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2  
3 IN RE: BERNARD L. MADOFF INVESTMENT SECURITIES LLC,  
4  
5 Debtor.  
6

7 - - - - - x  
8  
9 IRVING H. PICARD,  
10  
11 Plaintiff-Appellant,  
12

13 and

14  
15 SECURITIES INVESTOR PROTECTION CORPORATION,  
16  
17 Intervenor,  
18

19 - v.-  
20

21 UBS FUND SERVICES (LUXEMBOURG) SA, ACCESS INTERNATIONAL  
22 ADVISORS LLC, ACCESS INTERNATIONAL ADVISORS EUROPE LIMITED,  
23 ACCESS INTERNATIONAL ADVISORS LTD., ACCESS PARTNERS (SUISSE)  
24 SA, ACCESS MANAGEMENT LUXEMBOURG SA, as represented by its  
25 Liquidator MAITRE FERDINAND ENTRINGER, FKA ACCESS  
26 INTERNATIONAL ADVISORS LUXEMBOURG SA, ACCESS PARTNERS SA, as  
27 represented by its Liquidator MAITRE FERDINAND ENTRINGER,  
28 PATRICK LITTAYE, CLAUDINE MAGON DE LA VILLEHUCHET, in her  
29 capacity as Executrix under the WILL OF THIERRY MAGON DE LA  
30 VILLEHUCHET (AKA Rene Thierry de la Villehuchet),  
31 individually and as the sole beneficiary under the WILL OF  
32 THIERRY MAGON DE LA VILLEHUCHET (AKA Rene Thierry de la  
33 Villehuchet), AKA CLAUDINE DE LA VILLEHUCHET, PIERRE  
34 DELANDMETER, THEODORE DUMBAULD, LUXALPHA SICA V, as  
35 represented by its Liquidators MAITRE ALAIN RUKAVINA and  
36 PAUL LAPLUME, ROGER HARTMANN, RALF SHROETER, RENE EGGER,  
37 ALAIN HONDEQUIN, HERMANN KRANZ, BERNARD STIEHL, GROUPEMENT  
38 FINANCIER LTD., UBS AG, UBS (LUXEMBOURG) SA, MAITRE ALAIN  
39 RUKAVINA, in his capacity as liquidator and representative  
40 of LUXALPHA SICA V, PAUL LAPLUME, in his capacity as  
41 liquidator and representative of LUXALPHA SICA V, UBS THIRD  
42 PARTY MANAGEMENT COMPANY SA,  
43

44 Defendants-Appellees.

1 - - - - - x

2  
3 IN RE: BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

4  
5 Debtor.

6  
7 - - - - - x

8  
9 IRVING H. PICARD,

10  
11 Plaintiff-Appellant,

12

13 - v.-

14

15 HSBC BANK PLC, HSBC SECURITIES SERVICES (LUXEMBOURG) S.A.,  
16 HSBC BANK BERMUDA LIMITED, HSBC FUND SERVICES (LUXEMBOURG)  
17 S.A., HSBC PRIVATE BANK (SUISSE) S.A., HSBC PRIVATE BANKING  
18 HOLDINGS (SUISSE) S.A., HSBC BANK (CAYMAN) LIMITED, HSBC  
19 SECURITIES SERVICES (BERMUDA) LIMITED, HSBC BANK USA, N.A.,  
20 HSBC INSTITUTIONAL TRUST SERVICES (BERMUDA) LIMITED, HSBC  
21 SECURITIES SERVICES (IRELAND) LIMITED, HSBC INSTITUTIONAL  
22 TRUST SERVICES (IRELAND) LIMITED, HSBC HOLDINGS PLC,  
23 UNICREDIT S.p.A., PIONEER ALTERNATIVE INVESTMENT MANAGEMENT  
24 LIMITED, UNICREDIT BANK AUSTRIA AG, ALPHA PRIME FUND  
25 LIMITED,

26  
27 Defendants-Appellees,

28  
29 and

30  
31 SECURITIES INVESTOR PROTECTION CORPORATION,

32  
33 Intervenor.

34

35 - - - - - x

36  
37 IN RE: BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

38  
39 Debtor.

40

41 - - - - - x

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1 IRVING H. PICARD,

2  
3 Plaintiff-Appellant,

4  
5 - v.-

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7 HSBC BANK PLC, HSBC SECURITIES SERVICES (LUXEMBOURG) S.A.,  
8 HSBC BANK BERMUDA LIMITED, HSBC PRIVATE BANK (SUISSE) S.A.,  
9 HSBC PRIVATE BANKING HOLDINGS (SUISSE) S.A., HSBC BANK  
10 (CAYMAN) LIMITED, HSBC SECURITIES SERVICES (BERMUDA)  
11 LIMITED, HSBC BANK USA, N.A., HSBC INSTITUTIONAL TRUST  
12 SERVICES (BERMUDA) LIMITED, HSBC SECURITIES SERVICES  
13 (IRELAND) LIMITED, HSBC INSTITUTIONAL TRUST SERVICES  
14 (IRELAND) LIMITED, HSBC HOLDINGS PLC, HSBC FUND SERVICES  
15 (LUXEMBOURG) S.A.,

16  
17 Defendants-Appellees,

18  
19 SECURITIES INVESTOR PROTECTION CORPORATION,

20  
21 Intervenor.

22  
23 - - - - - x  
24

25 Before: JACOBS, Chief Judge, WINTER and CARNEY,  
26 Circuit Judges.  
27

28 A trustee appointed pursuant to the Securities Investor  
29 Protection Act appeals from the dismissal of his claims  
30 brought on behalf of the debtor and the debtor's customers,  
31 asserting that various financial institutions and other  
32 defendants aided and abetted the debtor's fraud. The United  
33 States District Court for the Southern District of New York  
34 (McMahon and Rakoff, JJ.) held that the claims were barred  
35 by the doctrine of in pari delicto and that the trustee  
36 lacked standing to pursue claims on behalf of customers. We  
37 affirm.

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23 Chase & Co., et al.  
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39 Appellees UniCredit S.p.A. and  
40 Pioneer Alternative Investment  
41 Management Ltd.  
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13 LLC, et al.

14  
15 Brett S. Moore, Porzio Bromberg  
16 & Newman P.C., New York, New  
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18 Luxalpha Sicav, et al.

19  
20 Robert Knuts, Park & Jensen LLP,  
21 New York, New York for  
22 Defendant-Appellee Theodore  
23 Dumbauld.

24  
25  
26 DENNIS JACOBS, Chief Judge:

27 Irving Picard ("Picard" or the "Trustee") sues in his  
28 capacity as Trustee under the Securities Investor Protection  
29 Act ("SIPA") on behalf of victims in the multi-billion-  
30 dollar Ponzi scheme worked by Bernard Madoff. The four  
31 actions presently before this Court allege that numerous  
32 major financial institutions aided and abetted the fraud,  
33 collecting steep fees while ignoring blatant warning signs.  
34 In summary, the complaints allege that, when the Defendants  
35 were confronted with evidence of Madoff's illegitimate

1 scheme, their banking fees gave incentive to look away, or  
2 at least caused a failure to perform due diligence that  
3 would have revealed the fraud. The Trustee asserts claims  
4 for unjust enrichment, breach of fiduciary duty, aiding and  
5 abetting fraud, and negligence, among others. The Trustee's  
6 position is supported by the Securities Investor Protection  
7 Corporation ("SIPC"), a statutorily created nonprofit  
8 corporation consisting of registered broker-dealers and  
9 members of national securities exchanges, which intervened  
10 to recover some or all of the approximately \$800 million it  
11 advanced to victims.

12 As we will explain, the doctrine of in pari delicto  
13 bars the Trustee (who stands in Madoff's shoes) from  
14 asserting claims directly against the Defendants on behalf  
15 of the *estate* for wrongdoing in which Madoff (to say the  
16 least) participated. The claim for contribution is likewise  
17 unfounded, as SIPA provides no such right. The decisive  
18 issue, then, is whether the Trustee has standing to pursue  
19 the common law claims on behalf of Madoff's *customers*. Two  
20 thorough well-reasoned opinions by the district courts held  
21 that he does not. See Picard v. HSBC Bank PLC, 454 B.R. 25  
22 (S.D.N.Y. 2011) (Rakoff, J.); Picard v. JPMorgan Chase &  
23 Co., 460 B.R. 84 (S.D.N.Y. 2011) (McMahon, J.).

1           Our holding relies on a rooted principle of standing: A  
2 party must "assert his own legal rights and interests, and  
3 cannot rest his claim to relief on the legal rights or  
4 interests of third parties." Warth v. Seldin, 422 U.S. 490,  
5 499 (1975). This prudential limitation has been  
6 consistently applied in the bankruptcy context to bar suits  
7 brought by trustees on behalf of creditors. See, e.g.,  
8 Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416  
9 (1972); Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d  
10 114, 118 (2d Cir. 1991).

11           Picard offers two theories for why a SIPA liquidation  
12 is a different creature entirely, and why therefore a SIPA  
13 trustee enjoys third-party standing: (1) He is acting as a  
14 bailee of customer property and therefore can pursue actions  
15 on customers' behalf to recover such property; and (2) he is  
16 enforcing SIPC's rights of equitable and statutory  
17 subrogation to recoup funds advanced to Madoff's customers.  
18 Neither is compelling. Although a SIPA liquidation is not a  
19 traditional bankruptcy, a SIPA trustee is vested with the  
20 "same powers and title with respect to the debtor and the  
21 property of the debtor . . . as a trustee in a case under  
22 Title 11." 15 U.S.C. § 78fff-1(a). At best, SIPA is silent



1 as to the questions presented here. And analogies to the  
2 law of bailment and the law of subrogation are inapt and  
3 unconvincing.<sup>1</sup>

#### 4 5 **BACKGROUND**

6 In December 2008, federal agents arrested Bernard L.  
7 Madoff, who had conducted the largest Ponzi scheme yet  
8 uncovered. Madoff purported to employ a "split-strike  
9 conversion strategy" that involved buying S&P 100 stocks and  
10 hedging through the use of options. In reality, he engaged  
11 in no securities transactions at all.<sup>2</sup>

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<sup>1</sup> The Defendants also argue that the Trustee has not met constitutional standing requirements, violates the Securities Litigation Uniform Standards Act, and fails to plead with particularity SIPC's purported subrogation claims. Given our holding, we decline to address these arguments.

<sup>2</sup> Although Madoff simply appropriated his clients' money without ever purchasing securities on their behalf, we have held that Madoff's victims are nonetheless "customers" under the Act. See In re Bernard L. Madoff Inv. Sec. LLC, 654 F.3d 229, 236 (2d Cir. 2011) ("SIPA . . . ensur[es] that claimants who deposited cash with a broker for the purpose of purchasing securities, are treated as customers with claims for securities. This is so because the critical aspect of the 'customer' definition is the entrustment of cash or securities to the broker-dealer *for the purposes of trading securities.*") (internal citations and quotation marks omitted), cert. denied, 133 S. Ct. 25 (2012).

1 In March 2009, Madoff pleaded guilty to securities  
2 fraud and admitted that he had used his brokerage firm,  
3 Bernard L. Madoff Investment Securities LLC ("BLMIS"), as a  
4 vast Ponzi scheme. The details of Madoff's fraud have been  
5 recounted many times. See, e.g., In re Bernard L. Madoff  
6 Inv. Sec. LLC, 654 F.3d 229, 231-32 (2d Cir. 2011), cert.  
7 denied, 133 S. Ct. 25 (2012); In re Bernard L. Madoff Inv.  
8 Sec. LLC, 424 B.R. 122, 126-32 (Bankr. S.D.N.Y. 2010).

9 Following Madoff's arrest, SIPA filed an application  
10 under SIPA, 15 U.S.C. § 78eee(a)(4)(B), asserting that BLMIS  
11 required protection. The district court appointed Picard as  
12 the firm's Trustee and referred the case to the bankruptcy  
13 court.

14 SIPA was enacted in 1970 to speed the distribution of  
15 "customer property" back to investors following a firm's  
16 collapse.<sup>3</sup> Customer property is cash and securities held  
17 separately from the general estate of the failed brokerage  
18 firm. "SIPA serves dual purposes: to protect investors, and  
19 to protect the securities market as a whole." In re Bernard  
20 L. Madoff Inv. Sec. LLC, 654 F.3d at 235. A SIPA

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<sup>3</sup> For a succinct overview of the statute's history, see  
Securities Investor Protection Corp. v. BDO Seidman, LLP, 49  
F. Supp. 2d 644, 649 (S.D.N.Y. 1999).

1 liquidation confers priority on customer claims by an  
2 expeditious alternative to a traditional bankruptcy  
3 proceeding. Under SIPA, each customer shares ratably in the  
4 fund of customer property according to the customer's "net  
5 equity."

6 If (as is often the case) the assets are not enough to  
7 satisfy all net equity claims, SIPC advances money (up to  
8 \$500,000 per customer) to the SIPA trustee, who is charged  
9 with assessing customer claims and making the ratable  
10 distributions. At the time of this appeal, SIPC had  
11 advanced approximately \$800 million.

12 A trustee also has authority to investigate the  
13 circumstances surrounding the insolvency and to recover and  
14 distribute any remaining funds to creditors. Picard alleges  
15 that his investigation has uncovered evidence of wrongdoing  
16 by third parties who aided and abetted Madoff, and seeks to  
17 replenish the fund of customer property by taking action  
18 against various financial institutions that serviced BLMIS.

19 Picard presses claims against JPMorgan Chase & Co., UBS  
20 AG, UniCredit Bank Austria AG, HSBC Bank plc, and affiliated  
21 persons and entities. The allegations against each are  
22 summarized one by one. We distill the detailed allegations

1 from the consolidated complaints, and recount only the  
2 background needed to understand our analysis. At this stage  
3 of the litigation, the allegations are assumed to be true.  
4 See Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 88 (2d Cir.  
5 2009).

6 **JPMorgan**. Madoff maintained a checking account at  
7 JPMorgan Chase & Co. ("JPMorgan")<sup>4</sup> for more than twenty  
8 years, beginning in 1986. In the years prior to BLMIS's  
9 bankruptcy, JPMorgan collected an estimated half billion  
10 dollars in fees, interest payments, and revenue from BLMIS.  
11 The Trustee alleges that JPMorgan was "at the very center"  
12 of Madoff's fraud and was "thoroughly complicit" in it. A  
13 662 ¶ 1.<sup>5</sup> Madoff's primary account with JPMorgan, the "703  
14 Account," was where hundreds of billions of dollars of  
15 customer money were "commingled and ultimately washed." A  
16 663 ¶ 2. The customer funds deposited into the 703 Account  
17 for "split-strike" securities transactions were instead  
18 funneled to other customers to sustain the illusion of large  
19 and reliable returns on investment.

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<sup>4</sup> Throughout this brief, "JPMorgan" refers to the four JPMorgan defendants: JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and J.P. Morgan Securities Ltd.

<sup>5</sup> Record citations refer to the joint appendix filed in the action under discussion.

1           The 703 Account was a retail checking account, not a  
2 commercial account. Billions of dollars from thousands of  
3 investors were deposited without being segregated or  
4 transferred to separate sub-accounts. These accounts  
5 exhibited, on their face, a "glaring absence of securities  
6 activity." A 714 ¶ 190. At the same time, numerous multi-  
7 million-dollar checks and wire transfers having no apparent  
8 business purpose were exchanged between Madoff and his close  
9 friend, Norman Levy (now dead).

10           In 2006, due diligence conducted by JPMorgan revealed  
11 strong and steady yields by Madoff's feeder funds during a  
12 time when the S&P 100 dropped thirty percent. As one money  
13 manager later acknowledged, that was too good to be true.  
14 In June 2007, JPMorgan's Chief Risk Officer John Hogan  
15 learned at a lunch with JPMorgan money manager Matt Zames  
16 that "there is a well-known cloud over the head of Madoff  
17 and that his returns are speculated to be part of a [P]onzi  
18 scheme." A 695 ¶ 119. Hogan asked a junior analyst to run  
19 a Google search on Madoff, and made no further inquiries  
20 when the search yielded no hard evidence.

21           Faced with "numerous indications of Madoff's fraud," in  
22 the fall of 2008 JPMorgan redeemed \$276 million of its

1 investments in Madoff's feeder funds. A 705 ¶¶ 156-60; A  
2 710 ¶ 178. But the company failed to tip off regulators or  
3 other investors. Though JPMorgan was uniquely positioned to  
4 put an end to Madoff's fraud, it quietly continued  
5 collecting its large fees.

6 **UBS and Access.** Defendants UBS AG<sup>6</sup> ("UBS") and Access  
7 International Advisors LLC<sup>7</sup> ("Access") are sued for aiding  
8 and abetting Madoff's fraud by creating feeder funds and  
9 collecting investments from abroad. UBS acted as sponsor,  
10 manager, administrator, custodian, and primary banker of the  
11 funds. UBS reaped at least \$80 million in fees as it  
12 facilitated investments in BLMIS, despite clear indicia of  
13 fraud. The "prestigious name" of UBS was used "to  
14 legitimize and attract money to Madoff's fraud," but UBS

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<sup>6</sup> "UBS" includes UBS AG, UBS (Luxembourg) S.A., UBS Fund Services (Luxembourg) S.A., UBS Third Party Management Company S.A., Roger Hartmann, Ralf Schroter, Rene Egger, Bernd Stiehl, Alain Hondequin, and Hermann Kranz.

<sup>7</sup> "Access" includes Access International Advisors LLC, Access International Advisors Europe Limited, Access International Advisors Ltd., Access Partners (Suisse) S.A., Access Management Luxembourg S.A., Access Partners S.A., Patrick Littaye, Claudine Magnon de la Villehuchet (in her capacities as Executrix and sole beneficiary of the Will of Thierry Magnon de la Villehuchet), Pierre Delandmeter, and Theodore Dumbauld. The Trustee also sues feeder funds created by UBS and Access such as Defendants Luxalpha SICA V and Groupement.

1 agreed to "look the other way and to pretend that they were  
2 truly ensuring the existence of assets and trades when in  
3 fact they were not and never did." A 916 ¶ 5.

4 UBS observed but ignored Madoff's lack of transparency  
5 and his uncanny ability to generate consistently high  
6 returns, except insofar as UBS declined to invest its own  
7 money in BLMIS or endorse Madoff's funds to its clients.  
8 In 2009, the Luxembourg regulator, the Commission de  
9 Surveillance du Secteur Financier, indicated that the  
10 failure of UBS to identify Madoff as a possible fraud was a  
11 violation of Luxembourg law.

12 Access was also alerted to Madoff's suspicious  
13 investment activities. In 2006, internal managers at Access  
14 became worried about the volume of options trades being  
15 reported by Madoff, and hired an independent consultant to  
16 investigate. The consultant concluded that Madoff could not  
17 possibly have executed the volume of options or equities  
18 trades he reported, and that his trading revealed "either  
19 extremely sloppy errors or serious omissions" that suggest  
20 he "doesn't really understand the costs of the option  
21 strategy." A 977 ¶ 218 (emphasis removed). Access  
22 concealed the consultant's findings and continued active

1 recruitment of investors for Madoff's feeder funds in order  
2 to keep churning its fees.

3 Unicredit. Madoff's fraud drew billions from abroad.  
4 With the help of UniCredit Bank Austria AG ("Bank Austria")  
5 and 20:20 Medici AG ("Bank Medici"), one Sonja Kohn  
6 established several Madoff feeder funds (the "Medici  
7 Funds"). Together, they funneled nearly \$3 billion into  
8 BLMIS. UniCredit S.p.A. and its two subsidiaries, Pioneer  
9 Alternative Investment Management Limited ("Pioneer") and  
10 Bank Austria (collectively, the "UniCredit entities"),  
11 helped to promote the Medici Funds and thereby facilitated  
12 the fraud.

13 The UniCredit entities and their affiliates made a lot  
14 of money servicing the Medici funds: Bank Medici took more  
15 than \$15 million in fees; and BA Worldwide, more than \$68  
16 million. The UniCredit entities were well aware that  
17 Madoff's returns were highly suspicious, and that the extent  
18 of BLMIS's trading activities was facially impossible. Yet  
19 they continued to aggressively market the Madoff feeder  
20 funds to new customers while purporting to provide  
21 oversight. Among the signs overlooked by the UniCredit  
22 entities were Madoff's failure to identify counterparties to



1 BLMIS's options transactions, BLMIS's atypical fee  
2 structure, and Madoff's impossibly high volume of  
3 transactions. Shortly after Madoff's arrest, a senior  
4 research analyst at Pioneer wrote, "[w]e should be the  
5 professionals protecting investors from this fraud . . .  
6 [but] there is not one [due diligence] report in the files  
7 except for one in May 2005." A 136 ¶ 314 (brackets in  
8 original).

9 **HSBC.** HSBC Bank plc ("HSBC")<sup>8</sup> established Madoff  
10 feeder funds (at least eighteen in seven different  
11 countries) that injected capital into the Ponzi scheme while  
12 ignoring obvious warning signs. As custodian and  
13 administrator of the funds, HSBC was required to hold the  
14 fund assets and handle day-to-day operations. HSBC also  
15 created derivative products, such as notes and swaps, to  
16 increase the flow of investment. These funds fed at least

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<sup>8</sup> The HSBC Defendants include HSBC Bank plc, HSBC Holdings plc, HSBC Securities Services (Luxembourg) S.A., HSBC Institutional Trust Services (Ireland) Limited, HSBC Securities Services (Ireland) Limited, HSBC Institutional Trust Services (Bermuda) Limited, HSBC Bank USA, N.A., HSBC Securities Services (Bermuda) Limited, HSBC Bank (Cayman) Limited, HSBC Private Banking Holdings (Suisse) S.A., HSBC Private Bank (Suisse) S.A., HSBC Fund Services (Luxembourg) S.A., and HSBC Bank Bermuda Limited.

1 \$8.9 billion into Madoff's scheme, a sum representing nearly  
2 forty percent of BLMIS's capital under management.

3 HSBC represented to customers that it exercised  
4 supervision and control over fund assets, whereas BLMIS  
5 itself took the role of custodian. Had HSBC performed  
6 oversight diligently, it would have seen thousands of  
7 instances in which Madoff's purported trades exceeded the  
8 total market volume of such trades on the given day.

9 Repeatedly, industry analysts and HSBC's own due diligence  
10 team openly questioned Madoff's extraordinary success, lack  
11 of transparency, and incredible trading volume.

12 In September 2005, HSBC commissioned KPMG LLP to detect  
13 potential fraud in BLMIS's operations. Resulting reports in  
14 2006 and 2008 warned that BLMIS's role as custodian of its  
15 own funds posed a risk that the trades were "a sham in order  
16 to divert client cash." A 89 ¶ 168. Nonetheless, HSBC  
17 continued to "enable[]" Madoff in order to reap a windfall.  
18 A 35 ¶ 1. In sum, HSBC "engineered a labyrinth of hedge  
19 funds, management companies, and service providers that, to  
20 unsuspecting outsiders, seemed to compose a formidable  
21 system of checks and balances," yet, in reality, "it  
22 provided different modes for directing money to Madoff while  
23 avoiding scrutiny and maximizing fees." A 36 ¶ 4.

1           **Procedural History.** On July 15, 2009, the Trustee  
2 commenced an adversary proceeding in the United States  
3 Bankruptcy Court for the Southern District of New York  
4 against HSBC and thirty-six others, including UniCredit and  
5 Pioneer.<sup>9</sup> The Amended Complaint sought recovery of \$2  
6 billion in preferential or fraudulent transfers (Counts 1  
7 through 19), and asserted four common law causes of action:  
8 aiding and abetting fraud, aiding and abetting breach of  
9 fiduciary duty, unjust enrichment, and money had and  
10 received (collectively, the "common law claims"). These  
11 common law claims sought \$6.6 billion from HSBC and \$2  
12 billion from the remaining defendants. A contribution claim  
13 was asserted under New York law.

14           On a motion by the UniCredit entities, the district  
15 court withdrew the reference to the bankruptcy court, for  
16 the limited purpose of deciding two threshold issues: (1)  
17 the Trustee's standing to assert the common law claims, and  
18 (2) preemption of these claims by the Securities Litigation  
19 Uniform Standards Act ("SLUSA").

20           The common law claims and the contribution claim were  
21 dismissed by Judge Rakoff in July 2011, on the grounds that

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<sup>9</sup> This proceeding consolidated two actions, one against HSBC and one against UniCredit and Pioneer.

1 the Trustee was in pari delicto with the defendants, lacked  
2 standing to assert the common law claims on customers'  
3 behalf, and could not demonstrate a right to contribution.  
4 See Picard v. HSBC Bank PLC, 454 B.R. 25, 37 (S.D.N.Y.  
5 2011). The court did not reach the question whether SLUSA  
6 bars the Trustee's claims. Id.

7 The Trustee's adversary proceeding against JPMorgan was  
8 commenced in December 2010. As in the proceedings against  
9 HSBC and UniCredit, the Trustee asserted common law claims  
10 seeking \$19 billion for, inter alia, aiding and abetting  
11 fraud, aiding and abetting breach of fiduciary duty, unjust  
12 enrichment, and conversion.

13 The adversary proceeding against UBS followed. Also  
14 named were Access, several of its affiliates, and two feeder  
15 funds. Again, the Trustee asserted common law claims for  
16 aiding and abetting fraud, aiding and abetting breach of  
17 fiduciary duty, unjust enrichment, and conversion, among  
18 others. Damages of approximately \$2 billion were sought on  
19 behalf of the customers of BLMIS (rather than BLMIS itself).

20 All Defendants (except Luxalpha and two individual  
21 Defendants) moved to dismiss the common law claims and the  
22 contribution claim. In November 2011, Judge McMahon granted  
23 the motions. See Picard v. JPMorgan Chase & Co., 460 B.R.

1 84 (S.D.N.Y. 2011). Judge McMahon concluded (as did Judge  
2 Rakoff) that the Trustee lacks standing to bring an action  
3 on behalf of third parties and has no valid claim for  
4 contribution. Id. at 106.

## 5 DISCUSSION

6 We review de novo a district court's dismissal of  
7 causes of action for failure to state a claim for relief or  
8 lack of standing. See Fulton v. Goord, 591 F.3d 37, 41 (2d  
9 Cir. 2009). Point I considers the Trustee's claims as  
10 asserted by him on behalf of BLMIS itself; Point II  
11 considers claims asserted by the Trustee on behalf of  
12 BLMIS's customers.

### 13 I

14 We agree with the district courts that the Trustee's  
15 common law claims asserted on behalf of BLMIS are barred by  
16 the doctrine of in pari delicto.

### 17 A

18 Under New York law,<sup>10</sup> one wrongdoer may not recover  
19 against another. See Kirschner v. KPMG LLP, 938 N.E.2d 941,

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<sup>10</sup> "In a bankruptcy proceeding, state law . . . determines whether a right to sue belongs to the debtor or to the individual creditors." Wight v. BankAmerica Corp., 219 F.3d 79, 86 (2d Cir. 2000) (citation and internal quotation marks omitted). New York law governs here.

1 950 (N.Y. 2010). The principle that a wrongdoer should not  
2 profit from his own misconduct "is . . . strong in New  
3 York." Id. at 964. The New York Appellate Division, First  
4 Department, has long applied the doctrine of in pari delicto  
5 to bar a debtor from suing third parties for a fraud in  
6 which he participated. See Barnes v. Hirsch, 212 N.Y.S.  
7 536, 539 (App. Div. 1st Dep't 1925) ("The bankrupts could  
8 not recover against these defendants for bucketing orders  
9 because they were responsible for the illegal transaction  
10 and parties to the fraud."), aff'd, 152 N.E. 424 (N.Y.  
11 1926).

12 A "claim against a third party for defrauding a  
13 corporation with the cooperation of management accrues to  
14 creditors, not to the guilty corporation." Shearson Lehman  
15 Hutton, Inc. v. Wagoner, 944 F.2d 114, 120 (2d Cir. 1991)  
16 (citing Barnes, 212 N.Y.S. at 537). The debtor's misconduct  
17 is imputed to the trustee because, innocent as he may be, he  
18 acts as the debtor's representative. See Wight v.  
19 BankAmerica Corp., 219 F.3d 79, 87 (2d Cir. 2000)  
20 ("[B]ecause a trustee stands in the shoes of the  
21 corporation, the Wagoner rule bars a trustee from suing to  
22 recover for a wrong that he himself essentially took part

1 in."); accord Breeden v. Kirkpatrick & Lockhart LLP (In re  
2 Bennett Funding Grp., Inc.), 336 F.3d 94, 99-100 (2d Cir.  
3 2003) (applying Wagoner rule in the context of "the greatest  
4 Ponzi scheme [then] on record" and holding that "the  
5 defrauded investors and not the bankruptcy trustee" were  
6 entitled to pursue malpractice claims against attorneys and  
7 accountants arising from the fraud).<sup>11</sup>

8 Picard alleges that the Defendants were complicit in  
9 Madoff's fraud and facilitated his Ponzi scheme by providing  
10 (well-paid) financial services while ignoring obvious  
11 warning signs. These claims fall squarely within the rule  
12 of Wagoner and the ensuing cases: Picard stands in the shoes  
13 of BLMIS and may not assert claims against third parties for  
14 participating in a fraud that BLMIS orchestrated.

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<sup>11</sup> See also Kirschner v. Grant Thornton LLP, No. 07  
Civ. 11604 (GEL), 2009 WL 1286326, at \*10 (S.D.N.Y. Apr. 14,  
2009) (applying Wagoner rule to dismiss fraud and breach of  
fiduciary claims where the debtor "participated in, and  
benefitted from, the very wrong for which it seeks to  
recover"), aff'd, 626 F.3d 673 (2d Cir. 2010); Hirsch v.  
Arthur Andersen & Co., 72 F.3d 1085, 1094-95 (2d Cir. 1995)  
(holding that even though "there [was] at least a  
theoretical possibility that some independent financial  
injury to the Debtors might be established," the Wagoner  
rule precluded standing "because of the Debtors'  
collaboration with the defendants-appellees in promulgating  
and promoting the Colonial Ponzi schemes").

1           Picard's scattershot responses are resourceful, but  
2 they all miss the mark. He contends that a SIPA trustee is  
3 exempt from the Wagoner rule, but adduces no authority. He  
4 argues that the rationale of the in pari delicto doctrine is  
5 not served here because he himself is not a wrongdoer; but  
6 neither were the trustees in the cases cited above.<sup>12</sup> He  
7 contends that in pari delicto should not impede the  
8 enforcement of securities laws, citing Bateman Eichler, Hill  
9 Richards, Inc. v. Berner, 472 U.S. 299 (1985); but Bateman  
10 Eichler is inapposite. See id. at 315-16 (holding that in  
11 pari delicto would not prevent defrauded tippee from  
12 bringing suit against defrauding tipper, at least absent  
13 further inquiry into "relative culpabilities" of tippee and  
14 tipper).<sup>13</sup> He invokes the "adverse interest" exception,

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<sup>12</sup> Relatedly, he argues that in a typical bankruptcy in pari delicto is designed to bar corporate malefactors, including shareholders, from recovering, whereas in a SIPA liquidation the trustee marshals assets for the benefit of the customer property estate. Accordingly, there is no similar concern here that funds collected by the trustee would be distributed to wrongdoers. But, in Kirschner v. KPMG LLP, the New York Court of Appeals declined to make an exception to the in pari delicto doctrine despite the trustee's urging that proceeds would "benefit blameless unsecured creditors . . . and shareholders." Kirschner v. KPMG LLP, 938 N.E.2d 941, 958 (N.Y. 2010).

<sup>13</sup> Like the Supreme Court in Bateman Eichler, we recently declined to apply in pari delicto to bar suit in a private civil antitrust action, "where private actions play



1 which directs a court not to impute to a corporation the bad  
2 acts of its agent when the fraud was committed for personal  
3 benefit. See The Mediators, Inc. v. Manney (In re  
4 Mediators, Inc.), 105 F.3d 822, 827 (2d Cir. 1997).  
5 However, "this most narrow of exceptions" is reserved for  
6 cases of "outright theft or looting or embezzlement . . .  
7 where the fraud is committed *against* a corporation rather  
8 than on its behalf."<sup>14</sup> Kirschner v. KPMG LLP, 938 N.E.2d  
9 941, 952 (N.Y. 2010). It is not possible thus to separate

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a significant role in the enforcement scheme." Gatt  
Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 80 (2d  
Cir. 2013) (dismissing action on threshold question of  
antitrust standing). Here, in contrast, barring claims  
brought by Madoff's successor-in-interest would not preclude  
his victims from bringing suit individually. See infra p.  
58 n.29. In pari delicto does not apply to all wrongdoers;  
the doctrine targets those who "actively participate in the  
illegal scheme and who are substantially at fault." Gatt  
Commc'ns, 711 F.3d at 84 (Wesley, J., concurring). The  
pleadings here leave us with no doubt that BLMIS--in whose  
shoes the Trustee stands--bore at least "substantially equal  
responsibility" for the injuries the Trustee now seeks to  
redress. See Bateman Eichler, 472 U.S. at 310-11.  
Accordingly, application of the rule in this context is well  
established. See, e.g., Wagoner, 944 F.2d at 120; Wight,  
219 F.3d at 87.

<sup>14</sup> When, as here, principal and agent are "one and the  
same . . . the adverse interest exception is itself subject  
to an exception styled the 'sole actor' rule," which  
"imputes the agent's knowledge to the principal  
notwithstanding the agent's self-dealing." In re Mediators,  
Inc., 105 F.3d at 827.

1 BLMIS from Madoff himself and his scheme. Finally, Picard  
2 argues that the district courts should not have applied the  
3 in pari delicto doctrine at the pleadings stage; but the New  
4 York Court of Appeals has held otherwise. See id. at 947  
5 n.3; see also Wagoner, 944 F.2d at 120. Early resolution is  
6 appropriate where (as here) the outcome is plain on the face  
7 of the pleadings.

8 **B.**

9 The Trustee's claim for contribution is the only one  
10 that may escape the bar of in pari delicto. See Barrett v.  
11 United States, 853 F.2d 124, 127 n.3 (2d Cir. 1988)  
12 (explaining that parties seeking contribution are  
13 necessarily in pari delicto).<sup>15</sup> The Trustee seeks  
14 contribution for payments made to BLMIS customers under  
15 SIPA, on the theory that the Defendants are joint  
16 tortfeasors with BLMIS under New York law.

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<sup>15</sup> Some courts have suggested that Wagoner nevertheless bars a contribution claim. See, e.g., Devon Mobile Commc'ns Liquidating Trust v. Adelpia Commc'ns Corp. (In re Adelpia Commc'ns Corp.), 322 B.R. 509, 529 (Bankr. S.D.N.Y. 2005); Silverman v. Meister Seelig & Fein, LLP (In re Agape World, Inc.), 467 B.R. 556, 580-81 (Bankr. E.D.N.Y. 2012). We need not decide whether such a claim would survive a Wagoner challenge because, as explained in text, there is no contribution right under SIPA.

1           The New York statute provides that "two or more persons  
2 who are subject to liability for damages for the same  
3 personal injury, injury to property or wrongful death, may  
4 claim contribution among them whether or not an action has  
5 been brought or a judgment has been rendered against the  
6 person from whom contribution is sought." N.Y. C.P.L.R.  
7 § 1401 (McKinney). Section 1401 "requires some form of  
8 compulsion; that is, the party seeking contribution must  
9 have been compelled in some way, such as through the entry  
10 of a judgment, *to make the payment against which*  
11 *contribution is sought.*" N.Y. State Elec. & Gas Corp. v.  
12 FirstEnergy Corp., No. 3:03-CV-0438 (DEP), 2007 WL 1434901,  
13 at \*7 (N.D.N.Y. May 11, 2007) (emphasis added).

14           However, the SIPA payments for which Picard seeks  
15 contribution were not compelled by BLMIS's state law fraud  
16 liability to its customers; his obligation to pay customers  
17 their ratable share of customer property is an obligation of  
18 federal law: SIPA. SIPA provides no right to contribution,  
19 and it is settled in this Circuit that there is no claim for  
20 contribution unless the operative federal statute provides  
21 one. See Nw. Airlines, Inc. v. Transp. Workers Union of  
22 Am., AFL-CIO, 451 U.S. 77, 97 n.38, 97-99 (1981); see also

1 Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 144 (2d Cir.  
2 1999) (affirming dismissal of New York state law  
3 contribution claims for liability under the Fair Labor  
4 Standards Act); KBL Corp. v. Arnouts, 646 F. Supp. 2d 335,  
5 341 (S.D.N.Y. 2009) (“[A] plaintiff cannot use New York  
6 State common law as an end-around to make a claim for  
7 contribution that it could not make under the federal  
8 statutory scheme.”); Lehman Bros., Inc. v. Wu, 294 F. Supp.  
9 2d 504, 505 n.1 (S.D.N.Y. 2003) (“[W]hether contribution is  
10 available in connection with a federal statutory scheme is a  
11 question governed solely by federal law.”) (citation and  
12 quotation marks omitted).

13 Picard emphasizes that he is not seeking contribution  
14 for violations of SIPA or any other federal statute, but  
15 that is beside the point. “The source of a right of  
16 contribution under state law must be *an obligation imposed*  
17 *by state law.*” LNC Invs., Inc. v. First Fid. Bank, 935 F.  
18 Supp. 1333, 1349 (S.D.N.Y. 1996) (emphasis added). The  
19 issue is therefore whether the payments made by the Trustee,  
20 for which he is seeking contribution, are required by state  
21 or federal law--an easy question.

1           The \$800 million paid out to customers fulfilled an  
2 obligation created by SIPA, a federal statute that does not  
3 provide a right to contribution "either expressly or by  
4 clear implication," Texas Industries, Inc. v. Radcliff  
5 Materials, Inc., 451 U.S. 630, 638 (1981). Unlike the  
6 Bankruptcy Act, SIPA does not require customers to establish  
7 a basis of liability as a prerequisite for the Trustee's  
8 disbursement obligation. The loss itself is enough. See 15  
9 U.S.C. § 78fff-2(c) (the Trustee "shall allocate customer  
10 property of the debtor . . . to customers of such debtor,  
11 who shall share ratably in such customer property on the  
12 basis and to the extent of their respective net equities");  
13 cf. Hill v. Day (In re Today's Destiny, Inc.), 388 B.R. 737,  
14 753-56 (Bankr. S.D. Tex. 2008) (holding that Texas law  
15 governed contribution claim where debtor sought contribution  
16 for obligations set forth in proofs of claim alleging fraud  
17 under state law). Because the Trustee's payment obligations  
18 were imposed by a federal law that does not provide a right  
19 to contribution, the district courts properly dismissed  
20 these claims.

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II

Having rejected the Trustee's claims asserted on behalf of BLMIS, we consider next whether the Trustee may assert such claims on behalf of BLMIS's customers. To proceed with these claims, the Trustee must first establish his standing. This he cannot do.

Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975). Standing depends, first, on whether the plaintiff has identified a "case or controversy" between the plaintiff and the defendants within the meaning of Article III of the Constitution. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970). "To have standing, '[a] plaintiff must [1] allege personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief.'" Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1091 (2d Cir. 1995) (alterations in original) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). In addition, the plaintiff must comply with "prudential" limitations on standing, of which the salient one here is that a party must "assert his own

1 legal rights and interests and cannot rest his claim to  
2 relief on the legal rights or interests of third parties.”  
3 Warth, 422 U.S. at 499.

4 We consider below Picard’s arguments that: (A) existing  
5 Second Circuit precedent allows for third-party standing in  
6 a SIPA liquidation; and (B) SIPA itself confers standing,  
7 both by creating a bailment relationship between the Trustee  
8 and the debtor’s customers, and by authorizing SIPC to  
9 pursue subrogation claims on customers’ behalf.<sup>16</sup>

10 **A**

11 The implied prohibition in Article III against third-  
12 party standing applies to actions brought by bankruptcy  
13 trustees. In Caplin v. Marine Midland Grace Trust Co. of  
14 N.Y., 406 U.S. 416 (1972), the Supreme Court ruled that  
15 federal bankruptcy law does not empower a trustee to collect  
16 money owed to creditors. That is because a bankruptcy  
17 trustee is not empowered “to collect money not owed to the  
18 estate”; the trustee’s proper task “is simply to collect and

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<sup>16</sup> In proceedings before one of the district courts, the Trustee grounded his standing argument in large part on Section 544(a) of the Bankruptcy Code, which gives a trustee the rights of a hypothetical lien creditor. The court considered this argument at length and ultimately rejected it, see Picard v. JPMorgan Chase & Co., 460 B.R. 84, 92-97 (S.D.N.Y. 2011) (McMahon, J.), and the Trustee has abandoned it on appeal.

1 reduce to money the property of the estates for which (he is  
2 trustee)." Id. at 428-29 (citation and internal quotation  
3 marks omitted). "[N]owhere in the statutory scheme is there  
4 any suggestion that the trustee in reorganization is to  
5 assume the responsibility of suing third parties" on behalf  
6 of creditors. Id. at 428. This way, creditors can "make  
7 their own assessment of the respective advantages and  
8 disadvantages, not only of litigation, but of various  
9 theories of litigation," id. at 431; no consensus is needed  
10 as to "the amount of damages to seek, or even on the theory  
11 on which to sue," id. at 432; and disputes over inconsistent  
12 judgments and the scope of settlements can be avoided, id.  
13 at 431-32.

14 Our Court has hewed to this principle. In Wagoner, the  
15 misappropriation of funds by the owner and president of the  
16 debtor company was facilitated by stock transactions  
17 effected through a third-party brokerage firm. Shearson  
18 Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 117 (2d Cir.  
19 1991). The trustee's claim that the brokerage aided and  
20 abetted the fraud was dismissed on summary judgment, and we  
21 affirmed, observing that "[i]t is well settled that a  
22 bankruptcy trustee has no standing generally to sue third



1 parties on behalf of the estate's creditors, but may only  
2 assert claims held by the bankrupt corporation itself." Id.  
3 at 118 (citing Caplin, 406 U.S. at 434); see also Hirsch v.  
4 Arthur Andersen & Co., 72 F.3d 1085, 1094 (2d Cir. 1995)  
5 (holding that Chapter 11 trustee had no standing to bring  
6 creditor claims against accountants and law firms that had  
7 provided services to the debtor, a real estate partnership  
8 operated as a Ponzi scheme); The Mediators, Inc. v. Manney  
9 (In re Mediators, Inc.), 105 F.3d 822, 826 (2d Cir. 1997)  
10 (affirming dismissal of breach of fiduciary duty claim  
11 brought by creditors' committee functioning as bankruptcy  
12 trustee, against bank and law firm for allegedly aiding and  
13 abetting debtor's fraud).

14 The Trustee makes little effort to explain why Caplin  
15 and its progeny do not control. Instead, he relies on a  
16 single Second Circuit case that was overruled by the Supreme  
17 Court, and on dicta in another. Apart from lacking  
18 precedential force, both cases are readily distinguishable.

19 **1**

20 In Redington v. Touche Ross & Co., 592 F.2d 617 (2d  
21 Cir. 1978), rev'd, 442 U.S. 560 (1979), a SIPA trustee sued  
22 the accountant of an insolvent brokerage for violations of

1 record-keeping provisions of Section 17(a) of the Securities  
2 Exchange Act, as well as violations of state common law.  
3 The district court dismissed the Section 17(a) claim for  
4 lack of an implied private right of action, and concluded  
5 that it lacked jurisdiction over the common law claims. See  
6 Redington v. Touche Ross & Co., 428 F. Supp. 483, 492-93  
7 (S.D.N.Y. 1977).

8 In reversing, we held that Section 17(a) did create an  
9 implied private right of action. See Redington v. Touche  
10 Ross & Co., 592 F.2d 617 (2d Cir. 1978), rev'd, 442 U.S. 560  
11 (1979). We then considered the trustee's claim that "[h]e  
12 is responsible for marshalling and returning [customer]  
13 property; to the extent that he is unable to do so, he  
14 argues, he may sue on behalf of the customer/bailors any  
15 wrongdoer whom they could sue themselves." Id. at 625.  
16 Relying on the Federal Rules of Civil Procedure, Redington  
17 concluded that "the Trustee, as bailee, is an appropriate  
18 real party in interest," id., and that "SIPC is subrogated  
19 to the right of action implied in section 17 in favor of  
20 brokers' customers against third parties such as  
21 accountants." Id. at 624. Redington would favor Picard's  
22 case, except that Redington is no longer good law.

1           The Supreme Court granted certiorari in Redington to  
2 decide whether Section 17(a) created an implied right of  
3 action and whether a SIPA trustee and SIPC had standing to  
4 assert that claim. See Touche Ross & Co. v. Redington, 442  
5 U.S. 560 (1979). The Court held that no private right of  
6 action existed under Section 17(a), id. at 579, and  
7 therefore considered it “unnecessary to reach” the standing  
8 issue, id. at 567 n.9. The case was remanded to consider  
9 whether an alternative basis for jurisdiction existed, but  
10 none was found. See Redington v. Touche Ross & Co., 612  
11 F.2d 68, 70 (2d Cir. 1979).

12           Picard argues that the Supreme Court left the standing  
13 question “untouched” because the opinion was “limited to a  
14 merits-based reversal on the issue of whether a private  
15 right of action existed under section 17(a).” Appellant Br.  
16 31 (11-5044). However, the question of who may assert a  
17 right of action is presented ordinarily only if a right of  
18 action has been found to exist. See Nat. R.R. Passenger  
19 Corp. v. Nat. Assoc. of R.R. Passengers, 414 U.S. 453, 456  
20 (1974) (“[T]he threshold question clearly is whether the  
21 Amtrak Act . . . creates a [private] cause of action . . .  
22 for it is only if such a right of action exists that we need

1 consider whether the respondent had standing to bring the  
2 action[.]").<sup>17</sup> The Supreme Court's reversal on the  
3 threshold question drained the Second Circuit Redington  
4 opinion of force on other questions. See Newdow v. Rio  
5 Linda Union Sch. Dist., 597 F.3d 1007, 1041 (9th Cir. 2010)  
6 ("[W]hen the Supreme Court reverses a lower court's decision  
7 on a threshold question," the Court "effectively holds the  
8 lower court erred by reaching [other issues].").

9 Following the Supreme Court's reversal, this Court  
10 vacated its original judgment on the ground that subject  
11 matter jurisdiction was lacking. See Order, Redington v.  
12 Touche Ross, Nos. 77-7183, 77-7186 (2d Cir. Aug. 8, 1979);  
13 Appellee Br. Addendum A (11-5207). As the Trustee concedes,  
14 vacatur dissipates precedential force. See Appellant Br. 30

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<sup>17</sup> The Trustee attempts to distinguish National  
Railroad on the ground that that case involved a single  
federal statute without additional claims, so a  
determination that the Amtrak Act did not create a private  
right of action ended the case. Because Redington also  
involved state law claims over which the Court exercised  
pendent jurisdiction, Picard reasons, "a determination on  
the existence of a private right of action tied to a federal  
statute does not end the court's inquiry into a trustee's  
standing to assert state common law claims." Appellant Br.  
36 (11-5044). In Redington, however, we did not consider  
specifically whether the trustee had standing to bring  
claims under common law. As explained in text, Redington's  
standing analysis was entirely dependent on the Court's  
antecedent ruling that the statute created an implied  
private right of action--a ruling that was later overturned.

1 (11-5044). See also O'Connor v. Donaldson, 422 U.S. 563,  
2 577 n.12 (1975) (observing that vacatur "deprives [the]  
3 court's opinion of precedential effect"); Brown v. Kelly,  
4 609 F.3d 467, 476-77 (2d Cir. 2010).

5 Since Redington, at least six judges in this Circuit  
6 have questioned or rejected third-party claims brought by  
7 SIPA trustees, beginning with Judge Pollack in Mishkin v.  
8 Peat, Marwick, Mitchell & Co., 744 F. Supp. 531, 556-58  
9 (S.D.N.Y. 1990).<sup>18</sup> See also Picard v. JPMorgan Chase & Co.,  
10 460 B.R. 84, 100-101 (S.D.N.Y. 2011) (McMahon, J.); Picard  
11 v. HSBC Bank PLC, 454 B.R. 25, 33-34 (S.D.N.Y. 2011)  
12 (Rakoff, J.); Picard v. Taylor (In re Park South Sec., LLC),  
13 326 B.R. 505, 516 (Bankr. S.D.N.Y. 2005) (Drain, J.);  
14 Giddens v. D.H. Blair & Co. (In re A.R. Baron & Co., Inc.),  
15 280 B.R. 794, 804 (Bankr. S.D.N.Y. 2002) (Beatty, J.); SIPC  
16 v. BDO Seidman, LLP, 49 F. Supp. 2d 644, 653 (S.D.N.Y. 1999)  
17 (Preska, J.), rev'd on other grounds, 222 F.3d 63 (2d Cir.  
18 2000).

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<sup>18</sup> In a hearing in the Mishkin case, Judge Pollack concluded, as we do, that Redington "was reversed in all respects not on other grounds" and "does not stand as the law of this circuit." SPA 17 (11-5175).

1           Yet Redington has enjoyed something of a half-life,  
2 with several courts (including this one) assuming without  
3 deciding that Redington retains residual force.<sup>19</sup> Redington  
4 should be put to rest; it has no precedential effect.

5           Even if Redington retained some persuasive value, it  
6 would not decide this case. First, Redington considered  
7 chiefly whether the trustee and SIPC had standing to bring a  
8 cause of action under Section 17 of the Exchange Act; the  
9 opinion said nothing about a SIPA trustee's ability to  
10 orchestrate mass tort actions against third parties. See  
11 Redington v. Touche Ross & Co., 592 F.2d 617, 618 (2d Cir.  
12 1978), rev'd, 442 U.S. 560 (1979) ("[W]e are presented with  
13 the question whether a private cause of action exists under  
14 section 17 of the Securities Exchange Act of 1934 against

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<sup>19</sup> Assuming that Redington was still good law, Judges Drain and Beatty instead rejected SIPA trustees' standing arguments on the ground that only SIPC, not a SIPA trustee, could enforce its rights of subrogation. See In re Park South Sec., LLC, 326 B.R. at 516; In re A.R. Baron & Co., Inc., 280 B.R. at 804. In BDO Seidman, LLP, Judge Preska held that although Mishkin's interpretation of SIPC's subrogation power was "more faithful to the letter and purpose of the Act," she was nonetheless "bound by Redington to find that SIPC has standing to bring suit." 49 F. Supp. 2d at 653. On appeal, this Court "assume[d], without deciding, that . . . SIPC has standing as the customers' subrogee," SIPC v. BDO Seidman, LLP, 222 F.3d 63, 69 (2d Cir. 2000), and ultimately dismissed its claims on substantive grounds, id. at 71-76.

1 accountants who prepare misleading statements of a broker's  
2 financial affairs, and if so, who may maintain such an  
3 action."). Second, our holding in Redington turned, in  
4 part, on an analysis of Fed. R. Civ. P. 17(a), which sets  
5 forth rules concerning real parties in interest, and which  
6 has no application here. See id. at 625; see also infra p.  
7 51 n.25. Third, Redington involved claims against a single  
8 accounting firm for a few discrete instances of alleged  
9 misconduct (the preparation of misleading financial  
10 statements). As a result, the policy concerns we express  
11 below (see infra pp. 59-69) would have been considerably  
12 diminished--and, indeed, were not even addressed by the  
13 Court. Fourth, and finally, in Redington the brokerage firm  
14 was not complicit in the wrongdoing, but rather "an entity  
15 distinct from its conniving officers [that] was directly  
16 damaged by Touche Ross' unsatisfactory audit." 592 F.2d at  
17 620. The Redington Court therefore did not have occasion to  
18 consider whether the doctrine of in pari delicto barred all  
19 or part of the suit. In sum, Redington is both non-binding  
20 and inapposite.

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2 The Trustee relies on St. Paul Fire & Marine Insurance  
3 Co. v. PepsiCo, Inc., 884 F.2d 688 (2d Cir. 1989), for the  
4 proposition that a trustee may assert creditors' claims if  
5 they are generalized in nature, and not particular to any  
6 individual creditor. However, the holding of that case has  
7 no application here.

8 PepsiCo had been guarantor of bonds issued by a  
9 subsidiary that later was acquired by a subsidiary of Banner  
10 Industries. When the (later) merged entity defaulted on the  
11 bonds, PepsiCo sued Banner, alleging diversion of assets and  
12 alter ego. The merged entity went bankrupt, and the trustee  
13 sued Banner for misappropriation. We ruled that the  
14 trustee--and not PepsiCo--could pursue Banner because Ohio  
15 law allowed a subsidiary to assert an alter ego claim  
16 against its parent, so that "[t]he cause of action therefore  
17 becomes property of the estate of a bankrupt subsidiary, and  
18 is properly asserted by the trustee in bankruptcy." Id. at  
19 703-04.

20 Picard directs us to a passage in St. Paul--stating  
21 that a trustee may bring a claim if the "claim is a general  
22 one, with no particularized injury arising from it, and if



1 that claim could be brought by any creditor of the debtor,"  
2 id. at 701--and contends that the third-party claims here  
3 are common to all customers because all customers were  
4 similarly injured by Madoff's fraud and the Defendants'  
5 facilitation. This argument is flawed on many levels:

6 • St. Paul decided the "specific question" whether a  
7 creditor may bring an alter ego claim against the debtor's  
8 parent when the debtor itself also possesses such a claim.  
9 Id. at 699. But Picard seeks to assert claims that are  
10 property only of the creditors, not of the debtor.

11 • The Trustee's broad reading of St. Paul would  
12 bring the Court's holding into conflict with a line of cases  
13 that came before and after it. As discussed supra pp. 32-  
14 34, it is settled that a trustee may not assert creditors'  
15 claims against third parties. See, e.g., Shearson Lehman  
16 Hutton, Inc. v. Wagoner, 944 F.2d 114 (2d Cir. 1991). And,  
17 of course, St. Paul could not alter the Supreme Court's  
18 ruling in Caplin. Picard's argument thus conflicts with  
19 Supreme Court and Second Circuit precedent. See generally  
20 In re Stanwich Fin. Servs. Corp., 317 B.R. 224, 228 n.4  
21 (Bankr. D. Conn. 2004) (highlighting this tension).

1           •       The language cited by Picard from St. Paul is not  
2 a pronouncement about third-party standing; it voices the  
3 maxim that only a trustee, not creditors, may assert claims  
4 that belong to the bankrupt estate. As St. Paul elsewhere  
5 states: "[T]he Trustee in bankruptcy has standing to  
6 represent only the interests of the debtor corporation.'  
7 Our decision today goes no further than to say that causes  
8 of action that could be asserted by the debtor are property  
9 of the estate and should be asserted by the trustee." St.  
10 Paul, 884 F.2d at 702 n.3 (internal citation omitted)  
11 (quoting Bloor v. Carro, Spanbock, Londin, Rodman & Fass,  
12 754 F.2d 57, 62 n.4 (2d Cir. 1985)). As illustrated by St.  
13 Paul, when a creditor seeks relief against third parties  
14 that pushed the debtor into bankruptcy, the creditor is  
15 asserting a derivative claim that arises from harm done to  
16 the estate. Judge Posner described this distinction:

17           The point is simply that the trustee is confined  
18 to enforcing entitlements of the corporation. He  
19 has no right to enforce entitlements of a  
20 creditor. He represents the unsecured creditors  
21 of the corporation; and in that sense when he is  
22 suing on behalf of the corporation he is really  
23 suing on behalf of the creditors of the  
24 corporation. But there is a difference between a  
25 creditor's interest in the claims of the  
26 corporation against a third party, which are  
27 enforced by the trustee, and the creditor's own  
28 direct--not derivative--claim against the third

1 party, which only the creditor himself can  
2 enforce.

3  
4 Steinberg v. Buczynski, 40 F.3d 890, 893 (7th Cir. 1994).

5 See generally Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863  
6 A.2d 772, 792 (Del. Ch. 2004).

7 • The customers' claims against the Defendants are  
8 not "common" or "general." A debtor's claim against a third  
9 party is "general" if it seeks to augment the fund of  
10 customer property and thus affects all creditors in the same  
11 way. Picard, however, seeks to assert claims on behalf of  
12 thousands of customers against third-party financial  
13 institutions for their handling of individual investments  
14 made on various dates in varying amounts. The Defendants'  
15 alleged wrongful acts, then, could not have harmed all  
16 customers in the same way.<sup>20</sup>

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<sup>20</sup> A recent case arising out of the BLMIS bankruptcy provides a useful contrast. In Fox v. Picard (In re Madoff), 848 F. Supp. 2d 469 (S.D.N.Y. 2012), the district court relied on St. Paul in holding that certain Madoff customers could not pursue fraudulent transfer claims "that were the property of the BLMIS estate." Id. at 478. The customer claims were "duplicative and derivative of the Trustee's fraudulent transfer claim." Id. at 479 n.2. Accordingly, the court found the claims to be "general" in the sense articulated in St. Paul, in that they arose from "a single set of actions that harmed BLMIS and all BLMIS customers in the same way." Id. at 480. Here, however, the customers' claims are not derivative of claims held by the BLMIS estate.

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**B**

The Trustee attempts to blunt the force of Caplin and its progeny by arguing that a SIPA liquidation is unique and is therefore not controlled by precedent under the bankruptcy code. He advances two theories for why a SIPA trustee enjoys standing to assert third-party claims.

**1**

Picard contends that, for SIPA purposes, the customers of a failed brokerage are bailors, and that he--acting as bailee--"has a sufficient possessory interest to permit him to 'recover for the wrongful act of a third party resulting in the loss of, or injury to, the subject of the bailment.'" United States v. Perea, 986 F.2d 633, 640 (2d Cir. 1993) (quoting Rogers v. Atl., Gulf & Pac. Co., 107 N.E. 661, 664 (N.Y. 1915)). We disagree.

First, the statute is not written or cast in terms of bailment. "To the extent consistent with the provisions of this chapter, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under [the Bankruptcy Code]." 15 U.S.C. § 78fff(b). As a general rule, SIPA vests trustees with "the same powers and title with respect to the debtor and the property of the debtor

1 . . . as a trustee in a case under Title 11." 15 U.S.C. §  
2 78fff-1(a). True, a SIPA trustee has some powers not  
3 conferred on a trustee under Title 11. Most notably, SIPA  
4 creates a fund of customer property that is separate from  
5 the debtor estate and that has priority over other  
6 creditors' claims, and authorizes the trustee to ratably  
7 distribute those funds based on customers' net equity. See  
8 15 U.S.C. § 78fff-2(c)(1)(B); In re Bernard L. Madoff  
9 Investment Secs., 654 F.3d 229, 231 (2d Cir. 2011), cert.  
10 denied, 133 S. Ct. 25 (2012). But the statute does not  
11 confer upon SIPA trustees a power, denied all other  
12 bankruptcy trustees, to sue third parties on claims that  
13 belong to persons other than the estate. Nowhere does the  
14 statute reference bailment, or characterize customers as  
15 "bailors" or trustees as "bailees," or in any way indicate  
16 that the trustee is acting as bailee of customer property.

17 Picard alternatively invokes the principle of bailment  
18 under the common law. This is dubious: courts are careful  
19 to avoid overlaying common law principles onto a statutory  
20 framework, even when (unlike here) the statute makes clear  
21 reference to common law. See Moore v. PaineWebber, Inc.,  
22 189 F.3d 165, 179-80 (2d Cir. 1999) ("That the statute . . .

1 borrow[s] in part from the common law should not mislead us:  
2 it remains the statute and its purpose that governs." ).  
3 This caution is especially apt here because the statute  
4 creates a ramified scheme that makes no mention of common  
5 law.

6 In any event, the analogy to the common law of bailment  
7 is flawed from start to finish. A bailment is "a delivery  
8 of personalty for some particular purpose, or on mere  
9 deposit, upon a contract express or implied, that after the  
10 purpose has been fulfilled it will be redelivered to the  
11 person who delivered it, or otherwise dealt with according  
12 to that person's directions, or kept until it is reclaimed."  
13 9 N.Y. Jur. 2d Bailments and Chattel Leases § 1 (West 2013).  
14 Even assuming that the customers' investments could be  
15 deemed bailed property, the only delivery that took place  
16 was when customers made their investments, either in BLMIS  
17 directly, or through the feeder funds. See Pattison v.  
18 Hammerstein, 39 N.Y.S. 1039, 1040 (App. Div. 1st Dep't  
19 1896); see also United States v. \$79,000 in Account No.  
20 2168050/6749900 at Bank of N.Y., 96 CIV. 3493 (MBM), 1996 WL  
21 648934, at \*6 (S.D.N.Y. Nov. 7, 1996) ("Delivery to the  
22 bailee is required to create a bailment."). So: any

1 supposed bailment pre-dated Picard's appointment; he was not  
2 entrusted with any customer property until *after* it had been  
3 impaired; and he never had control over the missing funds  
4 that he now seeks to recoup. He therefore is not the proper  
5 party to bring such an action. See 9 N.Y. Jur. 2d Bailments  
6 and Chattel Leases § 115 (West 2013) (explaining that bailee  
7 may only "bring an action to recover for the loss of or  
8 injury to the bailed property while in his or her  
9 possession").<sup>21</sup>

10 Moreover, Picard is not seeking to recover specific  
11 bailments for return to individual bailors. See 9 N.Y. Jur.  
12 2d Bailments and Chattel Leases § 82 (West 2013) ("One of  
13 the most important rights of the bailor is that, on the  
14 termination of the bailment, the bailor will return to him  
15 or her the identical thing bailed . . . ."). Unlike  
16 "customer name securities," which are separately held and  
17 returned to individual customers outside the normal  
18 distribution scheme,<sup>22</sup> Picard's claims are intended to

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<sup>21</sup> Judge McMahon likened the Trustee's position to that of a parking garage attendant who is handed the keys to a car that was recently in an accident and decides to sue the culpable party on the owner's behalf. See Picard v. JPMorgan Chase & Co., 460 B.R. 84, 104-05 (S.D.N.Y. 2011).

<sup>22</sup> See 15 U.S.C. § 78111(4) (excluding "customer name securities delivered to the customer" from definition of

1 augment the general fund of customer property so that it can  
2 be distributed ratably based on customers' net equity. This  
3 arrangement is not an analog to a bailment, in which the  
4 bailee is entrusted with an item that is to be recovered by  
5 the bailor at some later time.

6 SIPC urges that we view the transaction as though  
7 BLMIS, not the Trustee, acted as the bailee of customer  
8 property, and that the Trustee is simply acting on BLMIS's  
9 behalf to recover the bailed property. The short answer is  
10 that Madoff (and, by extension, BLMIS) took the investment  
11 money from the customers in order to defraud them--and a  
12 thief is not a bailee of stolen property. See Pivar v.  
13 Graduate Sch. of Figurative Art of the N.Y. Acad. of Art,  
14 735 N.Y.S. 2d 522, 522 (App. Div. 1st Dep't 2002) (holding  
15 that a bailment relationship arises if the bailee takes

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customer property); see also In re New Times Sec. Servs.,  
Inc., 371 F.3d 68, 72-73 (2d Cir. 2004). This contrast, and  
its ramifications, are illuminated by SIPC's own statements  
to Congress regarding the passage of the 1978 amendments to  
SIPA. SIPC's then-Chairman, Hugh F. Owens, explained that  
customer name securities "will be treated, in short, as  
though they are not part of the debtor's estate, but merely  
held by the debtor as bailee"--implying that most other  
commingled property, such as cash, would simply become part  
of the debtor's estate. SIPA Amendments: Hearings on H.R.  
8331 Before the Subcomm. on Sec., Comm. on Banking, Hous.  
and Urban Affairs, 95th Cong. 41-42 (1978) (Statement by  
Hugh F. Owens, Chairman of SIPC).



1 "lawful possession" of property "without present intent to  
2 appropriate").

3 Madoff's commingling of customer funds also defeats any  
4 analogy to bailment. Notwithstanding Madoff's pretense, he  
5 failed to maintain customers' investments in separate named  
6 accounts. He deposited all customer funds into a general  
7 account (the 703 Account) and distributed those new  
8 investments to earlier customers in lieu of actual returns.  
9 This arrangement, which enabled the fraud, made a bailment  
10 impossible. See Peoples Westchester Sav. Bank v. F.D.I.C.,  
11 961 F.2d 327, 330 (2d Cir. 1992) (distinguishing special  
12 accounts from general accounts); see also United States v.  
13 Khan, No. 97-6083, 1997 WL 701366, at \*2 (2d Cir. 1997)  
14 (holding that a deposit into a general bank account  
15 "destroys a potential bailment" under New York law).<sup>23</sup>

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<sup>23</sup> "With a few exceptions, such as commingled fungible goods in a warehouse, the general rule is that the bailee can only discharge his or her liability to the bailor by returning the identical thing received, in its original or an altered form, according to the terms of the bailment." 9 N.Y. Jur. 2d Bailments and Chattel Leases § 84 (West 2013). Rahilly v. Wilson, a case relied on by SIPC, is not to the contrary. See Rahilly v. Wilson, 20 F. Cas. 179, 182 (Cir. Ct. D. Minn. 1873) (comparing commingled bales of wheat to "an ordinary general deposit of money in a bank" and holding that no bailment had taken place).

1           SIPC attempts to obviate these difficulties by relying  
2 on SEC Rule 15c, which establishes bookkeeping segregation  
3 requirements for brokers. 17 C.F.R. § 240.15c3-3. Judge  
4 Rakoff was "mystified" by this argument, Picard v. HSBC Bank  
5 PLC, 454 B.R. 25, 32 (S.D.N.Y. 2011), as are we.

6           Rule 15c requires brokers to maintain a minimum cash  
7 balance in a reserve account and segregate all such cash for  
8 customers' benefit. See 17 C.F.R. § 240.15c3-3. It also  
9 "specifically contemplates the commingling of customer  
10 monies and the lending of customer securities." Levitin v.  
11 PaineWebber, Inc., 159 F.3d 698, 706 (2d Cir. 1998).

12           Whatever Rule 15c may do, it does not confer power on a SIPA  
13 trustee to sue on behalf of customers. First, the Rule is  
14 not a part of SIPA. Second, such a rule would exceed the  
15 scope of agency rule-making. See generally Alexander v.  
16 Sandoval, 532 U.S. 275, 291 (2001) ("Language in a  
17 regulation may invoke a private right of action that  
18 Congress through statutory text created, but it may not  
19 create a right that Congress has not."). In any event, the  
20 Rule does not suggest that the broker (or the Trustee)  
21 serves as a bailee of customer property, or that the Trustee  
22 may assert claims on behalf of customers.

1 Finally, SIPC and the Trustee infer a bailment  
2 relationship from federal common law and the Federal Rules  
3 of Civil Procedure. The inferences are strained at best.  
4 Federal common law, which does not speak to the powers of a  
5 SIPA trustee, offers no useful insight.<sup>24</sup> Nor do the  
6 Federal Rules of Civil Procedure.<sup>25</sup>

7 **2**

8 The Trustee argues that, because SIPC advanced funds to  
9 customers at the outset of the liquidation, SIPC is

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<sup>24</sup> SIPC suggests that it is appropriate to resort to federal common law where a significant conflict exists between state and federal law and where the need for uniformity in the treatment of brokerage customers is paramount. But no legal authority is offered to support the application of federal common law here. And there is no evident conflict between New York bailment law (on the one hand) and (on the other) SIPA, Rule 15c, or some broader federal policy.

<sup>25</sup> The Trustee invokes Rule 17, which allows a bailee to sue "in [his] own name[] without joining the person for whose benefit the action is brought." Fed. R. Civ. P. 17(a)(1). But, as discussed in text, the trustee is not a bailee. Additionally, Rule 17(a), like all rules prescribed by the Supreme Court, may not abridge, enlarge, or otherwise modify substantive rights. See 28 U.S.C. § 2072(b); Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 49 (2d Cir. 2005) ("The procedural mechanisms set forth in Rule 17(a) for ameliorating real party in interest problems may not . . . be employed to expand substantive rights."). It therefore cannot provide an independent basis for standing. See generally Natural Res. Def. Council, Inc. v. EPA, 481 F.2d 116, 121 (10th Cir. 1973).

1 subrogated to those customers' claims against the  
2 Defendants; SIPC therefore may assert those claims as  
3 subrogee; and Picard is authorized to enforce that right on  
4 SIPC's behalf. But SIPC is a creature of statute, and  
5 neither the plain language of the statute, nor its  
6 legislative history, supports the Trustee's position.

7 True, a SIPA trustee (unlike a trustee in bankruptcy),  
8 advances money to pay claims. The statute takes this fact  
9 into account by subrogating SIPC to customers' net equity  
10 claims to the extent of the advances they received. But it  
11 goes no further.

12 The Trustee's subrogation theory is premised in  
13 § 78fff-3(a):

14 To the extent moneys are advanced by SIPC to the  
15 trustee to pay or otherwise satisfy the claims of  
16 customers, in addition to all other rights it may  
17 have at law or in equity, SIPC shall be subrogated  
18 to the claims of such customers with the rights  
19 and priorities provided in this chapter, except  
20 that SIPC as subrogee may assert no claim against  
21 customer property until after the allocation  
22 thereof to customers as provided in section 78fff-  
23 2(c) of this title.

24  
25 15 U.S.C. § 78fff-3(a). It is undisputed that the phrase  
26 "claims of customers" refers (as throughout the statute) to  
27 customers' net equity claims against the estate. See  
28 generally In re Bernard L. Madoff Inv. Sec. LLC, 654 F.3d

1 229, 233 (2d Cir. 2011), cert. denied, 133 S. Ct. 25 (2012).  
2 SIPA thus allows only a narrow right of subrogation--for  
3 SIPC to assert claims against the fund of customer property  
4 and thereby recoup any funds advanced to customers once the  
5 SIPA trustee has satisfied those customers' net equity  
6 claims.

7 The Trustee urges us to conclude that § 78fff-3(a) does  
8 more--much more--by creating a right of subrogation that  
9 allows SIPC (and, by extension, the Trustee) to step into  
10 customers' shoes and to initiate and control litigation on  
11 their behalf, against any number of defendants, until SIPC  
12 has been repaid in full. As we emphasized earlier, SIPA  
13 grants trustees the "same powers and title with respect to  
14 the debtor and the property of the debtor" as a Title 11  
15 trustee, 15 U.S.C. § 78fff-1(a), and the Supreme Court has  
16 squarely rejected attempts by Title 11 trustees to capture  
17 such litigation, see Caplin v. Marine Midland Grace Trust  
18 Co., 406 U.S. 416, 428 (1972). As a final resort, the  
19 Trustee relies on a catch-all provision included in the 1978  
20 amendments to SIPA, which states that the subrogation rights  
21 afforded by § 78fff-3(a) should not be read to diminish "all  
22 other rights [SIPC] may have at law or in equity." 15

1 U.S.C. § 78fff-3(a). From here, the Trustee claims an  
2 implied right of equitable subrogation, "the principle by  
3 which an insurer, having paid losses of its insured, is  
4 placed in the position of its insured so that it may recover  
5 from the third party legally responsible for the loss."  
6 Winkelmann v. Excelsior Ins. Co., 650 N.E.2d 841, 843 (N.Y.  
7 1995). He thus claims a wide grant of authority to initiate  
8 class-action lawsuits and assert any number of tort claims  
9 against third parties on customers' behalf.<sup>26</sup> This is a  
10 long, long reach.

11 There is no sign that Congress intended an expansive  
12 increment of power to SIPA trustees. In 1973, the SIPC  
13 chairman appointed a Special Task Force to consider possible  
14 amendments to the 1970 Act. The resulting July 1974 report  
15 separately listed its "major policy recommendations" and its  
16 proposed "technical refinements." See Report to the Board  
17 of Directors of SIPC of the Special Task Force to Consider  
18 Possible Amendments to SIPA, Letter of Transmittal (July 31,  
19 1974). Recommendation II.A.9, deemed a "Major Policy  
20 Recommendation," states that "claims of SIPC as subrogee  
21 (except as otherwise provided), should be allowable *only as*

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<sup>26</sup> We use the term "class-action lawsuits" loosely here, without taking a position on the SLUSA question.

1 *claims against the general estate.* Id. at 12 (emphasis  
2 added); see also SIPA Amendments of 1975: Hearings on H.R.  
3 8064 Before the Subcomm. on Consumer Protection and Fin. of  
4 the H. Comm. on Interstate and Foreign Commerce, 94th Cong.  
5 64 (1976) (hereinafter "Hearings on H.R. 8064").

6 Notably, Caplin was decided in 1972, before the Task  
7 Force report and six years before Congress amended § 78fff-  
8 3(a) to include "all other rights [SIPC] may have at law or  
9 in equity." If Congress sought to exempt SIPA trustees from  
10 Caplin's rule and expand SIPC's subrogation rights to tort  
11 actions against third parties, we would expect such intent  
12 to be manifested in the statutory wording and in the  
13 record.<sup>27</sup>

14 The wording cited by Picard was proposed by SIPC itself  
15 as a "Minor Substantive or Technical Amendment[]" in order  
16 to "make clear that SIPC's subrogation rights under the 1970  
17 Act are cumulative with whatever rights it may have under  
18 other State or Federal laws." Hearings on H.R. 8064, 94th

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<sup>27</sup> Caplin was undoubtedly on the radar of legislators at the time, as an earlier version of Section 544 of the Bankruptcy Code introduced with the 1978 amendments contained a provision intended to overrule Caplin. See In re Ozark Rest. Equip. Co., Inc., 816 F.2d 1222, 1227 n.9 (8th Cir. 1987). Significantly, this provision was deleted prior to enactment. Id.

1 Cong. 197, 199 (1976) (Memorandum of the Securities Investor  
2 Protection Corporation in Regard to Certain Comments  
3 Concerning H.R. 8064). Congress "does not alter the  
4 fundamental details of a regulatory scheme in vague terms or  
5 ancillary provisions--it does not . . . hide elephants in  
6 mouseholes." Whitman v. Am. Trucking Assocs., Inc., 531  
7 U.S. 457, 468 (2001).

8 The Trustee adduces rules of insurance law to justify  
9 his claim, an analogy with some intuitive appeal: Principles  
10 of equity generally permit subrogees wide scope to sue  
11 third-party tortfeasors, a claim that arises most commonly  
12 with insurance. See, e.g., Winkelmann, 650 N.E.2d at 843.

13 But this argument succumbs to the same critique as  
14 Picard's bailment theory: We avoid engrafting common law  
15 principles onto a statutory scheme unless Congress's intent  
16 is manifest. See supra p. 46. The clearest Congressional  
17 intent here is that we should treat SIPA as a bankruptcy  
18 statute, not as an insurance scheme. "SIPA and FDIA are  
19 independent statutory schemes, enacted to serve the unique  
20 needs of the banking and securities industries,  
21 respectively."<sup>28</sup> SIPC v. Morgan, Kennedy & Co., 533 F.2d

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<sup>28</sup> Congress rejected some early versions of the SIPA bill "which were patterned on FDIA and which extended



1 1314, 1318 (2d Cir. 1976). We have since warned against  
2 oversimplified comparisons between insurance law and federal  
3 statutory law: "While this Court has referred to SIPC as  
4 providing a form of public insurance, it is clear that the  
5 obligations imposed on an insurance provider under state law  
6 do *not* apply to this congressionally-created nonprofit  
7 membership corporation." In re Bernard L. Madoff Inv. Sec.  
8 LLC, 654 F.3d 229, 239 (2d Cir. 2011), cert. denied, 133 S.  
9 Ct. 25 (2012) (internal citations and quotation marks  
10 omitted).

11 Relatedly, Picard argues under principles of equity  
12 that unless he can spearhead the litigation on behalf of  
13 defrauded customers, the victims will not be made whole,  
14 SIPC will be unable to recoup its advances, and third-party  
15 tortfeasors will reap windfalls.<sup>29</sup> No doubt, there are

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insurance coverage to certain beneficial interests  
represented by customer accounts." Morgan, Kennedy & Co.,  
533 F.2d at 1318.

<sup>29</sup> Picard and SIPC contend that, absent his exclusive  
authority to bring these customer claims, the Defendants  
would in effect be immunized from suit. But it is not  
obvious why customers cannot bring their own suits against  
the Defendants. In fact, the Defendants make clear that  
customers have already filed such actions. See, e.g., MLSMK  
Inv. Co. v. JP Morgan Chase & Co., 431 F. App'x 17 (2d Cir.  
2011) (summary order); Shapiro v. JP Morgan Chase & Co., No.  
11-CV-8331 (S.D.N.Y.); Hill v. JPMorgan Chase & Co., No. 11-  
CV-7961 (S.D.N.Y.). As in Redington, "the customers on  
whose behalf the Trustee seeks to maintain suit are not only

1 advantages to the course Picard wants to follow. But equity  
2 has its limits; it may fill certain gaps in a statute, but  
3 it should not be used to enlarge substantive rights and  
4 powers. Cf. In re Ozark, 816 F.2d at 1230 (observing that  
5 while Bankruptcy Code allows a court to apply equitable  
6 principles when necessary, "[t]hese powers . . . do not  
7 include the ability to award equitable relief where the  
8 party asserting the cause of action for such relief does not  
9 have standing under any other section of the Code").

10 As the Supreme Court observed, "SIPC's theory of  
11 subrogation is fraught with unanswered questions." Holmes  
12 v. SIPC, 503 U.S. 258, 270 (1992) (ultimately declining to  
13 decide subrogation issue and instead holding that link  
14 between stock manipulation and harm to customers was too  
15 remote to support SIPC's RICO claim). As in Holmes, SIPC  
16 has left courts "to guess at the nature of the 'common law  
17 rights of subrogation' that it claims." Id. at 271.

18 The practical skepticism voiced in Caplin in a  
19 traditional bankruptcy context is justified here as well.  
20 Would such suits prevent customers from "mak[ing] their own

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entitled to bring, but have already initiated their own  
action." Redington v. Touche Ross & Co., 592 F.2d 617, 635  
(2d Cir. 1978) (Mulligan, J., dissenting).

1 assessment of the respective advantages and disadvantages,  
2 not only of litigation, but of various theories of  
3 litigation"? Caplin, 406 U.S. at 431. Can a SIPA trustee  
4 control customers' claims against third parties if SIPC has  
5 not fully satisfied the customers' claims against the  
6 estate? How would inconsistent judgments be avoided, given  
7 that "independent actions are still likely because it is  
8 extremely doubtful that [the parties] would agree on the  
9 amount of damages to seek, or even on the theory on which to  
10 sue"? Id. at 432. Who would be bound by a settlement  
11 entered into by either the Trustee or by each customer who  
12 brings suit? Id. The size and scope of the litigation here  
13 only amplify these concerns.

14 As Caplin advises, it is better to leave these  
15 intractable policy judgments to Congress:

16 Congress might well decide that reorganizations  
17 have not fared badly in the 34 years since Chapter  
18 X was enacted and that the status quo is  
19 preferable to inviting new problems by making  
20 changes in the system. Or, Congress could  
21 determine that the trustee . . . was so well  
22 situated for bringing suits . . . that he should  
23 be permitted to do so. In this event, Congress  
24 might also determine that the trustee's action was  
25 exclusive, or that it should be brought as a class  
26 action on behalf of all [creditors], or perhaps  
27 even that the [creditors] should have the option  
28 of suing on their own or having the trustee sue on  
29 their behalf. Any number of alternatives are

1 available. Congress would also be able to answer  
2 questions regarding subrogation or timing of law  
3 suits before these questions arise in the context  
4 of litigation. Whatever the decision, it is one  
5 that only Congress can make.

6 Caplin, 406 U.S. at 434-35.

7 \* \* \*

8 For the foregoing reasons, the judgments are affirmed.