UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING H. PICARD, Plaintiff, - against - SAUL B. KATZ, et al., Defendants.	11-CV-03605 (JSR) (HBP)

MEMORANDUM OF LAW IN OPPOSITION TO TRUSTEE'S MOTION TO STRIKE THE EXPERT REPORTS AND TESTIMONY OF JOHN MAINE

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Defendants respectfully submit this memorandum of law in opposition to the Trustee's motion to exclude the expert reports and testimony of Defendants' expert, John Maine. The Trustee's motion lacks any merit and must be denied.

PRELIMINARY STATEMENT

The Trustee's effort to prevent John Maine from testifying at trial—while simultaneously seeking to present expert testimony by his own litigation consultant—is predicated on a fundamental misunderstanding of the case and the law that governs it. This case is not about professional investment managers, hedge funds, or "institutional investors." The customs and practices of the investment management industry are not in issue. It is undisputed that Defendants were not institutional investors; that BLMIS was a registered broker-dealer, not a hedge fund; and that Defendants were inexperienced in stock market investing, not part of the "investment management industry."

Nor is this case about so-called "red flags" for institutional investors, or Sortino ratios and what analysis of them, if performed, would reveal. It is not a negligence, or even a recklessness, case. The issue is whether Defendants were willfully blind to the fraud perpetrated on them and thousands of others by an exceptionally deceptive and cunning fraudster who managed to fool his regulators and peers for decades.

Unlike the Trustee's "red flags" expert, Dr. Steve Pomerantz, who addresses all the wrong issues, Mr. Maine has expertise relevant to this case—expertise in retail brokerage for high net worth individuals. He is, thus, uniquely well positioned to aid the trier of fact. Moreover, the Trustee's complaints about Mr. Maine lack any foundation. First the Trustee criticizes Mr. Maine for offering no "opinions," but then devotes the remainder of his brief to criticizing the "opinions" in Mr. Maine's reports. Which is it?

Ironically, each of the Trustee's complaints about Mr. Maine and his testimony applies to the Trustee's own proffered "investment management industry" expert, Dr. Pomerantz. At most the Trustee's arguments go to the weight, not the admissibility, of the evidence. Accordingly, there is no basis to exclude Mr. Maine's testimony and the Trustee's motion to strike should be denied.

BACKGROUND

Defendants are the ten individual partners of Sterling Equities, their family members, trusts, foundations, and affiliated business entities. Bernard L. Madoff Investment Securities LLC ("BLMIS") was an SEC-registered broker-dealer with whom Defendants invested as retail brokerage customers for more than two decades. Bernard L. Madoff ("Madoff") was their widely lauded broker, to whom each Defendant gave discretion to trade securities on his, her, or its behalf. Each Defendant entrusted his own money to BLMIS. It is undisputed that no Defendant was investing money for other people or for a fee. None is alleged to have ever worked for a stockbroker or investment bank, and none is alleged to have had any training in investment management.

Within this framework, Mr. Maine was asked to prepare an expert report pursuant to Fed. R. Civ. P. 26(a)(2)(B) regarding "private wealth management practices in the financial industry, how brokers operate with regard to client assets and the customer's ability to do due diligence with respect to broker operations, and the nature of securities brokerage accounts." (Expert Report of John Maine ("Maine Report"), dated Nov. 22, 2011, at 1 (Sheehan Decl., Ex. 1)[1].) Based upon his own extensive experience in the

[1] References to the "Sheehan Decl." and its attached exhibits are to the Declaration of David J. Sheehan, dated January 26, 2012 and filed in support of the

retail brokerage industry and a review of various materials identified, Mr. Maine provided an initial expert report that, among other things:

- describes how a broker-dealer differs from a hedge fund or mutual fund and explains different types of brokerage accounts (*id.* at 2-3, 5-6);
- states reasons why, in Mr. Maine's experience, wealthy individuals often hire professionals, such as brokers, to invest their assets (*id.* at 3-5);
- identifies the types of documents that brokerage customers receive from their broker-dealers and explains the manner in which customers ordinarily rely on those documents (*id.* at 6-11);
- concludes that BLMIS documents reviewed by Mr. Maine had the appearance of documents ordinarily issued by legitimate broker-dealers (*id.* at 11-13); and
- identifies other information available to BLMIS customers on which investors ordinarily rely in entrusting their assets to a broker-dealer (*id.* at 13-14).

Following receipt of Dr. Pomerantz's initial expert report ("Pomerantz Report") on behalf of the Trustee, Mr. Maine reviewed that report and provided his response in a rebuttal report ("Maine Rebuttal Report") dated December 13, 2011. Among other critiques in his Rebuttal Report, Mr. Maine expressed disagreement with Dr. Pomerantz's conclusion that high net worth individuals, such as Defendants, "have similar sophistication levels" as institutional investors. (Maine Rebuttal Report at 2-5 (Sheehan Decl., Ex. 2); Pomerantz Report ¶ 3 (Newman Decl., Ex. B)[2].) Mr. Maine further disagreed with Dr. Pomerantz's views concerning some of the supposed "red flags" Dr.

Trustee's Motion to Strike the Expert Reports and Testimony of John Maine (doc. no. 84).

[2] References to the "Newman Decl." and its attached exhibits are to the Declaration of David C. Newman, dated January 26, 2012 and filed in support of Defendants' Motion to Strike the Expert Reports and Testimony of Steve Pomerantz and Harrison J. Goldin (doc. no. 105).

Pomerantz opined would have caused an institutional investor, consistent with professional investment management norms and customs, to undertake further due diligence. (Maine Rebuttal Report at 6-7 (Sheehan Decl., Ex. 2).)

ARGUMENT

A qualified expert "may testify in the form of an opinion or otherwise." Fed. R. Evid. 702. Expert testimony is admissible if the "witness is 'qualified as an expert' to testify as to a particular matter," the expert's testimony is "reliable," and "the expert's testimony (as to a particular matter) will 'assist the trier of fact.'" *Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005).

The qualification requirement is satisfied if an expert possesses specialized knowledge, *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, No. 04-CV-7369, 2006 U.S. Dist. LEXIS 51869, at *14-15 (S.D.N.Y. July 27, 2006), and the "qualifications necessary to testify as an expert are minimal," *Keenan v. Mine Safety Appliances Co.*, No. 03-CV-710, 2006 U.S. Dist. LEXIS 65735, at *5 (E.D.N.Y. Aug. 31, 2006). Reliability of testimony relating to areas other than the "hard sciences" "depends heavily on the knowledge and experience of the expert." *United States v. Joseph*, 542 F.3d 13, 21-22 (2d Cir. 2008). Finally, expert testimony assists the jury if it provides, for example, helpful background information. "'[P]articularly in complex cases involving the securities industry, expert testimony may help a jury understand unfamiliar terms and concepts.'" *United States v. Russo*, 74 F.3d 1383, 1395 (2d Cir. 1996) (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991)).

Mr. Maine and his testimony easily satisfy each of these requirements.

I. MR. MAINE'S TESTIMONY IS RELEVANT

To avoid transfers of principal, this Court has held that the Trustee must show that each Defendant was willfully blind to Madoff's fraud. *See Picard v. Katz*, No. 11 Civ. 3605 (JSR), 2011 U.S. Dist. LEXIS 109595, at *23 (S.D.N.Y. Sept. 27, 2011). This requires proof that each Defendant (1) "subjectively believe[d]" that there was "a high probability" that Madoff was running a Ponzi scheme and (2) took "deliberate actions to avoid learning of that fact." *Global-Tech Appliances, Inc. v. SEB, S.A.*, 131 S. Ct. 2060, 2070 (2011). The question of any Defendant's willful blindness does not turn on a theory of negligence, nor does it turn on the diligence standards applicable to the "investment management" industry or what "industry" due diligence, if performed, would reveal. *Katz*, 2011 U.S. Dist. LEXIS 109595, at *21-23; *Picard v. Katz*, No. 11 Civ. 3605 (JSR), 2012 U.S. Dist. LEXIS 5143, at *7 (S.D.N.Y. Jan. 17, 2012).

Accordingly, to determine whether any Defendant, let alone all of the dozens of Defendants, was willfully blind to Madoff's fraud, the trier of fact will have to understand each Defendant's actual relationship with BLMIS and Madoff—not the relationship that should exist between a hedge fund professional and the third-party investors to whom that professional owes fiduciary duties. The actual relationship that each Defendant had with BLMIS is that of retail brokerage customer to registered broker-dealer—the precise area of Mr. Maine's extensive expertise and the focal point of his proffered expert testimony. For that reason alone, Mr. Maine's testimony is relevant and helpful.

The Trustee challenges Mr. Maine's testimony as irrelevant because "[t]he bulk" of the Maine Report "offers a general commentary on broker-dealers and their customers,

as well as a broad description on the nature [sic] of securities brokerage accounts" and is not addressed to "red flags and what due diligence would have revealed."[3] (Tr. Mem. at 17.[4]) According to the Trustee, such observations about "run-of-the-mill broker-dealers and their dealings with hypothetical customers with no connection to the actual facts of this case are wholly irrelevant." (*Id.*) Yet, this Court's prior rulings firmly establish that this is not a case about what would constitute a "red flag" to an investment industry professional or what investment management due diligence would reveal if, unlike here, it were undertaken. Those are essentially issues of professional negligence, or not. The Trustee cannot demonstrate any Defendant's "willful blindness" based on either alleged "red flags" that no Defendant ever saw or due diligence that no Defendant ever performed. Consequently, it is the expert testimony of Dr. Pomerantz that is "wholly irrelevant," not that of Mr. Maine.

II. MR. MAINE'S TESTIMONY IS HELPFUL TO THE TRIER OF FACT

In his challenge to Mr. Maine, the Trustee ignores the fundamental role experts play in educating a jury about concepts outside the common experience of lay jurors. *See Joseph*, 542 F.3d at 22 (expert testimony assists a jury if it helps "to explain conduct not normally familiar to most jurors"). The parameters of the retail brokerage industry, how

[3] The Trustee's own forensic and fraud investigation expert, Bruce G. Dubinsky, provides similar background information concerning how the retail securities brokerage industry operates. (*See, e.g.*, Expert Report of Bruce G. Dubinsky ¶¶ 28, 37, 62-65, 124, 132-37, 159, 185-90, 204, 215-16, 221, 224, 232 (Decl. of Dana M. Seshens in Supp. of Defs.' Mot. for Summ. J., Ex. C) (doc. no. 90).) It surely cannot be the Trustee's position that such background information is relevant when offered by his own expert, but not when offered by Defendants' expert.

[4] Citations to "Tr. Mem." refer to the Trustee's Memorandum of Law in Support of Motion to Strike the Expert Reports and Testimony of John Maine, dated January 26, 2012 (doc. no. 83).

it operates as a general matter, and the relationship between brokerage customers—and even wealthy brokerage customers—and their brokers are precisely the types of issues that are ripe for educational expert testimony. *See, e.g.*, *SEC v. Big Apple Consulting USA, Inc.*, No. 6:09-cv-1963, 2011 U.S. Dist. LEXIS 95292, at *11-12 (M.D. Fla. Aug. 25, 2011) (permitting expert testimony regarding brokerage records and related documents because "[t]he ability to understand and synthesize such records is beyond the understanding of the average lay person"); *see also, e.g.*, *SEC v. Johnson*, 525 F. Supp. 2d 70, 77 (D.D.C. 2007) ("[I]n securities cases, expert testimony commonly is admitted to assist the trier of fact in understanding trading patterns, securities industry practice, securities industry regulations, and complicated terms and concepts.") (citing cases). The Trustee fails to even consider the propriety of Mr. Maine's testimony as educational with regard to this highly relevant subject matter.

The Trustee further challenges Mr. Maine's "opinions" as unhelpful because they are "broad," "generic," "generalized," or "generalizations" that are "offered in the abstract." (Tr. Mem. at 9-12, 17-18.) But Rule 702 does not bar general opinions offered to help educate the jury. To the contrary, "[i]nstead of offering opinions based on the facts of the case, expert witnesses may be used by parties to educate the trier of fact about general principles, without applying those principles to the specific facts of the case." 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.05[2][a] (2d ed. 1997); *see also Bilzerian*, 926 F.2d at 1294-95 (affirming admissibility of expert testimony consisting of "general background on federal securities regulation and the filing requirements of Schedule 13D"); *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988) (affirming admissibility, in racketeering case, of expert testimony that "was,

by and large, general insofar as it described organized crime's infiltration of labor unions" and provided "background for the events alleged in the indictment").[5]

The remaining challenges to Mr. Maine's testimony as unhelpful lack any basis at all. For example, the Trustee suggests that Mr. Maine offers a legal "opinion" as to the duties of investors when he says that they are "'not required to be concerned' about the reliability of broker-dealers." (Tr. Mem. at 12-13.) Mr. Maine's views are taken entirely out of context (*compare* Maine Report at 10-11 (Sheehan Decl., Ex. 1)), but are nevertheless based on his experience in the brokerage industry and are entirely consistent with the applicable law. *See Katz*, 2011 U.S. Dist. LEXIS 109595, at *22 ("A securities investor has no inherent duty to inquire about his stockbroker, and SIPA creates no such duty."); *id.* at *22-23 (customer has no duty "to launch an investigation of his broker's internal practices—and how could he do so anyway?").

Moreover, it is ironic that the Trustee attacks Mr. Maine on this ground when his own expert, Dr. Pomerantz, testified that his opinion was based on his understanding that Defendants had a duty, *imposed by the courts*, to perform what he terms "investment management industry" due diligence in the face of "red flags" that would be obvious to a

[5] For these same reasons, the Trustee also is incorrect that an expert's testimony is not helpful if it is "not necessary for the resolution of a factual dispute." (Tr. Mem. at 12; *see also id.* at 17-18.) By its own terms Rule 702 contemplates that specialized knowledge may be useful to "help the trier of fact to understand the evidence *or* to determine a fact in issue" (emphasis added). None of the Trustee's authority is to the contrary. *See United States v. Mejia*, 545 F.3d 179, 196 (2d Cir. 2008) (expert cannot testify about a matter within the jury's common knowledge); *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986) (same); *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 60 (2d Cir. 2002) (affirming exclusion of testimony based on expert's assumption contrary to the evidence); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 268-70 (2d Cir. 2002) (affirming exclusion of unreliable scientific testimony); *Borsack v. Ford Motor Co.*, No. 04 Civ. 3255, 2009 U.S. Dist. LEXIS 124993, at *6-9 (S.D.N.Y. Feb. 3, 2009) (excluding unreliable scientific testimony).

professional investment manager. (Pomerantz Report ¶¶ 25-26 (Newman Decl., Ex. B); Deposition Transcript of Dr. Steve Pomerantz ("Pomerantz Tr."), Jan. 8, 2012, 177:1-178:5 (Newman Decl., Ex. D).) That understanding is directly contrary to this Court's ruling that the standard is willful blindness, not negligence. *Katz*, 2011 U.S. Dist. LEXIS 109595, at *21-23; *Katz*, 2012 U.S. Dist. LEXIS 5143, at *7.

III. MR. MAINE'S TESTIMONY IS OTHERWISE ADMISSIBLE UNDER RULE 702

The Trustee's remaining challenges to the admissibility of Mr. Maine's testimony range from nonsensical to unsubstantiated to frivolous, including that Mr. Maine lacks the requisite expertise to serve as an expert in this case; that Mr. Maine's non-scientific testimony lacks a sufficient, and sufficiently reliable, methodological basis; and that Mr. Maine's testimony ignores relevant record evidence. None of the Trustee's arguments is valid.

A. Mr. Maine Is Eminently Qualified to Testify As an Expert Concerning the Retail Securities Brokerage Business

The Trustee's attack on Mr. Maine's qualifications and experience is frivolous and results from nothing more than the Trustee's own misunderstanding of the issues that are relevant in this case. Indeed, the Trustee's attacks on Mr. Maine's credentials are more aptly directed to Dr. Pomerantz.

To provide expert testimony, a witness must be "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. "Courts within the Second Circuit have 'liberally construed expert qualification requirements.'" *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 716 F. Supp. 2d 220, 223 (S.D.N.Y. 2010). "In considering a witness's practical experience . . . as criteria

for qualification, the only matter the court should be concerned with is whether the expert's knowledge of the subject is such that his opinion will likely assist the trier of fact . . . ." *Johnson & Johnson*, 2006 U.S. Dist. LEXIS 51869, at *15 (internal quotation marks omitted).

Unlike the Trustee's expert, Dr. Pomerantz, who has *no* experience in the retail brokerage industry, Mr. Maine spent approximately 25 years working as a broker or supervisor at major brokerage firms. (Deposition Transcript of John D. Maine ("Maine Tr."), Jan. 5, 2012, 7:7-13; 8:23-9:8; 13:17-15:1; 28:11-18; 30:10-32:22 (Sheehan Decl., Ex. 3).) He worked for two years at Mitchum, Jones & Templeton, a West Coast financial firm, and spent the majority of his career at Smith Barney. (*Id.* 8:23-9:2; 10:7-16; 13:14-25; 28:11-18; 30:10-18.) Between 1982 and 1990, Mr. Maine was the regional director of Smith Barney's 1,000-person Philadelphia office. (*Id.* 30:10-32:22; Maine Report, Ex. A (Sheehan Decl., Ex. 1).) He was ultimately promoted to executive vice president of Smith Barney and served on the firm's board of directors for five years. (Maine Tr. 32:16-22 (Sheehan Decl., Ex. 3).) His direct experience with the private wealth management industry includes servicing individual retail and institutional investment accounts, managing brokers, and addressing client complaints. (*Id.* 9:9-23; 10:17-11:6; 14:22-15:15; 31:12-32:15.) Mr. Maine has also attained substantial experience in brokerage operations as an arbitrator, consultant, and witness, testifying in approximately 700 matters, including approximately 500 NASD arbitrations, numerous state court cases, and several cases in federal district court. (*Id.* 33:16-34:9; 38:6-15; 39:16-41:7; Maine Report, Ex. A (Sheehan Decl., Ex. 1).)

The Trustee nevertheless contends that Mr. Maine lacks the requisite expertise and qualifications to testify at trial because he (i) "has no due diligence or 'red flag' experience," (ii) "has never performed qualitative or quantitative analyses," and (iii) "does not have significant experience managing client accounts, or dealing with customers." (Tr. Mem. at 7.) Putting aside that the Trustee never asked Mr. Maine whether he had any such experience, neither due diligence nor "red flags" experience is relevant to this case. And the Trustee's assertion that Mr. Maine does not have experience "managing client accounts" or "dealing with customers" is directly contrary to Mr. Maine's testimony.[6]

Experts with qualifications similar to Mr. Maine's have routinely been permitted to testify in securities cases. *See In re Blech Sec. Litig.*, No. 94 Civ. 7696, 2003 U.S. Dist. LEXIS 4650, at *56-61 (S.D.N.Y. Mar. 26, 2003) (qualifying experts with 40 years of experience in the brokerage industry and 30 years of experience in the securities industry, including executive positions at securities firms and substantial testifying background); *Highland Capital Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 180 (S.D.N.Y. 2008) (qualifying expert with over 20 years of experience as retail broker and NASD and NYSE arbitrator); *SEC v. U.S. Envtl., Inc.*, No. 94 Civ. 6608, 2002 U.S. Dist.

[6] The Trustee's further claim that Mr. Maine's experience is inadequate because it is outdated is baseless. Since his time spent in the brokerage industry, Mr. Maine has continued to acquire meaningful and relevant experience as a consultant and expert witness. That Mr. Maine now testifies regularly "does not mean that his knowledge is 'stale,' . . . because . . . he has remained familiar with securities practices and industry conduct." *Ryan v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 3:03-CV-1154, 2010 U.S. Dist. LEXIS 53910, at *8-9 (D. Conn. June 2, 2010); *see also Lion Oil Trading & Transp., Inc. v. Statoil Mktg. & Trading (US) Inc.*, No. 08 Civ. 11315, 2011 U.S. Dist. LEXIS 24516, at *6-7 (S.D.N.Y. Feb. 28, 2011) (qualifying expert whose direct industry experience predated case by fifteen years because he continued to consult in the field).

LEXIS 19701, at *1-2, 12-13 (S.D.N.Y. Oct. 16, 2002) (qualifying expert with 30 years of experience in securities field to testify regarding consistency of documents with industry practice).

Mr. Maine should be no exception.

B. Mr. Maine's Testimony Is More Than Adequately Supported

Without regard for Mr. Maine's role as a non-technical expert, the Trustee attacks every one of his "opinions" as unreliable, either because he does not explain his "methodology" or because his reports "rely upon incomplete, insufficient, and/or incorrect facts and data." (Tr. Mem. at 8.) But Mr. Maine is not a technical expert and, thus, no scientific or methodological basis is required to render his views reliable. All of his views arise out of his extensive industry experience. (*See, e.g.*, Maine Report at 1, 3, 6, 11 (Sheehan Decl., Ex. 1); Maine Rebuttal Report at 1, 2, 4, 5, 6, 7 (Sheehan Decl., Ex. 2).)

Experts rendering non-scientific or non-technical opinions need not offer methods for *Daubert* scrutiny under Rule 702's reliability prong. That is because the reliability of evidence that is *not* from the "hard sciences" "depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *Joseph*, 542 F.3d at 21-22 (internal quotation marks omitted); *see also First Tenn. Bank Nat'l Ass'n v. Barreto*, 268 F.3d 319, 333-35 (6th Cir. 2001) (relying on *Daubert* to exclude experience-based testimony would turn *Daubert* "on its head," as "the distinction between scientific and non-scientific expert testimony is a critical one"); *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 24-25 (2d Cir. 1994) (deeming improper reliance on *Daubert* to reject testimony not based on scientific knowledge); Fed. R. Evid.

702 advisory committee's note (2000 amendments) ("In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.").

To try to overcome this mountain of well-established authority, the Trustee relies exclusively on inapplicable cases that address the reliability of proffered *scientific* or *technical* expertise—none of which supports his argument. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 653 (1998) ("Scientific evidence and expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgment."); *Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chicago*, 877 F.2d 1333, 1339-40 (7th Cir. 1989) (declining to give weight on *summary judgment* to economist's "naked" expert opinions); *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 650 F. Supp. 2d 314, 319-20 (S.D.N.Y. 2009) (excluding expert damages calculation based on concededly "unreliable and inaccurate data, together with a series of assumptions that have no basis in fact or reality," and expert "performed no econometric analysis"); *Li v. Aponte*, No. 05 Civ. 6237, 2009 U.S. Dist. LEXIS 59741, at *17-25 (S.D.N.Y. May 5, 2009) (excluding chiropractor's scientific testimony regarding injury's cause).[7]

[7] The Trustee further cites *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450 (S.D.N.Y. 2001), for the proposition that "securities experts cannot opine on customs and practices of broker-dealers when they do not reveal in their testimony how they have made use of their expertise by way of a methodology." (Tr. Mem. at 8.) But *Askin* stands for no such thing. There, the expert was excluded because he "was asked to reach legal conclusions regarding . . . ultimate issues" and his report was "permeated with inadmissible legal opinions and conclusions directed at telling the jury what result to reach." 130 F. Supp. 2d at 528-29. The expert report so completely failed "to articulate industry customs or standards for consideration by the jury" that it was "not so much testimony about industry custom or practice as it [was] thoughts on the state of the law relating to broker-dealers." *Id.* at 529.

There is, therefore, no basis to exclude Mr. Maine's testimony as unreliable. Instead, the proper challenge to the reliability of non-scientific, experience-based testimony is "on cross examination and goes to [the] testimony's weight . . . not its admissibility." *Joseph*, 542 F.3d at 21-22 (internal quotation marks omitted); *see also Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996) (expert testimony may be excluded as unreliable "if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison," but "other contentions that the assumptions are unfounded go to the weight, not the admissibility of the testimony" (internal citations and quotation marks omitted)); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 526 (2d Cir. 1996) (vigorous cross-examination and the presentation of contrary evidence at trial is "the traditional and appropriate means of attacking admissible evidence with which one disagrees").

C. Mr. Maine's Testimony Is Entirely Consistent With and Supported by Record Evidence

The Trustee further challenges Mr. Maine's testimony because he purportedly failed to consider certain record evidence that the Trustee deems "contrary" to his conclusions. The Trustee's arguments rely on distortions of Mr. Maine's testimony and of the underlying factual record. Even so, the Trustee's criticisms go to the weight, not the admissibility, of Mr. Maine's testimony, *see Boucher*, 73 F.3d at 21, and the Trustee's proper recourse is to challenge the basis of Mr. Maine's testimony on cross-examination, *see Joseph*, 542 F.3d at 21-22.

According to the Trustee, several pieces of evidence were "disregarded" by Mr. Maine that are "at odds" with the views he expressed about the general tendencies of private wealth management brokerage customers to focus on the "bottom line" when it comes to their investments as opposed to engaging in extensive due diligence or spending significant time managing their own investments. (Tr. Mem. at 11.) The Trustee's argument makes little sense, particularly where the record evidence supposedly disregarded by Mr. Maine in fact supports his opinions.

The Trustee contends that Mr. Maine's views are at odds with:

- Defendants' purported admission in their Answer that they "[o]versaw, facilitated and monitored" hundreds of BLMIS accounts. (Tr. Mem. at 11.) But Defendants admitted no such thing. All the cited paragraphs of Defendants' Answer reflect is that Arthur Friedman provided *administrative* assistance in connection with many accounts, including communicating customer requests to BLMIS, maintaining account paperwork, and monitoring account balances. Mr. Friedman's administrative role in no way contradicts Mr. Maine's views, and Mr. Maine considered Mr. Friedman's testimony. (Maine Rebuttal Report at 4 (Sheehan Decl., Ex. 2); Maine Tr. 73:7-17 (Sheehan Decl., Ex. 3).)

- Defendants' purported admission in their Answer that they "[c]losely monitored their monthly returns" and were "present when investment returns were discussed and reported at partner meetings." (Tr. Mem. at 11.) The Answer does not state that Defendants "closely" monitored returns; regardless, the monitoring of monthly returns, and the creation and review of "hell sheets" to track Madoff account balances (*id.*), are entirely consistent with Mr. Maine's views that wealthy investors tend to focus solely on the bottom line, *i.e.*, on account balances and monthly returns.

- Defendants' supposed effort to "recreate Madoff's split-strike conversion strategy." (Tr. Mem. at 11.) In fact, in the 1980s, "Arthur Friedman tried to replicate Madoff's strategy on paper and viewed the exercise a success." (Answer ¶ 764 (doc. no. 48).) There is no contradiction.

- Defendants' employment of "a leverage strategy by borrowing against their Madoff returns." (Tr. Mem. at 11.) Borrowing against a securities account, otherwise known as a margin account, is neither particularly unusual nor inconsistent with anything Mr. Maine says about retail accounts.

- Defendants' supposed admission in their Answer that they "[w]ere Fiduciaries and Plan Sponsors to a 401K plan featuring Madoff as the plan option of choice." (Tr. Mem. at 11.) It is unclear what the Trustee means by "the plan option of choice," but what the Answer states is that BLMIS was one of the investment options offered to participants in the Sterling Equities self-directed 401(k) retirement plan. (Answer ¶ 752 (doc. no. 48).) This has nothing to do with Mr. Maine's views, and the 401(k) plan, which is not a party to this action, is entirely irrelevant.

Finally, the Trustee contends that Mr. Maine's "opinion" that Defendants are not sophisticated investors lacks foundation. (Tr. Mem. at 15-16.) But Mr. Maine's foundation for his views—record evidence, including documents and deposition testimony—is no different from the foundation for Dr. Pomerantz's opposite view—record evidence, including documents and deposition testimony. Moreover, the supposed contrary record evidence that the Trustee claims Mr. Maine ignored—four Sterling Stamos documents—amounts to nothing more than inadmissible hearsay. (*See id.* at 15-16 & nn.20-21.) No such document contains any statement by a Defendant, let alone a statement against interest (*id.* at 19), and none was written, reviewed, approved, or adopted by any Defendant.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny the Trustee's motion to strike the expert reports and testimony of John Maine.

Dated: New York, New York
February 9, 2012

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