

16-2173-cv
SPV OSUS Ltd. v. UBS AG, et al

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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5 August Term, 2016

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7 (Argued: June 14, 2017

Decided: February 9, 2018)

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9 Docket No. 16-2173
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13 SPV OSUS LTD.,

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15 *Plaintiff-Appellant,*

16
17 v.

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19 UBS AG, UBS (LUXEMBOURG) S.A., UBS FUND SERVICES (LUXEMBOURG)
20 S.A., UBS THIRD PARTY MANAGEMENT COMPANY S.A., AIA LLC, ACCESS
21 PARTNERS (SUISSE) S.A., ACCESS MANAGEMENT LUXEMBOURG S.A.,
22 ACCESS PARTNERS S.A. (LUXEMBOURG), PATRICK LITTAYE, ACCESS
23 INTERNATIONAL ADVISORS LTD., THEODORE DUMBAULD,

24
25 *Defendants-Appellees.*¹
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28
29 Before: CALABRESI and POOLER, *Circuit Judges*, and RAMOS, *District Judge*.²

¹ The Clerk of the Court is directed to amend the caption as above.

² Judge Edgardo Ramos, United States District Court for the Southern District of New York, sitting by designation.

1 SPV Osus Ltd. is the putative assignee of Optimal Strategic U.S. Equity Ltd
2 (collectively, "SPV"). Optimal invested money directly with Bernard L. Madoff
3 Investment Securities LLC ("BLMIS"). When BLMIS turned out to be a massive
4 Ponzi scheme, *see In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 231-33 (2d
5 Cir. 2011), Optimal suffered losses it alleges totaled roughly \$2.9 billion.
6 SPV sued UBS AG and its affiliated entities (collectively, "UBS") and AIA LLC
7 and its affiliated entities and individuals (collectively, "Access") in New York
8 state court. In broad strokes, SPV alleges that UBS and Access aided and abetted
9 BLMIS and Madoff by sponsoring, and providing support for, two European-
10 based feeder funds. SPV alleges that the feeder funds channeled billions of
11 dollars to Madoff and BLMIS, allowing them to further their fraud. SPV alleges
12 UBS and Access chose to work with the feeder funds despite being aware of
13 fraudulent activity on the part of Madoff and BLMIS. Absent assistance from
14 UBS and Access, SPV allege, Madoff and BLMIS could not have continued to
15 operate their Ponzi scheme.

16 UBS removed the New York state action to the United States District Court
17 for the Southern District of New York (Rakoff, J.) SPV moved to remand. The
18 district court denied the motion, finding federal jurisdiction proper pursuant to

1 28 U.S.C. § 1334, which provides federal courts with “original but not exclusive
2 jurisdiction of all civil proceedings arising under title 11, or arising in or related
3 to cases under title 11.” 28 U.S.C. § 1334(b). *See SPV OSUS Ltd. v. UBS AG*, 2015
4 WL 4079079 (S.D.N.Y. July 1, 2015). The district court then granted UBS’s motion
5 to dismiss the complaint for lack of personal jurisdiction. *See SPV OSUS Ltd. v.*
6 *UBS AG*, 114 F. Supp. 3d 161 (S.D.N.Y. 2015). Finally, the district court granted a
7 separate motion by the Access Defendants to dismiss the complaint against them,
8 in relevant part, on the ground that SPV’s complaint failed to adequately allege
9 that actions by the Access Defendants proximately caused SPV’s loss. *See SPV*
10 *OSUS Ltd. v. UBS AG*, 2016 WL 3039192 (S.D.N.Y. May 26, 2016).

11 On appeal, SPV primarily argues that (1) this litigation is not “related to”
12 the Madoff/BLMIS bankruptcies, such that the federal courts lack jurisdiction; (2)
13 the district court erred in finding it lacked personal jurisdiction over UBS; and (3)
14 it adequately pled proximate cause. For the reasons detailed below, we affirm the
15 district court in all respects.

16 Affirmed.

17 Judge Calabresi concurs in the judgment and opinion of the Court, except
18 for Part II, and files a concurring opinion.

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CHRISTIAN WARD, Yetter Coleman LLP (Collin J. Cox, *on the brief*), Houston, TX, for Plaintiff-Appellant SPV Osus Ltd.

MARSHALL L. KING, Gibson, Dunn & Crutcher LLP (Gabriel Herrman, *on the brief*), New York, NY, for Defendants-Appellees UBS AG, UBS (Luxembourg) S.A., UBS Fund Services (Luxembourg) S.A., and UBS Third Party Management Company S.A.

ANTHONY L. PACCIOINE, Katten Muchen Roseman LLP (Brian L. Muldrew, *on the brief*), New York, NY, for Defendants-Appellees AIA LLC, Access Partners (Suisse) S.A., Access Management Luxembourg S.A., Access Partners S.A. (Luxembourg), Patrick Littaye, Access International Advisors Ltd.

POOLER, Circuit Judge:

This case presents yet another chapter in the Bernie Madoff saga. SPV Osus Ltd. is the putative assignee of Optimal Strategic U.S. Equity Ltd (collectively, "SPV"). Optimal invested money directly with Bernard L. Madoff Investment Securities LLC ("BLMIS"). When BLMIS turned out to be a massive Ponzi scheme, *see In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 231-33 (2d Cir. 2011), Optimal suffered losses it alleges totaled roughly \$2.9 billion.

1 Seeking a fresh path to recovery, SPV sued UBS AG and its affiliated
2 entities (collectively, “UBS”) and AIA LLC and its affiliated entities and
3 individuals (collectively, “Access”) in New York state court. The gravamen of
4 SPV’s complaint is that UBS and Access aided and abetted BLMIS and Madoff by
5 sponsoring, and providing support for, two European-based feeder funds—
6 Luxalpha SICAV and Groupement Financier Ltd. SPV alleges that the feeder
7 funds in turn channeled billions of dollars to Madoff and BLMIS, allowing them
8 to further their fraud. SPV alleges UBS and Access were involved with the feeder
9 funds despite being aware of numerous signs of fraudulent activity on the part of
10 Madoff and BLMIS. Absent such assistance from UBS and Access, SPV alleges,
11 Madoff and BLMIS could not have continued to operate their Ponzi scheme.

12 UBS removed the state court action to the United States District Court for
13 the Southern District of New York. SPV moved to remand. The district court
14 denied the motion, finding federal jurisdiction proper pursuant to 28 U.S.C.
15 § 1334, which provides federal courts with “original but not exclusive
16 jurisdiction of all civil proceedings arising under title 11, or arising in or related
17 to cases under title 11.” 28 U.S.C. § 1334(b). *See SPV OSUS Ltd. v. UBS AG*, 2015
18 WL 4079079 (S.D.N.Y. July 1, 2015) (“*SPV I*”). The district court then granted

1 UBS’s motion to dismiss the complaint for lack of personal jurisdiction. *See SPV*
2 *OSUS Ltd. v. UBS AG*, 114 F. Supp. 3d 161 (S.D.N.Y. 2015) (“*SPV II*”). Finally,
3 the district court granted a separate motion by the Access Defendants to dismiss
4 the complaint against them, in relevant part, on the ground that SPV’s complaint
5 failed to adequately allege that actions by the Access Defendants proximately
6 caused SPV’s loss. *See SPV OSUS Ltd. v. UBS AG*, 2016 WL 3039192 (S.D.N.Y.
7 May 26, 2016) (“*SPV III*”).

8 On appeal, SPV primarily argues that the district court erred in (1) not
9 granting SPV’s motion to remand, as the instant litigation is not “related to” the
10 Madoff/BLMIS bankruptcies and the federal courts lack jurisdiction; (2) finding it
11 lacked personal jurisdiction over UBS; and (3) finding it failed to adequately
12 plead proximate cause. For the reasons detailed below, we affirm the district
13 court’s decisions in all respects.

14

15

BACKGROUND

16 SPV is a Bahamian corporation that alleges is it the assignee of Optimal.
17 Optimal invested directly with BLMIS, and its last statement from BLMIS in
18 November 2008 reported roughly \$2.9 billion in its accounts. Madoff was

1 involuntarily forced into Chapter 7 in April 2009. In June 2009 the Madoff estate
2 was consolidated with a separate bankruptcy proceeding against BLMIS that was
3 filed under the Securities Investor Protection Act (“SIPA”). The order
4 consolidating the bankruptcy proceedings states that the consolidated estate
5 “shall be administered in accordance with SIPA and the Bankruptcy Code under
6 the jurisdiction of” the bankruptcy court, but “the Chapter 7 Trustee shall remain
7 Chapter 7 trustee of the Madoff estate and shall continue to have all powers,
8 rights, claims and interests of a Chapter 7 trustee[,] . . . [and] all powers, rights,
9 claims and interests of the Madoff estate are expressly preserved . . .”.

10 In December 2014, SPV filed suit in New York state court against UBS and
11 AIA. SPV’s suit set forth claims for aiding and abetting fraud, breach of fiduciary
12 duty, conversion, and knowing participation in a breach of trust. In essence, SPV
13 alleges that the defendants facilitated BLMIS’s fraud by moving billions of
14 dollars from European investors to BLMIS by providing support to the Luxalpha
15 and Groupement feeder funds. SPV alleges that by supporting the feeder funds,
16 UBS and Access provided Madoff and BLMIS with a veneer of credibility that
17 gave investors confidence in their decision to invest with Madoff and BLMIS,
18 allowing the fraud to continue. SPV also alleges that UBS ignored certain “red

1 flags” indicating Madoff and BLMIS were engaged in fraud, and continued to
2 service the feeder funds so that it might pocket fees. All the while, SPV alleges,
3 UBS protected itself and its clients by not marketing or recommending Madoff
4 funds.

5 UBS AG is a Swiss entity with its principal place of business in
6 Switzerland. The remaining UBS entities were, at all times relevant, Luxembourg
7 entities with their principal places of business in Luxembourg. Luxalpha was
8 organized and located in Luxembourg; Groupement was organized and located
9 in the British Virgin Islands. SPV alleges that it pleaded sufficient contacts to
10 allow the exercise of personal jurisdiction by virtue of the UBS entities’ contacts
11 with New York related to their interactions with the Luxalpha and Groupement
12 feeder funds. SPV also sued AIA LLC; Access International Advisors Ltd.; Access
13 Partners (Suisse) S.A.; Access Management Luxembourg S.A.; Access Partners
14 S.A. (Luxembourg); and Patrick Littaye (together, the “Access Defendants”).

15 As described above, the district court denied SPV’s motion to remand the
16 matter to state court, then granted separate motions to dismiss the complaint.
17 This appeal followed.

18

DISCUSSION

I. Appellate Jurisdiction.

SPV's notice of appeal designates its appeal as both from the judgment and from orders entered on July 21, 2015, July 24, 2015, May 26, 2016 and May 27, 2016. This list does not include the order and opinion denying the motion to remand. UBS argues that the failure to specify the remand order in the notice of appeal strips this Court of jurisdiction to consider an appeal from that order. We need not linger long over the issue, because even assuming arguendo that SVG waived its right to appeal, the denial of a motion to remand goes to this Court's subject matter jurisdiction, which may be raised at any time. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liability Litig.*, 488 F.3d 112, 123 (2d Cir. 2007). "Indeed, we have often taken it upon ourselves to determine whether removal jurisdiction existed even where that issue was not itself appealed." *Id.* at 121. Satisfied that the appeal from the district court's denial of the motion to remand is properly before us, we turn to the merits.

II. "Related to" jurisdiction

"On appeal from the denial of a motion to remand for lack of subject matter jurisdiction, we review the court's legal conclusions de novo and its

1 factual findings for clear error." *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56 (2d Cir.
2 2006). UBS removed to federal court pursuant to the general removal statute, 28
3 U.S.C. § 1452(a) and the bankruptcy removal statute, which grants federal courts
4 "original but not exclusive jurisdiction of all civil proceedings arising under title
5 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). "Congress
6 did not delineate the scope of 'related to' jurisdiction, but its choice of words
7 suggests a grant of some breadth." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08
8 (1995).

9 In this Circuit, "a civil proceeding is related to a title 11 case if the action's
10 outcome might have any conceivable effect on the bankrupt estate." *Parmalat
11 Capital Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 579 (2d Cir. 2011) (internal
12 quotation marks omitted). "If that question is answered affirmatively, the
13 litigation falls within the 'related to' jurisdiction of the bankruptcy court." *In re
14 Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992). "Congress intended to
15 grant comprehensive jurisdiction to the bankruptcy courts so that they might
16 deal efficiently and expeditiously with all matters connected with the bankruptcy
17 estate." *Celotex*, 514 U.S. at 308. While "related to" jurisdiction is not "limitless,"
18 *id.*, it is fairly capacious, and includes "suits between third parties which have an

1 effect on the bankruptcy estate." *Id.* at 307 n. 5. "An action is related to
2 bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or
3 freedom of action (either positively or negatively) and which in any way impacts
4 upon the handling and administration of the bankrupt estate." *Id.* at 308 n. 6.

5 Here, the claims at issue arise in an action that does not directly involve
6 the bankruptcy estates. "In determining whether potential claims by third party
7 defendants against the debtor for either indemnification or contribution give rise
8 to "related to" jurisdiction over litigation to which the debtor is not a party,
9 courts in this circuit . . . have generally found jurisdiction where there is a
10 'reasonable' legal basis for the claim." *In re Worldcom, Inc. Sec. Litig.*, 293 B.R. 308,
11 319 (S.D.N.Y. 2003) (collecting cases). A claim need not be certain to provide a
12 federal court with jurisdiction: "contingent outcomes can satisfy the 'conceivable
13 effects' test, so long as there is the *possibility* of an effect on the estate." *N.Y.*
14 *Commercial Bank v. Pullo*, No. 12-02052 (BRL), 2013 WL 494050, at *3 (Bankr.
15 S.D.N.Y. Feb. 7, 2013).

16 The gravamen of SPV's complaint is that defendants are joint tortfeasors
17 with Madoff and BLMIS, which, if proven, would provide defendants with a
18 putative contribution claim, to be asserted in the bankruptcy proceedings. SPV

1 urges us to find that the district court erred in denying its motion to remand to
2 state court because it erroneously found that UBS's potential contribution claims
3 sufficiently "related to" the Madoff/BLMIS bankruptcy proceedings to support
4 federal jurisdiction. SPV contends that UBS's potential claims are too remote
5 from the bankruptcy proceedings to have any effect on the estates, making the
6 exercise of federal jurisdiction improper. SPV argues that UBS's potential claim
7 for contribution in the bankruptcy proceedings is illusory, primarily because (1)
8 the bar date to assert claims against the Madoff and BLMIS estates expired,
9 barring UBS from pursuing any claim in the bankruptcy proceeding; and (2) in
10 any event, there is not enough money in either estate to pay out any such claims.

11 We agree with the district court that the failure to file claims prior to the
12 bar date is not fatal to the potential claims at issue here. Bankruptcy courts are
13 permitted to accept late proofs of claim. *See, e.g., In re PT-1 Commc'ns, Inc.*, 292
14 B.R. 482, 489 (Bankr. E.D.N.Y. 2003) (allowing filing of late claim where claimant
15 did not know claim existed until after the bar date lapsed). Unlike
16 indemnification claims, contribution claims do not accrue until after liability is
17 established. A party may not know of a potential contribution claim until sued,
18 which may be years after bankruptcy proceedings have commenced. For

1 example, here SPV sued UBS nearly five-and-half years after the SIPA bar date.
2 This lack of notice forms, at a minimum, a credible basis for defendants to
3 petition the bankruptcy court for leave to file a late proof of claim based on
4 excusable neglect. *See* Fed. R. Bankr. P. 9006(b)(1) (bankruptcy court may allow
5 late proof of claim “where the failure to act was the result of excusable neglect.”).

6 Conversely, “[a]n indemnification right arises at the time the
7 indemnification agreement is executed, and it constitutes a claim under the
8 Bankruptcy Code even if the act giving rise to indemnification has not yet
9 occurred.” *Allstate Ins. Co. v. Credit Suisse Sec. (USA) LLC*, 2011 WL 4965150, at *5
10 (S.D.N.Y. Oct. 19, 2011) (internal quotation marks omitted). Excusable neglect
11 does not excuse the failure to file proof of claim for an indemnification liability
12 by the bar date, such that the claim could not have any “conceivable effect” on
13 the estate. *Id.*, *see also Sealink Funding Ltd. v. Bear Stearns & Co. Inc.*, No. 12 Civ.
14 1397, 2012 WL 4794450, at *3 (S.D.N.Y. Oct. 9, 2012) (same).

15 Moreover, it is unclear whether the applicable bar date has passed. While a
16 bar date was set and has passed in the SIPA action involving the BLMIS estate,
17 no bar date was set in the Madoff estate. The consolidation order states only that
18 the combined estate “shall be administered in accordance with SIPA and the

1 Bankruptcy Code.” If the SIPA bar date controls, as SPV argues, it cannot be
2 waived. *See In re Lehman Bros., Inc.*, 493 B.R. 437, 443 (Bankr. S.D.N.Y. 2013)
3 (noting that unlike proceedings under bankruptcy chapters 7 and 11, a court
4 lacks discretion to extend the bar date in SIPA cases, with several exceptions
5 inapplicable here).

6 We need not resolve the issue of which bar date controls. Even if the bar
7 date set in the SIPA estate controls, simply settling the issue of whether a late
8 claim is allowable would likely have an effect on the estate. Any attempt to file a
9 late claim would result in the estate incurring costs. As the district court noted,
10 even unsuccessful claims require evaluation by the trustee, who recovers fees for
11 such work from the estate. *See* 11 U.S.C. § 704(a)(5) (trustee charged with
12 “examin[ing] proofs of claims and object[ing] to the allowance of any claim that
13 is improper”); 15 U.S.C. § 78fff(e) (“[a]ll costs and expenses of administration of
14 the estate of the debtor . . . shall be borne by the general estate of the debtor.”).

15 Second, if SPV were successful in its claims against UBS, it would reduce the
16 amount it is owed as a creditor of the BLMIS/Madoff estate. *See, e.g., n re Adelphia*
17 *Commc’ns Corp. Sec. & Deriv. Litig.*, No. 03 MDL 1529, 2005 WL 1404798, at *2
18 (S.D.N.Y. June 14, 2005) (“To the extent that plaintiffs are successful against the

1 defendants, plaintiffs' recoveries will in all probability (and certainly
2 conceivably) reduce the total of Adelpia's liabilities"); *see also WorldCom*, 293
3 B.R. at 323 ("The potential alteration of the liabilities of the estate and change in
4 the amount available for distribution to other creditors is sufficient to find that
5 litigation among non-debtors is 'related to' the bankruptcy proceeding.").

6 The need for litigation to settle the issue of whether a late claim would be
7 permitted also militates against finding this litigation "related to" the bankruptcy
8 proceeding. SPV relies on *Pacor, Inc. v. Higgins* for the proposition that unless the
9 underlying litigation "automatic[ally] creat[es] liability" for the bankruptcy
10 estate, the connection between the underlying litigation and the bankruptcy
11 proceedings is too remote to support "related to" jurisdiction. 743 F.2d 984, 995
12 (3d Cir. 1984). Like the other circuits to reject this branch of the *Pacor* analysis, we
13 think a more flexible approach appropriate. *See In re El Paso Refinery, LP*, 302
14 F.3d 343, 348-49 (5th Cir. 2002) (holding a "chain of indemnification provisions"
15 that could be used to assert a claim against the debtor allowed for "related to"
16 jurisdiction); *In re Dow Corning Corp.*, 86 F.3d 482, 489-94 (6th Cir. 1996) (holding
17 that suits against manufacturers and suppliers of silicone gel breast implants
18 were "related to" the bankruptcy of the Dow Corning Corporation because of

1 potential claims for contribution and indemnification against Dow); *In re*
2 *Wolverine Radio Co.*, 930 F.2d 1132, 1143 (6th Cir. 1991) (“related to” jurisdiction
3 found based on contractual indemnification provision even though the debtor
4 “would not be affected until and unless [the third party] invoked the
5 indemnification” clause); *A.H. Robins v. Piccinin*, 788 F.2d 994, 1001 (4th Cir. 1986)
6 (litigation “related to” bankruptcy proceedings when brought against officers of
7 debtor who may be entitled to indemnification under debtor's insurance policy);
8 *see also Arnold v. Garlock, Inc.*, 278 F.3d 426, 440 (5th Cir. 2001) (noting that
9 “related to” jurisdiction possible based on contribution claims). As discussed
10 above, a contingent contribution claim may serve as the basis for “related to”
11 jurisdiction as it may have a “conceivable effect” on the bankruptcy estate.

12 SPV also challenges the district court’s conclusion that it is “within the
13 realm of possibility” for defendants to receive a distribution from the estate. *SPV*
14 *I*, 2015 WL 4079079, at *4. SPV notes that the amount of loss claim greatly
15 exceeds the assets recovered by the estates. Thus, it argues, there will be no funds
16 available to pay UBS, assuming SPV prevails in the underlying litigation and
17 UBS asserts a contribution claim against the bankruptcy estate. The district court
18 found recovery possible because “the estate continues to recover substantial

1 assets, including almost \$1 billion in 2014 alone,” and that “the Trustee is
2 aggressively pursuing numerous other recoveries.” *Id.* While a payout by the
3 estate to defendants may be improbable, it is not impossible. In addition, any
4 claim by defendants potentially alters that distribution of assets among the
5 estates’ creditors, further supporting a finding that this litigation is “related to”
6 the bankruptcy proceedings.

7 Finally, there is a high degree of interconnectedness between this action
8 and the Madoff bankruptcies: SPV can only proceed on these claims if it
9 establishes that the Madoff fraud occurred. SPV’s assignor invested directly with
10 BLMIS. But for the automatic stay, it is difficult to imagine a scenario wherein
11 SPV would not also sue Madoff and BLMIS, given that SPV alleges that UBS
12 aided and abetted in their fraud. “The existence of strong interconnections
13 between the third party action and the bankruptcy has been cited frequently by
14 courts in concluding that the third party litigation is related to the bankruptcy
15 proceeding.” *See WorldCom*, 293 B.R. at 321 (“but for WorldCom’s bankruptcy,
16 [defendants] would have been named as a defendant in [this] action, and despite
17 its absence as a party, its conduct will remain at the heart of [this] litigation.”).

18

1 **II. Personal jurisdiction**

2 “We review a district court's dismissal of an action for want of personal
3 jurisdiction de novo, construing all pleadings and affidavits in the light most
4 favorable to the plaintiff and resolving all doubts in the plaintiff's favor.” *Penguin*
5 *Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010). “In order to survive
6 a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a
7 prima facie showing that jurisdiction exists.” *Id.* at 34–35 (internal quotation
8 marks omitted). A plaintiff “must include an averment of facts that, if credited
9 by the ultimate trier of fact, would suffice to establish jurisdiction over the
10 defendant.” *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir.
11 2010) (internal quotation marks and brackets omitted).

12 When a case is removed to federal court pursuant to 28 U.S.C. § 1452,
13 personal jurisdiction is allowed to the extent permitted by the Constitution of the
14 United States. Fed. R. Bankr. P. 7004(f). “To establish personal jurisdiction over a
15 defendant, due process requires a plaintiff to allege (1) that a defendant has
16 certain minimum contacts with the relevant forum, and (2) that the exercise of
17 jurisdiction is reasonable in the circumstances.” *In re Terrorist Attacks on*
18 *September 11, 2001*, 714 F.3d 659, 674 (2d Cir. 2013) (internal quotation marks

1 omitted). “For purposes of this initial inquiry, a distinction is made between
2 ‘specific’ jurisdiction and ‘general’ jurisdiction.” *Met. Life Ins. Co. v. Robertson-*
3 *Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996). “Specific jurisdiction exists when a
4 State exercises personal jurisdiction over a defendant in a suit arising out of or
5 related to the defendant's contacts with the forum; a court's general jurisdiction,
6 on the other hand, is based on the defendant's general business contacts with the
7 forum state and permits a court to exercise its power in a case where the subject
8 matter of the suit is unrelated to those contacts.” *Id.* (internal quotation marks
9 omitted).

10 “Because general jurisdiction is not related to the events giving rise to the
11 suit, courts impose a more stringent minimum contacts test, requiring the
12 plaintiff to demonstrate the defendant's continuous and systematic general
13 business contacts.” *Id.* (internal quotation marks omitted). “For an individual, the
14 paradigm forum for the exercise of general jurisdiction is the individual's
15 domicile; for a corporation, it is an equivalent place, one in which the corporation
16 is fairly regarded as at home.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*,
17 564 U.S. 915, 923 (2011). “The inquiry under *Goodyear* is not whether a foreign
18 corporation's in-forum contacts can be said to be in some sense continuous and

1 systematic,” but “whether that corporation's affiliations with the State are so
2 continuous and systematic as to render it essentially at home in the forum State.”
3 *Daimler AG v. Bauman*, 134 S. Ct. 746, 752 (2014) (internal quotation marks and
4 brackets omitted).

5 Our Court, in interpreting *Daimler*, noted that the case “expressly cast
6 doubt on previous Supreme Court and New York Court of Appeals cases that
7 permitted general jurisdiction on the basis that a foreign corporation was doing
8 business through a local branch office in the forum.” *Gucci Am., Inc. v. Weixing Li*,
9 768 F.3d 122, 135 (2d Cir. 2014). In *Gucci*, we held that a court could not properly
10 exercise general jurisdiction over the Bank of China, which had branch offices in
11 New York but was “incorporated and headquartered elsewhere” and conducted
12 only a small portion of its worldwide business within the forum. *Id.* at 135.

13 Here, UBS SA, UBS FSL and UBS TPM lack any presence in New York at
14 all: each is incorporated, and has its principal place of business in, Luxembourg.
15 None have any employees in the United States. UBS AG’s place of incorporation
16 and principal place of business is in Switzerland. As the district court correctly
17 adduced, *Daimler* bars the court’s exercise general jurisdiction over the USB
18 defendants. “[A]side from the truly exceptional case, a corporation is at home

1 and subject to general jurisdiction only in its place of incorporation or principal
2 place of business.” *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 29 (2d Cir. 2016).
3 SPV points to nothing that would render this an exceptional case. In *Brown*, we
4 found defendant Lockheed Martin’s contacts with Connecticut insufficient to
5 maintain general jurisdiction even though Lockheed continuously maintained a
6 physical presence in Connecticut for over 30 years, ran operations out of as many
7 as four leased locations in the State, employed up to 70 workers there, and
8 derived about \$160 million in revenue from its Connecticut-based work during
9 the relevant timeframe. *Brown*, 814 F.3d at 627-29. But Lockheed was neither
10 headquartered nor incorporated in Connecticut, and facts fatal to the attempt to
11 subject Lockheed to general jurisdiction in Connecticut. *Id.* at 628–31. Similarly,
12 here the USB defendants simply lack sufficient contacts with the United States to
13 allow the exercise of general jurisdiction.

14 Turning to the exercise of specific jurisdiction, “[t]he inquiry whether a
15 forum State may assert specific jurisdiction over a nonresident defendant focuses
16 on the relationship among the defendant, the forum, and the litigation.” *Walden*
17 *v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (internal quotation marks omitted).
18 “[S]pecific jurisdiction is confined to adjudication of issues deriving from, or

1 connected with, the very controversy that establishes jurisdiction.” *Goodyear*, 564
2 U.S. at 919. A court must look to “whether there was some act by which the
3 defendant purposefully availed itself of the privilege of conducting activities
4 within the forum State, thus invoking the benefits and protections of its laws.” *Id.*
5 at 924 (internal quotation marks and brackets omitted). “[T]he defendant’s suit-
6 related conduct must create a substantial connection with the forum State.”
7 *Walden*, 134 S. Ct. at 1121; *see also Goodyear*, 137 S. Ct. at 919 (exercise of specific
8 jurisdiction requires an “affiliation between the forum and the underlying
9 controversy, principally, [an] activity or an occurrence that takes place in the
10 forum State”). “[A] defendant’s general connections with the forum are not
11 enough” to support the exercise of specific jurisdiction. *Bristol-Myers Squibb Co. v.*
12 *Superior Court of Calif., San Francisco Cty.*, 137 S.Ct. 1773, 1781 (2017).

13 The Supreme Court has yet to address exactly how a defendant’s activities
14 must be tied to the forum for a court to properly exercise specific personal
15 jurisdiction over a defendant. Some circuits require that the in-forum conduct to
16 be the proximate cause of plaintiff’s injuries, while others find the standard
17 satisfied if the defendant’s activities are the “but for” cause of those injuries. *See*
18 *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (collecting and comparing cases).

1 In this Circuit, the standard applied depends on “the relationship among the
2 defendant, the forum, and the litigation:”

3 Where the defendant has had only limited contacts with
4 the state it may be appropriate to say that he will be
5 subject to suit in that state only if the plaintiff's injury
6 was proximately caused by those contacts. Where the
7 defendant's contacts with the jurisdiction that relate to
8 the cause of action are more substantial, however, it is
9 not unreasonable to say that the defendant is subject to
10 personal jurisdiction even though the acts within the
11 state are not the proximate cause of the plaintiff's injury.

12 *Id.*

13 Here, the connections between the USB Defendants, SPV's claims, and its
14 chosen New York forum are too tenuous to support the exercise of specific
15 jurisdiction. None of the USB Defendants are resident in New York. SPV's
16 complaint alleges the injuries suffered by OSUS were caused by Madoff and
17 BLMIS. Missing from the complaint is any allegation that OSUS relied on UBS's
18 contacts with the feeder funds when OSUS decided to invest directly with
19 BLMIS. Nor are there any allegations that OSUS based its decision to invest with
20 BLMIS on the fact that the UBS defendants helped create and service the feeder
21 funds. Indeed, OSUS began investing in BLMIS in 1997, and the feeder funds
22 were not created until 2003 (Groupement) and 2004 (Luxalpha). At bottom, the

1 contacts alleged by SPV between the UBS Defendants, the forum and the
2 litigation amount to a handful of communications and transfers of funds. These
3 limited contacts are insufficient to allow the exercise of specific personal
4 jurisdiction over the UBS Defendants. *See, e.g., Hau Yin To v. HSBC Holdings PLC,*
5 *2017 WL 816136 (S.D.N.Y. 2017)* (“communications with and payments to New
6 York merely to ensure compliance with contract terms negotiated and executed
7 outside of New York do not ‘project’ a defendant into the state sufficiently to
8 confer” specific jurisdiction over foreign defendants) (citation omitted)).

9 **III. Proximate cause**

10 As to the Access Defendants, SPV alleges that they aided and abetted
11 Madoff and BLMIS by luring investors into the feeder funds, which in turn
12 invested funds in BLMIS, and those funds allowed BLMIS to continue to
13 perpetuate its fraud. SPV asserted state law claims for aiding and abetting fraud,
14 aiding and abetting breach of fiduciary duty, aiding and abetting conversion,
15 and knowing participation in a breach of trust (which is essentially an aiding and
16 abetting claim). As set forth in *Lerner v. Fleet Bank, N.A.*, a claim for aiding and
17 abetting a breach of fiduciary duty under New York law:

1 (1) a breach by a fiduciary of obligations to another, (2)
2 that the defendant knowingly induced or participated
3 in the breach, and (3) that plaintiff suffered damage as a
4 result of the breach. With respect to the second
5 requirement, although a plaintiff is not required to
6 allege that the aider and abettor had an intent to harm,
7 there must be an allegation that such defendant had
8 actual knowledge of the breach of duty. And a person
9 knowingly participates in a breach of fiduciary duty
10 only when he or she provides substantial assistance to
11 the primary violator.

12
13 459 F.3d 273, 294 (2d Cir. 2006) (internal citation and brackets omitted). Under
14 New York law, “the elements of aiding and abetting a breach of fiduciary duty,
15 aiding and abetting a conversion, and aiding and abetting a fraud are
16 substantially similar.” *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 533 (S.D.N.Y.
17 2009); *see also Fed. Ins. Co. v. Am. Home Assurance Co.*, 639 F.3d 557, 566 (2d Cir.
18 2011) (“[W]here the parties agree that New York law controls, this is sufficient to
19 establish choice of law.”).

20 The district court dismissed SPV’s state law claims against the Access
21 Defendants after finding that SPV failed to adequately plead the “substantial
22 assistance” element of its claims. *SPV III*, 2016 WL 3039192 at *6-8. “Substantial
23 assistance occurs when a defendant affirmatively assists, helps conceal or fails to
24 act when required to do so, thereby enabling the breach to occur.” *Lerner*, 459

1 F.3d at 295 (citation omitted). “Substantial assistance requires the plaintiff to
2 allege that the actions of the aider/abettor proximately caused the harm on which
3 the primary liability is predicated.” *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452,
4 470 (S.D.N.Y. 2001). That is, the injury must “be a direct or reasonably
5 foreseeable result of the conduct.” *Id.* The district court correctly determined that
6 SPV’s state law claims against the Access Defendants are deficient as a matter of
7 law because SPV failed to adequately plead proximate cause. At most, SPV
8 pleads but-for causation. If the Access Defendants did not provide support and
9 assistance to the feeder funds, the feeder funds would not have collected money
10 from investors. If the money stopped flowing into BLMIS, such that the
11 fraudulent scheme would have collapsed much sooner, staunching OSUS’s
12 losses. The link between the Access Defendants’ actions (or inactions) and the
13 harm suffered by OSUS is simply too attenuated to constitute proximate cause.
14 As the district court pointed out, “if any entity that injected massive sums into
15 BLMIS could be said to have aided and abetted Madoff’s Ponzi scheme, OSUS,
16 which plaintiff claims invested \$1.6 billion in BLMIS, would presumably be
17 subject to liability on the same theory.” *SPV III*, 2016 WL 3039192, at *6; *see also*
18 *Cromer Fin. Ltd.*, 137 F. Supp. 2d at 472 (granting motion to dismiss aiding and

1 abetting claims on substantial assistance grounds because “[w]hile the Ponzi
2 scheme may only have been possible because of Bear Stearns' actions, or inaction,
3 Bear Stearns' conduct was not a proximate cause of the Ponzi scheme”).

4 SPV offers two different theories of proximate cause that it proposes to
5 incorporate into an amended complaint. Neither theory can salvage SPV's
6 claims. The first alternate theory is that the Access Defendants, through
7 misleading marketing materials, aided and abetted the BLMIS fraud by
8 providing BLMIS an “air of legitimacy.” Appellant's Br. at 64. SPV points to
9 nothing showing OSUS relied on the marketing materials provided by the Access
10 Defendants, was aware of the Access Defendants or even knew of the feeder
11 funds at issue. As noted above, OSUS invested with BLMIS directly, and its
12 investments began before the feeder funds were created. SPV's second alternate
13 theory is that the Access Defendants are liable because they failed to notify “the
14 world at large and international investors in particular” of BLMIS's fraud.
15 Appellant's Br. at 59. This theory of causation is unavailing because the Access
16 Defendants owed neither OSUS nor SPV any fiduciary duty. *See Lerner*, 459 F.3d
17 at 295 (“The mere inaction of an alleged aider and abettor constitutes substantial

1 assistance only if the defendant owes a fiduciary duty directly to the plaintiff.”)

2 (citation omitted)).

3 **CONCLUSION**

4 For the reasons given above, the judgment of the district court is

5 **AFFIRMED.**

6

7

8

9

1 Calabresi, *Circuit Judge*, concurring:

2 I join in the opinion except for its analysis of personal jurisdiction. It is not
3 that I necessarily disagree with that analysis. But I believe the better course, in
4 circumstances like those before us, is to assume personal jurisdiction *arguendo*
5 and direct a dismissal with prejudice for failure to state a claim. Our prior case
6 law allows us to do so.

7 Before *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), we, and
8 other circuits, regularly assumed jurisdiction when “the merits question [wa]s
9 more readily resolved” *Id.* at 93-94. But, in *Steel Co.*, the Supreme Court held
10 that this practice, dubbed the “doctrine of hypothetical jurisdiction,” “offend[ed]
11 fundamental principles of separation of powers” and, thus, was impermissible. *Id.*
12 at 94, 101.

13 *Steel Co.* does not, however, undermine the appropriateness of our deciding
14 the merits in the current case. *Steel Co.* was concerned with the judiciary’s powers
15 under Article III. *See id.* at 95-98. Personal jurisdiction, on the other hand, is
16 concerned with individual rights under the Due Process Clause. *Burger King v.*
17 *Rudzewicz*, 471 U.S. 462, 471-72 (1985).

1 The relevant differences between personal and subject-matter jurisdiction
2 are legion. Parties cannot stipulate to subject-matter jurisdiction, *Great Southern*
3 *Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900), but can to personal jurisdiction,
4 *see Burger King*, 471 U.S. at 472 n. 14. Courts have an independent duty to assess
5 subject-matter jurisdiction, *Great Southern*, 177 U.S. at 453, but not personal
6 jurisdiction, *Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp.*, 619 F.3d 207, 213
7 (2d Cir. 2010). And while subject-matter jurisdiction is an absolute limit on the
8 court’s power to adjudicate a claim, *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S.
9 379, 382 (1884), personal jurisdiction is not, *cf. In re DES Litigation*, 7 F.3d 20, 23-24
10 (2d Cir. 1993) (explaining that an interlocutory order finding personal jurisdiction
11 cannot be appealed by a prevailing party because a finding of personal jurisdiction
12 is not a “necessary step” for a district court’s dismissal of a complaint and entry of
13 judgment). I believe that *Steel Co.* is not controlling in cases of personal jurisdiction.
14 *But see Rationis Enter. Inc. of Panama v. AEP/Borden Indus.*, 261 F.3d 264, 267-68 (2d
15 Cir. 2001) (suggesting there is no difference between personal and subject-matter
16 jurisdiction in this regard).

17 Even if there is no difference in how personal jurisdiction and subject-matter
18 jurisdiction are to be treated, the prior cases would allow us to assume jurisdiction

1 in the circumstances before us. *See Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 n. 17
2 (2d Cir. 2012) (reaching the merits and declining to “address the personal
3 jurisdictional claims made by some defendants” where the court had personal
4 jurisdiction over other defendants). In *Norton v. Mathews*, 427 U.S. 524, 528-31
5 (1976), the Supreme Court avoided a jurisdictional question, and instead
6 dismissed on the merits. The Court did so because it had already decided the
7 merits question in a companion case. We applied *Norton* in *Center for Reproductive
8 Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002) (“*Center*”). In *Center*, we directed
9 a dismissal on the merits without reaching an open standing question because the
10 appellants pressed a merits argument that had been squarely rejected in an earlier
11 case. *Id.* at 193. We read *Norton* to allow courts to assume jurisdiction “in those
12 peculiar circumstances where the outcome on the merits has been foreordained”
13 and the court is not “us[ing] the pretermission of the jurisdictional question as a
14 device for reaching a question of law that otherwise would have gone
15 unaddressed.” *Center*, 304 F.3d at 194 (internal quotation marks omitted).

16 The *Norton* rule applies here as well. “[T]he outcome on the merits” against
17 the UBS defendants “has been foreordained.” We already reached the merits in
18 resolving the claims against the Access defendants, who are, except for the

1 personal jurisdiction issue, identically placed to the UBS defendants. Thus, if we
2 assume jurisdiction we would not be doing so “as a device for reaching a question
3 of law that otherwise would have gone unaddressed,” but instead as a means of
4 preventing waste of judicial resources.

5 We note that the *Norton* rule survived *Steel Co. Steel Co.* specifically
6 distinguished *Norton. Steel Co.*, 523 U.S. at 98. And this Court in *Center* affirmed
7 that *Norton* was still good law after *Steel Co. Center*, 304 F.3d at 194.

8 For these reasons, I conclude that we can and should assume personal
9 jurisdiction and reach the merits in this case. Moreover, I believe an additional
10 practical consideration favors our doing so here. A dismissal for lack of personal
11 jurisdiction, which must be without prejudice, invites Appellant to seek another
12 jurisdiction in which to bring claims we have already deemed meritless. This result
13 would be doubly wasteful of judicial resources.

14 Accordingly, while I fully join the rest of the court’s opinion, I do not join
15 the discussion of personal jurisdiction as to the UBS defendants. Instead, I would
16 hold in favor of Appellees on the merits, and dismiss the entire suit with prejudice.