

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (LGB)

SIPA LIQUIDATION
(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the
Liquidation of Bernard L. Madoff Investment
Securities LLC, and Bernard L.
Madoff,

Plaintiff,

Adv. Pro. No. 11-02493 (LGB)

v.

ABU DHABI INVESTMENT AUTHORITY,

Defendant.

**ORDER ON REMAND GRANTING IN PART
DEFENDANT'S MOTION TO DISMISS**

Pending before the Court is the order entered by the Honorable Andrew L. Carter, Jr. in the appeal of the Defendant, Abu Dhabi Investment Authority (“ADIA”), to the United States District Court for the Southern District of New York (the “District Court”) in *Picard v. Abu Dhabi Inv. Auth. (In re BLMIS)*, Case No. 22-cv-09911-ALC. Order, ECF¹ No. 147; *see also*

¹ Unless otherwise noted, all citations to “ECF” refer to this Court’s electronic docket refer of Adv. Pro. No. 11-02493-lgb.

Opinion & Order, *Picard v. Abu Dhabi Inv. Auth. (In re BLMIS)*, Case No. 22-cv-09911-ALC, ECF. No. 22 (“Op. & Order”).

I. Jurisdiction

This is an adversary proceeding commenced in this Court, in which the main underlying SIPA proceeding, Adv. Pro. No. 08-01789 (CGM) (the “SIPA Proceeding”), is pending. The SIPA Proceeding was originally brought in the District Court as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC et al.*, No. 08-CV-10791, and has been referred to this Court. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and (e), § 157(b), and 15 U.S.C. § 78eee(b)(2)(A) and (b)(4).

II. Background

The Court assumes familiarity with the background of the BLMIS Ponzi scheme and its SIPA proceeding. *See Picard v. Citibank, N.A. (In re BLMIS)*, 12 F.4th 171, 178–83 (2d Cir. 2021), *cert. denied sub nom. Citibank, N.A. v. Picard*, 142 S. Ct. 1209, 212 L. Ed. 2d 217 (2022).

This adversary proceeding was filed on August 11, 2011. Complaint, ECF No. 1 (“Complaint” or “Compl.”). The Defendant is a sovereign wealth fund responsible for investing assets of the Emirate of Abu Dhabi. *Id.* ¶ 2–4. Via the Complaint, the Trustee seeks to recover \$300,000,000 in subsequent transfers made to the Defendant. *Id.* ¶ 2. The subsequent transfers were derived from investments with BLMIS made by Fairfield Sentry Limited (“Fairfield Sentry”). *Id.* Fairfield Sentry is referred to as “feeder fund” because the intention of the fund was to invest in BLMIS. *Id.* ¶¶ 2, 7.

Following BLMIS’s collapse, the Trustee filed an adversary proceeding against Fairfield Sentry and related defendants to avoid and recover fraudulent transfers of customer property in the amount of approximately \$3 billion. *Id.* ¶¶ 35, 36. In 2011, the Trustee settled with Fairfield

Sentry. *Id.* ¶ 40. As part of the settlement, Fairfield Sentry consented to a judgment in the amount of \$3.054 billion (Consent J., 09-01239-lgb, ECF No. 109) but repaid only \$70 million to the BLMIS customer property estate. The Trustee then commenced a number of adversary proceedings against subsequent transferees like ADIA to recover the approximately \$3 billion in missing customer property. The Trustee alleges that ADIA received approximately \$300,000,000 through two transfers of funds, one in the amount of \$100,000,000 and the other in the amount of \$200,000,000, initially transferred from BLMIS to Fairfield Sentry and subsequently from Fairfield Sentry to ADIA. Compl. ¶ 41, ECF No. 1.

ADIA filed a motion to dismiss the adversary proceeding on May 11, 2022. Motion to Dismiss, ECF No. 109 (“Mot. To Dismiss”). Defendant argued in its Motion to Dismiss that this Court lacks subject matter jurisdiction and personal jurisdiction, that the Complaint fails to state a claim due to the safe harbor provision of the Bankruptcy Code and alleges that ADIA received BLMIS customer property and that the Defendant is protected by the affirmative defense of good faith under Section 550(b). *See* Mem. L., ECF No. 112. After the Plaintiff filed an Opposition to the Motion to Dismiss (“Opp’n Mem.”, ECF No. 114) and the Defendant filed a reply (“Reply”, ECF No. 117), the parties stipulated to waive oral arguments and rest on their papers. (“Stip. and Order”), ECF No. 122.

This Court issued a Memorandum Decision Denying Defendant’s Motion to Dismiss (“Mem. Decision”), finding, *inter alia*, that ADIA is not immune from liability under the Foreign Sovereign Immunities Act (the “FSIA”). Mem. Decision at 8, ECF No. 126. The Court determined that while the FSIA may cover ADIA as a foreign state² (28 U.S.C. §§ 1602–1611),

² The FSIA defines a “foreign state” to include “a political subdivision of a foreign state or an “agency or instrumentality of a foreign state as defined in subsection (b).” 28 U.S.C. § 1603(a). A defendant seeking to assert sovereign immunity under the FSIA must “present a *prima facie* case that it is a foreign state.” *Kensington Int’l Ltd.*

the statutory “commercial activities” exception to the FSIA applied to the claims at issue in this proceeding. Mem. Decision at 8, ECF No. 126. This Court found that the commercial activities exception applied as the Defendant’s acts had a “direct effect” in the United States. Mem. Decision at 8, ECF No. 126. Thus, this Court found it appropriate to exercise subject matter jurisdiction over ADIA under that exception to the FSIA. *Id.* The Court entered an Order Denying ADIA’s Motion to Dismiss (the “MTD Order”), ECF No. 130.

The Defendant appealed this Court’s ruling to the District Court on November 21, 2022. *See* Notice of Appeal, Case No. 22-cv-09911-ALC, ECF No. 1. The District Court issued its Opinion and Order on March 29, 2024, and its Amended Order on June 13, 2024. Op. & Order, Case No. 22-cv-09911, ECF. No. 22; Am. Order, Case No. 22-cv-09911, ECF. No. 25. The District Court affirmed this Court’s denial of ADIA’s Motion to Dismiss as it relates to the Plaintiff’s claim concerning the transfer of \$200,000,000. Op. & Order at 9, Case No. 22-cv-09911, ECF. No. 22 (“It is clear from the undisputed evidentiary record that ADIA’s March 3, 2005 redemption request and associated receipt of funds had a direct effect in the United States . . . The Bankruptcy Court therefore committed harmless error as to this transfer and the denial of dismissal is affirmed in part.”); *see also* Compl. Ex. E, ECF No. 1 (listing alleged subsequent transfers from Fairfield Sentry to ADIA).

The District Court reversed this Court’s denial of the Motion to Dismiss with respect to the claim concerning the transfer of \$100,000,000. *Id.* at 10 (“[T]his Court finds that the Trustee has not met their burden to establish that an exception to ADIA’s sovereign immunity applies and reverses the Bankruptcy Court’s decision in part on those grounds . . .”). In its Amended

v. Itoua, 505 F.3d 147, 153 (2d Cir. 2007). Following that showing, “the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted.” *Cabiri v. Gov’t of the Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999).

Order, the District Court clarified that it neither implicitly nor explicitly directed this Court to order further discovery on the issue of that transfer. Am. Order, Case No. 22-cv-09911, ECF. No. 25 (“The Bankruptcy Court is directed to dismiss all claims arising out of ADIA’s March 2006 redemption.”).

III. Discussion

After a defendant presents a *prima facie* case that it is a foreign state, the plaintiff has the burden to show with evidence that an exception applies to the FSIA’s grant of foreign sovereign immunity to the defendant. *Cabiri v. Gov’t of the Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999). Under the commercial exceptions clause to the FSIA,

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is [i] based . . . upon an act outside the territory of the United States [ii] in connection with a commercial activity of the foreign state elsewhere and [iii] that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). With respect to the third prong of the commercial activities exception, “an effect is direct if it follows as an immediate consequence of the defendant’s . . . activity.” *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 74 (2d Cir. 2010) (quoting *Republic of Argentina v. Weltover*, 504 U.S. 607, 618, (1992)). An effect “need not be substantial or foreseeable” to be direct. *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 108 (2d Cir. 2016) (internal citation omitted). However, it must be legally significant. *Guirlando* 602 F.3d at 77 (“That the money came from a bank account in New York is a fact but one without legal significance to the alleged tort.”).

The District Court has found that the Plaintiff’s allegations concerning the March 2006 redemption request and transfer in the amount of \$100 million are unsupported by “evidence supporting a finding that ADIA received the \$100 million funds into a bank account in the United States as was true in the previous redemption.” Op. & Order at 10, Case No. 22-cv-

09911, ECF. No. 22. As the District Court found, the Trustee has not met its burden of establishing that an exception to the FSIA's grant of sovereign immunity applies with respect to the transfer of \$100 million. *See id.* This Court thus lacks subject matter jurisdiction to hear the Plaintiff's claim for the recovery of Defendant's alleged March 2006 receipt of \$100,000,000. *See* Compl. ¶¶ 44–48, ECF No. 1 (Count One for Recovery of Subsequent Transfers Under 11 U.S.C. §§ 550 and 551); *see also* Compl. Ex. E (listing alleged subsequent transfers from Fairfield Sentry to ADIA).

IV. Conclusion

For the foregoing reasons, in accordance with the District Court's order reversing in part and remanding for further proceedings, Defendant's Motion to Dismiss is granted as to the claim for recovery of \$100,000,000 allegedly received by Defendant in March 2006. The Trustee shall submit a proposed order within fourteen days of the issuance of this decision, directly to chambers (via E-Orders), upon not less than two days' notice to all parties, as required by Local Bankruptcy Rule 9074-1(a). The Trustee may amend the complaint to remove allegations concerning the March 2006 transfer.

Dated: September 16, 2024
New York, New York

/s/ Lisa G. Beckerman
Honorable Lisa G. Beckerman
United States Bankruptcy Judge