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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.	Adv. Pro. No. 08-01789 (LGB) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff, Plaintiff, v. BUREAU OF LABOR INSURANCE and BUREAU OF LABOR FUNDS, Defendants.	Adv. Pro. No. 11-02732 (LGB)

TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE A SECOND AMENDED ANSWER AND AFFIRMATIVE DEFENSES

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Irving H. Picard, as trustee (the "Trustee") for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS"), under the Securities Investor Protection Act, 15 U.S.C. § 78aaa–*lll*, and the chapter 7 estate of Bernard L. Madoff, respectfully submits this memorandum of law and supporting declaration of Nicholas J. Cremona ("Cremona Decl."), in opposition to the Motion for Leave to File a Second Amended Answer and Affirmative Defenses ("Motion" or "Mot.") filed by defendants Bureau of Labor Insurance ("BLI") and Bureau of Labor Funds ("BLF," together with BLI, "Defendants") (ECF Nos. 143–45).

PRELIMINARY STATEMENT

Defendants' Motion is a poorly veiled attempt to overturn this Court's motion to dismiss ruling—issued in October 2012—and to undo the actions that Defendants have taken since then. There are no grounds to grant the Motion, particularly since binding Supreme Court precedent requires denial of the Motion. Accordingly, the Court should deny Defendants' Motion for three independent reasons.

First, Defendants' proposed affirmative defense would be futile. In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* ("*Coughlin*"), the United States Supreme Court held that section 106(a) of the Bankruptcy Code unambiguously abrogates the sovereign immunity of all foreign and domestic governments. 599 U.S. 382, 390 (2023). Section 106(a) provides that "sovereign immunity is abrogated as to a governmental unit" in adversary proceedings that concern §§ 550 and 551, such as this one. 11 U.S.C. § 106(a). The Supreme Court's ruling in *Coughlin* alone provides a basis to deny Defendants' Motion.

Second, Defendants' undue delay in filing the Motion requires its denial. Defendants first requested the Trustee's consent to file an amended answer with a sovereign immunity defense in October 2021, which the Trustee declined. Since that time, Defendants have actively litigated this case and participated in fact discovery. Defendants have now filed this Motion over twelve years

after this Court's ruling, three years after filing an amended answer that eliminated the defense, and sixteen months after the decision in *PIFSS*.[1] This delay forecloses an amendment now. Moreover, Defendants' *PIFSS* and *ADIA*[2] arguments are merely a distraction—nothing in either case excuses Defendants' delay (or, as discussed below, Defendants' voluntary waiver of any FSIA defense). Both cases are also distinguishable. Defendants also erroneously rely on an unauthenticated document that is not properly before the Court on a motion to amend.

Finally, Defendants waived their sovereign immunity defense three years ago. Even though Defendants' February 2013 answer included the defense, Defendants unilaterally filed an amended answer that omitted the defense in June 2022.

STATEMENT OF FACTS

I. Defendants and Their Redemption From Fairfield Sentry

A. Bureau of Labor Insurance and Bureau of Labor Funds

Defendant Bureau of Labor Insurance is an agency of the Republic of China, commonly known as Taiwan. BLI is a political branch of the Taiwanese government formerly responsible for labor safety policies, promotion of social security, and social welfare allowances, as well as handling investments of the Taiwanese Labor Insurance Fund. Declaration of Chung-Chun Tsai in Support of Motion to Dismiss ¶¶ 2, 4, ECF No. 9. Defendant Bureau of Labor Funds[3] was created in 2014 to manage various Taiwanese public sector pension funds, including BLI. BLF now holds custody of BLI. Stipulation and Order, ECF No. 132, at 2.

BLI invested $40 million in Fairfield Sentry Limited, a feeder fund that invested 95% of its assets with BLMIS. BLI first signed a Subscription Agreement with Sentry in January 2007 for shares in the amount of $10,000,000. *See* Declaration of Thomas L. Long in Support of Trustee's

[1] *The Public Inst. for Social Sec. v. Picard*, No. 22-cv-8741 (GHW), 2023 WL 6143985 (S.D.N.Y. Sept. 20, 2023).
[2] *Picard v. Abu Dhabi Inv. Auth.*, No. 22-cv-09911 (ALC), 2024 WL 1348751 (S.D.N.Y. Mar. 29, 2024).
[3] The parties stipulated to add BLF as a defendant to this action on June 6, 2022. ECF No. 132.

Memorandum of Law in Opposition to Motion Dismiss ("Long Decl."), Ex. 3, ECF No. 17-3. Later that same year, in November 2007, BLI invested an additional $30 million in Sentry. Long. Decl., Ex. 6, ECF No. 17-6.

B. BLI's Redemption and BLMIS's Contemporaneous Transfers to Fairfield Sentry

BLI redeemed its entire Sentry investment in August 2008. On July 4, 2008, BLI submitted a redemption request for all its shares in Sentry. Supplemental Declaration of Chung-Chun Tsai, Ex. A, ECF No. 39. One month later, on August 18, Sentry transferred a redemption payment of $42,123,406 to BLI. Complaint, ECF No. 1, Ex. C.

Within days of BLI's redemption request, and within days of BLI's receipt of its redemption from Sentry, BLMIS made significant transfers to Sentry. On July 10, just six days after BLI's redemption request, BLMIS transferred $20 million to Sentry. Compl., ECF No. 1, Ex. B, at 62. Similarly, on September 4, two weeks after Sentry's redemption payment to BLI, BLMIS transferred $120 million to Sentry. *Id.*

II. Defendants' Conduct During This Litigation

A. BLI's Motion to Dismiss Was Denied in its Entirety

On February 3, 2012, BLI moved to dismiss the Complaint, arguing that the Foreign Sovereign Immunities Act ("FSIA") deprives this Court of subject matter jurisdiction and shields BLI from litigation in the United States. Memorandum of Law in Support of Motion to Dismiss, ECF No. 10, at 4–8. On October 11, 2012, United States Bankruptcy Judge Lifland denied the motion in its entirety, holding that "BLI's actions caused a direct effect in the United States by causing a two-way flow of funds to and from New York-based BLMIS . . . ." Memorandum Decision and Order Denying BLI's Motion to Dismiss the Trustee's Complaint, ECF No. 51, at 14. In describing this flow of funds that BLI caused, the Court noted that BLI's redemption request "triggered a transfer of over $42 million (including over $2 million in profit) from BLMIS's

accounts in New York, through New York banks, finally to BLI abroad." *Id.* at 15. The Court held that the commercial activity exception to the FSIA applies and that BLI was not immune from suit in the United States. *Id.* at 11–15.

In February 2013, BLI filed an Answer and Jury Demand that included foreign sovereign immunity as an affirmative defense. ECF No. 54 at 9.

B. Defendants Voluntarily Withdrew any FSIA Defense and Waited Years to File this Motion

In October 2021, BLI—for the first time—sought the Trustee's consent to file an amended answer during a meet-and-confer. Three months later, in January 2022, BLI provided the Trustee with a proposed amended answer. Declaration of Bianca Lin in Support of Defendants' Motion for Leave to File a Second Amended Answer and Affirmative Defenses ("Lin Decl."), Ex. F at 11–13, ECF No. 144-6. BLI later provided the Trustee with a revised draft in March 2022. *Id.* at 1. On April 12, 2022, the Trustee declined to consent to BLI including in its answer any FSIA defenses, citing the Court's denial of BLI's motion to dismiss ten years prior. *Id.*; Lin Decl., Ex. G, ECF No. 144-7. The Trustee stated: "This defense has been *waived*. The court has already found that it has jurisdiction over BLI. It should be removed." *Id.* (emphasis added). Two weeks later, on May 5, BLI wrote back to the Trustee: "[R]egarding your comments to the last draft of the amended answer, we are accepting of all." Cremona Decl., Ex. 1. A month later, on June 8, 2022, Defendants filed the Amended Answer and Jury Demand that intentionally omitted any FSIA defense. ECF No. 133.

Since Defendants filed the amended answer, the United States District Court for the Southern District of New York issued two decisions that Defendants contend are significant to this case. On September 20, 2023, the district court dismissed the Trustee's adversary proceeding against The Public Institution for Social Security based on FSIA grounds. *The Public Inst. for Social Sec. v. Picard*, No. 1:22-cv-8741-GHW, 2023 WL 6143985 (S.D.N.Y. Sept. 20, 2023)

("*PIFSS*"). Six months later, on March 29, 2024, the district court dismissed certain of the Trustee's claims against Abu Dhabi Investment Authority, also on FSIA grounds. *Picard v. Abu Dhabi Inv. Auth.*, No. 22-cv-09911-ALC, 2024 WL 1348751 (S.D.N.Y. Mar. 29, 2024) ("*ADIA*").

On June 5, 2024—several months after the *PIFSS* and *ADIA* decisions—Defendants requested the Trustee's consent to file an amended answer to assert a foreign sovereign immunity defense. Lin Decl., Ex. C at 4, ECF No. 144-3. Defendants cited only *PIFSS* as the reason why the defense was viable. *Id.* The Trustee promptly denied consent to such a filing. *Id.* at 3.

Defendants waited several months to respond to the Trustee's message in June. On September 10, 2024—a year after *PIFSS* and six months after *ADIA*—Defendants again requested the Trustee's consent to an amended answer, this time offering to explicitly stipulate that the Trustee would not waive any argument that the defense should be stricken. *Id.* at 2. Again, the Trustee promptly denied consent. *Id.*

Defendants again waited several months to act after the Trustee's message in September. It was not until December 4, 2024 that Defendants filed the instant Motion.

ARGUMENT

The Court should deny the Motion. Under Rule 15, Defendants' proposed amendment would be futile because Bankruptcy Code § 106 precludes a sovereign immunity defense in a recovery action under Bankruptcy Code § 550. Defendants' undue delay in filing this Motion provides a separate ground for denying the Motion under Rule 15, and their arguments under *PIFSS* and *ADIA* are merely a distraction. Finally, Defendants waived any FSIA defense years ago.

I. Defendants' Motion Fails Under Rule 15

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend shall be granted freely "when justice so requires." *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 46 (2d

Cir. 1983). However, a court "has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007); *see Picard v. ABN AMRO Bank N.V.*, 654 B.R. 224, 234–35 (Bankr. S.D.N.Y. 2023) (denying leave to add affirmative defense due to futility). Here, the Court should deny Defendants' Motion on two independent grounds under Rule 15: futility and undue delay.

A. Supreme Court Precedent Renders Defendants' Proposed Affirmative Defense Futile

Under Rule 15, futility is a "determination, as a matter of law, that proposed amendments would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Pyskaty v. Wide World of Cars, LLC*, 856 F.3d 216, 224–25 (2d Cir. 2017) (quoting *Panther Partners Inc. v. Ikanos Commc'ns, Inc*., 681 F.3d 114, 119 (2d Cir. 2012)). Courts routinely recognize that when "granting leave to amend is unlikely to be productive," it is appropriate to deny leave to amend. *Ruffolo v. Oppenheimer & Co.,* 987 F.2d 129, 131 (2d Cir. 1993) (per curiam).

Here, the Supreme Court's decision in *Coughlin* renders Defendants' proposed affirmative defense futile. In *Coughlin*, the Supreme Court held that section 106(a) of the Bankruptcy Code unambiguously abrogates the sovereign immunity of all foreign governments. 599 U.S. at 390. The Court's ruling in *Coughlin* applies to BLI, a Taiwanese governmental entity.[4]

Section 106(a) provides that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section."

[4] Neither the *PIFSS* nor *ADIA* court addressed *Coughlin*. The Supreme Court issued *Coughlin* on June 15, 2023. In *PIFSS*, the Trustee's brief was filed on June 9, 2023, six days prior to *Coughlin*. *The Public Inst. for Social Sec. v. Picard*, 22-cv-8741 (GHW), ECF No. 17. Although the defendant's reply brief was filed on June 16, 2023 and argued that *Coughlin* would not change the outcome, *id.*, ECF No. 18, the *PIFSS* court stated at argument that it did not "know that [the Bankruptcy Code § 106] issue is before me; in fact, I don't think it is." *Id.*, ECF No. 22. In *ADIA*, the appeal was fully briefed on June 2, 2023, nearly two weeks before *Coughlin*. *Picard v. Abu Dhabi Inv. Auth.*, 22-cv-09911 (ALC) (S.D.N.Y.), ECF No. 15.

11 U.S.C. § 106(a). It then enumerates a list of Code provisions to which the abrogation applies, including, as relevant to this case, sections 548, 550, and 551. *Id.* Section 101(27), in turn, defines 'governmental unit' as:

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."

11 U.S.C. § 101(27). In *Coughlin*, the court applied "traditional tools" of statutory interpretation under its "clear-statement" test to determine whether Congress's abrogation of sovereign immunity under Sections 106(a) and 101(27) was "clearly discernible" from the statute itself. *Id.* at 388. Answering in the affirmative, the court concluded "the Bankruptcy Code *unequivocally* abrogates the sovereign immunity of *any and every government* that possesses the power to assert such immunity." *Id.* (emphasis added); *see Dep't of Agric. Rural Dev. Rural Hous. Serv. V. Kirtz*, 601 U.S. 42, 49 (2024) (Congress "stripp[ed] immunity" from sovereign entities with Bankruptcy Code § 106).

First, the court looked to the plain text of the Code and found that Congress "unmistakably intended to cover *all* governments" in Section 101(27)'s definition" of 'governmental unit.' *Id.* at 390 (emphasis added). The court considered the "strikingly broad" scope of Section 101(27), which includes a comprehensive list of governments that "vary in geographic location, size, and nature." *Id.* at 389. The court also noted that the definition "concludes with a broad catchall phrase, sweeping in 'other foreign or domestic government[s],'" making it "all-encompassing." *Id.* With respect to Section 106(a), the court found it significant that the abrogation of sovereign immunity "plainly applies to 'all governmental unit[s]' as defined by § 101(27)." *Id.* at 390. In other words, "Congress did not cherry-pick certain governments from § 101(27)'s capacious list . . . . Instead,

[it] categorically abrogated the sovereign immunity of *any* governmental unit that might attempt to assert it." *Id.*

Second, the court found the structure of the Bankruptcy Code reinforces what Section 106(a)'s and 101(27)'s plain text conveys. The Code establishes an "orderly and centralized" debt-resolution process, which requires the Code's basic provisions (*e.g.,* those governing automatic stays, discharge of debts, and confirmations of reorganization plans) to generally apply to *all* creditors—"whether or not the creditor is a 'governmental unit.'" *Id.* at 391. Section 106(a)'s abrogation of sovereign immunity is critical to these provisions and the functioning of the bankruptcy process. To the extent there are exceptions—the Court noted these are "finely tuned" within the Code to accommodate "essential" government functions, such as enforcing police and regulatory powers and tax administration. *Id.* at 391–92. The court found "no indication that Congress meant to categorically exclude certain governments" from the Code's "meticulous" and "carefully calibrated" scheme. *Id.* at 392. Applying this reasoning, the Supreme Court in *Coughlin* held that the Bankruptcy Code abrogates sovereign immunity of a Native American Tribe.

This reasoning applies with equal force here. Defendants fall squarely within Section 101(27)'s all-encompassing definition of "governmental unit." Section 106(a)'s abrogation of sovereign immunity, in turn, plainly applies to all "governmental unit[s]," as defined in Section 101(27). And the Trustee's claims here arise under sections 548, 550 and 551, expressly covered in Section 106. Thus, any sovereign immunity Defendants might otherwise enjoy is abrogated here.

The application of the FSIA in this case does not change the calculation. Even though *Coughlin* does not address the FSIA specifically, the Supreme Court's holding that Section 106(a) abrogated sovereign immunity was grounded in a recognition of that Section 106(a) serves a

critical role in the Bankruptcy Code's overall scheme. The Supreme Court was clear that the immunity of all sovereigns is abrogated by Section 106(a), and that includes Defendants here.

Finally, *Coughlin* constitutes a change in the law upon which the Court should rule. Before *Coughlin*, there was some precedent from courts across the country finding the Bankruptcy Code abrogated sovereign immunity. *See In re Tuli*, 172 F.3d 707, 711–12 (9th Cir. 1999) (finding Bankruptcy Code section 106(a) abrogated sovereign immunity of foreign state); *In re RMS Titanic Inc.*, 569 B.R. 825, 834 (M.D. Fla. 2017) (same). But there were also cases holding that FSIA provides the only basis for finding jurisdiction over a foreign sovereign. *See Republic of Argentina v. Weltover, Inc.,* 112 S. Ct. 2160, 2164 (1992) (FSIA provides sole basis for obtaining jurisdiction over foreign state in courts of this country); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-39 (1989) (same); *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) (same). In 2021, the district court noted "the absence of controlling authorities to the jurisdictional issue posed by the intersection of Section 106 and the FSIA. . . ." *In re Kumtor Gold Co*., 21 Civ. 6578 (AKH) 2021 WL 4926014, at *6 (S.D.N.Y. Oct. 21, 2021). The unmistakable language of *Coughlin* resolves any conflict: "The Code unequivocally abrogates the sovereign immunity of all governments, categorically." *Coughlin*, 599 U.S. at 393; *see also Miller v. United States*, 71 F.4th 1247, 1256 (10th Cir. 2023), *cert. granted*, 144 S. Ct. 2678 (2024) (holding that Bankruptcy Code § 106 abrogates sovereign immunity in actions under Bankruptcy Code § 544).

Standing alone, Bankruptcy Code § 106's abrogation of sovereign immunity renders Defendants' affirmative defense futile. Holding otherwise would prejudice the Trustee, as it would force the Trustee to prove in fact and expert discovery that Defendants' actions fall within an exception of the FSIA. Because the Supreme Court has already made clear that no FSIA defense is available to Defendants, allowing Defendants to amend would result in nothing but a waste of time and resources.

B. Defendants Unduly Delayed Filing This Motion

Separately, the Court should also deny the Motion based on Defendants' undue delay. Courts deny leave to amend where the motion is filed after an "inordinate delay," when there is "no satisfactory explanation is made for the delay," and the amendment would prejudice the non-moving party. *Franconero v. UMG Recordings, Inc.*, 542 F. App'x 14, 18 (2d Cir. 2013); *see also Chiaro v. Cnty. of Nassau*, 488 F. App'x 518, 519 (2d Cir. 2012); *Lynch v. Nat'l Prescription Adm'rs., Inc.*, No. 03 CIV. 1303 (GBD), 2019 WL 761194, at *11 (S.D.N.Y. Jan. 31, 2019), *aff'd sub nom*. *Lynch as Tr. of Health & Welfare Fund of Patrolmen's Benevolent Ass'n of City of N.Y. & Retiree Health & Welfare Fund of Patrolmen's Benevolent Ass'n of City of N.Y. v. Nat'l Prescription Adm'rs., Inc.*, 795 F. App'x 68 (2d Cir. 2020). In the context of motions for leave to amend an answer with an additional affirmative defense, courts have held that movants must act at the "earliest possible moment." *Id.* (citing *Strauss v. Douglas Aircraft Co.,* 404 F.2d 1152, 1155 (2d Cir.1968)); *see also Sadhu Singh Hamdard Tr. v. Ajit Newspaper Advert., Mktg. & Commc'ns, Inc.,* No. 04 CV 3503 (CLP), 2009 WL 10701800, at *3 (E.D.N.Y. Jan. 8, 2009), *aff'd*, 394 F. App'x 735 (2d Cir. 2010).

Here, Defendants filed this Motion after a significant delay. Defendants first raised the issue of filing an amended answer with the Trustee in October 2021. At no point did Defendants seek leave from the Court to file an answer that includes the FSIA defense. Now—over three years later and well into fact discovery—Defendants filed this Motion. Defendants' actions constitute an "inordinate delay," *Franconero*, 542 F. App'x at 18, as the Motion was certainly not filed at the "earliest possible moment." *Evans,* 704 F.2d at 47.

Even if the *PIFSS* decision were the "earliest possible moment" that Defendants could have acted—and it was not—there is still an undue delay. The *PIFSS* decision was issued in September 2023, and yet Defendants inexplicably waited fifteen months to file this Motion. And Defendants

had several other opportunities to file this Motion since then, but they continued to delay. The *ADIA* decision was issued in March 2024, and even if that decision were relevant here, Defendants waited nine months to act. The Trustee declined to consent to Defendants' amended answer multiple times over a period—which lasted for several months through September 2024, and yet Defendants waited even longer to file the Motion. Defendants' pattern of behavior constitutes an undue delay. *See View 360 Sols. LLC v. Google, Inc.,* 310 F.R.D. 47, 52–53 (N.D.N.Y. 2015) (finding Defendant's six-month delay warranted denial of its motion to amend).

Defendants have not provided a satisfactory explanation for their delay. *See Franconero*, 542 F. App'x at 18 ("The burden to explain a delay is on the party that seeks leave to amend.") (quoting *MacDraw, Inc. v. CIT Grp. Equipment Financing, Inc.*, 157 F3d. 956, 962 (2d. Cir. 1998)). In fact, Defendants only argue in a footnote at the very end of the Motion that the "protracted procedural history" of this case contributed to their inordinate delay. Mot. at 19 n.6. But the procedural history of this case, protracted or otherwise, is irrelevant. There was no procedural obstacle preventing Defendants from filing the Motion at any time after they first requested the Trustee's consent to include a defense based on the FSIA in October 2021.

Defendants also seem to imply that the Court should ignore their delay by repeatedly distancing the acts of their "new counsel" from those of their "prior counsel." Mot. at 6–7, 9, 19. This is a diversion unsupported by law. Substitution of counsel "does not render all prior history of discovery meaningless nor does it restart the discovery process." *In re Shader*, No. 10-10480, 2011 WL 6739581, at *2 (Bankr. D. Vt. Dec. 16, 2011); *see also D'Alto v. Dahon Cal., Inc.,* 100 F.3d 281, 282 (2d Cir. 1996) (noting that "upon the representation of [new] counsel, [the court] cannot open discovery and start all over again . . . as if this is a new action"); *Freeman v. Harmonia Holdings LLC,* No. 161866/2019, 2022 WL 1093439, at *3 (N.Y. Sup. Ct. Apr. 12, 2022) (finding changing lawyers does not restart discovery). Parties are thus "bound by the actions of their

previously retained counsel." *Benesowitz v. Metro. Life Ins. Co.*, No. 04-CV-805 (TCP), 2009 WL 2196785, at *8 (E.D.N.Y. July 9, 2009); *see Delgado v. Donald J. Trump for President, Inc.*, No. 19CV11764ATKHP, 2024 WL 1468397, at *2 (S.D.N.Y. Mar. 1, 2024) (a client is bound by the consequences of her attorney's actions).

Defendants' undue delay has prejudiced the Trustee. Fact discovery is set to conclude on June 2, 2025, and it should not be prolonged by Defendants' belated assertion of a dismissed defense that is already properly preserved for appeal.

Finally, Defendants' arguments regarding *PIFSS* and *ADIA* are merely a distraction.[5] According to Defendants, *PIFSS* and *ADIA* somehow revive their sovereign immunity defense. They do not. Nothing in *PIFSS* and *ADIA* excuses Defendants' delay (or, as discussed below, Defendants' voluntary waiver of any FSIA defense). Moreover, *PIFSS* and *ADIA* are distinguishable. Unlike in either of those cases, BLMIS transferred funds to Sentry *after* BLI's redemption request on July 10, 2008, and *after* BLI's redemption payment on September 4, 2008. These later-in-time BLMIS transfers are the "critical fact[s]" that were missing from both *PIFSS* and *ADIA* and are the basis for the *PIFSS* court distinguishing the facts of this case in reaching its decision. *PIFSS*, 2023 WL 6143985, at *3 and *7 n.5. Finally, the Court should ignore Defendants' arguments regarding the July 2008 BLMIS transfer because it is based on an unauthenticated document not referenced in the pleadings—the only documents properly before the Court. *Taylor v. City of N.Y.*, No. 18-CV-5500 (KAM) (ST), 2021 WL 848966, at *4 (E.D.N.Y. Mar. 4, 2021) ("At the Rule 15 motion to amend stage, the court is restricted by the limitations of a Rule 12(b)(6)

[5] The Trustee maintains that *PIFSS* and *ADIA* were wrongly decided. First, both cases fail to recognize the economic realities of feeder fund operations. Second, BLI's subscription into Sentry is part of the relevant "act" that must cause a direct effect in the United States. Third, the second clause of the commercial activity exception to the FSIA applies here because certain of Defendants' acts were "performed in the United States in connection with a commercial activity," given that the Second Circuit has held that all transfers stemming from BLMIS's bank account are, by definition, domestic activity. *See In re Picard*, 917 F.3d 85, 100 (2d Cir. 2019).

inquiry and may not consider outside exhibits without converting the motion into a motion for summary judgment.").

II. Defendants Waived Their FSIA Defense Three Years Ago

The Court should also deny the Motion because Defendants waived the right to assert the defense at the trial court level three years ago when they filed an amended answer that omitted the FSIA defense.

The FSIA establishes a framework for federal courts to exercise jurisdiction over a foreign state. 28 U.S.C. § 1602. Under the FSIA, foreign states are immune from the jurisdiction of United States courts, unless a specified exception applies. *Id*. § 1604*; Cap. Ventures Int'l v. Republic of Argentina*, 552 F.3d 289, 293 (2d Cir. 2009). FSIA's waiver exception provides that a foreign state may waive immunity "either explicitly or by implication." *Id*. § 1605(a)(1). Both explicit and implied waivers must be clear, unmistakable, and unambiguous. Here, Defendants waived sovereign immunity both explicitly and implicitly.

To explicitly waive sovereign immunity, the FSIA does not require "magic words" like "waiver" or "immunity" to effect explicit waiver. *Mohammad Hilmi Nassif & Partners v. Republic of Iraq*, No. 17-CV-2193 (KBJ), 2020 WL 1444918, at *13 (D.D.C. Mar. 25, 2020). Instead, the FSIA only requires that explicit waiver be made in a "definite and unambiguous manner; unequivocally; expressly; clearly; plainly." *Id.* (quoting *Explicitly*, Oxford English Dictionary (OED Third Edition 2016); *see* 28 U.S.C. § 1605(a)(1); *see also Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc*., 179 F.3d 1279 (11th Cir. 1999) (finding that the sovereign entity's "affidavit waives immunity completely and unambiguously").

Here, BLI explicitly waived sovereign immunity. In early 2022, when Defendants sought the Trustee's consent to file an amended answer with an FSIA defense, the Trustee was very clear why he did not consent: "This defense has been *waived*. The court has already found that it has

jurisdiction over BLI. It should be removed." Lin Decl., Ex. G (ECF No. 144-7). In response, Defendants were equally clear: "[R]egarding your comments to the last draft of the amended answer, *we are accepting of all*." Cremona Decl., Ex. 1 (emphasis added). Defendant's acceptance of the Trustee's position was definite, unambiguous, unequivocal, clear, and plain, and ultimately confirmed by their filing an answer that removed any affirmative FSIA defense.

Turning to implicit waiver, courts have recognized that failure to assert sovereign immunity defense in a responsive pleading represents a "conscious decision [by the sovereign] to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so." *Ashraf-Hassan v. Embassy of France in the United States*, 40 F. Supp. 3d 94, 101 (D.D.C. 2014), *aff'd sub nom. Ashraf-Hassan v. Embassy of France*, in the U.S., 610 F. App'x 3 (D.C. Cir. 2015). A litigant thus may waive sovereign immunity by "fil[ing] a responsive pleading in an action without raising the defense." H.R.Rep. No. 94–1487, at 18 (1976).

Here, Defendants' chose to file the Amended Answer without an FSIA defense. This was a "conscious decision" on the Defendants' part. *See Ashraf-Hassan*, 40 F. Supp. 3d at 101. This "conscious decision" is unmistakable because, as discussed above, Defendants reduced their "accept[ance] of the Trustee's position on the issue to writing. Cremona Decl., Ex. 1. In this regard, Defendants' reliance on *Drexel Burnham Lambert Grp. Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317 (2d Cir. 1993) is misguided. In *Drexel*, the foreign sovereign filed an amended answer that omitted the sovereign immunity defense. The court held that this was not enough to find waiver. *Id.* at 325–26. But in *Drexel*, the foreign sovereign did not expressly agree with the plaintiff to remove the defense, as Defendants did here.

CONCLUSION

Defendants' Motion is futile because the Supreme Court has made clear that Bankruptcy Code § 106 abrogates sovereign immunity. Defendants also unduly delayed filing this Motion, providing an independent basis for denying the Motion under Rule 15, and any arguments under *PIFSS* and *ADIA* are merely a distraction. Finally, Defendants voluntarily waived any sovereign immunity defense. Accordingly, the Court should deny the Motion.

Date: New York, New York
January 24, 2025

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