

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
In re:	:
	:
BERNARD L. MADOFF INVESTMENT	:
SECURITIES LLC,	:
	:
Debtor.	:
-----X	
IRVING H. PICARD, Trustee for the Liquidation	:
of Bernard L. Madoff Investment Securities LLC,	:
	:
Plaintiff,	:
	:
FEDERICO CERETTI, et al.,	:
	:
Defendants.	:
-----X	

Case No. 08-99000 (SMB)
Adv. Proc. No. 08-01789 (SMB)
SIPA LIQUIDATION

Adv. Proc. No. 09-01161 (SMB)

**MEMORANDUM DECISION GRANTING IN PART AND
DENYING IN PART DEFENDANT KINGATE GLOBAL
FUND, LTD.’S AND KINGATE EURO FUND LTD.’S
MOTIONS TO DISMISS THE FOURTH AMENDED COMPLAINT**

A P P E A R A N C E S:

BAKER & HOSTETLER LLP
*Attorneys for Plaintiff, Irving H. Picard,
Trustee for the Liquidation of
Bernard L. Madoff Investment Securities LLC*
45 Rockefeller Plaza
New York, NY 10111

Anthony M. Gruppuso, Esq.
Marc E. Hirschfield, Esq.
Geraldine E. Ponto, Esq.
David J. Sheehan, Esq.
Michelle R. Usitalo, Esq.
Thomas M. Wearsch, Esq.
Gonzalo S. Zeballos, Esq.
Of Counsel

QUINN EMANUEL URQUHART & SULLIVAN, LLP
*Attorneys for Joint Liquidators of Kingate Global Fund
Ltd. and Kingate Euro Fund Ltd.*
51 Madison Avenue, 22nd Floor
New York, NY 10010

Susheel Kirpalani, Esq.
Rex Lee, Esq.
Robert S. Loigman, Esq.
Xochitl S. Strohbehn, Esq.
Of Counsel

STUART M. BERNSTEIN
United States Bankruptcy Judge:

Kingate Global Fund, Ltd. (“Kingate Global”) and Kingate Euro Fund, Ltd. (“Kingate Euro,” and with Kingate Global, the “Funds” or the “Kingate Funds”) were Madoff feeder funds that received transfers aggregating \$825 million from Bernard L. Madoff Investment Securities LLC (“BLMIS”) within six years of the filing date of the BLMIS liquidation proceeding. The BLMIS trustee, Irving H. Picard (the “Trustee”), has sued the Kingate Funds as initial transferees and the other defendants as subsequent transferees to avoid and recover the transfers.

The Joint Liquidators of the Kingate Funds (the “Movants”) have moved to dismiss Counts I through VIII (the “Avoidance Claims”), Counts X and XII (the “Disallowance Claims”) and Count XI (the “Equitable Subordination Claim”) asserted in the Fourth Amended Complaint, dated, Mar.17, 2014 (“FAC”) (ECF Doc. # 100). For the reasons that follow, Counts X and XII are dismissed, and the motion is otherwise denied.

BACKGROUND

A. Madoff and BLMIS¹

The background information is taken from the well-pleaded factual allegations of the FAC and other information that the Court may consider on a motion to dismiss for failure to state a claim. Bernard L. Madoff, through BLMIS, operated a Ponzi scheme inducing investors to open discretionary trading accounts with BLMIS for the ostensible purpose of buying and selling securities. Madoff professed to engage in an investment strategy known as the “split-strike conversion strategy,” or SSC Strategy, through which he purported to invest in a basket of stocks within the Standard & Poor’s 100 Index (“S&P 100 Index”) that was intended to mimic the S&P 100 Index. (¶ 25.)² Supposedly, he would strategically time the purchases and sales, and at times, the funds would be out of the market and completely invested in U.S. Treasury securities. (¶ 25.) As a hedge, BLMIS would supposedly sell call options and buy put options on the S&P 100 Index. This is commonly referred to as a “collar.” (¶ 26.)

None of this actually happened. No securities were purchased or sold, and instead, BLMIS used the money invested by BLMIS customers to make distributions to other BLMIS customers. (¶ 28.)

Madoff was arrested on December 11, 2008 (the “Filing Date”). (¶ 13.) Upon application by the Securities Investor Protection Corporation (“SIPC”) made pursuant to the Securities Investor Protection Act of 1970 (“SIPA”), 15 U.S.C. §§ 78aaa, *et seq.*, the District Court appointed Irving H. Picard, Esq. as Trustee for BLMIS, and removed the case to this

¹ Headings are derived from the FAC. They are descriptive only, and do not necessarily imply the Court’s views of the allegations.

² The parenthetical notation “(¶ ___)” refers to the paragraphs in the FAC.

Court. (¶¶ 15-16.) Madoff pleaded guilty on March 12, 2009 to an eleven count criminal information, admitting he “operated a Ponzi scheme through the investment advisory side of [BLMIS].”

B. The Defendants

There are many defendants but the following discussion is limited to those who are germane to the Movants’ motion.

1. Ceretti and Grosso

Frederico Ceretti and Carlo Grosso are Italian nationals residing in the United Kingdom. (¶¶ 32-33.)

2. The Kingate Funds

Ceretti and Grosso formed the Kingate Funds. (¶ 2.) Both are British Virgin Islands (“BVI”) companies with addresses registered in BVI. (¶¶ 38, 40.) Kingate Global opened an account with BLMIS in March 1994; Kingate Euro opened an account with BLMIS as a sub-fund of Kingate Global on January 1, 1996. (¶¶ 39, 41.) The Kingate Funds are in liquidation proceedings in BVI. (¶ 43.)

BLMIS transferred the following approximate amounts to the Kingate Funds:

Fund	Transfers within six years of the Filing Date (\$)	Transfers within two years of the Filing Date (\$)	Transfers within ninety days of the Filing Date (\$)
Kingate Global	360,000,000	150,000,000	100,000,000
Kingate Euro	465,000,000	245,000,000	155,000,000

Despite these transfers, the Kingate Funds’ deposits exceeded their withdrawals. Kingate Global’s net equity as computed by the Trustee is \$578,862,952, (FAC, Ex. B, p. 25 of 25), and

Kingate Euro's net equity is \$220,885,142. (*Id.*, Ex. B, p. 23 of 23.) In total, they lost nearly \$800 million investing in BLMIS.

3. The Management Defendants

Grosso formed FIM Limited, a London asset management company, in 1981. (¶¶ 35, 49.) Ceretti and Grosso formed FIM Advisers, a London limited liability partnership, in 2004, where Ceretti serves as chief executive officer and Grosso serves as executive chairman and chief investment officer. (¶¶ 36, 50.) FIM Limited and FIM Advisers are referred to collectively as "FIM."

Ceretti and Grosso formed Kingate Management Limited ("Kingate Management") under the laws of Bermuda in 1994 to manage the Kingate Funds, and Kingate Management then appointed FIM, among other things, to advise and consult with Kingate Management concerning the Kingate Funds. (¶¶ 4-5, 44, 46, 51-53, 110, 112.) FIM acted as agent for Kingate Management, and Kingate Management acted as agent for the Kingate Funds. (¶ 83.) Between April 23, 2001 and 2005 (when it was replaced by FIM Advisers), FIM Limited served as a non-exclusive distributor for the Kingate Funds, identifying and soliciting potential shareholders. (¶ 112.) FIM and Kingate Management are referred to collectively as the "Management Defendants."

Kingate Management is in liquidation in Bermuda. (¶ 48.)

4. The Administrator

Citi Hedge, formerly known as BISYS Hedge Fund Services Limited ("BISYS") and Hemisphere Management Limited ("Hemisphere"), is a Bermuda corporation. (¶ 72.)

Christopher Wetherhill ("Wetherhill") founded Hemisphere and was its chief executive officer

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.