No. 19-277

IN THE

Supreme Court of the United States

HSBC HOLDINGS PLC, *et al.*,
Petitioners,

v.

IRVING H. PICARD AND
SECURITIES INVESTOR PROTECTION CORPORATION,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT IRVING H. PICARD

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PARTIES TO THE PROCEEDING

Petitioners are listed in the appendix to the petition. Pet. App. 185a-266a.

Respondents are (i) Irving H. Picard, as Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC, and (ii) the Securities Investor Protection Corporation (SIPC), which was "deemed to have intervened" in the court of appeals, see 15 U.S.C. § 78eee(d), and hence is considered a respondent, Sup. Ct. R. 12.6. Though incorrectly omitted from the caption of the petition, SIPC is acknowledged on page ii of the petition to have been a party below, and SIPC participated in argument in the Second Circuit (see Pet. App. 3a).

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BRIEF IN OPPOSITION FOR RESPONDENT IRVING H. PICARD

The Second Circuit decided two questions in this case, both correctly. Soundly applying this Court's recent decision in *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129 (2018), the court decided that the presumption against extraterritoriality presents no bar to recovering from foreign subsequent transferees fraudulent transfers made by Bernard Madoff's company in New York as part of his infamous Ponzi scheme. Correcting errors of law made by the lower courts, and correctly applying *de novo* review to a question of statutory interpretation, the Second Circuit held that *prescriptive* comity also poses no bar to bringing such property back into the estate for the benefit of Madoff's victims, including his foreign victims.

The petition challenges the first holding by claiming a conflict with the very decision of this Court that the Second Circuit faithfully applied. That contention is insubstantial. The petition next pretends that the court of appeals did something it did not do with respect to comity, and therefore asks this Court to decide a question not actually presented by this case. Compare Pet. i (asking this Court to decide "[w]hether . . . abstentions . . . on grounds of international comity should be reviewed . . . *de novo*, as the court below held") with Pet. App. 30a ("Adjudicative comity abstention . . . concerns a matter of judicial discretion. We thus review adjudicative comity dismissals for abuse of discretion."). Prescriptive comity, which is the doctrine at issue here, is not a doctrine of abstention

but one of statutory interpretation. Once the distinction is recognized, it is clear that the courts of appeals are in harmony, not discord. The petition should be denied.

STATEMENT

A. Legal Framework

The Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.* (SIPA), "provid[es] financial relief to the customers of failing broker-dealers" and promotes "confidence in the capital markets." *SIPC* v. *Barbour*, 421 U.S. 412, 413, 415 (1975). If a brokerage firm fails, the Securities Investor Protection Corporation (SIPC) may apply to a district court for a "protective decree." 15 U.S.C. § 78eee(a)(3). When the decree issues, a trustee selected by SIPC is appointed to liquidate the failed firm. *Id.* § 78eee(b)(3). The trustee seeks to repay the firm's customers. *Id.* § 78fff(a)(1).

If the failed firm has insufficient assets to repay its customers, the SIPA trustee "may recover any property transferred by the debtor [firm] which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of [the Bankruptcy Code]," *id.* § 78fff-2(c)(3), insofar as those provisions are consistent with SIPA, *id.* § 78fff(b). All of the property thus recovered goes to the customers.

Under the Bankruptcy Code, a trustee may sue persons who received property that the bankrupt debtor had transferred with fraudulent intent:

> The trustee may avoid any transfer . . . of an interest of the debtor in property . . . if the debtor voluntarily or involuntarily— (A) made such transfer . . . with actual intent to hinder, delay, or defraud . . . .

11 U.S.C. § 548(a)(1). The trustee's remedy (subject to certain defenses not at issue now) is recovery of the property or its equivalent:

> [If] a transfer is avoided under [Section 548], the trustee may recover . . . the property transferred, or, if the court so orders, the value of such property, from— (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.

Id. § 550(a). These provisions "maximize the funds available for, and ensure equity in, the distribution to creditors." *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 887 (2018).

This case concerns whether, in certain circumstances, these provisions of SIPA and the Bankruptcy Code permit the recovery of debtor property fraudulently transferred overseas. To answer that question, the courts below applied two rules of statutory construction. The first, the presumption against extraterritoriality, is that courts should "presume that federal statutes apply only within the territorial jurisdiction of the United States." *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (quotation marks omitted). The second, called prescriptive comity, is that courts should "construe[] ambiguous statutes to

avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004).

B. Factual Background

"Bernard Madoff orchestrated the largest Ponzi scheme in history through Madoff Securities, his New York investment firm." Pet. App. 7a. He told investors that he traded stocks and options, but in truth he parked their money in a New York bank account. *Ibid.* When investors asked for their money, Madoff Securities paid them from that account. *Ibid.*

"The scheme's success depended in part on the efforts of independent investment managers who channeled billions of dollars through financial vehicles—so-called 'feeder funds'—that invested largely or exclusively in" Madoff Securities. *Picard* v. *Fairfield Greenwich Ltd.*, 762 F.3d 199, 203 (2d Cir. 2014). The feeder funds funneled money from their investors to Madoff Securities and vice versa. Pet. App. 10a-11a. The feeder funds' investors knew that their money was going to Madoff Securities. Pet. App. 39a.

Some feeder funds were organized abroad, often in "offshore" financial centers. They include the three largest feeder-fund groups at issue here. The Fairfield Funds (Fairfield Sentry Limited, Fairfield Lambda Limited, and Fairfield Sigma Limited) were organized in the British Virgin Islands (BVI). The Kingate Funds (Kingate Global Fund, Ltd., and Kingate Euro Fund, Ltd.) were organized there and managed by Bermudian entities. And the Harley

Fund (Harley International (Cayman) Ltd.) was organized in the Cayman Islands. Pet. App. 9a-10a.

In December 2008, Madoff's scheme collapsed, and respondent Picard was appointed as Madoff Securities' SIPA Trustee. The collapse of Madoff's scheme led many feeder funds to collapse. Those feeder funds also entered liquidation. The Fairfield Funds entered liquidation in the BVI; the Kingate Funds entered liquidation there and in Bermuda; and the Harley Fund entered liquidation in the Cayman Islands. *Ibid.*

Some of the feeder funds in liquidation sought to recover payments they had made to their investors and service providers. For example, the Fairfield Funds' liquidators sued their investors and service providers using unjust enrichment, constructive trust, and similar theories. Pet. App. 75a-76a. The Kingate Funds brought actions against their service providers. Other funds, such as the Harley Fund, brought no such actions.

C. Procedural History

1. After Madoff's collapse, the "customer property" left over was "not sufficient to pay in full the [customers'] claims." See 15 U.S.C. § 78fff-2(c)(3). Hence, as SIPA prescribes, *ibid.*, the Trustee sought to recover property Madoff Securities had transferred. Specifically, he sued transferees under Bankruptcy Code Sections 548(a)(1)(A) and 550(a).

This case arises from 88 actions filed against predominantly foreign investors and service providers who received the Madoff Securities

transfers through foreign feeder funds. Pet. App. 5a, 11a. (The Trustee disputes that some of these defendants are foreign or received the Madoff Securities transfers in foreign bank accounts, but that issue is immaterial for present purposes.)

2. One defendant moved to dismiss, asserting that Section 550(a) of the Bankruptcy Code did not apply to it under the presumption against extraterritoriality. The bankruptcy court (Lifland, J.) disagreed. *Picard* v. *Bureau of Labor Ins.*, 480 B.R. 501 (Bankr. S.D.N.Y. 2012) (*BLI*).[1] Applying "step two" of *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), the court held that "the Trustee is not seeking to apply Section 550 extraterritorially" because that statute focuses "on the initial transfers [from New York] that deplete the bankruptcy estate." App., *infra*, 43a, 44a. Alternatively, the court held (under *Morrison*'s "step one") that "Congress expressed clear intent" for Section 550 to have extraterritorial reach, *id.* at 49a, adopting the reasoning of *In re French*, 440 F.3d 145, 151-52 (4th Cir. 2006).

In the other actions at issue here, the district court (Rakoff, J.) withdrew the reference to the bankruptcy court. Pet. App. 164a. Departing from *BLI*, the district court applied the presumption against extraterritoriality to bar the actions. Pet. App. 165a-177a. (The court did not address *BLI*.) In

[1] The Bureau of Labor Insurance is a petitioner here (see Pet. App. 201a), and *BLI* is a relevant opinion, cited favorably by the court of appeals (Pet. App. 23a). Accordingly, the Trustee has included *BLI* in an appendix. App, *infra*, 1a-55a.

the alternative, the district court held that the actions were barred by international comity. Pet. App. 177a-179a. The district court remanded.

The bankruptcy court (Bernstein, J.) then ruled on dispositive motions in all of the 88 actions at issue here. Applying the district court's holding, the bankruptcy court dismissed on comity grounds the actions involving feeder funds that had entered liquidation abroad. Pet. App. 68a-89a. The bankruptcy court dismissed the remaining actions (with exceptions not relevant) under the presumption against extraterritoriality. Pet. App. 90a-152a.

3. The court of appeals authorized a direct appeal. See 28 U.S.C. § 158(d)(2)(A). In that court, the Trustee was supported by *amici* including bankruptcy professors, professors of conflicts of laws, and the liquidator for the Fairfield Funds (Kenneth Krys). No scholar, liquidator, or sovereign supported petitioners' position.

The court of appeals reversed the bankruptcy court's holdings as to both the presumption against extraterritoriality and international comity. On both issues, the court limited its holding to "the Bankruptcy Code provisions in these actions." Pet. App. 39a. Contrary to petitioners' suggestion (at 31-33, 37), the court did not address the Code as a whole.

As to the presumption against extraterritoriality, the court of appeals held that *WesternGeco* "helps

resolve two issues relevant" here. Pet. App. 19a.[2] First, "the Bankruptcy Code's avoidance and recovery provisions work 'in tandem.'" *Ibid.* (quoting *WesternGeco*, 138 S. Ct. at 2137). Thus, "to determine § 550(a)'s focus in a given action, a court must also look to the relevant avoidance provision," which here is Section 548(a)(1)(A). Pet. App. 20a. Second, the focus of Section 550(a) in this context "is on the debtor's act of transferring property from the United States." Pet. App. 23a. Because that is a domestic act, the presumption against extraterritoriality does not apply. Petitioners' interpretation, the court added, would "open a loophole" whereby "a fraudster . . ., anticipating his downfall," could "transfer[] property to a foreign entity that then transferred it to another foreign entity," "mak[ing] the property recovery-proof." Pet. App. 26a.

As to comity, the court of appeals recognized that "international comity" means at least two different things: "a canon of construction, [which] might shorten the reach of a statute," and "a discretionary act of deference . . . to decline to exercise jurisdiction." Pet. App. 27a (quotation marks omitted). The first doctrine, called "prescriptive comity," warranted review *de novo* because it is a canon of construction. Pet. App. 29a. The second doctrine, called "adjudicative comity," warranted review for abuse of discretion because "abstention . . . concerns a matter of judicial discretion." Pet. App. 30a.

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[2] Like this Court in *WesternGeco*, the court of appeals addressed only the second step of the *Morrison* analysis.

It was undisputed that this case involves prescriptive comity. Pet. App. 31a. Thus, the court of appeals reviewed *de novo* the bankruptcy court's comity analysis. It reversed because that analysis "rest[ed] on incorrect premises: that we should look only to § 550(a), assume the United States has purely remedial interests, and focus on the subsequent transfer of property." Pet. App. 38a. The court also noted this Nation's interest in "equitable and orderly distribution" of the Madoff Securities estate: "SIPA and the Bankruptcy Code envision a unified proceeding, and we would frustrate this goal if we limited the reach of § 550(a) in these actions." Pet. App. 36a.

The court of appeals denied rehearing and rehearing en banc with no call for a response and no noted dissent.

D. Relevant Settlements

The Trustee has settled his claims against the Kingate Funds and the Fairfield Funds. Both settlements have been approved by courts here and in the jurisdictions where the Funds are liquidating (Bermuda and the BVI). And both settlements provide the Funds substantial claims in Madoff Securities' liquidation, which benefit their investors.

Under the Kingate Funds settlement, the Trustee is dismissing his claims against petitioners who received Madoff Securities money through the Kingate Funds. Those claims involve approximately $1 billion of transfers. Completion of the settlement thus will reduce the amount at issue here from about $4 billion to about $3 billion.

Under the Fairfield Funds settlement, both the Trustee and the Fairfield Funds' liquidator may pursue recoveries from persons who received Madoff Securities money through the Fairfield Funds. However, the settlement requires the Trustee and the liquidator to share any recoveries.

REASONS FOR DENYING THE PETITION

I. The Second Circuit's Holding That A Bankruptcy Court Can Remedy A Fraudulent Initial Transfer Within The United States By Recovering Money From A Foreign Subsequent Transferee Is Correct And Does Not Conflict With Any Holding Of This Court Or Another Court of Appeals

As the petition acknowledges (at 14-15), under *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 267 (2010), the application of a federal statute to conduct occurring abroad is not impermissibly extraterritorial if *either* the focus of the statute is domestic conduct *or* Congress intended that the statute apply extraterritorially. Only two courts of appeals have applied that analysis to the Bankruptcy Code's avoidance and recovery provisions.

In *In re French*, 440 F.3d 145 (4th Cir. 2006), a unanimous panel concluded that Congress intended the avoidance and recovery provisions of the Bankruptcy Code to apply extraterritorially. *Id.* at 151-52. Judge Wilkinson, concurring, observed that such extraterritorial application avoids "a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different

courts." *Id.* at 154-55 (quotation marks omitted). In the decision below, the Second Circuit likewise concluded that the relevant avoidance and recovery provisions could apply to recover property transferred abroad, but for a different reason: It held that the focus of those provisions is the fraudulent initial transfers, which, here, were domestic.[3]

Petitioners do not contend that any court of appeals has reached a conflicting result. Instead, they argue that the panel below misapplied a "straightforward test" (Pet. 21) in concluding that the focus of Bankruptcy Code § 550(a)(2) is on the initial, domestic transfers in this case. The result, petitioners claim, conflicts with this Court's opinions in *WesternGeco* and *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016).

But the Second Circuit has made no such elementary error. The unanimous view of every appellate judge to address the question, which is also the unanimous view of every academic who has written on the question, is correct.[4] Only by egre-

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[3] In accord with the Second Circuit's later analysis, the Fourth Circuit observed that the location in the Bahamas of property subject to the avoidance action did "not seem critical" to the extraterritoriality analysis because "§ 548 focuses not on the property itself, but on the fraud of transferring it." *French*, 440 F.3d. at 150.

[4] Every law professor to have written on the issue, or to have joined an *amicus* brief in this case, has agreed with the result reached by the Second Circuit. The *amici* who supported respondents below include the Reporter of the Restatement (Fourth) of Foreign Relations Law of the United States and numerous prominent bankruptcy professors. See Brief of

giously mischaracterizing this Court's opinions can petitioners suggest that the decision below conflicts with them. In any event, the question is not cert-worthy in the absence of a circuit conflict; if a court ever agrees with petitioners' position, there will be time enough for this Court to consider it.

1. The decision below carefully applied *WesternGeco* to determine that recovery of the transfers at issue here did not involve an extraterritorial application of 11 U.S.C. § 550(a)(2). A court "must look to a statute's 'focus' to determine whether a case involves a domestic application of that statute." Pet. App. 16a. In *WesternGeco*, this Court held that the focus of the Patent Act's damages provision, 35 U.S.C. § 284, was the location of the underlying infringement, which in that case was prohibited by 35 U.S.C. § 271(f)(2). 138 S. Ct. at 2138. This Court explained that a statute's focus turns on "the conduct it 'seeks to regulate,' as well as the parties and interests it 'seeks to protec[t]' or vindicate." *Id.* at 2137 (quoting *Morrison*, 561 U.S. at 267). When a statutory provision "works in tandem with other provisions," its focus "must be assessed in concert with those other provisions." *Ibid.* Because Section 284's role was to compensate patent holders

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Professors of Conflict of Laws, Case No. 17-2992, DE # 592; Brief of Bankruptcy Law Professors, Case No. 17-2992, DE # 593. Likewise, the leading academic article (prompted by the incorrect district-court decision that the Second Circuit has now reversed) is Edward R. Morrison, *Extraterritorial Avoidance Actions: Lessons from Madoff*, 9 BROOK. J. CORP. FIN. & COM. L. 268 (2014), and no one has published a contrary analysis in the five years since that article was published.

for infringement, its focus was on the underlying infringement under Section 271(f)(2). *Id.* at 2138. Because that underlying infringement occurred in the United States, the Court held, it was a *domestic* application of Section 284 to award damages for lost *foreign* sales. *Ibid.*

Mirroring that analysis, the opinion below held that it is a *domestic* application of Bankruptcy Code § 550(a)(2) to recover *foreign* subsequent transfers because the focus of Section 550 is on the initial, fraudulent transfer made avoidable by Section 548. Pet. App. 16a-27a. Congress designed the Bankruptcy Code's avoidance provisions to "protect[] a debtor's estate from depletion to the prejudice of the unsecured creditor." Pet. App. 21a (quoting *In re Harris*, 464 F.3d 263, 273 (2d Cir. 2006) (Sotomayor, J.) (original alteration marks omitted)). And "it is the initial transfer"—and only the initial transfer—"that fraudulently depletes the estate." Pet. App. 22a. Section 550(a) is thus merely "'a utility provision, helping execute the policy of § 548[(a)(1)(A)]' by 'tracing the fraudulent transfer to its ultimate resting place (the initial or subsequent transferee).'" Pet. App. 21a (quoting Morrison, *supra*, 9 BROOK. J. CORP. FIN. & COM. L. at 273). Here, those initial transfers occurred out of Madoff Securities' New York City bank account. Because the statute is focused on those domestic fraudulent transfers, Section 550(a)(2)'s application is domestic, even when the subsequent transfers (like the lost sales in *WesternGeco*) occurred overseas.

What then did the opinion below get wrong so as to warrant this Court's review? Petitioners never quite say. They complain that it simply cannot be

that Section 550(a)(2)'s authorization of a suit over "foreign transactions between foreign entities located abroad using foreign bank accounts" (Pet. 16) involves a domestic application of that statute. But that contention entirely disregards this Court's warning that "'what a statute authorizes is not necessarily its focus.'" Pet. App. 22a (quoting *WesternGeco*, 138 S. Ct. at 2138). The correct inquiry is, instead, into the "conduct [the statute] seeks to regulate" or "the parties and interests it seeks to protect." *WesternGeco*, 138 S. Ct. at 2137 (quotation marks and alterations omitted); see also *RJR Nabisco*, 136 S. Ct. at 2100 (the relevant question is the "'focus' of congressional concern"). Nor did *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437 (2007), "reject[]" (Pet. 18) such an inquiry into whether a statute is focused on domestic interests. *Microsoft*, in fact, did not address the statutory-focus inquiry at all.

Petitioners also repeatedly italicize the words "defendant's conduct," "conduct in this case," and the like, see Pet. 15-17, as if to suggest that the *defendant's* conduct must have occurred in the United States for the statute's application to be domestic. But *WesternGeco* held no such thing. To repeat: What this Court said matters is the conduct Congress sought to regulate and the persons it sought to protect. See *WesternGeco*, 138 S. Ct at 2138. Here, the conduct Congress sought to regulate is fraudulent depletion of the Madoff Securities estate, and the person Congress sought to protect is

the Madoff Securities estate.[5] Both are located in the United States.

At bottom, petitioners appear simply to disagree with the result the Court reached in *WesternGeco*, charging that it "gives courts license" to hold any statutory application domestic so long as it can be said to advance some "domestic policy goal." Pet. 17. That's hardly a basis for certiorari, but it is also quite wrong. A statute's focus turns on the domestic policy goal *that Congress sought to further in enacting the statute*. As this Court's cases make plain, a court does not have license to deem a statute's application domestic simply because there are other domestic policy goals that the statute conceivably advances. See, *e.g.*, *Morrison*, 561 U.S. at 266 ("the focus of the Exchange Act is not upon the

[5] These foci are obvious enough in any bankruptcy case, and the Second Circuit did not rely on any statute other than the Bankruptcy Code to reach its conclusion. Were the Bankruptcy Code insufficient to resolve the "focus" question, however, it would become necessary to analyze the focus of SIPA, as this case is not a pure bankruptcy case but instead a SIPA liquidation, in which provisions of the Code are incorporated by reference to the extent not inconsistent with SIPA. See Pet. App. 24a-25a & n.8. *Many* provisions of SIPA make clear its focus on protecting the victims of fraud by securities broker-dealers, but it suffices to cite 15 U.S.C. § 78eee(b)(2)(A), which gives the court administering the liquidation *"exclusive* jurisdiction of such debtor and its property *wherever located* (including property located outside the territorial limits of such court . . .)" (emphasis added). If there were doubt about the correctness of the construction of the Bankruptcy Code adopted below (which there is not), the appropriate case in which to resolve that doubt would be one without the SIPA overlay.

place where the deception originated, but upon purchases and sales of securities in the United States"); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991) (neither plaintiff's American citizenship nor the fact that he had been hired in Houston was the "focus" of Title VII's antidiscrimination provisions).

2. Petitioners' claim that the opinion below "conflicts with" this Court's opinion in *RJR Nabisco* is equally insupportable. See Pet. 19-20. *RJR Nabisco* and the opinion below concerned *separate statutory inquiries*: *RJR Nabisco* concerned the "first step" of the extraterritoriality analysis, at which a court asks whether Congress has given "a clear, affirmative indication" that it intended a statute to apply extraterritorially. 136 S. Ct. at 2101. *RJR Nabisco* did *not* address the second step, at which a court "look[s] to the statute's 'focus'" to determine whether a case involves an extraterritorial application (*ibid.*), because a stipulation of the parties had removed any dispute on that score. *Id.* at 2111. By contrast, the opinion below dealt *only* with that second step. See Pet. App. 16a-27a. It declined to address the first step because it was "of no moment" whether Congress intended for Section 550(a)(2) to apply extraterritorially given the court's determination that its application here is domestic. Pet. App. 16a n.6.

Each step is "a separate inquiry." *RJR Nabisco*, 136 S. Ct. at 2100. And it is "only at the second step of the inquiry [that a court] consider[s] a statute's 'focus.'" *Id.* at 2103. How, then, could the Second Circuit's resolution of one statutory inquiry—the

focus test—"conflict with" *RJR Nabisco*'s resolution of another inquiry? Petitioners do not say.

They do not conflict: *RJR Nabisco* instructs that courts should presume, at step one of the extraterritoriality inquiry, that a private cause of action does not apply extraterritorially, even when Congress has made clear its intention for a statute's substantive provisions to do so. See *id.* at 2106. *WesternGeco*, by contrast, instructs how to perform the step-two inquiry: When determining a statutory provision's "focus," the provision must be considered together with other provisions with which it works "in tandem." 138 S. Ct. at 2137. The opinion below addressed step two, and therefore followed *WesternGeco*. It cannot conflict with *RJR Nabisco* any more than *WesternGeco* itself does.

II. The Court Of Appeals' Standard Of Review For Comity Does Not Conflict With Any Holding Of Any Other Court

The second question presented asserts that the court of appeals reviewed an abstention decision *de novo*. Pet. i. From that premise, the petition argues (at 23-27) that the decision below conflicts with those of other Circuits and of this Court. But the premise is false; as a result, so are the claims of conflict. Moreover, courts would reach the same result even were this Court to side with petitioners on the standard of review.

1. This case does not present the question "[w]hether . . . abstentions . . . on grounds of international comity should be reviewed . . . *de novo*,

as the court below held." Pet. i. The Second Circuit held quite the opposite.

Petitioners presuppose that international comity is a single doctrine, a doctrine of abstention. Pet. i, 6, 13-14, 23, 25, 37. Yet petitioners also recognize two kinds of international comity, "prescriptive" and "adjudicative." Pet. 23. Petitioners never explain whether international comity is multiple doctrines or one doctrine with multiple variants. Likewise, they never explain what distinguishes "prescriptive" from "adjudicative" comity or why the distinction matters.

The correct answers show that petitioners' presupposition is incorrect: There is not a single doctrine of "comity" calling for "abstention" in particular cases. Instead, "international comity," like "jurisdiction" and "standing," refers to a set of related but critically distinct doctrines. And, of those doctrines, only adjudicative comity (also known as "comity of courts") is an abstention doctrine. Prescriptive comity (also known as "comity of nations")—the doctrine at issue here—is not.

"[A]djudicative" comity is "more precisely" called "abstention." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 820 (1993) (Scalia, J., dissenting). It is a doctrine under which federal courts may "decline[] to exercise [subject-matter] jurisdiction" on the basis of international comity. *Id.* at 797 (majority opinion); cf. *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 292 (2005) (summarizing domestic abstention doctrines). This Court has expressly declined to decide whether courts "should ever decline to exercise" jurisdiction on this basis. *Hartford Fire*, 509 U.S. at 798. Many courts of

appeals, however, have adopted the doctrine of adjudicative comity in some form. See Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 65-66 (2019) (collecting cases).

"[P]rescriptive comity," by contrast, does not involve "account[ing for] comity considerations case by case, abstaining where comity considerations so dictate." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 168, 169 (2004). That case-by-case abstention approach, this Court wrote, "is too complex to prove workable." *Id.* at 168. Prescriptive comity is not an abstention doctrine at all but rather a "rule of statutory construction." *Id.* at 164.

Under this rule, courts "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Ibid.* The rule "is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law." Restatement (Fourth) of Foreign Relations Law § 405 cmt. a. It is called "prescriptive" because it seeks to determine whether Congress has exercised its "jurisdiction to prescribe" law abroad. *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting) (quotation marks omitted); see *id.* at 814-18.

In a thoughtful and nuanced discussion (Pet. App. 27a-31a) that bears little resemblance to petitioners' caricature, the court of appeals distinguished prescriptive comity from adjudicative comity and held that they call for different standards of review. Because "[p]rescriptive comity poses a question of statutory interpretation," the court held that it would review prescriptive comity determinations *de novo*. Pet. App. 29a. "Adjudicative

comity abstention, on the other hand, concerns a matter of judicial discretion." Pet. App. 30a. Hence, the court would review abstention on that ground for abuse of discretion. *Ibid.* This case involves prescriptive comity, not adjudicative comity, because it does not "ask[] whether . . . our courts should abstain from exercising jurisdiction." Pet. App. 31a. ("[B]oth parties agree[d]." *Ibid.*)

The court of appeals' explicit recognition that it *would* review adjudicative-comity abstention for abuse of discretion—which petitioners never mention even while dramatically claiming that the Second Circuit "shattered the consensus among the circuits" (Pet. 25)—shows that the second question presented is not actually at issue here.[6] "[A]bstention[] . . . on grounds of international comity," see Pet. i, must mean adjudicative comity because only that doctrine is an "abstention" doctrine. And the court of appeals held that it would review such abstention "for abuse of discretion," as "other circuits . . . have held." See *ibid.* It never held that it would review any abstention *de novo*, as petitioners claim (*ibid.*). Rather, the court held that it would review *de novo* determinations of *prescriptive* comity, precisely because such a determination is not abstention but a rule of statutory construction.

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[6] It is ironic that petitioners accuse the Second Circuit of "collaps[ing] the two doctrines." Pet. 25. The court correctly noted that petitioners' "advocacy for abuse-of-discretion review relies on inapposite adjudicative comity cases." Pet. App. 29a n.12. The petition doubles down on that analytic error.

2. For related reasons, petitioners' contention that the decision below conflicts with those of other courts of appeals is misplaced.

To support their contention, petitioners cite (at 27) cases that undisputedly involve adjudicative comity. Those cases show not conflict but harmony. The court of appeals here held that it "review[s] adjudicative comity dismissals for abuse of discretion." Pet. App. 30a. In so holding, it expressly agreed with the other courts of appeals that "review decisions . . . to dismiss on" "'adjudicative' comity" grounds "for abuse of discretion." Pet. 23.

Petitioners also cite cases applying an abuse-of-discretion standard to what petitioners claim is prescriptive comity. But that claim is wrong.

Most of the cases that petitioners say involve prescriptive comity in fact bear the hallmarks of adjudicative comity. Each asked whether "to exercise or decline jurisdiction." *Perforaciones Exploración y Producción* v. *Marítimas Mexicanas, S.A. de C.V.*, 356 F. App'x 675, 680 (5th Cir. 2009) (per curiam) (non-precedential); accord *Daewoo Motor Am., Inc.* v. *General Motors Corp.*, 459 F.3d 1249, 1256 (11th Cir. 2006) (reviewing the "district court's decision to abstain" (quotation marks omitted)). Each answered that question by determining whether a pending foreign proceeding was an adequate alternative. *Perforaciones Exploración*, 356 F. App'x at 681 (declining to defer to foreign proceeding that "only receive[s] domestic recognition"); *Daewoo*, 459 F.3d at 1258 (evaluating "competen[ce]," "fraud," and "prejudic[e]" in foreign proceeding (quotation marks omitted)). And none could involve prescriptive

comity—a rule of construction—because none construed a federal statute. *Daewoo*, 459 F.3d at 1255 (applying state law in relevant part); *Perforaciones Exploración*, 356 F. App'x at 678 (applying Mexican law).[7]

Petitioners next claim that a recent prescriptive-comity case afforded "considerable discretion in balancing the comity factors." Pet. 24 (quoting *In re Sealed Case*, 932 F.3d 915, 938 (D.C. Cir. 2019)). But those factors show that the case they quote had nothing to do with prescriptive comity. The comity factors that the D.C. Circuit balanced included: "'the importance to the litigation of the documents requested,'" the "'specificity of the request,'" and "whether 'alternative means of securing the information' exist." *Sealed Case*, 932 F.3d at 931-32 (quoting *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987) (alterations omitted)).

As the factors reveal, *Sealed Case* concerned not the construction of a statute (as prescriptive comity does) but "the discretionary determination" whether "discovery is warranted, which may appropriately consider comity interests." See *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 146 n.6 (2014) (quotation marks omitted). Discovery rulings are quintessentially discretionary. And they are akin to adjudicative comity in that a district court has

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[7] Without elaboration, petitioners cite *GDG Acquisitions, LLC* v. *Government of Belize*, 749 F.3d 1024 (11th Cir. 2014). That case is similar to the same Circuit's earlier *Daewoo* decision in the relevant respects.

"jurisdiction . . . to order a foreign national party before it to produce evidence"; the question is whether to exercise that jurisdiction. *Société Nationale*, 482 U.S. at 539-40.

The ultimate holding of *Sealed Case* was that the district court did not abuse its discretion in *rejecting* a comity defense—wholly separate from the banks' statutory arguments under the Patriot Act (which had already been rejected in Part III of the opinion)—to the enforcement of subpoenas issued by the United States to obtain foreign bank records. 932 F.3d at 931. The court's discussion of the standard of review described the comity analysis at issue as a "fact-bound reasonableness call." *Id.* at 934. The court nowhere used the words "prescriptive comity" or "comity of nations" and nowhere referred to the judgment being made as one of statutory interpretation. Nor, deciding the case half a year after the Second Circuit decided this case, did the D.C. Circuit cite the decision below or suggest that it perceived a conflict with the Second Circuit. Quite the contrary, citing a Second Circuit case, the D.C. Circuit wrote that "[t]his approach comports with our sister circuits, which review similar questions for abuse of discretion." *Ibid.* (citing *Allstate Life Ins. Co.* v. *Linter Grp Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993)).

The only case left to demonstrate the purported Circuit conflict is the puzzling *Chavez* v. *Carranza*, 559 F.3d 486 (6th Cir. 2009). The plaintiff torture victims sued a Salvadorian military officer under federal law, and the defendant raised a Salvadorian "amnesty" statute as an affirmative defense. That issue is not prescriptive comity. The court did not use "comity" to construe any U.S. statute, and it held

that *Empagran*, the leading prescriptive-comity case, was "of little relevance." *Id.* at 495-96. For its standard of review, the court relied on a Second Circuit case, which the decision below certainly did not purport to overrule. *Id.* at 495 (citing *Bigio* v. *Coca-Cola Co.,* 448 F.3d 176, 178 (2d Cir. 2006)).

In sum, petitioners have identified no conflict among the courts of appeals because they have identified no court that reviews prescriptive-comity determinations for abuse of discretion.

Indeed, several prescriptive-comity cases in other courts of appeals applied a *de novo* standard, as the court of appeals did here. The Eighth and Ninth Circuits reviewed *de novo* comity-based decisions to construe the statutory phrase "gives rise to" as requiring proximate cause. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984, 987 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 537-38 (8th Cir. 2007). Similarly, the First Circuit decided *de novo* the "statutory construction" question whether "comity-based . . . principles of reasonableness" prevent criminal application of the Sherman Act to wholly foreign conduct. *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 3, 8 (1st Cir. 1997).

In other words, once the distinction between prescriptive and adjudicative comity is recognized, there is strong uniformity in the approaches taken by the courts of appeals. The decision below was based on express recognition of that distinction, preserving all of the ample Second Circuit law providing for abuse-of-discretion review of comity decisions that are *not*, like this case, exercises in

statutory construction. There is no conflict for this Court to review.

3. The decision below does not conflict with any decision of this Court.

Petitioners are correct, of course, that "deferential review is warranted where . . . the relevant issue at hand depends heavily on factual determinations." Pet. 26. Such determinations hinge on "presentation of evidence" and "hear[ing] all the witnesses." *U.S. Bank Nat'l Ass'n* v. *Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 968 (2018).

But petitioners are wrong that prescriptive comity is factual. See Pet. 25-27. It is a "rule of statutory construction." *Empagran*, 542 U.S. at 164. Under it, "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting). Application of prescriptive comity thus depends on international law, as well as on the statute's "text, history, and purpose." Restatement (Fourth) of Foreign Relations Law § 405 cmt. d. Accordingly, the court of appeals analyzed the Bankruptcy Code in the abstract and its relationship with international interests. Pet. App. 32a-34a, 36a-39a. Such analysis is legal in nature, not factual.[8]

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[8] Petitioners suggest that "conflict[] with foreign law" is a factual issue. Pet. 26. Not so; it is a legal issue reviewed *de novo*. *Animal Sci. Prods., Inc.* v. *Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873 (2018).

Courts may frame prescriptive-comity holdings as applications of the statute to generic facts, but that does not make the doctrine factual. The court of appeals, for example, held that "[p]rescriptive comity poses no bar to recovery when the trustee . . . uses § 550(a) to recover property from a foreign subsequent transferee . . . even if the initial transferee is in liquidation in a foreign nation." Pet. App. 37a. This Court's holding in *Empagran* was similar, though the Court was not reviewing or making factual determinations. 542 U.S. at 159 (holding that the Sherman Act does not apply to conduct with "an adverse domestic effect" and "an independent foreign effect giving rise to the claim"). Indeed, the holdings produced by many rules of construction are "factual" in this way. *E.g.*, *Quarles* v. *United States*, 139 S. Ct. 1872, 1875 (2019) (holding that statute does not apply "only if a person has the intent to commit a crime *at the exact moment* when he or she *first* unlawfully remains in a building"); *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 888 (2018) (holding that statute does not apply to "a transfer from A → D that was executed via B and C as intermediaries"). Despite involving such "facts," rules of construction are paradigmatically legal.

That prescriptive comity can involve weighing factors does not make it factual. Numerous purely legal issues involve factors. For example, to decide which jurisdiction's law applies, courts weigh factors such as "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue" and "the protection of justified expectations." Restatement

(Second) of Conflict of Laws § 6(2). Even so, such decisions are purely legal and thus reviewed *de novo*. *E.g.*, *Wu* v. *Stomber*, 750 F.3d 944, 947, 949 (D.C. Cir. 2014) (Kavanaugh, J.); *Armotek Indus., Inc.* v. *Emp'rs Ins. of Wausau*, 952 F.2d 756, 760 & n.5 (3d Cir. 1991) (Alito, J.).

Finally, the court of appeals did not "collapse[]" prescriptive comity and the presumption against extraterritoriality. See Pet. 25. Prescriptive comity "becomes relevant" "if the presumption against extraterritoriality has been overcome or is otherwise inapplicable." *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting); accord Restatement (Fourth) of Foreign Relations Law § 405 cmt. c. The court of appeals followed that logic.

4. This case is a poor vehicle to consider the second question presented. A ruling for petitioners on the standard of review would not change the outcome, for two reasons.

First, courts may not dismiss on comity grounds without a true conflict of law. *Hartford Fire*, 509 U.S. at 799; Pet. App. 31a. The court of appeals "assume[d] without deciding" that a conflict existed. Pet. App. 32a.[9] But the Trustee would demonstrate to this Court or a court on remand that no true

[9] With this assumption, the court of appeals declined to resolve the "conflict" issue but assumed that petitioners (who argued that a conflict existed) were correct. For this reason, and because no question presented fairly includes the issue, see Sup. Ct. R. 14.1(a), petitioners' "conflict" argument (at 28-31) cannot support granting the petition.

conflict exists here. See *infra* at 30-32. That showing would end the comity analysis without any need for balancing (or even consideration) of any other factors.

Second, should a court reach the merits of comity, the opinion below demonstrates why the Trustee would be sure to prevail under an abuse-of-discretion standard. In this context, "there is little practical distinction between review for abuse of discretion and review *de novo*." Pet. App. 30a (quotation marks omitted). That is because, as petitioners have it, comity is an abstention doctrine. And decisions to abstain merit close scrutiny because, when jurisdiction exists, "a federal court's obligation to hear and decide a case is virtually unflagging." *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013) (quotation marks omitted); see *Hachamovitch* v. *DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998) (linking that principle to the standard of review). Petitioners do not acknowledge, much less challenge, the "more rigorous" abuse-of-discretion standard that would apply. See Pet. App. 30a (quotation marks omitted).

Moreover, under any abuse-of-discretion standard, the core of the trial court's comity ruling still would be reviewed *de novo*. A trial court "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law." *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014) (quotation marks omitted). And key errors in the trial court's comity decision were errors of law. See Pet. App. 38a-39a (discussing four different legally "incorrect" and "inaccurate" "premises" of the lower courts' analysis). With such

errors of law corrected, the trial court's comity decision would have no discretionary leg to stand on.

5. Numerous *amici* argue that the Second Circuit's comity analysis reached the wrong result for various reasons. But the petition does not ask this Court to address the result of the comity analysis, only the standard of review that the Second Circuit applied. Moreover, *amici*'s arguments are easily refuted. For example, the BVI Restructuring Professionals tout the interest in "finality and certainty in redemption transactions" as a factor deserving weight in the comity analysis. Br. 11. But the avoidance and recovery provisions of the Bankruptcy Code, like those applied in insolvency regimes around the world, are *entirely* about disrupting the finality of completed transactions in appropriate circumstances, and "[t]hese avoiding powers help implement the core principles of bankruptcy." *Merit Mgmt.*, 138 S. Ct. at 888 (quotation marks omitted).

III. The Court Of Appeals' Decision Will Not Cause International Tension

1. Petitioners and their *amici* assert that the court of appeals' decision conflicts with foreign law.

Even were petitioners correct, the result would not change. The court of appeals "assume[d] without deciding that these conflicts exist[ed]." Pet. App. 32a. The court also held, correctly, that conflicts do not end the analysis in petitioners' favor; they merely *begin* the comity analysis. Pet. App. 31a; accord *Empagran*, 542 U.S. at 165; Restatement (Fourth) of Foreign Relations Law § 405 cmt. b ("[i]nterference

with the sovereign authority of foreign states may be reasonable if application of federal law would serve the legitimate interests of the United States").

At any rate, petitioners are incorrect. As the Trustee explained below (C.A. Br. 37-44; C.A. Reply Br. 40-50), there is no conflict. (Petitioners are wrong to claim, at 37, that either respondent admits otherwise.)

"Conflict" in this context has a precise meaning. For comity purposes, "[n]o conflict exists . . . 'where a person subject to regulation by two states can comply with the laws of both.'" *Hartford Fire*, 509 U.S. at 799 (quoting Restatement (Third) of Foreign Relations Law § 403 cmt. e).

Here, there is no *Hartford Fire* conflict. Even if transfers from feeder funds to certain petitioners were "legitimately executed" under foreign law, see Pet. 34, foreign law did not compel those transfers. Thus, returning the money to the Madoff Securities estate complies with U.S. law and does not *violate* foreign law, even though foreign law may not compel it. As Professor Morrison explained: "Although foreign law [might] not require the foreign customers to return assets to the *feeder funds*, U.S. law does require them to return those assets to *Madoff Securities*. There is no conflict." Morrison, *supra*, 9 BROOK. J. CORP. FIN. & COM. L. at 281. Hence, the Trustee is not "reach[ing] around" foreign proceedings (see Pet. 11): "From the perspective of the foreign insolvency proceedings, the Trustee's suit is a dispute between two third parties, the resolution of which has no bearing on the administration of the

foreign proceedings." Morrison, *supra*, 9 BROOK. J. CORP. FIN. & COM. L. at 281.

Even in some vague, non-*Hartford Fire* sense, there is no conflict. Foreign law has barred some feeder funds from recovering the transfers under *particular legal theories* such as unjust enrichment. *Fairfield Sentry Ltd. (In Liquidation)* v. *Migani*, [2014] UKPC 9 (Apr. 16, 2014). U.S. law might well do the same. But saying that a particular legal theory for recovering money from a defendant fails tells us nothing about whether a *different* legal theory—here, fraudulent transfer—permits recovery.

The Judicial Committee of the Privy Council (the tribunal of last resort for Bermuda, the BVI, and the Cayman Islands) recently made exactly this point. UBS sought to enjoin the Fairfield liquidators from pursuing proceedings in the United States under a statute that empowers a court "to set aside voidable transactions, such as an unfair preference or an undervalue transaction." *UBS AG New York* v. *Fairfield Sentry Ltd. (In Liquidation)*, [2019] UKPC 20, para. [1] (May 20, 2019). Affirming the lower courts' rejection of that application, the Privy Council specifically held that "[t]he liquidators' claims against UBS which have been allowed to proceed are not in conflict with the [*Migani*] decision in 2014." *Id.* para. [21].

Petitioners relatedly suggest that they could be liable both to the Trustee and to the feeder funds. That is extremely unlikely as a practical matter, and the law has ample tools to deal with such a situation case by case if it does arise. For transfers made through the Harley Fund, it cannot happen because

the Harley liquidator brought no claims. For transfers made through the Kingate Funds, the recent settlement (see pp. 9-10, *supra*) obviates all possible problems. And, for transfers made through the Fairfield Funds, the Fairfield liquidator and the Trustee have a strong cooperative arrangement, as the Fairfield Liquidator explained in his *amicus* brief below, filed in support of the Trustee. See DE # 1282. If some problem of double recovery somehow slips through the cracks, doctrines such as *res judicata*, as well as cooperation between the Trustee and a liquidator, are available. Throwing out all $4 billion (reduced to $3 billion by the Kingate settlement) of claims at issue here in the name of comity because of a speculative concern about some problem of double recovery would make no sense.

2. Unable to show a conflict, petitioners and their *amici* object that the court of appeals' decision undermines the sovereignty of other nations.

That objection lacks merit because the court of appeals' decision does not "interfere[] with the ability of foreign jurisdictions to regulate transactions within their" borders. See Pet. 36. Foreign law continues to regulate those transactions. U.S. law regulates only the fraudulent transfer of assets by U.S. persons. To effect that regulation, U.S. law provides a cause of action against anyone who receives fraudulently transferred assets other than for value and in good faith. That cause of action, though, is no different from any other claim against a foreign defendant. Tort claims against foreign defendants, for example, are made every day. They hardly regulate transactions abroad simply because a foreign defendant may end up having to pay a

judgment. For related reasons, this case does not involve "'a private civil remedy for foreign conduct.'" Pet. 19 (quoting *RJR Nabisco*, 136 S. Ct. at 2106). While providing such a remedy for foreign conduct may "create[] a potential for international friction," *RJR Nabisco*, 136 S. Ct. at 2106, these cases concern remedying Madoff Securities' *domestic* fraud.

Moreover, respect for foreign sovereignty is not a rule of decision but a value that animates "a broad range of particular doctrines of this Court." See Cayman Islands Br. 17. Those doctrines include the presumption against extraterritoriality and prescriptive comity. In developing those and related doctrines, this Court has carefully accounted for foreign sovereignty and its relationship to competing considerations, such as this Nation's interests. In this case, the court of appeals faithfully applied this Court's doctrines. As a result, the court gave foreign sovereignty interests the full weight they are due.

Other doctrines of this Court not specific to cross-border litigation further guard against encroachment on foreign sovereignty. "[R]estrictions on personal jurisdiction," for example, "'are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'" *Bristol-Myers Squibb Co.* v. *Superior Court of Cal.*, 137 S. Ct. 1773, 1780 (2017) (quoting *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958)). Applied here, personal-jurisdiction limitations preclude actions against a defendant that truly "ha[s] nothing to do with the United States." See RISA Bermuda Br. 5. Here, however, each petitioner knowingly invested money with Madoff Securities in New York through an intermediary.

3. Various *amici* assert that this Court should grant review so as not to upset the settled expectations of investors abroad.

It is not true, as *amici* assert, that investors in feeder funds had no "notice" that U.S. law might apply and suffered "surprise" when they were sued to claw back money into the Madoff estate in the United States. *E.g.*, SIFMA Br. 3, 4, 10, 20; RISA Bermuda Br. 7, 11. The court of appeals decided this case on the premise that those who knowingly invested with Madoff through feeder funds should not be surprised to suffer the consequences of dealing with what turned out to be a U.S.-based fraudulent scheme, after seeking to benefit from the returns ostensibly promised as part of the same scheme. Pet. App. 39a. To accept *amici*'s arguments would require this Court to reexamine a fact-bound (and correct) conclusion reached by the Second Circuit.[10]

Any expectation that U.S. law would not apply would have lacked foundation. Generations ago, this Court authorized a district court (in admiralty) to redress a transfer from one foreign entity to another in fraud of an American citizen. *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 686-88, 697-98 (1950). And, since 2006, the sole

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[10] Though based on the court of appeals' reading of the particular complaints at issue in this case, the conclusion that petitioners knowingly dealt with Madoff Securities is not, as *amicus* RISA Bermuda seems to suggest (at 7), contrary to a factual finding by the district court. This matter was resolved below on motions to dismiss under Fed. R. Civ. P. 12(b)(6). See Pet. App. 47a n.2, 90a, 133a.

precedential authority on the subject had held that Sections 548 and 550 operate extraterritorially. *French*, 440 F.3d 145. The comparable United Kingdom statute likewise operates extraterritorially. *Jetivia SA* v. *Bilta (UK) Ltd. (In Liquidation)*, [2015] UKSC 23, paras. [10], [53], [107]-[111], [212]-[218] (Apr. 22, 2015). There was no reason to believe that this case would come out differently.

4. Finally, petitioners and their *amici* assert that relief would have more appropriately been sought in foreign courts.

The Trustee has diligently sought and earned the cooperation of foreign courts. He has negotiated complex settlements with the court-appointed liquidators of the Fairfield and Kingate Funds, and courts in the BVI and Bermuda have approved those settlements.[11]

The suggestions of some *amici* that the Trustee go beyond that (*e.g.*, Cayman Islands Br. 14; Cayman Finance Br. 21-22) are based on cases involving the same debtor in liquidation in two different jurisdictions. This case is not like that. Madoff Securities, the debtor, is in liquidation only in the United States. "[T]he feeder funds, not Madoff Securities, are the debtors in the foreign courts." Pet. App. 34a.

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[11] This case shows that the court of appeals' decision does not make things "incredibly difficult for a [foreign] liquidator." Cayman Finance Br. 16. The only foreign liquidator to file an *amicus* brief below, the Fairfield Funds' liquidator, supported the Trustee's position.

Where, as here, the debtor is in liquidation in only one jurisdiction, that jurisdiction is universally "expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors." *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* ¶ 1 (2014); accord *Duggan* v. *Sansberry*, 327 U.S. 499, 510-11 (1946); *Rubin* v. *Eurofinance SA*, [2012] UKSC 46, para. [51] (Oct. 24, 2012); see also *In re French*, 440 F.3d at 154-55 (Wilkinson, J., concurring) ("[A] major purpose of the Bankruptcy Code is to forestall a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." (quotation marks omitted)). The debtor's liquidator accordingly should bring avoidance actions in the debtor's jurisdiction (here, the United States) to the extent possible. In this context, foreign courts expect to assist with ancillary matters like enforcement of judgments. *E.g.*, *Rubin* [2012] UKSC 46, para. [5].

Insofar as a debtor's liquidator may pursue avoidance actions outside the debtor's jurisdiction, that would shed no light on the issues here. Even if the action is brought in another jurisdiction, the law of the debtor's jurisdiction still should apply. *E.g.*, *In re Condor Ins. Ltd.*, 601 F.3d 319, 320-21, 326-27 (5th Cir. 2010) (applying Nevis avoidance law for debtor in liquidation in Nevis). And the scope of the law of the debtor's jurisdiction, the United States, is what is at issue here. Foreign courts may apply that law, but our courts are unquestionably better suited to determine its scope.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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October 30, 2019

APPENDIX

In re SECURITIES INVESTOR PROTECTION CORPORATION,
Plaintiff–Applicant

v.

BERNARD L. MADOFF INVESTMENT SECURITIES LLC,
Defendant.

In re Bernard L. Madoff, Debtor.

Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,
Plaintiff,

v.

Bureau of Labor Insurance, Defendant.

Adversary Nos. 08–01789 (BRL), 11–02732 (BRL).

United States Bankruptcy Court,
S.D. New York.

Oct. 11, 2012.

Baker & Hostetler LLP, By: David J. Sheehan, Thomas L. Long, Mark A. Kornfeld, Regina Griffin, Torello Calvani, Michelle Kaplan, Catherine Woltering, Constantine P. Economides, New York, NY, for Irving H. Picard, Esq., Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff, Investment Securities LLC and Bernard L. Madoff.

Lowenstein Sandler PC, By: Michael B. Himmel, Amiad M. Kushner, Jamie R. Gottlieb, New York, NY, for Bureau of Labor Insurance.

MEMORANDUM DECISION AND ORDER DENYING BLI'S MOTION TO DISMISS THE TRUSTEE'S COMPLAINT

BURTON R. LIFLAND, Bankruptcy Judge.

Before the Court is the motion (the "Motion to Dismiss") of the Taiwanese Bureau of Labor Insurance ("BLI") seeking to dismiss the complaint (the "Complaint") of Irving H. Picard, Esq. (the "Trustee"), trustee for the substantively consolidated Securities Investor Protection Act [1] ("SIPA") liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") and Bernard L. Madoff ("Madoff"), filed pursuant to SIPA sections 78fff(b), 78fff–1(a) and 78fff–2(c)(3), sections 105(a), 544, 550(a) and 551 of the Bankruptcy Code (the "Code") and various sections of New York Debtor and Creditor Law (the "NYDCL") [2] to recover certain transfers allegedly received by BLI as a subsequent transferee of funds originating from BLMIS.

BLI moves to dismiss the Complaint on four grounds: [3] (i) this Court lacks subject matter

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[1] 15 U.S.C. § 78aaa *et seq*. Hereinafter "SIPA" shall replace "15 U.S.C." in reference to SIPA sections.

[2] N.Y. Debt. & Cred. Law §§ 273–279 (McKinney 2001).

[3] In contravention of Local Bankruptcy Rule 9013–1, BLI failed to specify the statutory provisions upon which its motion

jurisdiction because BLI is immune from liability under the Foreign Sovereign Immunities Act (the "FSIA"); (ii) this Court lacks personal jurisdiction over BLI; (iii) the Trustee cannot recover from BLI, as subsequent transferee, under section 550 of the Code ("Section 550") because he has not avoided the initial transfers from BLMIS to Fairfield Sentry Limited ("Fairfield Sentry" or the "Fund") and cannot now do so because the relevant statute of limitations has expired; and (iv) the Trustee's claims are barred by the presumption against extraterritoriality, which prohibits the extraterritorial application of Section 550 against BLI. The Trustee argues to the contrary, contending that the Court has both subject matter and personal jurisdiction, and may use Section 550 to recover subsequent transfers from BLI.

At bottom, the Trustee's instant suit is based upon BLI's investment of tens of millions of dollars in Fairfield Sentry with the specific goal of having funds invested in BLMIS in New York, with intent to profit therefrom. Such investment was not haphazard. Rather, BLI intentionally tossed a seed from abroad to take root and grow as a new tree in the Madoff money orchard in the United States and reap the benefits therefrom.

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is predicated. *See* Local Bankruptcy Rule 9013–1 ("Each motion shall specify the rules and statutory provisions upon which it is predicated…."). It appears, however, that BLI is moving to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), (2) and (6).

For the reasons set forth below and at oral argument, the Motion to Dismiss is DENIED.

BACKGROUND[4]

The Trustee's instant action arises from the commercial relationship between Fairfield Sentry, the largest BLMIS feeder fund, and defendant BLI, an agency or instrumentality of the Republic of China (the "ROC") (commonly known as Taiwan). BLI is a political branch of the ROC responsible for labor safety policies and handling investments of the Labor Insurance Fund. *See* Declaration by Tsai, Chung–Chun in Support of Defendant's Motion to Dismiss Plaintiff's First Amended Complaint ("Tsai Decl.") (Dkt. No. 9), ¶ 4. BLI is statutorily authorized to invest "in any [ ] government-authorized projects, which may inure to the benefit of their Fund," *id.*, ¶ 6(e), including "[h]edge funds issued by the foreign fund management institutions," *id.,* ¶ 8(c).

Prior to investing in Fairfield Sentry, BLI hired an investment advisor agent, Union Securities Investment Trust Co. Ltd. ("Union Securities"), to conduct diligence on Fairfield Sentry. As part of this diligence, Fairfield Greenwich Group, the entity controlling Fairfield Sentry furnished BLI with a private placement memorandum and other general

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[4] A comprehensive discussion of the facts underlying this SIPA liquidation and Madoff's notorious Ponzi scheme is set forth in this Court's March 1, 2010 net equity decision. *See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC)*, 424 B.R. 122, 125–33 (Bankr. S.D.N.Y. 2010).

information about the Fund. BLI also received specific information about the Fund's investment strategy, along with past results and details of specific trades in the Standard & Poor's 100 Index ("S & P 100"). *See, e.g.*, Declaration of Thomas L. Long in Support of the Trustee's Memorandum of Law in Opposition to the Motion to Dismiss of the Bureau of Labor Insurance ("Long Decl.") (Dkt. No. 17), Ex. 1, pp. 1–6, 10. Union Securities learned that the Fund's "strategy is executed by Bernard L. Madoff Securities," *id.* at Ex. 1, p. 2, and that a minimum of 95% of the Fund's assets would be held in BLMIS's custody in New York and invested in U.S. Securities and Treasuries, *id.* at Ex. 4 (Private Placement Memorandum of Fairfield Sentry Limited, as of October 1, 2004) [hereinafter "2004 PPM"], p. 15; Supplemental Declaration of Thomas L. Long in Support of the Trustee's Sur–Reply in Opposition to the Motion to Dismiss of the Bureau of Labor Insurance ("Long Supp. Decl.") (Dkt. No. 46), Ex. 1 (Private Placement Memorandum of Fairfield Sentry Limited, as of August 14, 2006) [hereinafter "2006 PPM"], pp. 9–10.

Armed with this knowledge, BLI chose to invest in Fairfield Sentry for the following reasons:

> (I) [T]he history and asset size of [Fairfield Sentry] were in accordance with the relevant rules of the BLI; (2) [Fairfield Sentry] had a stable and steady annualized return rate of 11.02% and a Sharpe ratio of 2.81 since its foundation in 1990; (3) Investing in [Fairfield Sentry] met other requirements of BLI's policy.

Tsai Decl., ¶ 9. In order to invest with the Fund, BLI either individually or with the aid of Union Securities appears to have opened one or more accounts with JPMorgan Chase Bank in New York. *See* Long Decl., Ex. 3 (Subscription Agreement between BLI and Fairfield Sentry Limited, as Executed on January 4, 2007) [hereinafter "Subscription Agreement" or "Agreement"], pp. 1–2, 4, 11.

The Controlling Documents

On January 4, 2007, BLI signed the Subscription Agreement with Fairfield Sentry. *See id*. at p. 11. In accordance with this Agreement, BLI appointed Union Securities as its advisor. *See id*. at pp. 3–4. BLI acknowledged in the Agreement that it was a "Professional Investor," and "warrant[ed] that [it] has such knowledge and expertise in financial matters sufficient to evaluate the risks involved in an investment in [Fairfield Sentry]." *Id*. at p. 3, ¶ 5(c). BLI also indicated that it had "obtained sufficient information from [Fairfield Sentry] or its authorized representatives to evaluate such risks and ha[d] consulted with [its] own advisors and is fully informed as to the legal and tax requirements within the Subscriber's own country (countries) regarding a purchase of the Shares [of Fairfield Sentry]." *Id*. at p. 4, ¶ 8.

The Subscription Agreement expressly incorporated the 2004 PPM and, by amendment, the 2006 PPM (taken together, the "PPMs"). *See id*. at p. 1, ¶ 1. The PPMs clearly highlighted the prominent role of New York-based BLMIS's split strike

conversion strategy (the "SSC Strategy")[5] in Fairfield Sentry's investments. The 2006 PPM clearly stated:

> As a result of the Investment Manager's selection of Bernard L. Madoff Investment Securities, LLC ("BLM[IS]") as execution agent of the split strike conversion strategy, *substantially all of the Fund's assets will be held in segregated accounts at BLM[IS], a U.S. registered broker-dealer and qualified custodian.*

2006 PPM, p. 16 (emphasis added). During those times when BLMIS's SSC strategy was not in the U.S. equity markets, investor funds were used to purchase U.S. Treasury Bills. *See* Compl., ¶ 25. In addition, the PPMs set forth that BLMIS would retain custody of at least 95% of the Fund's assets in the United States and would determine which shares of companies on the S & P 100 would be purchased, as well as the timing of such purchases. *See* 2006 PPM, pp. 9–10 ("Investment Policies"); p. 21, ¶ 17 ("When the Fund invests utilizing the 'split strike conversion' strategy…it will not have custody of the assets so invested."); *see also* 2004 PPM, p. 15 ("BLM[IS] has approximately 95% of the Fund's assets under custody."). The 2006 PPM further clarified that "[t]he services of BLM[IS] and its personnel are essential to the continued operation of the Fund, and its profitability, if any." 2006 PPM, p.

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[5] The SSC Strategy involved entering the U.S. equity markets six to eight times a year through the purchase of shares of companies composing the S & P 100 and OEX 100 put options, along with the sale of OEX 100 call options. *See* 2006 PPM, pp. 9–10.

10. Fairfield Sentry's investment manager, Fairfield Greenwich (Bermuda) Ltd., had the discretion to invest less than 5% of the fund's net asset value outside of BLMIS's SSC strategy, with the rest going to BLMIS. *Id*. ("The Investment Manager, in its sole and exclusive discretion, may allocate a portion of the Fund's assets [ ] never to exceed, in the aggregate, 5% of the Fund's Net Asset Value").

The Agreement further memorializes the connections between BLI and New York in several additional ways. *First*, BLI "agree[d] that any suit, action or proceeding…with respect to this Agreement and [Fairfield Sentry] may be brought in New York" and "irrevocably submit[ted] to the jurisdiction of the New York courts with respect to any [p]roceeding." Subscription Agreement, p. 6, ¶ 19. *Second*, the Agreement specified that it "shall be governed and enforced in accordance with the laws of New York, without giving effect to its conflict of laws provisions." *Id*. at p. 5, ¶ 16. *Third*, the Agreement required that all subscription payments from BLI to Fairfield Sentry pass through Fairfield Sentry's New York HSBC bank account. *Id*. at pp. 1–2. *Finally*, BLI specified that all redemption payments from Fairfield Sentry Investments "should be wired only to" to JPMorgan Chase Bank, New York at 270 Park Avenue, New York, N.Y. 10017, USA. *Id*. at p. 11, ¶ 30(g).[6]

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[6] BLI either delivered the subscription documents or sent them by courier to Fairfield Sentry c/o Citco Fund Services (Europe) B.V., Telestone 8—Teleport, Naritaweg 165, 1043 BW Amsterdam, The Netherlands. *See* Tsai Decl., ¶ 11.

Subscription and Redemption Payments

On January 4, 2007, BLI transferred $10 million in subscription payments to Fairfield Sentry. *See* Tsai Decl., ¶ 10. On December 1, 2007, BLI transferred an additional $30 million in subscription payments to Fairfield Sentry. *See id*. In accordance with the Agreement, BLI sent the subscription payments from its JPMorgan account in Taiwan, through its accounts with JPMorgan Bank in London (the "London JPMorgan Accounts")[7] to a JPMorgan account in New York (the "New York JPMorgan Account"), to a New York account with HSBC Bank held by Citco for Fairfield Sentry (the "New York HSBC Account"). *See* Subscription Agreement, pp. 1–2, 11. The funds were then transferred to Fairfield Sentry's account with Citco Bank Nederland N.V., Dublin Branch in Ireland (the "Dublin Citco Account"). *See* Long Decl., Exs. 5, 6. Given that at least 95% of Fairfield Sentry's funds had to be invested in U.S. Securities utilizing BLMIS's SSC Strategy, *see* 2006 PPM, pp. 9–10, funds deposited in Fairfield Sentry's Dublin Citco Account were transferred to the New York HSBC Account and then to BLMIS's account at JP Morgan Chase in New York, *see* Long Supp. Decl., Ex. 5; Compl., ¶ 3.

On July 4, 2008, a BLI representative in Taiwan submitted a redemption request via fax to Fairfield Sentry's administrator, Citco Fund Services (Europe) B.V. ("Citco") in the Netherlands, specifying that

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[7] One of BLI's London JPMorgan Accounts was a USD account. *See* Supplemental Declaration of Tsai, Chung–Chun ("Tsai Supp. Decl.") (Dkt. No. 39), ¶ 3.

redeemed funds should be wired to the New York JP Morgan Account. *See* Tsai Decl., ¶ 15; Tsai Supp. Decl., ¶ 6, Ex. A.

Shortly before the redemption request, on May 5, 2008, Fairfield Sentry withdrew $80 million from its BLMIS accounts. *See* Compl., Ex. B. On July 10, 2008, Fairfield Sentry withdrew an additional $20 million, for a total of $100 million. *See id*. As alleged by the Trustee in the Complaint, this $100 million was utilized by Fairfield Sentry to make redemption payments to its shareholders, including but not limited to, BLI. *See* Compl., ¶¶ 34, 41, Exs. B, C.

On August 18, 2008, following receipt of funds originating from BLMIS's JPMorgan Account, Fairfield Sentry sent $42,123,406, an amount equivalent to the principal BLI invested with a 5% return, from the Dublin Citco Account to the New York HSBC Account, on to the New York JPMorgan Account and then to BLI's JPMorgan account in London. *See* Long Supp. Decl., Ex. 2; Tsai Supp. Decl., Ex. A. In honoring BLI's redemption, Fairfield complied with the wiring instructions BLI had specified in the Agreement and in its redemption request by sending the redemption payments to the New York JPMorgan Account specified by BLI. *See* Subscription Agreement, p. 11; Tsai Supp. Decl., Ex. A.

Procedural History

On September 22, 2011, the Trustee filed the Complaint against BLI to recover the $42,123,406 BLI received as a subsequent transferee from Fairfield Sentry. On November 23, 2011, counsel for

the Trustee requested that the Clerk of the Court serve process on BLI pursuant to 28 U.S.C. section 1608(b)(3)(B) by mailing a copy of a summons (the "Summons") and Complaint, along with a certified Chinese translation of each, and an order setting the time to respond (Dkt. No. 6). On December 6, 2011, the Clerk certified that BLI was served via Federal Express Priority Mail with a copy of the Summons, Complaint, and an order setting the time to respond (Dkt. No. 7). On February 3, 2012, Ettelman & Hochheiser, P.C. filed a motion to dismiss on BLI's behalf (Dkt. No. 10). On April 19, 2012, the Trustee filed an opposition to the motion to dismiss (Dkt. No. 16). On May 2, 2012, Lowenstein Sandler PC filed a Substitution of Counsel and Notice of Appearance (Dkt. No. 19), followed by a 35–page reply brief on June 14, 2012 (Dkt. No. 38). On July 16, 2012, the Trustee filed a sur-reply brief (Dkt. No. 45). A hearing was held on August 8, 2012.

* * *

For purposes of this Motion to Dismiss, the material facts alleged by the Trustee in the Complaint are accepted as true. All reasonable inferences should be drawn in favor of the plaintiff. *See Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995). The Court "may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits," *Reiss v. Societe Centrale Du Groupe Des Assurances Nationales*, 235 F.3d 738, 748 (2d Cir. 2000) (quotation omitted), and consider "all pertinent documentation submitted by the parties," *Pilates, Inc. v. Pilates Inst., Inc.*, 891 F. Supp. 175, 178 n. 2 (S.D.N.Y. 1995) (quotation omitted).

DISCUSSION

The Trustee's Complaint against BLI cannot be dismissed because (i) this Court has subject matter jurisdiction under the FSIA, (ii) this Court has personal jurisdiction over BLI, (iii) the Trustee may pursue recovery from BLI as a subsequent transferee because the initial transfers from BLMIS to Fairfield Sentry are avoidable, and (iv) the Trustee's claims are not barred by the presumption against extraterritoriality. The Court addresses each point in turn.

I. THE COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO THE FSIA

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). Under the FSIA, foreign states are "presumptively immune from the jurisdiction of United States courts; unless a specified exception applies." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). In the absence of such an exception, federal courts lack subject-matter jurisdiction over claims against foreign states. *Id.*

In evaluating whether a defendant is entitled to sovereign immunity under the FSIA, the defendant carries the initial burden of setting forth a *prima facie* case that it is a foreign state. *See Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993). If this showing is made, the burden shifts to the plaintiff, who must then produce evidence to

demonstrate that immunity should not be granted under exceptions to the FSIA, "although the ultimate burden of persuasion remains with the alleged foreign sovereign." *Id*.

a. BLI IS A "FOREIGN STATE" UNDER THE FSIA

The initial dispute centers on whether BLI qualifies as a "foreign state" entitled to immunity under the FSIA. The Act defines a "foreign state" as a "political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). BLI has produced evidence in the form of affidavits that it is an "agency or instrumentality" of the ROC. As averred in the affidavits, BLI (i) is a "political branch of the ROC in charge of the labor safety policies and handling of investments of the Labor Insurance Fund," Tsai Decl., ¶ 4, (ii) was created for a national purpose, namely "to protect Taiwan workers' livelihood and promote social security, as well as services related to social insurance, labor protection, and social welfare allowances," *id*. ¶ 2, and (iii) was established in accordance with Articles 4 and 5 of the Taiwan Labor Insurance Act to handle labor insurance affairs "under the direct authority of the Council of Labor Affairs of the Taiwan Executive Yuan, the executive branch of the government of the Republic of China." *Id*.; *see also Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004) (finding the Korean Deposit Insurance Corporation to be a foreign state because, *inter alia*, it was a Korean governmental institution formed by statute, performed functions traditionally performed by the government and many of its operations were overseen by the Korean government).

In an attempt to rebut this evidence, the Trustee argues in a footnote that BLI failed to provide sufficient proof that it is a foreign state. *See* Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC's Memorandum in Response to Defendant Bureau of Labor Insurance's Motion to Dismiss ("Tr. Opp.") (Dkt. No. 16), p. 5, n. 2. Yet, a "plaintiff cannot defeat a claim of immunity under the FSIA by simply arguing that more proof is required to prove 'agency or instrumentality' status." *Kao Hwa Shipping Co., S.A. v. China Steel Corp.*, 816 F. Supp. 910, 915 (S.D.N.Y. 1993). Rather, the Trustee must specifically rebut BLI's persuasive evidence, which the Trustee has failed to do. *See id*. Moreover, it appears that the Trustee conceded at oral argument that BLI is a foreign state. *See* Transcript dated August 8, 2012 (Dkt. No. 48) ("Transcript"), p. 34, lines 12–13 ("Clearly investment by a foreign state's instrumentality, like we're dealing with in this case…."). In light of the above, the Court finds that BLI is a foreign state and is thus immune from jurisdiction unless the Trustee can show that one of the exceptions to the FSIA applies.

b. THE THIRD CLAUSE OF THE COMMERCIAL ACTIVITY EXCEPTION APPLIES

The Trustee contends that BLI is not immune from jurisdiction because all three clauses of the commercial activity exception under the FSIA apply. This exception denies immunity to a foreign state in any case in which the underlying action is based:

> [i] upon a commercial activity carried on in the United States by the foreign state; or [ii] upon an

> act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2); *Republic of Argentina v. Weltover*, 504 U.S. 607, 611, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992).

The Court finds that it has subject matter jurisdiction over the instant action under at least the third clause of the commercial activity exception. Under this clause, a foreign state is subject to suit in the United States where the suit is based upon an act (i) that occurs outside the United States in connection with a commercial activity of the foreign state outside the United States, and (ii) causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2); *Weltover*, 504 U.S. at 611, 112 S.Ct. 2160.

i. Commercial Activity And The Act

In evaluating whether this third clause applies, the Court first addresses whether BLI's investment activity with Fairfield Sentry constitutes "commercial activity" under the Act. Congress has left much latitude to courts to determine which state acts constitute commercial activity under the FSIA. *See NML Capital, Ltd. v. The Republic of Argentina*, 680 F.3d 254, 258 (2d Cir. 2012) (finding that the legislative history of the FSIA "explicitly asserts the congressional intention to leave to the courts … a great deal of latitude in determining what is a

commercial activity for purposes of [the FSIA].") (quotation omitted).

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The basic inquiry in determining whether an activity is "commercial" is "whether the activity is of the type an individual would customarily carry on for profit." *De Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984). Therefore, "a state engages in commercial activity … where it exercises only those powers that can also be exercised by private citizens as distinct from those powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360, 113 S.Ct. 1471 (quotation omitted). The Supreme Court has found, for example, "a foreign government's issuance of regulations limiting foreign currency exchange" to be a sovereign activity "because such authoritative control of commerce cannot be exercised by a private party," while "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Weltover*, 504 U.S. at 614–15, 112 S.Ct. 2160; *see also* H.R. Rep. 94–1487 at 6615 (1976), 1976 U.S.C.C.A.N. 6604, 6615 (noting that "commercial activity" under the FSIA includes a foreign government's "investment in a security of an American corporation").

Here, as BLI's investment activity, including buying and redeeming shares from Fairfield Sentry, could have been carried out by a private individual for profit; such activity did not involve the use of

powers peculiar to sovereigns.[8] Accordingly, BLI's investment activity in Fairfield Sentry constitutes commercial activity under the FSIA.

With respect to the necessary "act" under the statute, BLI's signing of the Agreement and sending out the corresponding subscriptions payments, as well as making the redemption request, constitute acts that transpired outside of the United States in connection with BLI's commercial activity. The Court now addresses whether these acts had a direct effect in the United States.

ii. Direct Effect in the United States

The Second Circuit has called for courts to liberally construe what constitutes "direct effect in the United States" to provide access to courts for

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[8] Although never formally argued, BLI presented evidence that it made its redemption request for a national purpose: "BLI was requested by the Council of Labor Affairs of the executive branch of the ROC to redeem the overseas investment and return the cash to ROC to stabilize the operation of Labor Insurance Fund." Tsai Decl., ¶ 14. Whether a state acts as a private party, however, is a question of behavior rather than motivation. *See Saudi Arabia*, 507 U.S. at 360–61, 113 S.Ct. 1471. "In other words, the relevant inquiry concerns the power that is exercised, rather than the motive for its exercise." *NML Capital, Ltd. v. the Republic of Argentina*, 680 F.3d 254, 259 (2d Cir.2012). Accordingly, an assertion of a governmental motive or national purpose does not change the fact that BLI engaged in conduct in which a private party could customarily engage for profit. Indeed, "it is irrelevant *why* [BLI]" made the investments and requested the redemptions "in the manner of a private actor; it matters only that it did so." *Weltover*, 504 U.S. at 614, 617, 112 S.Ct. 2160.

plaintiffs who have been wronged. *See, e.g., Texas Trading & Mill. Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981) ("Courts construing either ['direct' or 'in the United States'] should be mindful … of Congress's concern with providing 'access to the courts' to those aggrieved by the commercial acts of a foreign sovereign….") (citation omitted) (overruled on other grounds). Courts should inquire whether the United States has an interest in the action such that "Congress would have wanted an American court to hear the case." *Id*. at 313.

The Supreme Court has found that "an effect is direct if it follows as an immediate consequence of the defendant's … activity." *Weltover*, 504 U.S. at 618, 112 S.Ct. 2160 (quotation omitted); *see also Martin v. Republic of S. Africa*, 836 F.2d 91, 95 (2d Cir. 1987) ("The common sense interpretation of a 'direct effect' " within the meaning of section 1605(a)(2) "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption.") (quotation omitted). To establish a direct effect in the United States, the United States "need not be the location where the *most* direct effect is felt, simply a direct effect." *Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127, 133 (2d Cir. 1998) (emphasis in original). Courts tend to refrain from finding a direct effect, however, if such effect in the United States is merely fortuitous or incidental, playing only a tangential role in the lawsuit. *See, e.g., Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993) (finding no direct effect where "the sole act connected to the United States[,] … the drawing of a check on a bank in New York, was entirely fortuitous and

entirely unrelated to the liability of the appellees"); *United World Trade v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237 (10th Cir. 1994) (finding no direct effect where "the defendants' performance of their contractual obligations had no connection at all with the United States").

Here, BLI's actions caused a direct effect in the United States by causing a two-way flow of funds to and from New York-based BLMIS: *to* BLMIS for investment in U.S. Securities and U.S. Treasuries and *from* BLMIS in the form of profits from those investments. This flow of funds in the form of subscription and redemption payments into and out of BLMIS in the United States via Fairfield Sentry was part of a specific investment structure explicitly set forth in the Subscription Agreement and the PPMs.[9] These documents stated that: (i) Fairfield Sentry was required to invest at least 95% of its assets in the Split Strike Conversion Strategy utilized and controlled by BLMIS in New York; (ii) BLMIS was to act as sub-custodian of these assets, holding them in segregated accounts in New York; and (iii) BLMIS was to invest these assets in U.S. Securities and Treasuries.

In light of this structure, upon signing the Subscription Agreement, BLI triggered the transfer

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[9] BLI was aware of this investment structure, not only because it read and executed these Agreements as a self-proclaimed "Professional Investor," *see* Subscription Agreement, p. 3, ¶ 5(c), but also because BLI hired a consultant, Union Securities, to conduct diligence on Fairfield Sentry and its investment strategies, see Long Decl., Exs. 1, 2.

of $40 million in subscription payments from its account in Taiwan to Fairfield Sentry through New York banks, ultimately to be held and invested by BLMIS. So, too, in making its redemption request, BLI triggered a transfer of over $42 million (including over $2 million in profit) from BLMIS's accounts in New York, through New York banks, finally to BLI abroad.

This movement of money to and from BLMIS in the United States, as contemplated by the Agreements, was not fortuitous or incidental; instead, it was "the ultimate objective" and the "*raison d'etre*" of the Agreement between BLI and Fairfield Sentry. *Filetech S.A. v. France Telecom, S.A.*, 212 F. Supp. 2d 183, 197 (S.D.N.Y. 2001). Indeed, these transfers form the basis for the Trustee's entire suit; the Trustee would not have brought this lawsuit but for them. These transfers, therefore, "bear[ ] a jurisdictionally relevant relationship to the [instant] cause[ ] of action." *Broadfield Fin., Inc. v. Ministry of Fin. of the Slovak Republic*, 99 F. Supp. 2d 403, 406 (S.D.N.Y. 2000). In sum, BLI's acts causing the flow of funds to and from BLMIS in New York for the purpose of investment and profit are sufficient to satisfy the direct effects test under the commercial activity exception of the FSIA.[10]

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[10] In addition, BLI's redemption request directly resulted in a sizeable financial loss for (i) a United States entity, BLMIS, and (ii) BLMIS customers who will receive less of a distribution from the Trustee's customer fund if the $42 million were to remain with BLI. At oral argument, counsel for BLI cited to

1. BLI's Counterarguments Are Unavailing

BLI advances several arguments against finding that BLI's commercial activity abroad had a direct effect in the United States, none of which are persuasive. *First*, BLI contends that the Trustee has failed to identify any transfer from BLMIS that was a direct effect of BLI's redemption request, having submitted only a hefty exhibit to his Complaint without parsing out the individual transfers. Such contention is erroneous, as the Trustee has sufficiently identified such transfers. In particular, the Trustee showed that on May 5, 2008, Fairfield Sentry withdrew $80 million from its BLMIS accounts and then withdrew an additional $20 million on July 10, 2008, for a total of $100 million. *See* Compl., Ex. B. The Trustee has alleged that Fairfield Sentry used this $100 million to make redemption payments to its shareholders, including but not limited to, BLI's redemption payment on

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Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993): "[T]he fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the [direct effect] exception." *See* Transcript, p. 16, line 25; p. 17, lines 1–3. *First*, as demonstrated above, BLMIS's financial loss is not the only direct effect BLI's actions had in the United States. *Second*, *Antares* is distinguishable because there, the entire tort upon which the lawsuit was based transpired in Nigeria; the only nexus to New York was the money paid from a New York bank account to Nigeria. Here, in contrast, the Trustee's lawsuit is based entirely on the transfers of funds themselves in and out of New York-based BLMIS.

August 18, 2008 in the amount of $42,123,406. *See* Compl., ¶¶ 34, 41, Exs. B, C.[11]

Second, BLI suggests that the transfer of $42,123,406 was not an "immediate" effect of the redemption request because (i) "45 days elapsed between BLI's July 4, 2008 redemption request to Citco in the Netherlands and Fairfield's August 18, 2008 transfer of $42,123,406 to BLI," Reply Memorandum of Law in Further Support of Defendant Bureau of Labor Insurance's Motion to Dismiss the Complaint ("BLI Reply") (Dkt. No. 38), p. 18, and (ii) Fairfield Sentry acted as an intervening factor, *id*. at pp. 17–18 ("To the extent Citco or Fairfield [Sentry], in response to BLI's redemption request, elected to fund the redemption of BLI's shares by requesting BLMIS in New York to transfer funds to Fairfield [Sentry], such intervening acts broke the chain of causation between *BLI's* redemption request and any direct effect in the United States.") (emphasis in original). BLI's arguments regarding immediacy are incorrect because there were no intervening acts that broke

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[11] BLI then argues that the sequence of these transfers shows that there was no direct effect between BLI's redemption request and Fairfield Sentry's honoring of its request. Yet, as explained *supra*, BLI's "acts" taken together, including signing of the Subscription Agreement, making subscription payments and making a redemption request, had a direct effect in the United States because, as contemplated by the Agreements, they caused money to flow (i) from BLI to Fairfield Sentry to BLMIS in the form of subscription payments and (ii) from BLMIS to Fairfield Sentry to BLI in the form of redemption payments.

the chain of causation between BLI's redemption request and any direct effect in the United States. *See Martin*, 836 F.2d at 95 (finding a consequence is "immediate" when there is "no intervening element, but, rather, flows in a straight line without deviation or interruption") (quotation omitted). Here, money flowed from subscribing shareholders to Fairfield Sentry, and ultimately to BLMIS (95% of the funds), and then back from BLMIS to Fairfield Sentry, and ultimately to the redeeming shareholders, which was the exact investment structure to which BLI consented through its execution of the Agreement and the PPMs. As such, despite a 45–day delay, the redemption request was "immediate." In addition, to explain this time lag, the Trustee pointed out at oral argument that in accordance with the Agreements, redemption requests were made by the 15th day of the month, shares were valued as of the end of the month, and payment took place 15 days later. *See* Transcript, p. 40; lines 15–20.

Finally, BLI posits that the Trustee has not satisfied the direct effect requirement because he has failed to point to a "legally significant act" *in the United States* that had a direct effect in the United States. To that end, BLI cites cases for the proposition that legally significant aspects of the lawsuit must occur within the United States. *See, e.g., Hanil*, 148 F.3d at 133; *Antares*, 999 F.2d at 36. The Second Circuit has recently clarified,[12] however,

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[12] Indeed, cases decided before and shortly after *Weltover* caused confusion because a requirement of performance of a legally significant act "in" the United States "would conflate the provisions of the third clause with those of the second clause" of

that it is not necessary for the legally significant acts to have transpired in the United States. *Guirlando*, 602 F.3d at 76 ("[W]e do not interpret the 'legally significant act' test as one requiring that the foreign state have 'performed' an act 'in the United States.' "). Rather, courts now hold that the legally significant acts test "requires that the conduct having a *direct effect* in the United States be *legally significant conduct* in order for the commercial activity exception to apply." *Id*. at 77 (emphasis in original) (internal quotation omitted). BLI's acts outside of the United States, including signing the Subscription Agreement, making subscription payments, and making its redemption request, constitute legally significant acts that form the basis for the Trustee's instant action.

At bottom, this is not a situation where "the ripples caused by an overseas transaction manage eventually to reach the shores of the United States." *Virtual Countries, Inc. v. Republic of S. Africa*, 300 F.3d 230, 236 (2d Cir. 2002). Rather, BLI intended to profit from BLMIS in New York through investments in Fairfield Sentry. As a result, the United States clearly has an interest in this action such that Congress would have wanted an American court to hear the case.

For the reasons explained above, BLI's Motion to Dismiss for lack of subject matter jurisdiction is DENIED.

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section 1605(a)(2). *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76 (2d Cir. 2010).

II. THE COURT HAS PERSONAL JURISDICTION OVER BLI

While the Second Circuit recently confirmed that foreign states are not "persons" that can "avail themselves of the fundamental safeguards of the Due Process Clause," *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 399–400 (2d Cir. 2009) (quotation omitted), it remains unclear, however, whether agencies and instrumentalities of foreign states enjoy due process protections. *See id.* at 400 ("[H]olding that a sovereign state does not enjoy due process protections does not decide the precise question in this case, because SOCAR is not a sovereign state, but rather an instrumentality or agency of one."). This Court need not resolve the exact status of BLI, however, because "in any event … the due process requirements have been met here." *Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127, 134 (2d Cir. 1998).

In order to be subjected to personal jurisdiction in the United States, due process requires that a defendant have sufficient minimum contacts with the forum in which defendant is sued "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[13] *Int'l*

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[13] There are two types of personal jurisdiction; general and specific. Under the facts, it is clear that there is no general jurisdiction because BLI did not have "continuous and systematic" contact with the U.S. Accordingly, the Court conducts an analysis only as to whether it has specific jurisdiction over BLI.

Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)); *see also Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991). These minimum contacts must represent some "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *Parex Bank v. Russian Sav. Bank*, 116 F. Supp. 2d 415, 422 (S.D.N.Y. 2000); *see also Picard v. Cohmad Sec. Corp. (In re BLMIS)*, 418 B.R. 75, 80 (Bankr. S.D.N.Y. 2009) (finding that for the exercise of specific jurisdiction, minimum contacts exist "where a foreign defendant purposefully direct[s] his activities at residents of the forum and the underlying cause of action arise[s] out of or relate[s] to those activities") (alteration in original) (quotation omitted). "The defendant's activity need not have taken place within the forum, and a single transaction with the forum will suffice." *Picard v. Maxam Absolute Return Fund, L.P. (In re BLMIS)*, 460 B.R. 106, 117 (Bankr. S.D.N.Y. 2011) (citations omitted). While a choice of law clause is not always dispositive as to personal jurisdiction, *see Zibiz Corp. v. FCN Tech. Solutions*, 777 F. Supp. 2d 408, 421 (E.D.N.Y. 2011), it "is a significant factor in a personal jurisdiction analysis because the parties, by so choosing, invoke the benefits and protections of New York law," *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 23 (2d Cir. 2004).

BLI argues that its due process rights would be violated if it were subjected to this Court's personal jurisdiction due to its "isolated contacts with the United States." Memorandum of Law in Support of Defendant's Motion to Dismiss ("BLI Mem. Law") (Dkt. No. 10), p. 8.[14] "Indeed, it would be unfair to force BLI to defend itself in the United States for simply having funds which it invested in an entity outside of the United States and ultimately ended up in an account located at BLMIS." *Id*. at 11.

BLI's argument is disingenuous because BLI's investments in Fairfield Sentry did not merely "end up" in an account at BLMIS as a result of happenstance or coincidence. Rather, BLI

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[14] To support this point, BLI emphasizes that various isolated banking arrangements, standing alone, are insufficient to establish personal jurisdiction under the FSIA. *See, e.g., Licci v. Am. Exp. Bank. Ltd.*, 704 F. Supp. 2d 403, 407 (S.D.N.Y. 2010) (holding that a foreign defendant must have more of a connection to the forum state than "mere maintenance" of a correspondent or intermediary bank account there to suffice for personal jurisdiction); *Canadian Grp. Underwriters Ins. Co. v. M/V "Arctic Trader"*, No. 96–9242, 1998 WL 730334, at *3 (S.D.N.Y. Oct. 19, 1998) ("*Standing alone*, the existence of a bank account is insufficient to exercise jurisdiction over a foreign defendant in New York, especially where the function of the account is only to wire funds to an overseas bank.") (emphasis added). As detailed above, the New York accounts through which the subscription and redemption payments passed were not merely maintained by BLI, nor is personal jurisdiction over BLI rooted in the mere existence of these accounts. Instead, as the Trustee's allegations make clear, BLI directed its investment towards the forum State, thereby purposefully availing itself of the benefits and protections of New York laws.

purposefully availed itself of the benefits and protections of New York laws by knowing, intending and contemplating that the substantial majority of funds invested in Fairfield Sentry would be transferred to BLMIS in New York to be invested in the New York securities market. BLI not only was a self-proclaimed "Professional Investor," but also hired Union Securities to conduct diligence on Fairfield Sentry and its investment strategies. *See* Long Decl., Exs. 1, 2. As part of this diligence, BLI was furnished with a private placement memorandum and other information about Fairfield Sentry, including specifics about the Fund's investment strategy and past results and trades in the S & P 100. *See* Long Decl., Ex. 1, pp. 1–6, 10. On BLI's behalf, Union Securities learned that the Fund's "strategy is executed by [BLMIS]," *id.* at 2, and the PPM highlighted BLMIS's central role in Fairfield Sentry's investment strategy, *see id.* at Ex. 4, p. 15. It explicitly stated that (i) Fairfield Sentry was required to invest at least 95% of its assets in the SSC utilized and controlled by BLMIS in New York; (ii) BLMIS was to act as custodian of these assets, holding them in segregated accounts in New York; and (iii) BLMIS was to invest these assets in U.S. Securities and Treasuries. *Id.*; 2006 PPM, p. 21; *see* Compl., ¶ 3; Subscription Agreement, p. 1, ¶ 3, Ex. 6.[15] Armed with the fruits of this diligence, BLI

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[15] Further evidencing the strong nexus with New York, the Agreement contains a New York choice of law clause and a New York forum selection clause. *See* Subscription Agreement, pp. 5, 6 (indicating the Agreement "shall be governed and enforced in accordance with the laws of New York, without giving effect to

signed the Subscription Agreement, which incorporated the PPMs.

In a nutshell, BLI invested tens of millions of dollars in Fairfield Sentry with the specific purpose of having funds invested in BLMIS in New York, and intended to profit from this U.S.-based investment. As such, BLI cannot claim a violation of its due process rights from having to appear in a New York court to defend itself in a suit arising from activities with a clear New York nexus. *See In re BLMIS*, 460 B.R. at 119 (finding no serious burden "where [the defendant's] counsel is in New York and there is a U.S. nexus to its economic activities, and given that 'the conveniences of modern communication and transportation' also militate against finding hardship based on lack of proximity") (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129 (2d Cir. 2002)). Accordingly, this Court has personal jurisdiction over BLI.

As a final jurisdictional argument, BLI asserts that this Court lacks both subject matter and personal jurisdiction because BLI invested only in Fairfield Sentry, never directed its funds to BLMIS, and, in fact, had no contact with BLMIS. In support of its point, BLI cites to *In re Aozora Bank Ltd.*, 480 B.R. 117 (S.D.N.Y. 2012), contending that when it purchased ownership interests in Fairfield Sentry, (i) the investment became the sole property of Fairfield Sentry, which exercised exclusive control over the

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its conflict of laws provisions" and requiring BLI to "irrevocably submit[ ] to the jurisdiction of the New York courts").

investment and directed the money to BLMIS, and (ii) the investors had no direct control over the funds and did not directly invest the money in BLMIS.

BLI's argument is erroneous because it conflates the concept of jurisdiction with the notion of a "customer" under SIPA, two entirely different standards requiring completely different analyses.[16] That BLI intended to purposefully avail itself of the forum warrants a finding of personal jurisdiction over BLI, but does not necessarily warrant any finding regarding customer status under SIPA. *See SIPC v. BLMIS (In re Bernard L. Madoff)*, 454 B.R. 285, 301 n. 22 (Bankr. S.D.N.Y. 2011) (holding that "in light of the nature of the … investments in the Feeder Funds," intent to invest ultimately with BLMIS is "of no consequence" to this Court's finding regarding customer status).

* * *

Having addressed jurisdiction, the Court now turns to two issues of first impression; (i) whether the Trustee, as a matter of law, may recover from BLI as a subsequent transferee ("Avoidance Issue"), and (ii) whether the Trustee's claims are barred by the presumption against extraterritoriality

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[16] Indeed, the *Aozora* court never addressed jurisdiction; it analyzed only which parties are entitled to SIPA customer claims. *See* 2012 WL 28468, at *3.

("Extraterritoriality Issue").[17] Before delving into the merits, a brief background is appropriate.

On May 18, 2009, the Trustee filed a complaint against the initial transferee, Fairfield Sentry, seeking, *inter alia*, the avoidance of all transfers from BLMIS to Fairfield Sentry during the six year period prior to the Filing Date totaling $3,054,000,000. *See* Adv. Pro. No. 09–1239, Dkt. No. 1. Shortly thereafter, the Eastern Caribbean Supreme Court in the High Court of Justice of the Virgin Islands (the "BVI Court") entered an order initiating the wind up of Fairfield Sentry. On May 9, 2011, the Trustee and the Fairfield Sentry Joint Liquidators at that time entered into a written settlement (the "Settlement" or "Settlement Agreement")[18] wherein Fairfield Sentry (i) agreed to

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[17] Judge Rakoff of the United States District Court, Southern District of New York, has withdrawn the reference in certain adversary proceedings to adjudicate these issues. The Extraterritoriality Issue has been fully briefed and oral argument was held on September 21, 2012. The Avoidance Issue is in the process of being briefed and oral argument is scheduled for November 30, 2012. *See* 12–MC–00115 (JSR) (Dkt. Nos. 167, 314). As BLI never moved to withdraw the reference and is not a party to the aforementioned adversary proceedings, these issues remain before this Court. In a recent order, Judge Rakoff noted that "to the extent that the issues overlap, whichever court reaches its issue first can provide guidance for the other." *See* Order, 12–MC–00115 (JSR) (Dkt. No. 214). In the instant decision, this Court addresses only those arguments presented before it.

[18] *See* Form of Agreement Between the Trustee and Kenneth Krys and Joanna Lau, Solely in Their Respective Capacities as the Foreign Representatives for and Joint Liquidators of Fairfield Sentry Limited, Fairfield Sigma Limited and Fairfield

pay $70 million to the Trustee, (ii) reduced its customer claim by nearly $730 million and (iii) entered into a consent judgment against it in favor of the Trustee for the entire amount of the initial transfers sought to be avoided by the Trustee (totaling $3,054,000,000). The Settlement Agreement stated that "the Judgments may be used by the Trustee to prosecute a Subsequent Transferee Claim, and then for the purpose of establishing the avoidance of the Withdrawals." Settlement Agreement, ¶ 24.

On June 10, 2011, following a hearing on the Trustee's Bankruptcy Rule 9019 Motion[19], this Court approved the Settlement conditioned upon its approval by the BVI Court. On June 24, 2011, the BVI Court approved the Settlement and on July 13, 2011, this Court entered the consent judgment against Fairfield Sentry. BLI incorrectly asserts that the consent judgment was the product of improper collusion and "collaboration among liquidation trustees with one common goal, settle the current dispute and go after secondary transferees." BLI

Lambda Limited [hereinafter "Settlement" or "Settlement Agreement"], Adv. Pro. No. 09–1239, Dkt. No. 69, Att. 2 (Ex. A).

[19] Motion for Entry of Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002(a)(3) and 9019(a) of the Federal Rules of Bankruptcy Procedure Approving an Agreement by and Between the Trustee and Kenneth Krys and Joanna Lau, Solely in Their Respective Capacities as the Foreign Representatives for and Joint Liquidators of Fairfield Sentry Limited, Fairfield Sigma Limited, and Fairfield Lambda Limited [hereinafter "Bankruptcy Rule 9019 Motion"] (Adv. Pro. No. 09–1239, Dkt. No. 69).

Mem. Law, p. 14. Instead, the Settlement was the result of a court-approved settlement process that (i) recognized the limited funds available to recover from an insolvent entity, and (ii) avoided the gratuitous costs and delays involved in adjudicating to judgment the Trustee's claims against Fairfield Sentry. *See* Bench Memorandum and Order Granting Trustee's Motion for Entry of Order Approving Agreement (Adv. Pro. No. 09–1239, Dkt. No. 92), p. 3. In approving the Settlement, this Court acknowledged that part of the value of the settlement was the consent judgment, which allowed the Trustee to seek recovery of funds against other parties in the future. *See id.* at p. 4 ("[T]he Trustee's and the Foreign Representatives' proposed joint litigation strategies provide for the assignment of claims, and allocation of recoveries, to the BLMIS estate, enhancing the Trustee's ability to achieve the substantially greater sums from third parties for ultimate distribution to creditors and customers of the BLMIS estate."). As set forth *infra*, the Court also recognized and preserved the rights of subsequent transferees to raise defenses and contest the avoidability of the initial transfers. *See* Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002 and 9019(a) of the Federal Rules of Bankruptcy Procedure Approving an Agreement By and Among the Trustee and Kenneth Krys and Joanna Lau, Solely in Their Respective Capacities as the Foreign Representatives for and Joint Liquidators of Fairfield Sentry Limited, Fairfield Sigma Limited, and Fairfield Lambda Limited, p. 3.

With respect to the Avoidance Issue and the Extraterritoriality Issue, BLI seemingly moves to

dismiss under Rule 12(b)(6), which allows a party to move to dismiss a cause of action for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6); FED. R. BANKR. P. 7012(b). When considering a motion to dismiss under Rule 12(b)(6), a court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *E.E.O.C. v. Staten Island Sav. Bank*, 207 F.3d 144, 148 (2d Cir. 2000).

The Court now turns to the merits of these issues.

III. THE TRUSTEE MAY PURSUE RECOVERY FROM BLI AS SUBSEQUENT TRANSFEREE UNDER SECTION 550 OF THE CODE BECAUSE THE INITIAL TRANSFERS FROM BLMIS TO FAIRFIELD SENTRY ARE AVOIDABLE

The issue before the Court is whether Section 550 requires a trustee to formally avoid an initial transfer to permit recovery against a subsequent transferee or if the mere avoidability of such transfer is sufficient.

Section 550 provides:

> [T]o the extent that a transfer is avoided under [an avoidance provision in the Code], the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders,

> the value of such property, from … (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a). BLI argues that the Trustee is barred from seeking recovery from BLI as a subsequent transferee because the Trustee, having entered into a settlement agreement, did not obtain a full and final judgment of avoidance against the initial transferee, Fairfield Sentry. The Court disagrees. Under these circumstances, the Trustee may recover from BLI under Section 550 because the Trustee timely filed a complaint against Fairfield Sentry alleging that the initial transfers from BLMIS to Fairfield Sentry are "avoidable" under section 548 of the Code. *See Official Comm. of Unsecured Creditors of M. Fabrikant & Sons, Inc. v. J.P. Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.)*, 394 B.R. 721, 741 (Bankr. S.D.N.Y. 2008) ("Avoidable … describes a transaction that can be voided … but that is valid until annulled.") (quotations and citations omitted). Indeed, the majority of courts have found that Section 550 requires a transfer be avoidable; it does not require a trustee to litigate a final judgment of avoidance against initial transferees before seeking recovery from subsequent transferees. 5 COLLIER ON BANKRUPTCY, ¶ 550.02[1] at 550–6 (16th Ed. 2011) ("The better view, adopted by the majority of courts is that … a recovery may be had from a subsequent transferee without suing the initial transferee."); *see, e.g., IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs., Inc.)*, 408 F.3d 689, 708 (11th Cir. 2005) ("Section 550(a) does not mandate a plaintiff to first pursue recovery against the initial transferee and

successfully avoid all prior transfers against a mediate transferee."); *Kendall v. Sorani (In re Richmond Produce Co.)*, 195 B.R. 455, 463 (N.D. Cal. 1996) ("[O]nce the trustee proves that a transfer is avoidable under section 548, he may seek to recover against any transferee, initial or immediate, or an entity for whose benefit the transfer is made.") (emphasis added); *Woods & Erickson, LLP v. Leonard (In re AVI, Inc.)*, 389 B.R. 721, 735 (9th Cir. BAP 2008) ("[A] trustee is not required to avoid the initial transfer from the initial transferee before seeking recovery from subsequent transferees under § 550(a)(2)."); *In re M. Fabrikant & Sons, Inc.*, 394 B.R. at 745–46 ("The plaintiff can proceed directly against the [subsequent transferees] and "avoid" the initial transfer as to them."). Further, there is nothing in Section 550 suggesting "that recovery from immediate transferees is in any way dependent upon a prior action or recovery against the initial transferee…. On the contrary, avoidability is an attribute of the transfer rather than that of the creditor." *In re Richmond Produce Co.*, 195 B.R. at 463 (quotation omitted).

Only one district court case in the Second Circuit has addressed this issue. *See Enron Creditors Recovery Corp. v. Int'l Fin. Corp. (In re Enron Creditors Recovery Corp.)*, 388 B.R. 489 (S.D.N.Y. 2008). In *Enron*, the bankruptcy court was confronted with a situation where it was impossible and impractical for the trustee to obtain a judgment of avoidance against the initial transferee, CLO Holdings, "because there was no CLO Holdings and there was no CLO trustee. The special purpose entity [CLO] … had been collapsed." *See In re Enron*

Creditors Recovery Corp., Hearing Transcript (Enron Transcript), No. 07–6597, Dkt. No. 32, Apr. 16, 2008, at p. 17, lines 21–24. As such, while the district court agreed with the bankruptcy court that Section 550 usually requires a formal avoidance of a transfer before permitting recovery from a subsequent transferee, it emphasized that it was "necessary to leave open the possibility of an exception where[,] for legal or practical reasons[,] it is *impossible or impractical* to satisfy the precondition of an avoidance." *See* Enron Transcript at p. 37, lines 15–25; p. 38, lines 1–10 (emphasis added).

In essence, the district court found that Section 550 must be construed flexibly to avoid harsh and inequitable results. Specifically, it noted that "two [sic] ready an application of the requirement of the condition precedent can amount to forfeiture. And in this application it would bar the trustee from seeking recovery of assets that arguably should be recovered for the bankrupt … and the creditors thereof." *Id*. at p. 38, lines 11–15; *see also id*. at p. 38, lines 16–21 ("[W]e are involved with statutory extensions of laws of equity and I think we should inform the way that the bankruptcy code and rules are interpreted not in the feasance of literal terms, but, certainly, where there is sufficient ambiguity to allow such we can satisfy *both literal rule and equity*….") (emphasis added).

The *AVI* court echoed the district court's sentiments that Section 550 "should be interpreted to provide flexibility." *In re AVI, Inc.*, 389 B.R. at 735. In the context of settlements in particular, it relied on such flexibility to "avoid [the] absurd result" of precluding a trustee from "pursuing

subsequent transferees after settling with an initial transferee who does not admit liability." *Id.* (emphasis added). The court emphasized that "Congress could not have contemplated this outcome in enacting § 550" because it would lead to trustees having "little incentive to partially settle avoidance actions, thereby running up the costs of litigation and causing further delay." *Id.*

Under the present circumstances where a settlement is at play, rigidly construing Section 550 to require a formal avoidance against Fairfield Sentry before permitting recovery from BLI makes little sense. It was "impractical" for the Trustee to obtain such a judgment against Fairfield Sentry because it would have entailed protracted, expensive litigation with an insolvent entity in the midst of a liquidation proceeding with little chance of meaningful recovery.[20] *See* Affidavit of Irving H. Picard,[21] (Adv. Pro. No. 09–1239) (Dkt. No. 71), Attachment 5, Ex. D, ¶¶ 4, 7 (Trustee attesting that, using his business judgment, he believed it preferable to settle with Fairfield Sentry rather than engage in an exercise of futility to litigate to a full

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[20] As a result of the Settlement, the Trustee is entitled to recover only $70 million, a mere two percent of the approximately $3 billion consent judgment against Fairfield Sentry. *See* Settlement Agreement, ¶¶ 1–2.

[21] Affidavit of Irving H. Picard, Trustee, In Support of Motion for Entry of Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002(a)(3) and 9019(a) of the Federal Rules of Bankruptcy Procedure Approving Agreements Between the Trustee and Greenwich Sentry, L.P., and Greenwich Sentry Partners LP.

and final judgment of avoidance). In addition, such a requirement would lead to the "absurd result" of forcing the Trustee to choose between engaging in such burdensome litigation with the insolvent initial transferee on the one hand, or forever forfeiting the right to recover from all subsequent transferees on the other. To avoid such an impractical result, the Court construes Section 550 flexibly to require only avoidability to pursue recovery from BLI.

The above notwithstanding, the Trustee will still be required to prove that the transfers from BLMIS to Fairfield were fraudulent and improper in connection with its suit against BLI as subsequent transferee because the Trustee's Settlement with Fairfield Sentry did not involve any determination on the merits as to the initial transfers.[22] So, too, BLI will be afforded its due process rights to contest the avoidability of these initial transfers. *See Dye v. Sachs (In re Flashcom, Inc.)*, 361 B.R. 519, 525 (Bankr. C.D. Cal. 2007) ("[A] stipulated or default judgment entered in an avoidance action does not preclude the defendants in a recovery action from disputing the avoidability."); *Thompson v. Jonovich (In re Food & Fibre Protection, Ltd.)*, 168 B.R. 408, 416 (Bankr. D. Ariz. 1994) (finding that a default judgment did not preclude defendants from asserting their due process rights to dispute avoidability of the initial transfer and raise whatever defenses were

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[22] In fact, there was an express denial of liability with regard to the initial transfers. *See* Settlement Agreement, ¶ 24 ("This Agreement … will not be deemed to be a presumption, concession or admission by any Party of any fault, liability or wrongdoing whatsoever.").

available to the initial transferee); *Morris v. Emprise Bank (In re Jones Storage and Moving, Inc.)*, No. 00–14862, 2005 WL 2590385 (Bankr. D. Kan. Apr. 14, 2005). That BLI should be afforded this right to dispute is a notion the Trustee does not contest. *See* Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC's Memorandum in Response to Defendant Bureau of Labor Insurance's Motion to Dismiss (Dkt. No. 16), p. 29 ("[T]hese cases merely hold that subsequent transferees' rights to due process afford them the opportunity to contest the avoidability of initial transfers, to the extent that issue was not fully adjudicated in a prior proceeding—a proposition that the Trustee does not contest.").

BLI further argues that since the Settlement did not constitute a true avoidance, it failed to trigger the one-year statute of limitations under section 550(f) of the Code. *See* 11 U.S.C. § 550(f) (stating the trustee must initiate recovery actions against subsequent transferees within "one year after the avoidance of the transfer"). To avoid the absurd result of section 550(f) of the Code never starting to run, BLI asserts that "the Court should apply the two-year statute of limitations contained in 11 U.S.C. § 546(a) to the Trustee's claims against BLI." *See* BLI Reply, p. 27; 11 U.S.C. § 546(a)(1)(A) (stating the trustee must initiate an avoidance proceeding within two years after entry of the bankruptcy petition). BLI contends that since the Trustee's Complaint against BLI was filed over two years after the bankruptcy petition, the suit is time-barred. BLI's arguments in this regard are erroneous. Although the Settlement does not constitute a formal

avoidance of the initial transfer from BLMIS to Fairfield, it presents the Court with finality with respect to Fairfield Sentry. This finality triggers the relevant one-year statute of limitations under section 550(f) of the Code. Without such a trigger, the Trustee would be permitted to bring suit against a subsequent transferee for an indefinite amount of time, a highly inequitable result. *See ASARCO LLC v. Shore Terminals LLC*, No. C 11–01384, 2012 WL 2050253, at *5 (N.D. Ca. June 6, 2012) (finding that a judicially approved settlement triggered the statute of limitations because any other result "would undermine the certainty that statutes of limitations are designated to further," and because otherwise "the statute of limitations would be indefinite because a triggering event might never occur"). Whether the Court looks at the date that (i) the Trustee's Bankruptcy Rule 9019 Motion was granted (June 7, 2011), (ii) a final order from this Court approving the Settlement was entered (June 10, 2011), (iii) a final order from the BVI court approving the Settlement was entered (June 24, 2011), or (iv) a consent judgment was entered against Fairfield Sentry by this Court (July 13, 2011), the Trustee's suit against BLI, commenced on September 22, 2011, was well within the one-year statute of limitations and is therefore deemed timely.

In light of the above, the Motion to Dismiss on these grounds is DENIED.

IV. THE TRUSTEE'S CLAIMS ARE NOT BARRED BY THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The final issue before the Court is whether the Trustee's claims against BLI under Section 550 are barred by the presumption against extraterritoriality.

The Supreme Court recently reaffirmed the presumption against extraterritoriality, which assumes that, unless Congress indicates otherwise, its legislation applies only within the territorial jurisdiction of the United States. *See Morrison v. Nat. Australia Bank Ltd.*, —— U.S. ——, ——, 130 S.Ct. 2869, 2877, 177 L.Ed.2d 535 (2010) ["*Morrison*"]. This principle "represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate" and "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Id*. As such, "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions." *Id*. (quotations omitted).

In light of this presumption, BLI argues that the Trustee improperly seeks to apply Section 550 extraterritorially to transfers that BLI received from Fairfield Sentry overseas. BLI is incorrect, however, because (i) the Trustee is not seeking to apply Section 550 extraterritorially, making this presumption inapplicable, and (ii) even if the Trustee were seeking to apply this section extraterritorially, Congress expressed clear intent to permit such an application. Accordingly, the Trustee's claims against BLI pursuant to Section 550 are not barred by the presumption against extraterritoriality.

A. The Presumption Against Extraterritoriality Does Not Apply Under These Circumstances

As demonstrated below, in light of the "focus" test annunciated in *Morrison*, in conjunction with pragmatic considerations, the Court finds that the Trustee is not seeking to apply Section 550 extraterritorially and, therefore, the presumption against extraterritoriality is not implicated in the instant Motion to Dismiss.

a. *The "Focus" Test Under* Morrison

In determining whether a statute is being applied domestically or extraterritorially, the Supreme Court in *Morrison* annunciated a transactional test centered on the "focus" of a statute, namely, the "objects of the statute's solicitude," and what the statute "seeks to regulate." 130 S.Ct. at 2883–84. If the acts or objects upon which the statute focuses are located in the United States, application of the statute is domestic and the presumption against extraterritoriality is not implicated, even if other activities or parties are located outside the United States. *See id.* at 2884–85; *SEC v. Gruss*, No. 11–Civ–2420, 2012 WL 1659142, at *8–10 (S.D.N.Y. May 09, 2012) (finding no extraterritorial application where focus of Investment Advisor Act was on investment advisers and fraud was perpetuated by domestic investment advisor against foreign clients); *see also Lapiner v. Camtek, Ltd.*, No. C 08–01327, 2011 WL 445849, at *2 (N.D.Cal. Feb. 2, 2011) (denying motion to dismiss on extraterritorial grounds because focus of act was domestic even though "the conduct on which [the]

plaintiff's claims are based took place outside of the United States, specifically in Israel, and that the majority of [the] stock is, purportedly, held in Israel").

As demonstrated by the text and structure of the avoidance and recovery sections of the Code, their focus is on the improper depletion of the bankruptcy estate's assets. *French v. Liebmann (In re French)*, 440 F.3d 145, 154 (4th Cir. 2006) ("[T]he Code's avoidance provisions protect creditors by preserving the bankruptcy estate against illegitimate depletions."). These avoidance and recovery provisions work in tandem to further the Code's policy of maximizing the value of the bankruptcy estate by permitting a trustee to avoid certain transfers that deplete the estate and recover the payments for the benefit of creditors. *See Lassman v. Patts (In re Patts)*, 470 B.R. 234, 243 (Bankr. D. Mass. 2012) ("These sections of the Bankruptcy Code must be read in conjunction when assessing a trustee's avoidance and recovery action, the purpose of which is to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred."); *see also* 5 COLLIER ON BBANKRUPTCY ¶ 548.01[1][a] (16th ed. 2010) ("[S]ection 548 serves the goal of increased creditor dividends by allowing the estate representative to avoid offending transactions, and bring the property back into the debtors' estate for distributions to creditors.").

Specifically, the focus of the avoidance and recovery sections is on the initial transfers that deplete the bankruptcy estate and not on the recipient of the transfers or the subsequent transfers. For example, the avoidance sections focus

on the transfers themselves, including the timing of the transfers, *see, e.g.*, 11 U.S.C. §§ 547(b)(4), 548(a)(1), (b), their purpose, *see, e.g.*, 11 U.S.C. § 548(a)(1)(A), and their effect on the transferor, *see, e.g.*, § 548(a)(1)(B). Further, the recovery section that governs the Trustee's claims against BLI, Section 550, is titled "Liability of transferee of avoided transfer." 11 U.S.C. § 550; *see Gruss*, 2012 WL 1659142, at *9 ("[A] title of a statute or section can aid in resolving any ambiguity in the legislation's text.") (quotation omitted). It makes no mention of the transfer from the initial transferee to the subsequent transferee; indeed, recovery from a subsequent transferee is grounded solely on the basis of it possessing a fraudulent transfer. *See* 11 U.S.C. § 550. Moreover, as "a court's recovery power is generally coextensive with its avoidance power," it is logical that the relevant transfer for purposes of the presumption against extraterritoriality is only the transfer that is to be avoided, namely the initial transfer. *See Diaz–Barba v. Kismet Acquisition, LLC*, No. 08–CV–1446, 2010 WL 2079738, at *8 (S.D.Cal. May 20, 2010).

Looking at the instant facts, the Trustee's application of Section 550 is domestic because the depletion of the BLMIS estate occurred in the United States. The BLMIS Ponzi scheme was operated in the United States and the funds used to operate the scheme were received and disbursed to investors in the United States. Specifically, the transfers at issue originated from BLMIS's New York JPMorgan Account and went to Fairfield Sentry's New York HSBC Account. These acts, which occurred domestically, are the "objects of the statute's

solicitude," and what the statute "seeks to regulate," *Morrison*, 130 S.Ct. at 2884. As the focus of Section 550 occurred domestically, the fact that BLI received BLMIS's fraudulently transferred property in a foreign country does not make the Trustee's application of this section extraterritorial. *See id*. at 2884–85; *Gruss*, 2012 WL 1659142, at *8–10; *Lapiner*, 2011 WL 445849, at *2.

b. Pragmatic Considerations

In addition, finding that the Trustee could not recover assets fraudulently transferred abroad, as BLI argues, would, from a practical standpoint, render hollow the avoidance and recovery provisions of the Code, an outcome clearly unintended by Congress. In particular, if the avoidance and recovery provisions ceased to be effective at the borders of the United States, a debtor could end run the Code by "simply arrang[ing] to have the transfer made overseas," thereby shielding them from United States law and recovery by creditors. *In re Maxwell Communication Corp.*, 186 B.R. at 816. Congress did not intend for this absurd result of according "an invariable exemption from the Code's operation to those who leave our borders to engage in fraud." *French*, 440 F.3d at 155 (Wilkinson, J., concurring). This is especially so given the prevalence of special purpose offshore entities engaging in financial and commercial activities in the United States. Moreover, "nothing is better settled[ ] than" the responsibility of courts to assure that statutes receive "a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Johnson v. U.S.*, 529 U.S. 694, 707 n. 9, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000)

(quoting *In re Chapman*, 166 U.S. 661, 667, 17 S.Ct. 677, 41 L.Ed. 1154 (1897); *see also Gruss*, 2012 WL 1659142, at *10) (finding congressional silence did not implicate the presumption against extraterritorially because "[n]ot every silence is pregnant…. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent") (quoting *Burns v. U.S.*, 501 U.S. 129, 136, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991)).[23] Accordingly, the Court declines to adopt BLI's position in this regard.

c. Maxwell *is Distinguishable From The Instant Facts*

Although BLI relies heavily on *Maxwell Communication Corp. plc v. Barclays Bank (In re Maxwell Communication Corp. plc)*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994), where the court found Section 547 of the Code could not be applied

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[23] The analysis above applies equally to subsequent transferees. If foreign subsequent transferees were insulated from recovery actions, the avoidance and recovery provisions of the Code would likewise be rendered ineffective. A debtor could engineer transfers to end up in the possession of foreign parties, thus preventing recovery by a trustee. Indeed, "[t]he cornerstone of the bankruptcy courts has always been the doing of equity, and in situations such as this, where money is spread throughout the globe, fraudulent transferors should not be allowed to use § 550 as both a shield and a sword. Not only would subsequent transferees avoid incurring liability, but they would also defeat recovery and further diminish the assets of the estate." *In re Int'l Admin. Servs., Inc.*, 408 F.3d 689, 707 (11th Cir. 2005) (quotation and citation omitted).

extraterritorially, *aff'd sub nom. Maxwell Communication Corp. plc v. Societe General plc (In re Maxwell Communication Corp. plc)*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd on other grounds*, 93 F.3d 1036 (2d Cir. 1996), *Maxwell* is distinguishable on its facts.

First, application of Section 547 was extraterritorial in *Maxwell* because the focus of the statute, depletion of the debtor's estate, occurred abroad; preferential transfers were made by a United Kingdom corporation from its accounts located abroad to recipients also located abroad. *See id.* at 809. Indeed, the *Maxwell* court expressly limited its holding to instances where the Debtor was not a United States entity and the transfers occurred abroad to other foreign entities. *See id.* at 814 ("To be clear, I do not hold today that no debtor may pursue a transfer overseas. What I do hold is that where a foreign debtor makes a preferential transfer to a foreign transferee and the center of gravity of that transfer is overseas, the presumption against extraterritoriality prevents utilization of section 547 to avoid the transfer."); *id.* at 808, n. 13 ("Much as I would relish the opportunity to address whether a debtor which is a U.S. entity could use section 547 to recover a preference made to a foreign creditor, I think it is best to refrain from such *dicta*."). In contrast, application of Section 550 here is domestic because, as discussed *supra*, the depletion of the BLMIS estate occurred in the United States.

Second, the Second Circuit declined to reach whether the presumption against extraterritoriality barred application of Section 547 abroad and ultimately affirmed the lower courts on comity

grounds. *Maxwell*, 93 F.3d at 1054–1055 (electing not to "decide whether, setting aside considerations of comity, the 'presumption against extraterritoriality' would compel a conclusion that the Bankruptcy Code does not reach the pre-petition transfers at issue"). Employing a comity analysis, the Second Circuit held that as *Maxwell* involved a debtor subject to joint insolvency proceedings in the United States and the United Kingdom, "the doctrine of international comity precludes application of the American avoidance law to transfers in which England's interest has primacy." *Id.* at 1055. This reasoning has no applicability to the instant case, where BLMIS is not subject to parallel liquidation proceedings in another court.[24]

In light of the above, the Trustee's application of Section 550 is purely domestic and is therefore not barred by the presumption against extraterritoriality.

B. Congress Expressed Clear Intent For Extraterritorial Application of Section 550

Even if the application of Section 550 were extraterritorial under these facts, which it is not, Congress expressed clear intent for such an

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[24] In addition, comity is an affirmative defense that BLI has the burden of proving. *See Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993). As BLI has not argued that comity concerns prevent the application of Section 550 to its receipt of fraudulent transfers from BLMIS, the Court need not address the issue.

application and the presumption against extraterritoriality "must give way when Congress exercises its undeniable 'authority to enforce its laws beyond the territorial boundaries of the United States.' " *French*, 440 F.3d at 151 (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991)). A statute need not include a clear statement declaring "this law applies abroad" to rebut the presumption, and statutory context may be consulted "in searching for a clear indication of statutory meaning." *U.S. v. Weingarten*, 632 F.3d 60, 65 (2d Cir. 2011) (citing *Morrison*, 130 S.Ct. at 2883). Moreover, "reference to nontextual sources is permissible" and "all available evidence" should be considered in determining congressional intent. *Id.* (quotations omitted); *see also French*, 440 F.3d at 151 ("To determine whether Congress has expressed such an affirmative intention, courts may look to … the text of the statute, the overall statutory scheme, and legislative history."). However, broad boilerplate terms in statutes are insufficient to overcome the presumption against extraterritoriality. *Morrison*, 130 S.Ct. at 2882.

Congress demonstrated its clear intent for the extraterritorial application of Section 550 through interweaving terminology and cross-references to relevant Code provisions. Specifically, (i) "property of the estate," under Section 541, includes all property worldwide; (ii) the avoidance provisions of Sections 544(b), 547, and 548 (the "Avoidance Provisions"), incorporate the language of Section 541—"an interest of debtor in property"—to delineate the extent to which transfers can be avoided, i.e., that which would have been property of the estate but for

the improper transfer can be avoided; and (iii) Section 550 explicitly authorizes the recovery of all transfers that have been avoided, which necessarily includes overseas property.

With respect to Section 541, it defines "property of the estate" as, *inter alia*, all "interests of the debtor in property as of the commencement of the case," 11 U.S.C § 541(a)(1), "wherever located and by whomever held." 11 U.S.C. § 541(a). In accord with the broad language of this section, courts have universally held that property of the estate extends to any property located worldwide. *See, e.g., Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998) (explaining that property of the estate "includes property outside the territorial jurisdiction of the United States"); *Nakash v. Zur (In re Nakash)*, 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (noting that "wherever located" is broadly construed "to include property located in and outside of the U.S.").

The Avoidance Provisions grant a trustee the power to avoid certain prepetition transfers "of an interest of a debtor in property." *See* 11 U.S.C. § 544(b), 547, 548. These sections' reference to the "interest of the debtor in property"—the same term used in Section 541—is not coincidental. Rather, as discussed by the Supreme Court in the context of preferential transfers under section 547 of the Code, property subject to avoidance is defined by "property of the estate" in Section 541. As explained by the Court, section 541 "delineates the scope of 'property of the estate' and serves as the postpetition analog to § 547(b)'s 'property of the debtor.' " *Begier v. I.R.S.*, 496 U.S. 53, 58–59, 110 S.Ct. 2258, 110 L.Ed.2d 46

(1990). This is because (i) " 'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings" and (ii) "the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate." *Id.* at 58, 110 S.Ct. 2258.

In circumstances similar to the instant proceeding, the Fourth Circuit concluded that the Avoidance Provisions' reference to Section 541 also incorporates that section to permit the avoidance of overseas transfers.

> By incorporating the language of § 541 to define what property a trustee may recover under his avoidance powers, § 548 plainly allows a trustee to avoid any transfer of property that would have been "property of the estate" prior to the transfer in question—as defined by § 541—even if that property is not "property of the estate" now. Through this incorporation, Congress made manifest its intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, *wherever that property is located.*

French, 440 F.3d at 151–52 (4th Cir. 2006) (citations omitted) (emphasis altered). Section 548's incorporation of "property of the estate" as defined in Section 541 "is not merely broad, boilerplate language that arguably contemplates application beyond the territorial jurisdiction of the United States." *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 74 (2d Cir. 1994). That is, Congress explicitly

incorporated the language of Section 541 to allow a trustee to maximize recoveries for the bankruptcy estate by permitting the avoidance of any transfer that would have been property of the estate, which necessarily includes assets fraudulently transferred outside the United States. *See French*, 440 F.3d at 152 ("Congress thus demonstrated an affirmative intention to allow avoidance of transfers of foreign property that, but for a fraudulent transfer, would have been property of the debtor's estate.").

Section 550, in turn, allows a trustee to recover any transfer to the extent it has been avoided. *See* 11 U.S.C. § 550. This section's use of the term "transfer" specifically refers to all transfers "avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title." *Id.* As such, by incorporating the avoidance provisions by reference, Section 550 expresses the same congressional intent regarding extraterritorial application. Thus, Congress expressed intent for the application of Section 550 to fraudulently transferred assets located outside the United States and the presumption against extraterritoriality does not apply.

BLI argues that the definition of property of the estate in Section 541 cannot form the basis for the extraterritorial application of the avoidance and recovery sections in the Code because under Second Circuit precedent, fraudulently transferred assets are not property of the estate until they are actually recovered. *See* BLI Reply, p. 32 (citing *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 131 (2d Cir. 1992)). BLI therefore urges this Court to adopt the view of *Barclay v. Swiss Fin. Corp. (In re Midland Euro Exchange, Inc.)*, 347 B.R. 708 (Bankr.

C.D. Cal. 2006), which criticized the holding of *French* for the same reason. *Id.* at 717–18. Both BLI and the court in *Midland Euro Exchange*, however, misunderstand *French*'s holding. In *French*, extraterritorial application of Section 548 was not premised on fraudulently transferred assets constituting actual property of the estate prior to recovery. *See French*, 440 F.3d at 151 n. 2 ("Because we hold that § 548 applies to the transfer in this case even assuming that § 541's definition of 'property of the estate' does not by itself extend to the [fraudulently transferred property], we need not join this dispute [on whether fraudulently transfers are property of the estate prior to recovery]."). Rather, as explained above, Section 548's reference to Section 541 expressed congressional intent to grant the Trustee authority to avoid and recover *all transfers* that, but for a fraudulent transfer, would have been property of the estate, even if not currently property of the estate. This grant of authority includes assets fraudulently transferred overseas because but for the fraudulent transfer, assets located overseas would undeniably be property of the estate.

In light of the above, the Motion to Dismiss on these grounds is DENIED.

CONCLUSION

For the reasons set forth herein, BLI's Motion to Dismiss is hereby DENIED.[25]

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[25] The Court notes that notwithstanding the approach of the Trustee seeking to recover all $42 million from BLI in the instant suit, in light of potential "value" defenses available

IT IS SO ORDERED.

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under the Code, it is conceivable that BLI would be liable only for its net winnings.