEMORANDUM OF LAW IN SUPPORT OF CALIFORNIA ATTORNEY GENERAL KAMALA D. HARRIS'S OPPOSITION TO TRUSTEE'S APPLICATION FOR ENFORCEMENT OF AUTOMATIC STAY AND PRELIMINARY INJUNCTION and**

**DECLARATION OF ALEXANDRA ROBERT GORDON IN SUPPORT OF ATTORNEY GENERAL KAMALA D. HARRIS' OPPOSITION TO TRUSTEE'S APPLICATION FOR ENFORCEMENT OF AUTOMATIC STAY AND PRELIMINARY INJUNCTION**
by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Tracy Cole
Baker Hostetler
45 Rockefeller Plaza, 11th Floor
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Clerk's Office of the USBC
One Bowling Green
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 29, 2012, at San Francisco, California.

| Sandy Shum | */s/ Sandy Shum* |
|---|---|
| Declarant | Signature |

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