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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, 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. THE ESTATE (SUCCESSION) OF DORIS IGOIN; LAURENCE APFELBAUM, individually and in her capacities as executor and beneficiary of the Estate (Succession) of Doris Igoin; and EMILIE APFELBAUM, Defendants.	Adv. Pro. No. 10-04336 (BRL)

TRUSTEE'S SURREPLY IN FURTHER OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FORUM NON CONVENIENS

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Irving H. Picard, as trustee ("Trustee") under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa, *et seq.*, for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") and Bernard L. Madoff ("Madoff"), by and through his undersigned counsel, submits this surreply ("Surreply") in further opposition to the motion dated April 2, 2012 ("Motion" or "Mot.") by Laurence Apfelbaum, Emilie Apfelbaum and the Estate (Succession) of Doris Igoin (collectively, "Defendants") to dismiss this proceeding for lack of personal jurisdiction and *forum non conveniens*.

PRELIMINARY STATEMENT

The Trustee respectfully submits this Surreply at the Court's direction following correspondence with Chambers on September 11, 2012. On September 5, 2012, Defendants filed a thirty-four page Reply Memorandum of Law in Further Support of their Motion to Dismiss ("Reply" or "Defs. Reply"), in which they raised additional arguments in connection with their assertion that this action should be dismissed for lack of personal jurisdiction or, in the alternative, transferred to France under the doctrine of *forum non conveniens*. As set forth herein and in the Trustee's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated August 3, 2012 ("Trustee's Opposition" or "Trustee's Opp."), their motion remains without merit.

ARGUMENT

I. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS

A. Defendants Consented to Personal Jurisdiction By Filing SIPA Claims

In their Reply, Defendants continue to contend that "[t]he hallmark" of submission to jurisdiction by filing a bankruptcy proof claim is the creditor's knowing consent—a rationale, they argue, that is inapplicable to this SIPA proceeding because the SIPA claim forms lack

certain information regarding the liquidation proceeding. (Defs. Reply at 5-9.) Yet Defendants still fail to identify a single case holding that a creditor's subjective understanding of the consequences of filing a proof of claim is relevant to the jurisdictional analysis. Indeed, the cases upon which they rely demonstrate the contrary. *See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989) (noting that creditors who file claims subject themselves "to all the consequences that attach to an appearance," but making no reference to creditors' knowledge); *Langenkamp v. C.A. Culp*, 498 U.S. 42, 44-45 (1990) (noting that creditors who file claims "bring[] themselves within the equitable jurisdiction of the Bankruptcy Court" without mentioning creditors' subjective understanding); *Deak & Co., Inc. v. R.M.P. Soedjono (In re Deak & Co., Inc.)*, 63 B.R. 422, 426 (Bankr. S.D.N.Y. 1986) (no discussion of proofs of claim as the defendant did not file one).

The rationale for basing personal jurisdiction on the filing of a bankruptcy proof of claim is that the claimant must accept the consequences of seeking affirmative relief from the court. (*See* Trustee's Opp. at 8-10.) This rationale has nothing to do with the creditor's subjective intent to submit to jurisdiction, and applies with equal force to SIPA claims. (*Id.* at 8-12.) The Defendants' lengthy comparative analysis of the SIPA claim form and bankruptcy proofs of claim (*see* Defs. Reply at 5-9) is itself illustrative of why their "subjective consent" proposal is not the law: examining a claimant's subjective intent in the personal jurisdiction analysis would create uncertainty, waste resources, and detract from the issues in the case. The relevant question is whether the creditor purposefully availed himself of the benefits of obtaining relief from this Court; the self-serving assertion that seeking such relief did not constitute "knowing consent" to jurisdiction is immaterial. *See, e.g.*, *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1095 (9th Cir. 2010) (rejecting securities fraud defendant's claim of subjective

unawareness, noting that "[i]f such a self-serving assertion could be viewed as controlling, there would never be a successful prosecution or claim for fraud").

Finally, Defendants' reliance on the distinction between equitable and personal jurisdiction (Defs. Reply at 4-5) is unavailing. Where courts find that equitable jurisdiction exists based on the creditor's claim filing, they do not hesitate to find that personal jurisdiction exists as well. *See, e.g., United States v. Levoy (In re Levoy),* 182 B.R. 827, 833 (9th Cir. BAP 1995) (finding that *Langenkamp* and its progeny, although dealing with the nature of the action, nonetheless supported a finding of *personal* jurisdiction); *Lykes Bros. Steamship Co., Inc. v. Hanseatic Marine Serv. (In re Lykes Bros. Steamship Co., Inc.),* 207 B.R. 282, 286 (Bankr. M.D. Fla. 1997) (citing *Langenkamp* and holding that a creditor had consented to *personal* jurisdiction by filing a proof of claim). When a SIPA claimant files a claim and invokes the debtor-creditor restructuring process, Bankruptcy Court jurisdiction is obtained over both the claimant and the subject matter of the action.

B. Defendants' Minimum Contacts Analysis is Mistaken

Putting aside their consent, Defendants fail to state a basis for disputing personal jurisdiction. First, Defendants mistakenly rely on New York's long-arm statute, Civil Practice Law and Rules § 302(a)(1) (McKinney's 2009) ("C.P.L.R."), which is irrelevant to this Bankruptcy proceeding. (Defs. Reply at 12-17); *see Bickerton v. Bozel S.A. (In re Bozel S.A.),* 434 B.R. 86, 97 (Bankr. S.D.N.Y. 2010) (noting that, in bankruptcy cases, "state long-arm statutes are inapplicable, and the only remaining inquiry for a bankruptcy court is whether exercising personal jurisdiction over the defendant would be consistent with the Due Process Clause of the Fifth Amendment"); *Enron Corp. v. Arora (In re Enron Corp.),* 316 B.R. 434, 444-

45 (Bankr. S.D.N.Y. 2004) (same).[1] The only relevant inquiry here is whether Defendants had minimum contacts with the United States—*i.e.*, whether they "purposefully avail[ed] [themselves] of the privilege of conducting activities within the [United States], thus invoking the benefits and protections of its laws . . . such that [Defendants] should reasonably anticipate being haled into court [here]." *Best Van Lines Inc. v. Walker*, 490 F.3d 239, 242-43 (2d Cir. 2007) (internal quotes and citations omitted).

Second, while attacking the Trustee's "proof" of their United States contacts (Defs. Reply at 10-11), Defendants essentially concede that the Trustee has met his burden of demonstrating a basis for personal jurisdiction.[2] Indeed, Laurence Apfelbaum does not dispute undertaking any contact relevant to this motion. (*See* Declaration of Laurence Apfelbaum ¶¶ 8-9 ("Apf. Decl.") (admitting that she chose to open accounts with BLMIS to invest her family's inheritance and signed customer agreements directly with Madoff for that purpose), ¶ 15 (averring that she "called the BLMIS office" when she wanted to make a withdrawal), ¶ 24 (admitting that she signed and submitted SIPA customer claims for her and her daughter's BLMIS accounts); Reply Declaration of Laurence Apfelbaum ¶ 7 ("Apf. Reply. Decl.") (acknowledging that she exchanged several faxes with Madoff, on one occasion to "explain what I needed in order to file French tax returns").) The only contact Defendants appear to dispute is that they "profited" from

[1] Accordingly, Defendants' continued reliance on *Société Générale v. Florida Health Services Center, Inc.*, No. 03 Civ 5616 (MGC), 2003 WL 22852656 (S.D.N.Y. 2003), and *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50 (2d Cir. 2012)—both of which were decided in the long-arm statute context—is wholly misplaced. In any event, those cases are distinguishable as they dealt with the narrow factual context of an out-of-state financial institution's use of a correspondent bank account in New York. (*See* Trustee's Opp. at 15.)

[2] In disclaiming the Trustee's "proof," Defendants overlook the procedural posture of this 12(b)(2) motion: prior to discovery, the Trustee need only create a *prima facie* case of personal jurisdiction. *Ball v. Metallurgie HobokenOverpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). The Court is not limited to the four corners of the complaint, and may "consider affidavits and documents submitted by the parties without converting the motion into one for summary judgment under Rule 56." *ESI, Inc. v. Coastal Corp.*, 61 F. Supp. 2d 35, 50 n.54 (S.D.N.Y.1999). Therefore, whether or not the Trustee has "proven" that Defendants exhibited such contacts with the United States is irrelevant—the allegations and the documents submitted by the Trustee are sufficient to create a *prima facie* case of personal jurisdiction.

BLMIS (Defs. Reply at 9, 15), but this misses the mark: whether Defendants used a portion of the funds they received to pay taxes is irrelevant to their status as "net winners" under the net equity formula affirmed by the Second Circuit. *In re Bernard L. Madoff Inv. Secs.*, 654 F.3d 229 (2d Cir. 2011), *cert. denied, Sterling Equities Assocs. v. Picard*, 132 S.Ct. 2712 (2012).

Defendants contend that the Trustee cannot rely on their conduct that predated the six-year period for which recovery of fraudulent conveyances is sought. (Defs. Reply at 10, 14.) This argument is baseless.[3] In actuality, the relevant consideration is the "overall picture" of the Defendants' contacts. *See Del Ponte v. Universal City Dev. Partners, Ltd.*, No. 07–CV–2360, 2008 WL 169358, at *10 (S.D.N.Y. Jan. 16, 2008); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985) (including "prior negotiations and contemplated future consequences" in minimum contacts analysis in a breach of contract action). This is as true in the SIPA and bankruptcy contexts as it is in other litigations. *See, e.g.*, *Picard v. Maxam Absolute Return Fund, L.P.*, 460 B.R. 106, 117-18 (Bankr. S.D.N.Y. 2011) (finding personal jurisdiction in claim stemming from subsequent transfers of 90-day preference payments based on, among other things, execution of an agreement more than two years prior to bankruptcy); *Baldiga v. Joint Stock Co. (In re Cyphermint, Inc.)*, 445 B.R. 11, 18-19 (Bankr. D. Mass. 2011) (finding sufficient jurisdictional contacts based on transactions taking place well before the preference and fraudulent transfer periods); *A & W Publishers, Inc. v. Bison Books Ltd. (In re A & W Publishers, Inc.)*, 39 B.R. 666, 667-68 (D.C.N.Y. 1984) (finding personal jurisdiction proper in 90-day preference action based on business transactions and contract negotiations taking place

[3] The sole case Defendants cite for this proposition, *On Line Marketing Inc. v. Norm Thompson Outfitters, Inc.*, No. 99 CIV. 10411 (HB), 2000 WL 426426 (S.D.N.Y. Apr. 20, 2011), does not support their argument. There, the Court rejected C.P.L.R. §302(a)(1) jurisdiction over an out-of-state retailer that engaged a New York consulting company to perform services for it in Oregon. The Court declined to consider the Defendants' prior solicitation of New York customers via mail order catalogue not because that conduct predated plaintiff's claims, but because it was not sufficiently related to the claims, which stemmed from the parties' consulting agreement. 2000 WL 426426, at *4. Here, the Trustee's claims stem directly from their interactions with BLMIS, regardless of timing.

beyond the 90-day period); *Deak*, 63 B.R. at 431-32 (finding purposeful availment based on defendant's filing of a notice of appearance two months after the bankruptcy filing). The claims against the Defendants are based, in part, on their conduct in opening their accounts in 1995 and conducting multiple transactions to and from the accounts over a period spanning more than a decade; this conduct was a "but for" cause of the Trustee's avoidance claims. *See Maxam*, 460 B.R. at 118.

C. Defendants' Conduct In This Litigation Supports Jurisdiction

As explained in the Trustee's Opposition, Defendants' participation in this litigation—including entering into stipulations to extend response deadlines and filing a motion to withdraw the reference—can and should be considered in the jurisdictional analysis. (Trustee's Opp. at 18.) While the stipulations executed between the Trustee and Defendants contained provisions protecting Defendants' right to assert the lack of personal jurisdiction defense,[4] this Court held in *Maxam* that defendant's execution of a stipulation containing virtually identical rights-reserving language created a basis for personal jurisdiction. *See Maxam*, 460 B.R. at 119; Stipulation, *Picard v. Maxam Absolute Return Fund, L.P.*, Adv. Pro. No. 10–05342 (BRL) (Bankr. S.D.N.Y. May 20, 2011) [Dkt. No. 24].

Notably, Defendants fail to explain why their filing of a motion to withdraw the reference in this proceeding should not be considered a "participatory factor" indicating their consent to personal jurisdiction. *See Maxam*, 460 B.R. at 119. Indeed, the Court in *Kriegman v. Cooper (In re LLS America, LLC)*, No. 11–80093–PCW11, 2012 WL 2564722 (Bankr. E.D. Wash. July 2, 2012), recently held that defendants in a bankruptcy case, by moving to withdraw the reference to the District Court, "sought affirmative relief and purposely availed themselves of the

[4] *See, e.g.*, Stipulation, *Picard v. Estate (Succession) of Doris Igoin*, Adv. Pro. No. 10-04336 (BRL) (Bankr. S.D.N.Y. Feb. 29, 2012) [Dkt. No. 15].

jurisdiction of the federal courts in this judicial district." 2012 WL 2564722, at *7. The same principle applies to support the exercise of personal jurisdiction over Defendants here.

II. DISMISSAL FOR *FORUM NON CONVENIENS* IS UNWARRANTED

A. Defendants Offer No Valid Reason Why the Trustee's Choice of Forum Should Not Receive Substantial Deference

Defendants devote much of their Reply to demonstrating that France is an available alternate forum for this dispute. While the Trustee does not concede the viability of France as a forum under the unique circumstances of this case,[5] the Defendants must demonstrate not merely that the Trustee's action could be brought in another forum, but that the action *should* be brought there. *See Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 245 (2d Cir. 2001) ("The defendant bears the burden of proof on all elements of the motion…").

The Trustee is entitled to the substantial deference typically given to domestic plaintiffs whose motives in bringing their claims in the United States are "bona fide." *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2005). Defendants' reliance on *Carey v. Bayerische Hypo-Und Vereinsbank AG*, 370 F.3d 234 (2d Cir. 2004) to overcome this deference is misplaced. There, the plaintiff's claims arose *entirely* out of her activities abroad, and involved property located in Germany and a contract specifying that a German court would have jurisdiction over any dispute. 370 F.2d at 238. Here, by contrast, most of the BLMIS activity from which this action arose took place in the United States, and the case's ties to the U.S. far

[5] This dispute is merely one portion of a case of unprecedented magnitude and scope, in which the core bankruptcy proceeding is being administered in the United States. The general ability of an alternate forum to handle complex fraud disputes is therefore not in itself dispositive of this issue. *See, e.g., In re AstroPower Liquidating Trust*, 335 B.R. 309, 329 (Bankr. D. Del. 2005) (defendants must show alternate forum is capable of adjudicating disputes "involving core bankruptcy matters"); *Piper Aircraft v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (noting that, even where the defendant is "amenable to process" in the other jurisdiction, the available remedy still may be "clearly unsatisfactory").

outnumber its few connections to France. Furthermore, the validity (or invalidity) under French law of the customer agreements signed by the Apfelbaums is irrelevant, as neither the validity nor existence of the contracts is an element of any of the Trustee's claims. (*See* Trustee's Opp. at 31.)

Defendants also discuss in great detail the Trustee's retention of French counsel, apparently to support the argument that his choice of forum is entitled to less deference. But Defendants offer no support whatsoever for this assertion. The Trustee's retention of foreign counsel in this multi-national liquidation does not suggest his willingness, or ability, to litigate the entirety of this action in any of these foreign jurisdictions, nor does it suggest that his decision to litigate in New York was made in bad faith or motivated by anything other than genuine convenience. Accordingly, his choice of forum is entitled to substantial deference.

B. The Trustee's Forum Choice Should Stand in View of The Balance of Private and Public Interests

Despite the introduction of additional facts and arguments in their Reply, Defendants have failed to meet their burden of "establish[ing] clearly each [private and public interest] factor . . . and . . . demonstrat[ing] that the balance tilts strongly in favor of the purported alternative forum." *Baena v. Woori Bank*, No. 05 Civ. 7018(PKC), 2006 WL 2935752, at *5 (S.D.N.Y. Oct. 11, 2006).

1. The Private Interest Factors Weigh in Favor of Maintaining This Action Here

(a) The Sources of Proof are Located Here. Defendants concede that the voluminous documents proving "the overall Madoff fraud" are located here, but incorrectly argue that such documents are unnecessary to this action. (Defs. Reply at 26.) To the contrary, the documents and witnesses located in New York prove the transfers that are the subject of this avoidance action. They also are a primary source of proof that BLMIS was a Ponzi scheme,

which establishes that the transfers were made with fraudulent intent.[6] They are thus essential to the Trustee's fraudulent transfer claims.[7]

(b) The Necessary Witnesses are Located Here. Defendants identify three potential French witnesses in their Reply whom they claim are relevant to whether Defendants exchanged value for transfers and received them in good faith. (Defs. Reply at 28-29.) But the proffered witnesses' testimony, if true, would not demonstrate that Defendants provided value to the accounts. The Defendants' proffer is that the witnesses oversaw Laurence Apfelbaum's "inheritance," in 1995, of funds from her family's BLMIS accounts. But this alleged "inheritance" consisted entirely of internal transfers from a pre-existing BLMIS account (No. 1FN006) to Laurence and Emilie Apfelbaum's BLMIS accounts (Nos. 1FN075 and 1FN076). At the time of these transfers, Account 1FN006 had a negative principal balance, and the entirety of the transfers consisted of fictitious profits. At the time of the "inheritance," no new principal was deposited into these accounts that could have constituted "value." Therefore, no amount of testimony about the nature of Laurence Apfelbaum's inheritance, the purported equity of 1FN006 in 1995 or the administration of Albert Igoin's estate can change the fact that Laurence and Emilie Apfelbaum's accounts were funded with fictitious profits, and Defendants' proffered witnesses simply cannot show otherwise. (Defs. Reply at 27; Amended Complaint, Ex. B.)

For the same reason, Mr. Pradie's proffered testimony regarding Defendants' good faith is irrelevant to this matter. Since Defendants provided no "value" in exchange for the millions of

[6] *See Picard v. Chais (In re Bernard L. Madoff Inv. Secs. LLC)*, 445 B.R. 206, 220 (Bankr. S.D.N.Y. 2011) ("It is now well recognized that the existence of a Ponzi scheme establishes that transfers were made with the intent to hinder, delay, and defraud creditors.") (citations omitted); *Picard v. Merkin (In re Bernard L. Madoff Inv. Secs. LLC)*, 440 B.R. 243, 255 (Bankr. S.D.N.Y. 2010) (same).

[7] The documents submitted with the Trustee's Opposition represent, unsurprisingly, only select examples of the Trustee's evidence; BLMIS's files contain decades of records specifically applicable to this avoidance action and these Defendants. Such records, which are located in New York, will dwarf any records Defendants may possess in France. (Defs. Reply at 26.)

dollars of fictitious profits they received, their good faith defense is immaterial. (*See* Trustee's Opp. at 25, n.20.) The relevant issues in this case remain the analysis of the cash flow into and out of Defendants' accounts—issues as to which the fact and expert witnesses are located here.

(c) The French Blocking Statute. Defendants cite one French court decision to support their assertion that the possibility of prosecution under France's blocking statute is real. (Defs. Reply at 31.) As Defendants acknowledge, however (*see* Reply Declaration of Bruno Quint ¶ 13), the person convicted in that case was an attorney attempting *voluntarily* to gather information in France, rather than a private citizen complying with a United States discovery order. Therefore, this prosecution under the French blocking statute is inapposite, and still insufficient to show "real" possibility that any French witnesses would face prosecution if required to comply with United States discovery. *See MeadWestvaco Corp. v. Rexam PLC*, No.1:10CV511 (GBL/TRJ), 2010 WL 5574325, at *2 n.1 (E.D. Va. Dec. 14, 2010) (holding that sole prosecution under French blocking statute was insufficient to show real likelihood of prosecution, as facts were not comparable to instant case). As discussed in the Trustee's opening brief, United States courts routinely order foreign parties to comply with federal discovery orders despite the existence of blocking statutes. *See, e.g.*, *Société Nationale Indust. Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987); *In re Global Power Equip. Grp., Inc.*, 418 B.R. 833, 847 (Bankr. D. Del. 2009).

2. The Expense of Instituting a Subsequent Enforcement Proceeding in France Does Not Warrant Dismissal

Defendants argue that the Trustee would likely have to file an enforcement proceeding in France after prevailing in the United States, and therefore it will be "more efficient and beneficial for the Estate for the Trustee to use his French counsel to present this action in France." (Defs. Reply at 32.) The Trustee disagrees. The Trustee is prepared, if necessary, to

bring all appropriate actions to enforce any judgments obtained in the more than one thousand avoidance actions he has brought here. This is far more efficient and beneficial to the estate than reformulating the Trustee's claims under French law, translating and producing vast amounts of English-language evidence currently housed in the United States, and reinstituting proceedings and re-serve the Defendants with process. This factor as well weighs against the French forum.

CONCLUSION

WHEREFORE, the Trustee respectfully requests that the Court deny Defendants' Motion in its entirety.

Date: October 1, 2012
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By: */s/ Tracy Cole*

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