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United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Foreign Cases

Statutes

Rules

Other Authorities

STATEMENT OF JURISDICTION

The bankruptcy court had subject-matter jurisdiction under 28 U.S.C. § 1334(b) and 15 U.S.C. §§ 78eee(b)(2)(A) and 78eee(b)(4) over the actions subject to this appeal brought by Irving H. Picard (the "Trustee"), as trustee for the estate of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* ("SIPA"),[1] and the substantively consolidated estate of Bernard L. Madoff ("Madoff"). The district court withdrew the reference to the bankruptcy court under 28 U.S.C. § 157(d).

After the bankruptcy court granted Appellees' motions to dismiss, the Trustee timely appealed the judgments. This Court has jurisdiction under 28 U.S.C. § 158(d)(2).

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[1] Citations in this brief to "SIPA" are to the sections of the Act as codified in Title 15 of the United States Code.

STATEMENT OF THE ISSUES

1. Whether the district and bankruptcy courts erred in ruling that SIPA and the Bankruptcy Code do not permit the recovery of customer property fraudulently transferred by a SIPA debtor based on the presumption against extraterritoriality.

2. Whether the district and bankruptcy courts erred in ruling that "comity of nations" (prescriptive comity) bars recovery from a subsequent transferee of customer property, even if SIPA and the Bankruptcy Code authorize such recovery.

STATEMENT OF THE CASE

I. The Trustee Sued Feeder Funds and Related Defendants to Recover Customer Property

As this Court knows, Madoff executed the largest Ponzi scheme in history. Through BLMIS, and entirely from New York, Madoff stole close to $20 billion from his customers. Madoff purported to employ an investment strategy that relied on the purchase and sale of U.S. securities. A few key employees sent money to and from BLMIS customers, using New York banks. A16255; A17492.

BLMIS customers knew that BLMIS was based in New York. To discuss their accounts, BLMIS customers would contact Madoff or his other employees in New York. *See*, *e.g.*, A16255; A17988. Many BLMIS customers were domestic, but even foreign customers conducted significant business in New York—they used New York banks, or New York personnel, or even had New York offices, often to conduct their "due diligence" on BLMIS. *See*, *e.g.*, A16255; A17498.

In December 2008, the Ponzi scheme collapsed. The Securities Investor Protection Corporation ("SIPC") petitioned for a protective decree placing BLMIS into liquidation in the Southern District of New York and appointing the Trustee. *See SEC v. Madoff*, No. 08-cv-10791 (S.D.N.Y. Dec. 15, 2008), ECF Nos. 5, 6. SIPC filed in New York because BLMIS's principal place of business was in New York. 28 U.S.C. § 1408; SIPA § 78fff(b). As SIPA requires, the district court referred the SIPA liquidation to the bankruptcy court. SIPA § 78eee(b)(4).

In a SIPA liquidation, a trustee focuses on returning property to customers promptly. SIPA § 78fff(a). Here, the Trustee worked to preserve and collect customer property for the benefit of BLMIS's defrauded customers. "Customer property" is a protected fund of property, which the Trustee uses to pay customer claims. SIPA § 78*lll*(2), (4).

The Trustee brought actions to recover customer property, including actions against "net winners" and those who knew about and helped perpetuate the fraud. The latter group included BLMIS feeder funds that invested with BLMIS. The feeder funds include Fairfield Sentry Limited ("Fairfield Sentry"), Fairfield Sigma Limited, and Fairfield Lambda Limited (collectively, the "Fairfield Funds"), Kingate Global Fund, Ltd. and Kingate Euro Fund, Ltd. (collectively, the "Kingate

Funds"), and Harley International (Cayman) Ltd. ("Harley"). The feeder funds withdrew billions of dollars from BLMIS and transferred that customer property to their shareholders, managers, and service providers, including Appellees.

Because the feeder funds were single-purpose entities that invested all or substantially all of their assets with BLMIS, when BLMIS collapsed the feeder funds also collapsed. The Fairfield Funds are being liquidated in the British Virgin Islands ("BVI"); the Kingate Funds are being liquidated in the BVI and Bermuda; and Harley was liquidated in the Cayman Islands. *SIPC v. BLMIS (In re BLMIS)*, No. 08-01789, 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22, 2016) ("*Madoff II*"), SPA238, 257–58.

The Trustee continued to assert his claims against the feeder funds in liquidation. The Trustee sued the Fairfield Funds to recover more than $3 billion they received in fraudulent transfers of customer property. A16237; A17480. The Fairfield Funds had few assets. After months of negotiations, the Trustee and the Fairfield Funds' liquidators (the "Fairfield Liquidators") entered a settlement agreement, A4665, which was approved by the bankruptcy court overseeing the BLMIS liquidation, A17437, and the BVI court overseeing the Fairfield Funds' liquidations. SPA872.

Under the settlement, the Trustee allowed the Fairfield Funds' SIPA claim for $230 million and the Fairfield Funds consented to a $3 billion judgment in favor of the Trustee. A4668. The Fairfield Funds were required to pay the Trustee $70 million and the Trustee would seek to recover the remainder of the $3 billion by bringing subsequent transfer actions against, among others, Appellees. A4669, 4672. Though the Trustee's claims against the Fairfield Funds were recognized in the BVI liquidations, the settlement provided that those claims could be satisfied only through the Trustee's actions against Appellees and after the Trustee shared recoveries with the Fairfield Liquidators. A4670–78.

Although the Fairfield Funds' investors do not qualify as customers under SIPA, they benefit from Fairfield Sentry's $230 million SIPA claim as well as recoveries from the Trustee's claims against Appellees. A4677. To date, the Trustee has paid almost $200 million to Fairfield Sentry. Accordingly, the restitution for Fairfield Fund investors victimized by BLMIS's fraud depends in large part on the success of the Trustee's actions to recover BLMIS customer property.

In April 2009, the Trustee sued the Kingate Funds to recover approximately $900 million in fraudulent transfers of customer property. A2767; A19872. That lawsuit remains pending.

In May 2009, the Trustee sued Harley to recover approximately $1 billion in fraudulent transfers of customer property. A4701. Harley defaulted. A4735. In November 2010, the bankruptcy court entered summary judgment for approximately $1 billion, A4873, which represented the amounts received within two years of BLMIS's collapse. A4717–18; A4730. The Harley liquidation is now closed.

The Trustee's suits against the BLMIS feeder funds' shareholders, managers, and service providers to recover subsequent transfers of customer property are the subject of this appeal. Vital to the funds' investments with BLMIS, the managers and service providers facilitated the transfers from BLMIS to the funds and subsequently to the funds' shareholders. *See*, *e.g.*, A15154–59; A15164; A15171–72; A15190–90; A25488–96; A25515–25; A25757–63. The shareholders knowingly invested in the feeder funds to take advantage of BLMIS's investment strategy involving the purported purchase and sale of U.S. securities. *See*, *e.g.*, A18820–21; A18827; A18833–38; A18843–47; A18849–50. Appellees shared a deliberate intent to profit from BLMIS's purported investment activity in the United States and knew the customer property received from the feeder funds originated from BLMIS, an SEC registered broker-dealer.

II. The Proceedings Below

The purportedly extraterritorial application of the Bankruptcy Code's avoidance and recovery provisions was the subject of three decisions in the BLMIS liquidation.

A. The Bankruptcy Court's Extraterritoriality Decision in *BLI*

In *Picard v. Bureau of Labor Insurance (In re BLMIS)* ("*BLI*"), the Trustee sued a Taiwanese defendant under Section 550 of the Bankruptcy Code to recover subsequent transfers made by Fairfield Sentry to BLI. 480 B.R. 501 (Bankr. S.D.N.Y. 2012), SPA896. BLI moved to dismiss. The bankruptcy court (Lifland, J.) denied the motion, concluding that the focus of Section 550 was on the initial transfer that depletes the debtor's estate, SPA926, that the facts resulted in a domestic application of Section 550, SPA 927–28, and that Congress intended for Section 550 to apply extraterritorially. SPA 930–31.

Applying *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the *BLI* court held that the focus of the Code's avoidance and recovery sections is "on the initial transfers that deplete[d] the bankruptcy estate and not on the recipient of the transfers or the subsequent transfers." SPA927. Thus, BLI's receipt of fraudulently transferred customer property in Taiwan did not "make the Trustee's application of this section extraterritorial." SPA928. The depletion of the BLMIS estate occurred domestically because the transfers at issue originated from BLMIS' JPMorgan Chase Bank account in New York and went to an HSBC Bank plc account in New York used by Fairfield Sentry's administrator. *Id.*

The court alternatively determined that "Congress demonstrated its clear intent for the extraterritorial application of Section 550 through interweaving terminology and cross-references to relevant Code provisions." SPA931. The court noted that, "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." SPA928 (quoting *Maxwell Commc'n Corp. v. Société Générale (In re Maxwell Commc'n Corp.)*, 186 B.R. 807, 816 (S.D.N.Y. 1995) ("*Maxwell I*")).

B. The District Court's Extraterritoriality and Comity Decision

Without citing the *BLI* decision, the district court (Rakoff, J.) reached the opposite conclusion in *SIPC v. BLMIS (In re Madoff Sec.)*, 513 B.R. 222 (S.D.N.Y. 2014) ("*Madoff I*"). SPA204. The district court withdrew the reference to determine "whether SIPA applies extraterritorially, permitting the Trustee to avoid or recover transfers that occurred abroad," SPA10, 15, and directed the parties to engage in consolidated briefing. Like *BLI*, the district court decision concerned the recovery of subsequent transfers made by the BLMIS feeder funds.

Contrary to the conclusion reached in *BLI*, the district court ruled that the "focus" of Section 550(a)(2) was on the transaction between the feeder funds and the subsequent transferees. SPA210. The district court held that the Trustee's recovery suits require an extraterritorial application of Section 550(a), SPA211–12, and the court rejected the argument that Congress intended Section 550(a) to apply extraterritorially. SPA213. The district court further held that SIPA had no impact on its extraterritoriality analysis. SPA216–17. Rather, the court held that SIPA has a predominantly domestic focus. SPA217.

The court alternatively ruled that "international comity" precludes the Trustee's use of Section 550(a) to reach presumed foreign transfers. SPA219–21. The court opined that many of the BLMIS feeder funds were in liquidation in their own countries, which had their own rules concerning disgorgement of transfers. SPA220. The court concluded that comity bars the Trustee from using SIPA to "reach around such foreign liquidations," that investors had "had no reason to expect that U.S. law would apply to their relationships with the feeder funds," and that (based on a choice-of-law analysis) the jurisdictions where the feeder funds were in liquidation have a greater interest in applying their own laws than the United States. SPA221.

The district court remanded the actions to the bankruptcy court for proceedings consistent with its decision. SPA222.

C. The Bankruptcy Court's Extraterritoriality and Comity Decision

On remand, the bankruptcy court acknowledged that it did "not write on a clean slate." SPA228. Interpreting the district court's mandate, the bankruptcy court concluded that "comity of nations" bars the Trustee's recovery of customer property that passed through foreign feeder funds that were the subject of foreign liquidation proceedings. SPA254. Downplaying the U.S. interests as "purely remedial," SPA260, the court concluded that the foreign jurisdictions have a greater interest in the transfers at issue, SPA259–60, and dismissed the Trustee's claims seeking to recover subsequent transfers from the Fairfield Funds, the Kingate Funds, and Harley. SPA261–66.

For the remaining actions where there was no BLMIS feeder fund in liquidation, the bankruptcy court interpreted the district court decision to mandate the dismissal of any claims seeking to "recover subsequent transfers between two foreign entities using foreign bank accounts (without consideration of a U.S. correspondent bank account)." SPA229. On that basis, the court dismissed certain of the remaining claims, while allowing others to continue where the Trustee's allegations of domestic residency, operations, or bank accounts support the inference of a domestic transfer. SPA287–312.

SUMMARY OF THE ARGUMENT

I. The presumption against extraterritoriality does not bar the Trustee's recovery actions. Either of two conditions will justify the application of a U.S. statute to matters involving another country: the case involves a domestic application of the statute, or Congress gave a clear, affirmative indication of its intent to apply the statute extraterritorially. Here, both are true.

The Trustee's suits constitute a domestic application of SIPA and the Bankruptcy Code even if the customer property he seeks to recover was re-transferred abroad. SIPA's focus is on "customer property." The money at issue became customer property upon deposit at BLMIS's bank account in New York and, by operation of SIPA and Securities Exchange Act Rule 15c3-3 (which implements SIPA), never ceased to be customer property. The focus of Sections 548 and 550 of the Bankruptcy Code is on the initial transfers that depleted the BLMIS estate. Those transfers took place in New York.

Furthermore, Congress intended that SIPA and the avoidance and recovery provisions of the Bankruptcy Code give the Trustee extraterritorial recovery powers. As the Fourth Circuit correctly concluded in *French v. Liebmann (In re French)*, 440 F.3d 145 (4th Cir. 2006), the interplay among provisions of Chapter 5 of the Bankruptcy Code shows that Congress empowered trustees to avoid transfers of property, wherever located, that would have been property of the estate but for the transfer. SIPA likewise has extraterritorial application and, indeed, makes explicit that the bankruptcy court's *in rem* jurisdiction extends to "any property transferred by the debtor which, except for such transfer, would have been customer property." SIPA § 78fff-2(c)(3). The policies underlying SIPA, as well as statutory text and structure, support allowing these actions to proceed.

II. Prescriptive comity, also known as "comity of nations," shortens the reach of a statute to avoid unreasonable interference with the sovereign authority of other nations. As an exception to U.S. courts' ordinary obligation to exercise the jurisdiction conferred on them, prescriptive comity should be narrowly confined.

As a threshold requirement for a comity-based dismissal, this Court's bankruptcy cases require a true conflict. It must be impossible for a debtor to comply with U.S. law and that of a foreign jurisdiction covering the same debtor. That is not true here. There are separate proceedings involving BLMIS and the foreign feeder funds, and BLMIS is not subject to parallel proceedings in a foreign court. The U.S. and BVI courts approved a settlement agreement allowing the Trustee and the Fairfield Liquidators to pursue simultaneous actions against subsequent transferees from the Fairfield Funds. Therefore, with respect to Fairfield Sentry—BLMIS's largest feeder fund—any conceivable conflict has been obviated. With respect to Harley, another feeder fund, the lower courts misapplied prescriptive comity by dismissing cases based on the mere theoretical possibility of a foreign lawsuit.

Even if a true conflict existed or was not required, the exercise of U.S. jurisdiction in this SIPA liquidation would be reasonable, making a comity dismissal inappropriate. No precedent justifying deference to foreign liquidation proceedings applies to the situation here. There are no conflicting regulatory regimes with which the parties cannot comply, and Appellees should not be permitted to misuse comity as a shield to liability. In addition, under the factors identified in case law and Restatements, the exercise of U.S. jurisdiction is reasonable. The lower courts failed to consider the U.S. interests inherent under SIPA, the importance of which other courts have recognized. And Madoff, the feeder funds, and Appellees have direct connections to the United States, giving it the predominant interest in these lawsuits.

STANDARD OF REVIEW

Rulings on motions to dismiss under Fed. R. Civ. P. 12(b)(6) and motions for judgment on the pleadings under Fed. R. Civ. P. 12(c) are reviewed *de novo*. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 392 (2d Cir. 2008).

De novo review extends to questions of the interpretation of a federal statute, such as the Bankruptcy Code or SIPA. *Id.*; *see, e.g.*, *Muller v. Costello*, 187 F.3d 298, 307 (2d Cir. 1999). *De novo* review also extends to determinations of foreign law. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 80 (2d Cir. 2002).

To the extent this Court reviews a district court's denial of a motion to dismiss on international comity grounds for abuse of discretion, *see JPMorgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 422 (2d Cir.

2005), it must be borne in mind that "[d]iscretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (citing Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 758 (1982)). For that reason and others, when reviewing a lower court's decision to dismiss a case based on comity because of a foreign proceeding, this Court applies a "more rigorous" abuse-of-discretion standard that is of "little practical distinction" from *de novo* review. *Royal & Sun Alliance Ins. Co. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006) (citations omitted).

To the extent that international comity is a doctrine of (or involves questions of) statutory interpretation, this Court's review is *de novo*. *Bank of N.Y. v. Treco (In re Treco)*, 240 F.3d 148, 155 (2d Cir. 2001).

ARGUMENT

I. The Presumption Against Extraterritoriality Does Not Bar the Trustee's Recovery Actions

The presumption against extraterritoriality is a rule of statutory construction that reflects the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quotation omitted).

In *Morrison*, the Supreme Court articulated a two-pronged test for examining the presumption against extraterritoriality. 561 U.S. at 262–66. One prong requires courts to determine "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). The other requires courts to examine whether "the case involves a domestic application of the statute." *Id.* To do so, courts look to the "focus" of the statutory provision at issue, by identifying the acts that the provision seeks to regulate and the parties or interests that it seeks to protect. *Morrison*, 561 U.S. at 267; *RJR Nabisco*, 136 S. Ct. at 2101. "If whatever is the focus of the provision occurred in the United States, then application of the provision is considered domestic and is permitted." Restatement (Fourth) of Foreign Relations Law of the United States § 203 cmt. c (Am. Law Inst. Tentative Draft No. 3, Mar. 10, 2017) ("Restatement Fourth"). As Judge Bernstein noted, courts apply the prongs in either order. SPA233.

Here, the activities that are the focus of SIPA, and of Sections 548 and 550 of the Code, occurred domestically. In addition, SIPA and Sections 548 and 550 apply extraterritorially.

A. The Trustee's Recovery Actions Are a Domestic Application of SIPA and of Sections 548 and 550 of the Code

In this SIPA liquidation, the Trustee's mandate is to recover all BLMIS customer property, using the tools of avoidance and recovery supplied to him through the Bankruptcy Code, and to distribute that customer property *pro rata* to the debtor's customers. SIPA § 78fff(a) & (b). The Trustee's ability to recover BLMIS customer property transferred to Appellees therefore must be determined by analyzing those claims under both SIPA and the Bankruptcy Code. Looking comprehensively at what SIPA and Sections 548 and 550 seek to regulate demonstrates that the Trustee's suits constitute a domestic application even though the customer property he seeks to recover was transferred abroad.

1. SIPA Is Focused on Customer Property

The focus of SIPA is simple: customer property. In enacting SIPA, Congress created a complete program for protecting customer property.

First, when Congress enacted SIPA, the Securities and Exchange Commission ("SEC") responded by promulgating a rule requiring broker-dealers to safeguard customers' securities and cash in a reserve fund, which would form the corpus of the firm's estate for distribution to customers if the firm went into liquidation under SIPA. Exchange Act Release No. 9856, Adoption of Rule 15c3-3, 37 Fed. Reg. 25224, 25225 (Nov. 29, 1972); Michael P. Jamroz, *The Customer Protection Rule*, 57 Bus. Law. 1069, 1071 (2002). That rule, codified at 17 C.F.R. § 240.15c3-3 ("Rule 15c3-3"), requires that a securities broker-dealer maintain control of securities held for customers, *see id.* § 240.15c3-3(b)–(d), and a "special reserve" bank account in an amount equal to the firm's net cash obligations to customers. *See id.* § 240.15c3-3(a), (e)(1). Rule 15c3-3 ensures that, in the event of a failure, all cash and securities owed by a broker-dealer to its customers are available for return to them. *See* Jamroz, *supra*, 57 Bus. Law. at 1071–74.

Second, Congress empowered SIPC—using the SIPC fund, composed of assessments paid by SIPC members—to advance funds to a SIPA trustee to pay claims of customers. *See* SIPA § 78fff-3(a).

Third, Congress permitted a SIPA trustee to recover customer property using the avoidance and recovery provisions of the Bankruptcy Code (which include Sections 547, 548, and 550). The avoidance and recovery provisions enable a trustee to repay the claims of customers and, if customers are fully satisfied, replenish the SIPC fund in subrogation of its advances. SIPA § 78fff-2(c)(1); *see Picard v. Estate (Succession) of Doris Igoin (In re BLMIS)*, 525 B.R. 871, 886 (Bankr. S.D.N.Y. 2015).

The overall purpose of SIPA is to "protect the public customers of securities dealers from suffering the consequences of financial instability in the brokerage industry." *SEC v. F.O. Baroff Co., Inc.*, 497 F.2d 280, 281 (2d Cir. 1974) (citations omitted). SIPA "was a legislative effort to reinforce the flagging confidence in the securities market by providing an extra margin of protection for the small investor." *SEC v. Packer, Wilbur & Co.*, 498 F.2d 978, 980 (2d Cir. 1974).

Again, SIPA accomplishes these ends through its key concept of "customer property." SIPA § 78*lll*. That concept began with the Chandler Act of 1938 and was carried through to SIPA and its amendments. Pub. L. No. 75-696, 52 Stat. 840–42. In both statutes, the concept of a "single and separate fund" of customer property ensured that customers of a brokerage house are protected first over all other creditors. Customer property is defined as "cash and securities . . . at any time received, acquired, or held by or for the account of a debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted." SIPA § 78*lll*(4).

Here, BLMIS commingled customer property in a single JPMorgan account, from which it made fraudulent transfers to its customers. Those transfers consisted of money that should have been set aside for customers under Rule 15c3-3, but was not. The property was "unlawfully converted" by BLMIS and is, by definition, customer property. *See id*. The Trustee's suits allege that the customer property first transferred by BLMIS can be traced to Appellees, making the property at issue on this appeal customer property. Because SIPA's focus is on customer property, and the funds became customer property upon their deposit with BLMIS in its JPMorgan account in New York, the application of SIPA to the Trustee's actions to recover customer property is domestic.

2. The Focus of Sections 548 and 550 of the Code Is on the Initial Transfers that Depleted the BLMIS Estate

To fulfill the congressional mandate of protecting customers and restoring the fund of customer property, a SIPA trustee is given the powers of a bankruptcy trustee under Section 548 and 550 as well as additional powers. SIPA §§ 78fff-1(a), 78fff-2(c)(1). Section 78fff-2(c)(3) empowers the Trustee to use the avoidance and recovery provisions of the Code to recover any property that was wrongfully transferred by BLMIS. Section 548 allows a trustee to set aside or void fraudulent, initial transfers. 11 U.S.C. § 548(a)(1)(A); *see BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994). Once the initial transfer is avoided, Section 550 allows a trustee to pursue collection remedies. *Christy v. Alexander & Alexander of New York Inc. (In re Finley, Kumble)*, 130 F.3d 52, 56 (2d Cir. 1997). In other words, Section 550(a) requires the amount of liability to be determined "before one can rightfully seek to recover it from any party." *Enron Corp. v. Int'l Fin. Corp. (In re Enron Corp.)*, 343 B.R. 75, 83 (Bankr. S.D.N.Y. 2006), *rev'd on other grounds*, 388 B.R. 489 (S.D.N.Y. 2008). Section 550 imposes liability on the initial transferee, a subsequent transferee, or both.

Section 548 by itself does not bring assets into the estate. Only through the use of Section 550 does a trustee restore the transferred property to the estate. Section 550 is a "utility provision, helping execute the policy of § 548." Edward R. Morrison, *Extraterritorial Avoidance Actions: Lessons From Madoff*, 9 Brook. J. Corp. Fin. & Comm. L. 268, 273 (2014). Thus, Sections 548 and 550 must be read together. *See Lassman v. Patts (In re Patts)*, 470 B.R. 234, 243 (Bankr. D. Mass. 2012).

When Sections 548 and 550 and SIPA are properly read together, their focus is on the return of assets whose conveyance improperly depleted the estate. *See Begier v. IRS*, 496 U.S. 53, 58 (1990); *In re French*, 440 F.3d at 154 ("[T]he Code's avoidance provisions protect creditors by preserving the bankruptcy estate against illegitimate depletions."); *BLI*, SPA927 ("a court's recovery power is generally coextensive with its avoidance power") (citation omitted).

Section 548 provides a means to avoid the initial transfer if it was fraudulent. Section 550, titled "Liability of transferee of avoided transfer," is remedial. 11 U.S.C. § 550. It requires no additional fraudulent transfer. Instead, it focuses on the same fraudulent, initial transfer.

Section 550(a) provides that to the extent a transfer is avoided—meaning the initial transfer from the debtor—the trustee can recover the property transferred from the initial transferee, Section 550(a)(1), or a subsequent transferee, Section 550(a)(2). Section 550(b)(1) provides defenses, also making reference to the "transfer avoided"—meaning the initial fraudulent transfer made by the debtor. 11 U.S.C. § 550(b)(1). "[T]he transfer that the Trustee must prove is avoidable [for purposes of Section 550(a)] is the initial transfer of property by the debtor, not any subsequent transfers of that property to the defendants from whom the Trustee seeks recovery here." *SIPC v. BLMIS (In re Madoff Sec.)*, 501 B.R. 26, 29–30 (S.D.N.Y. 2013) (citations omitted). Thus, the focus of Sections 548 and 550 is on the initial transfers depleting the estate.

Here, the fraudulent, initial transfers of customer property that depleted the estate were made by BLMIS from its JPMorgan bank account in New York. *Madoff II*, SPA235. Because the initial transfers of customer property occurred in the United States, and the focus of Sections 548 and 550 is on the initial transfer, application of Section 550 is domestic. *See BLI*, SPA927–28 (application of Section 550 is domestic as "the depletion of the BLMIS estate occurred in the United States," regardless of any subsequent transfers to foreign third parties); *Spizz v. Goldfarb Seligman & Co. (In re Ampal-Am. Israel Corp.)*, 562 B.R. 601, 613 (Bankr. S.D.N.Y. 2017) ("focus" of avoidance and recovery provisions is on initial transfer depleting property that would belong to the estate).

The district court concluded that the focus of both Sections 548 and 550 is on the property transferred, not the debtor, because a "mere connection to a U.S. debtor, be it tangential or remote, is insufficient on its own to make every application of the Bankruptcy Code domestic." SPA209. In that vein, the district court held that the focus of Section 548 is on the "nature of the transaction" and not on the debtor. SPA210. Likewise, it stated that the focus of Section 550 is on "the property transferred and the fact of its transfer, not the debtor." *Id.* (quotations omitted).

Even if the district court was right that the focus of Section 550 is not on the domestic debtor, but is instead transactional, its conclusion is a *non sequitur*. The transaction on which Sections 548 and 550 focus is the fraudulent, initial transfer that improperly depletes a debtor's estate.[2]

The district court was distracted by the presence of transfers to allegedly foreign parties in the chain of the Trustee's recovery efforts. SPA211. But, just as the fact that "*some* domestic activity is involved in the case" does not automatically make application of a statute domestic, *Morrison*, 561 U.S. at 266 (emphasis in original), so too the fact that some foreign conduct is involved in the case does not mean that the law in question is being applied extraterritorially. *In re*

[2] That this is the correct result is demonstrated by comparing the application of subsections 550(a)(1) and 550(a)(2), which respectively govern recovery from initial and subsequent transferees. It is undisputed that an action to recover avoided transfers from initial transferees, which is governed by subsection 550(a)(1), is a domestic application of the statute, regardless of whether recovery is sought abroad. *See Madoff II*, SPA283. Under the district court's rationale, however, an action to recover avoided transfers from subsequent transferees under subsection 550(a)(2) may be either a domestic or an extraterritorial application, depending on where recovery is sought. *See* SPA210. But there is no support for the notion that subsections (a)(1) and (a)(2) have a different "focus" within the meaning of *Morrison* and *RJR Nabisco*. Rather, a plain reading of the statute shows that the focus of Sections 548, 550(a)(1), and 550(a)(2) is on the initial transfer. Further transferring customer property after the initial transfer, whether between foreign or domestic transferees, does not alter the focus of the statute.

French, 440 F.3d at 149–50. Because the conduct relevant to the focus occurred in the United States, the existence of some "other conduct" that "occur[s] abroad" does not alter the conclusion that this case "involves a permissible domestic application" of the statute. *RJR Nabisco*, 136 S. Ct. at 2101; *Maxwell I*, 186 B.R. at 816 (rejecting the argument that transfers were "foreign" simply because they took place outside U.S. borders).

Here, the conduct that makes the application domestic is the fraudulent, initial transfer of customer property that depletes the estate. The application is domestic because the injury to the BLMIS estate occurred in New York. *See Bascuñán v. Elsaca*, 874 F.3d 806, 821–22 (2d Cir. 2017) ("absent some extraordinary circumstances, the injury is domestic if the plaintiff's property was located in the United States when it was stolen"). The fact that customer property was subsequently re-transferred—sometimes abroad—does not change the domestic focus of SIPA and Sections 548 and 550 here. *See SEC v. Gruss*, 859 F. Supp. 2d 653, 662 (S.D.N.Y. 2012) (finding no extraterritorial application with foreign clients involved in foreign transactions because focus of Investment Advisor Act is on the domestic investment adviser and its actions); *SEC v. ICP Asset Mgmt., LLC*, No. 10 Civ. 4791, 2012 WL 2359830, at *3 (S.D.N.Y. June 21, 2012) (same).

To hold otherwise means that "any streetwise transferee would simply re-transfer the money or asset in order to escape liability." *IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs.)*, 408 F.3d 689, 704 (11th Cir. 2005); *see also Maxwell I*, 186 B.R. at 816 (creditor—foreign or domestic—"who wished to characterize a transfer as extraterritorial could simply arrange to have the transfer made overseas"). There is no basis in policy or law to read the avoidance and recovery statutes to be so easily circumvented.

The conclusion that the application of Section 548 and 550 here is domestic is strongly buttressed by SIPA. SIPA mandates the recovery of customer property. The fact that such property may have been transferred abroad does not change its customer-property nature or diminish the Trustee's mandate to recover it. The only reading of Sections 548 and 550 consistent with the overall purposes and focus of the SIPA and the Bankruptcy Code is one that does not preclude a trustee from recovering avoidable fraudulent transfers of customer property for the benefit of the broker's customers. The Court's role "is to make sense rather than nonsense out of the *corpus juris*." *West Virginia Hosps. v. Casey*, 499 U.S. 93, 101 (1991), *quoted in Maslenjak v. United States*, 137 S. Ct. 1918, 1926 (2017).

B. Congress Intended a SIPA Trustee's Recovery Powers to Apply Extraterritorially

Even if SIPA and Sections 548 and 550 were being applied extraterritorially on these facts, which they are not, this Court should reverse the decisions below because Congress has expressed a clear intent for SIPA and the avoidance and recovery provisions of the Bankruptcy Code to apply extraterritorially.

1. Congress Empowered Trustees under the Bankruptcy Code to Avoid Transfers of What Would Have Been Property of the Estate but for the Transfer

In rejecting the argument that the avoidance provisions of the Bankruptcy Code apply extraterritorially, the district court placed itself in conflict with numerous courts. *In re French*, 440 F.3d 145 (Section 548 applies extraterritorially); *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 543 B.R. 127 (Bankr. S.D.N.Y. 2016) (same); *Emerald Capital Advisors Corp. v. Bayerische Moteren Werke Aktiengeselleschaft (In re FAH Liquidating Corp.)*, 572 B.R. 117 (Bankr. D. Del. 2017) (same). Those other courts reached the correct conclusion.

Sections 548 and 550 of the Code lack an express statement that they apply extraterritorially. But "an express statement of extraterritoriality is not essential." *RJR Nabisco*, 136 S. Ct. at 2102; *see also Morrison*, 561 U.S. at 265. Rather, courts interpret statutes by looking at their context and structure to determine Congress's intent. *See RJR Nabisco*, 136 S. Ct. at 2103 (looking to "structure" of statute); *Morrison*, 561 U.S. at 265 ("Assuredly context can be consulted as well.").

The meaning of a statutory provision is the one that is consonant with the rest of the statute. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). As Justice Scalia once observed for a unanimous Court in a bankruptcy case, "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citations omitted). "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citations omitted); *accord Dada v. Mukasey*, 554 U.S. 1, 16 (2007).

To understand Congress's intent that Sections 548 and 550 apply extraterritorially, start with Section 541 of the Code. No one disputes that Section 541 applies extraterritorially. *See, e.g.*, *Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998). It defines the debtor's estate to include all legal or equitable interests of the debtor in property as of the commencement of the case, "wherever located and by whomever held."

11 U.S.C. § 541. A parallel jurisdictional provision grants the district court exclusive jurisdiction "of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e)(1).

Section 541(a) contains no geographical restriction of any sort, but it does have temporal limitations. This Court has interpreted Section 541(a)(1) to mean that fraudulently transferred property cannot be considered part of the estate until the transfer has been successfully avoided and recovered. *FDIC v. Hirsch (In re Colonial Realty)*, 980 F.2d 125, 131 (2d Cir. 1992) ("[T]he inclusion of property recovered by the trustee pursuant to his avoidance powers in a separate definitional subparagraph clearly reflects congressional intent that such property is not to be considered property of the estate until it is recovered.") (quotations omitted)). Some other courts disagree, *see*, *e.g.*, *American Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266, 1275 (5th Cir. 1983), but the disagreement has no bearing on the proper resolution of this appeal.

The Fourth Circuit's *French* decision follows the correct analysis. Anticipating the analysis later endorsed in *Morrison*, the court applied a two-pronged inquiry, first addressing whether the regulated conduct should be characterized as foreign or domestic, *In re French*, 440 F.3d at 149–51, and then addressing whether Congress intended the Bankruptcy Code's avoidance and recovery provisions to apply extraterritorially, *id*. at 151–152. The court concluded "several indicia of congressional intent rebut the presumption against extraterritoriality." *Id*. at 151.

The strongest indicator of congressional intent was the global reach of Section 541. *In re French*, 440 F.3d at. 151. Because "Section 541 defines 'property of the estate' as, *inter alia*, all 'interests of the debtor in property,'" and Section 548 "allows the avoidance of certain transfers of such 'interest[s] of the debtor in property,'" it "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*." *Id.* (emphasis in original). As the Fourth Circuit explained in a footnote citing this Court's *Colonial Realty* decision, that conclusion is correct even if "property held by third-party transferees only becomes 'property of the estate' *after* it has been avoided and recovered." *Id.* at 151 n.2 (emphasis in original). Because Congress's incorporation of the phrase "property of the estate" in Section 548 "made manifest [Congress's] intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, wherever that property is located," it does not matter whether the property is currently property of the estate. *Id*. at 152.

The district court tried to justify its disagreement with *French* by opining "the logic of *French* is inconsistent with the Second Circuit's decision in *Colonial Realty*." SPA215. But the Fourth Circuit itself noted that its logic is consistent with *Colonial Realty*. *In re French*, 440 F.3d at 151 n.2. And the Fourth Circuit was right. *See* Morrison, *supra*, 9 Brook. J. Corp. Fin. & Comm. L. at 278; *accord In re Lyondell Chem. Co.*, 543 B.R. at 153–54.

Section 541 concerns, among other things, the scope of a trustee's power to avoid transfers of property that, but for the transfer, would have been property of the estate. Section 548 does not require that the property to be recovered *currently* be property of the estate. If it so required, and if (as *Colonial Realty* holds) fraudulently transferred property does not become property of the estate until it is recovered, then Section 548 would never allow any recoveries at all. That is why Section 548 says that a trustee may avoid "an interest of the debtor in property." Section 550 states that, to the extent a transfer is avoided under Section 548, the trustee may recover "the property transferred." Unrecovered fraudulent transfers such as those in this appeal are not yet "property of the estate" under *Colonial Realty*, but they are indisputably "an interest of the debtor in property."

Furthermore, the district court's reasoning would result in outcomes inconsistent with the goals of the avoidance and recovery provisions of the Code. "[I]t is hard to believe that Congress intended for the Code to apply extraterritorially with respect to property of the estate but not to apply extraterritorially with respect to what would have been property of the estate but for a fraudulent transfer." *In re Lyondell Chem. Co.*, 543 B.R. at 153–54; *accord In re FAH Liquidating Corp.*, 572 B.R. at 125–26.

Properly considered as a whole, Chapter 5's text, title, statutory context, and legislative history reveal that Congress designed the avoidance and recovery provisions to allow trustees to recover property of the debtor—wherever located—that was fraudulently transferred by the debtor. "Congress expressed intent for the application of Section 550 to fraudulently transferred assets located outside the United States" whenever such transfers are properly avoided. *BLI*, SPA933. Therefore, "the presumption against extraterritoriality does not apply" to Section 550. *Id*.

2. Congress Intended that SIPA Apply Extraterritorially

The district court erred when it held that Congress did not intend to permit SIPA to apply extraterritorially. SPA216–18. Specific provisions of SIPA and the overall purpose of SIPA demonstrate the opposite.

SIPA extends a bankruptcy court's *in rem* jurisdiction to "property located outside the territorial limits of such court." SIPA § 78eee(b)(2)(A)(i). Moreover, SIPA § 78eee(b)(2)(A)(i) extends the court's jurisdiction to property of the "debtor." SIPA thus goes beyond the language in Section 541 setting forth the

Bankruptcy Code's *in rem* jurisdiction, which refers only to property of the "estate." 11 U.S.C. § 541(a).

SIPA § 78fff-2(c)(3) provides that certain property "shall be deemed to have been the property of the debtor," and therefore subject to the court's *in rem* jurisdiction under the provisions quoted above. Specifically, "the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property" to the extent that the transfer "is voidable or void" under the Bankruptcy Code, and "[s]uch recovered property shall be treated as customer property" and is "deemed to have been the property of the debtor." SIPA § 78fff-2(c)(3)

This very expansive definition of "property of the debtor" is "an intended fiction." *Hill v. Spencer Sav. & Loan Assoc. (In re Bevill Bresler, Inc.)*, 83 B.R. 880, 894 (D.N.J. 1988). Its purpose is "'to enable the trustee to fit the transfer into the provisions of the avoidance sections of the Code.'" *Id.* (quoting 4 Collier on Bankruptcy ¶ 749.02[2], at 749-3 (15th ed. 1987)). Congress deliberately drafted that legal fiction in SIPA § 78fff-2(c)(3), along with SIPA § 78eee(b)(2)(A), to provide SIPA trustees with expansive authority to marshal assets, wherever located, for the benefit of customers when assets are missing, such as when property is missing from Rule 15c3-3 custodial accounts. SIPA § 78fff-1(a).

In *Bevill*, the court used these SIPA provisions to permit a trustee for a failed New Jersey broker-dealer to avoid the debtor's transfer of a customer's securities from one London account to another. 80 B.R. at 897. The court rejected the customer's arguments: that English law controlled the question of title; and that the SIPA trustee had no avoidance power unless English law made the property that of the "debtor" within the meaning of the Bankruptcy Code's avoidance provisions. *Id*. at 895–96. Instead, the court held SIPA § 78fff-2(c)(3) controlled and deemed the transferred securities to be property of the debtor. *Id*. at 895. Besides contravening SIPA's text, the customer's arguments against extraterritoriality ran counter to the purpose of SIPA. *Id.* The court's rejection of them was "bolstered by the fact that in this and many other SIPA liquidations, many of the relevant actions took place inside the United States." *Id*.

The district court rejected *Bevill* as inconsistent with the Supreme Court's later decision in *Morrison*. SPA218. The district court oversimplified the issue, however, when it equated the broader arguments about SIPA to arguments about securities fraud actions (which were at issue in *Morrison*) simply because SIPA is located within the Securities Exchange Act of 1934. SPA218. Extraterritoriality analysis "must be applied separately" to different statutory provisions, even within a single statute such as RICO. *RJR Nabisco*, 136 S. Ct. at 2108; *see id.* at 2106 ("Irrespective of any extraterritorial application of § 1962, we conclude that

§ 1964(c) does not overcome the presumption against extraterritoriality."). As the Supreme Court observed, different provisions could pose different risks of "international friction." *Id.*

In *Morrison*, a so-called "f-cubed" case, the Supreme Court held that because Section 10(b) of the '34 Act does not apply extraterritorially, 561 U.S. at 265, an Australian purchaser could not use Section 10(b) against an Australian company issuing securities traded on an Australian exchange solely because some of the allegedly deceptive conduct occurred, and some of the allegedly misleading statements were made, in Florida. *Id.* at 266. That holding does not undermine the *Bevill* court's holding that a trustee for a U.S. entity may proceed against transactions taking place abroad. The *Bevill* court's holding did not depend on a conclusion that the securities laws in general apply extraterritorially. Its holding depended on SIPA's specific terms and purposes. *Bevill*, 83 B.R. at 896–98. Through SIPA, Congress has regulated SEC-registered broker-dealers holding customer property in a stronger, more specific way than it regulates companies that issue securities.

More generally, the district court rejected the notion that SIPA applies extraterritorially by pointing to provisions of SIPA that evidenced, in its view, a domestic focus. SPA217. As examples, the district court cited SIPA § 78ccc(a)(2)(A)(i), which allows SIPA to exclude foreign broker-dealers from membership, and SIPA § 78*lll*(2)(C)(i), which excludes transactions with foreign subsidiaries of SIPA members from protection. *Id*.

But those provisions have nothing to do with whether Congress intended SIPA to apply extraterritorially. They prohibit SIPC and the fund from initiating a liquidation and or paying customers of non-SIPC members (foreign broker-dealers) who do not pay assessments to SIPC. In fact, foreign brokers registered with the SEC are members of SIPC unless they request an exemption under SIPA § 78ccc(a)(2)(A)(i). Likewise, non-U.S. customers are protected by SIPA if they are customers of U.S. broker-dealers, even when they transact with a non-U.S. affiliate with an account at a U.S. broker-dealer.[3] Congress enacted SIPA to protect the financial assets of the U.S. market and all participants, domestic or foreign, when a U.S. broker-dealer fails to comply with its obligations. H.R. Rep. No. 91-1613, at 1, *reprinted in* 1970 U.S.C.C.A.N. 5254, 5254. That goal is consistent with SIPA's intended purpose to maintain public confidence in the U.S. securities markets. *See SIPC v. Barbour*, 421 U.S. 412, 415 (1975).

Moreover, SIPA contemplates that customer property may be held overseas. Rule 15c3-3 requires broker-dealers to safeguard cash and securities for customers, creates a corpus of customer property, and lists the appropriate custodial locations

[3] *See* SIPA § 78*lll*(2); *see also*, *e.g.*, Securities Investor Protection Corporation, *Investor FAQs*, https://www.sipc.org/for-investors/investor-faqs/#affiliated-non-us-broker-dealer-omnibus (last visited Jan. 9, 2018).

for these accounts, which includes domestic *and* foreign institutions. 17 C.F.R. § 15c3-3(c). A SIPA trustee exercises control over customer property, whether located domestically or in a foreign location.

The district court ignored SIPA's mandate to recover customer property, and failed to engage with the relevant statutory text and purpose. A comprehensive review of SIPA's provisions demonstrates Congress's intent to allow a SIPA trustee to recover customer property, wherever held.

II. Comity Does Not Bar the Trustee's Recovery Actions

A. The Law of International Comity

Comity is an affirmative defense; the party asserting the defense bears the burden of proof. *Drexel Burnham Lambert Grp., Inc. v. Galadari*, 777 F.2d 877, 880 (2d Cir. 1985). "[S]tates normally refrain from prescribing laws that govern activities connected with another state 'when the exercise of such jurisdiction is unreasonable.'" *Maxwell Commc'n Corp. v. Société Générale (In re Maxwell Commc'n Corp.)*, 93 F.3d 1036, 1047–48 (2d Cir. 1996) ("*Maxwell II*") (quoting Restatement (Third) of Foreign Relations Law of the United States § 403(1) (Am. Law. Inst. 1986)) ("Restatement Third").

In this Court, comity "is not an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency." *Altos Hornos*, 412 F.3d at 423 (quotations omitted).

However, "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). Because of that baseline principle, dismissals based on comity must be narrow exceptions.

On May 22, 2017, the American Law Institute approved the Restatement Fourth, which updated the influential Restatement Third published in 1987. Section 204 of the Restatement Fourth states that, "As a matter of prescriptive comity, U.S. courts may interpret federal statutory provisions to include other limits on their applicability." Restatement Fourth § 204. Comment a states that, "Reasonableness," as used in comity case law, "is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law." *Id.* § 204 cmt. a.

This case concerns the doctrine of prescriptive comity, also known as "comity of nations." *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J. dissenting). Comity of nations concerns "the respect sovereign nations afford each other by limiting the reach of their laws." *Id*. A different doctrine, comity of courts or adjudicative comity, concerns deference to foreign courts, allowing a U.S. court to decline jurisdiction in a case "more appropriately adjudged elsewhere." *Id.*; *see Maxwell II*, 93 F.3d at 1047; *Altos Hornos*, 412 F.3d at 424. Appellees have conceded that this appeal concerns only the doctrine of comity of nations. *See* Reply Consolidated Supplemental Memorandum, *In re BLMIS*, No. 08-01789 (SMB) (Bankr. S.D.N.Y. Sept. 30, 2015), ECF No. 11542 at 10, 44–47.

Prescriptive comity shortens the reach of a statute "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). As we will show, there is nothing unreasonable about allowing the Trustee to use SIPA and the Bankruptcy Code in this case.

1. There Is No True Conflict between U.S. and Foreign Law under *Maxwell II*

The existence of a true conflict between U.S. and foreign law is a "threshold requirement" for a comity-based dismissal in a bankruptcy case. *Maxwell II*, 93 F.3d at 1050. The degree of conflict must "rise to the level of a true conflict, *i.e.*, 'compliance with the laws of both countries [must be] impossible,' to justify [] abstention on comity grounds." *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd. (In re Vitamin C Antitrust Litig.)*, 837 F.3d 175, 185 (2d Cir. 2016) (quoting *Hartford Fire*, 509 U.S. at 799), *petition for cert. pending*, No. 16-1220. "No 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 § 403 cmt. e).

As this Circuit has held, in bankruptcy, "a conflict between two avoidance rules exists if it is impossible to distribute the debtor's assets in a manner consistent with both rules." *Maxwell II*, 93 F.3d at 1050. The "threshold requirement of a true conflict" existed in *Maxwell II* because the debtor's transfers were potentially avoidable under U.S. law but not under U.K. law, thus making it impossible "to comply with the rules of both forums." *Id*. Critically, what was at issue in *Maxwell II* was the ability of *the debtor itself* to comply with two different legal regimes. *Id.* It was not an allegation that two different debtors (such as BLMIS and the feeder funds) might be subject to different avoidance rules or different priority schemes.

Here, no conflict like that in *Maxwell II* exists between U.S. and foreign avoidance law. Compliance with the laws of both countries is possible, and there is no "true conflict."

The debtor BLMIS is not subject to parallel proceedings in a foreign court. The bankruptcy court acknowledged that the foreign liquidations were not parallel proceedings involving BLMIS. SPA253–54. Nevertheless, foreign liquidations informed the lower courts' conclusion that those foreign jurisdictions had a greater interest than the United States. *Madoff I*, SPA220; *Madoff II*, SPA254–66.

Maxwell II does not support the lower courts' conclusion. The case turned on *the debtor's* parallel proceedings. *Maxwell II*, 93 F.3d at 1052; *see also,* *Maxwell I*, 186 B.R. at 813 ("The unique aspect and the most important feature of this case for purposes of these appeals is [the debtor's] parallel bankruptcy filings in the courts of two nations."). Accordingly, as Judge Lifland correctly observed, the basis for dismissal in *Maxwell II* "has no applicability to the instant case, where BLMIS is not subject to parallel proceedings in another court." *BLI*, SPA930; *see also In re French*, 440 F.3d at 154 (finding "no danger that the avoidance law of the regulating state—the United States—will in fact conflict with [foreign] avoidance law" in a case where the U.S. debtor was not involved in a parallel proceeding).

Maxwell II also concerned a foreign debtor and foreign transfers. The debtor was incorporated in England and managed from its headquarters in England. 93 F.3d at 1040. Maxwell incurred most of its debts in England, and the preferential transfers that repaid those debts were made in England, pursuant to agreements governed by English law. *Id*. at 1040–41.

The Trustee's cases present the mirror image of *Maxwell II*. The same factors that favored primacy in the U.K. favor U.S. primacy here. *See In re PSINet, Inc.*, 268 B.R. 358, 378 (Bankr. S.D.N.Y. 2001) ("While *Maxwell* plainly holds that United States courts should afford comity when the interests to be advanced are primarily foreign, there is nothing in *Maxwell* that leads the Court to believe that when the exact opposite is true, comity requires a disregard of United States law. . . .").

The district court erred again in stating that the BVI court's rejection of the Fairfield Liquidators' common-law claims was "a determination in conflict with what the Trustee seeks to accomplish here." SPA220. That observation conflates the SIPA liquidation of BLMIS and the feeder funds' foreign liquidations. The foreign liquidations are separate, stand-alone proceedings. They are third-party actions in which the Trustee is not named as a party, just as the foreign liquidators are not named as parties in the Trustee's actions. They involve different claims under a different regulatory regime. The outcome of those proceedings will not resolve the Trustee's claims against Appellees. "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. & Comm. L. at 281.

Furthermore, no foreign court has addressed whether Appellees received transfers in good faith. *See In the Matter of Fairfield Sentry Ltd.*, [2017] BVIHCMAP: 11-16, 23-28 of 2016, (E.C.S.C. Ct. App. Territory of the Virgin Is.), SPA1092 (noting previous decision by Privy Council had addressed issue of value but had not addressed whether NAV certificates were issued or received in bad faith). Under SIPA and the Bankruptcy Code, the Trustee may recover transfers of customer property if Appellees did not receive the transfers in good faith. Accordingly, the BVI courts' prior rejection of the Fairfield Liquidators' claims did not create a conflict with U.S. law.

2. The Fairfield Sentry Settlement Agreement Obviates any Purported Conflict Between U.S. and BVI Law

The application of prescriptive comity to the Trustee's actions against Appellees with Fairfield-related transfers is particularly unwarranted. The BVI and U.S. courts already have obviated any possible conflict.

Any imaginable conflict ceased when the U.S. and the BVI courts approved a settlement allowing the Trustee and the Fairfield Liquidators both to pursue actions against Appellees who received subsequent transfers from Fairfield Sentry. In approving the settlement, the bankruptcy court acknowledged that "the 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 substantially greater sums from third parties for ultimate distribution to creditors and customers of the BLMIS estate." *See* Bench Memorandum and Order, A17434; *see also BLI*, SPA918–19. Because of the settlement, there is "no effort to make an 'end-run' around" the foreign bankruptcy proceeding. *SMP Ltd. v. SunEdison, Inc. (In re SunEdison, Inc.)*, 577 B.R. 120, 131 (Bankr. S.D.N.Y. 2017).

Contrary to the view of the courts below, investors in feeder funds benefit from the Trustee's ability to avoid fraudulent transfers and recover customer property. *See* Transcript Approving Settlement, dated June 7, 2011, A3746–47 ("It is . . . clear to the Court, reviewing the settlement, that there are very substantial benefits . . . accruing to the Fairfield Sentry BVI proceeding and the creditors that are involved there."); *cf. In re Tremont Sec. Law Litig.*, 699 F. App'x 8, 11–13 (2d Cir. 2017) (approving post-settlement plan for benefit of indirect investors of BLMIS). That is why it does not matter that "the Trustee has successfully argued that the investors in feeder funds have no [direct] recourse under SIPA against the BLMIS customer property estate because they were not customers of BLMIS." *Madoff II*, SPA260. It is true that Appellees are not entitled to a customer claim under SIPA. *See SIPC v. BLMIS (In re BLMIS)*, 454 B.R. 285, 290 (Bankr. S.D.N.Y. 2011). However, Fairfield Sentry has an allowed claim for $230 million and shares in the recoveries achieved by the Trustee. A4668. Thus far, the Trustee has paid the Fairfield Liquidators almost $200 million for the benefit of their creditors.

Unsurprisingly, the Fairfield Liquidators have not sought deference. The settlement between the Trustee and the Fairfield Liquidators was a creative cross-border solution that has maximized recoveries for the customers of BLMIS *and* the creditors of Fairfield Sentry. Such cooperation engenders rather than undermines comity among nations. *See Maxwell II*, 93 F.3d at 1053.

3. There Is No Conflict between U.S. and Cayman Law

After Harley defaulted, the Trustee brought actions against Appellees to recover customer property subsequently transferred by Harley. A4701. There is no evidence in the record that Harley's liquidators brought any actions against Appellees or anyone else, before Harley's liquidation in 2015. Nevertheless, the district court precluded the Trustee's claims based on concerns of comity because the Trustee was seeking to "reach around" the Harley liquidation in Cayman. *Madoff I*, SPA220. Dismissal based solely on the *theoretical possibility* of a foreign lawsuit expands the comity defense beyond recognition. The bankruptcy court never identified a conflict between U.S. and Cayman law, and neither of the Cayman decisions cited by the bankruptcy court in its truncated choice-of-law analysis identified such a conflict. *See Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1988) ("A 'substantial claim' [of a true conflict] is insufficient; a conflict must be clearly demonstrated."), *overruled on other grounds*, *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 406 (2d Cir. 2014). The first decision recognized the Trustee as the sole representative of the BLMIS estate in Cayman. *See In re BLMIS*, 2010(1) CILR 231 (Grand Ct. Cayman Is.), SPA869–70. The second decision followed the Trustee's application for information relating to potential causes of action that Harley might have against its administrator Fortis Prime Fund Solutions (IOM) Limited ("Fortis"). The decision rejected the Trustee's application to seal a report from the Harley liquidators concerning their claims against Fortis. *See In re Harley Int'l (Cayman) Ltd.*, 2012(1) CILR 178 (Grand Ct. Cayman Is.), SPA885. Neither decision addresses the validity of the initial transfers Harley received from BLMIS or the subsequent transfers received by Appellees.

The bankruptcy court also relied on a decision from the Cayman court regarding whether U.S. or Cayman law applied to a fraudulent-transfer action brought by the Trustee against Primeo Fund. SPA264–65. The Trustee had sued Primeo Fund in the U.S. bankruptcy court, and Primeo defaulted. The Trustee then sued Primeo Fund in the Cayman Islands to recover the fraudulent transfers under U.S. and Cayman law. The Cayman court held that Cayman law applied to the Trustee's claims brought in the Cayman Islands. *Picard v. Primeo Fund (In Liquidation)*, 2014(1) CILR 379 (Ct. App. Cayman Is.), SPA960–65. However, the court never identified a conflict that would make it impossible to distribute BLMIS's assets in a manner consistent with both sovereign's laws. Instead, the court held that both Cayman and U.S. law provided for the avoidance of fraudulent transfers. *Id*.

B. The Exercise of U.S. Jurisdiction Is Eminently Reasonable in the Circumstances of this Case

Even if this Court believes that there is a "true conflict" or that—notwithstanding *Maxwell II*—comity can justify dismissal in a bankruptcy case without a true conflict, comity dismissals in favor of foreign liquidations have been limited to circumstances not present here. In addition, the guiding principle in applying principles of comity is that dismissal is inappropriate unless the exercise of U.S. jurisdiction would be unreasonable. *Maxwell II*, 93 F.3d at 1047–48 (citing Restatement Third § 403(1)). This case presents no such situation.

1. None of the Typical Circumstances Justifying Deference to Foreign Liquidation Proceedings Is Present in this SIPA Liquidation

When comity arises in the bankruptcy context, an oft-repeated principle is that U.S. courts will defer to a foreign liquidation proceeding to allow for an "equitable, orderly, and systematic distribution of the debtor's assets." *Maxwell II*, 93 F.3d at 1048 (quotation omitted). Even in the bankruptcy context, however, "comity has never meant categorical deference to foreign proceedings." *In re Treco*, 240 F.3d at 157. Here, the lower courts erred by deferring to three foreign liquidation proceedings without a showing that the Trustee's suits interfered with the equitable distribution of a foreign debtor's assets.

In general, the cases in which this Court defers to foreign liquidation proceedings are *adjudicative* comity cases. This is a *prescriptive* comity case.

Specifically, this Court defers if: (1) there are parallel proceedings in the United States and a foreign jurisdiction involving the same debtor, *see, e.g.*, *Maxwell II*, 93 F.3d at 1048; (2) there is a foreign proceeding for a foreign debtor and a U.S. court is being asked to adjudicate a creditor claim or provide relief to the creditor in the United States, *see*, *e.g.*, *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713–15 (2d Cir. 1987); or (3) there is a foreign proceeding for a foreign debtor and the foreign debtor has brought an ancillary Chapter 15 case in a U.S. court, *see*, *e.g.*, *Krys v. Farnum Place (In re Fairfield Sentry Ltd.)*, 768 F.3d 239, 245–46 (2d Cir. 2014). The common thread is that the party seeking deference is the foreign debtor, so that its assets can be equitably distributed in a single proceeding.

In dismissing the Trustee's claims, the bankruptcy court broadly stated that "comity is especially important in the context of the Bankruptcy Code," because deference "promotes the goals of fair, equitable and orderly distribution of the debtor's assets" and because Congress has "recognized the central concept of comity under chapter 15 of the Bankruptcy Code when providing additional assistance to foreign representatives." SPA250–51. That observation, however, conflated the comity-of-courts and comity-of-nations analyses (an error, ironically, that the court elsewhere attributed to the Trustee). The bankruptcy court, for example, relied almost exclusively on comity-of-courts cases in "abstaining" from jurisdiction under a purported comity-of-nations analysis. Regardless, none of the circumstances justifying deference to a foreign liquidation proceeding is present here.

The debtor, BLMIS, is a U.S. broker-dealer in a SIPA liquidation in the U.S. bankruptcy court and is not subject to parallel proceedings in any foreign jurisdiction. The Trustee is not a creditor seeking to do an end run around a foreign proceeding by asking the U.S. court for relief at the expense of any foreign debtor's other creditors. *See*, *e.g.*, *Altos Hornos*, 412 F.3d at 427–29 (dismissing creditor complaint against foreign borrower seeking a judgment regarding ownership of funds); *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir. 1985) (vacating creditor's attachment against foreign debtor's local assets to enable all "the assets of a [foreign] debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion"). The SIPA liquidation is not an ancillary proceeding. *See*, *e.g.*, *In re Treco*, 240 F.3d at 156; *In re Rubin*, 160 B.R. 269, 274 (Bankr. S.D.N.Y. 1993). Finally, neither the BLMIS feeder funds nor those funds' home jurisdictions requested deference. *See Farnum Place*, 768 F.3d at 246 (bankruptcy court erred in deferring to BVI court because "it is not apparent at all that the BVI Court even expects or desires deference in this instance"); *Bigio v. Coca-Cola Co.*, 448 F.3d

176 (2d Cir. 2006) (district court erred in dismissing on comity because foreign government never objected to adjudication by U.S. courts).

The lower courts improperly deferred to three foreign jurisdictions where BLMIS feeder funds are or were in liquidation, out of concern that adjudication of the Trustee's suits would interfere with those foreign liquidations. That approach is backwards. "If any philosophy can be attributed to the structure of the Code it is that of deference to the country where the primary insolvency proceeding is located, *including the United States if the plenary proceeding is located here*, and flexible cooperation in administration of assets." *In re Simon*, 153 F.3d at 998 (emphasis added). The SIPA liquidation in the United States has primacy over the derivative liquidations of BLMIS's feeder funds that followed. The overarching goal of comity in bankruptcy is to allow one nation to collect and distribute a debtor's assets. BLMIS is a U.S debtor being liquidated under U.S statutes. Comity's overarching goal, therefore, can be achieved *only* by enabling the Trustee to marshal and distribute the assets of BLMIS under the auspices of the U.S. bankruptcy court. Deference to the feeder funds' jurisdictions neither assists in the equitable and orderly distribution of BLMIS's assets nor disrupts the equitable and orderly distribution of the feeder funds' assets.

Appellees are not seeking a comity dismissal to ensure the orderly and equitable distribution of assets in the foreign liquidation. Rather, Appellees are seeking to use the third-party funds' foreign liquidation to escape liability altogether. In such circumstances, allowing the suits furthers rather than interferes with the equitable distribution of assets.

In a case involving a Dutch defendant in a U.S. adversary proceeding, the Third Circuit declined to extend comity to a Dutch bankruptcy proceeding because the defendant in the U.S. proceeding was not the foreign debtor and therefore the equitable distribution of the Dutch debtor's assets was not implicated. *Remington Rand Corp. v. Bus. Sys. Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987). Accordingly, the Third Circuit held that the defendant could not use the third-party Dutch bankruptcy proceeding "as a shield" to liability. *Id.*; *see also In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 465–66 (Bankr. S.D.N.Y. 2008).

Similarly, in *In re Kingate Management Ltd. Litigation*, the district court declined to dismiss on comity grounds an investor class action brought against the Kingate Funds' managers and administrators. No. 09-cv-5386 (DSB), 2016 WL 5339538, at *35 (S.D.N.Y. Sept. 21, 2016), The district court noted that the Kingate Funds, not the defendants, were in liquidation in the BVI and Bermuda and that the claims in the class action involved distinct duties owed to the plaintiffs and additional causes of action not asserted by the Kingate Funds' liquidators in their respective liquidations. *Id.* Declining to defer, the court observed that it was "not clear that the normal justification for deferring to foreign bankruptcy proceedings, to allow 'equitable and orderly distribution of a debtor's property,' would apply under these circumstances." *Id*. (quoting *Royal & Sun Alliance Ins. Co.*, 466 F.3d at 93).

Here, the challenged suits do not implicate the equitable distribution of assets in a foreign liquidation. To the extent that an adjudicative comity analysis is even appropriate in a prescriptive comity case, Appellees should not be permitted to use a foreign liquidation as a shield to liability.

2. The Exercise of U.S. Jurisdiction Is Reasonable

In bankruptcy cases, this Court has applied a multi-factor balancing test derived from the Restatement Third to determine whether the application of U.S. law would be unreasonable such that dismissal is required. *Maxwell II*, 93 F.3d at 1048. The Restatement Third factors "correspond to familiar choice-of-law principles" that balance "the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law." *Id.*

Under the Third Restatement, a state shall abstain from the exercise of jurisdiction "when the exercise of . . . such jurisdiction is unreasonable." Restatement Third § 403(1). "[U]nreasonableness is determined by evaluating all relevant factors." *Id.* § 403(2). The Restatement Third factors, as summarized in *Maxwell II*, are:

> the link between the regulating state and the relevant activity, the connection between that state and the person responsible for the activity (or protected by the regulation), the nature of the regulated activity and its importance to the regulating state, the effect of the regulation on justified expectations, the significance of the regulation to the international system, the extent of other states' interests, and the likelihood of conflict with other states' regulations.

93 F.3d at 1048 (citing Restatement Third § 403(2)).

The Fourth Restatement views these factors as consistent with the principle of reasonableness that the Supreme Court has articulated in *Empagran*. *See* Restatement Fourth § 204, Note 4 (discussing choice-of-law analysis in bankruptcy cases). However, the Restatement Fourth also notes that, if Congress intended for a statute to apply extraterritorially (or the application of the statute is domestic), "a U.S. court must apply that provision *even if* doing so would interfere with the sovereign authority of other states." *Id.* § 204 cmt. a (emphasis added). The Restatement Fourth further provides: "Prescriptive comity does not seek to avoid all interference with the sovereign authority of other states, but rather to avoid unreasonable interference with such authority." *Id.* § 204 cmt. b. And interference "may be reasonable if such application would serve the legitimate interests of the United States." *Id.*; *see also Empagran*, 542 U.S. at 165.

Under the factors from *Maxwell II* and the Restatements, the United States has a greater interest than any other jurisdiction in the disputes at issue here, and the Trustee's lawsuits should be allowed to proceed.

a) The Lower Courts Failed to Consider the U.S. Interests Inherent under SIPA

The bankruptcy court held that the foreign jurisdictions in which BLMIS's feeder funds were in liquidation had a greater interest in applying their laws to the transfers at issue than the United States. In support of that holding, the bankruptcy court dismissed the U.S. interests as "purely remedial." SPA260. "Remedial" interests, however, can be every bit as important as any other interest protected by the law. That is why it is often said that there can be no right without a remedy, *e.g.*, *Marbury v. Madison*, 1 Cranch 137, 163 (1803) (citing 3 William Blackstone, *Commentaries on the Laws of England*), and that remedial statutes are to be construed broadly, *e.g.*, *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 58 (2d Cir. 2017).

In any event, the bankruptcy court failed to address the legitimate U.S. interests in the safeguarding of customer property held by U.S.-regulated broker-dealers. The court likewise did not address U.S. interests in using SIPA liquidations as a safety net for customers when their property is missing from their broker-dealers. "Despite the resulting cross-border conflict, the United States has a strong interest in having a United States bankruptcy court resolve issues of bankruptcy law, particularly in a circumstance such as this where the relevant provisions of the Bankruptcy Code provide far greater protections than are available under applicable provisions of foreign law." *Lehman Bros. Special Fin.*

Inc. v. BNY Corp. Tr. Servs. Ltd. (In re Lehman Bros. Holdings Inc.), 422 B.R. 407, 417 (Bankr. S.D.N.Y. 2010); *see also CarVal UK Ltd. v. Giddens (In re Lehman Bros., Inc.)*, 791 F.3d 277, 281 (2d Cir. 2015) (reviewing principles articulated under SIPA), *cert. denied sub nom.*, 136 S. Ct. 1158 (2016).

In 1970, Congress enacted SIPA to restore confidence in the United States securities markets. *See Barbour*, 421 U.S. at 415. Congress designed SIPA to return customer property promptly. *Id*. at 416. SIPA is a hybrid statute, rooted in Section 60e of the old Bankruptcy Act and expanded and tailored by Congress to address the unique problems of stockbroker failures. It is comprehensive in scope. *Supra* at 16.

Numerous courts have recognized the strong U.S. interest in applying the avoidance and recovery provisions incorporated into SIPA, acknowledging that "SIPA reflects an overriding federal policy to protect investors . . . and protect the securities markets as a whole." *Igoin*, 525 B.R. at 886 (quotation marks omitted). "The United States has a strong interest in applying the provisions of its Bankruptcy Code . . . on behalf of all of the creditors and customers in this SIPA proceeding." *Picard v. Chais (In re BLMIS)*, 440 B.R. 274, 281 (Bankr. S.D.N.Y. 2010); *accord Picard v. Cohmad Sec. Corp. (In re BLMIS)*, 418 B.R. 75, 81 (Bankr. S.D.N.Y. 2009).

In the decision below, the bankruptcy court failed to appreciate the interplay of the avoidance and recovery sections of the Bankruptcy Code with SIPA's affirmative mandate to recover and distribute customer property pro rata to a broker's customers. By contrast, prior decisions of the bankruptcy court (Lifland, J.) correctly recognized important U.S. interests under SIPA.

When a subsequent transferee defendant sued the Trustee in the Cayman Islands, seeking a declaration that it was not liable in the BLMIS proceeding for the subsequent transfers, Judge Lifland rejected defendant's comity arguments and enjoined the action. *Picard v. Maxam Absolute Return Fund, L.P. (In re BLMIS)*, 460 B.R. 106, 122 (Bankr. S.D.N.Y. 2011). He determined that the Cayman action threatened "to erode the strong public policies underlying SIPA, namely protecting investors and their faith in the securities market by expeditiously returning customer funds to investors," and challenged the bankruptcy court's exclusive *in rem* jurisdiction over the worldwide estate of BLMIS assets. *Id*. at 123. The district court (Oetken, J.) affirmed, noting that to hold otherwise would "raise doubts about the reliability of America's judiciary in responding to bankruptcies in the American securities markets." *Picard v. Maxam Absolute Return Fund, L.P. (In re BLMIS)*, 474 B.R. 76, 87 (S.D.N.Y. 2012).

The "principal purpose of SIPA" is to protect customers against the financial losses stemming from their broker's insolvency. *Stafford v. Giddens (In re New*

Times Sec. Servs., Inc.), 463 F.3d 125, 127 (2d Cir. 2006). SIPA therefore creates fundamental U.S. interests by giving the Trustee power to sue to recover customer property. The Trustee's action protects BLMIS's customers who invested with the understanding that SIPA would protect their interests—by recovering their customer property—in the event of BLMIS's insolvency. The Trustee must be able to use SIPA and the Bankruptcy Code's fraudulent-transfer provisions to restore the fund of customer property and equitably distribute the assets in the manner consistent with U.S. law. *See Igoin*, 525 B.R. at 886–87.

b) Madoff, BLMIS, the Feeder Funds, and Appellees Have Direct Connections to the United States, Giving it the Greater Interest in these Suits

The lower courts engaged in only a cursory analysis of the interests at stake under the Restatements, and the conclusions they reached were based on either an erroneous view of foreign court decisions or a misimpression of facts that were neither solicited nor allowed to be developed below. Had the courts performed the proper analysis, the only conclusion they could have reached was that U.S. interests predominate.

First, the BLMIS liquidation is pending in the U.S. bankruptcy court under SIPA and other U.S. law, because Madoff operated his Ponzi scheme from the United States. BLMIS was a New York limited liability company and an SEC-registered broker-dealer with a principal place of business in New York. *See, e.g.*, A6454. From New York, Madoff stole billions of dollars from customers, representing that he would invest customer money by purchasing U.S. securities. *See*, *e.g.*, A6753–86.

Second, the BLMIS feeder funds have direct connections to the United States. To varying degrees, their managers operated and controlled the funds from New York. For example, the Fairfield Funds were managed by FGG from New York, A17549–60; and Harley was managed by Fix Asset Management from New York. A18824–26. By contrast, neither the Fairfield Funds nor Harley had offices or employees in the BVI or Cayman Islands, respectively. A17549; A17557; A6678–69.

Third, Appellees' investments in the feeder funds did not end up at BLMIS out of "happenstance or coincidence." *BLI*, SPA914. Appellees knew that BLMIS was a U.S. broker-dealer registered with the SEC and that the feeder funds invested all or nearly all of their assets with BLMIS in New York for investment in U.S. securities. As Judge Lifland correctly observed, Appellees purposefully invested in the feeder funds with "the specific goal of having funds invested in BLMIS in New York." SPA897.

Fourth, the transfers at issue are domestic. The initial transfers that depleted the BLMIS estate were made from BLMIS's bank accounts in New York, and many of the subsequent transfers also passed through or were received by

Appellees in New York. *See*, *e.g.*, A17575–99. Those subsequent transfers were reconveyances of the initial, domestic transfer from the BLMIS estate, and they had a substantial, direct, and foreseeable effect on the BLMIS estate. *See BLI*, SPA908 ("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"). For example, BLMIS wired money from its New York bank account to an account at HSBC Bank plc in New York used by Fairfield Sentry's administrator. A9094–95. The money then traveled to the administrator's account in Dublin, Ireland, before returning to New York for deposit in correspondent, or Appellees' own, bank accounts in New York. A9158. With respect to Harley, BLMIS wired the money to an account held by Harley's administrator at Northern Trust Banking Corporation in New York. A18825–26. Most of the money then stayed in New York. For example, Appellee BNP Paribas Arbitrage SNC received $975 million in Appellee BNP Paribas S.A.'s New York bank account. A18828

Fifth, post-liquidation, Appellees have availed themselves of U.S. law by filing proofs of claim in the SIPA liquidation, *see*, *e.g.*, Objection to Determination of Claim (No. 013751 or 013899) filed on behalf of Appellee National Bank of Kuwait, S.A.K., *In re BLMIS*, No. 08-01789 (SMB) (Bankr. S.D.N.Y. Jan. 6, 2010), ECF No. 1287, participating in the class actions against the feeder funds, *see*, *e.g.*, *In re Tremont Sec. Law Litig.*, 699 F. App'x 8, and filing claims with the

Department of Justice's forfeiture fund. *See* www.madoffvictimfund.com (last visited Jan. 9, 2018). Appellees should not be allowed to take advantage of U.S. laws and at the same time be shielded from U.S. laws.

Sixth, Appellees should have expected that U.S. law would apply to their investments in BLMIS through the feeder funds. The lower courts erred in stating that Appellees "had no reason to expect" that U.S. law would govern the recovery of transfers received from BLMIS. *Madoff I*, SPA221; *Madoff II*, SPA260–61. Many Appellees are U.S. companies, U.S. citizens, or U.S. residents. *See*, *e.g.*, A14107, A21956. Appellees who invested in the Fairfield Funds entered into subscription agreements with New York choice-of-law and venue provisions. *See*, *e.g.*, A17552. Other Appellees entered into custodian agreements with BLMIS or credit agreements with the feeder funds that contained New York venue and choice-of-law provisions. *See*, *e.g.*, A18828. Appellees had no justifiable expectation that the feeder funds' respective liquidations would shield them from U.S. law.

By contrast, no foreign state has a comparable interest in regulating the liquidation of BLMIS or the transfers of customer property the Trustee seeks to recover from Appellees. Of the almost 250 Appellees, only 44 are residents or incorporated in BVI, Bermuda, or the Cayman Islands (*i.e.*, the locations of the feeder funds' liquidations). *See* Exhibits A & B to Order of the United States

Bankruptcy Court for the Southern District of New York (Bernstein, J.), *In re BLMIS*, No. 08-01789 (SMB) (Bankr. S.D.N.Y. Dec. 17, 2014), A4344. Local law prohibited the feeder funds from selling to residents of the respective jurisdictions, unless to international business companies. *See*, *e.g.*, A9150.

In light of the respective U.S. and foreign interests, there is no possible effect on foreign relations if the U.S. bankruptcy court exercises jurisdiction over the Trustee's claims. The Trustee is neither interfering with the legal regimes or policies of the BVI or the Cayman Islands, *cf. In re Vitamin C Antitrust Litig.*, 837 F.3d at 179, 189, nor interfering with their liquidators' interests in winding up the affairs of their domestic funds, *see Cunard*, 773 F.2d at 458. The Trustee's and the liquidators' respective actions can coexist without disrupting the orderly administration of the others' estates. The Trustee and the Fairfield Liquidators are already working together through an agreement approved by the U.S. and BVI courts. *See supra* at 41. With respect to the other BLMIS feeder funds, both actions can proceed simultaneously in the United States and other countries, with the issue of prejudice addressed if Appellees ever face liability to both the Trustee and the foreign liquidators.

Finally, pursuing Appellees in the bankruptcy court under U.S. law is the Trustee's only available remedy. *See Maxwell II*, 93 F.3d at 1052 (comity dismissal was inappropriate because the examiner had "no alternative mechanism for voiding preferences"). Other than a single action against the Kingate Funds' managers, the Trustee has no pending foreign actions against Appellees, and new foreign actions against Appellees would be time-barred.[4]

And, as a practical matter, a bankruptcy trustee typically looks to subsequent transferees under Section 550(a) only where the initial transferee is insolvent. The lower courts' decisions thus take away Section 550(a) where it is needed most. This paradox is particularly evident with regard to the Fairfield Funds: the Trustee has the cooperation of the Fairfield Liquidators and the consent of the BVI court to exercise this remedy.

For all of these reasons, it was error to dismiss any of the Trustee's lawsuits in the name of comity.

CONCLUSION

The judgments of the bankruptcy court should be reversed.

[4] *See In the Matter of Fairfield Sentry Ltd.*, SPA1091 (finding New York an appropriate forum in which to try the Fairfield liquidators' claims against all parties and noting that New York "may be the only forum in which to try them since limitation periods in BVI may operate as a bar.").

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,754 words, excluding the parts of the brief exempted by Rule 32(f).

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