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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	SIPA LIQUIDATION No. 08-01789 (BRL) (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor,	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. SONJA KOHN, et al. Defendants.	Adv. Pro. No. 10-05411 (BRL) Case No. 11 Civ. 01181 (JSR) **TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO DISMISS**

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PRELIMINARY STATEMENT

The members of the Medici Enterprise did not commit their racketeering activity in a vacuum. All Defendants, and particularly the Moving Defendants, exploited a financial system that is broken. Trillions of dollars in shareholder equity have evaporated in this corrupt paradigm. Everyone is left holding the bag. Everyone except the banks, who are routinely excused for their actions that harm the public. This does not comport with the most elementary notions of morality and justice.

There was a time when large financial institutions could avoid being held accountable for their crimes by claiming that criminal activity could not possibly serve their long-term interests. We all trust that those days are over. Led by its former Chairman and CEO Alessandro Profumo ("Profumo"), UniCredit S.p.A. ("UniCredit") and its subsidiaries UniCredit Bank Austria AG ("Bank Austria") and Pioneer Global Asset Management S.p.A. ("Pioneer") (together, the "Moving Defendants"), engaged in a pattern of systematic ongoing conduct that exploited and compromised their legitimacy, reputation, and financial institution infrastructure to feed at least $9.1 billion of other people's money into BLMIS. Almost $5 billion of this influx occurred after UniCredit joined the Medici Enterprise in 2005. See Second Amended Complaint ("SAC") [1] Exhibit N.

After Madoff confessed to his own crimes, the Trustee determined that the BLMIS estate (the "Estate") had a shortfall of approximately $19.6 billion. Absent Defendants' $9.1 billion

[1] On August 26, 2011, the Trustee sought leave of the Court to file a second amended complaint in this action. The Court directed the Trustee to incorporate his new allegations in this filing. The Trustee's Proposed Second Amended Complaint ("SAC") containing scores of new allegations as to, among others, the Moving Defendants is attached hereto as Exhibit 1. A comparison of the SAC with the First Amended Complaint filed on February 3, 2011 is attached hereto as Exhibit 2.

infusion, Madoff's Ponzi scheme would not have continued for as long as it did. Nor would the Estate have become as insolvent as it is.

The Medici Enterprise is composed of the seventy-seven known individual and corporate Defendants named in this action. It is an association-in-fact, not a legal entity, defined by its conspiracy to profit from its lucrative access to Madoff. The Medici Enterprise conducted its affairs primarily by: (i) defrauding, among others, the clients of UniCredit, Bank Austria, and Bank Medici; (ii) creating a vast money laundering infrastructure to funnel this ill-gotten cash into BLMIS; and (iii) distributing the spoils of this "Illegal Scheme" to its members.

All members of the Medici Enterprise, including the Moving Defendants, violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") through this elaborate pattern of racketeering that included over 10,000 predicate acts of: (i) money laundering in violation of 18 U.S.C. § 1956; (ii) engaging in monetary transactions in property derived from specific unlawful activity in violation of 18 U.S.C. § 1957; (iii) wire fraud in violation of 18 U.S.C. § 1343; (iv) financial institution fraud in violation of 18 U.S.C. § 1344; (v) mail fraud in violation of 18 U.S.C. § 1341; (vi) transporting funds taken by fraud in violation of 18 U.S.C. § 2314; (vii) transportation of persons to defraud in violation of 18 U.S.C. § 2314; (viii) receiving funds taken by fraud in violation of 18 U.S.C. § 2315; and (ix) interstate and international travel in violation of the Travel Act, 18 U.S.C. § 1952.

Nothing in this Court's decision in Picard v. HSBC Bank, PLC governs the Trustee's standing to bring his RICO claims here. --- B.R. ----, No. 11 Civ. 763 (JSR), 2011 WL 3200298 (S.D.N.Y. July 28, 2011), appeal docketed, No. 11 Civ. 763 (JSR) (2d Cir. Aug. 26, 2011). This action presents different facts and is predicated on different theories: (i) the Trustee's RICO

claims are not common law claims susceptible to Wagoner[2] or the affirmative defense of in pari delicto; (ii) the Trustee is not a joint tortfeasor with any of the Defendants here, nor does he bring claims for aiding and abetting Madoff; and (iii) Madoff's fraud is not the subject of this action. The Illegal Scheme is not the Ponzi scheme.

The Trustee is uniquely situated to maintain these RICO claims against these Defendants. For over two years the Trustee has conducted an expansive investigation of the members of the Medici Enterprise. The Trustee's investigation began, as it must, at the site of the injured Estate. It was immediately clear that Madoff's Ponzi scheme was not the only scheme responsible for the Estate's exorbitant debt to its creditors. Crime attracts crime. Madoff's sham investment advisory business provided other corrupt actors with the opportunity to enrich themselves on the back of his crimes. UniCredit and Bank Austria, in concert with their seventy-four co-conspirators, committed an elaborate pattern of crimes in such a manner that they are best prosecuted here, by the Trustee, under RICO.

The purpose of the RICO statute is to "eradicat[e] organized crime from the social fabric" by divesting "the association of the fruits of ill-gotten gains." United States v. Turkette, 452 U.S. 576, 585 (1981). Congress armed parties such as the Trustee with RICO in part to "fill prosecutorial gaps" in holding criminals, including rogue financial institutions, responsible for the damage that they have wrought. Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 493 (1985). The Trustee, appointed by the Securities Investor Protection Corporation ("SIPC"), brings his RICO claims "to further the congressionally-mandated purpose of protecting the investors" and to "vindicate important public interests." MacRae v. Doe (In re Application of

[2] See Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 120 (2d Cir. 1991).

Exec. Secs. Corp.), 702 F.2d 406, 410 (2d Cir. 1983). UniCredit, Bank Austria, and Pioneer should not go unpunished.

In the face of well-supported allegations of wire fraud, mail fraud, falsification of records, and money-laundering, Moving Defendants seek to dismiss the Trustee's claims under RICO.[3] Defendants assert that the Trustee's claims must be dismissed because: (i) he does not have standing to allege a violation of RICO; (ii) there are no allegations of proximate cause; (iii) his RICO claims are barred by the defense of in pari delicto; (iv) the RICO claims are barred by the Private Securities Litigation Reform Act ("PSLRA"); (v) the RICO claims are extraterritorial; and (vi) the Trustee does not properly assert violations of §§ 1962(c) and (d). Each contention is without merit and Defendants' motions to dismiss should be denied in their entirety.

ARGUMENT

I. THE TRUSTEE CAN REDRESS THE ESTATE'S INJURY HERE

A. The Moving Defendants Injured the Estate

Madoff's Ponzi scheme was never solvent and Defendants deepened its insolvency by sustaining the Ponzi scheme with over half of the money it ultimately lost. Defendants do not contest that the Estate, now represented by the Trustee, suffered an injury in its business or property under 18 U.S.C. § 1964(c). See SAC ¶¶ 4, 8, and 53. This is a cognizable injury under RICO. See Allard v. Arthur Andersen & Co., 924 F. Supp. 488, 494 (S.D.N.Y. 1996) (injecting

[3] Due to this Court's decision in Picard v. HSBC PLC, without waiving any rights, this brief addresses only the Trustee's RICO claims. --- B.R. ----, No. 11 Civ. 763 (JSR), 2011 WL 3200298 (S.D.N.Y. July 28, 2011), appeal docketed, No. 11 Civ. 763 (JSR) (2d Cir. Aug. 26, 2011). The Trustee and SIPC maintain that he has standing to bring his common law claims (unjust enrichment, conversion, and money had and received) as bailee and subrogee under Redington v. Touche Ross & Co., 592 F.2d 617 (2d Cir. 1978) rev'd on other grounds, 442 U.S. 560 (1979). As such, the Trustee incorporates by reference his arguments under Redington and the Securities Litigation Uniform Standards Act ("SLUSA") in HSBC, 2011 WL 3200298. The Trustee has filed a notice of appeal in that matter with the Second Circuit.

funds into insolvent corporation causes redressable injury under RICO); Schacht v. Brown, 711 F.2d 1343, 1350-51 (7th Cir. 1983) (corporation "ineluctably damaged" by its "increased exposure to creditor liability" and such injury is redressable under RICO); Shapo v. O'Shaughnessy, 246 F. Supp. 2d 935, 964 (N.D. Ill. 2002) (defendants' RICO violations prolonged the life of two insolvent companies and allowed defendants "to continue to fleece the companies and to hide their wrongful actions.").[4]

B. The Illegal Scheme Is Not Madoff's Ponzi Scheme

Defendants mischaracterize the Trustee's allegations as they seek to conflate their own Illegal Scheme with Madoff's Ponzi scheme. The two schemes, however, are different—each was a vast set of crimes independent in its criminality from the other. Madoff is in jail for his own crimes. The Illegal Scheme is Defendants' own money laundering racket that they orchestrated for their benefit. Madoff's Ponzi scheme merely presented Defendants with the opportunity to commit their own criminal acts. The Trustee does not allege that Defendants laundered money for Madoff, acted at his direction, or even that Madoff was aware of the Illegal Scheme or Defendants' RICO violations. The Trustee does not allege that Madoff or BLMIS was a participant in the Illegal Scheme. The purpose of the ongoing Illegal Scheme is to enrich the members of the Medici Enterprise.[5] The Illegal Scheme would have been just as corrupt if Madoff was lucky. It was not predicated on Madoff's crimes.

[4] Deepening insolvency is a recognized measure of damages in this District. See, e.g., Kittay v. Atl. Bank of N.Y. (In re Global Servs. Grp. LLC), 316 B.R. 451, 458 (Bankr. S.D.N.Y. 2004) (explaining that New York courts recognize deepening insolvency as a cognizable theory of damages); Bloor v. Dansker (In re Investors Funding Corp. of New York Secs. Litig.), 523 F. Supp. 533, 541 (S.D.N.Y. 1980) ("[a] corporation is not a biological entity for which it can be presumed that any act that extends its existence is beneficial to it.").

[5] The distinction between Madoff's Ponzi scheme and the Illegal Scheme is further illustrated by the fact that Madoff's Ponzi scheme ended when he confessed. The Medici Enterprise, however, continues its racketeering activity, and continues to protect its assets from recovery by the Trustee. See SAC ¶¶ 33, 34, 39, and 65.

1. Defendants' Illegal Scheme

a. The Money-In Component

The "Money-In" aspect of the Illegal Scheme involved feeding other people's money into BLMIS from which Defendants generated hundreds of millions of dollars of fees for services that they purported to perform. See SAC ¶¶ 19, 21, and 22. Bank Austria, Pioneer, UniCredit, and others, were "the operating nucleus of the Money-In component of the Illegal Scheme." Id. ¶ 404. All Ponzi schemes must collapse eventually absent a constant influx of funds that the Illegal Scheme here provided. This "Money-In" component damaged the Estate by artificially prolonging BLMIS's life and deepening its insolvency.

b. The Money-Out Component

The "Money-Out" component of the Illegal Scheme involved the direct theft of the Estate's assets, which was accomplished and concealed through the Medici Enterprise's elaborate network of sham entities. Id. ¶ 212. These two components of the Illegal Scheme "were entirely interdependent, coextensive, and concurrent" with each other, not with Madoff's Ponzi scheme. Id. ¶ 24. The "Money-In" component had the effect of extending the Ponzi scheme's survival with the express purpose of generating a windfall in unearned fees while also further depleting the Estate's assets through the "Money-Out" component. Id. ¶ 22.

2. The Wagoner Rule Does Not Apply Here

Defendants ran their own criminal organization, independent of Madoff. Under these circumstances, Madoff's illegal acts cannot provide the basis for any form of "unclean hands" defense here. This is not Hirsch v. Arthur Andersen in which the defendants successfully invoked the "Wagoner Rule" because the claims by the debtor against other "Ponzi Participants"

belonged to the creditors. 72 F.3d 1085, 1088, n.3, 1094-95 (2d Cir. 1995); Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 120 (2d Cir. 1991).[6]

Wagoner and its progeny cannot apply where, as here, a bankruptcy trustee's claims are predicated on misconduct independent of the debtor's actions. "[T]he Second Circuit [has] held that prudential considerations deprive[] a trustee from even having standing to bring in federal court a common law claim that is clearly defeated by the doctrine of in pari delicto." HSBC, 2011 WL 3200298, at *9 (citation omitted) (dismissing claims of contribution and aiding and abetting Madoff's fraud and breach of fiduciary duty under Wagoner). This holding does not govern here.

First, the Trustee's RICO claims are not susceptible to the affirmative defense of in pari delicto. See Schacht, 711 F.2d at 1347 (because "the cause of action here arises under RICO, a federal statute; we . . . bring to bear federal policies in deciding the estoppel question.") (cited with approval for this point by O'Melveny & Myers v. FDIC, 512 U.S. 79, 84 (1994) and Resolution Trust Corp. v. Diamond, 45 F.3d 665, 672 (2d Cir. 1995)).

Second, the Trustee is not a joint tortfeasor with any of the Defendants here. The Trustee's claims are not "replete with allegations of Madoff's role as the 'mastermind[]' of the fraud." HSBC, 2011 WL 3200298, at *9. Madoff's fraud is not the subject of this action. The members of the Medici Enterprise were primarily liable for over ten thousand of their own

[6] The so-called Wagoner Rule provides that "[u]nder New York law, '[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to the creditors, not the guilty corporation.'" Bankr. Servs., Inc. v. Ernst & Young (In re CBI Holding Co.), 529 F.3d 432, 488 (2d Cir. 2008) (citing Wagoner, 944 F.2d at 120).

crimes under RICO in furtherance of the Illegal Scheme. Defendants were not secondarily liable for Madoff's Ponzi scheme. Wagoner cannot apply here.[7]

II. DEFENDANTS' RICO VIOLATIONS PROXIMATELY CAUSED THE ESTATE'S INJURY

The Trustee has pled causation under RICO. RICO's standing provision provides a private right of action to any person injured in his business or property "by reason of" violations of § 1962. See 18 U.S.C. § 1964(c) (1995). This provision requires that the plaintiff show that the alleged pattern of racketeering proximately caused his injury. See Holmes v. SIPC, 503 U.S. 258, 267-69 (1992); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 647 (2008). "Proximate cause is an elusive concept, one always determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent." Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 235 (2d Cir. 1999) (citation omitted).

The Trustee here is similarly situated to the two trustees in Holmes, who the Court suggested had standing to bring the RICO claims at issue there on behalf of the defunct broker-dealers. 503 U.S. at 273. See also Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc., 271 F.3d 374, 381 (2d Cir. 2001) ("the [Holmes] Court noted . . . that the liquidating trustees

[7] Only the Trustee can assert these RICO claims. Any application of Wagoner is inequitable here and would produce the perverse result of ensuring that Defendants keep the fruits of their ill-gotten gains. The use of an equitable doctrine to produce such an inequitable result is senseless and has been rejected by several other circuits. See, e.g., Scholes v. Lehman, 56 F.3d 750, 754 (7th Cir. 1995) ("the appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the wrongdoer's] evil zombies. Freed from [the wrongdoer's] spell they became entitled to the return of the moneys"); Logan v. JKV Real Estate Servs. (In re Bogdan), 414 F.3d 507, 515 (4th Cir. 2005) (holding that in pari delicto did not bar bankruptcy trustee's action and that the trustee should be allowed "to maximize the value of the estate so that the claims against the debtor are paid to the fullest extent possible"); FDIC v. O'Melveny & Myers, 61 F.3d 17, 19 (9th Cir. 1995) ("[w]hile a party may itself be denied a right or defense on account of its misdeeds, there is little reason to impose the same punishment on a trustee, receiver or similar innocent entity that steps into the party's shoes pursuant to court order or operation of law.").

suing directly on behalf of the defunct broker-dealers would have been the proper plaintiffs" because they were directly harmed by defendants' pattern of racketeering). The Trustee here is not like the non-purchasing customers in Holmes, who through SIPC brought RICO claims against the third-party perpetrators of a stock manipulation scheme that eventually bankrupted the broker-dealers. 503 U.S. at 269-71. The Court reasoned that because those plaintiffs did not purchase the falsely-priced stocks, any injuries they incurred were derivative of the direct victims of the scheme. Id. The Supreme Court's directness test in Holmes controls here.[8] See Hemi Grp., LLC v. City of New York, 130 S. Ct. 983, 984-85 (2010) (proximate cause requires some direct relation between the injury asserted and the injurious conduct alleged); Baisch v. Gallina, 346 F.3d 366, 373-74 (2d Cir. 2003) (RICO standing extends to all directly harmed parties).

A. Defendants' Predicate Acts Directly Caused the Estate's Injury

The Trustee's theory of causation is straightforward and supported by Supreme Court precedent: Defendants and their co-conspirators dramatically deepened BLMIS's insolvency through the injection of billions of dollars into the already-insolvent corporation.[9] See SAC ¶¶ 1 and 63. In establishing its "directness" test, the Supreme Court laid out a three-part test to

[8] To the extent the Second Circuit looks to elements of "foreseeability" to satisfy the "direct responsibility" test established in Hemi, the Trustee meets that standard. See Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23-24 (2d Cir. 1990). The deepening insolvency of the Estate was the direct and "natural consequence" of the Illegal Scheme. Id. The Trustee's complaint also satisfies the "zone of interest test," which has been incorporated into the Second Circuit's analysis of RICO standing. See Baisch v. Gallina, 346 F.3d 366, 373 (2d Cir. 2003); Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 236 (2d Cir. 1999).

[9] Defendants contend the Trustee's plea for damages creates "unsolvable proximate cause conundrums." UCG Mem. at 24. It does not. Under RICO, the Trustee need not plead the precise quantum of his injury. Rather, he need only demonstrate that he has been injured and is entitled to relief. See The Limited, Inc. v. McCrory Corp., 683 F. Supp. 387, 392-93 (S.D.N.Y. 1988). The Trustee does not stand in the shoes of BLMIS's customers or investors here as to his RICO claims. The fact that any recovery by the Trustee for the Estate will ultimately be used to compensate its creditors does not mean that this action is brought on their behalf. See Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 348-49 (3d Cir. 2001) ("it is irrelevant that, in bankruptcy, a successfully prosecuted cause of action leads to an inflow of money to the estate that will immediately flow out again to repay creditors."); Scholes v. Lehmann, 56 F.3d 750, 754 (7th Cir. 1995) ("[t]hat the return would benefit the limited partners is just to say that anything that helps a corporation helps those who have claims against its assets.").

determine proximate cause analysis under RICO: (i) is there a risk of double recovery?; (ii) is the apportionment of damages straightforward?; and (iii) is there a better-positioned litigant that can bring these RICO claims? Holmes, 503 U.S. at 269-70. Defendants largely ignore this test, which the Trustee has met as to the Moving Defendants, and all of their co-Defendants.

1. There Is No Risk of Double Recovery Here

The risk of double recovery is the critical question in the proximate causation analysis. In Holmes, the attenuated nature of SIPC's injuries created the very real possibility that SIPC would recover more than once should those more directly harmed by the Defendants' pattern of racketeering successfully bring suit against the same Defendants for the same conduct. 503 U.S. at 271-74.

Here, the Trustee brings his RICO claims on behalf of the Estate. This action, by its very nature, is the only one of its kind that seeks to redress the massive debt the Estate incurred as a result of Defendants' racketeering activity. Defendants established an infrastructure whereby they could skim their cut of billions of dollars flowing in and out of BLMIS. See SAC ¶¶ 296, 320, 398-403, 423, 426, 471, and 479. Only the Trustee may recover from these Defendants for these violations of RICO. Indeed, Defendants do not, and cannot, posit a scenario in which another litigant's recovery against Defendants can redress the Estate's injury.

2. This Court Can Apportion the Damage Caused by Defendants' Misconduct

Here, the Trustee represents the directly injured party and there is no attenuation between the damage and the RICO violations. Defendants' racketeering activity specifically targeted the Estate. See, e.g., RCS p. 40; cf. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 454-58 (2006) (defendants' alleged wrongdoing (failure to pay taxes) was directed towards New York State, not the plaintiff who suffered indirect competitive injuries as a result of defendants' alleged fraud).

Unlike in Holmes, where the class of plaintiffs was not the target of the defendant's misconduct, this Court may easily apportion what damage was caused to the Estate by Defendants' racketeering activity. The SAC and RICO Case Statement ("RCS") establish in detail the volumes, timing, and sources of the funds that Defendants pumped into BLMIS and the precise amounts (thus far identified by the Trustee) of Customer Property siphoned from BLMIS.

3. There Is No Better-Positioned Litigant to Bring These RICO Claims

The Trustee is the only litigant who can recover damages on behalf of the Estate.[10] On December 15, 2008, Judge Stanton appointed the Trustee to, in part, litigate any claims belonging to the Estate to compensate its creditors. This distinguishes the Trustee's RICO claims from those dismissed in Hemi (where New York State, as the direct victim of the defendant's conduct, was in the better position to bring the City's RICO claims) and Anza.

B. Defendants Mischaracterize the Trustee's RICO Claims and Rely on Inapposite Case Law

Defendants cannot credibly argue that the Estate's injuries are indirect or attenuated. Rather, they mischaracterize the Trustee's causation theory in an attempt to square what they say are his claims with inapposite case law. First, Defendants suggest the Trustee cannot establish proximate cause and claim that the Trustee's RICO claims are predicated on a theory of secondary liability, wherein Defendants facilitated Madoff's crimes. See UCG Mem. at 22-23; BA Mem. at 13. Defendants rely largely on Lerner v. Fleet Bank, N.A. for the proposition that the directness test is not satisfied where the alleged misconduct served to aid and abet a Ponzi

[10] The members of the Medici Enterprise, including Moving Defendants, may have harmed others. The Trustee's position as representative of the Estate does not preclude those other victims from bringing their own claims against any member of the Medici Enterprise for any harm they suffered directly. Because the harm suffered by the creditors of the Estate is derivative of the Estate's harm, however, they are not the direct victims of the Illegal Scheme.

scheme perpetrated by a third-party. 318 F.3d 113, 118-19, 123-24 (2d Cir. 2003). Unlike the RICO claims in Lerner, however, Defendants were primary actors in their own scheme that directly injured the Estate. Defendants' misconduct need only be a direct cause, not the sole cause, of the Estate's injury to satisfy the directness standard. See Krys v. Aaron (In re Refco Inc. Secs. Litig.), No. 08 Civ. 7416 (JSR), 2010 WL 6397586, at *43 (S.D.N.Y. July 19, 2010) (refusing to dismiss RICO claims that met RICO's proximate cause requirement). As in In re Refco, Defendants' racketeering activity is "intertwined" with the Estate's insolvency.[11] Id.

Nor is it necessary for the Trustee to show that Defendants intended the Estate's injury. See Hemi, 130 S. Ct. at 991 (RICO plaintiff need not show that harm was intended or desired). Rather, the Trustee need only show that Defendants created a "risk of harm." Baisch, 346 F.3d at 376; Dale v. Banque SCS Alliance S.A., No. 02 Civ. 3592 (RCC) (KNF), 2005 WL 2347853, at *7 (S.D.N.Y. Sept. 22, 2005). A racketeer need not intend to financially harm its victims. Baisch, 346 F.3d at 376.[12] The purpose and goal of the Illegal Scheme was to profit from Kohn's access to Madoff. See SAC ¶¶ 1-4 and 19-21; RCS pp. 33 and 35. At the very least, Defendants consciously disregarded that BLMIS was insolvent and funneled increasing amounts of money into and out of BLMIS.

[11] Nor was Madoff's independent criminal conduct an "intervening direct cause." BA Mem. at 13. The Trustee alleges that Madoff's Ponzi scheme would have collapsed long before the Filing Date were it not for the racketeering activity of Defendants and their co-conspirators. See SAC ¶¶ 4 and 8; RICO Case Statement ("RCS") pp. 33-34. The damage sustained by the Estate that the Trustee seeks to redress here is directly attributable to the racketeering activity of the defendant members of the Medici Enterprise.

[12] Characterizing the Moving Defendants' conduct as bolstering (rather than deepening the insolvency of) the Estate is to adopt the perverse position of the perpetrators here. See In re Bernard L. Madoff Inv. Secs. LLC, --- F.3d ----, No. 10-2378BK (L), 2011 WL 3568936, at *5 (2d Cir. Aug. 16, 2011) (disregarding the fiction that the Estate was solvent and refusing to give "legal effect to Madoff's machinations").

C. The Nexus Between Defendants' Acts and the Estate's Injury

Incredibly, Defendants claim that the Trustee does not accuse UniCredit and Pioneer of themselves "feeding money into BLMIS." UCG Mem. at 23. That is untrue; he does. SAC passim. Defendants, however, cannot now avail themselves of the corporate formalities that they disregarded during the course of the Illegal Scheme. See id. ¶¶ 5, 310, 312, 341, 396-97, 405, 426, 431, and 468; RCS pp. 30-31, 35-38, 40, and 61.

For example, on August 15, 1995, Bank Austria opened a direct BLMIS account where it fed $1,500,000 into BLMIS. See id. ¶ 367. Bank Austria and Kohn created Primeo Fund on December 30, 1993, the first of the Medici Enterprise Feeder Funds, through which it fed over $350 million of other people's money into BLMIS right up until Madoff confessed. See RCS pp. 36 and 61. Bank Austria and Kohn opened the second Primeo Fund account on March 1, 1996. Kohn activated Thema International in 1996. Kohn and former Bank Austria executives Zapotocky and Radel-Leszczynski created Alpha Prime Fund in 2003 and Senator Fund in 2006. Bank Medici and Bank Austria began distributing Herald Fund in 2004 and Herald (Lux) in 2008. UniCredit acquired Bank Austria in 2005, bought the Primeo Fund business in 2007, and replaced BA Worldwide as investment manager of Primeo Fund in July of 2007. See SAC ¶¶ 141-42, 466, and 470.[13]

[13] Defendants' predicate acts were committed in furtherance of the Illegal Scheme and damaged the Estate. The Trustee need not show that the Estate was the target of violations predicated on fraud (e.g., mail fraud, wire fraud, etc.). See Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 649-50 (2008). Rather, the Trustee need only allege that someone relied on the Defendants' mail and wire fraud, which as Defendants admit, he has. See UCG Mem. at 24, n.17. It is irrelevant (but perhaps illuminating to Defendants' other victims) to suggest that the Trustee lacks standing because the Illegal Scheme had other victims (such as the Medici Enterprise Feeder Fund investors). See Baisch, 346 F.3d at 374-75 (holding that "[n]o precedent suggests that a racketeering enterprise may have only one target, or that only a primary target has standing."); Krys v. Aaron (In re Refco Inc. Secs. Litig.), No. 08 Civ. 7416 (JSR), 2010 WL 6397586, at *43 (S.D.N.Y. July 19, 2010) (same). Defendants' mischaracterization of the Trustee's allegations of mail and wire fraud as "against the feeder fund investors" is similarly misplaced. UCG Mem. at 23-24.

III. THE TRUSTEE HAS PLED THE REQUISITE RICO ELEMENTS

Despite the complexity of the Illegal Scheme and criminal sophistication of the members of the Medici Enterprise, the Trustee has pled in detail over 10,000 predicate acts under RICO committed between 1987 and 2009. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Defendants' suggestion that certain allegations in the SAC be viewed in a light most favorable to themselves is incorrect. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009). Hence, Defendants' offer of "plausible explanations" for their criminal conduct is inappropriate at this stage. See In re Initial Pub. Offering Secs. Litig., 241 F. Supp. 2d 281, 370 (S.D.N.Y. 2003) ("alternative theories offered by [d]efendants cannot defeat the pleading").

A. The Defendants Are Members of an Association-in-Fact Enterprise

The Medici Enterprise is an association-in-fact enterprise under RICO and Defendants do not contest this. RICO defines an enterprise to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This language must be interpreted broadly. See Turkette, 452 U.S. at 580 (holding that "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group associated in fact."). The Trustee has pled all three elements of an association-in-fact enterprise: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." Boyle v. United States, 129 S. Ct. 2237, 2244 (2009). The Trustee alleges all three elements along with "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." Id. at 2243 (citation omitted).

1. The Purpose of the Medici Enterprise

The purpose of the Medici Enterprise (through the Illegal Scheme) is, of course, to enrich its members. See SAC ¶¶ 1, 4, 24, 362, 399, 404, and 487. Illicit profit is the classic example of an enterprise's purpose. See, e.g., United States v. Boyle, No. S1 08 CR 523 (CM), 2010 WL 4457240, at *3 (S.D.N.Y. Oct. 27, 2010) (enterprise existed for the purpose of "'enriching its members and associates' via the commission of various crimes"); Automated Teller Mach. Advantage LLC v. Moore, No. 08 Civ. 3340 (RMB), 2009 WL 2431513, at *6-7 (S.D.N.Y. Aug. 6, 2009) (enterprise existed to fraudulently induce plaintiffs to enter into agreements to purchase fictional ATMs); Fuji Photo Film U.S.A., Inc. v. McNulty, 640 F. Supp. 2d 300, 314 (S.D.N.Y. 2009) (defrauding Fuji by billing for services never performed). UniCredit, Bank Austria, Pioneer, Profumo, and all other Defendant members of the Medici Enterprise shared in its economic windfall.[14] Defendants were not united simply by the routine commercial goal of earning profits, but by the "common purpose" of illicitly skimming money off the flow of other people's money that they directed into BLMIS.

2. The Defendants' Relationships Are the Foundation of the Medici Enterprise

Defendants' lucrative longtime association with Kohn and their other co-defendants is the raison d'être of the Medici Enterprise. The Defendants sought, by criminal acts, to monetize SK's relationship with BLMIS. The Trustee alleges deep, longstanding, and multifarious connections among the seventy-six (76) Defendants, how they conspired to form and operate the

[14] The fact that the Moving Defendants are corporate entities is irrelevant. "[A] corporate entity may be held liable as a RICO person 'where it associates with others to form an enterprise that is sufficiently distinct from itself.'" Manhattan Telecomm. Corp., Inc. v. Dialamerica Mkt., Inc., 156 F. Supp. 2d 376, 381 (S.D.N.Y. 2001) (citation omitted). Aside from their participation in the Illegal Scheme, the Trustee understands that UniCredit, Bank Austria, and Pioneer are otherwise legitimate financial institutions.

Medici Enterprise, and execute their Illegal Scheme. See, e.g., SAC ¶¶ 29-32, 221, 223, 227, 235, 242, 263, 330, 337, 341, 384, 389, and 404. Although the Medici Enterprise may not have had regular meetings, dues, or established regulations within the organization, these trappings are not required. See Boyle, 129 S. Ct. at 2245. Once the trier of fact sorts through the Medici Enterprise's vast array of shell corporations, shared personnel, interrelated directors, and parent-subsidiary relationships, what emerges is a cohesive transnational entity that deployed an opaque cloak of legitimacy over a massive money laundering operation.

3. The Medici Enterprise Was Formed in New York in the 1980s

The Medici Enterprise has been executing the Illegal Scheme since at least 1985. Bank Austria became a member of the Medici Enterprise in the early 1990s. See SAC ¶ 336-37. Since UniCredit joined the Medici Enterprise in 2005, the Illegal Scheme pumped more money into BLMIS than in the previous twenty years combined. SAC Exhibit M. The mutually beneficial business relationship between Kohn and UniCredit predates this acquisition by years. See id. ¶¶ 450-53 and 460-63. Pioneer executives introduced Kohn to the inner circle of the Milanese banking community, including Gutty and Profumo. Id. ¶¶ 457-59. UniCredit and Pioneer already had significant exposure to BLMIS and Madoff. Starting in 2001, after UniCredit acquired Pioneer, Pioneer managed various funds that held investments with Madoff feeder funds Kingate Global Fund Ltd. and Fairfield Sentry Ltd. See id. ¶ 461. Upon its acquisition of Bank Austria, UniCredit conspired with certain Bank Austria directors and executives who were previously involved in the Illegal Scheme. See id. ¶¶ 487-92.

B. Defendants Exercised Operational Management and Control of the Medici Enterprise

Pleading operational management is a "low hurdle" for the Trustee at this stage. First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 176 (2d Cir. 2004). Each Defendant

need not be the "mastermind" of the Illegal Scheme.[15] Liability under § 1962(c) is "not limited to upper management . . . [a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise . . .." Reves v. Ernst & Young, 507 U.S. 170, 184 (1993).

"Aggressor" corporations like UniCredit and Bank Austria, who are "active perpetrator[s] of the fraud," are liable for the acts of their employees and officers and directors under RICO.[16] USA Certified Merchs., LLC v. Koebel, 262 F. Supp. 2d 319, 328 (S.D.N.Y. 2003). Profumo and Gutty, as well as at least nine key senior managers of Bank Austria, in addition to their own RICO violations, "had knowledge of, or w[ere] recklessly indifferent toward, the unlawful activity" of the other members of the Medici Enterprise.[17] Ctr. Cadillac, Inc. v. Bank Leumi Trust Co. of New York, 808 F. Supp. 213, 236 (S.D.N.Y. 1992) (defendant company benefited from predicate acts, therefore respondeat superior liability is appropriate under RICO).

[15] Even if Moving Defendants were not deemed to have "conducted" the affairs of the Medici Enterprise, their knowledge and conduct make them conspirators under § 1962(d) because they conspired with Kohn, who Moving Defendants do not contest was the Medici Enterprise's mastermind.

[16] Courts use the terms "aggressor" and "central figure" interchangeably. See USA Certified Merchs., LLC v. Koebel, 262 F. Supp. 2d 319, 328 (S.D.N.Y. 2003); Dubai Islamic Bank v. Citibank, N.A., 256 F. Supp. 2d 158, 165 (S.D.N.Y. 2003) (noting corporation may be found vicariously liable where corporation is said to be a central figure (or aggressor) in the alleged scheme); Kovian v. Fulton Cnty. Nat'l Bank & Trust Co., 100 F. Supp. 2d 129, 133 (N.D.N.Y. 2000) (defining aggressor corporations as those that are central figures in the illegal scheme).

[17] Profumo: SAC ¶¶ 141, 143, 465, 473, 475, 479, 483, and 486; Gutty: Id. ¶¶ 384, 453-55, 473, 475, 479, 486, 504, and 506; Randa: Id. ¶¶ 132, 326-29, 337, 341-42, 365-66, 369, 370, 392-95, 464, and 523; Kadrnoska: Id. ¶¶ 133, 341, 342, 349, 366, 369, 370, and 523; Zapotocky: Id. ¶¶ 31, 134, 326, 329-30, 337-38, 341-42, 346, 354-55, 365-67, 369-70, 379, 428, 471, and 523; Radel-Leszcynski: Id. ¶¶ 31, 135, 354-55, 357-59, 365, 428, 431, 433-35, 470-71, 474, 488, and 523; Kretschmer: Id. ¶¶ 31, 130, 138, 341-42, 351-52, 354-55, 363-67, 369-70, 384, and 523; Hemetsberger: Id. ¶¶ 31, 130, 139, 342, 350, 354-55, 370, and 523; Nograsek: Id. ¶¶ 130, 140, 326, 340-41, 348, 366, 384, and 523; Duregger: Id. ¶¶ 116, 136, 272, 340, 353, 359, 384, 396, 408, 523, 547, and 552; Fischer: Id. ¶¶ 137, 337-38, 341-42, and 354-55.

1. Defendants Were Central and Active Participants in the Illegal Scheme

a. UniCredit and Pioneer

UniCredit ensured its control over Bank Austria by hand-selecting certain UniCredit officials to serve on Bank Austria's boards.[18] Although UniCredit, through Bank Austria, owned a minority share of Bank Medici (in violation of its own policy), it had the power to install Gutty, the number-two man at UniCredit, on Bank Medici's board of directors, and took steps to ensure that associates who questioned, among other things, Herald Fund, were fired. See id. ¶ 481-85.

b. Bank Austria

Bank Austria's membership in the Medici Enterprise spans almost two decades and goes far beyond an "ordinary banking relationship" with its co-conspirators. In 1995, Bank Austria created BA Worldwide exclusively to collect fees generated by the operation of the Illegal Scheme and to pay off-shore bonuses to certain members of the Medici Enterprise, including Randa and Zapotocky. See id. ¶¶ 356-361. Its key executives partnered with Kohn to create what would become Bank Medici, and, through Randa, provided substantial assistance in its acquisition of a banking license. See id. ¶ 392. Bank Austria's relationship with its co-conspirator Eurovaleur dates to at least 1993, when it assisted Kohn with the transfer of its trademark in New York. See id. ¶ 339. Bank Austria provided Kohn with its own proprietary research that she would then provide to Madoff to paper his payments to her for the duration of the Illegal Scheme. See id. ¶ 13-15. Bank Austria routinely sent its officers and directors to

[18] Specifically, Sergio Ermotti, Candido Fois, and Vittorio Ogliengo serve on Bank Austria's Supervisory Board and Francesco Giordano, Massimilano Fossati, and Gianni Franco Papa serve on Bank Austria's Management Board.

New York to meet with Madoff and Kohn. Bank Austria exercised a great degree of discretion, control, and management with respect to the Medici Enterprise.[19]

C. The Trustee Has Pled That Defendants Engaged in a Pattern of Racketeering

The Defendants' predicate acts, which taken together constitute a pattern, are pled with the requisite particularity.

1. The Trustee Has Adequately Pled Scienter

The Moving Defendants deliberately engaged in the Illegal Scheme and the Trustee has abundantly pled their scienter. The Trustee has alleged facts: (i) showing that defendant had both motive and opportunity; or (ii) constituting circumstantial evidence of conscious behavior or recklessness. See Powers v. British Vita, PLC, 57 F.3d 176, 184-85 (2d Cir. 1995); see also Ellington Mgmt. Grp., LLC v. Ameriquest Mortg. Co., No. 09 Civ. 416 (JSR), 2009 WL 3170102, at *2 (S.D.N.Y. Sept. 29, 2009). The appropriate inquiry is "whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." Pollio v. MF Global, Ltd., 608 F. Supp. 2d 564, 572 (S.D.N.Y. 2009) (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322-23 (2007)). Here, the Trustee has met both of these tests.[20]

[19] UniCredit and Bank Austria did not merely provide run-of-the-mill banking services to the Medici Enterprise. See MTA v. Contini, No. 04 Civ. 0104, 2005 WL 1565524, at *5 (E.D.N.Y. July 6, 2005) (denying motion to dismiss RICO claims against financial institution that directly benefited from racketeering activity). Defendants' caselaw is not to the contrary. See United States v. Viola, 35 F.3d 37, 43 (2d Cir. 1994) (janitor unwittingly took directions and performed tasks that were helpful to the enterprise); Rosner v. Bank of China, 528 F. Supp. 2d 419, 429-31 (S.D.N.Y. 2007) (defendant bank merely provided routine professional services to members of the enterprise).

[20] The pleading requirements of Rule 9(b) are relaxed with respect to pleading the scienter element of mail and wire fraud under civil RICO. See O'Brien v. Nat'l Prop. Analyst Partners, 936 F.2d 674, 676 (2d Cir. 1991).

2. UniCredit's Scienter

When UniCredit took an equity stake in the Medici Enterprise Feeder Funds, it took a very "hands-on" approach and replaced BA Worldwide with Pioneer as Primeo Fund's investment manager. UniCredit instructed Pioneer to pay Kohn $1.2 million for allowing UniCredit to redirect Primeo Fund's investment through BLMIS. SAC ¶ 478. Bank Austria paid Kohn almost $1 million for her role in restructuring Primeo Fund. See id. ¶ 397. Gutty, then UniCredit's Vice-Chairman, sat on the supervisory boards of Bank Medici and Kohn's Privatlife. RCS p. 31. UniCredit rewarded Bank Austria executives (and co-conspirators) with high-ranking positions at UniCredit and Pioneer. SAC ¶¶ 487-92.[21]

UniCredit and Pioneer were aware of significant defects in their relationship with BLMIS, recklessly disregarded and/or suppressed this information, and discouraged their employees from addressing those defects. See id. ¶¶ 482-86. When these employees tried to examine BLMIS and elevate their concerns, they were, in at least one instance, fired. See id. ¶ 285.

3. Bank Austria's Scienter

Bank Austria and UniCredit's knowledge is in many cases overlapping and co-extensive. Both, however, had independent opportunity and motive to engage in the Illegal Scheme. Kohn's access to BLMIS led Bank Austria and its executives to engage in a fifteen year-long quid-pro-quo relationship with Kohn whereby it provided her with financial security, institutional backing, and even her own bank whose specific purpose was to funnel money into

[21] UniCredit appointed Friedrich Kadrnoska to its board of directors, named Wilhelm Hemetsberger to its Executive Management Committee, and made Werner Kretschmer its Global Head of Retail, Executive Vice President of Asset Management, and Country Head of Austria and Eastern Europe. UniCredit also appointed Josef Duregger to the board of UniCredit's branch in the United Kingdom and hand-selected Ursula Radel-Leszczynski to head Pioneer's management of Primeo Fund.

BLMIS. See id. ¶¶ 116, 322-79, and 396. Simultaneously, its subsidiary BA Worldwide, investment manager to Primeo Fund, generated millions in fees for pretending to execute Madoff's investment strategy itself. Just as UniCredit was aware that Pioneer was receiving fees for nothing, so was Bank Austria with respect to BA Worldwide. Id. ¶¶ 359-61 and 472.[22] Further, it kicked back twenty percent of this free money to its Eurovaleur for its supposed role as a "sub-advisor." Id. ¶ 359. Finally, BA Cayman Island received additional offshore kickbacks from HAM. Id. ¶ 408. HAM also acted as the investment manager to Herald Fund, received millions in fees, and also pretended to execute Madoff's investment strategy itself. Former Bank Medici CEO, Peter Scheithauer, characterized HAM's payments to Bank Medici as a "gift" from Kohn. Id. ¶ 29.

4. Continuity of the Medici Enterprise's Pattern of Racketeering

The Moving Defendants engaged in a continuous pattern of racketeering throughout the course of the Illegal Scheme. The Medici Enterprise's many members, over many years, engaged in unlawful conduct. Defendants' thousands of predicate acts, deeply intertwined participants, and the longevity of their racketeering activity satisfy both the closed-ended and open-ended continuity requirements.[23]

a. Bank Austria's Continuity

Bank Austria committed thousands of RICO predicate acts, including money laundering, monetary transactions of property derived from specific unlawful activity, mail fraud, wire fraud,

[22] There is an ongoing criminal tax investigation by Austrian authorities regarding Bank Austria's use of BA Worldwide as a slush fund created solely to enrich its executives. Id. ¶¶ 363-65.

[23] The Medici Enterprise presents the threat of continued unlawful activity which satisfies open-ended continuity. See Fresh Meadow Food Servs. LLC v. RB 175 Corp., 282 Fed.Appx. 94, 99 (2d Cir. 2008). "In assessing whether . . . the plaintiff has shown open-ended continuity, the nature of the RICO enterprise and of the predicate acts are relevant." Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.,187 F.3d 229, 242 (2d Cir. 2009). Although the Ponzi scheme ended with Madoff's confession, the Illegal Scheme is ongoing, as the Medici Enterprise continues to launder its ill-gotten gains by moving funds and concealing ownership. See, e.g., SAC ¶¶ 528-41.

and violations of the Travel Act spanning from January 1, 1996 to January 23, 2008. RCS pp. 43-60.

b. UniCredit's Continuity

UniCredit, Pioneer, and Profumo each committed scores of predicate acts including money laundering, monetary transactions of property derived from specific unlawful activity, mail fraud, and wire fraud between December 16, 2005 and November 12, 2008. RCS pp. 44, 48-49, 54-55, and 57.

5. The Trustee Has Pled with the Requisite 9(b) Particularity

The Trustee alleges all of Defendants' predicate acts of wire fraud, mail fraud, and bank fraud with the requisite particularity under Rule 9(b). Rule 9(b) requires plaintiff to state:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of such statements and the person responsible for making (or in the case of omissions, not making) the same, (3) the content of such statements, and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

Novomoskovsk Joint Stock Co. "Azot" v. Revson, No. 95 Civ. 5399 (JSR), 1997 WL 698192, at *4 (S.D.N.Y. Nov. 7, 1997). The SAC cross-references the relevant RCS sections that exhaustively set forth facts that the Trustee has thus far discovered with respect to UniCredit, Bank Austria, Pioneer, and Profumo. RCS pp. 24-27, 30-31. The Trustee's allegations satisfy even the strictest application of Rule 9(b) in this Circuit.[24]

[24] The Trustee's Rule 9(b) pleading bar is even lower. See Eisenberg v. Feiner (In re Ahead by a Length), 100 B.R. 157, 166 (Bankr. S.D.N.Y. 1989). Courts in this Circuit have taken a more liberal approach to allegations of fraud pled by a bankruptcy trustee. See Picard v. Chais (In re BLMIS), 445 B.R. 206, 219 (Bankr. S.D.N.Y. 2011) ("courts will take a 'liberal' approach in construing allegations of actual fraud asserted by a bankruptcy trustee on behalf of all creditors of an estate").

D. UniCredit and Bank Austria Are Vicariously Liable

UniCredit and Bank Austria may be held liable for the actions of their subsidiaries and executives under theories of agency. See, e.g., Koebel, 262 F. Supp. 2d at 328 (permitting vicarious liability where defendant corporation is an "active perpetrator" or a "central figure" in the criminal scheme). Defendants characterize themselves as unwitting conduits for the nefarious conduct of others, particularly Kohn. BA Mem. at 13; UCG Mem. at 23. The conduct of UniCredit and Bank Austria, however, demonstrates that they are "central figures" in the Illegal Scheme. They are liable for their own acts as well as those of their officers and directors.

Profumo and Gutty, as well as at least nine key senior managers of Bank Austria, had knowledge of, or were recklessly indifferent toward, the unlawful activity of the other members of the Medici Enterprise.[25] See SAC ¶¶ 140, 472-74, 478, and 485-86. The SAC is replete with transgressions by UniCredit and Bank Austria's high-level officers and directors and catalogs the hundreds of millions of dollars reaped by UniCredit, Bank Austria, and the other members of the Medici Enterprise directly from the Illegal Scheme. See id. ¶¶ 132-40, 143-44, 354, 358, 362, 368, 399, 401-03, 406, 408-09, 428, 431, 547, and 551-53.

E. Defendants Conspired to Violate RICO

Defendants conspired with each other to engage in a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c) to perpetrate the Illegal Scheme, in violation of 18 U.S.C. § 1962(d). See id. ¶¶ 21, 32, 223-24, 238, 242, 341, 394, 473, and 479. Defendants contend the Trustee has not pled a "conscious agreement" to engage in the Illegal Scheme. UCG at 21; BA

[25] Nine senior managers of Bank Austria with executive authority are Defendants in this action: Randa (Chairman); Kadrnoska (Deputy Chairman and member of the Management Board); Zapotocky (Director of Equities and Head of Asset Management); Radel-Leszczynski (President of BA Worldwide); Kretschmer (Director); Hemetsberger (Director); Nograsek (Head of Financial Investment Division); Josef Duregger (Member of Bank Austria's Commercial Representation Board and appointed to sit on board of Bank Medici to supervise Kohn); and Peter Fischer (Treasurer).

at 13-14; Profumo at 2. Despite the "secrecy and concealment" of the Illegal Scheme, however, the Trustee pleads ample facts to state a claim against each of the Moving Defendants. Madanes v. Madanes, 981 F. Supp. 241, 259 (S.D.N.Y. 1997) (participation in the conspiracy can be shown entirely through circumstantial evidence); U.S. v. Cassino, 467 F.2d 610, 618 (2d Cir. 1972) ("[y]our common sense will tell you that when men in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding.").

Each of the Moving Defendants understood that the purpose of the Medici Enterprise was to generate "hundreds of millions of dollars in 'retrocession fees,' 'management fees,' 'distribution fees,' and other illicit proceeds of the Illegal Scheme" and each understood that they were not acting alone. See SAC ¶¶ 21-22 and 411. Under 18 U.S.C. § 1962(d), the Trustee need only establish that a defendant agreed "to conduct the affairs of a particular, identified enterprise through a pattern of racketeering activity." Elsevier, Inc. v. W.H.P.R., Inc., 692 F. Supp. 2d 297, 313 (S.D.N.Y. 2010).[26] The Trustee meets this standard under section 8(a). Serin v. N. Leasing Sys., Inc., No. 7:06 CV 1605, 2009 WL 7823216, at *14 (S.D.N.Y. Dec. 18, 2009) (RICO conspiracy claims are subject to the more relaxed pleading standards of Federal Rule of Civil Procedure 8(a)); see SAC ¶¶ 339-40, 354, 466-76, and 480.

IV. THE PSLRA DOES NOT BAR THE TRUSTEE'S CLAIMS

The Private Securities Litigation Reform Act ("PSLRA") is irrelevant here. The PSLRA amended RICO in 1995, in part, to bar plaintiffs from "rely[ing] upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of

[26] There is neither a requirement that the defendant commited some overt act nor is there a rule that a "conspirator knew of all criminal acts by insiders in furtherance of the conspiracy." United States v. Zichettello, 208 F.3d 72, 100 (2d Cir. 2000).

RICO." 18 U.S.C. § 1964(c) (1995). No applicable securities are at issue here, nor does the Trustee allege any conduct that is otherwise actionable securities fraud.

Defendant members of the Medici Enterprise, independent of Madoff, operated a large-scale money laundering scheme and conspired to profit off of Kohn's access to BLMIS. See SAC ¶¶ 208, 231, 366, 371, and 478. Defendants and their co-conspirators committed more than ten thousand predicate acts in furtherance of their scheme. See RCS pp. 41-60. Not one of these predicate acts stems from, or is related to, Madoff's execution of his Ponzi scheme.

Nonetheless, Defendants argue that the Second Circuit's decision in MLSMK Inv. Co. v. JPMorgan Chase & Co., --- F.3d ----, No. 10-3040, 2011 WL 2640579 (2d Cir. July 7, 2011) "should end the RICO claims in this case." UCG Mem. at 8. Defendants misread MLSMK to hold that any RICO claim based on any conduct that is in any way related to anything to do with any securities is barred by the PSLRA. Id. Under Defendants' incorrect interpretation of MLSMK, the PSLRA would bar a RICO action based on any crimes, even arson or blackmail, that were committed to keep alive a longstanding securities fraud.

A. Madoff's Fraud Is Not a Necessary Component of the Trustee's RICO Claims

The Trustee's RICO claims are not "rooted in allegations" of Madoff's securities fraud. UCG Mem. at 8. Of 734 allegations and 22 causes of action in the Second Amended Complaint, the Moving Defendants identify four allegations, each of which unremarkably observe that the Illegal Scheme indirectly furthered Madoff's Ponzi scheme. UCG Mem. at 7. Where "the securities were merely a happenstance cog in the scheme," as here, "[t]he fraud [bears] an insufficient connection to the securities." Rezner v. Bayerische Hypo-Und Vereinsbank AG, 630 F.3d 866, 872 (9th Cir. 2010). Notably, there are no allegations that Defendants conspired with

Madoff to further his Ponzi scheme or that Defendants aided and abetted Madoff in any way. This is not artful pleading. The Illegal Scheme is not the Ponzi scheme. Madoff's actions were not integral to Defendants' RICO violations. Indeed, unlike the Ponzi scheme, the Illegal Scheme is ongoing.

Nevertheless, Defendants go "all in" on MLSMK, which applies the PSLRA bar to RICO claims entirely predicated on Madoff's securities fraud. In MLSMK, plaintiffs brought RICO claims against banks expressly alleged to have entered into a "conspiracy to violate RICO by aiding and abetting" Madoff's fraud. 2011 WL 2640579, at *1. Specifically, the purpose of the enterprise in MLSMK was to "protect Madoff" and to "partner with him in the fleecing of his victims[]." Id. at *3 (citation omitted). Unsurprisingly, the relevant legal question in MLSMK was not whether the RICO claims were rooted in securities fraud, but rather whether the securities fraud was "actionable" because private plaintiffs—such as those in MLSMK—cannot bring securities aiding and abetting claims under the Securities and Exchange Act of 1934. Id. at *4-8. Defendants do not establish that the Illegal Scheme "sounds in" Madoff's fraud.[27]

B. Defendants' RICO Predicate Acts Are Not Otherwise Actionable Under the Securities and Exchange Act of 1934

1. The Illegal Scheme Is a Money Laundering Scheme

Defendants' own conduct—as primary actors in their own scheme—does not trigger the PSLRA. Defendants fail to show, as they must, how even one predicate act is actionable under

[27] In the context of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") courts in this Circuit hold that for a claim to "sound in securities" the material misstatements or omissions in connection with a purchase or sale of a covered security must be a "necessary component" of the claim. See Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc., 341 F. Supp. 2d 258, 261 (S.D.N.Y. 2004) ("regardless of the words used by plaintiff in framing her allegations and regardless of the labels she pastes on each cause of action a court must determine whether fraud is a necessary component of the claim") (emphasis in original); Grund v. Del. Charter Guar., --- F. Supp. 2d ---, No. 09 Civ. 8025, 2011 WL 2118754 (S.D.N.Y. May 26, 2011) (same); Anwar v. Fairfield Greenwich Ltd., 728 F.Supp.2d 372, 399 n. 7 (S.D.N.Y. 2010) (same).

the securities laws. See Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc., 189 F.3d 321, 330 (3d Cir. 1999); Mezzonen v. Wright, No. 97 Civ. 9380 (LMM), 1999 WL 1037866, at **3-5 (S.D.N.Y. Nov. 16, 1999). This is because Defendants' RICO violations largely consist of illicit transfers of moneys to and from entities controlled and/or owned by Defendants and communications via wire made in furtherance of the Illegal Scheme. See SAC Exhibit L.; see RCS pp. 51-58. For example, in the last year of the Ponzi scheme, UniCredit, together with Kohn and Gutty, embarked on an effort to "diversify" Bank Medici's holdings through the creation of three sham Liechtenstein insurance companies. See SAC ¶¶ 499-507. In fact these companies had no legitimate business purpose other than to transfer $5.3 million from HAM for the benefit of Kohn. RCS p. 21. These companies are the subject of a criminal money laundering investigation in Liechtenstein. SAC ¶ 507. None of these allegations satisfies the elements of a securities fraud claim under Section 10(b) of the 1934 Securities and Exchange Act.[28]

Defendants suggest that because their primary bad acts—money laundering, financial transactions in criminally derived property, transporting funds taken by fraud, receipt of stolen funds, and wire fraud—injected money into BLMIS, Madoff's securities fraud is somehow imputed to Defendants. See UCG Mem. at 9. This bootstrapping cannot trigger the PSLRA. The only relevant determination is whether Defendants' conduct alone is actionable securities fraud. See Bald Eagle, 189 F.3d at 330 (holding that the "proper focus" of the PSLRA's

[28] Securities fraud requires a showing of a scheme to defraud or a misleading statement or omission of material fact in connection with the purchase or sale of securities. 15 U.S.C. § 78j(b). A plaintiff must prove that the defendants: (1) made a misstatement or omission of a material fact; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) upon which the plaintiff reasonably relied; and (5) that the plaintiff's reliance was the proximate cause of their injury. See Heller v. Deutsche Bank, No. Civ.A. 04 CV 3571, 2005 WL 525401, at * 3 (E.D.Pa. Mar. 3, 2005). The Trustee does not seek to redress any specific investor's claim against Defendants here.

amendment to RICO "is on whether the conduct pled as predicate offenses is 'actionable' as securities fraud—not on whether the conduct is 'intrinsically connected to, and dependent upon' conduct actionable as securities fraud") (internal citation omitted); Royal Indem. Co. v. Pepper Hamilton LLP, 479 F.Supp.2d 419, 426 (D.Del. 2007) (same). Simply shouting "Madoff!" does not transform Defendants' crimes into Madoff's securities violations.

2. There Are No Covered Securities in This Action

Where, as here, there are no covered securities, there can be no securities fraud. The only financial products purchased or sold during the Illegal Scheme were shares in the Medici Enterprise Feeder Funds. Foreign hedge fund shares, generally, are not securities and they are not covered by the PSLRA.[29] See Grund v. Del. Charter Guar. & Trust Co., --- F. Supp. 2d ----, No. 09 Civ. 8025, 2011 WL 2118754, at *11 (S.D.N.Y. May 26, 2011) (although plaintiffs' money ended up in a Ponzi scheme, their claims were not preempted by the PSLRA because their investment was in an intermediate fund, which itself was not a covered security); Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Amer. Secs. LLC, 750 F.Supp.2d 450, 455 (S.D.N.Y. 2010) (same). The prospectuses for each Medici Enterprise Feeder Fund confirm that they were not registered on any U.S. exchange, under the Investment Company Act, the Securities Act of 1933, or the securities laws of any of the states within the U.S. They are not covered by the statute.

[29] In Morrison v. Nat'l Bank of Australia the Supreme Court held that the presumption against extraterritorial application of U.S. securities law did not allow foreign investors to bring securities claims against foreign defendants for stocks not traded on an American exchange. 130 S.Ct. 2869, 2884 (2010). At least one court has held in Madoff litigation that shares in an offshore fund were not actionable securities. In re Banco Santander Secs.-Optimal Litig., 732 F.Supp.2d 1305, 1317 (S.D. Fla. 2010) ("Plaintiffs neither purchased shares on an American stock exchange, nor did they purchase shares in the United States . . . [their] securities fraud claims therefore [did] not survive Morrison").

Nor would Defendants' supposed misrepresentations or omissions be in connection with what Madoff purported to purchase or sell on behalf of BLMIS.[30] See Anwar, 728 F. Supp. 2d at 398 (the connection between plaintiffs who invested in funds, who in turn invested in BLMIS, who in turn purported to invest in securities, would "snap[] even the most flexible rubber band"); Banco Santander, 732 F. Supp. 2d at 1341 ("[t]he relevant relationships in this litigation, as in all litigation, [were] the relationships between the Plaintiffs and the Defendants, not the Plaintiffs and Madoff, who [was] not a party to this lawsuit. Madoff's actions simply [were] not the crux of this litigation."); Grund, 2011 WL 2118754, at *11 ("[t]he rubber band of 'in connection with' [did] not reach beyond [defendant investment fund] to [the] Ponzi scheme."); Banc of America Secs., 750 F.Supp.2d at 456 ("[d]efendants made misleading statements in connection with plaintiffs' purchase, sale, or holding of uncovered securities—namely shares of the Funds"—which were not equivalent to Madoff's securities). Accordingly, the Trustee's claims are not precluded by the PSLRA.

V. THE TRUSTEE'S RICO CLAIMS ARE NOT EXTRATERRITORIAL

The Medici Enterprise and the Illegal Scheme originated in New York, thousands of RICO predicate acts occurred in New York, and gravely injured a New York victim. The Estate was injured in New York and its bankruptcy is being administered here in this District by a Trustee appointed in New York. That some members of the Medici Enterprise may be foreign is

[30] Whether the Trustee's claims involve actionable securities is an issue of fact to be resolved by a jury or on a motion for summary judgment, or at the very least, warranting discovery. See Anwar, 728 F.Supp.2d 405 ("a more developed factual record [was] necessary to inform a proper determination as to whether Plaintiffs' purchases of the Offshore Funds' shares occurred in the [U.S.]"); Flood v. Makowski, No. 03 cv 1803, 2004 WL 1908221, at *19 (M.D.Pa. Oct. 22, 2003) (finding where there are competing schemes regarding whether the predicate acts involved securities, the consideration was more appropriate on a motion for summary judgment); Amari v. Spillan, No. 2:08 Civ. 829, 2009 WL 995627, at *5 (S.D. Ohio Apr. 14, 2009) ("[a]s the discovery unfold[ed], the parties would be in a better position to ascertain whether the alleged fraudulently induced [transactions] constitut[ed] actionable securities fraud."); Automated Teller Mach. Advantage LLC v. Moore, No. 08 Civ. 3340 (RMB), 2009 WL 2431513, at **4-5 (S.D.N.Y. Aug. 6, 2009) (same).

not dispositive. Just as "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States[,]" Morrison v. Nat'l Australia Bank, Ltd., it is also rare that a sophisticated criminal organization will operate entirely domestically. 130 S.Ct. 2869, 2884 (2010) (emphasis in original). The RICO statute was enacted to eradicate all racketeering, including the sophisticated economic racketeering of the Medici Enterprise. The Illegal Scheme was perpetrated here, and it must be stopped here.

A. Morrison Is Not Applicable Here

The Trustee's RICO claims are not extraterritorial and Morrison and its RICO-specific progeny do not preclude them. Morrison, in fact, is not implicated here. Defendants, however, misstate that under Morrison any criminal activity that has any foreign aspect cannot be reached by the RICO statute. This is incorrect. The Supreme Court held in Morrison that the focus of the Exchange Act "is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." Morrison, 130 S.Ct. at 2884. Similarly, the focus of RICO is to combat a criminal "enterprise as the recipient of, or cover for, a pattern of criminal activity." Cedeño v. Intech Grp., Inc., 733 F.Supp.2d 471, 474 (S.D.N.Y. 2010). RICO applies to an enterprise when the impact of its activity upon it is in the United States, as it is here. Defendants' interpretation would allow, for example, a terrorist organization to plan and direct racketeering activities from abroad, to be carried out by agents in the United States, to then be immune from RICO and other liability because the enterprise is "located" abroad.[31] The Trustee's claims conform with this Circuit's application of RICO post-Morrison. See Norex

[31] See, e.g., United States v. Marzook, 426 F. Supp. 2d 820, 826 (N.D. Ill. 2006) (denying motion to dismiss RICO count alleging Hamas was a RICO enterprise because "the fact that Hamas is a foreign entity does not immunize it from the reach of RICO.") (citation omitted).

Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 32 (2d Cir. 2010); Cedeño, 733 F.Supp.2d at 473.

B. Cedeño Controls Here

In Cedeño, this Court dismissed §§ 1962(a) and (c) claims based on the foreign activity of an almost entirely foreign alleged enterprise that injured a foreign plaintiff. Unlike here, the enterprise in Cedeño was almost entirely based in Venezuela. The entire pattern of racketeering activity occurred abroad. The only domestic nexus was the classic, fortuitous, and insufficient passage of funds through U.S. banks in furtherance of the foreign acts committed by the foreign enterprise. Defendants selectively quote Cedeño while failing to apply the standard it set forth or engage in any analysis whatsoever. Rather, they simply assert that an enterprise containing some foreign members may not be subject to claims under RICO. UCG Mem. at 10. This Court, however, held that the domesticity of a § 1962(c) enterprise depends on how its members benefited from the pattern of racketeering, not on the domiciles of some of its members. 733 F. Supp. 2d at 473-74. Here, the members of the Medici Enterprise benefited from flows of billions of dollars in and out of New York and the injury of a New York victim. As set forth below, the application of this Court's holding in Cedeño militates against dismissal of the Trustee's RICO claims.

C. The Medici Enterprise and the Illegal Scheme Are Not Extraterritorial

Post-Morrison RICO cases in this Circuit have only addressed extraterritoriality in the "foreign-cubed"[32] context where "the alleged enterprise and the impact of the predicate activity upon it are entirely foreign." Cedeño, 733 F. Supp. 2d at 473-74 (emphasis added); Norex, 631

[32] Claims brought by a foreign plaintiff against foreign defendants outlining foreign conduct are considered "foreign-cubed" claims. This action is not even "foreign-squared," much less "foreign-cubed."

F.3d at 32; see also Farm Credit Leasing Servs. Corp. v. Krones (In re Le-Nature's), No. 09-1445, 2011 WL 2112533 at *3 (W.D. Pa. May 26, 2011) (holding that RICO applied to foreign conduct of foreign defendants because "the alleged enterprise was domestic, and within the ambit of RICO"). Here, both the pattern of racketeering activity and the cover provided by the interwoven members of the Medici Enterprise were firmly rooted in both New York and abroad. Indeed, the criminal manner in which the Medici Enterprise spanned the Atlantic and deepened the Estate's insolvency lies at the heart of the Trustee's RICO claims.[33]

1. The Medici Enterprise in New York

The Medici Enterprise consists of fourteen (14) defendants that were domiciled in New York during the Illegal Scheme, including Sonja Kohn, who masterminded the Illegal Scheme while living in New York for nearly a decade. A third of the Non-Defendant Bad Actors relied upon by Defendants and their co-conspirators were located in New York during the Illegal Scheme. Over the course of the Illegal Scheme, the Medici Enterprise helped create thirty (30) direct BLMIS investment accounts in New York. SAC ¶ 222. These accounts fed at least $9.1 billion into BLMIS's bank account at JPMorgan Chase in New York, almost $5 billion of which was transferred into New York after UniCredit formalized its role in the Illegal Scheme in November 2005. See id. Exhibits M and N.

UniCredit, Bank Austria, and Pioneer maintain a presence in New York that facilitated their pattern of racketeering activity in furtherance of the Illegal Scheme. Id. ¶¶ 129 and 141-42. The UniCredit branch at 150 E. 42nd Street, New York, New York has at least $17 billion in assets. Fourteen (14) other defendants regularly traveled to New York in furtherance of the

[33] There is no well-developed test for determining the situs of an association-in-fact enterprise under RICO. An association-in-fact, unlike a traditional corporation, may not have a single "location" or "nerve-center."

Illegal Scheme, including several high-ranking Bank Austria executives and directors. Id. ¶¶ 134-35 and 138-39. Kohn entered into her secret agreement with Madoff in New York. Id. ¶ 2. Kohn forged her longstanding relationship with Bank Austria in its offices in midtown New York. Id. ¶¶ 322 and 324. Indeed, Bank Austria and Kohn conceived of Primeo Fund in New York — the first and longest-lasting of the Medici Enterprise Feeder Funds. See id. ¶¶ 338-40 and 342.

2. The Laundered New York Funds

Four of Kohn's Sham Entities received at least 113 payments of Customer Property totaling more than $65,468,414 from BLMIS between 1992 and 2008. Id. Exhibit B. Kohn's Infovaleur and Erko, both New York entities, effected at least 249 payments of Customer Property totaling over $22,230,314 to other co-defendants, including Bank Austria. Id. ¶¶ 265-68, 272-73, 279-80, and 292. Eurovaleur sent at least 31 payments to other co-defendants totaling $1,836,391 and received at least 154 payments (all but two from Bank Austria) totaling $14,404,214 in furtherance of the Illegal Scheme. Id. ¶¶ 310-11, 359, 373, and 397. Kohn's Erko and Infovaleur in New York sent at least $5,978,193 to Kohn's family members, and transferred at least $16,252,121 to other members of the Medici Enterprise, including Bank Austria. See id. Exhibit L.

3. Over Half of the Predicate Acts Have a Nexus with New York

UniCredit, Pioneer, and Bank Austria used the Medici Enterprise Feeder Funds to send billions of dollars to BLMIS in New York. See id. ¶¶ 19, 22-23, 343, 398, 427, 430, and 494. Kohn's New York and other Sham Entities received transfers directly from BLMIS's account at JPMorgan Chase and funneled millions of dollars from their own New York accounts to other members of the Medici Enterprise. Bank Austria also opened a direct account with BLMIS and

received millions in transfers through that account from JPMorgan Chase in New York, including fictitious profits. See id. ¶ 367; RCS p.25.

The Illegal Scheme is a transnational conspiracy, conjured up and operated in and from New York, involving critical New York-based conspirators with thousands of RICO violations occurring in New York. In this globalized economy, racketeering schemes that victimize Americans will inevitably contain transnational components. It is not the law, nor was it Congress's intent, that the members of a RICO enterprise be immunized from liability simply because their scheme has a foreign component. See Gen. Envtl. Sci. Corp. v. Horsfall, Nos. 92-4110 to 92-4114, 1994 WL 228256, at *7 n.12 (6th Cir. May 25, 1994) ("Congress hardly would have immunized from RICO liability the foreign-based co-conspirators of a racketeering enterprise that conducts its activities here and that injures persons here."). The Trustee's claims are not extraterritorial.

VI. THE TRUSTEE HAS NOT CONSPIRED WITH DEFENDANTS

A. The Affirmative Defense of In Pari Delicto Is Premature Here

The Trustee's RICO claims may not be precluded by an in pari delicto affirmative defense at this motion to dismiss stage. When applied to a federal statute, in pari delicto is an affirmative defense, not a standing inquiry. See Rogers v. McDorman, 521 F.3d 381, 385-86 (5th Cir. 2008). In any event, plaintiff's fault is a question of fact to be assessed by a jury. See Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 311 n.21 (1985); In re Motel 6 Secs. Litig., No. 93 Civ. 2183 (JFK), 2000 WL 322782, at *5 (S.D.N.Y. Mar. 28, 2000).

Courts in this Circuit and elsewhere have held that in pari delicto does not apply to RICO claims. See Wilson v. Toussie, 260 F. Supp. 2d 530, 539 (E.D.N.Y. 2003) (declining to "blaze a new jurisprudential path" by recognizing defendants' in pari delicto defense); Schwartz v. Upper Deck Co., 956 F. Supp. 1552, 1556 (S.D.Cal. 1997), rev'd on other grounds, 104 F. Supp. 2d 228

(S.D.Cal. 2000) ("Federal Courts which have addressed the issue have held that the in pari delicto defense is not available in RICO cases."); In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Secs. Litig., 636 F. Supp. 1138, 1156 (C.D. Cal. 1986) (same). This Court should not qualify the unambiguous term "any person" injured by a RICO violation by adding the term "innocent."[34]

B. To the Extent It Applies, In Pari Delicto Does Not Bar the Trustee's RICO Claims Here

Those courts that have recognized an in pari delicto defense to RICO claims have applied the Supreme Court's test set forth in Bateman Eichler:

> a private action for damages in these circumstances may be barred on the grounds of the plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public.

472 U.S. at 310-11.

Here, neither prong of the Bateman Eichler test is met. Madoff and BLMIS were not involved in the Illegal Scheme, much less "equally involved." Madoff is not alleged to have "devised" or "controlled" the Illegal Scheme, nor is he alleged to have directed any of the predicate acts, much less have been "the hub" of the Illegal Scheme. Cf. Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1149 (11th Cir. 2006) (debtor found equally responsible where it "devised," "promoted," "marketed," and "controlled all

[34] The overwhelming majority of courts that have addressed the issue have held that the unclean hands defense is not available in civil RICO actions. See Fla. Software Sys., Inc. v. Columbia Healthcare Corp., No. 97-2866-CIV-T-17B, 1999 WL 781812, at *1 (M.D. Fla. Sept. 16, 1999) (holding that unclean hands is not a valid defense to civil RICO claims); Local 851 of the Int'l Bhd. of Teamsters v. Kuehne & Nagel Air Freight Inc., No. 97 Civ. 0378, 1998 WL 178873, at *2 (E.D.N.Y. Mar. 6, 1998) ("[t]he few courts that have considered this issue have held that the defense of unclean hands is not available in RICO actions.").

aspects" of the illegal scheme). Moreover, the first prong of Bateman Eichler requires that "the parties' [substantially equal] culpability [arise] out of the same illegal act." Pinter v. Dahl, 486 U.S. 622, 632 (1988) (emphasis added). Bateman Eichler, and Pinter all held that when applying the in pari delicto defense to federal claims, the conduct must be based on the same illegal acts. See also Perma Life Mufflers, Inc. v. Int'l Parts Corp, 392 U.S. 134, 138 (1968). The Second Circuit has not departed from this requirement. BrandAid Mktg. Corp. v. Biss, 462 F.3d 216, 218 (2d Cir. 2006) ("application of the doctrine requires that the plaintiff be 'an active, voluntary participant in the unlawful activity that is the subject of the suit'") (quoting Pinter, 486 U.S. at 636).[35]

The second prong of Bateman Eichler "require[s] that public policy implications be carefully considered before the defense is allowed, [and] ensures that the broad judge-made law does not undermine the congressional policy favoring private suits as an important mode of enforcing federal [statutes]." Pinter, 486 U.S. at 633. Preclusion of this suit would, in fact, significantly interfere with Congress's goal of combating racketeering and protecting customers of defunct broker-dealers. The Supreme Court has "often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes." Perma Life, 392 U.S. at 138.

[35] See also OSF Healthcare Sys. v. Banno, No. 00-1096, 2010 WL 431963, at *3 (C.D.Ill. Jan. 29, 2010) (striking defendants' unclean hands and in pari delicto defenses to RICO claims where plaintiff engaged in precisely the same type of fraudulent scheme as defendants, but "plaintiff's alleged fraud involve[d] different transactions than Plaintiff sue[d] about"); Lewis v. Brobeck (In re Brobeck), No. 03-2075, 2008 WL 5650052, at *3 (Bankr. E.D.Tenn. Nov. 6, 2008) (fact that plaintiff charged usurious interest did not support in pari delicto defense against claims that the same loans were fraudulently procured); Bagga Enter., Inc. v. Bagga (In re Jamuna Real Estate, LLC), 365 B.R. 540, 559 (Bankr.E.D.Pa. 2007) (because defendants were responsible for the RICO violations and directed the racketeering acts, the debtor, and thereby the Trustees, were not active participants in the RICO violations); The Interpublic Grp. of Cos., Inc. v. Fratarcengelo, No. 00 Civ. 3323 (SHS), 2002 WL 31720355, at *1-2 (S.D.N.Y. Dec. 4, 2002) (where defendant alleged that the plaintiff had engaged in a similar fraud to inflate its own stock price through accounting irregularities, the court rejected the proposed defense because the "defendants [did] not and [could] not allege that plaintiff was an active, voluntary participant in [defendant's] overvaluation.") (citation omitted).

C. Allowing a Premature In Pari Delicto Defense Here Is Contrary to Public Policy

An in pari delicto defense in the absence of discovery and factual development is a powerful weapon to hand every person ever accused in the context of RICO, where accomplices are sought to destroy the enterprise. In pari delicto is contrary to the goals of Congress. It is axiomatic in equity jurisprudence that "[t]here may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be." 472 U.S. at 307, 105 (quoting 1 J. Story, Equity Jurisprudence 305 (13th ed. 1886)). Courts have recognized just such an interest in RICO actions. Nat'l Mortg. Equity Corp., 636 F. Supp. at 1156 (plaintiff's culpability should not "prohibit [the plaintiff] from bringing an action that otherwise advances RICO's broad anti-racketeering policies.").

Even if Madoff were a participant in the Illegal Scheme, which he is not, "it is particularly important to permit 'litigation among guilty parties [that will serve] to expose their unlawful conduct and render them more easily subject to appropriate civil, administrative, and criminal penalties'" especially here where the Illegal Scheme is vast, sophisticated, and designed to evade detection. Bateman Eichler, 472 U.S. at 315-16 (quoting Kuehnert v. Texstar Corp., 412 F.2d 700, 706, n.3 (5th Cir. 1969)).

There is no danger here of a wealth transfer between bad actors, much less co-conspirators. Madoff will die in prison for his own crimes, not those of Defendants. BLMIS is being liquidated, and any recovery by the Estate will be used to compensate its creditors. See Schacht, 711 F.2d at 1343 (refusing to preclude RICO claims where recovery would not inure to miscreant shareholders); Bagga Enter., Inc. v. Bagga (In re Jamuna Real Estate, LLC), 365 B.R. 540, 559 (Bankr. E.D. Pa. 2007) ("[a]llowing the Trustees to press the RICO claims poses no threat of shifting ill-gotten assets from one conspirator to another.").

CONCLUSION

The Moving Defendants violated RICO to obtain money. Their acts harmed the Estate. The Trustee seeks to redress that harm with this action. Under all applicable law, and in the interest of justice, this action must go forward.

Dated: New York, New York
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/s/ *Timothy S. Pfeifer*

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