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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

BRIEF OF STATUTORY INTERVENOR SECURITIES INVESTOR PROTECTION CORPORATION

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1(a) of the Federal Rules of Appellate Procedure, the Securities Investor Protection Corporation ("SIPC") hereby states that it has no parent corporation and there is no publicly held corporation owning 10% or more of stock in SIPC.

Dated: January 10, 2018
Washington, D. C.

/s/ Josephine Wang
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Camp. v. Nat'l Union Fire Ins. (In re Government Secs. Corp.),
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Data v. Mukasey, 554 U.S. 1 (2008)..43

Donell v. Kowell, 533 F.3d 762 (9th Cir.), *cert. den.*,
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*Emerald Capital Advisors Corp. v. Bayerische Moteren Werke
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Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 49

In re Fairfield Sentry Ltd. Litigation, 458 B.R. 665 (S.D.N.Y. 2011) 13

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In re Fairfield Sentry Ltd., No. 10-cv-7311 (GBD) Doc. No. 46 (S.D.N.Y. 2011) 13

FDIC v. Hirsch (In re Colonial Realty Co.), 980 F.2d 125 (2d Cir. 1992) 47

Ferris, Baker Watts, Inc. v. Stephenson (In re MJK Clearing, Inc.), 286 B.R. 109 (Bank. D. Minn. 2002), *aff'd*, 2003 WL 1824937 (D. Minn. April 7, 2003), *aff'd*, 371 F.3d 397 (8th Cir. 2004) 28

Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240 (2d Cir. 1999) 29

Fogerty v. Petroquest Resources, Inc. (*In re Condor Ins. Ltd.*), 601 F.3d 319 (5th Cir. 2010) 31

In re French, 440 F.3d 145 (4th Cir. 2006), *cert. den. sub nom. French v. Liebmann*, 549 U.S. 815 (2006) 40, 45, 48

In re Globo Comunicacoes E Participacoes S.A., 317 B.R. 235 (S.D.N.Y. 2004) 45

Hilton v. Guyot, 159 U.S. 113 (1895) 29

Iida v. Kitahara (In re Iida), 377 B.R. 243 (9th Cir. BAP 2007) 31

JP Morgan Chase Bank v. Altos Hornos de Mexico, 412 F.3d 418 (2d Cir. 2005) 29, 31-32, 33

Kismet Acquisition, LLC v. Icenhower (In re Icenhower), 757 F.3d 1044 (9th Cir. 2014), *cert. den. sub nom. Diaz-Barba v. Kismet Acquisition, LLC*, ___ U.S. _____, 135 S. Ct. 2376 (2015) 48-49

TABLE OF AUTHORITIES
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CASES: **PAGE**

Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag), 961 F.2d 341 (2d Cir. 1992) 30, 32

Maxwell Communication Corp. v. Societe Generale (In re Maxwell Communication Corp.), 93 F.3d 1036 (2d Cir. 1996)... 29-30

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Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007)..44

Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. 2012) 13

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Official Comm. of Unsecured Creditors of Arcapita v. Bahrain Islamic Bank, 549 B.R. 56 (S.D.N.Y. 2016)...................................39

Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C. (c) v. Bahrain Islamic Bank, (In re Arcapita Bank B.S.C.(C), 575 B.R. 229 (Bankr. S.D.N.Y. 2017) 49

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Picard v. Bureau of Labor Insurance (In re Bernard L. Madoff), 480 B.R. 501 (Bankr. S.D.N.Y. 2012) 40, 41, 42, 48

Picard v. Greiff (In re Madoff Sec.), 476 B.R. 715 (S.D.N.Y. 2012), *aff'd sub nom., Picard v. Ida Fishman Revocable Trust (In re BLMIS)*, 773 F.3d 411 (2d Cir. 2014), *cert. den.*, __ U.S. __, 135 S. Ct. 2858 and 135 S. Ct. 2859 (2015) 35

TABLE OF AUTHORITIES
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CASES: **PAGE**

Rent Stabilization Ass'n of City of New York v. Dinkins, 5 F.3d 591 (2d Cir. 1993)....21

Russello v. United States, 464 U.S. 16 (1983).... 51-52

RJR Nabisco, Inc. v. European Community, __ U.S. __ , 136 S. Ct. 2090 (2016)....41, 44, 45

Royal and Sun Alliance Ins. Co. v. Century Int'l Arms, Inc., 466 F.3d 88 (2d Cir. 2006) 21

Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) 44

Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222 (S.D.N.Y. 2014), *supplemented*, No. 12-MC-115 JSR, 2014 WL 3778155 (S.D.N.Y. July 28, 2014)....2

Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, Adv. Pro. No. 08-01789 (SMB), 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22, 2016) 3

SEC v. Packer, Wilbur & Co., 498 F.2d 978 (2d Cir. 1974) 27

Sender v. Buchanan (*In re Hedged-Invs. Assocs.*), 84 F.3d 1286 (10th Cir. 1996)....35

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SIPC v. BLMIS (In re Bernard L. Madoff), 531 B.R. 439 (Bankr. S.D.N.Y. 2015) 35

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Smith v. United States, 507 U.S. 197 (1993) 44

U.S. v. Al Kassar, 660 F.3d 108 (2d Cir. 2011, *cert. den.,* 566 U.S. 986 (2012)...21

U.S. v. Weingarten, 632 F.3d 60 (2d Cir. 2011) 44

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Zervos v. Verizon New York, Inc., 252 F.3d 163 (2d Cir. 2001) 21

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78*lll*(4)...27, 28, 51
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TABLE OF AUTHORITIES
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STATUTES AND RULES: **PAGE**

Securities Investor Protection Act of 1970, §

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Rules of the Securities and Exchange Commission, 17 C.F.R. § 240.

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LEGISLATIVE MATERIALS:

H. R. Rep. No. 109-31 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88 .... 31, 45

S. Rep. No. 95-989, *reprinted in* 1978 U.S.C.C.A.N. 5787 51

OTHER:

Alternative Net Capital Requirements for Certain Brokers and Dealers, Exchange Act Release No. 11004, 57-533, 39 Fed. Reg. 41540 (Nov. 29, 1974) 24-25

Broker-Dealers; Maintenance of Certain Basic Reserves, Exchange Act Release No. 9856, 37 Fed. Reg. 25224 (Nov. 29, 1972) 24

TABLE OF AUTHORITIES
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OTHER (cont.): **PAGE**

Obligations of Broker-Dealers to Maintain Physical Possession or Control and Certain Reserves, Exchange Act Release No. 9622, 37 Fed. Reg. 11687 (June 10, 1972) 25-26

Merrill Lynch Pierce Fenner & Smith Inc., SEC No-Action Letter, 1981 WL 25047, at *1 (June 27, 1981) 54

Luis A. Aguilar, former Comm'r, SEC, Preparing for the Regulatory Challenges of the 21st Century at the Georgia Law Review Annual Symposium: Financial Regulation: Reflections and Projections (March 20, 2015), *reprinted at* https://www.sec.gov/news/speech/preparing-for-regulatory-challenges-of-21st-cen-tury.html....................56

PUBLICATIONS:

Department of the Treasury, Federal Reserve Bank of New York and Board of Governors of the Federal Reserve System, U.S. Portfolio Holdings of Foreign Securities as of December 31, 2016, ticdata. treasury.gov/Publish/shc2016_report.pdf 55....................55

Investment Company Institute, The US Retirement Market, Third Quarter 2017, http://www.ici.org/info/ret_17_q3_data.xls 55

HEDGE FUNDS AND PRIME BROKERS (Mark Berman ed., Risk Books 2d ed. 2009) 4

Michael P. Jamroz, *The Net Capital Rule*, 47 Bus. Law. 863 (May 1992)....................22

Michael P. Jamroz, *The Customer Protection Rule*, 57 Bus. Law. 1069 (May 2002)....................24, 26

JURISDICTIONAL STATEMENT

This consolidated appeal is by Irving H. Picard, as Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§78aaa et seq. ("SIPA").[1] The BLMIS liquidation proceeding is pending before the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). The Trustee initiated a number of avoidance and recovery actions within the liquidation, including actions against subsequent transferees. The Bankruptcy Court had jurisdiction over the actions under 28 U.S.C. § 157(b)(1) and SIPA § 78eee(b)(4).

The United States District Court for the Southern District of New York ("District Court") withdrew the reference with respect to many of the Trustee's actions and thereafter set forth some basic guidelines that, upon remand of the actions to the Bankruptcy Court, were to govern the Bankruptcy Court's decision regarding motions to dismiss the subsequent transfer claims. *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014), *supplemented*, No. 12-MC-115 JSR, 2014 WL 3778155 (S.D.N.Y. July 28, 2014). (SPA-204,

[1] Participation by the Securities Investor Protection Corporation ("SIPC") in this consolidated appeal is pursuant to SIPA Section 78eee(d) which makes SIPC a party in interest as to all matters in a SIPA proceeding, "with the right to be heard on all such matters."

For convenience, references herein to provisions of SIPA shall omit "15 U.S.C."

SPA-223).[2] The District Court had jurisdiction over the actions under 28 U.S.C. §1334(b) and SIPA §78eee(b)(2)(A).

The Bankruptcy Court issued its decision on November 22, 2016. *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Adv. Pro. No. 08-01789 (SMB), 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22, 2016). (SPA-226). Thereafter, the parties jointly petitioned this Court for permission to appeal from the decision.

On September 27, 2017, the Court granted the petitions as to 86 cases to which the decision applied. On October 5, 2017, the Court issued an amended Order which granted the petitions as to the decision in 87 cases. On November 30, 2017, the Court granted a joint petition as to an additional appeal of the decision. The appeals in the now-88 cases have been consolidated under Docket No. 17-2992. This Court has jurisdiction under 28 U.S.C. § 158(d)(2)(A).

STATEMENT OF THE ISSUES

The issues in this consolidated appeal are set forth in the Trustee's brief. They may be summarized as follows:

> Whether a SIPA trustee may recover customer property entrusted to a U.S. broker and stolen by the broker, if the property has left U.S. shores.

[2] References herein to pages of the Special Appendix and of the Joint Appendix, correspondingly, are to "SPA-__" and "A-__."

SIPC respectfully submits that the answer is "yes," and that the Bankruptcy Court erred in declining to exercise jurisdiction based on comity and extraterritoriality.

STATEMENT OF THE CASE[3]

A. The Gateway to the Fraud

The BLMIS Ponzi scheme, perpetrated by Bernard Madoff ("Madoff") out of New York, was kept afloat largely by cash infusions that BLMIS received from feeder funds like Fairfield Sentry Limited ("Sentry") and sub-feeders like Fairfield Sigma Limited ("Sigma") and Fairfield Lambda Limited ("Lambda") (collectively, "the Funds").[4] Sentry invested directly with BLMIS, and was the largest feeder to have an account with BLMIS. Sigma and Lambda were indirect beneficiaries, having no accounts with BLMIS, but owning shares of Sentry. Those shares were paid for with monies invested in foreign currencies and then converted into U.S. dollars as required for investment in Sentry. (A-17556, ¶ 224).

---

[3] Because many of these cases involved the Fairfield Funds and because of space limitations, the facts stated herein relate to Fairfield. The analysis of the applicable law, however, is intended to apply to all of the cases.

[4] A feeder fund is a hedge fund that solicits and pools monies from investors. Hedge funds strike a net asset value per share for each class of shares offered. In a master feeder structure, each feeder invests its assets in a master feeder which holds the portfolio. Non-U.S. investors and U.S. tax-exempt investors buy shares in the offshore feeder while U.S. tax-paying investors invest in the onshore fund or in the master fund itself. HEDGE FUNDS AND PRIME BROKERS 3, 10 (Mark Berman ed., Risk Books 2d ed. 2009).

That the monies were invested with Madoff came as no surprise to shareholders of these Funds. From 2006, the offering materials of the Funds advised that BLMIS was a broker-dealer registered with the Securities and Exchange Commission ("SEC"), and that the objective was to achieve capital appreciation directly for Sentry, and indirectly for Sigma and Lambda, through investments with BLMIS. As indicated in the Private Placement Memoranda for the Funds, the "services of BLM [BLMIS] and its personnel are essential to the continued operation of the Fund, and its profitability, if any." (A-17990).[5]

That disputes relating to investment in the Funds could be resolved in New York also was no secret to their shareholders. The subscription agreements that the Funds required each shareholder to complete and sign, specified, in relevant part:

> **New York Courts**: Subscriber agrees that any suit, action or proceeding ("Proceeding") with respect to this Agreement and the Fund may be brought in New York. Subscriber irrevocably submits to the jurisdiction of the New York courts with respect to any Proceeding and consents that service of process as provided by New York law may be made upon Subscriber in such Proceeding, and may not claim that a Proceeding has been brought in an inconvenient forum. Subscriber consents to the services of process out of any New York

[5] Similarly, a January 1, 1998 Information Memorandum issued by Sentry advised that "The Manager [of Sentry] has delegated all investment management duties to [BLMIS]. As a result, [Sentry] is subject to the judgment, decisions and trading opinions of [BLMIS] and has no control over the decisions implemented by [BLMIS]." (A-5321).

> court in any such Proceeding by the mailing of copies thereof, by certified or registered mail, return receipt requested, addressed to Subscriber at the address of Subscriber then appearing on the Fund's records. Nothing herein shall affect the Fund's right to commence any Proceeding or otherwise to proceed against Subscriber in any other jurisdiction or to serve process upon Subscriber in any manner permitted by any applicable law in any relevant jurisdiction.

(A-6692).

Avoiding U.S. taxation, together with the opportunity to invest with Madoff, were part of the Funds' appeal. Although subscription in the Funds was limited to individuals of high net worth who were non-U.S. persons or U.S. investors that were tax-exempt, that requirement was easily circumvented. Thus, for example, when Koch Industries, a U.S. company headquartered in Wichita, KS, sought to increase its investment in a related Fairfield fund, it was unable to do so because the fund was fully subscribed. Skirting the requirement of being able to invest only if a non-U.S. person or tax exempt, and even though the subscription agreement provided that, except with the consent of the Fund, shares of the Funds "will not at any time be held for the account or benefit, directly or indirectly, of any U.S. Person," (A-6688, ¶ 5), Koch Industries used Koch Investment, a private unlimited company present in the United Kingdom on paper only and owned and controlled by Koch Industries, to invest with BLMIS through Sentry. Through Sentry, over $21.5 million of funds stolen from BLMIS customers were diverted to

Koch Investment. (A-8280, ¶ 1). In 2009, after Madoff was arrested, Koch Industries dissolved Koch Investment. (A-8282, ¶ 10).

B. <u>The Fairfield Set-Up</u>

While having nominal ties abroad, the Fairfield Funds were in fact U.S. owned and operated. The Funds were part of a consortium of individuals and entities that operated under the umbrella name of Fairfield Greenwich Group ("Greenwich Group") (A-17485, ¶ 1). Among others, the Greenwich Group included the Sentry Fund, as well as two other master hedge funds, Greenwich Sentry and Greenwich Sentry Partners, L.P., each of which had an account with BLMIS. (*Id.*) Members and personnel of the Greenwich Group, based in the U.S., played a large role in processing the "investments." BLMIS customer money withdrawn by the Funds was transferred to Fund subscribers to pay for redeemed shares or was transferred to Greenwich Group administrative entities, partners, and employees to pay significant management and performance fees based on the fictitious performance of BLMIS. In this manner, the Greenwich Group reached far and wide, as monies belonging to BLMIS customers were freely distributed and re-distributed to funds, fund subscribers and Greenwich Group officials and personnel and parties with whom Greenwich Group contracted. (A-17494 – A-17501, ¶ ¶ 33-57).

C. The Greenwich Group At Its Inception

In 1988, two individuals, Walter Noel ("Noel") and Jeffrey Tucker ("Tucker"), formed the Greenwich Group, and operated it out of New York City. (A-17494, ¶ 33). The Greenwich Group grew to include other individuals, the master hedge funds, an array of sub-feeders and funds of funds, and a number of administrative entities purporting to offer management and back office support to the funds. The three master Hedge Funds invested more than 95% of their assets, net of fees and expenses, with BLMIS -- Sentry being the largest. (A-17495, ¶ 36). The success of the Greenwich Group depended upon its ability to market the funds as BLMIS funds. Principals of the Greenwich Group travelled the world promoting the funds and soliciting billions of dollars for investment. (A-17501, ¶ 59.) By the end of 2008, Sentry alone had invested more than $4.2 billion with BLMIS (A-16398, ¶ 535).

In 1990, Noel and Tucker had organized Sentry as an international business company under British Virgin Islands ("BVI") law so that it could enjoy tax-free status. At all times, Sentry was a shell corporation with no employees and no office, and a post office box as its registered address in the BVI. (A-17549, ¶ 198). Initially, its operations were outsourced to a Delaware corporation owned by Noel and Tucker. Later, its operations were outsourced to other Greenwich entities that were created and worked out of New York. (A-17496 – A-17497, ¶¶ 40-41).

Citco Fund Services (Europe) BV, a financial services provider serving hedge funds and offering hedge fund administration, was to provide back office administrative services to Sentry, and Citco Global Custody NV was to be custodian for its funds. But the agreement with the latter specified that BLMIS would serve as sub-custodian, meaning that BLMIS would have actual custody of Sentry assets. (A-17497, ¶ 42). As the Sentry August 14, 2006 Private Placement Memorandum disclosed:

> As a result of the Investment Manager's selection of Bernard L. Madoff Investment Securities, LLC ("BLM") …, substantially all of the Fund's assets will be held in segregated accounts at BLM, a U.S. registered broker-dealer and qualified custodian. Accordingly, BLM will be a sub-custodian of the Fund.

(A-17996). Although Sentry's mailing address on BLMIS records initially was an address in Greenwich, CT, by 1998, BLMIS was directed to send all Sentry account statements and related documents to the Greenwich Group's New York headquarters. (A-17497, ¶ 43). Furthermore, notwithstanding the Citco entities' roles, New York Greenwich Group personnel made all operational decisions for Sentry, as they controlled all subscriptions into and redemptions from Sentry. (A-17552, ¶ 207).

Noel and Tucker opened accounts in Sentry's name at Citco Bank Nederland, N.V. Dublin Branch, but New York Greenwich Group personnel controlled those accounts as well. (A-17497, ¶ 42). Payment for purchases of

shares of the Sentry Fund, and for redemption of fund shares, centered on U.S. banks. For example, Banque Lombard Odier & Cie. S.A. ("Lombard"), a Swiss private bank, was instructed to send subscription funds to a New York correspondent bank account at HSBC Bank USA, N. A., for deposit into the bank account of Sentry as the beneficial owner of the account. (A-5324, ¶ 19). This was consistent with the Sentry Private Placement Memorandum, dated as of August 14, 2006, which instructed subscribers to wire subscription funds to an account in the name of Citco Bank Nederland N.V. Dublin Branch for the benefit of Fairfield Sentry Limited, at HSBC Bank in New York.[6] (A-17994). From Sentry's administrator's account, the funds would be deposited into BLMIS's account at JP Morgan Chase Bank N.A. in New York. Redemption payments for Lombard would be made to Lombard's bank account at Citibank N.A. in New York. (A-5323, ¶ 16; A-5324, ¶ 21).

Among other things, Sentry offering documents disclosed the relationships among the parties, and the 20% performance fee to be paid to the Funds on "gains" in the Sentry BLMIS accounts. The documents also disclosed that all investment decisions would be made by BLMIS in New York, and that all Sentry assets would be held in discretionary accounts at BLMIS. (A-17498, ¶ 44).

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[6] Sigma subscribers were instructed to wire subscription funds to De Nederlandsche Bank, in Amsterdam, while Lambda subscribers were to wire subscription funds to Credit Suisse First Boston, Zurich. The funds were then wired to Sentry's administrator's account in the U.S.

Like Sentry, Lambda and Sigma were organized as BVI international companies, structured similarly to Sentry with respect to administration and operational services, and fully controlled by New York Greenwich Group personnel. (A-17499, ¶¶ 50, 51; A-5333, ¶ 50).

D. <u>The Subscribers</u>

Organizing a fund under foreign law while maintaining the fund's principal place of business in New York, and operating and controlling it in all respects out of New York was the *modus operandi* of the Greenwich Group. The Private Placement Memoranda and Subscription Agreements of, for example, Sigma and Lambda, in significant respects paralleled those of the Sentry Memorandum and Agreement. (A-17558, ¶¶ 231, 232; A-17559, ¶ 234). Under the Subscription Agreements, the subscribers (i) agreed to submit themselves "irrevocably" to "the jurisdiction of the New York courts with respect to any Proceeding…" (A-6692, ¶ 20; A-5323, ¶ 16), and (ii) acknowledged that their interests in the funds would be subject to New York Law. In relevant part, the Agreements provided:

> *Governing Law*. This Agreement shall be governed and enforced in accordance with the laws of New York, without giving effect to its conflict of laws provisions.

(A-6692, ¶ 17; A-17558, ¶ 232; A-9098, ¶ 16).

E. The Funds Are Liquidated and Law Suits Are Brought

Fund subscribers or shareholders were not eligible for dividends on their investments, but could redeem their shares at specified times. (A-9115-9116). In the six years before the filing date, Sentry withdrew $2.895 billion from its BLMIS accounts including $1.580 billion withdrawn in the last two years. (A-17554, ¶ 213). But the uncovering of the Madoff fraud signaled the end for the Funds. Without Madoff, the Greenwich Group had no value and was left with few assets. (A-17549, ¶ 196). Nevertheless, before BLMIS's downfall, Greenwich Group members, employees, related entities, and fund subscribers enjoyed mightily the fruits of the Madoff fraud. As examples with respect to Greenwich Group members alone, in the six years preceding the BLMIS failure, Noel received over $208 million in BLMIS customer funds; Tucker, $188 million; and Andres Piedrahita, Noel's son-in-law who became a member of the Greenwich Group, more than $172 million. (A-17607, ¶ 441; A-17780, Ex. 14; A-17784, Ex. 16; A-17786, Ex. 17; A-17788, Exs. 18-A, 18-B; A-17824, Exs. 30-A, 30-B). The BLMIS customer money was paid either directly to Piedrahita or to an entity wholly-owned by him. (A-17579, ¶ 322). His wife also received, in payments to her or to her wholly-owned entity, over $5 million. (A-17608, ¶ 441; A-17788; A-17824, Exs. 30-A, 30-B). Following Madoff's arrest, Piedrahita and his wife sold their New York residence, and travelled from country to country after taking

delivery of a $12 million yacht (A-17579, ¶ 320). While impressive, these transfers were just the tip of the iceberg of how money stolen from Madoff customers freely flowed in all directions throughout the structure built by the Greenwich Group.

In 2009, the Funds entered into liquidation in the BVI. Liquidators or representatives were appointed for the Funds ("Foreign Representatives") and beginning in April 2010, the Foreign Representatives brought suits in New York state court. The suits generally were against banks and owners of shares of the Funds. The suits were premised on the incorrect calculation of the net asset value of the shares as a result of the Madoff fraud. *See In re Fairfield Sentry Ltd. Litigation*, 458 B.R. 665, 671-672 (S.D.N.Y. 2011).

On July 22, 2010, upon a petition filed with the permission of the BVI Court by the Foreign Representatives, the Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") granted recognition to the BVI liquidation proceedings as "foreign main proceedings" under Chapter 15 of Title 11 of the United States Code.[7] The Foreign Representatives initiated a number of suits in the Bankruptcy Court, similar to those in state court, and obtained removal of the

[7] The recognition order was affirmed in *In re Fairfield Sentry Ltd*., No. 10-cv-7311 (GBD) Doc. No. 46 (S.D.N.Y. 2011), and in *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2012).

state court actions to the Bankruptcy Court where the suits were consolidated. *Id.* at 672.

F. <u>The Trustee Settles With The Foreign Representatives</u>

The SIPA Trustee initiated his own suits, seeking to recover the customer property that was transferred from BLMIS to the Funds, the Greenwich Group parties, and others. The rationale for the suits was simple. What began as money entrusted by customers to BLMIS remained customer money notwithstanding that the money illicitly had left U.S. shores. Among others, the Trustee sued the Funds for recovery of approximately $3 billion in withdrawals made by Sentry from its BLMIS accounts. On May 9, 2011, the Trustee and the Foreign Representatives reached a settlement of the case. (A-4664 – A-4686). The settlement agreement gave Sentry an allowed customer claim for $230 million in the SIPA proceeding in return for a cash payment of $70 million to the Trustee. In addition, the Foreign Representatives would assign to the Trustee certain of their state law claims and causes of action against the Greenwich Group and related parties. The Foreign Representatives and the Trustee, on behalf of their respective estates, would share in recoveries made in their respective suits, including the Trustee's subsequent transfer actions. The settlement agreement was approved by the Bankruptcy Court in the SIPA case on June 7, 2011. (A-17431). The agreement also was approved by the BVI Court in the Sentry, the Lambda, and the Sigma proceedings. (SPA-

872). The BVI Court authorized the Foreign Representatives to enter into the Settlement Agreement with the Trustee, and further authorized them "to take any and all actions to comply with and carry out the terms of the Agreement…." (SPA-872 –SPA-884).

G. <u>The Lower Court Decisions</u>

1. The Decision of the District Court

The District Court (Rakoff, J.) withdrew the reference of a number of the adversary proceedings to consider whether Section 550(a)(2) of the Bankruptcy Code (11 U.S.C.) applied extraterritorially in order to allow, for example, the Trustee's suits to recover transfers by the Funds to their subscribers to go forward.[8] In its decision, the District Court set down broad principles that were to govern resolution of the question. Viewing the transfers as made by one foreign entity to

[8] In relevant part, 11 U.S.C. § 550(a) provides as follows:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
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> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
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> (2) any immediate or mediate transferee of such initial transferee.

another foreign entity, the Court concluded that the application of Section 550(a)(2) under the facts of the cases would be an impermissible extraterritorial application of that Section that was not intended by Congress. Alternatively, the Court concluded that the suits would be barred by considerations of comity. (SPA-219 – SPA-221).

With respect to extraterritoriality, the Court applied the two-step test set forth in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255-257 (2010) ("*Morrison*"). (SPA-208). This required the Court to analyze 1) whether the facts involved an extraterritorial application of the statute; and 2) if so, whether extraterritorial application was permitted by statute. Whether a statutory provision was being applied extraterritorially required identification of the "focus" of the provision or the transactions at which the provision was directed. The Court concluded that the focus of Section 550(a) was on the property transferred and on its transfer; that in these cases, the transfers were by foreign feeder funds to foreign recipients; and that an extraterritorial application of Section 550(a) therefore was required. (SPA-210, SPA-212). The Court also concluded that Congress did not intend Section 550(a) to apply extraterritorially because even though Section 550(a) provided for avoidance of transfers "for the benefit of the estate" and the estate included property "wherever located," avoidance property did not become "property of the estate" until recovered. (SPA-213 – SPA-215).

In the alternative, the District Court decided that reliance upon Section 550(a) was precluded by international comity which required weighing the interests of the United States in the subject matter against those of the foreign jurisdiction. The Court noted that at least two of the hedge funds were the subject of liquidation proceedings in their own countries and that those countries had their own rules as to when disgorgement of property was proper. The Court viewed the Trustee's suits as an attempt to reach around determinations of the foreign jurisdictions and concluded that "these foreign jurisdictions have a greater interest in applying their own laws than does the United States." (SPA-221). The Court remanded the adversary proceedings to the Bankruptcy Court for further proceedings consistent with its Opinion and Order. (SPA-222).

2. *The Decision of the Bankruptcy Court*

Upon remand, the Bankruptcy Court (Bernstein, J.) held that as between the United States and the foreign jurisdictions in which the hedge funds had been incorporated, the "United States has no interest in regulating the relationship between the Funds and their investors or the liquidation of the Funds and the payment of their investors' claims." (SPA-260). The Court observed that with respect to Sentry, the BVI Court had ruled that redemptions were governed by the Fund's articles of incorporation and BVI law, and that the shareholders would have expected BVI law to control. The Court barred the recovery of any subsequent

transfers arising from the avoidance of initial transfers made by BLMIS to the Fairfield Funds under the doctrine of comity, as well as any subsequent transfers made by BLMIS to other funds that it deemed similarly situated. (SPA-261). The Court dismissed a vast majority of the complaints in these actions but refrained from dismissing the complaints against three funds that were subsequent transferors in liquidation in Luxembourg. As to those, the Court left open the possibility of entertaining a motion to supplement the record upon receipt of information regarding the liquidations, and addressing the questions of whether Luxembourg law included avoidance provisions, and whether a suit by the Trustee would be an end-run around the foreign proceedings.

With respect to extraterritoriality, the Court discounted a number of factors that arguably could cause an entity to be "foreign" or domestic, and focused only on the four factors that the District Court deemed relevant: the locations of the sending and receiving bank accounts, and the locations or residences of the transferor and transferee. (SPA-283). The Bankruptcy Court noted that it was bound by the decision of the District Court that a transfer by means of a U.S. correspondent account would not qualify a transfer as domestic. (SPA-284). The Court concluded, however, that a transfer by a U.S. resident from a U.S account, even if to a foreign transferee, would be a domestic transaction. (SPA-284). Upon

application of the four factors, the Court dismissed many of the remaining cases on the basis of extraterritoriality and allowed some to proceed.

SUMMARY OF THE ARGUMENT

The decisions of the lower courts provide a roadmap to would-be fraudsters on how to launder stolen customer money and place it beyond the reach of U.S. courts and authorities. The transfer of such money out of the U.S. to a "foreign" entity, no matter how questionably "foreign" the entity may be, followed by the further transfer of the money to another entity abroad, causes the money that customers entrusted to their U.S. broker to lose its identity and no longer to belong to them. If the same transfers were made in the U.S., recourse could be had against the immediate and subsequent transferees and the customer money would be recovered and restored to its owners. But because the money is sent abroad, the foreign transferee acquires an ownership interest in it, subject to whatever a foreign court, applying foreign law, holds.[9] The decision of the lower court means that the United States surrenders its sovereignty by leaving to foreign jurisdictions the right to decide the fate of cash entrusted by customers to their U.S. broker for investment in the U.S. Markets. In the interest of preserving harmony among nations, the foreign immediate or subsequent transferee is allowed to fare better

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[9] Even if stolen customer property were not sent abroad, if the immediate transferee happened to be the subject of a foreign liquidation proceeding, the subsequent transferee presumably also could keep the property.

than its U.S. counterpart, and the customers, to whom the money belonged, remain the designated losers.

The aforementioned outcome is not what Congress intended nor what it provided in SIPA. While taking into account, as they should, the concerns of the foreign jurisdictions, both the District and Bankruptcy Courts gave short shrift to the concerns of the U.S. and where U.S. public interest lies. But when properly balanced, U.S. interests far outweigh those of any foreign jurisdiction. The use of customer property in the United States is closely regulated and guarded, and for good reason. Investor confidence is critical to the proper functioning, and to how investors perceive the safety and soundness, of the U.S. markets. By undermining investor confidence, the misuse of customer property adversely affects investors in the U.S. markets, and, as such, the public interest. The rights to customer property should not be easily surrendered, as the lower Court held is to be done here. Particularly in today's world of international dealings, the decision of the lower Court has consequences that go well beyond the Madoff fraud. It is not enough to imply that if Congress intended to guard against such loopholes, it should have so provided, or to say that customers *may* have recourse under foreign law, or to conclude that the desire to avoid international discord necessarily trumps domestic policy concerns. *See* SPA-218. A statute must be construed consistent with its purposes and enforced according to its terms. Under SIPA, Congress has provided

for the protection of customer property both here and abroad. The decision of the Bankruptcy Court should be reversed.

STANDARD OF REVIEW

The dismissals in these cases on appeal were based on the complaints or on the complaints supplemented by undisputed facts in the record. Therefore, the review by this Court is *de novo*. To the extent the lower Court resolved disputed facts, its findings would be reviewed for clear error. *Rent Stabilization Ass'n of City of New York v. Dinkins*, 5 F.3d 591, 594 (2d Cir. 1993). Questions of law, including questions of statutory interpretation, are reviewed *de novo. U.S. v. Al Kassar*, 660 F.3d 108, 124 (2d Cir. 2011), *cert. den.*, 566 U.S. 986 (2012). The dismissal of an action based on international comity is reviewed for abuse of discretion, but because the review is from a decision to abstain from exercising jurisdiction, the review is even more rigorous than it is ordinarily under an abuse-of-discretion standard. A lower court abuses its discretion when its decision rests on an error of law or fact or "cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001). In the review of a decision to abstain, "there is little practical distinction between review for abuse of discretion and review *de novo*." *Royal and Sun Alliance Ins. Co. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006).

ARGUMENT

I. THE INTERESTS OF THE UNITED STATES LIE IN THE PROTECTION OF CUSTOMER PROPERTY

A. The Broker-Dealer's Financial Responsibility Requirements

Upon an application by SIPC, the District Court to which the application is made, shall issue a protective decree placing a securities broker-dealer in SIPA liquidation, if, among other grounds, the Court finds that the broker-dealer is not in compliance with financial responsibility or hypothecation of customer securities requirements prescribed under the Securities Exchange Act of 1934 ("the 1934 Act") or under Rules promulgated by the Securities and Exchange Commission ("SEC"). SIPA § 78eee(b)(1)(C). The need for compliance is such that the mere inability of the broker-dealer to make required computations, even if ultimately there is no deficiency of customer property, is enough to trigger a SIPA liquidation. *See* SIPA § 78eee(b)(1)(D).

The 1934 Act financial responsibility requirements include the SEC's Net Capital Rule which requires the broker-dealer to maintain a minimum amount of net capital (assets over liabilities) in order to ensure adequate liquidity in case of a firm failure. *See* 17 C.F.R. § 240.15c3-1. *See also* Michael P. Jamroz, *The Net Capital Rule*, 47 Bus. Law. 863, 864 n.5 (May 1992). The requirements also include recordkeeping and reporting requirements under SEC Rules 17a-3 through 17a-5, 17a-11, and 17a-13, and limits on the hypothecation of customer securities

under SEC Rule 8c-1, 17 C.F.R. §§ 240.17a-3 through 17a-5, 240.17a-13, and 240.8c-1. Finally, the financial responsibility requirements include SEC Rule 15c3-3, 17 C.F.R. § 240.15c3-3 (SPA-1119), known as the Customer Protection Rule.

SEC Rule 15c3-3 has two basic components:

One, the broker-dealer must take and maintain possession and control of customers' fully-paid and excess margin securities. *See* 17 C.F.R. § 240.15c3-3(b)(1). Securities are deemed to be in the control of the brokerage if, among other locations, the securities are held in an account in the name of the broker-dealer for the benefit of customers, at a clearing corporation or custodian bank. *See* 17 C.F.R. § 240.15c3-3(c)(1). Foreign depositories and foreign custodian banks also are acceptable control locations so long as the SEC has designated them as such. 17 C.F.R. § 240.15c3-3(c)(4).

Two, with regard to customer cash, Rule 15c3-3 requires broker-dealers to establish at one or more banks a special reserve bank account for the exclusive benefit of customers. This account contains customer cash or "qualified securities," that is, U.S. Treasuries or other securities backed by the full faith and credit of the Federal Government. 17 C.F.R. § 240.15c3-3(a)(6). The amount to be kept in the account is calculated weekly under a formula contained in the Rule, and is equal to the amount by which customer credit items exceed customer debit

items. 17 C.F.R. § 240.15c3-3(e)(1). As under the Net Capital Rule, securing customer cash and securities ensures against the loss of customer property should the brokerage fail. *See Broker-Dealers; Maintenance of Certain Basic Reserves*, Exchange Act Release No. 9856, 37 Fed. Reg. 25,224, 25,225 (Nov. 29, 1972) (Rule 15c3-3 evidences an approach that is "consistent with one of the principal objectives of the SIPC Act that customer funds and securities not be exposed to risk of loss through broker-dealer insolvency."). *See also* Michael P. Jamroz, *The Customer Protection Rule*, 57 Bus. Law. 1069, 1071 (May 2002).

The protection of customer property is critical to investors' willingness to invest which in turn, is critical to the formation of strong capital markets in the U.S. As the SEC observed in announcing certain revisions to its Net Capital Rule:

> The key factors which distinguish the securities industry from other industries are its custodial responsibility for customers' funds and securities and the unique role the industry must play in the formation and maintenance of the capital needs of governments and corporations. Thus, the scope and purpose of requirements concerning the fiscal responsibility of broker-dealers are designed to achieve an environment in which the failure of a broker-dealer does not result in loss to its customers or the customers of other broker-dealers.
> *** [C]apital requirements must not only be sufficient to enable broker-dealers to meet their immediate commitments to customers but also provide reasonable assurance against the loss of customer assets by interacting with minimum operational and custodial standards as well as existing surveillance, reporting and examination programs within the industry's regulatory and self-regulatory framework. Capital requirements

> must also balance the need for the efficient use and deployment of existing resources to meet the industry's function of capital formation and maintenance with the equally important need to protect public customers and instill within them confidence to insure their continued participation in the nation's capital markets.

Alternative Net Capital Requirements for Certain Brokers and Dealers, Exchange Act Release No. 11004, 57-533, 39 Fed. Reg. 41540, 41541 (Nov. 29, 1974).

B. The Interdependence Between the Financial Responsibility Requirements and SIPA

Significantly, the Customer Protection Rule was enacted by the SEC pursuant to a directive from Congress under SIPA. *See* 37 Fed. Reg. at 25,224 (Rule 15c3-3 was "well fashioned to furnish the protection for the integrity of customer funds and securities as envisioned by Congress when it amended section 15(c)(3) of the Act by adopting section 7(d) of the Securities Investor Protection Act of 1970."). Under SIPA Section 7(d), Congress amended Section 15(c)(3) of the 1934 Act to prohibit securities brokers or dealers from engaging, by means of interstate commerce, in the purchase or sale of securities, in contravention of rules adopted by the SEC "in the public interest or for the protection of investors." Such rules were to "require the maintenance of reserves with respect to customers' deposits or credit balances." Securities Investor Protection Act of 1970, Pub. L. No. 91-598, § 7(d), 84 Stat. 1636, 1653 (1970). *See Obligations of Broker-*

Dealers to Maintain Physical Possession or Control and Certain Reserves, Exchange Act Release No. 9622, 37 Fed. Reg. 11687 (June 10, 1972).

The fact that Rule 15c3-3 grew out of SIPA is indicative of the symbiotic relationship between the financial responsibility requirements when a brokerage is in business, and SIPA should the brokerage fail. On the one hand, the Customer Protection Rule and the other financial responsibility requirements ensure customers against the loss or misuse of their property while the brokerage is operating. *See* Jamroz, *The Customer Protection Rule*, 57 Bus. Law. at 1070 ("The rule, which can be loosely described as a 'segregation' rule, divides the customer and proprietary activities of the firm."). But, if customer property is lost or missing due to a violation of the financial responsibility requirements, SIPA is invoked to mitigate the loss. In the same way that the requirements protect customer assets when a brokerage is in business, SIPA protects customers against the loss of their property if the brokerage fails. It does so by maximizing the recovery of customer property for the benefit of customers and by making SIPC funds available, within limits, in case of a shortfall. The public interest is such that taxpayer funds are available, up to $2.5 billion, should the aforementioned sources be inadequate to satisfy customers. SIPA § 78ddd(h).

The protection of customer assets is critical both before and after brokerage failure for reasons that transcend individual loss. Early on, this Court recognized

the potentially dire consequences to the nation's financial system in the absence of protection. In *SEC v. Packer, Wilbur & Co*., 498 F.2d 978 (2d Cir. 1974), the Court remarked as follows:

> The failure of a business is an unhappy event for debtor and creditor alike. When the bankrupt is one of the pillars of the financial community, a brokerage firm long identified in the popular mind with stability and redoubtable finance the failure can produce a tremor in financial circles throughout the nation. The near collapse in 1969 of Hayden Stone and the rumors of impending failures of other brokerage houses cast a pall over Wall Street …. The industry naturally feared that the breakdown of these houses would be attended by a general decline in public confidence in the securities market. Congress soon became concerned for the state of the market and in particular for the plight of the many small investors who fell victim to the economic demise of their brokers. The upshot was a legislative effort to reinforce the flagging confidence in the securities market by providing an extra margin of protection for the small investor. The measure adopted was the Securities Investor Protection Act of 1970 ….

498 F.2d at 980.

Customer property is broadly defined under SIPA Section 78*lll*(4). It includes, at a minimum, cash and securities contained in customers' accounts. But it also can include property of the debtor, such as debtor's bank accounts containing non-customer funds, which could have been set aside or held for the benefit of customers to remedy any shortfall. *See* SIPA § 78*lll*(4)(E). *See also*

Ferris, Baker Watts, Inc. v. Stephenson (In re MJK Clearing, Inc.), 286 B.R. 109, 129-132 (Bank. D. Minn. 2002), *aff'd*, 2003 WL 1824937 (D. Minn. April 7, 2003), *aff'd*, 371 F.3d 397 (8th Cir. 2004). Significantly, "customer property" also includes "property unlawfully converted." SIPA § 78*lll*(4).

II. THE BANKRUPTCY COURT ERRED IN EXERCISING COMITY

A. At Issue Is Stolen Customer Property

While the fact of the transfers in these cases was important, what was more important was that the transferred property was stolen from customers of the U.S. broker-dealer. The Courts below gave little consideration to this, instead readily deferring to foreign Courts to decide whether Fund subscribers or other subsequent transferees that received the stolen customer property could keep it. One plausible outcome in such a situation is that even if, for example, subscribers were ordered by foreign courts to return the monies to their hedge funds, there would be no guarantee of the return of the monies to a SIPA debtor's estate or customers. Instead, in that scenario, subsequent transferees such as a Lambda or a Sigma could keep the monies as part of *their* estates; any claim by a SIPA Trustee would be processed along with the claims of other creditors of the sub-feeders; and the customers of the U.S. brokerage to whom the monies actually belonged again would have their monies used to pay others.

International comity is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). When a parallel proceeding is pending in a foreign jurisdiction with proper jurisdiction, the national court may defer to the foreign court with respect to the adjudication of claims because the "equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding…." *Finanz AG Zurich v. Banco Economico S.A.,* 192 F.3d 240, 246 (2d Cir. 1999). But, even in that circumstance, for deference to be given, 1) the foreign proceeding must be procedurally fair; and 2) deference must comport with the laws and public policy of the United States. *JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 424 (2d Cir. 2005) ("*JP Morgan*"), *citing Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457-59 (2d Cir. 1985) ("*Cunard*").

The Bankruptcy Court remarked that in the cases at hand, the comity referred to by the District Court below was the comity among nations, as opposed to adjudicatory comity (that is, parallel proceedings) in which deference is given to a foreign court where the same case is pending. (SPA-253 – SPA-254). *See Maxwell Communication Corp. v. Societe Generale (In re Maxwell*

Communication Corp.), 93 F.3d 1036, 1047 (2d Cir. 1996) *("Maxwell").* Although there is no parallel liquidation proceeding of BLMIS, both the District and Bankruptcy Courts, in their analyses, appear to have been influenced by the pendency of the liquidations of the Funds and the claims and lawsuits by the Foreign Liquidators and the SIPA Trustee against the same parties. Whether or not parallel proceedings are at issue, ultimately and in any event, the interests of each nation must be balanced against one another, with the nation having the lesser interest deferring to the other nation. [10]

There are many public policy reasons why observance of comity in these cases is inappropriate. Most relate to the fact that the transfers at issue were of customer property, and that the property was stolen. In this regard, there is a limited exception to comity that is instructive in offering a useful comparison.

B. The Interest Asserted by the Trustee Is "Antecedent to the Distributive Rules of Bankruptcy Administration"

In *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag)*, 961 F.2d 341 (2d Cir. 1992), Refco, a New York currency trading firm, entered into a contract with Mebco, a Swiss bank, to exchange U.S. dollars into a

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[10] In *Maxwell*, the Court identified various factors guiding the choice-of-law election. *See* 93 F.3d at 1047-1048. Ultimately, as the Court observed, comity "is a doctrine that takes into account 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. [citation omitted]" *Id.* at 1048.

foreign currency. Refco deposited over $7 million with the bank, but instead of performing its part of the agreement, the bank declared bankruptcy in Switzerland. Koreag was appointed as the Mebco liquidator. Refco thereafter sued Mebco in federal District Court in New York, on the basis that Mebco had no right to the funds that Refco had deposited. Koreag moved to dismiss. The District Court determined that the matter should be addressed in a turn-over proceeding under Section 304(b)(2) the Bankruptcy Code. [11]

Refco initiated the turn-over proceeding in the Bankruptcy Court in New York and moved for summary judgment. The Bankruptcy Court granted the motion for summary judgment but, on the basis of international comity, held that the proceeds should be distributed in the Swiss bankruptcy proceeding and declined to rule on the question of ownership. On appeal, the District Court affirmed.

Upon a further appeal, this Court vacated the order of the District Court and remanded on the ground that "disputes with respect to the ownership of assets do not always implicate the concerns that ordinarily require international comity

[11] 11 U.S.C. Section 304, repealed in 2005 (P. L. 109-8, Title VIII, § 802(d)(3), 119 Stat. 146 April 20, 2005) was the predecessor to chapter 15 of Title 11. *Iida v. Kitahara (In re Iida)*, 377 B.R. 243, 251 (9th Cir. BAP 2007). "Congress intended that case law under [former] section 304 apply unless contradicted by Chapter 15." *Fogerty v. Petroquest Resources, Inc.* (*In re Condor Ins. Ltd.)*, 601 F.3d 319, 328 (5th Cir. 2010), *citing* H.R. REP. NO. 109-31 (2005).

abstention in foreign bankruptcy proceedings." *JP Morgan,* 412 F.3d at 425. In *Koreag*, the Court held:

> Property interests have an independent legal source, antecedent to the distributive rules of bankruptcy administration, that determines in the first instance the interests of claimant parties in particular property. It logically follows that before a particular property may be turned over pursuant to § 304(b)(2), a [United States] bankruptcy court should apply local law to determine whether the debtor has a valid ownership interest in that property when the issue is properly posed by an adverse claimant.
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> * * * *
>
> It is also not the case that Mebco's other creditors are prejudiced by such a threshold determination as to property ownership. Refco is not merely asserting rights as an ordinary creditor or claimant in a bankruptcy proceeding. Its position is that Mebco does not own the Disputed Funds. A determination that the funds are not property of the estate therefore does not improperly affect other creditors of the estate, because they have valid claims only against the estate's bona fide assets. The situation is clearly distinguishable from an effort by a normal bankruptcy creditor, without any plausible ownership claim to a specific asset, to gain a preferred position vis-à-vis other creditors by initiating a separate legal proceeding.

961 F.2d at 349-350.

By comparison, the monies that were transferred in the instant cases were never BLMIS's to transfer. Instead of allowing the monies to be distributed in the normal course in a foreign liquidation proceeding, the Bankruptcy Court should

have retained jurisdiction on the ground that the transfers were of stolen customer property that did not belong to any of the debtors or transferees, but to customers of a registered U.S. broker-dealer, the protection of which was subject to the laws and rules of the U.S.

C. U.S. Public Policy Favors No Deference

As previously mentioned, deference is appropriate only if the foreign proceeding is procedurally fair, and U.S. policies and laws are not contravened. *JP Morgan*, 412 F.3d at 424. Comity may be salutary in many instances, but its application must not undermine the "guiding premise" of bankruptcy which "is the equality of distribution of assets among creditors." *Cunard,* 773 F.2d at 459. As stated in *Banque de Financement, S.A. v. First National Bank of Boston*, 568 F.2d 911 (2d Cir. 1977):

> In exercising its discretion the district court is to guard against forcing American creditors to participate in foreign proceedings in which their claims will be treated in some manner inimical to this country's policy of equality.

568 F.2d at 921.

In deferring to the foreign courts, the Bankruptcy Court did not analyze foreign law, or its potentially adverse impact on BLMIS customers that resulted, for example, from Fund redeemers being allowed to keep the customers' stolen monies.

1. The Subscribers' Right to Fictitious Profits In the BVI

In reviewing the issue of whether Sentry subscribers should be allowed to keep the amounts that they received upon redemption of their interests, the BVI Court of Appeal rejected the Liquidators' assertion that mistake in the calculation of the value of the Fund shares due to the Madoff fraud was a basis for undoing redemption amounts paid. The BVI Court observed that the price of Fund shares could never be definitively established if it could be varied based on information acquired after the transaction presumably had been completed. The Court concluded that based upon the documentation issued to the subscribers and the need for finality, those subscribers who redeemed their interests prior to liquidation would be allowed to keep the amounts received while those members who had not would bear the brunt of the loss. The dismissal of the appeal on the basis that the subscribers provided good consideration in redeeming their shares and that the Fund was bound by any certificate as to the subscription or redemption price given in good faith by Fund Directors was upheld. (SPA-967 – SPA-980). [12]

[12] In 2017, the Court of Appeal of the Eastern Caribbean Supreme Court denied a motion by some redeemers to enjoin the Foreign Representatives from pursuing avoidance actions under BVI law in the U.S. In those actions, among other things, the Foreign Representatives alleged that that the Administrators of the Funds did not report the redemption prices in good faith; and that some redeemers acted in bad faith. *See* SPA-1079.

2. The BLMIS Customers' Right to Fictitious Profits in the U.S.

The outcome in the foreign courts differs markedly from the outcome in the U.S. where, in a Ponzi scheme, fictitious account statements are not treated as real and the calculation of what customers are owed is not based upon fictitious profits shown therein. *See SIPC v. BLMIS*, 424 B.R. 122 (Bankr. S.D.N.Y. 2010), and *In re Bernard L. Madoff Investment Securities LLC*, 654 F.3d 229, 235 (2d Cir. 2011), *reh'g and reh'g en banc den.* (2d Cir. Nov. 8, 2011), *cert. dismissed*, 566 U.S. 1032 (2012), and *cert. den.*, 566 U.S. 934 (2012). Moreover, in the U.S., Congress expressly has provided for the recovery of such transfers. Congress allows avoidance suits, among others, against transferees who receive transfers in good faith and within a specified two year period, so long as the transferee has not provided "value" in exchange for the transfer. *See* 11 U.S.C. §§ 548(a)(1)(A) and 548(c). Consistently, U.S. Courts have held that an investor's paper profits from a Ponzi scheme are not for "value." *See Donell v. Kowell*, 533 F.3d 762, 771-72 (9th Cir.), *cert. den.*, 555 U.S. 1047 (2008); *Sender v. Buchanan* (*In re Hedged-Invs. Assocs.*), 84 F.3d 1286, 1290 (10th Cir. 1996). *See also Picard v. Greiff (In re Madoff Sec.),* 476 B.R. 715, 729 (S.D.N.Y. 2012), *aff'd sub nom., Picard v. Ida Fishman Revocable Trust (In re BLMIS)*, 773 F.3d 411 (2d Cir. 2014), *cert. den.*, __ U.S. __, 135 S. Ct. 2858 and 135 S. Ct. 2859 (2015); *SIPC v. BLMIS (In re Bernard L. Madoff)*, 531 B.R. 439, 460, 479 (Bankr. S.D.N.Y. 2015).

3. **The Weighing of the Criteria By the Lower Court**

The Bankruptcy Court did not analyze how customers of the U.S. brokerage fare versus Fund subscribers, notwithstanding that the stolen monies at stake belonged to the customers. It did not consider that foreign subscribers do substantially better under BVI law at the expense of BLMIS customers. It did not consider that Fund subscribers who redeemed in whole or in part, so long as they received the monies in good faith, keep all fictitious profits while good faith investors through the U.S. brokerage and their transferees in the U.S. must return the same amounts received in the two years preceding liquidation. It mistakenly assumed that the Fund subscribers do not benefit from recoveries in the U.S., even though the Funds themselves were customers of BLMIS. While the District Court correctly noted that Fund subscribers, as "indirects," were not "customers" under SIPA (SPA-218—SPA-219), the Court overlooked that the subscribers, in fact, benefit from the allowance of the Funds' claims in the SIPA proceeding. Amounts received by the Funds, based on their allowed "customer" claims in the SIPA proceeding, are shared with the subscribers in the Funds' own liquidation proceedings. Those amounts include advances from SIPC, and in a different SIPA liquidation proceeding, could include U.S. taxpayer dollars. The amounts also include the Funds' *pro rata* share of customer property which, in turn, includes

avoidance amounts recaptured by the Trustee and re-paid by subsequent transferees similarly situated to the subscribers.

In addition, Fund subscribers share in distributions from the approximately $4 billion forfeiture fund administered through the U.S. Department of Justice ("DOJ"). As reported by the Special Master overseeing the DOJ Madoff Victim Fund, payments from the Fund have begun to Madoff victims living "in 49 States, the District of Columbia and 119 countries. These fraud victims invested indirectly in Madoff through 836 different investment vehicles." *See http://www.madoffvictimfund.com.* In sum, in the name of "comity," the foreign transferees who received the monies entrusted by customers to their U.S. broker, profit from the U.S. system while being insulated by the U.S. system from liability.

Notably, the BVI Court itself did not see fit to limit the Trustee's avoidance actions as the lower Courts have done here. Thus, in approving the settlement agreement between the Trustee and the Fairfield Foreign Liquidators, the BVI Court authorized the Liquidators "to take any and all actions to comply with and carry out the terms of the Agreement." (SPA-877). Among other things, the Agreement provided for the prosecution by the Trustee of subsequent transferee claims. (A-4672). The fact that the BVI Court signaled its acquiescence to subsequent transferee actions by the Trustee as early as June 2011 -- long before

the Bankruptcy Court issued its opinion in 2016 -- is yet another factor that the Bankruptcy Court failed to weigh in exercising comity.

Finally, unlike the BLMIS customers, the Fund subscribers received the benefit of their bargain. The monies that the subscribers invested were used for their intended purpose, that is, to buy shares of a Fund. Beyond that, the Fund subscribers assumed the risk on their investments. If the BLMIS investments did well, they would profit. If they did poorly, the subscribers knew that they could lose their investment. In contrast, the funds of the BLMIS customers were not used for their intended purpose. While the BLMIS customers also assumed the risk of investment loss, they had no reasonable expectation that their monies would be lost due not to investment, but to theft. In this regard, the expectations of the customers were not met. Those expectations are further thwarted if the protections that Congress carefully crafted for their benefit, and for the benefit and maintenance of the U.S. financial system, must yield to foreign law.[13]

[13] The Bankruptcy Court commented that "if the [Sentry] shareholders had any expectations relating to which law governed redemptions, they should have expected BVI law to govern." (SPA-260). But the Court's conclusion is contradicted by the facts. As discussed above, the offering materials of the Funds advised of the connection to, and reliance upon, the U.S. broker-dealer and that it would make all investment decisions; the Private Placement Memorandum advised that the Fund's assets would be held at the U.S. Broker-dealer; under the subscription agreements signed by the subscribers, each subscriber "irrevocably" submitted itself to the jurisdiction of the New York courts and consented to service of process out of any New York court; and the subscription agreements explicitly stated that the agreement would "be governed and enforced in accordance with

In affording comity and thereby failing to consider that deference was not consistent with U.S. law or policy, the Bankruptcy Court erred. Any policy concerns of the BVI, while important, should not undermine those of the U.S.

III. THE FOCUS OF 11 U.S.C. SECTION 550(a)(2) IN THIS SIPA PROCEEDING IS NOT EXTRATERRITORIAL

A. The Disparate Views On "Focus"

In adhering to the Supreme Court's *Morrison* test to determine whether Section 550(a)(2) of Title 11 was being applied extraterritorially, the District Court looked to the regulatory "focus" of the provision which it held to be the transfer of property to a subsequent transferee. (SPA-210). Whether the transfers were extraterritorial turned on their location and on the "component events of those transactions." *Id*., *citing In re Maxwell Communication Corp*., 186 B.R. 807, 817 (S.D.N.Y. 1995). Reducing the components to the locations of the transferors and transferees, and to the nature of the banks as correspondent banks or not, the Court concluded that the transfers were foreign, involving transfers from foreign feeder funds to their foreign customers and other foreign transferees through foreign

New York law, without giving effect to its conflict of laws provisions." A-6692, ¶ 17. *See* A-17498, ¶ 44; A-6692, ¶ 20; A-5323, ¶ 16; A-17558, ¶ 232; A-9098, ¶ 16). Moreover, to the extent a U.S. correspondent bank was used by a subscriber, the subscriber "can hardly claim that it could not have foreseen being haled into court in the forum in which the correspondent bank account it had selected is located." *See Official Comm. of Unsecured Creditors of Arcapita v. Bahrain Islamic Bank*, 549 B.R. 56, 68 (S.D.N.Y. 2016).

banks, and therefore requiring an extraterritorial application of Section 550(a)(2). (SPA-211 – SPA-212).

The Bankruptcy Court noted that the District Court reached an opposite conclusion from the earlier decision by Bankruptcy Judge Lifland in *Picard v. Bureau of Labor Insurance (In re Bernard L. Madoff)*, 480 B.R. 501 (Bankr. S.D.N.Y. 2012) ("*BLI*") (SPA-895), one of the cases in these appeals. In *BLI*, the Bankruptcy Court, following Fourth Circuit precedent in *In re French*, 440 F.3d 145 (4th Cir. 2006), *cert. den. sub nom., French v. Liebmann*, 549 U.S. 815 (2006) ("*French*"), reasoned that the focus of the avoidance and recovery provisions of Title 11 was on "the initial transfers that deplete the bankruptcy estate and not on the recipient of the transfers or the subsequent transfers." The *BLI* Court observed that the avoidance of initial transfer provisions, including under Section 548 of Title 11 upon which the Trustee relied in his complaints, focused on the transfers themselves, as well as on their timing, purpose, and effect on the transferor. In contrast, Section 550, entitled "Liability of transferee of avoided transfer," focused merely on possession. In the *BLI* Court's view, the object of concern to Congress under the avoidance provisions, and what the avoidance provisions sought to regulate under *Morrison*, was the initial transfer that depleted the estate, rather than on the progression of transfers. Because the BLMIS Ponzi scheme occurred in the U.S., and the transfers were made from the firm's JP Morgan account to the HSBC

account designated by Sentry, both of which were in New York, the application of the avoidance provision was domestic and not extraterritorial. *See BLI*, 480 B.R. at 524-525. (SPA-927 – SPA-928).

Adhering to the principle that if "conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad," *RJR Nabisco, Inc. v. European Community*, __ U.S. __ , 136 S. Ct. 2090, 2101 (2016) ("*RJR Nabisco*"), Judge Lifland concluded that because the relevant conduct in the cases at hand occurred in the United States, the fact that the stolen customer property thereafter was transferred abroad was of no consequence. The Bankruptcy Court stated:

> If foreign subsequent transferees were insulated from recovery actions, the avoidance and recovery provisions of the Code would likewise be rendered ineffective. A debtor could engineer transfers to end up in the possession of foreign parties, thus preventing recovery by a trustee. Indeed, '[t]he cornerstone of the bankruptcy courts has always been the doing of equity, and in situations such as this, where money is spread throughout the globe, fraudulent transferors should not be allowed to use § 550 as both a shield and a sword. Not only would subsequent transferees avoid incurring liability, but they would also defeat recovery and further diminish the assets of the estate.' [citation omitted]

480 B.R. at 525 n. 23. (SPA-929). *Cf. ParkCentral Global Hub Ltd. v. Porsche Automobile Holdings,* 763 F.3d 198, 221(2d Cir. 2014) ("*Park Central*") (Leval, J., concurring) ("Bright-line rules … would permit unscrupulous securities dealers to

design their transactions with their victims so as to stay on the side of the line that is outside the reach of the statute.")

B. **The View of "Focus" That Is Consistent With SIPA**

The reasoning in *BLI* comports with the goal of customer protection under SIPA. Under SIPA Section 78fff(b), the enumerated provisions of Title 11, including the avoidance provisions in Chapter 5 thereof, apply only to the extent consistent with SIPA. A provision is inconsistent if it "conflicts with an explicit provision" of SIPA or if its application "would substantially impede the fair and effective operation of SIPA without providing significant countervailing benefits." *SIPC v. Charisma Sec. Corp*., 506 F.2d 1191, 1195 (2d Cir. 1974). *See In re Chicago Partnership Bd., Inc.*, 236 B.R. 249, 260 (Bankr. N.D. Ill. 1999) ("To the extent that the provisions of the Bankruptcy Code conflict with the provisions of SIPA, SIPA shall control."); *Camp. v. Nat'l Union Fire Ins. (In re Government Secs. Corp.)*, 111 B.R. 1007, 1011 (S.D. Fla. 1990) ("it is difficult to imagine how application of [the Bankruptcy Code provision] could be deemed anything but consistent with SIPA, the purpose of which is to protect customers of securities brokerages"), *aff'd*, 972 F.2d 328 (11th Cir. 1992), *cert. den. sub nom., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa v. Camp*, 507 U.S. 952 (1993).

A construction of Section 550(a)(2) that prevents the recovery of stolen customer monies transferred abroad is detrimental to customers and impedes,

rather than furthers, the operation of SIPA. The lower Courts chose to reduce the test of extraterritoriality to four factors turning strictly on location, and to construe Section 550(a)(2) in isolation and without reference to SIPA or to its "object of solicitude," namely, the preservation of customer property and use of the avoidance powers toward that end. *But see Park Central*, 763 F.3d at 215 (location of a transaction is not "the definitive factor in the extraterritoriality inquiry.") To be applicable, Section 550(a)(2) needed to be construed in a manner consistent with SIPA so as to further, and not undermine, its purposes. As stated in *Crandon v. United States,* 494 U.S. 152, 158 (1990), "[i]n determining the meaning of the statute, [the Court] look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Accord, Data v. Mukasey*, 554 U.S. 1, 16 (2008). The decisions of the lower Court would place stolen customer property beyond reach, simply because it was transferred abroad and notwithstanding that initial transfers have been avoided. But the purposes of SIPA and its primary goal of protecting customer property to effectuate those purposes, make clear that the focus of the avoidance provisions, including Section 550(a)(2), is on the initial transfer of stolen customer property that depletes the estate. In this regard, the Trustee's recovery actions against subsequent transferees present no extraterritorial application of Section 550(a)(2).

IV. IN ANY EVENT, SECTION 550(a)(2) APPLIES EXTRATERRITORIALLY <u>IN THIS SIPA PROCEEDING</u>

A. <u>The Global Reach of the Estate</u>

The presumption that U.S. laws do not apply extraterritorially is founded on the notion that "United States law governs domestically but does not rule the world." *Microsoft Corp. v. AT&T Corp*., 550 U.S. 437, 454 (2007). This avoids conflict with foreign law and more fundamentally, reflects the fact that U.S. law ordinarily addresses domestic concerns. *See RJR Nabisco,* 136 S. Ct. at 2100, *citing Smith v. United States*, 507 U.S. 197, 204 n.5 (1993). On the other hand, while extraterritorial effect must be clearly intended, it need not be explicitly stated, "if by that is meant a requirement that a statute say 'this law applies abroad.'" *U.S. v. Weingarten*, 632 F.3d 60, 65 (2d Cir. 2011) ("*Weingarten*"), *quoting Morrison*, 130 S. Ct. at 2883. Rather, it is appropriate to consider "all available evidence about the meaning" of a statutory provision in determining whether it applies abroad. *Sale v. Haitian Ctrs. Council, Inc*., 509 U.S. 155, 177 (1993); *Weingarten*, 632 F.3d at 65. This includes not only statutory language, but, among other criteria, context. As the Supreme Court observed in *RJR Nabisco*:

> While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. "Assuredly context can be consulted as well." … Context is dispositive

> here. Congress has not expressly said that § 1962(c) applies to patterns of racketeering activity in foreign countries, but it has defined "racketeering activity" – and by extension a "pattern of racketeering activity" – to encompass violations of predicate statutes that do expressly apply extraterritorially. Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect. [citation omitted]

136 S. Ct. at 2102-2103.

RJR Nabisco is instructive here. While Section 550(a)(2) does not state explicitly that it has extraterritorial application, it provides that avoided property may be recovered "for the benefit of the estate." The "estate" is defined in 11 U.S.C. Section 541, and consists, under Subsection (a) thereof, of "property, wherever located and by whomever held." The term has been construed to include property worldwide. *See French*, 440 F.3d at 151 (trustee has title of the debtor to property in and outside of the United States); *In re Globo Comunicacoes E Participacoes S.A.*, 317 B.R. 235, 251 (S.D.N.Y. 2004) ("Congress intended [Section 541 of the Bankruptcy Code] to have global reach.") *See also* H. R. Rep. No. 109-31, pt. 1, at 107 ("the United States, like some other countries, asserts insolvency jurisdiction over property outside its territorial limits under appropriate circumstances") and 118 (United States has "worldwide jurisdiction over property of a domestic or foreign debtor in a full bankruptcy case") (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 170 and 180. By providing in Section 550(a)(2) that

property is recovered for the benefit of the "estate," which, by definition, includes property throughout the world, it stands to reason that the transferred property must be of the same nature as estate property, that is, property located domestically or abroad since, once recovered, it becomes a part of such property.[14]

B. The Lower Courts' View of "Property of the Debtor"

The lower Courts viewed the issue differently. The Trustee had argued that Section 541 was incorporated into the avoidance and recovery provisions of Title 11 because those provisions used a phrase that also appeared in Section 541. The phrase in question was "interests of the debtor in property." Because "interests of the debtor in property" included property worldwide under Section 541(a)(1), the Trustee maintained that the phrase would have the same meaning when used in other provisions of Title 11. Those provisions included Section 548(a)(1), one of the fraudulent transfer provisions relied upon by the Trustee. In providing for the avoidance of any transfer "of an interest of the debtor in property," the Trustee

[14] In pertinent part, 11 U.S.C. Section 548(a)(1) provides for the avoidance of fraudulent transfers of "an interest of the debtor in property." Once a transfer is avoided under Section 548, the trustee may then recover the property or its value from the initial transferee or any subsequent transferee, respectively, under Section 550(a)(1) and (2). The fact that the avoidance provision of Section 548(a)(1) refers to the debtor's interest in property, and that the definition of the estate under Section 541 pertains to estate property, is irrelevant as "property of the debtor" and "property of the estate" have been held to be interchangeable terms, separated only by time. The former refers to pre-petition, and the latter to post-petition, interests. *See Begier v. I.R.S.*, 496 U.S. 53, 58-59 (1990).

contended that Section 548(a)(1), like Section 541, would have worldwide reach and apply to all property "wherever located." *See* 11 U.S.C. § 548(a)(1).

The District Court rejected the analysis, finding it to be "neither logical nor persuasive." (SPA-214). The Court noted that while property of the estate and property of the debtor might be interchangeable terms, the phrase "interests of the debtor in property" was not used in Section 541(a)(3) which specifically applied to Section 550, the provision at issue. Under Section 541(a)(3), the estate included:

> Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this Title.

11 U.S.C. §541(a)(3). Under Section 550, fraudulently transferred property would only become property of the estate *after* recovery. Therefore, Section 541(a)(3) supplied no basis for extraterritorial authority. (SPA-214 – SPA-215). *See FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 131 (2d Cir. 1992).

According to the District Court, SIPA did not change the analysis. SIPA Section 78fff-2(c)(3) merely made the avoidance provisions of Title 11 applicable to the proceeding, and SIPA's focus predominantly was domestic since it expressly excluded from SIPC membership foreign brokers, and offered no protection to persons whose claims arose out of transactions with a foreign subsidiary of the SIPC member. *See* SIPA §§ 78ccc(a)(2)(A)(i) and 78*lll*(2)(C)(i). Finally, although SIPA Section 78eee(b)(2)(A)(i) gave the Courts exclusive jurisdiction

over the debtor and its property "wherever located," the provision suffered from the same infirmity as Section 541 of the Bankruptcy Code, namely, a transfer of property first would have to be avoided before the property could be deemed part of the estate. (SPA-217 – SPA-218).

C. **The Global Recovery of "Property of the Debtor" Under SIPA**

The Fourth Circuit took a different approach in *French* which was rejected by the District Court (SPA-215), but adopted by Judge Lifland in *BLI*. In *BLI*, the Bankruptcy Court explained the holding of the Fourth Circuit in *French* as follows:

> In *French*, extraterritorial application of Section 548 was not premised on fraudulently transferred assets constituting actual property of the estate prior to recovery. … Rather, … Section 548's reference to Section 541 expressed congressional intent to grant the Trustee authority to avoid and recover *all transfers* that, but for a fraudulent transfer, would have been property of the estate, even if not currently property of the estate. This grant of authority includes assets fraudulently transferred overseas because but for the fraudulent transfer, assets located overseas would undeniably be property of the estate.

BLI, 480 B.R. at 528. (SPA-934).[15] For reasons discussed below, the analysis in *BLI* is supported by SIPA and more closely carries out its purposes.

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[15] The *French* decision was found persuasive in *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 543 B.R. 127, 152--155 (Bankr. S.D.N.Y. 2016), whose reasoning was adopted in *Emerald Capital Advisors Corp. v. Bayerische Moteren Werke Aktiengesellschaft (In re Fah Liquidating Corp)*, 572 B.R. 117, 124-126 (Bankr. D. Del. 2017). Similarly, in a postpetition transfer action, the Ninth Circuit upheld an extraterritorial application of Section 550 of Title 11. *Kismet*

First, under SIPA Section 78eee(b)(2)(A), as the District Court correctly observed, the Court in the SIPA case has "exclusive jurisdiction of such debtor and its property wherever located." As in the definition of property of the estate under Section 541(a) of Title 11, the clause means property located in the U.S. and property located abroad. If Section 541(a) provides a basis for extraterritorial application, so too does SIPA Section 78eee(b)(2)(A).

Second, the District Court erred in its rejection of the Trustee's analysis with regard to the "interest of the debtor in property." The Trustee correctly observed that the same term appears in two sections of Title 11: the fraudulent transfer provision of Section 548(a)(1), and the definition of estate property under Section 541(a)(1). On the other hand, the District Court correctly noted that Section 541(a)(3) of Title 11 includes as estate property, recoveries made under various sections of Title 11, including Section 550. But the District Court overlooked that Section 548 is not among the Sections listed in Section 541(a)(3), and in this regard, its analysis fails. When Congress uses the same phrase in different parts of a statute, the phrase is presumed to have the same meaning. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) ("basic canon of statutory construction that identical terms within an Act bear the same meaning.") In the

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Acquisition v. Icenhower (In re Icenhower), 757 F.3d 1044, 1051 (9th Cir. 2014). *Cf.*, cases cited in *Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C. (c) v. Bahrain Islamic Bank, (In re Arcapita Bank B.S.C.(C),* 575 B.R. 229, 248-249 n.12 (Bankr. S.D.N.Y. 2017).

same way that "interests of the debtor" in Section 541(a)(1) refers to interests of the debtor worldwide, the use of the term in the fraudulent transfer provision of Section 548(a)(1) must have the same meaning, that is, the Section permits the avoidance of transfers of interests of the debtor in property worldwide.

Third, if an initial transfer of debtor property can be avoided worldwide, it is fair to assume that whatever other impediments there may be, the fact that a subsequent transfer also takes place abroad should be no obstacle to its recovery. However likely, the answer in bankruptcy is not dispositive here. This is a SIPA proceeding and provisions of Title 11 made applicable under SIPA Section 78fff(b) apply only if they are consistent with SIPA. Section 541(a)(3) identifies as property of the estate any "interest in property that the trustee recovers under section … 550…." But under SIPA Section 78fff-2(c)(3), once customer property is recovered, it is "customer property," and not property of the estate. In making property that is recovered, property of the estate, Section 541(a)(3) of Title 11 is inconsistent with SIPA, and therefore, inapplicable.

Fourth, furthermore, the District Court's conclusion that property first must be recovered before it can be deemed estate property is consistent with the definition of customer property in a bankruptcy stockbroker liquidation under Subchapter III of Title 11, but not in a SIPA proceeding. For this reason as well, the District Court analysis fails.

Under Section 741(4)(A)(i) of Title 11, which is contained in Subchapter III of Title 11, customer property includes "property that was unlawfully converted from *and that is the lawful property of the estate* [emphasis added]." With respect to Section 741(4)(A)(i), the legislative history provides:

> Clause (i) refers to customer property not properly segregated by the debtor or customer property converted and then recovered so as to become property of the estate. Unlawfully converted property that has been transferred to a third party is excluded until it is recovered as property of the estate by virtue of the avoiding powers.

S. Rep. No. 95-989, at 101, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5887. The requirement of recovery in Section 741(4)(A)(i) is consistent with Section 541(a)(3), which makes property that has been transferred, property of the estate once it is recovered.

Contrary to the definition of "customer property" in Subchapter III, the definition of "customer property" in SIPA contains no reference to recovery. Instead, under SIPA Section 78*lll*(4), in relevant part, customer property simply is "property unlawfully converted." In the interpretation of a statute, the fact that Congress has included language in one provision and omitted it in another is "an argument against reading it as implied." *See Russello v. United States,* 464 U.S. 16, 23 (1983) (Where language is included in one section of a statute, but omitted

in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

The difference between the definitions is intentional and derives from the special protection that SIPA affords customers and the reasons previously discussed that underlie the need for that protection. While there may be stockbroker "customers" in a Subchapter III liquidation, they are not the kind of customers that Congress has deemed in SIPA to be in need of protection for market soundness purposes. If a broker-dealer has "customers," as defined in SIPA, and there is a deficiency in customer property leading to customer loss, the remedy is under SIPA and not Subchapter III. As such, not only do the provisions of Subchapter III of Title 7 not apply to the SIPA proceeding, *see* SIPA § 78fff(b), but other than in the case of a too-big-to fail brokerage, no stockbroker that is a member of SIPC and that has a customer may enter a bankruptcy proceeding without the specific consent of SIPC. *See* SIPA Section 78eee(a)(3)(B).

Unlike in a Subchapter III liquidation, in a SIPA liquidation, before recovery and for purposes of recovery only, the property transferred is deemed to be "property of the debtor," bringing it within the analysis discussed above relating to "interests of the debtor," with worldwide application. SIPA § 78fff-2(c)(3). The analysis is further reinforced by SIPA Section 78eee(b)(2)(A)(i) which gives the

Court exclusive jurisdiction over the SIPA debtor and "its property wherever located."

Fifth, the District Court erred in concluding that the predominantly domestic focus of SIPA bars the recovery of customer property located abroad. Notwithstanding that the SIPA protection is aimed at the customers of the U.S. registered broker-dealer, there are foreign aspects to the securities business and therefore, to SIPA. For instance, in a SIPA proceeding, SIPA protects *all* eligible customers of the registered broker-dealer whether they reside in the U.S. or abroad and no matter their citizenship. To illustrate – once a SIPC member is placed in liquidation, the SIPA trustee must publish and mail notice of the liquidation to customers. SIPA § 78fff-2(a)(1). Publication and mailing commonly are not only domestic but foreign. For example, in the Lehman Brothers Inc. case, with Court permission, the Trustee published notice in, among others, the International Herald Tribune, and the Global Edition of the Wall Street Journal.[16] In the SIPA proceeding of MF Global Inc., publication occurred in the Wall Street Journal, for circulation throughout the United States, Asia and Europe. In BLMIS, publication

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[16] *See* Affidavits of Publication in *In re Lehman Brothers Inc*., Case No. 08-01420-scc, Doc. Nos. 399 and 397, filed on December 7, 2008 (Bankr. S.D.N.Y.); in *In re MF Global*, Case No. 11-02790-mg, Doc. No. 759, filed on December 15, 2011 (Bankr. S.D.N.Y.); in *In re BLMIS*, Adv. Pro. No. 08-01789-BRL, Doc. No. 12, filed on December 23, 2008 (Bankr. S.D.N.Y.); and in *SIPC v. TWS Financial, LLC*, Case No. 13-01152-ess (SIPA), Doc. No. 4 at 2, filed on June 18, 2013 (Bankr. E.D.N.Y.)

included, among others, all editions of the Wall Street Journal, as well as the Jerusalem Post, and Ye'diot Achronot. Even in smaller SIPA proceedings such as the TWS Financial LLC case, publication included notices in La Nación (Argentina), and the Warsaw Gazette in order to reach Polish customers of the failed broker-dealer. Customers of the debtor broker-dealer are eligible for protection under SIPA, no matter their country of origin.

Furthermore, as discussed above, under SEC Rule 15c3-3(c)(4), 17 C.F.R. § 15c3-3(c)(4), securities are deemed to be under the control of a broker-dealer if, with the consent of the SEC, the securities are held in custody at a foreign depository, foreign clearing agency or foreign custodian bank. *See, e.g.,* Merrill Lynch Pierce Fenner & Smith Inc., SEC No-Action Letter, 1981 WL 25047, at *1 (June 27, 1981) (requesting approval of the Hongkong & Shanghai Banking Corp. to serve as a foreign control location for foreign securities of customers of Merrill Lynch). This, too, is another "foreign" aspect to SIPA.

At bottom, SIPA has important foreign aspects to it. Even if it did not, however, the objective of SIPA is to protect customers of the registered U.S. broker-dealer, wherever they may be. Those customers entrust their money to their broker and their confidence in their broker, and by extension, in the U.S. Markets, is broken if they cannot trust their broker to do what it is expected to do, and if the law fails to protect them when needed. The notion that stolen customer money is

no longer recoverable because it has been sent abroad is incompatible with SIPA and out-of-step in today's world of global markets. Investor money routinely is sent and/or held abroad, whether intentionally, negligently, or fraudulently, and it is imperative that should a brokerage fail, a SIPA trustee be able to use all of the tools that Congress has given him to retrieve that property for the benefit of customers. Toward that end, SIPA must be construed consistent with its provisions and purposes.

In the final analysis, with over $9 trillion in U.S. holdings of foreign securities, including more than $1.4 trillion in U.S. retirement assets invested abroad,[17] it is unfathomable that a SIPA trustee would be prevented from recovering any portion of those assets that are stolen customer property simply because the assets have been moved abroad. In this regard, the following cautionary words by a former Commissioner of the SEC should be heeded:

> Technological advances that have impacted the domestic securities markets have also significantly affected the global securities market and have accelerated the

[17] Department of the Treasury, Federal Reserve Bank of New York and Board of Governors of the Federal Reserve System, U.S. Portfolio Holdings of Foreign Securities as of December 31, 2016, at 4, ticdata. treasury.gov/Publish/shc2016_ report.pdf; and Table 20: Mutual Fund Retirement Assets by Type of Account and Fund, Investment Company Institute, The US Retirement Market, Third Quarter 2017, http://www.ici.org/info/ret_17_q3_data.xls.

> movement of capital across international borders. Over the past 20 years, the global securities market has grown in both size and sophistication - and as the global markets grow, Americans have a greater ability to invest in securities markets around the world. This increase in investment opportunities has been facilitated, in part, by advances in technology that provide investors - through their desktops and smart phones - with access to nearly limitless investment opportunities worldwide.
>
> These developments require that the SEC think more globally and recognize that its registrants will increasingly be global players, that fraud perpetuated at home can be initiated by those who have never set foot in the United States, and that a market meltdown can have global origins and ramifications.

Luis A. Aguilar, former Comm'r, SEC, Preparing for the Regulatory Challenges of the 21st Century at the Georgia Law Review Annual Symposium: Financial Regulation: Reflections and Projections (March 20, 2015), *reprinted at* https://www.sec.gov/news/speech/preparing-for-regulatory-challenges-of-21st-century.html.

CONCLUSION

For all of the foregoing reasons, the decision of the Bankruptcy Court should be REVERSED.

Respectfully submitted,

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Dated: January 10, 2018
Washington, D.C.

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