

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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IRVING H. PICARD,	:
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Plaintiff,	:
	:
- against -	: 11-CV-03605 (JSR)(HBP)
	:
SAUL B. KATZ, et al.,	:
	:
Defendants.	:
	:
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**DEFENDANTS' RESPONSE TO TRUSTEE'S STATEMENT OF UNDISPUTED
MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1**

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Pursuant to Rule 56.1(b) of the Local Civil Rules of the Southern District of New York, Defendants respectfully submit this response to the Trustee's Statement of Undisputed Material Facts Pursuant to Local Rule 56.1 ("Trustee's Rule 56.1 Statement"), which was filed in support of the Trustee's motion for partial summary judgment ("Trustee's Partial Summary Judgment Motion").

The Trustee's Rule 56.1 Statement violates Local Rule 56.1(a) in numerous respects. It is replete with expert and legal conclusions; when it asserts facts, they are often immaterial and irrelevant to the Trustee's motion for partial summary judgment; and many factual assertions are not supported by the cited evidence. Defendants object to these improper assertions and have identified them in their responses set forth below.

1. Madoff founded BLMIS as a sole proprietorship in 1960 and registered BLMIS as a broker-dealer with the Securities Exchange Commission ("SEC") as of January 19, 1960.

Defendants' Response:

Not disputed.

2. BLMIS purported to operate three business units: a market making business, a proprietary trading business, and the investment advisory business.

Defendants' Response:

Not disputed.

3. The market making and proprietary trading businesses were referred to within BLMIS as “House 5.”

Defendants’ Response:

Immaterial and irrelevant for purposes of the Trustee’s Partial Summary Judgment Motion. Defendants do not dispute that the expert report of Bruce G. Dubinsky (the “Dubinsky Report”) states that the market making and proprietary trading business units of BLMIS were referred to internally at BLMIS as “House 5.” (Dubinsky Report ¶ 28 (Declaration of Bruce G. Dubinsky, MST, CPA, CFE, CVA, CFF, CFFA (“Dubinsky Decl.”), dated Jan. 26, 2012, Ex. 1).)

4. The investment advisory business was referred to within BLMIS as “House 17.”

Defendants’ Response:

Immaterial and irrelevant for purposes of the Trustee’s Partial Summary Judgment Motion. Defendants do not dispute that the Dubinsky Report states that the investment advisory business unit of BLMIS was referred to internally at BLMIS as “House 17.” (*Id.*)

5. House 5 provided execution for broker-dealers, banks, and financial institutions, and was a member of the National Association of Securities Dealers, Inc.

Defendants’ Response:

Not disputed that BLMIS, which included “House 5” as described in the Dubinsky Report, was a broker-dealer registered with the SEC and “provided execution for broker-dealers, banks, and financial institutions, and was a member of the National

Association of Securities Dealers, Inc.” (*See supra* ¶ 1; Dubinsky Report ¶¶ 28, 212 (Dubinsky Decl., Ex. 1); *Picard v. Katz*, No. 11 Civ. 3605 (JSR), 2012 U.S. Dist. LEXIS 5143, at *7 n.3 (S.D.N.Y. Jan. 17, 2012); *Picard v. Katz*, No. 11 Civ. 3605 (JSR), 2011 U.S. Dist. LEXIS 109595, at *8 (S.D.N.Y. Sept. 27, 2011).)

6. In 1983, BLMIS registered Madoff Holdings Limited in London, which began operating as Madoff Securities International Limited (“MSIL”) in 1988.

Defendants’ Response:

Not disputed, but immaterial and irrelevant for purposes of the Trustee’s Partial Summary Judgment Motion.

7. In 1987, BLMIS moved from its location at 110 Wall Street to the “Lipstick Building” at 885 Third Avenue, where it eventually leased the 17th, 18th, and 19th floors.

Defendants’ Response:

Immaterial and irrelevant for purposes of the Trustee’s Partial Summary Judgment Motion. Defendants do not dispute that BLMIS leased the 18th floor at 885 Third Avenue starting on April 1, 1987; the 17th floor starting on February 14, 1990; and the 19th floor starting on January 15, 1997. (*See* Dubinsky Report ¶ 29 & n.16 (citing CWIE-BR00002468) (Dubinsky Decl., Exs. 1, 5).)

8. BLMIS’s market making and proprietary trading businesses (House 5) were located on the 18th and 19th floors of the Lipstick Building. The investment advisory business (House 17) was located on the 17th floor.

Defendants' Response:

Not disputed, but immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Defendants note that the Dubinsky Report, which is the evidence cited by the Trustee for this assertion, relies upon documents that do not support these assertions. (*See id.* ¶ 29 & nn. 17-18.)

9. On December 11, 2008, Madoff was arrested and charged with securities fraud, investment advisor fraud, mail fraud, wire fraud, international money laundering to promote fraud in the sales of securities, international money laundering the conceal the proceedings of fraud in the sale of securities, money laundering, making false statements, perjury, making a false filing with the SEC, and theft from an employee benefit plan.

Defendants' Response:

Not disputed.

10. Madoff pleaded guilty to the eleven-count information, which alleged—and he admitted—that he operated a massive Ponzi scheme through the IA Business of BLMIS.

Defendants' Response:

Not disputed.

11. For his crimes, Madoff was sentenced to 150 years in prison.

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Defendants do not dispute that Bernard L. Madoff ("Madoff") was

sentenced, in part, to a term of imprisonment of 150 years for the criminal counts to which he pleaded guilty.

12. Five other BLMIS employees and accomplices have pleaded guilty to federal fraud charges for assisting Madoff in operating his Ponzi scheme through the IA Business of BLMIS.

Defendants' Response:

Defendants do not dispute that at least five individuals have pleaded guilty to criminal charges in connection with the fraud perpetrated by Madoff through BLMIS, but dispute that these five individuals pleaded guilty to “assisting Madoff in operating his Ponzi scheme through the IA Business of BLMIS.” (*See* Plea Allocation of Frank DiPascali (“DiPascali Plea”), *United States v. DiPascali*, No. 09 Crim. 764 (S.D.N.Y. Aug. 11, 2009) at 44:18-20 (admitting that he “helped Bernie Madoff, and other people, carry out the fraud that hurt thousands of people,” but not allocuting to the existence of a “Ponzi scheme”) (Declaration of David J. Sheehan in Supp. of Trustee’s Mot. for Partial Summ. J. (“Sheehan Decl.”), dated Jan. 26, 2012, Ex. 4); Plea Allocation of David Friehling (“Friehling Plea”), *United States v. Friehling*, No. 09 Crim. 700 (S.D.N.Y. Nov. 3, 2009) at 34:20-35:4 (“First and foremost, it is critical for your Honor to be aware that at no time was I ever aware that Bernard Madoff was engaged in a Ponzi scheme.”) (Sheehan Decl., Ex. 5); Plea Allocation of Eric S. Lipkin, *United States v. Lipkin*, 10 Crim. 228 (S.D.N.Y. June 6, 2011) at 31:21-35:2 (admitting to working “with Bernard L. Madoff Investment Securities’ employees to deceive others,” but not allocuting to the existence of a “Ponzi scheme”) (Sheehan Decl., Ex. 6); Plea Allocation of David Kugel,

United States v. Kugel, No. 10 Crim. 228 (S.D.N.Y. Nov. 21, 2011) at 32:1-19 (admitting to providing “historical trade information to other BLMIS employees, which was used to create false, profitable trades in the Investment Advisory clients’ accounts at BLMIS,” but not allocuting to the existence of a “Ponzi scheme”) (Sheehan Decl., Ex. 7); Plea Allocation of Enrica Cotellessa-Pitz, *United States v. Cotellessa-Pitz*, No. 10 Crim. 228 (S.D.N.Y. Dec. 19, 2011) at 34:1-5 (“Although I now know that the crimes I committed helped to cover up and perpetuate Bernard Madoff’s fraudulent Ponzi scheme, at the time I committed these crimes I did not know that Madoff and others were stealing investors’ money instead of actually investing the money through securities trading.”) (Sheehan Decl., Ex. 8).)

13. These employees face jail sentences for their involvement in the scheme.

Defendants’ Response:

Not disputed, but immaterial and irrelevant for purposes of the Trustee’s Partial Summary Judgment Motion.

14. In December 2008, BLMIS was placed into liquidation and the Trustee was appointed to, among other things, marshal estate assets and determine customer claims.

Defendants’ Response:

Not disputed, but immaterial and irrelevant for purposes of the Trustee’s Partial Summary Judgment Motion.

15. Madoff operated a Ponzi scheme through the investment advisory business of BLMIS.

Defendants' Response:

Not disputed that Madoff engaged in a fraudulent scheme in which he purported to execute, but did not actually execute, securities transactions on behalf of BLMIS customers. Defendants dispute that labeling that fraud a "Ponzi scheme" has any legal relevance.

16. Prior to the revelation of the massive fraud, BLMIS investment advisory customers would deposit money in accounts they opened with BLMIS's investment advisory business, and Madoff would purport to engage in different investment strategies on their behalf.

Defendants' Response:

Disputed. The evidence cited by the Trustee does not support the assertions in paragraph 16. Moreover, there is no evidence that any Defendant understood Madoff to be investing in "different investment strategies."

17. BLMIS investment advisory customers received account statements from BLMIS that purported to reflect securities transactions and investment returns that appeared as though their investments with BLMIS were profitable.

Defendants' Response:

Not disputed insofar as account statements were received from BLMIS that purported to reflect transactions and investment returns in each Defendant's account (*see, e.g., Declaration of Arthur Friedman, dated Nov. 11, 2009, ¶ 7 & Ex. D (doc. no. 110)*),

but disputed insofar as the investments reflected on BLMIS account statements were not always reported to be profitable. (Bankruptcy Rule 2004 Deposition Transcript of Arthur Friedman, June 22-24, 29, 2010, 125:11-15 (Declaration of Dana M. Seshens in Supp. of Mot. for Summ. J. (doc. no. 90), Ex. J).)

18. None of the purported investment strategy securities transactions reflected on the BLMIS investment advisory customer statements took place.

Defendants' Response:

Not disputed that BLMIS did not execute the transactions reflected on Defendants' BLMIS account statements.

19. As far as back as the 1970s, there is no evidence that the purported investment transactions reflected in the customer statements of BLMIS' investment advisory business customers ever occurred, and in fact the evidence reveals that those transactions did not and could not have occurred.

Defendants' Response:

Paragraph 19 violates Local Rule 56.1(a) insofar as it sets forth the conclusion that certain investment transactions "did not and could not have occurred," which is improperly included in the Trustee's Rule 56.1 Statement. Defendants do not dispute that the Dubinsky Report states that there is "no evidence that the purported investment transactions for House 17 customers ever occurred at least as far back as the 1970s" (Dubinsky Report ¶ 19 (Dubinsky Decl., Ex. 1)), but note that Madoff stated during his plea allocution that, "[t]o the best of [his] recollection, [his] fraud began in the early

1990s.” (Plea Allocution of Bernard L. Madoff (“Madoff Plea”), *United States v. Madoff*, No. 09 Crim. 213 (S.D.N.Y. Mar. 12, 2009) at 25:12-13 (Sheehan Decl., Ex. 2).)

20. During the 1970s through the mid-1990s, BLMIS generally represented to its investment advisory customers that it was investing in a “convertible arbitrage strategy.”

Defendants’ Response:

Immaterial and irrelevant for purposes of the Trustee’s Partial Summary Judgment Motion, and disputed. Madoff represented to BLMIS customers that he was engaged in a split strike conversion strategy. (Madoff Plea 25:20-26:18 (Sheehan Decl., Ex. 2).)

21. Convertible securities are generally fixed income and preferred equity instruments that permit the purchaser to convert that security to shares of stock under pre-specified conditions and time-frames set forth by the issuer.

Defendants’ Response:

Immaterial and irrelevant for purposes of the Trustee’s Partial Summary Judgment Motion. Defendants do not dispute that the Dubinsky Report states that “[c]onvertible securities are generally fixed income and preferred equity instruments that allow the purchaser to convert that security to shares of stock under pre-specified conditions set forth by the issuer.” (Dubinsky Report ¶ 66 (Dubinsky Decl., Ex. 1).)

22. It was impossible for BLMIS to have engaged in the convertible arbitrage securities trades reported in the BLMIS customer statements.

Defendants' Response:

Paragraph 22 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 22 also is immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 22 is improperly included in the Trustee's Rule 56.1 Statement and no response is required. To the extent a response is required, the evidence cited by the Trustee does not support the conclusion set forth in paragraph 22. Defendants do not dispute that the Dubinsky Report concludes, based on a sampling analysis of market volume that is limited in both time period and the number of accounts tested, that the "purported transactions underlying the convertible arbitrage strategy . . . could not have been legitimate." (*Id.* ¶ 78.)

23. BLMIS could not have engaged in the convertible arbitrage securities trades reported in customer statements in the 1970s-1980s because in many instances, the volume of convertible securities trades reflected in BLMIS investment advisory customer statements (both in the aggregate and on an individual customer account basis over time) exceeded the entire reported market volume for those particular securities on the days they were supposedly traded—at times by a multiple of more than *150 times* the entire market volume.

Defendants' Response:

Paragraph 23 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 23 also is immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 23

is improperly included in the Trustee's Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Dubinsky Report identifies certain examples where, for the accounts and time periods utilized for testing purposes, the daily volume of transactions in particular securities reported by BLMIS exceeded the daily market volume for those particular securities. (*Id.* ¶¶ 72, 76-77.)

24. BLMIS could not have engaged in the convertible arbitrage securities trades reported in customer statements in the 1970s-1980s because in many instances, on many trading days, trades were recorded at prices that were impossible, as they were outside the range of market-reported trading prices on those given days.

Defendants' Response:

Paragraph 24 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 24 also is immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 24 is improperly included in the Trustee's Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Dubinsky Report identifies certain examples where, for the accounts and time periods utilized for testing purposes, the prices at which particular securities transactions reported by BLMIS were executed fell outside the daily reported market price range for those particular securities. (*Id.* ¶¶ 80-82.)

25. BLMIS could not have engaged in the convertible arbitrage securities trades reported in customer statements in the 1970s-1980s because in many instances, dividend payments and/or accrued interest—which generally constitute a major

component of a convertible arbitrage transaction—were not reported on investment advisory business customer statements even though the real convertible securities paid dividends or interest.

Defendants' Response:

Paragraph 25 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 25 also is immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 25 is improperly included in the Trustee's Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Dubinsky Report identifies certain examples where, for the securities utilized for testing purposes, BLMIS did not properly account for dividends that were paid by those particular securities.

(*Id.* ¶¶ 85-88.)

26. BLMIS could not have engaged in the convertible arbitrage securities trades reported in customer statements in the 1970s-1980s because those trades were recorded as having occurred on dates *after* the securities had already been called and converted—and therefore those securities could no longer have possibly been held by an investor.

Defendants' Response:

Paragraph 26 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 26 also is immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 26 is improperly included in the Trustee's Rule 56.1 Statement and no response is required.

To the extent a response is required, Defendants do not dispute that the Dubinsky Report identifies certain examples where transactions in securities reported by BLMIS occurred on dates after which those securities already had been called. (*Id.* ¶¶ 83-84.)

27. BLMIS could not have engaged in the convertible arbitrage securities trades reported in customer statements in the 1970s-1980s because there were no independent transfer records evidencing that the purported convertible securities were ever converted by the IA Business into common shares, despite being shown as having been converted on the BLMIS investment advisory customer statements, again demonstrating that the purported trading activity never happened.

Defendants' Response:

Paragraph 27 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 27 also is immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 27 is improperly included in the Trustee's Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Dubinsky Report identifies certain examples where, for the securities utilized for testing purposes, there was no documentation relating to the transfer or conversion of those securities. (*Id.* ¶¶ 93-94.)

28. In the early 1990s, BLMIS changed the primary purported investment strategy for customers from convertible arbitrage to a split strike conversion strategy, later stating that "the opportunity within the marketplace to trade convertible arbitrage has decreased."

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion, and disputed. The evidence relied upon does not support the assertion that Madoff changed his purported investment strategy in the early 1990s. (*See id.* ¶ 112 n.124 (citing AMF00139075 (letter from BLMIS to unidentified client on March 16, 1999, indicating that BLMIS has been engaged in the split strike conversion strategy “for more than fifteen years”) (Dubinsky Decl., Ex. 7); AMF00139560 (Trading Authorization Guidelines dated July 3, 1991 and signed on behalf of Roofers Local 195 Pension Fund, authorizing Madoff to engage in discount convertible arbitrage transactions, premium convertible arbitrage transactions, and split-conversion hedge option transactions) (Dubinsky Decl., Ex. 20)).)

29. A split-strike conversion investment strategy typically involves buying a basket of stocks closely correlated to an index, while concurrently selling call options and buying put options on the index.

Defendants' Response:

Not disputed, but immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion.

30. BLMIS's investment advisory business purportedly used a split-strike strategy based on the S&P 100 equity index, which included the 100 largest U.S. stocks as determined by the S&P index committee.

Defendants' Response:

Not disputed, but immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion.

31. BLMIS never engaged in the split-strike conversation securities trades reported in customer statements between the 1990s and 2008.

Defendants' Response:

Not disputed insofar as the assertion in paragraph 31 should read "split-strike conversion" rather than "split-strike *conversation*."

32. BLMIS could not have engaged in the split-strike conversion securities trades reported in customer statements in the 1990s-2008 because the available records from Depository Trust & Clearing Corporation ("DTCC")—which, through its subsidiaries, provides clearance for almost all equity, bond, government securities, mortgage-backed securities, money market instruments and over-the-counter derivative transactions in the U.S. Market—did not record *any* security holdings for BLMIS investment advisory customers during this time.

Defendants' Response:

Paragraph 32 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 32 also is immaterial for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 32 is improperly included in the Trustee's Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Dubinsky Report provides that, for the time period analyzed, there were no DTC records relating to accounts in the

investment advisory business unit of BLMIS. (Dubinsky Report ¶¶ 138-42 (Dubinsky Decl., Ex. 1).)

33. BLMIS could not have engaged in the split-strike conversion securities trades reported in customer statements in the 1990s-2008 because the reported equity and options trades exceeded the entire reported market value for the relevant securities on numerous trading days.

Defendants' Response:

Paragraph 33 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 33 also is immaterial for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 33 is improperly included in the Trustee's Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Dubinsky Report identifies certain examples where, for the time period analyzed, the daily volume of transactions in particular securities reported by BLMIS exceeded the daily market volume for those particular securities. (*Id.* ¶¶ 115-16.) The assertion in paragraph 33 is also nonsensical insofar as it states that "the reported equity and options trades exceeded the entire reported market *value* for the relevant securities on numerous trading days."

34. BLMIS could not have engaged in the split-strike conversion securities trades reported in customer statements in the 1990s-2008 because hundreds of thousands of purported trades affecting 5,500 accounts were recorded at impossible prices, as they were outside the range of reported trading prices on those days.

Defendants' Response:

Paragraph 34 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 34 also is immaterial for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 34 is improperly included in the Trustee's Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Dubinsky Report identifies certain examples where, for the time period analyzed, the prices at which particular securities transactions reported by BLMIS were executed fell outside of the daily reported market price range for those particular securities. (*Id.* ¶ 117.)

35. BLMIS could not have engaged in the split-strike conversion securities trades reported in customer statements in the 1990s-2008 because thousands of trades affecting over 3,700 accounts were recorded as having settled after hours or on weekends or holidays when the exchanges were closed, and thousands of trades were reported as having settled on days not within the standard required timeframe for settling transactions.

Defendants' Response:

Paragraph 35 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 35 also is immaterial for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 35 is improperly included in the Trustee's Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Dubinsky Report identifies certain examples where, for the time period analyzed, the settlement date for particular

securities transactions reported by BLMIS either fell on dates when the securities markets were closed or fell outside of the standard settlement timeframe. (*Id.* ¶¶ 128-31.)

36. BLMIS could not have engaged in the split-strike conversion securities trades reported in customer statements in the 1990s-2008 because dividends reflected on BLMIS customer statements as having been paid by the respective companies were never received by BLMIS on behalf of its investment advisory customers.

Defendants' Response:

Paragraph 36 violates Local Rule 56.1(a) because it does not contain a fact and instead sets forth a conclusion. Paragraph 36 also is immaterial for purposes of the Trustee's Partial Summary Judgment Motion. Accordingly, Paragraph 36 is improperly included in the Trustee's Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Dubinsky Report provides that, for the time period and BLMIS accounts analyzed, dividends reported on BLMIS account statements were never received from the issuer of the security by BLMIS. (*Id.* ¶¶ 160-67.)

37. Madoff perpetuated his fraud by creating false customer statements and fictitious documents. BLMIS customer statements false reported trades that were purportedly executed in a prior month's period but in actuality the trades were never recorded in that previous month's statement ("prior month backdated trades").

Defendants' Response:

Defendants do not dispute that Madoff perpetuated his fraud by creating fictitious documents, including false BLMIS customer statements that reflected transactions that

were never executed. Defendants also do not dispute that the Dubinsky Report identifies certain examples where BLMIS customer statements “reported trades that were purportedly executed in a prior month’s period, sometime stretching back years, but in actuality were never recorded on that previous month’s statement.” (*Id.* ¶ 205.)

38. The computer system for the investment advisory business—run from an IBM AS/400 with code originating from programs written in the 1970s and early-to-mid ‘80s—could not support a broker-dealer environment where actual trades were being executed because it did not link with any of the standard platforms used in a trading or investment environment, such as NASDAQ or the DTC, a subsidiary of DTCC.

Defendants’ Response:

Paragraph 38 violates Local Rule 56.1(a) insofar as it states the conclusion that the IBM AS/400 computer system at BLMIS “could not support a broker-dealer environment,” which is improperly included in the Trustee’s Rule 56.1 Statement. In addition, paragraph 38 is immaterial and irrelevant for purposes of the Trustee’s Partial Summary Judgment Motion. Defendants do not dispute that the Dubinsky Report characterizes the programming code found on the IBM AS/400 system at BLMIS as having been “developed in the late 1970s through the early-to-mid 1980s,” and that there was “no evidence” demonstrating that this system was connected to standard trading platforms such as NASDAQ or the DTC. (*Id.* ¶¶ 190, 192.)

39. The BLMIS investment advisory business’ IBM’s computer code allowed BLMIS to generate random trade orders used to create fictitious backdated trade histories for its customers.

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Defendants do not dispute that the Dubinsky Report provides that programming code for the IBM AS/400 system enabled BLMIS to generate random sets of orders for specific securities that were used to generate fictitious backdated trade histories for BLMIS customers. (*Id.* ¶¶ 196-203.)

40. The computer system for the BLMIS investment advisory business also contained software capable of generating fake DTC reports and fake DTC screen print-outs created to replicate official DTC inquiry look-ups, for which there was no legitimate business purpose.

Defendants' Response:

Paragraph 40 violates Local Rule 56.1(a) insofar as it states the legal conclusion that "there was no legitimate business purpose," which is improperly included in the Trustee's Rule 56.1 Statement. Paragraph 40 also is immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Defendants do not dispute that the Dubinsky Report provides that the IBM AS/400 computer system at BLMIS contained software capable of creating fake DTC reports and fake DTC screenshots. (*Id.* ¶¶ 143-52.)

41. BLMIS was "schtupping" certain customers' purported investment returns utilizing a process to provide those customers with extra fictitious trades that were rigged to generate additional fictitious gains in order to reach pre-determined rates of return

thresholds. BLMIS employees followed DiPascali's handwritten instructions to manually increase the returns of certain accounts in order to meet these customers' expectations.

Defendants' Response:

Paragraph 41 violates Local Rule 56.1(a) insofar as it sets forth an inference and, accordingly, is improperly included in the Trustee's Rule 56.1 Statement. Paragraph 41 also is immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Defendants do not dispute that the Dubinsky Report identifies an example of handwritten instructions signed by Frank DiPascali relating to a "B.SCHUPT" trading program. (*Id.* ¶ 171.)

42. BLMIS did not register as an Investment Adviser with the SEC when the Uniform Application for Investment Advisor Registration ("Form ADV") became required in 1979, even though it had the requisite number of client accounts.

Defendants' Response:

Paragraph 42 violates Local Rule 56.1(a) insofar as it states the legal conclusion that BLMIS "had the requisite number of client accounts," which is improperly included in the Trustee's Rule 56.1 Statement. Paragraph 42 also is immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Defendants do not dispute that the Dubinsky Report states that BLMIS registered with the SEC as an investment advisor in 2006. (*Id.* ¶ 212.)

43. Once BLMIS registered as an investment advisor in 2006, Madoff made material misrepresentations in every report filed with the SEC regarding the number of accounts, assets under management, cash on hand, liabilities, and commissions.

Defendants' Response:

Paragraph 43 violates Local Rule 56.1(a) because it states the legal conclusion that “Madoff made material misrepresentations,” which is improperly included in the Trustee’s Rule 56.1 Statement. Defendants do not dispute that the Dubinsky Report identifies examples of reports filed with the SEC by BLMIS that contained misrepresentations. (*Id.* ¶¶ 214-26.) Defendants also do not dispute that certain individuals stated during their plea allocutions that statements made in documents filed with the SEC by BLMIS contained certain misrepresentations. (*See, e.g.*, Madoff Plea 28:10-19 (Sheehan Decl., Ex. 2); DiPascali Plea 49:13-21 (Sheehan Decl., Ex. 4).)

44. BLMIS used an accountant who was a customer of the Investment Advisory business, who was therefore not independent as required by SEC, AICPA, and New York law.

Defendants' Response:

Paragraph 44 violates Local Rule 56.1(a) insofar as it states the legal conclusion that the accountant used by BLMIS was “not independent,” which is improperly included in the Trustee’s Rule 56.1 Statement. Paragraph 44 also is immaterial and irrelevant for purposes of the Trustee’s Partial Summary Judgment Motion. Defendants do not dispute that David Friehling stated during his plea allocution that he was a BLMIS customer. (Friehling Plea 36:1-37:7 (Sheehan Decl., Ex. 5).)

45. BLMIS’s accountant, David Friehling, pleaded guilty to several federal fraud charges for his involvement in the scheme.

Defendants' Response:

Not disputed that, in connection with the fraud at BLMIS, David Friehling pleaded guilty to: securities fraud; investment advisor fraud; four counts of making false filings with the SEC; and three counts of obstructing or impeding the administration of the Internal Revenue laws. (*Id.* at 37:12-42:25.)

46. BLMIS was “hopelessly” insolvent from at least December 11, 2002 because its debts were greater than the fair value of all its property.

Defendants' Response:

Paragraph 46 violates Local Rule 56.1(a) because it states a legal conclusion. Accordingly, paragraph 46 is improperly included in the Trustee's Rule 56.1 Statement and no response is required.

47. Hundreds of millions of dollars of investment advisory customer money was funneled to the other business units of BLMIS, and, by at least 2000, a significant percentage, if not a majority, of the “revenue” reported by Madoff's proprietary and market making businesses was actually customer money from the Ponzi scheme.

Defendants' Response:

Paragraph 47 violates Local Rule 56.1(a) insofar as it states a conclusion relating to the revenue of the various business units of BLMIS, which is improperly included in the Trustee's Rule 56.1 Statement. In addition, paragraph 47 is immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion, and disputed. The evidence relied upon does not support the assertions set forth in paragraph 47. (*See* Expert Report of Lisa M. Collura (“Collura Report”), Nov. 22, 2011, ¶¶ 16, 19-20

(Declaration of Lisa M. Collura (“Collura Decl.”), dated Jan. 26, 2012, Ex. 1); Dubinsky Report ¶¶ 241-52 (Dubinsky Decl., Ex. 1).) Moreover, these factual assertions are disputed by Madoff’s plea allocution, during which he stated that BLMIS’ proprietary trading and market making business units “were legitimate, profitable, and successful in all respects.” (Madoff Plea 25:6-11 (Sheehan Decl., Ex. 2).)

48. BLMIS investment advisory customer funds were not used to engage in any securities transactions in furtherance of its purported investment strategies as set forth above, but instead, were deposited by BLMIS into a bank account at JPMorgan Chase Bank (“JPMorgan”), account number xxx-xxx703 (the “703 Account”).

Defendants’ Response:

Defendants do not dispute that BLMIS did not engage in any of the securities transactions reflected on Defendants’ BLMIS account statements. Defendants also do not dispute that the Collura Report states that funds provided to BLMIS by its customers for investment purposes during the period December 1998 to December 2008 were instead deposited into a bank account numbered xxx-xxx703 (the “Chase 703 Account”) at JP Morgan Chase. (See Collura Report ¶ 16 (Collura Decl., Ex. 1).)

49. BLMIS used the customer deposits in the 703 Account to fund two other BLMIS bank accounts, JPMorgan account #xxx-xxxxxx509 (the “509 Account”) and Bankers Trust account #xx-xxx-599 (the “BT Account”), which were almost exclusively used to fund redemption requests.

Defendants' Response:

Defendants do not dispute that the Collura Report states that, for the period December 1998 through December 2008, the deposits into the account at JP Morgan Chase numbered xxx-xxxxxx509 (the "Chase 509 Account") and into the account at Bankers Trust numbered xx-xxx-599 (the "BT 599 Account") consisted solely of transfers from the Chase 703 Account. (*Id.* ¶¶ 24, 27.) Defendants also do not dispute that the Collura Report states that, for the period December 1998 through December 2008, approximately 99% of the outflows from the Chase 509 Account and approximately 97% of the outflows from the BT 599 Account were "related to customer withdrawals." (*Id.* ¶¶ 26, 29.)

50. When BLMIS investment advisory customers submitted redemption requests seeking to withdraw funds they believed they held in their BLMIS accounts, BLMIS would use the commingled customer deposits held in the 703 Account, and often transferred to the 509 Account and/or the BT Account to satisfy their requests.

Defendants' Response:

Not disputed that the Collura Report states that, for the period December 1998 through December 2008, 98% of the outflows from the Chase 703 Account were "related to customer withdrawals." (*Id.* ¶ 23.)

51. The Sterling Defendants consist of the Saul Katz ("Katz"), Fred Wilpon ("Wilpon"), other Sterling Equities partners, their family members, and related entities and trusts, who collectively held over the course of 25 years 185 investment advisory customer accounts that are the subject of this litigation.

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion, and disputed insofar as there is no evidence that BLMIS accounts were held "collectively" by Defendants. Furthermore, as a result of the Court's September 27, 2011 Opinion and Order, a number of Defendants and accounts are no longer the subject of this litigation. Defendants do not dispute that certain Defendants had a nearly 25-year relationship with BLMIS.

52. The Sterling Partners opened their first BLMIS investment advisory accounts in or around October 1985.

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Defendants do not dispute that Fred Wilpon and Saul Katz each opened a BLMIS account in or around October 1985. (*See Answer, Picard v. Katz*, 11 Civ. 3605, doc. no. 48, ¶¶ 62, 69 (S.D.N.Y. Oct. 11, 2011).)

53. The Sterling Partners, their family members, and related entities each held interests in multiple IA accounts and in different capacities.

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Defendants do not dispute that the Sterling Partners, their family members, and certain related entities each held interests in different BLMIS accounts and at times in different capacities. (*See id.* ¶¶ 46, 1102.)

54. From October 1, 1985 to December 11, 2008, the Sterling Defendants engaged in 5,246 cash deposit and withdrawal transactions in the 185 accounts they held.

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. As a result of the Court's September 27, 2011 Opinion and Order, a number of Defendants and accounts are no longer the subject of this litigation. In addition, paragraph 54 addresses cash deposit and withdrawal transactions outside of the two-year period relevant to this case. Defendants do not dispute that the Collura Report and the expert report of Matthew B. Greenblatt ("Greenblatt Report") state that there were 5,246 cash deposit and withdrawal transactions executed during the period October 1, 1985 to December 11, 2008 in 185 BLMIS accounts held, in the aggregate, by Defendants. (Collura Report ¶ 31 (Collura Decl., Ex. 1); Greenblatt Report ¶ 60 (Declaration of Matthew B. Greenblatt ("Greenblatt Decl."), dated Jan. 26, 2012, Ex. 1).)

55. All but 15 of the 5,246 cash deposit and withdrawal transactions related to the Sterling Defendants Accounts are reflected on BLMIS investment advisory customer statements, and the remaining 15 transactions which took place during the first eleven days of December 2008 were traced to BLMIS's investment advisory Checkbook File.

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. As a result of the Court's September 27, 2011 Opinion and Order, a number of Defendants and accounts are no longer the subject of this litigation. In addition, paragraph 55 addresses cash deposit and withdrawal transactions outside of the

two-year period relevant to this case. Defendants do not dispute that the Greenblatt Report provides that 5,231 cash deposits and withdrawals were identified in Defendants' BLMIS account statements for the period October 1, 1985 through November 30, 2008, and that 15 cash deposits and withdrawals were identified in the BLMIS Checkbook File for the period December 1, 2008 through December 11, 2008. (Greenblatt Report ¶ 60 (Greenblatt Decl., Ex. 1).)

56. For the time period December 1998 to December 2008 based on BLMIS bank record availability, FTI reconciled approximately 99% of the 225,000 cash transactions reflected on BLMIS customer statements.

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Defendants do not dispute that the Collura Report states that "99% of the approximately 225,000 cash deposit and/or withdrawal transactions that were reflected in all BLMIS customer statements" for the period December 1998 to December 2008 were reconciled against BLMIS bank records for the same period. (Collura Report ¶ 30 (emphasis omitted) (Collura Decl., Ex. 1).)

57. For the time period December 1998 to December 2008, FTI reconciled 99.4% of the Sterling Defendants' 5,246 cash transactions reflected on their BLMIS customer statements.

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion, and disputed insofar as the assertion in paragraph 57 misstates the

number of cash transactions that purportedly were reconciled for the period December 1998 to December 2008. (*See id.* ¶ 32.)

58. From October 1, 1985 to December 11, 2008, FTI reconciled 98 percent (or 5,147) of the Sterling Defendants' 5,246 cash transactions with available BLMIS bank records, customer files, and documents/data produced by the Sterling Defendants.

Defendants' Response:

Immaterial and irrelevant for purposes of the Trustee's Partial Summary Judgment Motion. Defendants do not dispute that the Collura Report states that FTI "reconciled 5,147, representing approximately 98%, of the 5,246 cash transactions reflected in the customer statements of the 185 Defendants' Accounts to available BLMIS bank records, documentation contained in BLMIS customer files, Quicken data and/or other documents produced by the Defendants themselves." (*Id.* ¶ 54.)

59. FTI created chronological listings of all cash deposit and withdrawal transactions for every BLMIS customer account, including the accounts of the Sterling Defendants, from April 1, 1981 through December 11, 2008. On an account-by-account, daily basis, FTI calculated every Investment Advisory customer account holder's principal balance (the "Principal Balance") from April 1, 1981 through December 11, 2008 based upon the following seven factors:

(1) The initial investment of each customer, which for accounts opened after April 1, 1981 was either a cash deposit or an inter-account transfer;

(2) Cash deposits made by each account holder in the form of checks or wire transfers, which were recorded on customer statements as cash deposits;

(3) Non-cash deposits of principal, such as securities or bonds, made by customers;

(4) Inter-account transfers “in” to one BLMIS account from another account in which no new funds entered or left BLMIS;

(5) Cash withdrawals (or “redemptions”) made by each BLMIS holder and transferred via wire or check;

(6) Inter-account transfers “out” of one BLMIS account to another account in which no new funds entered or left BLMIS; and

(7) Payments made by BLMIS on behalf of an account holder to a third party for apparent legal obligations, such as to the Internal Revenue Service on behalf of foreign account holders.

Defendants’ Response:

Paragraph 59 violates Local Rule 56.1(a) because the methodology described therein does not assert any fact. In addition, paragraph 59 is immaterial to the Trustee’s Partial Summary Judgment Motion. Accordingly, paragraph 59 is improperly included in the Trustee’s Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Greenblatt Report explains that FTI employed the methodology set forth in paragraph 59.

60. “Core Account Documents” were relied upon to calculate Principal Balances for each Investment Advisory customer account, including: BLMIS customer statements from November 1978 through November 2008, supported by third party bank records for all periods that such records are available; Portfolio Management Reports

generated by the BLMIS on a monthly basis; Portfolio Management Transaction Reports created by BLMIS for the time periods from January 1985 through December 1986 and from January 1990 through December 1995; Spiral bound notebooks containing handwritten transaction information related almost exclusively to cash receipts and cash disbursements for the time periods from April 1985 through September 1990 and from August 1991 through November 1994; and the “Checkbook File,” a data table within the investment advisory business’s IBM AS/400 computer system that contains manually-inputted cash receipts and cash disbursements, maintained for the time period from January 2000 through December 11, 2008.

Defendants’ Response:

Paragraph 60 violates Local Rule 56.1(a) because the description of what comprised “core account documents” does not assert any fact. In addition, paragraph 60 is immaterial to the Trustee’s Partial Summary Judgment Motion. Accordingly, paragraph 60 is improperly included in the Trustee’s Rule 56.1 Statement and no response is required. To the extent a response is required, Defendants do not dispute that the Greenblatt Report defines “core account documents” to include the various documents set forth in paragraph 60.

61. Of the Sterling Defendants' 185 accounts, 144 accounts were "net winners" of more than \$295 million in fictitious profits withdrawn over the life of the Sterling Defendants' investment.

Defendants' Response:

Paragraph 61 violates Local Rule 56.1(a) because it purports to state a legal conclusion that is in dispute. (*See, e.g.*, Mem. of Law in Supp. of Sterling Defs. Mot. to Dismiss the Am. Compl. or, in the Alternative, for Summ. J. (doc. no. 21); Mem. of Law in Supp. of Defs. Mot. for Summ. J. (doc. no. 86); Mem. of Law Regarding Determination of "For Value" and Net Equity Decision (doc. no. 62); Reply Mem. of Law Regarding Determination of "For Value" and Net Equity Decision (doc. no. 70).)

Moreover, as a result of the Court's September 27, 2011 Opinion and Order, a number of Defendants and accounts are no longer the subject of this litigation. In addition, paragraph 61 addresses cash deposit and withdrawal transactions outside of the two-year period relevant to this case.

62. Within the Two-Year Period, the Two-Year Net Winner Defendants received transfers of \$83,309,162 in fictitious profits from 34 accounts.

Defendants' Response:

Paragraph 62 violates Local Rule 56.1(a) because it purports to state a legal conclusion that is in dispute. (*See, e.g.*, Mem. of Law in Supp. of Sterling Defs. Mot. to Dismiss the Am. Compl. or, in the Alternative, for Summ. J. (doc. no. 21); Mem. of Law in Supp. of Defs. Mot. for Summ. J. (doc. no. 86); Mem. of Law Regarding

Determination of “For Value” and Net Equity Decision (doc. no. 62); Reply Mem. of Law Regarding Determination of “For Value” and Net Equity Decision (doc. no. 70).)

Defendants do not dispute the account numbers, names of account holders, the account names, or the numbers set forth in columns 4, 5, and 11 of Exhibit 2 to the Declaration of Matthew B. Greenblatt (*see* Greenblatt Decl., Ex. 2), but Defendants dispute the legal characterization of those numbers (*see, e.g.*, Mem. of Law in Supp. of Sterling Defs. Mot. to Dismiss the Am. Compl. or, in the Alternative, for Summ. J. (doc. no. 21); Mem. of Law in Supp. of Defs. Mot. for Summ. J. (doc. no. 86); Mem. of Law Regarding Determination of “For Value” and Net Equity Decision (doc. no. 62); Reply Mem. of Law Regarding Determination of “For Value” and Net Equity Decision (doc. no. 70).)

Dated: New York, New York
February 9, 2012

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