

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-2992(L) Caption [use short title]

Motion for: Motion to Stay the Issuance of the Mandate Pursuant to Fed. R. App. P. 41(d)(1) Pending the Filing of a Petition for a Writ of Certiorari

Set forth below precise, complete statement of relief sought: Defendants- Appellees request that this Court stay the issuance of the mandate in this appeal pursuant to Fed. R. App. P. 41(d)(1) pending the disposition of their impending petition for a writ of certiorari in the United States Supreme Court.

In re: Irving H. Picard, Trust

MOVING PARTY: See Addendum A OPPOSING PARTY: See Addendum B

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: See Addendum A OPPOSING ATTORNEY: See Addendum B [name of attorney, with firm, address, phone number and e-mail]

Court- Judge/ Agency appealed from: Hon. Stuart M. Bernstein, U.S. Bankruptcy Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: November 16, 2018

Signature of Moving Attorney:

/s/ Carmine D. Boccuzzi, Jr. Date: 4/8/2019 Service by: CM/ECF Other [Attach proof of service]

<b>Addendum A</b>			
<b>Number</b>	<b>Case Number</b>	<b>Moving Parties</b>	<b>Moving Attorneys</b>
1.	17-2992	Banque Lombard Odier & Cie SA, FKA Lombard Odier Darier Hentsch & Cie	John F. Zulack, Esq., Allegaert Berger & Vogel LLP 111 Broadway, 20 <sup>th</sup> Floor New York, New York 10006
2.	17-2995	Union Securities Investment Trust Co., Ltd.	Blanka K. Wolfe, Esq., Direct: 212-653-8700 Sheppard, Mullin, Richter & Hampton LLP 30 Rockefeller Plaza New York, NY 10112
3.	17-2995	Union USD Global Arbitrage Fund	Blanka K. Wolfe, Esq.
4.	17-2995	Union USD Global Arbitrage A Fund	Blanka K. Wolfe, Esq.
5.	17-2995	Union Arbitrage Strategy Fund	Blanka K. Wolfe, Esq.
6.	17-2996	Banque Cantonale Vaudoise	John F. Zulack, Esq., Allegaert Berger & Vogel LLP 111 Broadway, 20 <sup>th</sup> Floor New York, New York 10006
7.	17-2999	Grosvenor Investment Management Ltd.	Russell T. Gorkin, Esq., Proskauer Rose LLP 11 Times Square New York, NY 10036  Gregg M. Mashberg, Esq., Partner Proskauer Rose LLP 11 Times Square New York, NY 10036
8.	17-2999	Grosvenor Aggressive Growth Fund Limited	Russell T. Gorkin, Esq.  Gregg M. Mashberg, Esq., Partner
9.	17-2999	Grosvenor Balanced Growth Fund Limited	Russell T. Gorkin, Esq.  Gregg M. Mashberg, Esq., Partner
10.	17-2999	Grosvenor Private Reserve Fund Limited	Russell T. Gorkin, Esq.  Gregg M. Mashberg, Esq., Partner
11.	17-3003	BSI AG, individually and as successor in interest to Banco Del Gottardo	David Farrington Yates, Esq., Direct: 212-488-1200 Kobre & Kim LLP

			<p>6th Floor 800 3rd Avenue New York, NY 10022</p> <p>George W. Shuster, Jr., Esq., Direct: 212-937-7232 Wilmer Cutler Pickering Hale and Dorr LLP 7 World Trade Center 250 Greenwich Street New York, NY 10007</p>
12.	17-3004	First Gulf Bank	<p>George M. Chalos, Direct: 516-721-4076 Chalos &amp; Co., P.C. 55 Hamilton Avenue Oyster Bay, NY 11771</p> <p>Briton Paul Sparkman, Attorney Direct: 713-574-9454 Chalos &amp; Co., P.C. 7210 Tickner Street Houston, TX 77055</p>
13.	17-3005	Parson Finance Panama S.A.	<p>Eugene F. Getty, Esq., Direct: 212-889-2821 Kellner Herlihy Getty &amp; Friedman LLP 470 Park Avenue South, 7N New York, NY 10016</p>
14.	17-3006	Delta National Bank and Trust Company	<p>Lawrence Joel Kotler, Esq., Direct: 215-979-1514 Duane Morris LLP 1540 Broadway New York, NY 10036</p>
15.	17-3007	Unifortune Asset Management SGR SPA	<p>Richard B. Levin, Esq., Jenner &amp; Block LLP 919 3rd Avenue New York, NY 10022</p> <p>Carl Nicholas Wedoff, Esq., Direct: 212-891-1653 Jenner &amp; Block LLP 919 3rd Avenue New York, NY 10022</p>
16.	17-3007	Unifortune Conservative Fund	<p>Richard B. Levin, Esq.</p> <p>Carl Nicholas Wedoff, Esq.</p>
17.	17-3008	National Bank of Kuwait SAK	<p>Richard A. Cirillo, Esq.,</p>

			King & Spalding LLP 1185 Avenue of the Americas New York, NY 10036
18.	17-3009	Natixis S.A. (in its own capacity and as successor-in-interest to IXIS Corporate & Investment Bank)	Bruce M. Ginsberg, Esq., Direct: 212-468-4820 Davis & Gilbert LLP 1740 Broadway New York, NY 10019  James R. Serritella, Esq., Direct: 212-468-4945 Davis & Gilbert LLP 1740 Broadway New York, NY 10019
19.	17-3009	Natixis Financial Products LLC (as successor-in-interest to Natixis Financial Products Inc.)	Bruce M. Ginsberg, Esq.  James R. Serritella, Esq.
20.	17-3009	Bloom Asset Holdings Fund	Bruce M. Ginsberg, Esq.  James R. Serritella, Esq.
21.	17-3009	Tensyr Limited	Timothy P. Harkness, Esq., Direct: 212-277-4000 Freshfields Bruckhaus Deringer US LLP 31st Floor 601 Lexington Avenue New York, NY 10022  David Y. Livshiz, Esq., Direct: 212-277-4000 Freshfields Bruckhaus Deringer US LLP 31st Floor 601 Lexington Avenue New York, NY 10022
22.	17-3010	Cathay Life Insurance Co. LTD.	Scott D. Lawrence, Esq., Direct: 214-720-4300 Akerman LLP Suite 3600 2001 Ross Avenue Dallas, TX 75201  David W. Parham, Esq., Direct: 214-720-4345 Akerman LLP Suite 3600 2001 Ross Avenue

			Dallas, TX 75201
23.	17-3011	Barclays Bank (Suisse) S.A.	<p>Marc J. Gottridge, Esq., - Direct: 212-909-0643 [COR NTC Retained] Hogan Lovells US LLP 875 3rd Avenue New York, NY 10022</p> <p>Andrew M. Harris, Esq. Direct: 212-918-5712 Hogan Lovells US LLP 875 Third Avenue New York, NY 10022</p>
24.	17-3011	Barclays Bank S.A.	<p>Marc J. Gottridge, Esq.</p> <p>Andrew M. Harris, Esq.</p>
25.	17-3011	Barclays Private Bank & Trust Limited	<p>Marc J. Gottridge, Esq.</p> <p>Andrew M. Harris, Esq.</p>
26.	17-3012	Arden Asset Management LLC	<p>M. William Munno, Esq., Attorney Direct: 212-574-1200 Seward &amp; Kissel LLP 1 Battery Park Plaza New York, NY 10004</p> <p>Michael Benjamin Weitman, Esq., Direct: 212-574-1486 Seward &amp; Kissel LLP 1 Battery Park Plaza New York, NY 10004</p>
27.	17-3012	Arden Asset Management Inc.	<p>M. William Munno, Esq.</p> <p>Michael Benjamin Weitman, Esq.</p>
28.	17-3012	Arden Endowment Advisers, Ltd.	<p>M. William Munno, Esq.</p> <p>Michael Benjamin Weitman, Esq.</p>
29.	17-3013	Royal Bank of Canada	<p>Mark Thomas Ciani, Esq., Direct: 212-940-8800 Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022</p> <p>Anthony L. Paccione, Esq., Katten Muchin Rosenman LLP</p>

			575 Madison Avenue New York, NY 10022
30.	17-3013	Guernroy Limited	Mark Thomas Ciani, Esq.  Anthony L. Paccione, Esq.
31.	17-3013	Royal Bank of Canada (Channel Islands) Limited	Mark Thomas Ciani, Esq.  Anthony L. Paccione, Esq.
32.	17-3013	Royal Bank of Canada Singapore Branch	Mark Thomas Ciani, Esq.  Anthony L. Paccione, Esq.
33.	17-3013	Royal Bank of Canada (Suisse) S.A.	Mark Thomas Ciani, Esq.  Anthony L. Paccione, Esq.
34.	17-3013	RBC Dominion Securities Inc.	Mark Thomas Ciani, Esq.  Anthony L. Paccione, Esq.
35.	17-3013	Royal Bank of Canada Trust Company (Jersey) Limited	Mark Thomas Ciani, Esq.  Anthony L. Paccione, Esq.
36.	17-3014	SNS Bank N.V.	Charles C. Platt, Direct: 212-230-8860 Wilmer Cutler Pickering Hale and Dorr LLP 7 World Trade Center 250 Greenwich Street New York, NY 10007  Andrea J. Robinson, Esq., Direct: 617-526-6360 Wilmer Cutler Pickering Hale and Dorr LLP 60 State Street Boston, MA 02109  George W. Shuster, Jr., Esq., Direct: 212-937-7232 Wilmer Cutler Pickering Hale and Dorr LLP 7 World Trade Center 250 Greenwich Street New York, NY 10007
37.	17-3014	SNS Global Custody B.V.	Charles C. Platt  Andrea J. Robinson, Esq.

			George W. Shuster, Jr., Esq.
38.	17-3016	Koch Industries, Inc., as successor in interest to Koch Investment (UK) Company	Jonathan P. Guy, Esq., Direct: 202-339-8516 Orrick, Herrington & Sutcliffe LLP 1152 15th Street, NW Washington, DC 20005
39.	17-3018	Kookmin Bank	Richard A. Cirillo, Esq., King & Spalding LLP 1185 Avenue of the Americas New York, NY 10036
40.	17-3019	Bank Julius Baer & Co., Ltd.	Eric Brian Halper, Esq., Direct: 212-402-9413 McKool Smith, PC 47th Floor 1 Bryant Park New York, NY 10036  Virginia Weber, Esq., Direct: 212-402-9417 McKool Smith, PC 47th Floor 1 Bryant Park New York, NY 10036
41.	17-3020	Six Sis AG	Andreas A. Frischknecht, Esq. Direct: 212-257-6960 Chaffetz Lindsey LLP 33rd Floor 1700 Broadway New York, NY 10019  Erin Valentine, Esq., Direct: 212-257-6960 Chaffetz Lindsey LLP 33 <sup>rd</sup> Floor 1700 Broadway New York, NY 10019
42.	17-3021	Trincastar Corporation	Richard B. Levin, Esq., Jenner & Block LLP 919 3rd Avenue New York, NY 10022  Carl Nicholas Wedoff, Esq., Direct: 212-891-1653 Jenner & Block LLP 919 3rd Avenue New York, NY 10022

43.	17-3023	Schroder & Co. Bank AG	Martin. J Crisp Direct: 212-596-9000 Ropes & Gray LLP 1211 Avenue of the Americas New York, NY 10036
44.	17-3024	Bureau of Labor Insurance	Jennifer Fiorica Delgado Direct: 646-414-6962 Lowenstein Sandler LLP 18th Floor 1251 Avenue of the Americas New York, NY 10020  Zachary Rosenbaum, Direct: 212-204-8690 Lowenstein Sandler LLP 1251 Avenue of the Americas New York, NY 10020
45.	17-3025	Caceis Bank, Luxembourg Branch	Daniel Schimmel, Esq., Direct: 646-927-5500 Foley Hoag LLP 1301 Avenue of the Americas, 25 <sup>th</sup> Floor New York, NY 10019
46.	17-3025	Caceis Bank	Daniel Schimmel, Esq.
47.	17-3026	CA Indosuez (Switzerland) S.A., f/k/a Credit Agricole (Suisse) S.A.	Lawrence B. Friedman, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006  Elizabeth Vicens, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
48.	17-3026	Credit Agricole S.A., AKA Banque Du Credit Agricole	Lawrence B. Friedman  Elizabeth Vicens
49.	17-3029	Solon Capital, Ltd., c/o Appleby Corporate Services (Bermuda) Canons Court 22 Victoria Street Hamilton HM 12 Bermuda	William J. Sushon, Esq., O'Melveny & Myers LLP Times Square Tower 7 Times Square New York, NY 10036
50.	17-3032	Quilvest Finance Ltd.	Thomas E. Lynch, Attorney Direct: 212-326-3939 Jones Day 250 Vesey Street



			New York, NY 10281
51.	17-3033	Lloyds TSB Bank PLC	<p>Mark Thomas Ciani, Esq., Direct: 212-940-8800 Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022</p> <p>Anthony L. Paccione, Esq., Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022</p>
52.	17-3034	Atlantic Security Bank	<p>Anthony D. Boccanfuso, Arnold &amp; Porter Kaye Scholer LLP 250 West 55th Street New York, NY 10019</p> <p>Scott Schreiber, Esq., Direct: 202-942-5672 Arnold &amp; Porter Kaye Scholer LLP 601 Massachusetts Avenue, NW Washington, DC 20001</p>
53.	17-3035	Orbita Capital Return Strategy Limited	<p>Gary J. Mennitt, Esq., Direct: 212-698-3831 Dechert LLP 27th Floor Mailroom 1095 Avenue of the Americas New York, NY 10036</p>
54.	17-3038	The Sumitomo Trust & Banking Co., Ltd.	<p>Michael Zeb Landsman, Esq., Direct: 212-888-3033 Becker, Glynn, Muffly, Chassin &amp; Hosinski LLP 16th Floor 299 Park Avenue New York, NY 10171</p> <p>Jordan E. Stern, Esq., Direct: 212-888-3033 Becker, Glynn, Muffly, Chassin &amp; Hosinski LLP 16th Floor 299 Park Avenue New York, NY 10171</p>
55.	17-3039	Zephyros Limited	<p>William J. Sushon, Esq., O'Melveny &amp; Myers LLP Times Square Tower 7 Times Square</p>

			New York, NY 10036
56.	17-3040	Merrill Lynch Bank (Suisse) SA	Pamela A. Miller, Esq., Direct: 212-326-2088 O'Melveny & Myers LLP Times Square Tower 7 Times Square New York, NY 10036
57.	17-3041	Northern Trust Corporation, 50 LaSalle Street Chicago, IL 60603	Mark Thomas Ciani, Esq., Direct: 212-940-8800 Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022  Anthony L. Paccione, Esq., Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022
58.	17-3041	Barfield Nominees Limited, Trafalgar Court Les Baques St. Peters Port Guernsey United Kingdom	Mark Thomas Ciani, Esq.  Anthony L. Paccione, Esq.
59.	17-3042	Credit Agricole Corporate and Investment Bank, 1301 Avenue of the Americas New York, NY 10019, DBA Credit Agricole Private Banking Miami, FKA Calyon S.A., DBA Credit Agricole Miami Private Bank, Successor in Interest to Credit Lyonnais S.A.	Lawrence B. Friedman, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006  Elizabeth Vicens, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
60.	17-3043	Korea Exchange Bank, Individually And As Trustee For Korea Global All Asset Trust I-1, And For Tams Rainbow Trust III	Richard A. Cirillo, Esq., King & Spalding LLP 1185 Avenue of the Americas New York, NY 10036
61.	17-3043	Korea Investment Trust Management Company	John D. Giampolo, Esq., Direct: 212-382-3300 Wollmuth Maher & Deutsch LLP 500 5th Avenue New York, NY 10110
62.	17-3044	Nomura International plc	Brian H. Polovoy, Esq., Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022  Randall L. Martin, Esq.,

			Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022
63.	17-3047	Societe Generale Private Banking (Suisse) S.A., FKA SG Private Banking Suisse S.A.	John F. Zulack, Esq., Flemming Zulack Williamson Zauderer LLP 1 Liberty Plaza New York, NY 10006
64.	17-3047	Societe Generale Private Banking (Lugano-Svizzera) S.A., FKA SG Private Banking (Lugano-Svizzera) S.A.	John F. Zulack, Esq.
65.	17-3047	Socgen Nominees (UK) Limited	John F. Zulack, Esq.
66.	17-3047	Lyxor Asset Management S.A., as Successor in Interest to Barep Asset Management S.A.	John F. Zulack, Esq.
67.	17-3047	Societe Generale Holding De Participations S.A., as Successor in Interest to Barep Asset Management S.A.	John F. Zulack, Esq.
68.	17-3047	SG AM AI Premium Fund L.P., FKA SG AM Alternative Diversified U.S. L.P.	John F. Zulack, Esq.
69.	17-3047	Lyxor Asset Management Inc., as General Partner of SG AM AI Premium Fund L.P., FKA SGAM Asset Management, Inc.	John F. Zulack, Esq.
70.	17-3047	SG Audace Alternatif, FKA SGAM AI Audace Alternatif	John F. Zulack, Esq.
71.	17-3047	SGAM AI Equilibrium Fund, FKA SGAM Alternative Multi Manager Diversified Fund	John F. Zulack, Esq.
72.	17-3047	Lyxor Premium Fund, FKA SGAM Alternative Diversified Premium Fund	John F. Zulack, Esq.
73.	17-3047	Societe Generale, S.A., as Trustee for Lyxor Premium Fund	John F. Zulack, Esq.
74.	17-3047	Societe Generale Bank & Trust S.A.	John F. Zulack, Esq.
75.	17-3047	OFI MGA Alpha Palmares, FKA Oval Alpha Palmares	Brian J. Butler, Esq., Direct: 315-218-8000 Bond, Schoeneck & King, PLLC 1 Lincoln Center 110 West Fayette Street Syracuse, NY 13202
76.	17-3047	Oval Palmares Europlus	Brian J. Butler, Esq.

77.	17-3047	UMR Select Alternatif	Brian J. Butler, Esq.
78.	17-3047	Bank Audi S.A.M.-Audi Saradar Group, FKA Dresdner Bank Monaco S.A.M.	Gary J. Mennitt, Esq., Direct: 212-698-3831 Dechert LLP 27th Floor Mailroom 1095 Avenue of the Americas New York, NY 10036
79.	17-3050	Intesa Sanpaolo S.p.A., as Successor in Interest to Banca Intesa SpA 1 William Street New York, NY 10004	Andrew Ditchfield, Direct: 212-450-3009 Davis Polk & Wardwell LLP 450 Lexington Avenue New York, NY 10017  Elliot Moskowitz, Esq., Direct: 212-450-4241 Davis Polk & Wardwell LLP 450 Lexington Avenue New York, NY 10017
80.	17-3050	Eurizon Capital SGR S.p.A., Eurizon Capital SGR SpA (as Successor in Interest to Eurizon Investimenti SGR SpA, f/k/a Nextra Investment Management SGR SpA, and Eurizon Alternative Investments SGR Spa, f/k/a Nextra Alternative Inv Piazzatte Giordano Dell'Amore 3 20121 Milan Italy	Andrew Ditchfield  Elliot Moskowitz, Esq.
81.	17-3050	Eurizon Low Volatility, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Low Volatility	Andrew Ditchfield  Elliot Moskowitz, Esq.
82.	17-3050	Eurizon Low Volatility II, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Low Volatility II	Andrew Ditchfield  Elliot Moskowitz, Esq.
83.	17-3050	Eurizon Low Volatility PB, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Low Volatility PB	Andrew Ditchfield  Elliot Moskowitz, Esq.
84.	17-3050	Eurizon Medium Volatility, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Medium Volatility	Andrew Ditchfield  Elliot Moskowitz, Esq.

85.	17-3050	Eurizon Medium Volatility II, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Medium Volatility II	Andrew Ditchfield  Elliot Moskowitz, Esq.
86.	17-3050	Eurizon Total Return, Piazzetta Giordano Dell'Amore 3 c/o Eurizon Capital SGR SpA 20121 Milan Italy, FKA Nextra Total Return	Andrew Ditchfield  Elliot Moskowitz, Esq.
87.	17-3054	Banco Itau Europa Luxembourg, S.A.	Brian H. Polovoy, Esq., Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022  Randall L. Martin, Esq., Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022
88.	17-3054	Banco Itau Europa International	Brian H. Polovoy, Esq. Randall L. Martin, Esq.
89.	17-3057	UBS AG	Gabriel Herrmann, Esq., Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166  Marshall R. King, Esq., Attorney Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166
90.	17-3057	UBS (Luxembourg) SA	Gabriel Herrmann, Esq., Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166  Marshall R. King, Esq., Attorney Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166
91.	17-3057	UBS Fund Services (Luxembourg) S.A.	Gabriel Herrmann, Esq.  Marshall R. King, Esq., Attorney
92.	17-3057	UBS Third Party Management Company S.A.	Gabriel Herrmann, Esq.  Marshall R. King, Esq., Attorney

93.	17-3057	Access International Advisors Ltd.	Brian Lee Muldrew, Esq., Direct: 212-940-6581 Katten Muchin Rosenman LLP Suite 1422 575 Madison Avenue New York, NY 10022  Anthony L. Paccione, Esq., Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022
94.	17-3057	Access Management Luxembourg SA, FKA Access International Advisors Luxembourg SA, as represented by its Liquidator Maitre Ferdinand Entringer	Brian Lee Muldrew, Esq.  Anthony L. Paccione, Esq.
95.	17-3057	Access Partners SA, as represented by its Liquidator Maitre Ferdinand Entringer	Brian Lee Muldrew, Esq.  Anthony L. Paccione, Esq.
96.	17-3057	Patrick Littaye	Anthony L. Paccione, Esq.  Brian Lee Muldrew, Esq.
97.	17-3057	Pierre Delandmeter	Scott Berman, Direct: 212-833-1100 Friedman Kaplan Seiler & Adelman LLP 7 Times Square New York, NY 10036
98.	17-3058	Banque Internationale a Luxembourg S.A., individually and as successor in interest to Dexia Nordic Private Bank S.A., FKA Dexia Banque Internationale a Luxembourg S.A.	Jeff Edward Butler, Esq., Clifford Chance US LLP 31 West 52nd Street New York, NY 10019
99.	17-3058	RBC Dexia Investor Services Bank S.A.	Mark Thomas Ciani, Esq., Direct: 212-940-8800 Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022  Anthony L. Paccione, Esq., Katten Muchin Rosenman LLP 575 Madison Avenue New York, NY 10022
100.	17-3058	RBC Dexia Investor Services Espana S.A.	Mark Thomas Ciani, Esq.

			Anthony L. Paccione, Esq.
101.	17-3058	Banque Internationale a Luxembourg (Suisse) S.A., FKA Dexia Private Bank (Switzerland) Ltd.	Jeff Edward Butler, Esq.
102.	17-3059	Abu Dhabi Investment Authority	Marc Greenwald, Direct: 212-849-7140 Quinn Emanuel Urquhart & Sullivan, LLP 22nd Floor 51 Madison Avenue New York, NY 10010  Eric Mark Kay, Esq., Direct: 212-849-7273 Quinn Emanuel Urquhart & Sullivan, LLP 22nd Floor 51 Madison Avenue New York, NY 10010
103.	17-3060	Dakota Global Investments, Ltd.	Jeff Edward Butler, Esq., Clifford Chance US LLP 31 West 52nd Street New York, NY 10019
104.	17-3062	HSBC Bank plc	Thomas J. Moloney, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
105.	17-3062	HSBC Securities Services (Luxembourg) SA	Thomas J. Moloney
106.	17-3062	HSBC Bank Bermuda Limited	Thomas J. Moloney
107.	17-3062	HSBC Fund Services (Luxembourg) S.A.	Thomas J. Moloney
108.	17-3062	HSBC Private Bank (Suisse) S.A.	Thomas J. Moloney
109.	17-3062	HSBC Private Banking Holdings (Suisse) SA	Thomas J. Moloney
110.	17-3062	HSBC Cayman Services Limited (sued as HSBC Bank (Cayman) Limited)	Thomas J. Moloney
111.	17-3062	HSBC Securities Services (Bermuda) Limited	Thomas J. Moloney
112.	17-3062	HSBC Bank USA, N.A.	Thomas J. Moloney
113.	17-3062	HSBC Institutional Trust Services (Bermuda) Limited	Thomas J. Moloney
114.	17-3062	HSBC Securities Services (Ireland) Limited	Thomas J. Moloney

115.	17-3062	HSBC Institutional Trust Services (Ireland) Limited	Thomas J. Moloney
116.	17-3062	HSBC Holdings PLC	Thomas J. Moloney
117.	17-3062	BA Worldwide Fund Management Limited	Franklin B. Velie, Esq., Direct: 212-484-9866 Pierce Bainbridge Beck Price & Hecht LLP 277 Park Ave, 45 <sup>th</sup> Floor New York, NY 10172  Jonathan G. Kortmansky, Esq., Direct: 212-484-9866 Pierce Bainbridge Beck Price & Hecht LLP 277 Park Ave, 45 <sup>th</sup> Floor New York, NY 10172
118.	17-3064	SICO Limited	Thomas J. Moloney, Cleary Gottlieb Steen & Hamilton LLP 1 Liberty Plaza New York, NY 10006
119.	17-3065	ABN AMRO Fund Services (Isle of Man) Nominees Limited, FKA Fortis (Isle of Man) Nominees Limited	Christopher R. Harris, Esq. Latham & Watkins LLP 885 3rd Avenue New York, NY 10022  Thomas Giblin, Esq., Direct: 212-906-1200 Latham & Watkins LLP 885 3rd Avenue New York, NY 10022
120.	17-3065	Platinum All Weather Fund Limited	Anthony D. Boccanfuso, Arnold & Porter Kaye Scholer LLP 250 West 55th Street New York, NY 10019  Scott Schreiber, Esq., Direct: 202-942-5672 Arnold & Porter Kaye Scholer LLP 601 Massachusetts Avenue, NW Washington, DC 20001
121.	17-3065	Odyssey	Ralph A. Siciliano, Esq., Direct: 212-508-6718 Tannenbaum Helpen Syracuse & Hirschtritt LLP 900 3rd Avenue New York, NY 10022
122.	17-3066	Fairfield Investment Fund Limited	William A. Maher, Esq.



			Wollmuth Maher & Deutsch LLP 500 5th Avenue New York, NY 10110  Fletcher W. Strong, Esq. Wollmuth Maher & Deutsch LLP 500 5th Avenue New York, NY 10110
123.	17-3066	Fairfield Greenwich Limited	Peter E. Kazanoff, Esq., Direct: 212-455-3525 Simpson Thacher & Bartlett LLP 425 Lexington Avenue New York, NY 10017
124.	17-3066	Fairfield Greenwich (Bermuda) Limited	Peter E. Kazanoff, Esq.
125.	17-3066	Fairfield Greenwich Advisors LLC	Peter E. Kazanoff, Esq.
126.	17-3066	Fairfield International Managers, Inc.	Peter E. Kazanoff, Esq.
127.	17-3066	Walter Noel	Andrew Hammond, Direct: 212-819-8297 White & Case LLP 1221 Avenue of the Americas New York, NY 10020
128.	17-3066	Jeffrey Tucker	Daniel Jeffrey Fetterman, Esq., Direct: 212-506-1700 Kasowitz Benson Torres LLP 1633 Broadway New York, NY 10019  David Mark, Attorney Direct: 212-506-1700 Kasowitz Benson Torres LLP 1633 Broadway New York, NY 10019
129.	17-3066	Andres Piedrahita	Andrew Joshua Levander, Esq., Direct: 212-698-3683 Dechert LLP 1095 Avenue of the Americas New York, NY 10036  Neil A. Steiner, Esq., Direct: 212-698-3671 Dechert LLP 27th Floor Mailroom 1095 Avenue of the Americas

			New York, NY 10036
130.	17-3066	Mark McKeefry	Peter E. Kazanoff, Esq.
131.	17-3066	Daniel Lipton	Peter E. Kazanoff, Esq.
132.	17-3066	Amit Vijayvergiya	Peter E. Kazanoff, Esq.
133.	17-3066	Gordon McKenzie	Peter E. Kazanoff, Esq.
134.	17-3066	Richard Landsberger	Peter E. Kazanoff, Esq.
135.	17-3066	Philip Toub	Peter E. Kazanoff, Esq.
136.	17-3066	Andrew Smith	Peter E. Kazanoff, Esq.
137.	17-3066	Harold Greisman	Peter E. Kazanoff, Esq.
138.	17-3066	Gregory Bowes	Bruce Allen Baird, Esq., Direct: 202-662-5122 Covington & Burling LLP 1 CityCenter 850 10th Street, NW Washington, DC 20001
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168.	17-3077	Alpine Trustees Limited, Individually and as Trustees of the El Praela Trust	Timothy P. Harkness, Esq.
169.	17-3077	Port of Hercules Trustees Limited, Individually and as Trustee of the El Praela Trust	Timothy P. Harkness, Esq.
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171.	17-3077	El Praela Group Holding Services Limited	Timothy P. Harkness, Esq.
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183.	17-3080	Credit Suisse International Limited	William J. Sushon, Esq.
184.	17-3080	Credit Suisse Nominees (Guernsey) Limited	William J. Sushon, Esq.
185.	17-3080	Credit Suisse London Nominees Limited	William J. Sushon, Esq.
186.	17-3080	Credit Suisse (UK) Limited	William J. Sushon, Esq.
187.	17-3080	Credit Suisse Securities (USA) LLC	William J. Sushon, Esq.
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233.	17-3141	UBS Fund Services (Luxembourg) S.A.	Gabriel Herrmann, Esq.  Marshall R. King, Esq., Attorney
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## United States Court of Appeals

*for the*

## Second Circuit



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

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

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### MOTION TO STAY THE ISSUANCE OF THE MANDATE PENDING THE FILING OF A PETITION FOR A WRIT OF CERTIORARI

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Holding Services, Ashby Holding  
Services Limited, El Praela Trading  
Investments Limited and Tensyr Limited*

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## PRELIMINARY STATEMENT

Pursuant to Federal Rule of Appellate Procedure (“FRAP”) 41(d)(1), Defendants-Appellees<sup>1</sup> respectfully move this Court to stay the issuance of the mandate in this appeal in light of this Court’s February 25, 2019 Certified Opinion and Judgment (the “Decision”), pending Defendants-Appellees’ forthcoming petition for a writ of certiorari (the “Petition”) in the Supreme Court of the United States (the “Supreme Court”). Defendants-Appellees intend to file the Petition by July 2, 2019 and, per FRAP 41(d)(2)(B), will duly notify the circuit clerk in writing once they have filed the Petition so that a stay, if granted, may continue until the Supreme Court’s final disposition of the Petition. A stay is warranted because the Petition will present two substantial questions to the Supreme Court and, in addition, there is good cause for a stay. *See* FRAP 41(d)(1).

First, the Petition will present a substantial question to the Supreme Court regarding whether this Court incorrectly expanded the reach of U.S. Bankruptcy Code Section 550(a) to allow a U.S. bankruptcy trustee to unwind wholly foreign financial transactions remotely related to domestic transactions made by a U.S. debtor. Defendants-Appellees respectfully submit that this Court misapplied *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), *RJR Nabisco, Inc.*

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<sup>1</sup> Defendants-Appellees are the Parties listed in Addendum A to the Joint Brief For Defendants-Appellees, Dkt. No. 935.

*v. European Community*, 136 S. Ct. 2090 (2016), and *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018), resulting in a decision that undermines the presumption against extraterritoriality and is in conflict with relevant decisions of the Supreme Court. In its Decision, this Court failed to apply the presumption against extraterritoriality to 11 U.S.C. Section 550(a) (“Section 550(a)”), the liability-creating provision of the U.S. Bankruptcy Code under which the Trustee’s action is brought. Although the Decision purported to rely on the Supreme Court’s “focus” test established in *Morrison*, as well as the Supreme Court’s recent decision in *WesternGeco*, both of those decisions make clear that the focus test requires the Court to apply the presumption against extraterritoriality to the liability-creating provision of the relevant statute. Supreme Court review is therefore necessary in light of the importance of the issue and the conflict with Supreme Court precedent.

Second, the Petition will present a substantial question to the Supreme Court regarding whether this Court incorrectly reviewed *de novo* the lower courts’ application of the doctrine of international comity to dismiss actions where the transactions at issue were received from foreign investment funds that are subject to their own foreign insolvency proceedings. In applying a *de novo* standard of review to reverse the United States District Court for the Southern District of New York’s (the “District Court”) and the United States Bankruptcy Court for the

Southern District of New York's (the "Bankruptcy Court") dismissal of claims on international comity grounds, the Decision creates a conflict with the decisions of all other United States courts of appeals to consider the issue, all of which instead applied the correct abuse of discretion standard of review. *See, e.g., Mujica v. AirScan Inc.*, 771 F.3d 580, 589 (9th Cir. 2014); *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014); *Chavez v. Carranza*, 559 F.3d 486, 495 (6th Cir. 2009); *Underwood v. Hillard (In re Rimsat, Ltd.)*, 98 F.3d 956, 963 (7th Cir. 1996); *Remington Rand Corp.-Del. v. Bus. Sys., Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987); *Perforaciones Exploración Y Producción v. Marítimas Mexicanas, S.A. de C.V.*, 356 F. App'x 675, 680-81 (5th Cir. 2009) (per curiam). Moreover, the Supreme Court has frequently granted certiorari to review and resolve issues implicating foreign affairs, including considerations of international comity. *See, e.g., Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018). Supreme Court review is necessary to resolve the circuit split created by this Court's Decision.

There is also good cause for a stay. The Decision requires these eighty-eight consolidated actions to proceed in the Bankruptcy Court, despite a potentially dispositive decision of the Supreme Court in the event that certiorari is granted and the Decision is reversed. A stay would serve to maintain the current status quo in this appeal and avoid requiring the 200-plus parties to expend potentially

unnecessary resources to reargue the motions to dismiss on other grounds before the Bankruptcy Court and potentially engage in costly discovery much, if not all, of which could be rendered moot if the Supreme Court grants certiorari and the Decision is reversed. In addition, many of these defendants would once again be subjected to potential double liability for the transfers at issue, a significant threat that was appropriately alleviated by the Bankruptcy Court's decision. SPA257-263. Moreover, the Decision risks damaging the United States' foreign relationships, both from implementing the Decision's newly-expanded reach of the U.S. Bankruptcy Code as well as its failure to adhere to long-standing principles of international comity. In light of this potentially irreparable harm, and because no prejudice would result from a stay, Defendants-Appellees respectfully submit that the balance of equities strongly favors a stay of the issuance of the mandate.

### **BACKGROUND**

This action consolidates eighty-eight separate adversary proceedings brought in the Bankruptcy Court by the Trustee for the Bernard L. Madoff Investment Securities estate against hundreds of Defendants-Appellees, the vast majority of which are foreign entities. SPA319-868. In these actions, the Trustee seeks, pursuant to U.S. Bankruptcy Code Section 550(a), to recover from Defendants-Appellees subsequent transfers that were transferred overseas from foreign investment funds to Defendants-Appellees. SPA228. Attempts by the Trustee to

recover these transfers therefore implicate critical questions of federal law and international relations. As a result, the District Court (Rakoff, J.) withdrew the reference to the Bankruptcy Court to decide these questions. SPA6-7.

On July 7, 2014, the District Court issued its decision. SPA204-222. The District Court applied the Supreme Court's two-step focus test in *Morrison* to reject the Trustee's attempts to recover foreign transfers from Defendants-Appellees. In applying step one of the test, the District Court found that nothing in the text of Section 550(a) "suggests that Congress intended for this section to apply to foreign transfers." SPA213. In applying step two, the District Court found that the focus of Congressional concern with respect to Section 550(a), *i.e.*, the "transactions that the statute seeks to 'regulate,'" *Morrison*, 561 U.S. at 267 (citation omitted), is the foreign subsequent transfers and "*not* the relationship of that property to a perhaps-distant debtor." SPA210 (emphasis added).

As a result, the District Court held that "section 550(a) does not apply extraterritorially to allow for the recovery of subsequent transfers received abroad by a foreign transferee from a foreign transferor." SPA221. In the alternative, the District Court held that "the Trustee's use of section 550(a) to reach these foreign transfers would be precluded by concerns of international comity" where the foreign investment funds were involved in liquidation proceedings in their home countries which have their own rules concerning the disgorgement of transfers

received from a debtor. SPA219-220. The District Court remanded the adversary proceedings to the Bankruptcy Court for further proceedings consistent with its opinion. SPA222.

The Bankruptcy Court (Bernstein, J.), which has administered hundreds of the Trustee's Madoff-related actions for many years, applied the District Court's analysis to the actions consolidated in this appeal. On November 21, 2016, the Bankruptcy Court dismissed certain claims against Defendants-Appellees on extraterritoriality grounds. SPA226-318. The Bankruptcy Court also abstained from deciding all of the claims against Defendants-Appellees in which the Trustee sought to recover transfers made by foreign investment funds that are the subject of foreign liquidation proceedings under foreign law based on principles of international comity. SPA252-255; SPA260-263. The Bankruptcy Court balanced the respective interests of the United States and the foreign nations whose law applies to these foreign liquidation proceedings and held that the jurisdictions of the foreign nations "have a greater interest in regulating the activity that gave rise to the [duplicative] claims asserted by the Trustee and the [foreign] liquidators." SPA259. The Bankruptcy Court also considered the expectations of foreign investors and the risks of double liability. SPA259 ("The Trustee's subsequent transfer claims . . . duplicate the actions brought by the respective liquidators . . . against substantially the same defendants to recover substantially the *same*

*transfers.*”) (emphasis added). The Trustee appealed the District Court’s and Bankruptcy Court’s dismissals of the actions on extraterritoriality and international comity grounds in September 2017. Docketing Notices, Dkt. Nos. 1, 3.

On February 25, 2019, the panel of the Second Circuit (the “Panel”) issued the Decision, vacating and remanding to the Bankruptcy Court for further proceedings consistent with the Decision. Decision 40. The Panel explicitly declined to apply step one of the two-step focus test outlined in *Morrison* and ultimately concluded that Section 550(a) applies domestically where, as here, the initial fraudulent transfers from the debtor were made in the United States. *Id.* 15, 39. In concluding that Section 550(a) applies domestically, the Panel found that the “relevant transfer is the debtor’s initial transfer” and the lower courts “erroneously focus[ed] on the subsequent transfer[s].” *Id.* 39, 38. The Panel also applied a *de novo* standard of review to the lower courts’ dismissals grounded in principles of international comity and concluded that, in these circumstances, “prescriptive comity considerations do not limit the reach of the Bankruptcy Code provisions.” *Id.* 40.

On March 11, 2019, Defendants-Appellees filed a timely petition for rehearing and rehearing *en banc*, Rehearing Petition, Dkt. No. 1320 (the “Rehearing Petition”), which the Court denied on April 3, 2019. Order, Dkt. No. 1408. The issuance of the mandate was automatically stayed during the pendency

of the Rehearing Petition and remains stayed by the filing of the instant motion, absent further order of the Court. *See* FRAP 41(b).

### **ARGUMENT**

Under FRAP 41(d)(1), “[a] party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court.” FRAP 41(d)(1). The motion “must show that the petition would present a substantial question and that there is good cause for a stay.” *Id.* These factors are fully satisfied here.

#### **I. Defendants-Appellees’ Petition Will Raise Substantial Questions Warranting Supreme Court Review**

The standard governing whether a stay should be granted pending the filing of a petition for certiorari requires considering “whether four Justices would vote to grant certiorari” as well as giving “some consideration as to predicting the final outcome of the case in [the Supreme Court].” *U.S. Postal Serv. v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers); *see also United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (noting that judges of the lower courts are to apply the same criteria articulated by the Supreme Court in considering whether to grant a stay). The Petition will present two substantial questions for Supreme Court review.

The Supreme Court Rules indicate that a grant of certiorari may be warranted where, as here, a “court of appeals has decided an important question of federal law that has not been, but should be, settled by [the Supreme Court], or has



decided an important federal question in a way that conflicts with relevant decisions of [the Supreme Court].” Sup. Ct. R. 10(c). In addition, Supreme Court review is appropriate where “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” Sup. Ct. R. 10(a). This Court must also consider the likelihood that the Supreme Court may grant certiorari “in the context of the case history [and] the Supreme Court’s treatment of other cases presenting similar issues.” *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001). Defendants-Appellees submit that these considerations weigh in favor of granting a stay in this case with respect to both of the substantial questions discussed below.

*A. The Petition Will Raise A Substantial Question Regarding The Scope Of The U.S. Bankruptcy Code*

Defendants-Appellees’ Petition will raise a substantial question of federal law regarding the scope of the U.S. Bankruptcy Code. The Decision also raises a “[s]ignificant federal statutory question[] implicating foreign affairs,” weighing in favor of the Supreme Court’s grant of certiorari. Stephen M. Shapiro, et al., *Supreme Court Practice* 270 (10th ed. 2013).

Defendants-Appellees also respectfully submit that this Court’s holding misapplied the Supreme Court’s focus test articulated in *Morrison* in a way that conflicts with relevant decisions of the Supreme Court and undermines the presumption against extraterritoriality. *See Morrison*, 561 U.S. at 255. Step one of

the focus test first articulated in *Morrison*, and explained further in *RJR* and *WesternGeco*, requires that courts assessing the extraterritorial reach, if any, of a U.S. statute determine “whether the statute gives a clear, affirmative indication that it applies extraterritorially.” *RJR*, 136 S. Ct. at 2101. The second step of the test requires courts to consider “whether the case involves a domestic application of the statute.” *Id.* at 2101. The Supreme Court has further explained that the “whole point of the focus test” is “determining how the statute has actually been applied.” *WesternGeco*, 138 S. Ct. at 2137.

*WesternGeco* made clear that determining how a statute has been applied requires a court to first identify the provision of the statute that creates liability and, second, to identify “the conduct relevant to the statutory focus” of that provision. *Id.* Applying this framework, the Supreme Court in *WesternGeco* identified the relevant liability-creating provision of the U.S. Patent Act, 35 U.S.C. Sections 1 *et seq.* (the “Patent Act”), (*i.e.*, Section 271(f)(2)) and then determined the conduct that provision sought to regulate (*i.e.*, the domestic act of infringement). This same framework was applied two years earlier in *RJR*, where the Supreme Court separately analyzed the extraterritorial application of two provisions of the federal Racketeer Influenced and Corrupt Organizations statute (“RICO”), 18 U.S.C. Sections 1961-68, because those provisions implicated separate liability-creating provisions. *RJR*, 136 S. Ct. at 2106. Notably, the

Supreme Court in *RJR* rejected the argument, adopted by this Court in its underlying decision in that action, that the two relevant RICO provisions should be considered together because the application of one provision turned on the application of the other (*i.e.*, the statute’s private cause of action provision turned on the provision that identified the prohibited conduct). *Id.* Instead, the Supreme Court reiterated its conclusion that it must “separately apply the presumption against extraterritoriality” to each liability-creating provision, even where “the presumption has been overcome with respect to” portions of the statute on which a liability-creating provision turns. *Id.*

Defendants-Appellees respectfully submit that the Panel’s Decision adopts reasoning similar to the argument rejected by the Supreme Court in *RJR* and does not adhere to the framework set out in the Supreme Court’s decisions in *Morrison*, *RJR*, and *WesternGeco*. The Panel failed to identify the focus of the relevant statutory provision—Section 550(a)—which is a liability-creating provision requiring an independent application of the presumption against extraterritoriality. The Decision relies heavily on the fact that Section 550(a) requires as its prerequisite the avoidance of initial transfers under a separate statutory provision of the U.S. Bankruptcy Code, 11 U.S.C. Section 548. Decision 24. However, this reliance is misplaced because the Trustee’s cause of action asserted against the Defendants-Appellees is based upon Section 550(a). As the District Court

correctly found in applying the presumption against extraterritoriality to the correct provision, Section 550(a), the regulatory focus of that provision is “the transfer of property to a subsequent transferee, not the relationship of that property to a perhaps-distant debtor.” SPA210.

Defendants-Appellees submit that the Decision impermissibly expands the reach of the U.S. Bankruptcy Code with far-reaching consequences and is therefore especially appropriate for Supreme Court review. *See Supreme Court Practice* 252 (“Certiorari is often granted . . . where the court of appeals has allegedly misconstrued, misapplied, or misconceived an applicable Supreme Court opinion.”). Moreover, the Supreme Court has repeatedly demonstrated an interest in recent years in reviewing decisions implicating the extraterritorial scope of U.S. laws. *See, e.g., WesternGeco*, 138 S. Ct. 2129 (addressing extraterritoriality in the context of the Patent Act); *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (per curiam) (certiorari granted to address extraterritoriality in the context of 18 U.S.C. § 2703); *RJR*, 136 S. Ct. 2090 (addressing the extraterritorial scope of the RICO Act); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (addressing the extraterritorial scope of the Alien Tort Statute). This trend underscores the likelihood that the Supreme Court will grant certiorari to decide the important question of the extraterritorial scope of the U.S. Bankruptcy Code. Because the Decision conflicts with Supreme Court precedent, Defendants-

Appellees further submit that the Supreme Court is reasonably likely to reverse this Court's holding.

*B. The Petition Will Raise A Substantial Question Regarding A Circuit Split*

Defendants-Appellees' Petition will also raise the substantial question of whether this Court incorrectly applied a *de novo* standard of review to the Bankruptcy Court's application of the doctrine of international comity to dismiss actions where the transactions at issue are also subject to avoidance in foreign insolvency proceedings and face the very real risk of double liability. The Decision is a departure from prior Second Circuit decisions and creates a circuit split with six other United States courts of appeals, which instead uniformly review such determinations for abuse of discretion. Circuit splits are a principal factor for the Supreme Court in considering whether to grant certiorari petitions. Sup. Ct. R. 10(a); *see also Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . .").

Prior to the Decision, this Court was aligned with all other circuits in applying a deferential abuse of discretion standard of review to lower courts' decisions grounded in principles of international comity. *See, e.g., Leopard Marine & Trading, Ltd. v. Easy St. Ltd.*, 896 F.3d 174, 189 (2d Cir. 2018) (reviewing for abuse of discretion); *JP Morgan Chase Bank v. Altos Hornos de*

*Mex., S.A. de C.V.*, 412 F.3d 418, 422 (2d Cir. 2005) (same); *Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993) (same); *Mujica v. AirScan Inc.*, 771 F.3d 580, 589 (9th Cir. 2014) (same); *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014) (same); *Chavez v. Carranza*, 559 F.3d 486, 495 (6th Cir. 2009) (same); *Underwood v. Hillard (In re Rimsat, Ltd.)*, 98 F.3d 956, 963 (7th Cir. 1996) (same); *Remington Rand Corp.-Del. v. Bus. Sys., Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987) (same); *Perforaciones Exploración Y Producción v. Marítimas Mexicanas, S.A. de C.V.*, 356 F. App'x 675, 680-81 (5th Cir. 2009) (per curiam) (same). The application of an abuse of discretion standard of review is unsurprising, as both practical and policy considerations favor such deference.

Where, as here, principles of international comity are implicated by multiple related international bankruptcy proceedings, the court is required to “give due regard to the various interests at stake.” *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 140 (2d Cir. 2014). Considering these interests in cross-border insolvencies involves a fact-intensive analysis balancing the interests of the United States, the interests of foreign states, and any potential conflict between the laws of these nations, as well as “the interests of all creditors, and other interested entities, including the debtor.” 11 U.S.C. § 1501(a)(3). This complex analysis and balancing of United States’ and foreign interests is best suited to the lower court,

regardless of whether the comity analysis turns on whether there are duplicative actions in foreign courts or on the interpretation of a U.S. statute that unreasonably conflicts with foreign law and foreign governmental interests, including by establishing rules for property rights resulting from foreign transfers between foreign parties. The Bankruptcy Court, which has for many years administered the Trustee's actions, as well as hundreds of related actions brought by the liquidators of the largest foreign investment fund, "is intimately familiar with the nuances of the case" and "is in a far better position to [conduct this analysis] than is an appellate court, which must work from a cold record." *Berg v. Gackebach (In re Bolar Pharm. Co. Sec. Litig.)*, 966 F.2d 731, 732 (2d Cir. 1992). It is therefore unsurprising that, prior to the Decision, every United States court of appeals, including this Court, exercised deference in reviewing lower courts' factual determinations resolving considerations of international comity.

Defendants-Appellees submit that in the event that the Supreme Court grants certiorari, it is reasonably likely that the Supreme Court will reverse the Decision's international comity holding in order to restore uniformity among the United States courts of appeals in the application of a deferential standard of review to lower courts' fact-based findings grounded in principles of international comity. The importance of this question and the likelihood of Supreme Court review is further supported by the fact that the Decision's international comity holding implicates

issues of foreign affairs, which the Supreme Court has expressed a particular interest in reviewing and resolving both historically and in recent years. *See, e.g., Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018) (considering international comity in addressing the weight a federal court should give to the views of a foreign government when making determinations of foreign law); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018) (addressing issue implicating “foreign-relations tensions” and international “policy judgments”); *RJR*, 136 S. Ct. at 2106 (considering the “potential for international friction” in “applying U.S. substantive law” to foreign conduct); *Kiobel*, 569 U.S. at 117 (addressing “significant foreign policy implications” in applying U.S. law to foreign conduct); *Regan v. Wald*, 468 U.S. 222, 242 (1984) (addressing issues implicating “weighty concerns of foreign policy”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) (“We granted certiorari because the issues involved bear importantly on the conduct of the country’s foreign relations . . .”).

In light of the foregoing, Defendants-Appellees respectfully submit that it is reasonably likely that the Supreme Court will grant certiorari to review both of the substantial questions discussed *supra* and that there is a reasonable prospect that the final outcome of these questions may reverse the Decision. *See USPS*, 481 U.S. at 1302; *RJR*, 136 S. Ct. at 2099, 2111 (granting certiorari “[b]ecause of th[e] conflict [among circuit courts] and the importance of the issue”).



## **II. Good Cause Exists For A Stay Of The Issuance Of The Mandate**

In determining whether there is good cause for a stay, courts “balance the equities of granting a stay by assessing the harm to each party if a stay is granted.” *Books*, 239 F.3d at 828. Here, the balance of hardships favors a stay, as no prejudice would result from a stay and irreparable harm is likely to result if the mandate issues.

*First*, once the mandate issues, the parties will be required to reargue the motions to dismiss on other grounds before the Bankruptcy Court and potentially engage in costly discovery. These proceedings would likely no longer continue on a consolidated basis, but would instead immediately flood the Bankruptcy Court with litigation in eighty-eight separate adversary proceedings involving hundreds of defendants. The parties would be required to litigate numerous fact-intensive and complex inquiries, including arguments based on personal jurisdiction, service of process, and good faith, among others. The potentially unnecessary expenditure of resources by the courts and the parties to resolve these issues could be rendered moot if the Supreme Court grants certiorari and the Decision is reversed. *Cf. United States ex rel. Chandler v. Cook Cty.*, 282 F.3d 448, 451 (7th Cir. 2002)

(finding the “expense of preparing for trial” during the pendency of a petition for certiorari to be an “important” harm sufficient to warrant a stay of the mandate).

*Second*, allowing the actions to proceed before the Bankruptcy Court would subject many defendants to potential double liability for the transfers at issue, as many of these same transfers are being sought by foreign liquidators in their own insolvency proceedings. Indeed, some Defendants-Appellees have already settled the claims brought by the liquidators based on the very same transfers the Trustee pursues here, and have made payments required by those settlements. The lower courts found, and the Trustee does not dispute, that the Trustee has brought actions to recover transfers from Defendants-Appellees who are separately being sued by foreign investment funds seeking to recover the very same transfers, and even some who have already settled such suits. *See* Decision 8; Decl. of Paul Pretlove, Dkt. 923-2; Arg. Tr. 65:1-3. Although the Bankruptcy Court’s decision eliminated this highly inequitable result, the Decision again subjects Defendants-Appellees to “the odious possibility of . . . double liability” in the United States and abroad.

*Banco Para el Comercio Exterior de Cuba v. First Nat’l City Bank*, 744 F.2d 237, 241-42 (2d Cir. 1984) (citation omitted).

*Third*, as discussed *supra* Section I, the Decision implicates issues of foreign affairs, both in the implementation of the Decision’s substantially-expanded reach of the U.S. Bankruptcy Code, as well as the Decision’s failure to adhere to long-

standing principles of international comity. The Decision requires more than a hundred foreign defendants to immediately begin expending resources to defend against the Trustee's claims. Because the Decision condones the application of U.S. law to wholly foreign conduct that is otherwise regulated by foreign states, Defendants-Appellees respectfully submit that maintenance of these actions "creates a danger of international friction." *RJR*, 136 S. Ct. at 2095. A stay of the mandate would avoid "the international discord that can result when U.S. law is applied to conduct in foreign countries," especially where Defendants-Appellees had every reason to believe their foreign conduct would be governed by foreign law. *RJR*, 136 S. Ct. at 2100 ("It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world.") (internal quotation marks and citation omitted); SPA220-222.

*Finally*, no party will be prejudiced by a stay. The parties have previously acknowledged the benefit of staying the proceedings in the underlying actions to this consolidated proceeding until final determination on the issues of extraterritoriality and international comity are reached by entering into a jointly-negotiated case management order implementing such a stay. A4341-4342. This order contemplated the potentially dispositive nature of the decisions related to extraterritoriality and international comity, which could, of course, moot any additional briefing, argument, or discovery related to the remaining issues in each

of these actions. As a result, litigation on the remaining issues in these actions has been stayed for years pending adjudication of the extraterritoriality and international comity issues. A stay of the issuance of the mandate would merely continue the status quo and respect the understanding Defendants-Appellees and the Trustee previously reached. No party would be prejudiced by a relatively brief continuance of the stay to permit the Supreme Court to decide Defendants-Appellees' Petition.

### **CONCLUSION**

For the foregoing reasons, the Court should stay the issuance of the mandate in this appeal pursuant to FRAP 41(d)(1) pending the ultimate disposition of Defendants-Appellees' impending petition for a writ of certiorari in the Supreme Court.

Dated: April 8, 2019  
New York, New York

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## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 27(d)(2)(A), because it contains 4,536 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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