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Liquidation of Bernard L. Madoff Investment
Securities LLC and Bernard L. Madoff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, Plaintiff, v. DEFENDER LIMITED, RELIANCE MANAGEMENT (BVI) LIMITED, RELIANCE MANAGEMENT (GIBRALTAR) LIMITED, RELIANCE INTERNATIONAL RESEARCH LLC, TIM BROCKMANN, and JUSTIN LOWE, Defendants.	Adv. Pro. No. 10-05229 (BRL)

TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION OF RELIANCE MANAGEMENT (BVI) LIMITED, RELIANCE MANAGEMENT (GIBRALTAR) LIMITED AND TIM BROCKMANN TO DISMISS THE TRUSTEE'S COMPLAINT BASED ON A LACK OF PERSONAL JURISDICTION

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Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") and the estate of Bernard L. Madoff ("Madoff"), under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.*, by his undersigned counsel, hereby opposes the motion by Defendants Reliance Management (BVI) Limited ("Reliance BVI"), Reliance Management (Gibraltar) Limited ("Reliance Gibraltar") and Tim Brockmann ("Brockmann" and collectively with Reliance BVI and Reliance Gibraltar, the "Moving Defendants") to dismiss the Trustee's complaint for lack of personal jurisdiction (the "Motion").

PRELIMINARY STATEMENT

The Trustee brought this action against the Moving Defendants because they obtained millions of dollars from directing investor money into BLMIS in New York[1] including through Defendant Defender Limited ("Defender"), which received substantial avoidable transfers that are a subject of this action. The Moving Defendants through Defender transferred $534 million of investor money into BLMIS. They created Striker Fund ("Striker") to leverage investments in Defender. Those investments were in turn wholly invested in BLMIS. Reliance BVI was Defender's manager, and Reliance Gibraltar was the investment advisor to another offshore Madoff feeder fund, Luxembourg Investment Fund U.S. Equity Plus ("LIF-USEP"), which also was invested directly and entirely with BLMIS in New York.[2] Moving Defendants used defendants Reliance International Research LLC ("RIR") and Justin Lowe ("Lowe"), who are

[1] Compl. ¶116 (Reliance Group received millions of dollars in fees related to investments by RMA into Kingate Global and Optimal); Compl. ¶120 (between May 11, 2007 and the Filing Date, Defender invested $534,000,000 with BLMIS); Declaration of Oren J. Warshavsky, dated August 10, 2012 (the "Warshavsky Decl.") Ex. 6 at 36 (Reliance BVI would receive a Management Fee of up to 1.7 percent per annum varying by share class for Defender Limited, and could charge an additional Subscription Fee of up to 2 percent); Warshavsky Decl. Ex. 7 (Reliance BVI received a management fee equal to 0.4 percent per annum of the net asset value of Striker Limited); Compl. ¶69 (Reliance Gibraltar was receiving fees for its role as a distributor of LIF-USEP in the amount of a percentage of the Portfolio Management Fees and Subscription Fees charged to investors).

[2] LIF-USEP is the subject of a separate action brought by the Trustee in this Court in which Reliance BVI, Reliance Gibraltar, and RIR are defendants. *Picard v. UBS AG, et al.*, 10-ap-05311 (Bankr. S.D.N.Y. Dec. 7, 2010).

located in New York, to assist them with these activities, and in particular to facilitate communications with BLMIS and potential investors.[3] Reliance BVI, Reliance Gibraltar and RIR described themselves as the "Reliance Group" and operated as a single business enterprise.[4]

The Moving Defendants argue that this Court does not have personal jurisdiction over them because—they claim—they are residents of or incorporated outside of the United States, have never maintained offices, real or personal property, telephone, telex, or telefax numbers, or a bank account in the United States. (Motion at 2-5, 18.) But personal jurisdiction has never required that the defendant be a national of or present physically in the forum. Jurisdiction is proper because the Moving Defendants, directly and through RIR, the New York branch of the Reliance Group, regularly conducted business with BLMIS in New York that gave rise to the claims in the Trustee's complaint. The Reliance Group established Defender, and its exclusive relationship with BLMIS in New York, and it arranged Defender's investments with BLMIS in New York in order to receive substantial compensation. Now, faced with the reality that they benefited at the expense of BLMIS's defrauded customers—who invested billions of dollars in the United States—the Moving Defendants argue that they should not be subject to a lawsuit about the very actions they directed at this forum. This escape act should not be permitted.

Brockmann and Lowe created RIR as a New York company so that the Reliance Group would have a presence in New York.[5] They ascribed to RIR a nominal purpose of providing "administrative and research services" to Reliance BVI, and subsequently, Reliance Gibraltar, but in fact RIR provided much more. The Reliance Group held itself out as a single business enterprise whose New York operations were essential to the Group's ability to market and perform services to its clients: one of the "Key considerations in selecting Reliance," the Group

[3] *See* Warshavsky Decl. Ex. 1 for a brief description of the individuals and entities relevant to this matter.
[4] *See, e.g.*, Warshavsky Decl. Ex. 8 at 216 (identifying organization chart for "Reliance Group").
[5] Warshavsky Decl. Ex. 9 at 13:15-14:5.

claimed, was its "Presence in Europe and North America – Our combined presence in Europe and North America is a key advantage in accessing and researching managers."[6] RIR and Lowe acted as agents in New York for the Reliance Group in setting up and maintaining the Reliance Group's relationship with BLMIS, with Lowe signing all correspondence sent to BLMIS from both the Reliance Group and Defender.[7] Moreover, Brockmann was intimately involved in the management of RIR despite his foreign residence.

Having purposefully directed their activities at the United States and availed themselves of the privilege of conducting business in this forum, the Moving Defendants are subject to the jurisdiction of this Court. Accordingly, the Motion should be denied, and the Trustee's claims against them and the other defendants in this action should proceed. In the alternative, the Court should allow the Trustee to conduct jurisdictional discovery.

BACKGROUND

A. Factual Background

Foreign feeder funds, invested solely in BLMIS in New York, and their managers enabled and perpetuated the largest financial fraud in history. Defender, an investment fund organized under the laws of the British Virgin Islands, and Striker, a leveraged investment fund organized under the laws of Ireland, were two such funds.[8] The Reliance Group created both funds as vehicles for investment in BLMIS.[9] Reliance BVI outwardly served as Defender's fund manager and Reliance BVI's wholly-owned subsidiary, Reliance Gibraltar, outwardly served as LIF-USEP's investment advisor.[10] The Moving Defendants used Defender, Striker, LIF-USEP,

[6] Warshavsky Decl. Ex. 8 at 210 (emphasis in original).
[7] *See, e.g.*, Warshavsky Decl. Ex. 10 at 78602-78604, 78610 (correspondence in Defender's customer file maintained by BLMIS).
[8] Warshavsky Decl. Ex. 6; Warshavsky Decl. Ex. 11.
[9] Warshavsky Decl. Ex. 11.
[10] Warshavsky Decl. Ex. 12.

Optimal Strategic U.S. Equity Ltd. ("Optimal") and Kingate Global Fund, Ltd. ("Kingate Global") to feed foreign investors to BLMIS, earning millions of dollars while doing so.[11]

1. History Of The Reliance Group

The Reliance Group is comprised of three corporate entities: Reliance BVI, Reliance Gibraltar and RIR. All three were created by Brockmann, an investment manager based in Switzerland and Gibraltar. Brockmann created Reliance BVI in 1998.[12] Reliance BVI managed Reliance Multi-Adviser Fund Limited ("RMA"), which opened for investment in 1999.[13] RMA was a fund of hedge funds and was described as Reliance Group's flagship fund.[14] It was Reliance Group's first gateway for investment into BLMIS via Kingate Global and Optimal.[15] Brockmann owns Reliance BVI with Lowe's father, Jack Lowe.[16] The Reliance Group's involvement with BLMIS began as early as 1999 when it started investing RMA investor money with BLMIS through Kingate Global, which solely invested with BLMIS.[17]

In 2000, Brockmann used his school chum Justin Lowe to establish Reliance's presence in New York by forming RIR, a New York corporation, and establishing its principal place of business in New York.[18] Although Lowe attended secondary school with Brockmann in Switzerland, he is an American now living in New York. Lowe admitted that RIR was created in New York to exploit the benefits of this forum, namely, geographical proximity to "hedge fund

[11] *See supra* at n.1.
[12] Warshavsky Decl. Ex. 13.
[13] Warshavsky Decl. Ex. 8 at 214; Warshavsky Decl. Ex. 14 (internal Reliance e-mail describing pitch to potential investor).
[14] Warshavsky Decl. Ex. 15 at 17:3-5, 18:25-19:7, 27:18-23.
[15] *Id.*
[16] Warshavsky Decl. Ex. 16 at 5437 (indicating that Tim Brockmann and Jack James Lowe shared ownership of Reliance's management entities); Warshavsky Decl. Ex. 9 at 31:4-32:12; Warshavsky Decl. Ex. 17 at 4673 (identifying "Justin [sic] Lowe" as owning 30 percent of Reliance Management (BVI) Limited, which owned Reliance Management (Gibraltar) Limited, through a series of holding companies).
[17] Warshavsky Decl. Ex. 9 at 11:17-12:1, 34:2-7.
[18] Warshavsky Decl. Ex. 9 at 8:25-10:7, 13:15-15:5; Warshavsky Decl. Ex. 18.

activity," the majority of which was "taking place in New York."[19] Brockmann and Lowe created RIR ostensibly to provide Reliance BVI with "research" services,[20] but in fact RIR performed functions in New York that were essential to the Reliance Group's operations, including, but not limited to, fundraising, negotiating fund terms and conditions with banks, communicating redemption requests on behalf of funds invested with BLMIS, coordinating various efforts to establish funds to invest with BLMIS and "launching" funds that invested with BLMIS.[21] From 2001 to 2006, Brockmann and Lowe shared ownership of RIR equally.[22]

After 2001, the Reliance Group, through RMA, began investing in Optimal in order to receive more detailed information about trades purportedly made by BLMIS.[23] In 2004, Brockmann created Reliance Gibraltar as a wholly-owned subsidiary of Reliance BVI to, among other things, serve as the investment advisor for LIF-USEP.[24] Both Optimal and LIF-USEP invested 100 percent of their assets with BLMIS. Echeverria and Brockmann arranged the investment advisor position for Reliance Gibraltar to satisfy Brockmann's interest in receiving more detailed information about Madoff's trades.[25] Reliance Group had been receiving information regarding BLMIS trades from Optimal but only when Reliance Gibraltar became LIF-USEP's investment advisor did the Reliance Group begin to receive regularly—via its New York office—the monthly trade ticket information directly from BLMIS.[26]

By 2007, the Reliance Group wanted its own investor relationship with BLMIS. Following a key meeting with BLMIS in February 2007, the Reliance Group created Defender, a

[19] Warshavsky Decl. Ex. 9 at 13:15-14:9.
[20] *Id.*
[21] *See infra* section III.A.1.
[22] Warshavsky Decl. Ex. 19.
[23] Warshavsky Decl. Ex. 9 at 49:13-23, 115:14-118:2, 294:10-17.
[24] *Id.* at 67:4-9.
[25] *Id.* at 166:4-22, 167:8-168:15.
[26] *Id.*

feeder fund solely invested in BLMIS.[27] By this time, Reliance Group had received investment information for BLMIS dating back nearly 10 years for RMA's investment in Kingate Global.[28] Eventually, Reliance Group formed another fund, Striker, which invested in Defender at a two times leveraged rate.[29] Creating a leveraged investment into Defender was a goal of Brockmann's, and Lowe carried out the day-to-day work to accomplish it.[30]

2. Brockmann's Ties To BLMIS Pre-Date The Reliance Group

In 1993, Brockmann and his father formed Turicum Private Bank Limited ("Turicum") in Gibraltar. Turicum claimed to be "an independent Gibraltar Private Bank and Asset Management company which promote[d] Swiss Private Banking values."[31] Turicum was a distributor for Bank Medici—the Austrian instrumentality of Madoff confidante Sonja Kohn.[32] Turicum clients invested over $39 million with BLMIS.[33] Amadeus Fiduciaire S.A. ("Amadeus"), another entity created by Brockmann's father, was RMA's investment advisor until July 2005, and Amadeus's clients provided the seed capital for RMA.[34] Brockmann serves as the president and a member of the board of Amadeus and as a director of Turicum.[35]

3. The Reliance Group Acted As A Single Business Enterprise To Exploit Access To BLMIS

The three Reliance companies operated as a single business enterprise throughout the period relevant to this matter. Aside from creating and owning all Reliance Group entities, Brockmann has admitted that he was the director of Reliance Gibraltar from April 2005 to

[27] Warshavsky Decl. Ex. 16 at 5437 ("Reliance launched Defender to provide additional capacity to investors who wanted exposure to the Madoff strategy.").
[28] Warshavsky Decl. + at 116:4-24, 143:16-144:3.
[29] Warshavsky Decl. Ex. 20 at ¶26-29 (describing formation of Striker Fund); *see also* Warshavsky Decl. Ex. 21 (internal Fortis e-mail describing Striker Fund).
[30] Warshavsky Decl. Ex. 22 at 30:2-10.
[31] Warshavsky Decl. Ex. 23.
[32] Compl. ¶8.
[33] *Id.*
[34] *Id.*
[35] *Id.*

December 2009, and the "director" of Reliance BVI from September through October 2008.[36] He also admitted that he was "indirectly"[37] the principal controlling shareholder of Reliance BVI until 2011 when he says he sold his shares. Reliance Group promotional literature, published under the name Reliance Management Ltd., identified Brockmann as the "Chief Investment Advisor" of "Reliance Management Ltd." (having locations in both New York and Gibraltar)[38] and as "Chief Investment Officer" of "Reliance Group" (having locations in both New York and Gibraltar).[39] "Reliance Management Ltd." is not the name of any entity in the Reliance Group. The Reliance Group used names for its enterprise that were convenient or expedient without regard to corporate formalities.

The Reliance Group and Brockmann were aware of numerous indicia of fraud at BLMIS but proceeded to do business with BLMIS for Defender.[40] Despite knowing the risks involved, the Reliance Group arranged for the delegation of asset management authority for Defender to BLMIS.[41] In so doing, the Reliance Group provided a façade of legitimacy for Madoff's fraud in order to collect fees.[42]

Defender withdrew approximately $30.3 million in the two years preceding the collapse of BLMIS on December 11, 2008.[43] The Reliance Group received millions of dollars in fees operating and servicing these funds.[44] In this action, the Trustee seeks the avoidance and recovery of these transfers under bankruptcy law, as well as the disallowance or equitable

[36] Affidavit of Tim Brockmann in Support of Motion of Reliance Management (BVI) Limited, Reliance Management (Gibraltar) Limited, and Tim Brockmann to Dismiss Plaintiff's Adversary Complaint for Lack of Personal Jurisdiction, ¶2, No. 10-ap-5229 (Bankr. S.D.N.Y. Apr. 27, 2012), ECF No. 38 ("Brockmann Aff.").
[37] Brockmann Aff. ¶2; Warshavsky Decl. Ex. 17 at 4673 (Brockmann owned a 70 percent interest in Reliance BVI through a series of three holding companies: Bariggi Holdings Limited, Barrigi Financial Limited, and Barrigi Participations Limited).
[38] Warshavsky Decl. Ex. 24 at 2007, 2034.
[39] Warshavsky Decl. Ex. 8 at 216, 222.
[40] Compl. ¶7 & Compl. Section VII.
[41] Warshavsky Decl. Ex. 10 at 78610-78632 (BLMIS account opening documents for Defender).
[42] Compl. ¶¶53, 98, 115, 214-217.
[43] Compl. ¶4.
[44] Compl. ¶83.

subordination of Defender's customer claim, and asserts additional common law claims against the Moving Defendants and other defendants.[45]

B. Procedural History

The Trustee filed his complaint in this action on December 5, 2010.[46] On April 2, 2012 the Moving Defendants, Defender, RIR and Lowe filed motions to withdraw the reference for the purpose of having the District Court resolve various issues, including the application of the Section 546(e) safe harbor, antecedent debt, SLUSA preemption, the Trustee's standing to bring common law claims, and the effect of the Supreme Court's *Stern v. Marshall* decision.[47]

ARGUMENT

I. STANDARD OF REVIEW

A plaintiff need only make a prima facie showing of jurisdiction over a defendant in order to defeat a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). *See Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007); *Hoffritz for Cutlery Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985). The Court must construe all inferences in the Trustee's favor. *See DiStefano v. Carozzi N. Am., Inc*., 286 F.3d 81, 84 (2d Cir. 2001). Factual allegations contained in the complaint must be accepted as true for purposes of the motion except for unsupported allegations that are refuted by "direct, highly specific, testimonial evidence" presented by the defendant and not countered by the plaintiff. *See Schenker v. Assicurazioni Genereali S.p.A., Consol.*, No. 98 Civ. 9186, 2002 WL 1560788, at *3 (S.D.N.Y. July 15, 2002). Here, no such exacting affidavits have been submitted. Rather, as

[45] Compl. Counts One through Fourteen.
[46] Complaint, Picard v. Defender, *et al.*, No. 10-ap-5229 (Bankr. S.D.N.Y. Dec. 5, 2010), ECF No. 1.
[47] Motion to Withdraw the Reference filed on behalf of Tim Brockmann, Defender Limited, Reliance Management (BVI) Limited, Reliance Management (Gibraltar) Limited, No. 10-ap-5229 (Bankr. S.D.N.Y. Apr. 2, 2012), ECF No. 28; Motion to Withdraw the Reference filed on behalf of Justin Lowe, Reliance International Research LLC, No. 10-ap-5229 (Bankr. S.D.N.Y. Apr. 2, 2012), ECF No. 24.

discussed *infra*, Tim Brockmann's affidavit contains little more than conclusory, self-serving statements contradicted by the complaint and the documents referenced herein.

In addition to the complaint, a plaintiff may rely on affidavits and supporting materials to meet its burden of a prima facie showing. *See Pilates, Inc. v. Pilates Inst., Inc.*, 891 F. Supp. 175, 178 n.2 (S.D.N.Y. 1995) ("all pertinent documentation submitted by the parties may be considered in deciding the motion."); *In re Tamoxifen Citrate Antitrust Litig.*, 262 F. Supp. 2d 17, 21 (E.D.N.Y. 2003) (citing *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981)). "Such pleadings and affidavits must be construed in the light most favorable to the plaintiffs, and all doubts must be resolved in plaintiffs' favor." *In re Tamoxifen*, 262 F. Supp. 2d at 21 (citing *Hoffritz*, 763 F.2d at 57.).

II. STANDARD FOR DETERMINING PERSONAL JURISDICTION

Under Rule 7004(f) of the Bankruptcy Rules, a court has personal jurisdiction over the defendant provided that "the exercise of jurisdiction is consistent with the Constitution and laws of the United States." Fed. R. Bankr. P. 7004(f) (2010); *see also GMAM Inv. Funds Trust I v. Globo Comunicações e Participações S.A. (In re Globo Comunicações e Participações S.A.)*, 317 B.R. 235, 251 (Bankr. S.D.N.Y. 2004). For defendants that have not consented to jurisdiction, this analysis entails a two-step inquiry.

First, the court must establish that the defendant has sufficient "contacts with the forum state to justify the court's exercise of personal jurisdiction." *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164 (2d Cir. 2010) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Rule 7004(f) requires "minimum contacts" with the United States, rather than with any particular state. *See Picard v. Chais (In re Bernard L. Madoff Inv. Sec. LLC)*, 440 B.R. 274, 278 (Bankr. S.D.N.Y. 2010) ("*Chais*"); *Federalpha Steel LLC v. Fed. Pipe & Steel Corp. (In re Federalpha Steel LLC)*, 341 B.R. 872, 887 (Bankr. N.D. Ill. 2006) (the Bankruptcy Rules permit

"worldwide service of process, limited only by the due process clause of the Fifth Amendment.") (internal citation omitted); *Anheuser-Busch, Inc. v. Paques, Inc. (In re Paques, Inc.)*, 277 B.R. 615, 633 (Bankr. E.D. Pa. 2000).

Courts undertaking this analysis distinguish between specific and general jurisdiction. Specific jurisdiction exists when "a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Chloe*, 616 F.3d at 164 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n.8 (1984)). The exercise of specific jurisdiction is also appropriate when a foreign defendant, "through an act performed elsewhere, causes an effect in the United States." *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81, 87 (S.D.N.Y. 1995). The act must be "expressly aimed" at the forum to support the exercise of specific jurisdiction. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984). By contrast, general jurisdiction "is based on the defendant's general business contacts with the forum state and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts." *Chloe*, 616 F.3d at 164 (citing *Helicopteros*, 466 U.S. at 414-15 & n.9).

Second, if the court is satisfied that there are sufficient minimum contacts, it must then assess whether the exercise of personal jurisdiction would be reasonable under the circumstances such that the exercise comports with "traditional notions of fair play and substantial justice." *Id.*; *see also Chloe*, 616 F.3d at 164 (citing *Int'l Shoe Co.*, 326 U.S. at 316).

As demonstrated below, each of the Moving Defendants is subject to the Court's jurisdiction, because each of the Moving Defendants has minimum contacts with the United States. The Trustee's claims against each Moving Defendant arise out of each Moving

Defendant's contacts with the forum, and it is reasonable to subject each Moving Defendant to suit in the United States.

Jurisdiction is also appropriate over the Moving Defendants under New York's long arm statute, Civil Practice Law and Rules 302(a)(1). N.Y. C.P.L.R. 302(a)(1) (McKinney 2009) ("CPLR"). Under CPLR § 302, personal jurisdiction exists where the defendant "transacts business" in New York. A single transaction is sufficient, even if the defendant never enters the state, "so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976, 982 (S.D.N.Y. 1992) (quoting *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (N.Y. 1988)). Because CPLR § 302 does not reach as far as the Constitution permits, contacts sufficient to establish personal jurisdiction in New York will satisfy the requirement of minimum contacts with the United States. *See Chais*, 440 B.R. at 280.

Where a foreign entity is not present in New York, the jurisdictional presence of a related entity may be imputed to the foreign entity in two circumstances: (1) where one of the entities acts as the agent of the other entity, or (2) where one entity is the "mere department" of the other entity. *See Drucker Cornell v. Assicurazioni Generali S.p.A., Consol.*, No. 97 Civ. 2262, 2000 WL 284222, at *3 (S.D.N.Y. Mar. 16, 2000).[48]

A. Agency Jurisdiction

"To establish that a corporation doing business in New York is an agent of a related foreign corporation, the plaintiff must show that the former 'does all the business which [the foreign corporation] could do were it here by its own officials." *Dorfman v. Marriott Int'l Hotels, Inc.*, No. 99 Civ. 10496, 2002 WL 14363, at *3 (S.D.N.Y. Jan. 3, 2002); *see also Palmieri v.*

[48]The distinction between the agency and mere department tests "is not always great." *Mayatextil, S.A. v. Liztex U.S.A., Inc.*, No. 92 Civ. 4528, 1995 WL 131774, *4 (S.D.N.Y. Mar. 23, 1995). "Ultimately, the important issue in evaluating jurisdiction is that of fairness." *Palmieri v. Estefan*, 793 F. Supp. 1182, 1193-94 (S.D.N.Y. 1992).

Estefan, 793 F. Supp. 1182, 1190 (S.D.N.Y. 1992). The Second Circuit has stated that the New York entity must "provide[] services beyond 'mere solicitation' and these services [must be] sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." *Wiwa v. Royal Dutch Petrol. Co.*, 226 F.3d 88, 95 (2d Cir. 2000); *see also Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967).

An agency relationship also exists between entities "engaged in a single business enterprise that relies on the joint efforts" of each of the entities, *Dorfman*, 2002 WL 14363, at *11, and "[t]he interrelatedness of the corporations is the factor on which the courts have focused, rather than on the control of one by the other." *Palmieri*, 793 F. Supp. at 1193. Ultimately, for purposes of the agency test, courts "look to realities rather than to formal relationships." *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322, 1344 (E.D.N.Y. 1981); *see also Palmieri*, 793 F. Supp. at 1193-1194.

The Moving Defendants are subject to jurisdiction because of their agency relationship with other Defendants in this action. The Moving Defendants created, operated, and administered Defender as a fee-generating portal into the United States, such that Defender's contacts with the United States should be imputed to them. Likewise, the Moving Defendants are subject to the Court's jurisdiction because RIR and Lowe acted as their agents in New York.

Additionally, under CPLR § 302(a)(1), "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or *through an agent* . . . transacts any business within the state." (emphasis added.) Further, a corporation can act as the agent of a corporate officer and subject the officer to personal jurisdiction under CPLR § 302(a)(1). *See Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18 at 21 (2d Cir. 1988); *In re Sumitomo Copper Litig.*, 120 F. Supp.2d

328, 337 (S.D.N.Y. 2000). Jurisdiction through agency is properly found if the corporate entity "engaged in purposeful activities with this state in relation to [the] transaction for the benefit of and with the knowledge and consent of the [foreign individual] and . . . [the foreign individual] exercised some control over [the corporate entity] in the matter." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460 at 522 (N.Y. 1988) (asserting jurisdiction over foreign individual who operated company that was party to the transactions in dispute). As detailed below, Brockmann is subject to jurisdiction because of the significant control he exerted over RIR, such that RIR's contacts with the forum should be imputed to him.

B. Mere Department Jurisdiction

"A corporation is deemed a mere department of another corporation if the latter's control is so pervasive that the corporate separateness is more a formality than a reality." *In re Levant Line, S.A.*, 166 B.R. 221, at 231 (Bankr. S.D.N.Y. 1994). When analyzing whether one entity is a "mere department" of another, courts typically analyze the following factors: (1) common ownership; (2) the financial interdependence of the entities; (3) the degree to which the parent company interferes in the selection and assignment of the subsidiary's personnel and fails to observe corporate formalities; and (4) the extent to which the parent company exercises control over the marketing and operational policies of the subsidiary. *Erick Van Egeraat Associated Architects v. NBBJ LLC*, No. 08 Civ. 7873, 2009 WL 1209020, at *2 (S.D.N.Y. Apr. 29, 2009) (citing *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft*, 751 F.2d 117, 120 (2d Cir. 1984)). Common ownership is the only essential factor. *Beech Aircraft*, 751 F.2d at 120. Consideration of the other factors "necessitates a balancing process, and not every factor need weigh entirely in the plaintiffs' favor." *ESI, Inc. v. Coastal Corp.*, 61 F. Supp. 2d 35, 51-52 (S.D.N.Y. 1999); *see also Dorfman* 14363, at *7 (S.D.N.Y. 2002). The "mere department" case law is both instructive and, in the case of Reliance Gibraltar, governing. Reliance Gibraltar is a "mere department" of

Reliance BVI for jurisdictional purposes, and the case law is instructive regarding the attribution of the activities of RIR to the foreign entities.

III. THE COURT HAS PERSONAL JURISDICTION OVER THE MOVING DEFENDANTS

Reliance BVI and Reliance Gibraltar are subject to the Court's jurisdiction because they were part of the Reliance Group, which acted as a "single enterprise" with its essential activities taking place in New York where RIR and Lowe acted as New York agents for the rest of the Reliance Group. The Moving Defendants also are subject to the Court's jurisdiction because of their purposeful and systematic direction of investment activity into BLMIS in New York through the offshore feeder funds Defender, LIF-USEP and Striker, and their management of this activity. Brockmann is subject to the Court's jurisdiction for the additional reasons that he consented to jurisdiction in New York at the creation of RIR and was personally involved in the major decisions and investment activities directed to BLMIS in New York.

A. Moving Defendants Are Subject To Jurisdiction Because Of The Activities Of Their Agents In New York

1. The Reliance Group Is A Single Business Enterprise With RIR And Lowe Acting As Its Agent In New York

Brockmann, Lowe and other Reliance personnel ignored any corporate distinction between the various Reliance entities and operated as a single business enterprise with its core operations and most of its employees in New York. Reliance BVI was the fund manager for Defender, and Reliance Gibraltar played a similar role for LIF-USEP. However, neither of these companies had the wherewithal to perform their obligations as fund managers and, in fact, Reliance BVI had no employees.[49] Instead, as described herein, both Reliance BVI and Reliance Gibraltar had RIR in New York perform many of their fund manager duties. When companies

[49] Warshavsky Decl. Ex. 17 at 4661.

are engaged in a single business enterprise that relies on the joint efforts of various entities, the courts consider the actions of that single business enterprise as a whole in deciding personal jurisdiction. *Dorfman*, 2002 WL 14363, at *11 (finding jurisdiction over foreign corporation that "could not function without the management and coordination carried out by [the New York entity].").

The Reliance Group held itself out to the world as a united business endeavor that relied on the joint efforts of all its affiliates. For example:

- In Defender's promotional materials, contact details for "Reliance" were provided for the New York office with no reference to RIR.[50]
- In presentations on Defender, Reliance touted its "Global Presence," noting that its New York office was responsible for "Fund Research Operations" and "Client Communication." [51]
- In an "Organizational Chart" dated November 2008, Reliance identified the "Reliance Group" as having four functional areas: "Fund Research/Risk Mgt.," "Finance/Operations," "Client Relations," and "Legal/Compliance." The first three areas are dominated by employees in Reliance's New York office.[52]
- The "Launch Presentation" for Defender, dated April 2007, describes the Reliance Group's activities in New York but does not identify RIR.[53]
- Reliance describes Justin Lowe as a Managing Partner and member of Reliance's Investment Team in a November 2008 report drafted by "Reliance Management Ltd." about Defender.[54] Seven of the eight members of the "Investment Team" for Reliance were located in Reliance's New York office.[55]
- All entities in the Reliance Group shared the same website, "www.reliance-funds.com,"[56] and shared the same domain for e-mails, "reliance-funds.com."[57]

[50] Warshavsky Decl. Ex. 8 at 222.
[51] *Id.* at 215.
[52] *Id.* at 216.
[53] Warshavsky Decl. Ex. 25 at 9843.
[54] Warshavsky Decl. Ex. 8 at 216.
[55] *Id.*
[56] *Id.*
[57] *See, e.g.*, Warshavsky Decl. Ex. 26 (e-mail from Justin Lowe's Reliance address jlowe@reliance-funds.com); and Warshavsky Decl. Ex. 27 (e-mail from Trevor Uhl's Reliance address tuhl@@reliance-funds.com).

- Lowe admitted that the "reliance-funds" e-mail domain "technically belongs to Reliance BVI" and that RIR "ran" it.[58]

- RIR provided office space, a corporate e-mail account, and blackberry service to a consultant for Reliance Gibraltar who was based in Frankfurt, Germany.[59]

- E-mails from employees of RIR routinely included disclaimers indicating the e-mails were sent by Reliance BVI or Reliance Gibraltar, not RIR.[60]

- RIR helped design Reliance Group's website "www.reliance-funds.com" and uploaded information onto the website.[61]

- The Reliance Group used names containing the word "Reliance" interchangeably without regard to the legal names of the entities within the Reliance Group.

The Reliance Group led third parties to believe it was a single business enterprise with operations in New York and Gibraltar. Jakob Hirschbaeck, director of Fiman Limited, which was a director of Defender, described Reliance BVI and RIR under oath as "associated entities" acting together as Defender's investment manager and identified how "Mr. Justin Lowe for Reliance" communicated with Fortis Bank on behalf of Defender.[62] The following are other examples of the Reliance Group holding itself out as a single business enterprise with its locus in New York:

- In an internal memorandum contemplating financing Striker, Fortis Bank provided the following description: "Reliance is a hedge fund manager based in New York, Gibraltar, Frankfurt and Geneva who manage assets of c$1.6bn over 8 funds."[63]

- HSBC understood that Reliance BVI and RIR were one and the same. "[We] visited the offices of Reliance Management (BVI) Limited and Reliance International LLC ("Reliance") located at 147 East 48th Street, New York, NY on May 9, 2007 for the purpose of conducting a thorough due diligence review of Reliance, its policies,

[58] Warshavsky Decl. Ex. 9 at 219:14-17.
[59] *Id.* at 76:1-8, 141:20-142:4.
[60] *See, e.g.*, Warshavsky Decl. Ex. 28 (e-mail from Justin Lowe including a disclaimer for "Reliance Management (Gibraltar) Ltd"); Warshavsky Decl. Ex. 29 (e-mail from Justin Lowe including a disclaimer for "Reliance Management Ltd"); Warshavsky Decl. Ex. 27 at 3915 (e-mail from employee of RIR including a disclaimer for "Reliance Management (BVI) Ltd").
[61] Warshavsky Decl. Ex. 9 at 142:5-8.
[62] Warshavsky Decl. Ex. 20 at ¶¶ 12-13.
[63] Warshavsky Decl. Ex. 30.

procedures, risk management and operations."[64] In this same document, HSBC, which held Defender's bank accounts, stated "[f]ounded in 1998 Reliance International LLC is an experienced hedge fund manager that runs both fund of funds and single manager funds" conflating Reliance BVI with RIR.[65] HSBC identified "[t]he Reliance Directors" as being Brockmann, Lowe and Uhl.[66] Lowe and another RIR employee, Jason Whitt, hosted the HSBC visitors in RIR's New York offices.[67] However, HSBC's notes about the meeting indicate that HSBC believed it was meeting in Reliance BVI's and RIR's New York offices.[68]

- Justin Lowe sent an e-mail to JP Morgan Chase referring to Reliance Group's formation of Striker Fund stating that "[w]e launched a levered [sic] version of Defender using Fortis as Leverage provider."[69]

- Justin Lowe negotiated with Fortis Bank to finance the leveraged investment into Defender and Striker. Fortis described Lowe as "one of their main contacts at Reliance."[70]

- Echeverria of Optimal e-mailed with Lowe – not Brockmann, Reliance BVI or Reliance Gibraltar – regarding Defender redemptions.[71]

- Lowe told Royal Bank of Canada in an e-mail that he would be "in our Gibraltar office all next week," and included a disclaimer for Reliance Management (Gibraltar) Ltd.[72]

- The Reliance Group, in its launch presentation for Defender, consistently described itself in terms of a single business noting, for example, that "the Reliance head office is based in Gibraltar and research is conducted in New York City, where the investment research group is located."[73]

- Lowe's business card, which he shared with bank representatives when seeking investment into Striker, identified himself as the Managing Partner of "Reliance International LLC," using his "reliance-funds.com" e-mail address and included the Reliance Group's insignia with the word "Reliance" beneath it.[74]

- Lowe's e-mails, in which his signature block identifies him as the Managing Partner of Reliance International LLC, with a New York address and phone number, contain

[64] Warshavsky Decl. Ex. 16 at 5437.
[65] *Id.*
[66] *Id.* at 5438.
[67] *Id.* at 5437.
[68] *Id.*
[69] Warshavsky Decl. Ex. 31 at 7281 (e-mail series between Justin Lowe and Cathy Wang of JP Morgan Chase regarding providing leverage for Striker).
[70] Warshavsky Decl. Ex. 32 at 4472 (e-mail between Fortis employees regarding Reliance).
[71] Warshavsky Decl. Ex. 33 (e-mail series between Lowe and Echeverria regarding redemption from BLMIS).
[72] Warshavsky Decl. Ex. 34 (e-mail series between Justin Lowe and employees of RBC) (emphasis added).
[73] Warshavsky Decl. Ex. 25 at 9841.
[74] Warshavsky Decl. Ex. 35.

a disclosure that "Reliance Management (Gibraltar) Ltd. manages a group of offshore alternative investment vehicles."[75]

- Reliance Group promotional material stated that "Key considerations in selecting Reliance" were its "Presence in Europe and North America – Our combined presence in Europe and North America is a key advantage in accessing and researching managers," and its "Experienced, Tightly Knit Team – The principals of Reliance have been working together since 1999," referring to Brockmann, Lowe and Uhl.[76]

RIR and Lowe, the Managing Partner of RIR, acted as agents for Reliance BVI in fulfilling its responsibilities as founder/manager of Defender. Although Lowe was not an officer, director or employee of Reliance BVI or Defender, he managed the launch of Defender including the following activities:

- Sent all correspondence related to the launching of Defender to BLMIS. In fact, all correspondence in BLMIS's file from the fund was signed by Lowe on Defender letterhead.[77]

- Signed and forwarded to HSBC agreement documents regarding Defender.[78] "The custody/admin agreements you sent back are fine with me and I am ready to sign."[79]

- Managed problems with Fortis regarding the timing of processing of Striker trades into Defender at HSBC, with only RIR employees copied on the correspondence.[80]

- Sent BLMIS account opening documents to Fidux for signature by Defender's director, David Whitehead.[81]

- Requested a standard transfer form from HSBC for Defender so "we can have it sent to our Directors," referring to Defender's directors.[82]

- Made the decision to launch Defender, stating "I have decided today to launch the fund May 1st even though we are still waiting for the trading authorization with Madoff."[83]

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[75] *See e.g.*, Warshavsky Decl. Ex. 34 at 6692 (e-mail series between Justin Lowe and employees of RBC).
[76] Warshavsky Decl. Ex. 8 at 210 (emphasis in original).
[77] Warshavsky Decl. Ex. 10 at 78602-78603 (facsimile from Justin Lowe to BLMIS providing account details for Defender), at 78604 (letter from Justin Lowe on "Defender (BVI) Limited" letterhead to Erin at BLMIS enclosing materials required to open Defender's account), and at 78610 (letter from Justin Lowe on "Defender Limited" letterhead to Erin Reardon at BLMIS enclosing the signed account opening documents for Defender.").
[78] Warshavsky Decl. Ex. 36 (e-mail series between Justin Lowe and HSBC).
[79] *Id.* at 631.
[80] Warshavsky Decl. Ex. 20 ¶¶12-13; Warshavsky Decl. Ex. 37.
[81] Warshavsky Decl. Ex. 26.
[82] Warshavsky Decl. Ex. 38.
[83] Warshavsky Decl. Ex. 28 (e-mail from Justin Lowe to Fidux, which owned the corporate director of Defender).

- RIR supervised Mark Dittmar, a consultant for Reliance Gibraltar, from RIR's New York office.[84]

- After Madoff's arrest, Brockmann directed Lowe to deliver account closing documents for Defender in person to BLMIS on behalf of the Reliance Group.[85]

Not only did the Reliance Group's New York operations take center stage in the formation and establishment of Defender as a BLMIS feeder fund, they played an essential role in the Reliance Group's ongoing management of investments in Defender and in its relationship with BLMIS. Lowe had a hands-on role in the day-to-day management for the Reliance Group of investments in Striker and Defender and communicated with Fortis and HSBC about those investments.[86] He was the contact for BLMIS regarding the account opening documents.[87] On May 2, 2007, Lowe directed BLMIS to send duplicate copies of trade tickets for Defender to his New York office.[88] Lowe attended meetings with Madoff with Brockmann and Echeverria.[89]

Reliance Gibraltar's role as investment advisor to LIF-USEP meant that RIR conducted a variety of work in New York for the benefit of Reliance Group. This work is detailed in the complaint filed in the Trustee's matter *Picard v. UBS AG, et al.*,[90] and in the Trustee's brief in opposition to motions to dismiss filed in that matter,[91] but included the following:

- LIF-USEP's distributors frequently communicated questions about investments in LIF-USEP and their access to documents concerning other Madoff feeder funds directly to RIR.[92]

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[84] Warshavsky Decl. Ex. 22 at 9:3-19.
[85] Warshavsky Decl. Ex. 9 at 96:13-98:19.
[86] *See* Warshavsky Decl. Ex. 37 (e-mail chain between Justin Lowe and Sinead Looney of Fortis).
[87] Warshavsky Decl. Ex. 10 at 78602-78603 (facsimile from Justin Lowe to BLMIS providing account details for Defender) (May 2, 2007).
[88] *Id.*
[89] Warshavsky Decl. Ex. 39 (Reliance Management Note to File drafted by Justin Lowe regarding Visit with Bernard L. Madoff on December 4, 2008) (edited after Dec. 11, 2008); Warshavsky Decl. Ex. 40 (Reliance Management Note to File drafted by Justin Lowe regarding Visit with Bernard L. Madoff on February 1, 2007).
[90] Compl., *Picard v. UBS AG, et al.*, 10-ap-05311 (Bankr. S.D.N.Y. Dec. 7, 2010).
[91] Trustee's Opp'n Br., *Picard v. UBS AG, et al.*, 10-ap-05311 (Bankr. S.D.N.Y. Aug. 17, 2012).
[92] *See, e.g.*, Warshavsky Decl. Ex. 41 at 7216-7217 (e-mail from Lowe alerting M&B of LIF-USEP redemptions); Warshavsky Decl. Ex. 42 at 12815 (e-mail from Lowe about speaking with Juan Carlos Herguata, of M&B, about

- UBS SA personnel regularly communicated with RIR in New York regarding LIF-USEP subscriptions, redemptions, and other efforts to facilitate LIF-USEP's investment with BLMIS.[93]

The variety and number of these facts establish not only a joint effort by the Reliance Group, Brockmann, and Lowe, but a near complete delegation of business activities by the Moving Defendants to New York-based RIR and Lowe. In fact, RIR's only "customers" were Reliance BVI and Reliance Gibraltar, making RIR completely dependent on Brockmann, Reliance BVI and Reliance Gibraltar for work and financing.[94] RIR and Lowe rendered substantial services on Reliance BVI and Reliance Gibraltar's behalf, and Reliance BVI and Reliance Gibraltar could not have functioned without these services provided in New York. As such, RIR and Lowe acted as agents of the Moving Defendants, and the Moving Defendants are subject to the Court's jurisdiction. *Dorfman*, 2002 WL 14363, at *15 (citing *Frummer v. Hilton Hotels Int'l*, 19 N.Y.2d 533, at 536-537 (N.Y. 1967)) (holding that the "decisive test" supporting a finding of agency is when the purported agent's services in New York are "sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.").

The Moving Defendants were "engaged in a single business enterprise that relie[d] on the joint efforts" of each of them, RIR and Lowe. *Dorfman*, 2002 WL 14363, at *11. This joint effort was well-established by the Reliance Group through its failure to recognize the distinct corporate forms of its foreign and domestic entities, and through its own active marketing campaign touting its global presence and, specifically, its location in New York. The Reliance Group bragged in marketing materials that the Reliance Group principals—Brockmann, Lowe

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starting the "'new' LIF"); Warshavsky Decl. Ex. 43 (e-mail from Herguata to Lowe and Echeverria, regarding the "LIF Ireland prospectus").

[93] *See, e.g.*, Warshavsky Decl. Ex. 44, Warshavsky Decl. Ex. 45, Warshavsky Decl. Ex. 46, Warshavsky Decl. Ex. 47.

[94] Warshavsky Decl. Ex. 9 at 56:22-59:15, 124:18-125:10.

and Uhl—were an "Experienced, Tightly Knit Team," a factor courts within the Southern District of New York have held supports a finding of personal jurisdiction over a foreign entity. *Bialek v. Racal-Milgo, Inc.*, 545 F. Supp. 25, 32 (S.D.N.Y. 1982) (holding that the sales and service subsidiary was an agent of the parent because the subsidiary and parent functioned as "components of a tightly-knit commercial organization.").

The Moving Defendants cannot evade the jurisdiction of this Court where, as here, they delegated activities that are the subject of this action to the Reliance Group's New York entity. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. BP Amoco P.L.C.*, 319 F. Supp. 2d 352, 360 (S.D.N.Y. 2004) (the foreign entity could not be immunized from personal jurisdiction on a cause of action arising out of the very activities it delegated to the New York entity to perform). Moreover, the Moving Defendants "could not function without the management and coordination carried out by" RIR and Lowe whose responsibilities included promoting the BLMIS funds, meeting with potential investors and fund managers in New York, acting as Reliance Group's touted New York base, running the e-mail domain for reliance-funds.com, and negotiating leveraged financing for investment into BLMIS. *Dorfman*, 2002 WL 14363, at *11.

2. The Court Also Has Jurisdiction Over The Moving Defendants Under CPLR § 302(a)(1) Because Their Agents Transacted Business In New York

Each of the Moving Defendants also is subject to jurisdiction because RIR and Lowe transacted business in New York as their agents. Under CPLR § 302(a)(1), "a court may exercise personal jurisdiction over any non-domiciliary. . .who in person or *through an agent*. . .transacts any business within the state." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460 (N.Y. 1988) (asserting jurisdiction over foreign individual who operated company that was party to the transactions in dispute). This test is easily satisfied because RIR and Lowe transacted business

in New York with the knowledge and consent of and for the benefit of the Moving Defendants who clearly exercised more than "some control" over RIR.

A plaintiff is not required to show that the foreign party expressly requested or consented to the agent's actions, as activities of an agent will be attributed to the principal if they authorized the agent to act in the state. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 319 F. Supp. 2d at 360. Indeed, a party "cannot deputize another to take certain actions on its behalf and then disclaim knowledge or interest when those actions give rise to a legal dispute." *Id.*

Lowe and RIR performed functions in New York for the Moving Defendants with respect to the launching and ongoing management of Defender and other investments with BLMIS in New York. Additionally, Moving Defendants benefitted from their actions with respect to RIR and Lowe. *See Retail Software*, 854 F.2d at 23. Moreover, the Moving Defendants exercised more than "some control" over RIR—indeed, they were "primary actors" who exercised authority, direction, and control over RIR's activities in New York. *See Retail Software*, 854 F.2d 18 (finding jurisdiction over "primary actor[s] in the transaction in New York" who were not "some corporate employee[s] . . . who played no part in" it) (quoting *Kreutter*, 527 N.Y.S.2d at 201). RIR's and Lowe's contacts with the forum should be imputed to the Moving Defendants because of this agency relationship.

B. The Moving Defendants Are Subject To Jurisdiction Because They Purposefully Directed Investment Activity To BLMIS In New York

The Moving Defendants' contacts with this forum easily satisfy the minimum contacts requisite for the Court's exercise of personal jurisdiction because they directed investment activity to BLMIS in New York. *See Picard v. Maxam Absolute Return Fund, L.P. (In re Bernard L. Madoff Inv. Sec. LLC)*, 460 B.R. 106, 117 (Bankr. S.D.N.Y. 2011) ("*Maxam*") (finding that as a result of defendants' "directing investments to the United States, the Court

cannot escape the conclusion that it has specific jurisdiction over [the defendants]."); *Chais*, 440 B.R. at 274 (Bankr. S.D.N.Y. 2010) (noting "that foreign defendants who profited by their maintenance of BLMIS accounts and receipt of transfers subjected themselves to personal jurisdiction of this Court with regard to the Trustee's claims arising from such transfers."). Further, specific jurisdiction exists because the Trustee's complaint seeks to recover BLMIS funds subsequently transferred to Moving Defendants as fees charged to BLMIS feeder fund Defender, among other claims, and therefore unquestionably "arises out of or relates to" Moving Defendants' contacts with this forum. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (stating that nonresident defendant is subject to jurisdiction "if the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities").

1. The Reliance Group Formed Defender And Opened The Defender Account At BLMIS In New York

The Reliance Group formed Defender in order to facilitate overseas investment into BLMIS in New York.[95] It subsequently created Striker as a vehicle for leveraged investments into Defender. Those investments were, like all other investments in Defender, directed exclusively to BLMIS in New York.[96] Defender grew from $27 million upon creation to over $440 million at the end of 2008. All or virtually all of this money was invested—in New York—with BLMIS. Reliance BVI outwardly served as Defender's manager, among other roles, and received tens of millions of dollars from this relationship. Likewise, the Reliance Group and Brockmann authorized and supervised Defender's direction of funds into this forum and enabled the Reliance Group to profit handsomely from BLMIS through their actions.

[95] Warshavsky Decl. Ex. 16 at 5437 ("Reliance launched Defender to provide additional capacity to investors who wanted exposure to the Madoff strategy.").
[96] Warshavsky Decl. Ex. 20 at ¶26-29; *see also* Warshavsky Decl. Ex. 21.

In February 2007, Brockmann and Lowe attended their first meeting with Madoff, a meeting scheduled in order to open the Defender account.[97] Approximately two months later, Lowe initiated the launch of Defender.[98] On May 9, 2007, Reliance BVI, through New York-based RIR, delivered signed BLMIS account opening documents for Defender to BLMIS in New York.[99] These Defender account opening documents included a Customer Agreement, which established the Defender account at BLMIS in New York, an Option Agreement and a Trading Authorization Limited to Purchases and Sales of Securities, which delegated asset management authority to BLMIS in New York, and a Sub-Custodian agreement, which delegated custodial authority to BLMIS in New York.[100] Notably, these documents were signed by David Whitehead acting as Director of Defender while he was also Chairman of Reliance BVI.[101]

The actions the Moving Defendants took with respect to BLMIS cannot be discounted based on claims the actions were performed on behalf of Defender, or, as stated in the Sub-Custodian Agreement, for the "exclusive benefit" of Defender. The Reliance Group created Defender, established an account with BLMIS in New York on behalf of Defender, and communicated with BLMIS relating to Defender to earn fees for facilitating investment into BLMIS. The Trustee seeks these fees from the Moving Defendants through his subsequent transferee causes of action, among other claims. Actions the Moving Defendants and their personnel, and RIR and its personnel acting as their agents (*see* Section III.A.1 *supra*), took on behalf of Defender can be taken into account when determining whether the Moving Defendants have the minimum contacts required for jurisdiction. *Maxam*, 406 B.R. at 118 (exercising

[97] Warshavsky Decl. Ex. 9 at 167:22-168:15, 173:24-175:23.
[98] Warshavsky Decl. Ex. 28 (e-mail from Justin Lowe to Fidux stating "I have decided today to launch the fund May 1st" referring to Defender).
[99] Warshavsky Decl. Ex. 10 at 78610 (letter from Justin Lowe on "Defender Limited" letterhead to Erin Reardon at BLMIS enclosing the signed account opening documents for Defender.").
[100] Warshavsky Decl. Ex. 10 at 78610-78632 (BLMIS account opening documents for Defender).
[101] *Id.*

specific jurisdiction over foreign defendant with respect to money subsequently transferred to it where defendant "directed investments to the United States"); *see also In re Med-Atlantic Petroleum Corp.*, 233 B.R. 64 (Bankr. S.D.N.Y. 1999) ("Courts look at the totality of the circumstances in order to determine whether or not the defendant engaged in some purposeful activity in New York in connection with the matter in controversy.").

The Reliance Group formed Defender as a fund to feed investments into BLMIS in New York. By participating in those actions, directly and through their agents in New York, the Moving Defendants are subject to the jurisdiction of the Court. *Maxam*, 460 B.R. at 117, *Chais*, 440 B.R. at 274.; *Picard v. Cohmad Sec. Corp. (In re Bernard L. Madoff Inv. Sec. LLC)*, 418 B.R. 75, at 80-81 (Bankr. S.D.N.Y. 2009) ("*Cohmad*").

2. Reliance Group Personnel Communicated With BLMIS Employees In New York Regarding Defender

Further supporting the jurisdictional nexus, the Reliance Group had the telephone number for Madoff's direct line, and RIR personnel were encouraged to communicate with BLMIS employees in New York regarding Defender.[102] All correspondence Defender sent to BLMIS in BLMIS's file for the fund was signed by Lowe on Defender letterhead.[103] All correspondence the Reliance Group sent to BLMIS was signed by Lowe, including a facsimile that directed BLMIS to: (i) send account opening documents to RIR, (ii) send copies of trade tickets to RIR, and (iii) contact RIR should anyone at BLMIS have any questions regarding Defender.[104] In fact, aside from transactional correspondence by HSBC, Defender's only communication with

[102] Warshavsky Decl. Ex. 15 at 122:6-20.
[103] Warshavsky Decl. Ex. 10 at 78604 (letter from Justin Lowe on "Defender (BVI) Limited" letterhead to Erin at BLMIS enclosing materials required to open Defender's account), and at 78610 (letter from Justin Lowe on "Defender Limited" letterhead to Erin Reardon at BLMIS enclosing the signed account opening documents for Defender.).
[104] Warshavsky Decl. Ex. 10 at 78602-78603 (facsimile from Justin Lowe to BLMIS providing account details for Defender).

BLMIS was through RIR.[105] These communications were the function of the fund manager, Reliance BVI, but were performed by Lowe in New York, as Reliance BVI's agent. In fact, it was Lowe who had and controlled use of Madoff's direct phone number.[106]

Brockmann and Lowe personally met with Madoff on at least two occasions, the first of which was instrumental to the establishment of Defender as a BLMIS feeder fund.[107] In Brockmann's affidavit accompanying the Motion, he admitted that he participated in both meetings as a director of Reliance Gibraltar. At the time he was also the "principle [sic] controlling shareholder"[108] of Reliance BVI, which owned 100 percent of Reliance Gibraltar.

The Trustee's claims against the Moving Defendants arise out of or relate to the communications between RIR, purportedly on behalf of Defender and Reliance Group, and BLMIS. These communications were made in furtherance of the Reliance Group's business relationship with BLMIS—pursuant to which the Reliance Group received fees from Defender that the Trustee now seeks to recover.

3. The Reliance Group Received Substantial Fees As A Result Of Its Direction Of Investments To New York Through Defender

As a result of its direction of investments to BLMIS through Defender, Reliance BVI received substantial fees, further underscoring the contacts between Reliance BVI and the forum that give rise to jurisdiction. Reliance BVI received these fees from Defender in connection with its purported role as Defender's manager,[109] although the actual work of the manager was

[105] Warshavsky Decl. Ex. 10 (copy of customer file for Defender Limited maintained by BLMIS).
[106] Warshavsky Decl. Ex. 22 at 96:16-19; Warshavsky Decl. Ex. 15 at 122:6-20.
[107] Warshavsky Decl. Ex. 9 at 167:22-168:15, 173:24-175:23; Warshavsky Decl. Ex. 39 (Reliance Management Note to File drafted by Justin Lowe regarding Visit with Bernard L. Madoff on December 4, 2008) (edited after Dec. 11, 2008); Warshavsky Decl. Ex. 40 (Reliance Management Note to File drafted by Justin Lowe regarding Visit with Bernard L. Madoff on February 1, 2007).
[108] Brockmann Aff. ¶2.
[109] Warshavsky Decl. Ex. 6 at 36 (indicating that Reliance BVI would receive a Management Fee for Defender Limited of up to 1.7 percent per annum varying by share class, and could charge an additional Subscription Fee of up to 2 percent).

performed in New York by BLMIS and RIR. The Trustee's suit, which, among other claims, seeks to recover these fees subsequently transferred to Reliance BVI, and from there to the rest of the Reliance Group, Brockmann and Lowe, plainly arises out of or relates to the contacts between Reliance BVI and the forum that allowed Reliance BVI to earn such fees. *See Burger King*, 471 U.S. at 472; *see also Jesup, Josephthal & Co., Inc. v. Piguet & Cie*, No. 90 Civ. 6544, 1991 WL 168053 (S.D.N.Y. Aug. 22, 1991) (finding jurisdiction over a Swiss private bank that made investments in the forum on behalf of its clients because, by providing such services to its clients, the bank "act[ed] to inure its own benefit").

4. The Moving Defendants' Direction Of Investors' Money To BLMIS Through LIF-USEP, Kingate Global And Optimal Also Supports Jurisdiction

The Reliance Group also directed investors' money into BLMIS through LIF-USEP, a fund for which it was the investment advisor. The Reliance Group took on many of the administrative roles for LIF-USEP. For example, Reliance Gibraltar agreed to be LIF-USEP's investment advisor, and in that capacity, was responsible for directing investments into BLMIS and for calculating LIF-USEP's net asset value. Most of these vital functions were performed in New York by RIR employees. The Reliance Group also directed a portion of the money invested in its flagship fund, RMA, to BLMIS feeder funds Kingate Global and Optimal.[110] Both of those feeder funds invested 100 percent of their assets with BLMIS. Having operated Defender, Striker and LIF-USEP to direct business to BLMIS in New York, and used Kingate Global and Optimal for the same purpose, the Moving Defendants should not be permitted to use their overseas residence to avoid a lawsuit directly bearing on their actions.[111]

[110] Warshavsky Decl. Ex. 15 at 17:3-5, 18:25-19:7, 27:18-23.
[111] Reliance Gibraltar and LIF-USEP are discussed in greater detail in the Trustee's brief in opposition to motions to dismiss filed in this Court in the matter, Trustee's Opp'n Br., *Picard v. UBS AG, et al.*, 10-ap-05311 (Bankr. S.D.N.Y. Aug. 17, 2012).

C. The Court Has Personal Jurisdiction Over The Moving Defendants Because The Moving Defendants Acted As Agents For Defender

The Moving Defendants are also subject to suit in the United States because of their agency relationship with Defender. When one foreign company acts as the agent of another foreign company which was doing business with entities in the United States, then "it follows that specific jurisdiction therefore attaches to both." *Leonard v. Optimal Payments Ltd. (In re Nat'l Audit Def. Network),* 332 B.R. 896, 905-06 (Bankr. D. Nev. 2005) ("[a foreign parent] may not avoid jurisdiction in the United States by conveniently interposing a subsidiary between its acts and the debtor."); *see also Dorfman*, 2002 WL 14363, at *3 ("To establish that a corporation doing business in New York is an agent of a related foreign corporation, the plaintiff must show that the former 'does all the business which [the foreign corporation] could do were it here by its own officials.") (citation omitted). Defender does not appear to have ever had any employees, office space, or physical presence of its own. Rather, the Reliance Group acted on behalf of Defender to perform all or virtually all of Defender's work. Defender could not have functioned without Reliance BVI and the other members of the Reliance Group.

Defender submitted a customer claim to the Trustee and also held a customer account with BLMIS.[112] These facts unquestionably submit Defender to the Court's jurisdiction. *See Chais*, 440 B.R. at 278-280 (holding that the minimum contacts inquiry is required only when "a foreign defendant has not consented to jurisdiction by filing a proof of claim in the bankruptcy case," and also that contacts arising from the maintenance of direct accounts with BLMIS give rise to personal jurisdiction). Given the Moving Defendants' critical role in establishing Defender and in operating, managing, and servicing Defender, the jurisdictional contacts of Defender should be imputed to the Moving Defendants.

[112] Compl. Section IX.

D. The Court Also Has Jurisdiction Over Reliance BVI Because Reliance Gibraltar Is A Mere Department Of Reliance BVI[113]

Reliance BVI is also subject to the jurisdiction of this Court because Reliance Gibraltar is a mere department of Reliance BVI. Courts in this jurisdiction have established a four-part test to determine whether a corporate subsidiary or affiliate is a mere department of its corporate parent: (1) common ownership; (2) financial interdependence; (3) interference with personnel and disregard for corporate formalities; and (4) control over operational and marketing policies. *Van Egeraat*, 2009 WL 1209020, at *2. Each prong of the mere department test is satisfied here such that the imputation of Reliance Gibraltar's jurisdictional contacts to Reliance BVI is not blind aggregation, but rather the consequence of their mere department relationship. *Van Egeraat*, 2009 WL 1209020, at *2 (citing *Beech Aircraft*, 751 F.2d at 120).

The first and threshold requirement, common ownership, is satisfied because of the undisputed fact that Reliance Gibraltar is a wholly owned subsidiary of Reliance BVI.[114] Consideration of the other factors "necessitates a balancing process, and not every factor need weigh entirely in the plaintiffs' favor." *ESI, Inc. v. Coastal Corp.*, 61 F. Supp. 2d 35, 51-52 (S.D.N.Y. 1999); *see also Dorfman*, 2002 WL 14363, at *7. The second requirement, financial interdependence, third requirement, failure to observe corporate formalities, and fourth requirement, interference with operations, are satisfied by the way the Reliance Group operates as a single business enterprise with revenues coming into Reliance BVI and Reliance Gibraltar that are completely dependent upon services performed in New York by RIR. Reliance Gibraltar is a mere department of Reliance BVI because it was: (1) formed for the purpose of allowing

[113] Although the Trustee is not arguing herein that RIR is a mere department of the other Reliance Group entities, the operative concern of the mere department test is the level of corporate intimacy and control between local and foreign entities. That concern reinforces the Trustee's arguments that jurisdiction over the Moving Defendants is proper because RIR and Lowe operated in New York as the Moving Defendants' agents.
[114] Brockmann Aff. ¶5.

Reliance BVI to manage a Luxembourg-based SICAV, (2) a wholly-owned subsidiary of Reliance BVI, (3) along with Reliance BVI, controlled by Tim Brockmann, and (4) had the same address that Reliance BVI later assumed. Reliance Gibraltar's contacts with the United States should, therefore, also be imputed to Reliance BVI.

The interconnected and undifferentiated nature of the Reliance Group demonstrates that none of the constituent components of the Reliance Group had any independent business and none could have operated separately from the Reliance Group. In fact, without the New York office, the Moving Defendants would not have been able to so successfully funnel millions of dollars into BLMIS in New York. Brockmann stood behind each Reliance entity, establishing and operating them for the purpose of benefiting from BLMIS's New York-based operations; to put money into, and take it out of, New York State. Therefore, in addition to the direct ties between each Moving Defendant and the forum, jurisdiction exists over Reliance BVI based on Reliance Gibraltar being a mere department of Reliance BVI.

E. The Court Has Jurisdiction Over Brockmann

Specific jurisdiction also exists over Brockmann because he has the minimum contacts with the forum required for this Court to exercise personal jurisdiction. All of the reasons why the Court has jurisdiction over all of the Moving Defendants apply to Brockmann. In addition, he consented to the jurisdiction of the New York courts when he established RIR with Lowe in 2000. He also was involved in the major decisions and investment activities that were purposely directed to BLMIS in New York.

1. Brockmann Took Advantage Of The Benefits Of New York Law And Consented To Jurisdiction Of The New York Courts

Brockmann entered into an operating agreement with Lowe, a New York resident, to form RIR in September 2000. The operating agreement was governed by New York law:

> 9.5 Applicable Law. All questions concerning the construction, validity, and interpretation of this Agreement and the performance of the obligations imposed by this Agreement shall be governed by the internal law, not the law of conflicts, of the State of New York.[115]

Brockmann and Lowe consented to subject matter jurisdiction in federal and state courts in New York with respect to disputes arising under the agreement and also consented to personal jurisdiction in those courts:

> 9.8 Exclusive Jurisdiction and Venue. Any suit involving any dispute or matter arising under this Agreement may only be brought in a United States District Court located in the State of New York or any New York State Court having jurisdiction over the subject matter of the dispute or matter. All Members hereby consent to the exercise of personal jurisdiction by any such court with respect to any such proceeding.[116]

Having established RIR in New York and chosen New York law to govern any disputes relating to the operation of RIR, Brockmann deliberately chose to take advantage of the benefits of New York law and of having business operations in New York. Therefore, he could have reasonably expected to be haled into New York court with respect to any transactions related to the activities of RIR in New York. *Aquiline Capital Partners LLC v. Finarch LLC*, No. 11 Civ. 3684, 2012 WL 1764218, at *10 (S.D.N.Y. May 17, 2012) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("The test for 'minimum contacts' has come to rest on whether a defendant's 'conduct and connection with the forum state' are such that a defendant 'should reasonably anticipate being haled into court there.'")). The Trustee's causes of action against Brockmann arise in large part out of the activities that RIR performed for the Reliance Group in New York with respect to BLMIS, and he specifically consented to the jurisdiction of the New York courts.

[115] Warshavsky Decl. Ex. 19 at 5263.
[116] *Id.*

2. Brockmann Was Directly Involved In The Major Decisions That Directed Investments Into BLMIS In New York

Brockmann created RIR and was its managing member until 2006, when he sold his shares to the current LLC members: Lowe (51 percent) and Trevor Uhl (49 percent). Even after that date, Brockmann continued to exert control over RIR on his own behalf and on behalf of Reliance BVI and Reliance Gibraltar:

- Brockmann was the "ultimate boss" of the Reliance Group which "operated as one company."[117]
- It was "clear that Tim was the boss and controlled the final decisions in terms of any company decisions, as well as . . . management of the funds, as well as compensation and corporate strategy, business strategy, client development, et cetera."[118]
- Brockmann met in person with most investment managers at the final decision stage after an investment had been vetted.[119]
- Brockmann conducted performance reviews for RIR employees. "Tim had wanted to participate and lead the performance reviews for all employees, the year end performance reviews and bonus negotiations and discussions, and so he was leaving that night or the next day, so they were – they had scheduled them on December 5th . . . ."[120] This performance review occurred in December 2008, nearly three years after Brockmann sold his shares in RIR.
- Brockmann interviewed potential employees for RIR.[121]
- Brockmann was a critical part of the decision-making with respect to bonuses paid by RIR in December 2008, even though he was not an officer or employee of RIR: "If Tim Brockmann had decided not to allow payment to go out to RIR for the amounts of these bonuses, then RIR would not have had the money in its checking account or any other account at that time to make those payments, yes, that's right."[122]
- Lowe negotiated his own compensation with Tim Brockmann "on a regular basis." "I was paid a [sic], I think the accountants called it a guaranteed payment, which I, in rough terms, agreed with Tim would be a certain amount for a certain period. We revised it on a [sic] – it wasn't a salary. It was what would I [sic] get as a partner in the company once everything is said and done was [sic] discussed. It wasn't a salary.

[117] Warshavsky Decl. Ex. 22 at 14:15-15:18.
[118] *Id.* at 14:11-18.
[119] *Id.* at 16:13-25.
[120] *Id.* at 335:4-13.
[121] *Id.* at 18:15-22.
[122] Warshavsky Decl. Ex. 48 at 53:12-54:16.

> Okay, feels right that this is for the next six months, this is roughly within a certain band, roughly what I am willing to pay you – I, Reliance Management, willing to pay you, RIR. And we'd haggle over it. It wasn't Marrakesh, but it was, you know, sometimes some haggling. I felt I should be paid more for the work that was done, he felt that maybe, you know, work wasn't sufficient, and so we'd haggle."[123]

- Brockmann visited RIR in New York every quarter for eight years and, in the spring of 2008, Reliance Group rented an apartment for him in New York City for a period of two and a half months so that Brockmann could "make sure he was in tune with what was going on" following the news of the collapse of Bear Stearns.[124]

Brockmann admits that he met with Madoff in New York, once in February 2007, just before the creation of Defender as a feeder fund into BLMIS, and again in December 2008.[125] His attempt to minimize these meetings is unavailing. Even if these meetings were the only contacts with the forum—which the Trustee does not concede—they are sufficient to subject Brockmann to personal jurisdiction. "Even a single purposeful contact may be sufficient to meet the minimum contacts standard when the underlying proceeding is directly related to that contact," *Application to Enforce Admin. Subpoenas Duces Tecum of S.E.C. v. Knowles*, 87 F.3d 413, 419 (10th Cir. 1996) (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)), especially when such single contact "represent[s] a deliberate affiliation with the forum that renders foreseeable the possibility of being haled into court in the United States at least as to those specific contacts." *Id.*; *see also Burger King Corp.*, 471 U.S. at 475 n.18, 105 S.Ct. 2174.

Brockmann's first meeting with Madoff in New York is particularly relevant as it was for the purpose of initiating and forming a direct relationship with BLMIS that resulted, shortly thereafter, in the Reliance Group creating Defender for the sole purpose of feeding investors' money into BLMIS in New York. New York courts recognize that even one meeting in New York is sufficient to confer personal jurisdiction over a foreign defendant when that meeting

[123] Warshavsky Decl. Ex. 9 at 59:24-60:13.
[124] *Id.* at 113:15-115:4; Brockmann Aff. ¶15 (stating that in the Spring of 2008 Reliance Gibraltar "leased an apartment in New York for my use.").
[125] Brockmann Aff. ¶13.

involved business discussions that were instrumental in creating or furthering a business relationship. *See CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 367 -368 (2d Cir. 1986) (finding that a single visit to New York to establish "a more solid business relationship between the parties" supported a finding of jurisdiction); *see also George Reiner & Co., Inc. v. Schwartz*, 41 N.Y.2d 648, 649-650 (N.Y. 1977) (one visit in which the parties entered into a contract satisfied the requirements for jurisdiction); *Hi Fashion Wigs, Inc. v. Peter Hammond Adver., Inc.*, 32 N.Y.2d 583, at 585-586 (N.Y. 1973) (defendant's single visit to personally guarantee a contract was enough to sustain jurisdiction).

A court has jurisdiction over a foreign defendant if he travels to the forum to participate in business meetings that are "more than isolated, casual encounters," but are instead essential to the formation or continuance of a business relationship. *See, e.g.*, *Miller v. Calotychos*, 303 F. Supp. 2d 420, 425 (S.D.N.Y. 2004) (finding jurisdiction over U.K. defendants based on two lengthy meetings with plaintiff in New York during which the parties promoted their joint venture and discussed details regarding ownership and management of same); *Zainal v. America-Europe-Asia Int'l Trade and Mgmt. Consultants, Ltd.*, 670 N.Y.S.2d 76, 76-77 (N.Y. App. Div. 1998) (finding defendant's meetings in New York to negotiate an agreement "was a purposeful availment of the privilege of conducting business in the jurisdiction" and not "an insignificant and fortuitous transitory presence"). Brockmann's 2007 meeting with Madoff in New York was essential to the establishment of a direct relationship between the Reliance Group and BLMIS and the formation of Defender as a new feeder fund whose sole purpose was to funnel investors' money into BLMIS in New York.

Brockmann's control of the Reliance Group's efforts to direct investor money into BLMIS in New York is sufficient to establish that this Court has specific jurisdiction over

Brockmann. *See Cohmad*, 418 B.R. at 81 (finding minimum contacts where foreign defendant's "purposeful and profitable activities contributed to the massive losses suffered by victims of the BLMIS Ponzi scheme in the U.S."); *Maxam*, 460 B.R. at 117 (finding specific jurisdiction where foreign "defendant [had] been and remain[ed] a 'player' in the BLMIS and related proceedings."); *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 473 (N.Y. 1988) (holding that jurisdiction was properly sustained where foreign individual used company in New York to secure plaintiff's investment and paid New York company for that service). Physical presence in New York is not necessary, when, as here, the defendants' actions directly touched the forum. *See Heritage House Restaurants v. Cont'l Funding Group*, 906 F.2d 276, 283 (7th Cir.1990) (finding jurisdiction and stating "[w]e have never held that the lack of presence in the forum state is determinative of the lack of jurisdiction.") Brockmann's profitable relationship "creat[ed] a situation where it may well be unfair to allow [him] to escape having to account . . . for consequences that proximately ar[ose] from [his] activities." *Burger King*, 471 U.S. at 474.

The Trustee seeks to avoid and recover subsequent transfers that found their way to Brockmann from BLMIS through the other defendants. On a motion to dismiss, it is enough that the Trustee has alleged that payments to Brockmann originated with BLMIS. *In re Allou Distrib., Inc.*, 379 B.R. 5, 30 (Bankr. E.D.N.Y. 2007) ("plaintiff must allege sufficient facts to show, if proved, that the funds at issue originated with the debtor . . . dollar-for-dollar accounting is not required."). Further, it is quite possible that Brockmann received other benefits through his ownership and control of the Reliance Group as a result of its direction of investors' money to BLMIS in New York. *See Retail Software Servs., Inc. v. Lashlee*, 854 F.2d at 23 (presuming that "officers, directors, and shareholders . . . st[and] to benefit from [their corporation's] entry into the New York market"); *see also Moneygram Payment Sys., Inc. v. Consorcio Oriental,*

S.A., No. 05 Civ. 10773 (RMB), 2007 WL 1489806, at *5 (S.D.N.Y. May 21, 2007) (finding jurisdiction over officer who benefitted from corporation's New York transactions).

Brockmann cannot escape this Court's reach by claiming he undertook his actions as a corporate director and/or officer. "The Supreme Court has recognized that a defendant's status as an employee or corporate officer 'does not somehow insulate [him] from jurisdiction' arising from his business-related contacts with the United States." *Bickerton v. Bozel S.A. (In re Bozel S.A.)*, 434 B.R. 86, 99 (Bankr. S.D.N.Y. 2010) (quoting *Calder v. Jones*, 465 U.S. 783, 790 (1984)). Rather, the Bankruptcy Court may assert specific jurisdiction over a corporate officer where the "Adversary Proceeding arises out of [the officer's] duties as a corporate officer and his corresponding contacts with the United States." *Id*.; *see also In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp.2d 334, 351 (D. Md. 2004) ("an individual defendant's actions directed at the forum, even if those acts were done in that defendant's corporate capacity" are relevant to jurisdiction); *Torco Oil Co. v. Innovative Thermal Corp.*, 730 F. Supp. 126, 134 n.18 (N.D. Ill. 1989) (jurisdiction permissible over foreign corporate officers where defendants are "primary participants in an alleged wrongdoing intentionally directed at" the forum state) (quoting *Calder*, 465 U.S. at 790). Brockmann directed his actions at the United States, through his dominion and control of investment funds entirely invested in New York.

F. The Moving Defendants Are Subject To The General Jurisdiction Of This Court Because They Engaged In A Continuous And Systematic Course Of Business In New York

A finding of general jurisdiction under Rule 7004 of the Bankruptcy Rules requires that a defendant maintain "continuous and systematic" contacts with the United States. *See Bickerton v. Bozel S.A. (In re Bozel S.A.)*, 434 B.R. at 97-98. Similarly, a foreign corporation is subject to this Court's general jurisdiction under N.Y. C.P.L.R. 301 "if it is engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of its presence." *Dorfman*,

2002 WL 14363, at *2. The Moving Defendants engaged in a continuous and systematic course of business in New York, through which they directed millions of dollars of investors' money into BLMIS, warranting jurisdiction.

On behalf of the Moving Defendants, Brockmann attended and participated in weekly market calls and Portfolio Advisory Committee conference calls with individuals in New York.[126] RIR communicated regularly with the Moving Defendants through written reports, quarterly letters and monthly letters concerning each fund through which the Reliance Group invested.[127] RIR's employees also drafted thousands of "summary notes" and "notes to file" that were "written down in a database [] in New York" and shared with the Moving Defendants.[128] Furthermore, as set forth above, Brockmann visited New York regularly and often to conduct business on behalf of the Moving Defendants. These communications and contacts are more than sufficient to establish that the Moving Defendants had a "presence" in New York, subjecting them to this Court's general jurisdiction.

G. The Moving Defendants Waived Personal Jurisdiction Defenses By Participating In This Action And Other Proceedings In New York

By actively participating in this proceeding and other proceedings in the Southern District of New York, the Moving Defendants purposefully availed themselves of the protections afforded by United States law "effectively consent[ing]" to personal jurisdiction, and waived their ability to challenge jurisdiction. *See Cohmad*, 418 B.R. at 81. When a defendant voluntarily appears in a United States court proceeding by participating in motion practice, as the Moving Defendants have, the defendant consents to personal jurisdiction. *Id.* A defendant's failure to use "great diligence in challenging personal jurisdiction" may result in the waiver of its

[126] Warshavsky Decl. Ex. 9 at 106:16-25, 107:7-24, 108:8-17.
[127] *Id.* at 109:3-9.
[128] *Id.* at 109:3-19, 109:24-110:11.

defenses to personal jurisdiction. *Andros Compania Maritima, S.A. v. Intertanker Ltd.*, 718 F. Supp. 1215, 1217 (S.D.N.Y. 1989). If a defendant does not raise the defense of lack of personal jurisdiction in its first "significant defensive move," such as a responsive pleading or motion, the defendant waives its ability to assert that defense. Fed. R. Civ. P. 12(h)(1)(B); Fed. R. Bankr. P. 2012(b); *see also JP Morgan Chase Bank, N.A. v. Law Office of Robert Jay Gumenick, P.C.*, No. 08 Civ. 2154, 2011 WL 1796298, at *2 (S.D.N.Y. Apr. 22, 2011).

The Moving Defendants have availed themselves of the benefits of the Southern District of New York by affirmatively seeking relief from the court. On April 2, 2012, the Moving Defendants moved to withdraw the reference.[129] By seeking the District Court's relief, the Moving Defendants waived their ability to challenge personal jurisdiction. *See, e.g.*, *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999) (finding that, despite its later attempts to raise defense of lack of personal jurisdiction, defendant had waived that defense by first seeking venue transfer without pressing the defense); *Herbst Gaming, Inc. v. Insurcorp. (In re Zante, Inc.)*, No. 3:10-cv-00231, 2010 WL 5477768, at *7 (D. Nev. Dec. 29, 2010) (finding that by moving to withdraw the reference and for summary judgment, defendants submitted to *in personam* jurisdiction as a matter of law). The Moving Defendants' contentions that this Court lacks personal jurisdiction over the Moving Defendants should therefore be rejected.

The Moving Defendants did not preserve their objections to jurisdiction with the footnote in their motion to withdraw the reference. Asserting possible future objections to personal jurisdiction "in passing" will not protect a defendant from forfeiting the defense. *See, e.g.*, *Bryant Park Capital v. Jelco Ventures*, No. 05 Civ. 8702, 2005 WL 3466013, at *1 (S.D.N.Y.

[129] Motion to Withdraw the Reference filed on behalf of Tim Brockmann, Defender Limited, Reliance Management (BVI) Limited, Reliance Management (Gibraltar) Limited, No. 10-ap-5229 (Bankr. S.D.N.Y. Apr. 2, 2012), ECF No. 28.

Dec. 16, 2005). The Moving Defendants' failure to argue lack of personal jurisdiction before filing their motion to withdraw the reference forfeited that defense. *Id.*

IV. THE MOVING DEFENDANTS FAIL TO SHOW THAT THE EXERCISE OF PERSONAL JURISDICTION WOULD BE UNREASONABLE

Once the Trustee makes a prima facie showing of the requisite minimum contacts, the exercise of jurisdiction may be defeated only "where the defendant presents 'a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Chloe.*, 616 F.3d at 165 (quoting *Burger King*, 471 U.S. at 477); *see also Cohmad*, 418 B.R. 75, 81. The reasonableness inquiry focuses on whether "[the court's] exercise of jurisdiction will not offend 'traditional notions of fair play and substantial justice.'" *Chais*, 440 at 278 (quoting *Asahi Metal Indus. Co., Ltd. v. Super. Ct. Cal.*, 480 U.S. 102, 113 (1987)).

The Supreme Court has identified five factors helpful in determining the "reasonableness" of the exercise of personal jurisdiction: (1) "the burden on the defendant"; (2) "the forum State's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the shared interest of the several States in furthering fundamental substantive social policies." *Burger King*, 471 U.S. at 476-77 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

This Court previously held that these factors favor the exercise of jurisdiction over foreign defendants in connection with the Trustee's efforts to recover BLMIS-related transfers. *See Chais*, 440 B.R. at 281-282 ("On the basis of [defendant's] purposeful and profitable financial transactions in the United States, this Court certainly has jurisdiction to determine whether a defendant's transactions contributed to the massive losses suffered by victims of the BLMIS Ponzi scheme in the United States.") (internal citation omitted). In so holding, this Court

determined that the significant interests implicated by the Trustee's actions will justify even serious burdens on a foreign defendant. *Id.*; *see also Cohmad*, 418 B.R. at 81; *Maxam*, 460 B.R. at 119. In any case, there is no serious burden "where [the defendant's] counsel is in New York and there is a U.S. nexus to its economic activities, and given that 'the conveniences of modern communication and transportation' also militate against finding hardship based on lack of proximity." *Maxam*, 460 B.R. at 119 (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129 (2d Cir. 2002)).

The Second Circuit has found the exercise of personal jurisdiction reasonable when a defendant causes consequences in the forum. *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990); *see also SEC v. Gonzalez de Castilla*, No. 01 Civ. 3999, 2001 WL 940560, at *4 (S.D.N.Y. Aug. 20, 2001); *Chais*, 440 B.R. at 281. By funneling money into and out of BLMIS, facilitating investments with BLMIS, and benefitting from the relationship with BLMIS by collecting enormous fees, each of the Moving Defendants is inextricably linked to Madoff's scheme and the losses suffered by thousands of investors in the United States.

New York and the United States have a strong interest in exercising personal jurisdiction over the Moving Defendants. The liquidation of BLMIS concerns a failed, federally-regulated New York broker-dealer and is proceeding in New York. The Trustee is overseeing hundreds of suits before this Court, involving billions of dollars in claims similar to, and related to, the claims brought against the Moving Defendants. This Court has already held that "the most efficient resolution of the controversy would be in the United States, where the inextricably-related BLMIS litigation is ongoing." *Chais*, 440 B.R. at 281; *see also Nordberg v. Granfinanciera, S.A. (In re Chase & Sandborn Corp.)*, 835 F.2d 1341, 1347 (11th Cir. 1988) (finding personal jurisdiction reasonable where the trustee already had several other related actions pending in the

forum). The Court's interests in maintaining a cohesive litigation structure far outweigh any inconvenience imposed on the Moving Defendants by being forced to litigate here.

The United States has a significant interest in adjudicating claims arising under the Bankruptcy Code. *See Cohmad*, 418 B.R. at 81-82 ("[T]he United States has a strong interest in applying the fraudulent transfer and preference provisions of its Bankruptcy Code."); *Maxam*, 460 B.R. at 119 ("United States has a strong interest in applying the fraudulent transfer and preference provisions of its Bankruptcy Code since the Trustee's claims arise under it, and defendants' transfers have allegedly deprived United States' creditors of distributions to which they are entitled."). Here, the Trustee's claims arise under the Bankruptcy Code, bolstering this Court's interest in retaining jurisdiction over the Moving Defendants. Balancing all relevant interests, the exercise of personal jurisdiction over the Moving Defendants comports with the "reasonableness" embodied in "traditional notions of fair play and substantial justice." *Chais*, 440 at 278 (quoting *Asahi*, 480 U.S. at 113).

The Moving Defendants' conclusory arguments and "evidence" fall far short of the "direct, highly specific, direct testimonial evidence" necessary to show that jurisdiction would be unreasonable. *See Schenker*, 2002 WL 1560788, at *3. Furthermore, the allegations set forth in the complaint—bolstered by the specific evidence presented in the Trustee's opposition to the Motion and accompanying declaration—demonstrate that each of the Moving Defendants maintained minimum contacts with the forum that subject them to jurisdiction, notwithstanding their generalized declarations to the contrary. The Moving Defendants are unable to show that the balance of interests would weigh against the exercise of personal jurisdiction by this Court.

V. JURISDICTIONAL DISCOVERY SHOULD BE PERMITTED IN THE ALTERNATIVE

In the event this Court finds that the Trustee has not successfully alleged personal jurisdiction over any of the Moving Defendants, discovery should be permitted on this limited issue. *APWU v. Potter*, 343 F.3d 619, 627 (2d Cir. 2003) (noting that "a court should take care to give the plaintiff ample opportunity to secure and present evidence relevant to the existence of jurisdiction") (internal quotations omitted). Courts have permitted jurisdictional discovery where a plaintiff has made a "sufficient start" towards a prima facie case, a standard that is more than met here. *See Uebler v. Boss Media, AB*, 363 F. Supp. 2d 499, 506 (E.D.N.Y. 2005); *Stratagem Dev. Corp. v. Heron Int'l N.V.*, 153 F.R.D. 535, 547-48 (S.D.N.Y. 1994); *see also Texas Int'l Magnetics, Inc. v. BASF Aktiengesellschaft*, 31 F. App'x 738, 739 (2d Cir. 2002) (permitting jurisdictional discovery to develop factual record on personal jurisdiction issue); *Picard v. Magnify Holdings Inc. (In re Bernard L. Madoff Inv. Sec. LLC*), 10-05279 (BRL), Order at 16-17, Dkt. No. 97 (Bankr. S.D.N.Y. June 15, 2012) (permitting jurisdictional discovery to determine relevant jurisdictional facts surrounding moving defendant).

The Trustee has made far more than a "threshold showing that there is some basis for the assertion of jurisdiction, facts that would support a colorable claim of jurisdiction." *Ayyash v. Bank Al-Madina*, No. 04 Civ. 9201, 2006 WL 587342, at *5 (S.D.N.Y. Mar. 9, 2006). The Trustee has met this burden despite key documents bearing on jurisdiction residing within the Moving Defendants' exclusive possession. *Winston & Strawn v. Dong Won Sec. Co.*, No. 02 Civ. 0183, 2002 WL 31444625, at *5 (S.D.N.Y. Nov. 1, 2002) (permitting discovery "where the facts necessary to establish personal jurisdiction . . . lie exclusively within the defendant's knowledge." (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.4 (2d Cir. 1977)); *Uebler*, 363 F. Supp. 2d at 506. Further, where jurisdictional theories are fact-

intensive, such as here, jurisdictional discovery is warranted. *See Winston & Strawn*, 2002 WL 31444625, at *5 (ordering jurisdictional discovery to "gauge the extent of [parent's] control over [subsidiary] and whether such control would provide a basis for jurisdiction . . . ."); *see also Amsellem v. Host Marriot Corp.*, 280 A.D.2d 357, 359 (N.Y App. Div. 2001) (finding jurisdictional discovery appropriate "especially since the corporate relationships are complex and the relevant facts are exclusively within the control of [defendant]").

Jurisdictional discovery would permit the Trustee to fully develop the facts regarding each of the Moving Defendants' contacts with the forum. Brockmann states that other than the two meetings he had in New York with Madoff, Reliance Gibraltar had no direct contact with BLMIS and that Reliance BVI never had direct contacts with BLMIS.[130] RIR personnel delivered the account opening documents for Defender to BLMIS and communicated with BLMIS about Defender.[131] As RIR itself did not have any contractual ties with Defender, they could have been doing so only as agents of and on behalf of Reliance BVI. Moreover, Brockmann admits that he used an RIR credit card to pay for expenses he incurred during his frequent and sometimes lengthy stays in New York.[132] The Trustee is entitled to additional documents from the Moving Defendants in this regard to explore the full nature of the relationship between the Moving Defendants and employees of RIR and BLMIS located in New York, and the full nature of the Reliance Group's relationships, services provided, and fees received with respect to Defender, Striker and LIF-USEP.

Jurisdictional discovery would also allow the Trustee to confirm his understanding of the Reliance Group's organizational structure, personnel, and duties with respect to Defender and LIF-USEP. The Trustee should be permitted to review documents that may speak to the extent

[130] Brockmann Aff. ¶13.
[131] *Supra* n.77.
[132] Brockmann Aff. ¶18.

to which Reliance BVI relied upon RIR and Lowe in performing its management role with respect to Defender, such that RIR's and Lowe's contacts should be imputed to it for purposes of jurisdiction. Moreover, examination of Reliance BVI's financial records would show whether it segregated the substantial management and performance fees it received from Defender.

CONCLUSION

The Trustee respectfully requests that the Court deny the Motion in its entirety or, in the alternative, permit limited discovery to allow the Trustee to develop the factual record regarding personal jurisdiction over the Moving Defendants.

Dated: August 17, 2012
New York, New York

Respectfully submitted,

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