UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. HSBC BANK PLC, et al., Defendants.	Adv. Pro. No. 09-01364 (BRL) **MEMORANDUM OF LAW IN OPPOSITION TO ALPHA PRIME ASSET MANAGEMENT'S, REGULUS ASSET MANAGEMENT'S, AND CARRUBA ASSET MANAGEMENT'S MOTION TO DISMISS**

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Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") and the estate of Bernard L. Madoff ("Madoff"), under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.*, by his undersigned counsel, hereby opposes the December 2, 2011 motion (Docket No. 155) submitted by defendants Alpha Prime Asset Management ("APAM"), Regulus Asset Management ("Regulus"), and Carruba Asset Management ("Carruba") (collectively, the "Moving Defendants") to dismiss the Amended Complaint dated December 5, 2010 ("Am. Compl.") for lack of personal jurisdiction.

I. PRELIMINARY STATEMENT

The Trustee has adequately alleged that this Court has personal jurisdiction over the Moving Defendants. Indeed, as discussed below, the standard for doing so is not particularly restrictive. Although the Moving Defendants are entities incorporated in Bermuda, they conducted business in the United States; they were, in fact, created for the sole purpose of doing business in the United States. Their efforts included the management, approval, and facilitation of investments into Madoff's Ponzi scheme in New York. The Trustee's Amended Complaint alleges that the fees they "earned" for these efforts comprise avoidable and recoverable transfers of Customer Property.[1] These facts, together with the balance of the Trustee's allegations in his Amended Complaint, establish that this Court has personal jurisdiction over the Moving Defendants. The Moving Defendants' motion is an attempt to evade jurisdiction through the mere averment that the Trustee's allegations are not so. The arguments of lawyers cannot

[1] The term "Customer Property" used herein has the same meaning ascribed to it in the Trustee's Amended Complaint in this action.

overcome the Trustee's pleadings—especially at this stage, when the allegations of the Amended Complaint are presumed true. Further, even if the Court were to consider the affidavits submitted by the Moving Defendants in support of their motion, those affidavits fail to deprive this Court of personal jurisdiction over the Moving Defendants for the acts described in the Trustee's Amended Complaint.

As described in the Trustee's Amended Complaint, the Moving Defendants were designed to do only one thing: attract investors to put their money into BLMIS's Investment Advisory Business ("the IA Business") located at 885 Third Avenue, New York, New York. The Trustee need not—and does not—dispute that the Moving Defendants are Bermuda corporations who lacked a physical presence in New York. Personal jurisdiction arises, as set forth in the Amended Complaint, from the Moving Defendants' regular and continuous business activities directed at this forum. The Moving Defendants acted as the investment managers and investment advisors to two feeder funds: Alpha Prime Fund, Ltd. ("Alpha Prime") and Senator Fund SPC ("Senator"). As explained in the Amended Complaint, the Moving Defendants' sole purpose and activity was dedicated to the relationship between Alpha Prime and Senator (the "Feeder Fund Defendants") on the one hand, and BLMIS on the other: facilitating the transfer of funds to and from BLMIS accounts in New York, the receipt of BLMIS account statements and administration of the relationships with BLMIS. For their efforts—all of which either took place in New York, or constituted tortious conduct affecting New York—these Moving Defendants reaped fees and profits comprising avoidable and recoverable transfers of Customer Property.

The arguments and "evidence" set forth by the Moving Defendants, which is nothing more than the plain denial of the Trustee's allegations, fall far short of the "highly specific, direct

testimonial evidence" necessary to effectively show that jurisdiction would be unreasonable. *See Blakeman v. Walt Disney Co.*, 613 F. Supp. 2d 288, 294 (E.D.N.Y. 2009).

Having purposefully availed themselves of the privilege of conducting business in the United States, and, specifically, in New York, the Moving Defendants cannot now evade the jurisdiction of this Court by simply understating the critical role their business activities played in Madoffs' Ponzi scheme. Accordingly, the current motion should be denied. In the alternative, the Court should allow the Trustee to conduct jurisdictional discovery.

II. FACTS GIVING RISE TO PERSONAL JURISDICTION[2]

A. The Trustee's Amended Complaint Satisfactorily Alleges This Court's Personal Jurisdiction Over the Moving Defendants

On December 11, 2008 Madoff was arrested for operating a Ponzi scheme through BLMIS's IA Business, and charged with violations of criminal securities laws, including, *inter alia*, securities fraud, investment advisor fraud, and mail and wire fraud. Contemporaneously, the Securities and Exchange Commission ("SEC") filed a complaint in the District Court alleging that Madoff and BLMIS engaged in fraud through the IA Business. *See SEC v. Madoff,* No. 08 Civ. 10791 (S.D.N.Y. Dec. 11, 2008). The Securities Investment Protection Corporation's ("SIPC") application requesting the appointment of the Trustee as trustee for the liquidation of the business of the BLMIS was approved on December 15, 2008. Since that time, the Trustee has brought adversarial proceedings to recover Customer Property for the benefit of BLMIS and, ultimately, its customers.

[2] The Court is, by now, familiar with the background facts of this case. A more in-depth discussion of the facts underlying Madoff's Ponzi scheme and the SIPA liquidation are set forth in this Court's prior decisions. *See Picard v. HSBC Bank PLC,* 454 B.R. 25 (S.D.N.Y. 2011).

When Madoff's Ponzi scheme collapsed, reaching the inevitable point in time when redemptions exceeded deposits, billions of dollars had been stolen from thousands of accountholders. In his Amended Complaint, the Trustee alleged that the Moving Defendants played an important role in Madoff's attempt to prolong his Ponzi scheme by attracting international investment in his fraudulent IA Business. (Am. Compl. at ¶¶ 3-7). The Moving Defendants helped to funnel new investment from the then-untapped well of global investors. (*Id*. at ¶ 16). Specifically, the Trustee alleged that the Moving Defendants managed the Feeder Fund Defendants and helped direct funds into BLMIS, received investor funds from BLMIS, and communicated regularly with persons in New York regarding those investments. (*Id*. at ¶ 128-131). In performing these duties, the Moving Defendants received BLMIS account statements and trade confirmations describing the purported purchase and sale of securities in New York by BLMIS. (*Id*. at ¶ 131). The Moving Defendants helped hide Madoff's fraud by omitting Madoff's name from Feeder Fund offering documents. (*Id*. at ¶ 146). For their efforts, the Moving Defendants were paid fees which comprised avoidable and recoverable transfers of Customer Property. (*Id*. at ¶ 352).

Moving Defendant APAM was the investment manager to Alpha Prime, a feeder fund whose only purpose was to facilitate investment in BLMIS's IA Business.[3] (*Id*. at ¶¶ 60, 77). That means that APAM coordinated (or assisted with the coordination of) Alpha Prime depositing money into BLMIS's bank account in New York and withdrawing approximately $86

[3] Alpha Prime Fund Ltd. ("Alpha Prime") is subject to the jurisdiction of this Court by virtue of the Customer Claim they filed against the Bernard L. Madoff Investment Securities LLC ("BLMIS") estate on Jan. 23, 2009.

million from BLMIS. (*Id.* at ¶¶ 60, 125) It is those transfers upon which the Trustee's claims against APAM are based.

Moving Defendant Regulus was, from its incorporation in 2006, the investment manager to Senator, a feeder fund whose only purpose was to facilitate investment in BLMIS's IA Business in New York.[4] (*Id*. at ¶¶ 61, 78). Moving Defendant Carruba was, from its incorporation in 2006, the investment advisor to Senator. (*Id*. at ¶ 79). That means that APAM coordinated (or assisted with the coordination of) Alpha Prime depositing money into BLMIS's bank account in New York and withdrawing approximately $86 million from BLMIS. (*Id.* at ¶¶ 61, 125). It is those transfers upon which the Trustee's claims against APAM are based.

The Amended Complaint further alleges that all of the Moving Defendants, *inter alia*, communicated regularly with persons in New York regarding BLMIS, delivered documents to BLMIS in New York, including account opening documents and agreements, and received documents from BLMIS for the benefit of the Feeder Fund Defendants. (*Id.* at ¶¶ 128-130)

Critically, these transactions—as well as the fake securities transactions to which they pertained—all occurred in the United States. In return for their "services" managing and facilitating these investments, each of the Moving Defendants received fees and distributions comprising Customer Property to which they are not entitled. (*Id*. at ¶¶ 77-79). Specifically, the Trustee alleged in his Amended Complaint that the Moving Defendants are subsequent transferees of Preferential Transfers under 11 U.S.C. §§ 547(b), 550(a), and 551 (Am. Compl. at ¶¶ 400-04); Subsequent Transfers under N.Y. Debtor and Creditor Law §§ 273-279 and 11

[4] Senator Fund SPC ("Senator") is subject to the jurisdiction of this Court by virtue of the Customer Claim against the BLMIS estate they filed Jan. 23, 2009.

U.S.C. §§ 544, 547, 548, 550(a), and 551, (Am. Compl. at ¶¶ 450-456); and were unjustly enriched under New York common law. (Am. Compl. at ¶¶ 537-541).

III. ARGUMENT

A. Standard of Review

To secure personal jurisdiction over a non-resident defendant, a court must determine that the defendant has sufficient contact with the forum. Requiring a connection to the forum serves "fair warning" on a potential defendant and "gives a degree of predictability to the legal system that allows a potential defendant to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

1. Bankruptcy Rule 7004(f)

Where, as here, claims are asserted under United States Bankruptcy Code, Bankruptcy Rule 7004(f) describes the limits of this Court's exercise of personal jurisdiction. Proper service under Rule 7004(f) is considered sufficient to establish personal jurisdiction over any defendant. *See Enron Corp. v. Arora (In re Enron Corp.)*, 316 B.R. 434, 440 (Bankr. S.D.N.Y. 2004). Rule 7004(f), by allowing for nationwide service of any defendant in a bankruptcy matter, makes plain that "minimum contacts" with the United States, rather than any specific forum, is sufficient to establish personal jurisdiction. *J.T. Moran Fin. Corp. v. Am. Consol. Fin. Corp. (In re J.T. Moran Fin. Corp.)*, 124 B.R. 931, 934 (S.D.N.Y. 1991) (Rule 7004 confers "nationwide" personal jurisdiction upon the Bankruptcy Court). Thus, the bankruptcy court has personal jurisdiction over any defendant with minimum contacts with any state in which a federal court has jurisdiction. (*Id.*).

Personal jurisdiction under 7004(f) is "limited only by the due process clause of the Fifth Amendment." *Picard v. Maxam Absolute Mgmt. Fund, LP*, 460 B.R. 106, 116 (Bankr. S.D.N.Y.

2011); *Picard v. Chais (In re Bernard L. Madoff Inv. Secs. LLC)*, 440 B.R. 274, 278 (Bankr. S.D.N.Y. 2010) (same); *Picard v. Cohmad Secs. Corp. (In re Bernard L. Madoff Inv. Secs. LLC)*, 418 B.R. 75, n.1 (Bankr. S.D.N.Y. 2009) (same). A court must reasonably determine that the defendant has "certain minimum contacts [with the forum] such that the maintenance of the suit does not 'offend traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. State of Washington, Office of Unemployment Comp. and Placement*, 326 U.S. 310, 316 (1945) (internal citations omitted); *Chais*, 440 B.R. at 278; *NationsBank, N.A. v. Macoil, Inc. (In re Med-Atl. Petroleum Corp.)*, 233 B.R. 644, 653 (Bankr. S.D.N.Y. 1999). "Fair play and substantial justice" protect a defendant from being bound by the "judgments of a forum in which he has established no meaningful contacts, ties, or relations." *Int'l Shoe*, 326 U.S. at 316. Despite these protections, "the Due Process clause may not readily be wielded as a territorial shield to avoid interstate obligations that have voluntarily been assumed." *Burger King*, 417 U.S. at 474; *Marvel Worldwide Inc. v. Kirby*, No. 10 Civ. 141 (CM) (KNF), 2010 WL 1655253, at *8 (S.D.N.Y. Apr. 14, 2010).

2. "Minimum Contacts"

As constrained by the Due Process clause, "minimum contacts" requires "that there be 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*, 471 U.S. at 474. This is shown where Defendant has been "deliberately engaging" in activity within the State. *Id*. at 475-76 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). As the Supreme Court has explained, "minimum contacts" can be established under either specific or general jurisdiction, so long as the minimum contact described is not "random," "fortuitous," or "attenuated." *Burger King*, 471 U.S. at 475. "The defendants' conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled

into court there." *Price v. Sterling Foster & Co. (In re Sterling Foster & Co., Secs. Litig.)*, 222 F. Supp. 2d 289, 300 (E.D.N.Y. 2002) (citing *Int'l Shoe*, 362 U.S. at 316).

3. The Fifth Amendment Requires Jurisdiction be Reasonable

In addition to "minimum contacts," due process considerations require that the exercise of jurisdiction be "reasonable." *Int'l Shoe*, 326 U.S. at 316. This is a fact-specific inquiry hinging on the circumstances of each particular case. *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 243 (2d Cir. 1999) (citing *Int'l Shoe*, 326 U.S. at 316); *see also Picard v. Maxam Absolute Return Fund, L.P. (In re Bernard L. Madoff Inv. Secs. LLP)*, 460 B.R. 106, 117 (Bankr. S.D.N.Y. 2011). The Supreme Court has identified five factors helpful in determining the "reasonableness" of the exercise of personal jurisdiction: "(1) the burden that the exercise of jurisdiction will impose on the defendants; (2) the interests of the forum state in adjudicating the cause; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies." *Burger King*, 471 U.S. at 476-77.

4. The Trustee's Burden

A plaintiff need only make a *prima facie* showing of jurisdiction over the defendant in order to prevail upon a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). *See Thomas v. Ashcroft*, 470 F.3d 491, 495 (2d Cir. 2006). A *prima facie* case may be established by the pleadings alone. *Cutco Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986) ("[p]rior to discovery, a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdictions."). Personal jurisdiction exists unless a defendant is able to refute "unsupported allegations" with "highly specific, direct testimonial evidence." *Blakeman*, 613 F. Supp. 2d at 299; *First Capital Asset Mgmt. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 389

(S.D.N.Y. 2002) ("a defendant cannot win a Rule 12(b)(2) motion merely by denying plaintiff's allegations. Rather the defendant's moving papers must 'entirely refute the plaintiff's allegations.'") (internal citation omitted); *Burger King*, 471 U.S. at 474 (defendant "must present a compelling case that the exercise of jurisdiction would be unreasonable"); *Cohmad*, 418 B.R. at 81 (same). And of course, prior to an evidentiary hearing, all evidence is "construed in the light most favorable to plaintiff and all doubts are resolved in its favor." *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 56-57 (2d Cir. 1985)).

In response, however, a plaintiff need not be limited strictly to the four corners of the complaint; they may rely on affidavits in addition to pleadings. *Vodopia v. Koninklikjke Philips Electronics, N.V.*, 398 Fed. Appx. 659, 662 (2d Cir. 2010); *Cohmad*, 418 B.R. at 79 (plaintiff may make *prima facie* case "through its own affidavits and supporting materials") (citing *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981)).

The Moving Defendants' arguments are no different than those rejected by the Second Circuit in *Blakeman*. There, plaintiff alleged that defendants' wrongful acts caused harm in New York. Defendants argued simply that they were not "involved" with the allegedly tortious conduct in New York. 613 F. Supp. 2d at 301-03. The Court held that plaintiff's allegations of personal jurisdiction were sufficient, thus finding that the defendants' arguments were not the "direct, highly specific, testimonial evidence" required to rebut allegations of personal jurisdiction. *Id*. at 298-99.

B. The Trustee has Alleged Sufficient "Minimum Contacts" by the Moving Defendants

Based on the extensive activities the Moving Defendants undertook while acting as investment managers and investment advisor to BLMIS Feeder Funds, the Trustee has established personal jurisdiction over the Moving Defendants arising from both specific and

general jurisdiction, as well as from New York's long-arm statute, New York Civil Practice Law and Rules (N.Y. C.P.L.R.) §§ 302(a)(1), (3).

1. Moving Defendants are Subject to the Specific Jurisdiction of This Court

Specific jurisdiction exists 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.'" *Burger King*, 471 U.S. at 472 (internal citations omitted); *Chais*, 440 B.R. at 279 (same). As described below, the Amended Complaint established that the Moving Defendants had "minimum contacts" with both the United States and New York, and that the Trustee's causes of action "arise out of or relate to" those "minimum contacts."

a. Moving Defendants Purposefully Directed Their Activities at New York

The Moving Defendants' contact with New York was not random. For years, the Moving Defendants provided critical management and other services to funds which were wholly invested in Madoff's IA Business in New York. This was, in fact, the reason the Moving Defendants were organized, and was the only legitimate business purpose they ever served. As investment managers and advisors to Alpha Prime and Senator, the Moving Defendants' each and every business activity was purposefully directed at managing those funds' investment accounts in New York. They were paid to direct and monitor the transfer of investor funds into and out of the IA Business, to communicate regularly with persons in New York regarding those investments, and to review account statements and trade confirmations they received from BLMIS in New York. Ultimately, they earned substantial revenue from these business activities in New York. (Am. Compl. at ¶¶ 128-131).

The Moving Defendants protest that their activities "were at no point conducted in New York, or the United States, but were rather limited to Bermuda and Europe," so they "in no way

transacted business in New York and therefore did not purposefully avail [themselves] of the protections of any of the protections or benefits of New York laws." (Memorandum in Support of APAM's Motion to Dismiss the Amended Complaint at ¶ 11).[5] This is precisely the type of bald assertion held ineffective to challenge personal jurisdiction in this Circuit. *See, e.g.*, *First Capital Asset Mgmt.*, 218 F.Supp. 2d at 390; *Blakeman*, 613 F.Supp.2d at 301-03. The Moving Defendants need not have stepped foot in the United States to invoke the personal jurisdiction of this Court. *See Burger King*, 417 U.S. at 474-76 (where defendant has a substantial connection to the forum, "jurisdiction . . . may not be avoided merely because the defendant did not *physically* enter the forum State."); *Maxam*, 460 B.R. at 117. As described in the Trustee's Amended Complaint, the Moving Defendants directed their activities at New York, to facilitate the investment of millions of dollars into Madoff's IA Business. (Am. Compl. at ¶ 22). These actions are sufficiently related to New York for the purposes of establishing specific jurisdiction. *See, e.g., Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 491 (S.D.N.Y. 2001) (where foreign defendant directed and serviced investments in a United States fund, any fund-connected activity was purposefully directed at the United States).

Because the Moving Defendants' businesses were directed at purported securities transactions made in New York, the Moving Defendants "purposefully availed" themselves of the benefits of New York. The Moving Defendants' deliberate selection of Madoff's New York-based IA Business, for "the unique investment opportunities offered by BLMIS," (*Chais*, 440 B.R. at 279), establishes this Court's jurisdiction over them. The Moving Defendants' physical

[5] All references to the December 2, 2011 Memorandum in Support of Alpha Prime Asset Management's ("APAM") Motion to Dismiss the Amended Complaint shall be of the form "APAM Mem. at __."

presence outside of the United States is of no matter, and is an "argument" soundly rejected by other courts in connection with the Trustee's efforts in this case. *See Cohmad*, 418 B.R. at 81 (finding minimum contacts where defendant's "purposeful and profitable activities contributed to the massive losses suffered by victims of the BLMIS Ponzi scheme in the U.S."); *Maxam*, 460 B.R. at 117 (finding specific jurisdiction where "defendant [had] been and remain[ed] a 'player' in the BLMIS and related proceedings."). The Moving Defendants' profitable relationship "creat[ed] a situation where "it may well be unfair to allow them to escape having to account. . . for consequences that proximately ar[ose] from [their] activities." *Burger King*, 471 U.S. at 474.

b. The Trustee's Causes of Action Arise Out of the Moving Defendants' Actions

The Trustee's causes of action in this proceeding arise out of the same acts which establish the Moving Defendants' "minimum contacts" with New York, thereby satisfying the second prong of the standard for the existence of specific jurisdiction. As in *Cohmad*, this Court has already held in a very similar set of facts that where a foreign defendant profited from transfers from BLMIS, the Trustee's claims to reclaim those transfers arose from the defendants' conduct. The relevant facts are no different here. The Trustee asserts fraudulent and preferential transfer claims against the Moving Defendants which, as in *Cohmad*, arose from business activities directed at New York.

The Moving Defendants argue that the payments they received "were paid out of accounts in Luxembourg," and "not from any monies originating from BLMIS or any US accounts." (APAM Mem. at ¶¶ 21, 24). First, this argument does not contradict the Trustee's allegations: that the money was transferred from a bank account in Luxembourg does not address whether those funds are Customer Property, or whether those transfers arose from business activities directed at the United States. This is another example of the type of argument too

general to overcome the Trustee's allegations of jurisdiction. *Blakeman,* 613 F. Supp. 2d at 298-99; *First Capital Asset Mgmt.,* 218 F. Supp. 2d at 389. That payments may have been made to the Moving Defendant from an account in Luxembourg does not, at this stage, wash the trail of Madoff from the funds. It is enough that the Trustee has alleged that payments to the Moving Defendants originated with BLMIS in New York. *See In re Allou Distrib., Inc.,* 379 B.R. 5, 30 (Bankr. E.D.N.Y. 2007) ("plaintiff must allege sufficient facts to show, if proved, that the funds at issue originated with the debtor. . . dollar-for-dollar accounting is not required. . . at the pleading stage."). The Trustee has alleged that these funds originated from BLMIS, and comprise avoidable and returnable transfers of Customer Property which must be returned for the benefit of BLMIS, and, ultimately, its customers.

As this Court previously held, "the Trustee's claims are inextricably related such that but for the transfers of BLMIS funds. . . there could be no fraudulent transfer claims against [defendant]." *Chais,* 440 B.R. at 280; *see also Cohmad,* 418 B.R. at 80 (same); *Maxam,* 460 B.R. at 118 (same). The acts and the claims are co-extensive. Therefore, the Trustee's actions sufficiently relate to the Moving Defendants' contacts with New York, and specific jurisdiction is warranted.

c. Specific Jurisdiction also Exists Under N.Y. Long-Arm Statute §§302(a)(1) & (3)

In addition to jurisdiction conveyed by Rule 7004(f), "[a] court sitting in diversity [may] [apply] the law of the forum state in determining whether it has personal jurisdiction over the defendants." *Agency Rent a Car Sys., Inc. v. Grand Rent a Car Corp.,* 98 F.3d 25, 29 (S.D.N.Y. 1996) (citing *Cutco,* 806 F.2d at 365). In this case, jurisdiction is also proper in this case under N.Y. C.P.L.R. §§ 302(a)(1) & (3).

Section 302(a)(1) provides, in relevant part, that "a court may exercise personal jurisdiction over any non-domiciliary. . . who in person or through an agent. . . transacts any business within the state." (McKinney's 2009). *See also Richard Feiner and Co., Inc. v. BMG Music Spain, S.A.*, No. 01 Civ. 0937 (JSR), 2003 WL 740605 (S.D.N.Y. Mar. 4, 2003). The Second Circuit has explained that this requires a showing that the defendant engaged in a "continuous and systematic course of activity that it can be deemed present in the state in of New York." *Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44, 50-51 (2d Cir. 1991); *see also Vodopia,* 398 Fed. Appx. at 661-62 (conduct must be purposefully direct "not occasionally or casually, but with a fair measure of permanence and continuity"); *Cutco,* 806 F.2d at 365 ("[a] nondomiciliary 'transacts business' under CPLR 302(a)(1) when he 'purposefully avails [himself] to the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws'") (internal citations omitted).

The Moving Defendants' argument that they did not physically enter New York is unavailing. "One transaction in New York is sufficient to invoke jurisdiction, even though the defendant never entered New York, so long as the defendants' activities [in New York] were purposeful." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988); *see also Sole Resort, S.A. DE C.V. v. Allure Resorts Mgmt., LLC,* 450 F.3d 100, 103 (2d Cir. 2006) (holding that a § 302(a)(1) claim must show "'some articulable nexus between the business transacted and the cause of action sued upon'") (internal citation omitted); *Richard Feiner,* 2003 WL 740605, at *2 ("it is clear that § 302(a)(1) is a 'single act statute'") (internal citation omitted).

Moving Defendants argue that "the lack of a contractual relationship with BLMIS or any other New York entity or person renders any assertion of jurisdiction under the Second Circuit's minimum contact/business transaction standard. . . unworkable." (APAM Mem. at 31). Moving

Defendants are wrong. No single fact is determinative of the question of whether a defendant was "doing business" in New York. Rather, the "ultimate determination is based on the totality of the circumstances." *Agency Rent a Car*, 98 F.3d at 29 (citing *PaineWebber Inc. v. the Westgate Grp., Inc.*, 748 F.Supp. 115, 118 (S.D.N.Y. 1990). As shown previously with regard to specific jurisdiction (*infra*, Section III B. 1), the "totality of the circumstances" in this case makes plain that personal jurisdiction under New York's long-arm statute is appropriate.

Jurisdiction over the Moving Defendants also exists under N.Y. C.P.L.R. § 302(a)(3) which confers jurisdiction over a defendant who "commits a tortious act without the state causing injury to person or property within the state." N.Y. C.P.L.R. § 302(a)(3) (McKinney's 2009). Courts have used five elements to inform the application of this standard: "(1) the defendant committed a tortious act outside the state; (2) the cause of action arose from that act; (3) the act caused injury to a person or property within the state; (4) the defendant expected or should reasonably have expected the act to have consequences in the state; (5) the defendant derive[d] substantial revenue from the interstate or international commerce." *Sole Resort*, 450 F.3d at 106. Tortious conduct under § 302(a)(2) carries "no minimum threshold of activity required so long as the cause of action arises out of the alleged infringing activity in New York." *Citigroup Inc. v. City Holdings Co.*, 97 F. Supp. 2d 549, 566 (S.D.N.Y. 2000).

The Trustee has alleged that the Moving Defendants have committed tortious behavior which ultimately resulted in their unjust enrichment. (Am. Compl. at ¶¶ 537-39). The Moving Defendants received millions of dollars in management fees, advisory fees, distribution and performance fees, and administrative fees "for furthering and expanding the Ponzi scheme" which comprise avoidable and recoverable transfers of Customer Property. (Am. Compl. at ¶ 540). Thus, jurisdiction based under N.Y. C.P.L.R. § 302(a)(3) is proper.

The Trustee's allegations satisfy each of the relevant elements: (1) the Moving Defendants committed tortious acts, through the receipt of avoidable and receivable transfers of Customer Property; (2) the Trustee's causes of action are directly related to the Moving Defendants' activities in New York, namely, the Trustee seeks return of those transfers; (3) the Moving Defendants caused injury in New York, to both BLMIS, which was rendered insolvent by these and other transfers, and to its customers, whose money was stolen in the Ponzi scheme; (4) the Moving Defendants should have reasonably expected their business activities in New York to subject them to the jurisdiction of New York courts; and (5) the Moving Defendants derived substantial revenue from the described business activities. Thus, the Trustee has adequately alleged that Moving Defendants are subject to New York's long-arm jurisdiction under § 302(a)(3).[6]

2. Moving Defendants are Subject to the General Jurisdiction of This Court

Due Process concerns may also be satisfied upon a finding that the Moving Defendants' conduct gives rise to general jurisdiction. General jurisdiction exists where defendant's contacts with the forum, unrelated to the action, are "so continuous and systematic that the defendant could reasonably foresee being haled into court in that [forum] for any matter." *Garg v. Winterthur*, 525 F. Supp. 2d 315, 319 (E.D.N.Y. 2007) (quoting *Int'l Med. Grp., Inc. v. Am. Arbitration Ass'n, Inc.*, 312 F.3d 833, 846 (7th Cir. 2002); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). Under this standard, a defendant's contact is

[6] APAM's, Regulus Asset Management's ("Regulus"), and Carruba Asset Management's ("Carruba") (collectively, the "Moving Defendants") argument that they do not own property in New York is a red herring. The Trustee has never alleged that the Moving Defendants owned property in New York or that the Moving Defendants were subject to personal jurisdiction under § 302(a)(4).

"so extensive" as to render the defendant "constructively present." *Schultz v. Safra Nat'l Bank of New York*, No. 08 Civ. 2371, 2009 WL 636317, at *5 (S.D.N.Y. Mar. 10, 2009). By virtue of their business activities directed at investment accounts in this forum, the Moving Defendants are subject to the general jurisdiction of this Court.

a. Moving Defendants' Contact with New York was "Continuous and Systematic"

The Moving Defendants' business activities in New York were both continuous and systematic. Courts within this Circuit have previously held that where a fund administrator principally provides administrative services for funds in United States investments and derives a substantial portion of their revenues from those funds, they are subject to the general jurisdiction of a district court. For example, in *Cromer Finance*, a Bermudian Administrator of a United States invested Fund who, "among other things, maintain[ed] records of Fund transactions, disburse[d] payments of the Fund's costs and expenses, collect[ed] subscription payments, ke[pt] the Fund's accounts and those records required by law, prepare[d] monthly financial statements, file[d] any necessary tax returns, and allow[ed] the Fund's auditor to inspect the register and any other records" was found subject to the court's general jurisdiction. 137 F. Supp. 2d at 476. The administrator defendant in *Cromer* knew that "while technically operating as an offshore-fund, [the fund] was entirely managed out of New York by [an investment manager]. . . [who] invested the Fund's assets in United States' securities traded on American exchanges. . . and [defendant] received from the United States all of the information from which it prepared the statements it disseminated as Fund administrator." *Id*.

The Moving Defendants were investment managers and investment advisor to funds completely invested in United States securities. Like the defendants in *Cromer*, they were responsible for receiving and directing funds to and from New York, communicating regularly

with persons in New York, and receiving information about these investments in New York. (Am. Compl. at ¶¶ 128-131). Their contacts were not "random," "fortuitous," or "attenuated." Each and every one of these acts was directed at the forum of New York, for the purpose of investing in New York, and deriving benefit from financial circumstances distinct to New York. Moreover, Alpha Prime and Senator were the entirety of Moving Defendants' client base; their activities in relation to those were funds were their only business purpose and responsibility. *See Cromer*, 137 F. Supp. 2d at 476 (deriving 66% to 90% of revenue from funds linked to the United States was sufficient for general jurisdiction); *Rocker Mgmt., LLC v. Lernout & Hauspie Speech Prods. N. V.* No. Civ.A. 00-5965, 2005 WL 3658006, at *8 (D.N.J. June 7, 2005) (plaintiffs showed *prima facie* case where 30% of defendant's business was attributed to its multinational clients whose accounts were managed in the United States).

Thus, Moving Defendants' arguments cannot effectively rebut the Trustee's allegations of general jurisdiction. That they were not incorporated or licensed in New York, with no ties to New York, no appointed agents in New York, no offices in New York, no employees in New York, no rented or owned property in New York, no post office box or telephone number in New York, or without assets in New York does not preclude that they were "constructively present" for purposes of finding general jurisdiction. (APAM Mem. at 3; Declaration of James Keyes in Support of Defendant's Motion to Dismiss the Amended Complaint at ¶ 4). Moving Defendants need not even have ever stepped foot in New York in order to be subject to general jurisdiction. *Burger King*, 471 U.S. at 476. Rather, this Court's general jurisdiction over the Moving Defendants arises from their activities at New York, and the revenue "earned" for these activities in New York, and from the fact that these activities were "continuous" and "systematic." *See Cromer*, 158 F. Supp. 2d at 354-57 (jurisdiction was to be reasonably expected where defendants

"consistently took direction from New York investment manager and all of the Bermuda defendants based their work on financial information emanating from that investment manager").

Moving Defendants cannot now, after five years of directing their every activity at the New York financial market, escape their "continuous" and "systematic" conduct in the United States. They may have done so from the safety of Bermuda and Europe, but, as shown, they remain subject to the general jurisdiction of the court.

C. Personal Jurisdiction Must be Reasonable

1. The Exercise of Personal Jurisdiction Over the Moving Defendants is Reasonable

Once it is established that a defendant has sufficient "minimum contacts" with the United States, a court is required to undertake a "reasonableness" inquiry to ensure "the assertion of jurisdiction 'comports with 'traditional notions of fair play and substantial justice'—that is, whether it is reasonable under the circumstances of [this] case.'" *Kernan*, 175 F.3d at 244 (internal citations omitted). This inquiry traditionally focuses on the "nature and quality" of the defendant's alleged contacts with the forum. However, there is no "talismanic jurisdictional formula"; instead, the analysis turns on the "totality of the circumstances." *Burger King*, 471 U.S. at 485; *Marvel Worldwide*, 2010 WL 1655253, at *7.

Here, the Trustee's allegations are robust. The Moving Defendants are entities formed for the active purpose of managing business activities in the United States. (*See supra*, Sect. II). Such direct and purposeful availment of this forum is exactly the quality and nature of contact described by the Supreme Court and the Second Circuit. *Burger King* 471 U.S. at 486; *Cromer Fin. Ltd. v. Berger*, No. 00 Civ. 2284, 2001 WL 506908, at *2 (S.D.N.Y. May 14, 2001).

2. Courts Have Exercised Jurisdiction Over Similarly Situated Defendants

The Moving Defendants' arguments are neither compelling nor novel. In fact, courts have routinely rejected nearly identical claims. Indeed, as the Supreme Court has emphasized "'often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.'" *Maxam*, 460 B.R. at 119 (internal citations omitted); *Cohmad*, 418 B.R. at 81; *First Capital Asset Mgmt.*, 218 F. Supp. 2d at 404. A court must not only consider the interests of the plaintiff and the burden on the defendant, but also "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive policies.'" *Burger King* 471 U.S. at 477 (internal citations omitted); *Kernan*, 175 F.3d at 244. Moving Defendants' mere assertion that jurisdiction would be "fundamentally unfair" is not enough to overcome New York's "manifest interest in providing effective means of redress to their [their] residents." *Burger King*, 471 U.S. at 482-83 (citing to *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984)); *see also McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

3. Foreign Residency is Not an Undue Burden

As courts of this Circuit have noted, it is "only in highly unusual cases that inconvenience will rise to the level of a constitutional concern." *In re Enron*, 316 B.R. at 444. Moving Defendants ask the Court to look to the Ninth Circuit case of *Ins. Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266 (9th Cir. 1981) for the proposition "the primary concern is for the burden on the defendant" who "has done little reach out to the forum state." *Id.* at 1272. (APAM Mem. at 20). The facts in that case, however, are inapposite. In that case, three Seattle boat companies partnered to purchase a boat in Massachusetts, which after weeks of repair in Mexico, sank off the coast of Alaska. Plaintiffs then attempted to bring suit against the Mexican shipyard in

Alaska. Although noting that "modern means of communication and transportation have tended to diminish the burden of defense of a lawsuit in a distant forum." *Marina Salina Cruz*, 649 F.2d at 1271. The Ninth Circuit held that because there were no known transportation routes between defendant's location in Mexico and Alaska, that the burdens on defendant were of "particular significance." *Id.* at 1272. The same situation does not exist here. The Moving Defendants face no similar obstacles in navigating the treacherous route between New York and Bermuda. Persuasive Second Circuit authority shows these concerns to have been largely eclipsed by modern technology. *See Kernan*, 175 F.3d at 244; *Maxam*, 460 B.R. at 119. The Moving Defendants' ability to retain local counsel also speaks to their exaggeration of this burden. *See Maxam*, 460 B.R. at 119 (there was no significant burden where defendant already had counsel in New York); *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 645 (S.D.N.Y. 2011) (finding there was no burden where defendants had been represented by American counsel for years). Moving Defendants are essential witnesses to the actions of the Feeder Funds and other involved parties, and they will be required to participate in this case, in this forum, in any event. This mandatory participation and production of documents that will accompany the progression of the HSBC case in the Southern District favors a finding of personal jurisdiction by this Court. *See Kreutter*, 71 N.Y.2d at 471 (jurisdiction is proper where the added burden of defending an action in New York was marginal in light of the fact that defendant's presence in New York would be undoubtedly required as a witness). Moving Defendants have demonstrated no aspect of their foreign residency which renders exercise of jurisdiction by this court unreasonable.

4. Balance of Interests Weigh in the Trustee's Favor

Further, because the liquidation of BLMIS is taking place in New York, both New York and the United States have a strong interest in exercising personal jurisdiction over the Moving Defendants. The Trustee is currently overseeing over 1,000 suits before this Court. His actions

involve billions of dollars in claims similar to, and related to, the claims brought here against the Moving Defendants. This Court has already held that "the most efficient resolution of the controversy would be in the United States, where the inextricably-related BLMIS litigation is ongoing." *Chais*, 440 B.R. at 281; *see also Chase & Sandborn Corp. v. Granfinanciera, S.A. (In re Chase & Sandborn Corp.)*, 835 F.2d 1341, 1347 (11th Cir. 1988) (finding personal jurisdiction reasonable where the bankruptcy trustee already had several other related actions pending in the forum). In light of the multitude of "inextricably-related" proceedings arising from Madoff's Ponzi scheme, the Court's interests in maintaining a cohesive litigation structure far outweigh the minimal inconvenience imposed on Moving Defendants.

Finally, the United States has a determined interest in adjudicating claims which arise under the United States Bankruptcy Code. *See Cohmad*, 418 B.R. at 81-82 (citing *U.S. Lines, Inc. v. GAC Marine Fuels Ltd. (In re McLean Indus. Inc.)*, 68 B.R. 690, 699 (Bankr. S.D.N.Y. 1986); *Maxam*, 460 B.R. at 119 ("United States has a strong interest in applying the fraudulent transfer and preference provisions of its Bankruptcy Code since the Trustee's claims arise under it, and defendants' transfers have alleged deprived United States' creditors of distributions to which they are entitled."); *Cohmad*, 418 B.R. at 81 ("the United States has a strong interest in applying the fraudulent transfer and preference provisions of its Bankruptcy Code"). Here, the Trustee's claims have all arisen under the Bankruptcy Code, thereby solidifying this Court's interest in retaining jurisdiction over the Moving Defendants. Balancing all relevant interests, the exercise of personal jurisdiction over the Moving Defendants comports with the "reasonableness" embodied in "traditional notions of fair play and substantial justice."

D. <u>At a Minimum, Jurisdictional Discovery is Warranted</u>

In the event that this Court does not find that the Trustee has successfully alleged personal jurisdiction over the Moving Defendants, limited discovery should be permitted. *See*

Daventree Ltd. v. Republic of Azerbaijan, 349 F. Supp. 2d 736, 761 (S.D.N.Y. 2004). Courts have permitted jurisdictional discovery where a plaintiff has "made a sufficient start towards establishing personal jurisdiction." *Hollins v. U.S. Tennis Ass'n*, 469 F. Supp. 2d 67, 71 (E.D.N.Y. 2006). Provided that a "plaintiff has identified a genuine issue of jurisdictional fact, jurisdictional discovery is appropriate." *Daventree Ltd.*, 349 F. Supp. 2d at 761.

Despite assertions to the contrary, the Moving Defendants' documents do not describe accurately their complete role as alleged in the Trustee's Amended Complaint. In the event that this Court wishes to grant limited discovery, a number of documents will quickly establish the propriety of the exercise of personal jurisdiction in this case.

The Trustee is prepared to show through such discovery that documentary evidence establishes that the Moving Defendants acted in New York, and intentionally directed their business activity in New York in connection with Alpha Prime and Senator's Madoff-related investments, which form the basis of each of the Trustee's causes of action.

APAM claims it "never provided any investment advice to Alpha Prime," but rather functioned to coordinate and pay for legal and accounting services, and pay back fees to investors. (APAM Mem. at 21). However, documents produced to the Trustee from third parties show that APAM was held out as having responsibilities well beyond clerical and accounting functions. Beyond mere recitals of responsibilities, the documents produced by third parties, now in the Trustee's possession, indicate that APAM actually did perform many of these roles.

Similarly, Regulus maintains that despite being Senator's investment manager, they "conduct[ed] clerical work on behalf of Senator. . . [and] never provided advisory services to Senator. . ." and its services were limited to "coordinating legal and accounting services for Senator" and "paying back fees to Senator's investors." (APAM Mem. at 23). Yet, documents

produced to the Trustee from third parties show that Regulus held themselves out as being far more involved in Senator's investments than this.

Finally, the Moving Defendants claim that while Carruba was originally organized "for the purpose of providing advisory services to Regulus," it is and "has always been a dormant, inactive company that has no bank account whatsoever." (APAM Mem. at 26). Documents produced to the Trustee from third parties dispute that Carruba is, or ever was, a dormant company. Rather, these documents demonstrate that Carruba was the acting investment advisor to Senator.

These documents establish that the Moving Defendants are either incorrect, or have failed to recall the explicit representations made to investors about the Moving Defendants' role in steering customers into Madoff's Ponzi scheme.

For the reasons discussed in this Memorandum, the Trustee's Amended Complaint makes a prima facie showing of personal jurisdiction over the Moving Defendants, under both New York's long-arm statute and the Due Process Clause of the Fourteenth Amendment, which is further bolstered by the documents discussed above. If, however, the Court concludes otherwise, the Trustee's allegations, at minimum, identify multiple issues of jurisdictional fact warranting exploration.

IV. CONCLUSION

WHEREFORE, the Trustee respectfully requests that the deny this Court deny the Defendants' Motion to Dismiss, or, to grant the Trustee jurisdictional discovery as it may deem appropriate to further develop the factual record.

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Respectfully Submitted,

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