UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BERNARD L. MADOFF, Debtor.	Adv. Pro. No. 08-01789 (BRL) SIPA LIQUIDATION (Substantively Consolidated)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. SAUL B. KATZ, *et al.*, Defendants.	Adv. Pro. No. 10-5287 (BRL) Case No. 11-Civ-03605 (JSR)

TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANTS' MOTION TO STRIKE THE EXPERT REPORT AND TESTIMONY OF HARRISON J. GOLDIN

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Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.*, and the estate of Bernard L. Madoff ("Madoff"), by and through his undersigned counsel, hereby submits this Memorandum of Law in Opposition to the Defendants' Motion to Strike the Expert Reports and Testimony of Dr. Steve Pomerantz and Harrison J. Goldin ("Goldin"), dated Jan. 26, 2012 (hereinafter, the "Motion").[1]

PRELIMINARY STATEMENT

Goldin's Report and expected testimony are both necessary and relevant in aiding the jury with understanding what conduct is expected of a sponsor, administrator, trustee, and fiduciary of a retirement plan in accordance with industry standards. Here, the Defendants included and endorsed BLMIS as a fund option in the Sterling Equities Associates' Retirement Plan (the "Plan"). At the time of BLMIS's collapse, well over 90% of money in the Plan was allocated to BLMIS. Goldin will assist the trier of fact by explaining how Defendants were expected to perform with regard to safeguarding their employee's retirement funds. Goldin's specialized knowledge is probative as to how the Defendants' actions and omissions, with regard to discharging their obligations under the Plan, demonstrate a conscious decision by the Defendants to not investigate and not conduct due diligence into Madoff and his investment performance.

[1] Citations to the Defendants' Memorandum of Law in Support of the Motion to Strike the Expert Reports and Testimony of Dr. Steve Pomerantz and Harrison J. Goldin, dated Jan. 26, 2012 (hereinafter "Defs. Br. at __"), at 10-11. The Trustee opposes the Motion, as it relates to Dr. Steve Pomerantz, via a separate memorandum of law.

In connection with his retention, Goldin prepared and signed an Expert Report, dated November 22, 2011 ("Goldin Rep.").[2] The Trustee offers Goldin to: (i) outline the standards, protocols and guidelines that are generally accepted among those responsible for administering third-party retirement plans ("Standards"); and (ii) determine whether the "Sterling Fiduciaries," identified as Defendants Sterling Equities Associates,[3] Arthur Friedman, and Michael Katz, departed from the Standards in administering the Plan. Goldin has opined that:

- The Sterling Fiduciaries departed from industry Standards by failing to conduct diligence on BLMIS. (Goldin Rep. at 13-14.);
- The Sterling Fiduciaries departed from industry Standards by failing to act in the face of warning signs. (*Id*. at 15-16.);
- The Sterling Fiduciaries departed from industry Standards in the documentation and disclosure of the Sterling Plan's structure, administration and performance. (*Id.* at 17-23.);
- The Sterling Fiduciaries departed from industry Standards by compromising their independence and failing to make appropriate disclosure. (*Id.* at 24-25.); and
- The Sterling Fiduciaries departed from industry Standards by failing to promote the diversification of Sterling Plan assets. (*Id.* at 25-26.)

Because Goldin's testimony is both necessary and relevant, the Motion should be denied.

ARGUMENT

Rule 702 of the Federal Rules of Evidence provides that an expert may testify if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to

[2] Declaration of David J. Sheehan in Opposition to the Defendants' Motion to Strike the Expert Reports and Testimony of Harrison J. Goldin, dated February 09, 2012 (hereinafter "Sheehan Decl."), Exhibit 1. Goldin prepared and signed an Errata Sheet to his report on January 10, 2012, which is attached as Sheehan Decl., Exhibit 2.

[3] Sterling Equities Associates is a general partnership formed under the laws of the state of New York. (Answer to the Am. Compl. at ¶ 384). The general partners of Sterling Equities Associates are Fred Wilpon, Saul Katz, Richard Wilpon, Michael Katz, David Katz, Arthur Friedman, Marvin Tepper, Gregory Katz, Thomas Osterman, and Jeffrey Wilpon. (*Id.* at ¶ 385).

understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed.R.Evid. 702. (2000). Here, Defendants have raised no objections to Goldin's qualifications, the sufficiency of the facts and data he relied upon, or his methodology.[4] Goldin's report and expected testimony consist of his specialized knowledge of the retirement plan industry.

I. GOLDIN'S TESTIMONY IS NECESSARY

Goldin's expected testimony will assist the jury in understanding, among other things, the retirement plan industry, the highly unusual nature of the Plan, and the Sterling Fiduciaries' actions and inactions related to the administration of the Plan. "Expert witnesses are often uniquely qualified in guiding the trier of fact through a complicated morass of obscure terms and concepts." *U.S. v. Duncan,* 42 F.3d 97, 101 (2d Cir. 1994). Testimony regarding industry practice is routinely admitted and "is appropriate if it helps a jury evaluate a defendant's conduct against 'the standards of accepted practice.'" *U.S. v. Jacques Dessange, Inc.*, S2 99 CR. 1182, 2000 WL 294849, at *2 (S.D.N.Y. March 21, 2000) (citing *U.S. v. Blizerian,* 926 F.2d 1285, 1295 (2d Cir. 1991)); *see also In re Blech Sec. Litig.*, 94-Civ-7695, 2003 WL 1610775, at *19 (S.D.N.Y. March 26, 2003) (finding that experts could testify that particular practices deviated from the norm and that "it is proper for an expert to testify as to the customs and standards of an industry, and to opine as to how a party's conduct measured up against such standards") (internal citations omitted).

Most recently, this Court recognized that expert testimony on the retirement plan industry assists the trier of fact. *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank,* 09-Civ-686,

[4] Defendants' conclusory statement that Goldin's opinions are "unfounded" lacks any substantiation and should be disregarded. (Defs. Br. at 10).

2011 WL 6288415, at * 1 (S.D.N.Y. Dec. 15, 2011) (expert testimony admitted on whether pension plan fiduciary met standards of care when he failed to understand investment risk, failed to conduct sufficient due diligence, and failed to follow up on "red flags"). So too here.[5]

Defendants misstate the purpose and relevance of Goldin's testimony and erroneously argue that the Trustee is using Goldin to advocate for a different legal standard- the "prudent man" standard under ERISA - rather than the willful blindness standard established by this Court. (Def. Br. at 10-11). Contrary to this bald assertion, Goldin's expected testimony is necessary to explain to the jury certain specialized tenets of the retirement plan industry (*e.g.*, the roles of a trustee, a plan sponsor, a custodian, and the role of due diligence). (Goldin Rep. at 11-12). Goldin's report and testimony are also necessary to explain to the jury why the inclusion of an investment option like BLMIS in a 401(k) plan, as well as the unusual manner in which the BLMIS option was administered, was highly irregular and further heightened the need for independent due diligence by the Sterling Fiduciaries. (Goldin Rep. at 13-23).

Because Goldin's testimony will assist the jury here, it is properly admitted.

II. GOLDIN'S TESTIMONY IS RELEVANT

Goldin's testimony is relevant as to whether the Defendants consciously avoided confirming their suspicions of Madoff. Rule 702's relevancy standard requires the court to assess the "fit of the proposed testimony; *i.e.*, whether the expert testimony is 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" *Degelman Indus. Ltd. v. Pro-Tech Welding & Fabrication, Inc.*, 06-CV-6346, 2011 WL 6754051, at *2 (W.D.N.Y.

[5] *See also, Stuart Park Assoc. Ltd. P'ship v. Ameritech Pension Tr.*, 51 F.3d 1319, 1327-28 (7th Cir. 1995) (admitting expert testimony concerning fiduciary obligations under ERISA which would establish reasonableness of defendants' motives and not invented for the purposes of trial); *In re Reliant Energy ERISA Litig.*, H-02-2051, 2005 WL 5989791, at * 2 (S.D. Tex. Aug. 19, 2005) (finding expert testimony on complex legal issues under ERISA, "such as whether Defendants were ERISA fiduciaries for certain relevant purposes," helpful).

May 27, 2011) (internal citations omitted) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993)).

Defendants argue that Goldin's expected testimony is irrelevant as to how the Defendants chose to invest their own funds. (Defs. Br. at 5). This argument is a red herring and ignores why Goldin's testimony should be admitted. Since 1997, Defendants were undoubtedly responsible for the safeguarding of tens of millions of dollars in Plan assets. Defendants chose not only to include Madoff as a fund "option," but also chose to endorse Madoff to their Plan participants in derogation of industry standards. (Goldin Rep. at 24). Goldin opines that a "fiduciary is responsible for exercising due diligence to ensure that a plan makes reasonable investments," and "that those investments are properly managed, reported on and safeguarded." (*Id.* at 6). He further opines that the Defendants' reliance on their personal investment history with Madoff was insufficient in discharging their due diligence obligations. (*Id.* at 16).

Defendants' extreme departure from industry standards concerning due diligence goes right to the heart of the Trustee's allegations that the Defendants willfully blinded themselves to Madoff's fraud.[6] *See PFS Distrib. Co. v. Raduechel*, 574 F.3d 580, 597 (8th Cir. 2009) (holding that testimonies of accounting expert who opined that accountant acted in compliance with professional accounting standards, and bank expert, who testified that bank correctly handled relevant file under banking standards, were relevant to knowledge and state of mind); *Vernazza*

[6] Arthur Friedman and Michael Katz admit that they conducted no due diligence on BLMIS in connection with creating the 401(k) plan. (Michael Katz Tr. 244:7-20; Friedman Tr. 570:5-15). The relevant excerpts from the Deposition of Michael Katz, dated December 9, 2011 ("Michael Katz Tr.") are attached as Sheehan Decl, Exhibit 3. The relevant excerpts from the Rule 2004 Examination of Arthur Friedman, June 24, 2010 ("Friedman Tr.") are attached as Sheehan Decl., Exhibit 4. Michael Katz testified that he understood his responsibility as a trustee to the Plan participants "was to make sure that their monies were protected… in a manner that as if it was my money, or better." (Michael Katz Tr. 227:22- 228:3). Yet, he acknowledged that the 401(k) account was treated just like any other Madoff account. (*Id.* at 230:20-23).

v. S.E.C., 327 F.3d 851, 862 (9th Cir. 2003); *U.S. v. Fauls*, 65 F.3d 592, 598 (7th Cir. 1995); *Kearney v. Auto-Owners Ins. Co.*, 8:06-CV-595, 2009 WL 3712343, at *10 (M.D. Fla. Nov. 5, 2009); *Gebhart v. S.E.C.*, 595 F.3d 1034, 1042 (9th Cir. 2010)**.**

Goldin's opinions and expected testimony concerning the Sterling Fiduciaries' failure to investigate and conduct due diligence, in contravention of industry standards (Goldin Rep. at 13), is probative of whether or not they willfully blinded themselves to Madoff's fraud. Similarly, Goldin's opinions and expected testimony regarding the Sterling Fiduciaries failure to both understand and accurately disclose Madoff's strategy, its risks, fees and returns to their plan participants (*Id.* at 17-23) is equally probative.

CONCLUSION

For the foregoing reasons, the Trustee respectfully asks this Court to deny Defendants' Motion.

Dated: New York, New York
February 9, 2012

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