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)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants respectfully submit this reply memorandum of law in further support of their motion for summary judgment dismissing the Trustee's Complaint. Because the Trustee has failed to raise any genuine issue of material fact, Defendants are entitled to judgment as a matter of law and the Complaint should be dismissed in its entirety.

PRELIMINARY STATEMENT

The Trustee offers no evidence to dispute the record presented by Defendants, which demonstrates that, for good reason, Defendants trusted Bernard L. Madoff ("Madoff") until the day his fraud was disclosed and never for a moment thought that he or his brokerage, Bernard L. Madoff Investment Securities LLC ("BLMIS"), was engaged in a Ponzi scheme or fraud. Instead, the Trustee argues that Defendants must be found "willfully blind" because they *should have* suspected Madoff and *should have* done regular quantitative and qualitative investment management due diligence on BLMIS' operations.

This argument distorts the law and itself compels summary judgment for Defendants. "Willful blindness" is not negligence. Willful blindness requires evidence that a Defendant both (1) *subjectively believed* that there was a *high probability* that Madoff was engaged in a fraud *and* (2) took *deliberate action* to avoid learning the truth. The Trustee has put forward no evidence that any Defendant ever suspected that BLMIS was fraudulent. He does not even suggest, let alone offer evidence, that any Defendant deliberately took action to avoid confirming BLMIS' fraud. And the Trustee has largely abandoned his sweeping imputation theories. Because the Trustee has failed to raise any genuine dispute of material fact, he is not entitled to a trial. There are no facts for a jury to decide.

ARGUMENT

I. THE TRUSTEE DISTORTS THE "WILLFUL BLINDNESS" STANDARD

The Trustee makes no effort to prove "willful blindness." Instead he lowers the bar for himself. He conflates the two parts of the "willful blindness" standard into one and deems the standard objective. He contends that the "test is whether Defendants were aware of facts that *would suggest* a high probability of fraud to investors like them, *not whether they actually suspected* that Madoff was running a Ponzi scheme." (Trustee's Mem. of Law in Opp. to Defs. Mot. for Summ. J. ("Tr. Opp. Mem.") at 37 (emphasis added).) He further suggests that failure to reach the "correct" conclusion based on those same facts satisfies the requirement that a Defendant take *deliberate action* to avoid learning the truth. (*Id.*) The Trustee thus deliberately misstates the two parts of the "willful blindness" standard and posits that it permits him to prove both at one time and with the same evidence—of negligence.

The Trustee is wrong. Willful blindness is a two-part analysis that is quite distinct from negligence, or even recklessness.

> "While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that *surpasses* recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing *and who can almost be said to have actually known the critical facts*. By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing . . . and a negligent defendant is one who should have known of a similar risk but, in fact, did not." *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070-71 (2011) (emphases added) (citations omitted).

Under *Global Tech*, admissible evidence must show that a Defendant *subjectively believed* that there was a high probability that Madoff was engaged in a Ponzi scheme. Admissible evidence further must show, not that a Defendant failed to initiate an investigation, but that the Defendant took deliberate action to avoid confirming the fraud. *See, e.g.*, *United States v. Kozeny*, No. 09-4704, 2011 U.S. App. LEXIS 24740, at *19-23 (2d Cir. Dec. 14, 2011) (willful blindness conviction properly based on evidence that defendant voiced suspicions about investment-related FCPA violations and then formed separate investment company to shield himself and others from possible criminal conduct); *SEC v. Credit Bancorp, Ltd.*, 386 F.3d 438, 451-53 (2d Cir. 2004) (banker who essentially knew of adverse claim to securities in bank's possession was willfully blind where he deliberately avoided easily accessible information in his own files that would have confirmed the existence of the adverse claim).

The Trustee cannot prove willful blindness.[1] And his overt attempt to confuse the relevant legal standard, to impose retroactively a duty that did not exist, and to ignore this Court's ruling that he may not recover on a theory of negligence must be rejected. *See Picard v. Katz*, No. 11 Civ. 3605, 2011 U.S. Dist. LEXIS 109595, at *22-23 (S.D.N.Y. Sept. 27, 2011); *Picard v. Katz*, No. 11 Civ. 3605, 2012 U.S. Dist. LEXIS 5143, at *7 (S.D.N.Y. Jan. 17, 2012).

[1] As the Court is aware, Defendants and the Trustee disagree as to which party bears the burden of proof on willful blindness. (Tr. Opp. Mem. at 32-34.) Because Defendants have established their lack of willful blindness and the Trustee has failed to refute that showing, Defendants are entitled to summary judgment regardless of which party bears the burden.

II. THERE IS NO DISPUTE: NO DEFENDANT WAS WILLFULLY BLIND

A. No Defendant Subjectively Believed that Madoff Was Running a Ponzi Scheme or Other Fraud

The Trustee does not challenge Defendants' evidence that no Defendant ever believed there was any possibility, let alone a high probability, that Madoff was engaged in fraud or running a Ponzi scheme. He does not challenge the facts upon which Defendants' trust in Madoff was based, including that Madoff was prominent in the investment community and that BLMIS was a registered and regulated broker for more than forty years. He does not dispute that Defendants and their families, trusts, and closest friends entrusted hundreds of millions of dollars to BLMIS or that, even after they began to diversify their liquid investments, they left substantial amounts invested at BLMIS. The Trustee also does not dispute that Defendants routinely exposed their BLMIS account statements to major financial institutions for review or that those institutions readily accepted them as valid and valuable collateral. None of these undisputed facts is consistent with an actual belief of a high probability that BLMIS was a fraud.

Instead, the Trustee contends that the Sterling Partners *should have* figured out that Madoff was running a Ponzi scheme because they were given sporadic "warnings" or were aware of "red flags" that "would suggest a high probability of fraud *to investors like them.*"[2] (Tr. Opp. Mem. at 37 (emphasis added).) But there were no credible warnings,

[2] The Trustee's effort to prove his case with a "red flags" expert demonstrates his effort to manipulate this case to fit something other than the willful blindness standard—be it negligence, recklessness, scienter, or otherwise. No retail customer can be said to be willfully blind because he *did not* reach a conclusion that an institutional investor *should*
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and no warning that any Defendant credited. Nor did any supposed "red flag" actually cause any Defendant to conclude that there was even a possibility that BLMIS was fraudulent.

There Were No Peter Stamos Warnings. Incredibly, in the face of unwavering evidence to the contrary, the Trustee continues to contend that Peter Stamos warned Saul Katz that BLMIS was fraudulent. (Tr. Opp. Mem. at 21-22.) The Trustee has now deposed Mr. Stamos twice. Both times, under oath, Mr. Stamos stated categorically, emphatically, and unflinchingly that, up until the day Madoff's fraud was disclosed, he believed Madoff to be a most honest and honorable man and an exceptional money manager, and that he *never* warned any Sterling Partner that Madoff's lack of transparency, or anything else, was a "red flag" for fraud. (Defs. Mem. at 14-15; Defs. Motion to Dismiss. Mem. at 6-7.[3])

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have reached. And no Defendant was part of the "investment management industry" or bound by, let alone knowledgeable of, investment management industry "norms and customs." In fact, there is no evidence that even an investment management professional would have reached the conclusion that Madoff was a fraud. Dr. Pomerantz "never concludes that the Defendants *would* have discovered Madoff's fraud. Rather, Pomerantz opines that a quantitative analysis would have further confirmed the Defendants' investment accounts with BLMIS contained indicia of fraud." (Tr. Mem. of Law in Opp. to Defs. Mot. to Strike the Expert Reports and Testimony of Dr. Steve Pomerantz at 7 n.10 (emphasis added) (doc. no. 113).)

[3] Citations to "Defs. Mem." refer to the Memorandum of Law in Support of Defendants' Motion for Summary Judgment, dated January 26, 2012 (doc. no. 86). Citations to "Defs. Motion to Dismiss Mem." refer to the Memorandum of Law in Support of Sterling Defendants' Motion to Dismiss the Amended Complaint or, in the Alternative, for Summary Judgment, dated March 20, 2011 (doc. no. 21).

The Trustee points to no probative contrary evidence. Instead, he now insinuates that Mr. Stamos' testimony, upon which he himself relies as evidence of the supposed key warnings, is not credible. (Tr. Opp. Mem. at 23 & n.26.) He has no contemporaneous evidence to support any such claim. Rather, he argues that post-December 11, 2008 emails from Peter Stamos, his then-colleague Ashok Chachra, and his brother Basil Stamos contradict Mr. Stamos' testimony. (*Id.* at 22-23.) But they do not. Each of the authors who was questioned about his emails testified that none was predicated on any such warning, and none of the emails reflects the communication of any warning to any Defendant. (Defs. Motion to Dismiss Mem. at 6-7; P. Stamos Rule 2004 Tr. 227:19-228:12 (Seshens Supp. Decl., Ex. BB); B. Stamos Tr. 71:22-72:9; 75:11-77:12; 78:15-79:21; 80:19-81:2; 82:20-83:6 (Seshens Supp. Decl., Ex. CC); Bohorquez Decl., Exs. 138-51.[4])

In addition, the emails are inadmissible hearsay. The Trustee argues, without record support, that the emails of Peter Stamos and Ashok Chachra are party admissions under Fed. R. Evid. 801(d)(2)(D) because "the Sterling Partners were also partners in Sterling Stamos" and they "authorized Peter Stamos to take all actions necessary, on their behalf, with respect to the operational and investment decisions of Sterling Stamos."[5] (Tr.

[4] Citations to "Seshens Supp. Decl." refer to the Supplemental Declaration of Dana M. Seshens in Further Support of Defendants' Motion for Summary Judgment, dated February 16, 2012. Citations to "Bohorquez Decl." refer to the Declaration of Fernando A. Bohorquez, Jr. in Opposition to the Defendants' Motion for Summary Judgment, dated February 9, 2012 (doc. no. 126).

[5] The Trustee makes no argument at all for the admissibility of the more than ten Basil Stamos emails on which he relies. (Tr. Opp. Mem. at 22.) None supports the Trustee's contention in any event. When Basil Stamos emailed his many philanthropic
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Opp. Mem. at 22 n.24.) But stating that the Sterling Partners were "partners" of Sterling Stamos does not establish the requisite agency relationship, for which "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that *the principal is to be in control* of the undertaking" must be shown. *Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. & Tel. Co.*, No. 92 Civ. 1735, 1998 U.S. Dist. LEXIS 3198 at *130 (S.D.N.Y. March 16, 1998) (emphasis added) (citing *Cabrera v. Jakabovitz*, 24 F.3d 372, 386 (2d Cir. 1994)). The Trustee himself contends that the Sterling Partners ceded all control to Peter Stamos (Tr. Opp. Mem. at 22 n.24 (citing R. 56.1 ¶ 173)), precluding a finding that Sterling Stamos was the Partners' agent.[6]

There Were No Merrill Lynch Warnings. There is no evidence of any Merrill Lynch fraud concern about BLMIS, and certainly no evidence that any such concern was communicated to any Defendant. Yet, the Trustee now contends that Merrill Lynch required Sterling Stamos to divest a large investment in BLMIS because BLMIS self-cleared, self-custodied and self-executed. (Tr. Opp. Mem. at 20.) The Trustee never

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partners after disclosure of Madoff's fraud that his brother Peter "made the call" on Madoff years ago, he was referring to Peter's decision to have Basil and his family take their funds out of Madoff because of diversification concerns, heightened by Madoff's lack of transparency. (*See, e.g.*, B. Stamos Tr. 71:22-72:9; 75:11-77:12; 78:15-79:21; 80:19-81:2; 82:20-83:6 (Seshens Supp. Decl., Ex. CC).) Basil Stamos never testified that Peter Stamos warned the Sterling Partners of anything improper about Madoff.

[6] The Trustee, indeed, is correct that the Sterling Partners vest all authority over Sterling Stamos operations and investments with Peter Stamos. The Sterling Partners were not and are not general partners of the Sterling Stamos funds, but, rather, hold passive, non-controlling interests in entities that, in turn, are the funds' general partners.

claims that this was known to any Defendant, and he has all relevant Sterling Stamos and BLMIS records, so he knows that no such investment was ever made. But the testimony on which he relies demonstrates that the only issue for Merrill Lynch was the suitability of a Madoff investment for *retail* customers (Tr. Rule 56.1 ¶ 232), which Merrill believed could have been alleviated if BLMIS shifted its prime brokerage business to Merrill. (K. Dunleavy Tr. 118:14-119:6 (Bohorquez Decl., Ex. 126).) No fraud issue was ever raised. That Merrill Lynch entered into a joint venture with Madoff in 2003 further dispels any claim that Merrill Lynch thought Madoff was a fraud. The Trustee's response—that the venture was with a different part of Madoff's business (Tr. Opp. Mem. at 20 n.23)—is hardly a consequential distinction if Merrill Lynch had a fraud concern.

Saul Katz Did Not Believe Noreen Harrington. The Trustee relies heavily on the testimony of Noreen Harrington that she warned Saul Katz, at a meeting in 2003, that BLMIS was either front running or its returns were fiction. (Tr. Opp. Mem. at 17-18.) Even if credited—and there is no substantiating evidence elsewhere in the record (*see* Defs. Mem. at 25)—Ms. Harrington's testimony does not show that Mr. Katz actually believed there was a possibility of fraud. It shows the opposite. Ms. Harrington's testimony is clear: she voiced an opinion, but neither Mr. Katz nor anyone else at the meeting believed that Madoff was doing anything wrong. (*Id.* at 24-25.) Indeed, they were incredulous. (*Id.*) She was aware that her accusations were utterly contrary to the facts known to Mr. Katz for many years, and, when probed by Mr. Katz about her Madoff accusations, she offered no facts to support her opinion and told him she "could be wrong." (*Id.*) Thus, Ms. Harrington's testimony *itself*, taken as true for purposes of this

motion, shows that Mr. Katz acted in a manner that demonstrates the opposite of "willful blindness."

Defendants Did Not Consider "Fraud Insurance" Because of Madoff Concerns. There is no evidence that the Sterling Partners' consideration of insurance was a "manifestation" of the Partners' "awareness of a potential risk of fraud to their investments." (Tr. Opp. Mem. at 14.) There is no evidence that the Partners' colleague, Chuck Klein, suggested that they buy insurance because he or anyone else at American Securities was concerned that BLMIS was a fraud.[7] (Defs. Mem. at 22.) And the undisputed evidence is that the Sterling Partners saw no need for insurance and bought none, yet continued to increase their deposits with BLMIS. The trumpeted Ponzi scheme insurance "shopping spree" is entirely unsupported.

No Other Evidence Raises Any Factual Dispute. None of the Trustee's remaining contentions demonstrates that any Defendant acted in a manner inconsistent with his subjective belief that BLMIS was a legitimate broker-dealer.

- The Trustee appears to have abandoned his unsupported claim that the Sterling Partners created Sterling Stamos to diversify away from Madoff because of fraud concerns, presumably because there was no such evidence and the contention is entirely at odds with leaving half a billion dollars with BLMIS even after Sterling Stamos was formed. (Defs. Mem. at 13-16; Defs. Motion to Dismiss Reply Mem. at 8-11.[8])

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[7] The Trustee insinuates that internal American Securities documents suggest that there were internal concerns about Madoff at American Securities. (Tr. Opp. Mem. at 14). The inadmissible hearsay document on which the Trustee relies does not support that contention, but even if it did, there is no evidence that anyone at American Securities communicated any such view to any Sterling Partner.

[8] Citations to "Defs. Motion to Dismiss Reply Mem." refer to the Reply Memorandum of Law in Further Support of Sterling Defendants' Motion to Dismiss the (…continued)

- Also effectively abandoned is the Trustee's claim that Sterling Stamos was restructured to protect Madoff and BLMIS from regulatory scrutiny. (Tr. Opp. Mem. at 30-31.) The Trustee has come forward with no evidence that the Sterling Partners did anything to protect Madoff from regulatory scrutiny; rather, the undisputed testimony shows that they wished to protect their own privacy and that of their families. (Defs. Mem. at 26.)

- The uncontroverted evidence shows that no investment professional at Sterling Stamos, nor any Sterling Partner, compared Bayou with BLMIS or concluded that one had anything to do with the other. (*Id.* at 26.)

- The uncontroverted evidence shows that the Sterling Partners viewed Madoff's strategy as safe and conservative and understood that it was intended to limit upside gain and downside risk. (*Id.* at 9.)

- The uncontroverted evidence shows that no Sterling Partner, including Michael Katz, thought Madoff's auditor was a "red flag." (M. Katz Tr. 327:24-328:2 (Seshens Supp. Decl., Ex. DD); M. Katz Tr. 158:3-16; 160:10-25 (Bohorquez Decl., Ex. 5).)

- The uncontroverted evidence shows that no Sterling Partner ever thought anything of BLMIS' practice of going to cash at year-end. (S. Katz Tr. 89:4-11 (Bohorquez Decl., Ex. 4); M. Peskin Tr. 265:6-11 (Bohorquez Decl., Ex. 6).)

- The uncontroverted evidence shows that no Sterling Partner ever thought Madoff was front-running. (Defs. Motion to Dismiss Mem. at 28-30; Defs. Motion to Dismiss Reply Mem. at 24-25.)

- There is no evidence that the circulation among the Sterling Partners of public news articles in 2001 caused any of them to conclude that there was a high probability that BLMIS was engaged in fraud. (*See* Tr. Opp. Mem. at 14.)

Madoff's Fraud Was Carefully Concealed. Finally, the Trustee ignores the evidence he himself has offered as to how Madoff so successfully hid his fraud—from customers, from regulators, including the SEC, and from financial industry participants—

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Amended Complaint or, in the Alternative, for Summary Judgment, dated June 20, 2011 (doc. no. 26).

in part by operating side-by-side with legitimate businesses. The Trustee has spent literally hundreds of millions of dollars to document the extreme steps taken by Madoff and his band of co-conspirators. Therefore, his repeated contention that Defendants should have figured it out themselves, without the benefit of hindsight and the multitude of criminal confessions, is facially implausible.

B. No Defendant Deliberately Avoided Learning the Truth About Madoff's Ponzi Scheme

No Defendant had any belief that BLMIS was possibly, or even likely, fraudulent. Their view that he was honest was based on decades of facts pointing to his legitimacy. The Trustee's failure to refute these facts alone ends the willful blindness inquiry. Further, the Trustee identifies no deliberate action that any Defendant took to avoid confirming a suspicion—which none had—about Madoff's legitimacy. He identifies *no* information that the Sterling Partners possessed or were given, but refused to confront. Instead, he claims that Defendants *should have* done due diligence and then calls their failure to do so "deliberate." (Tr. Opp. Mem. at 26.) But no Defendant had a duty to conduct due diligence for his, her, or its investment, *see Katz*, 2011 U.S. Dist. LEXIS 109595, at *22-23, and a failure to conduct due diligence cannot, as a matter of law, sustain the second prong of the willful blindness test. *Global-Tech*, 131 S. Ct. at 2070-71.

Perhaps recognizing this fatal deficiency, the Trustee instead argues that he can satisfy the second part of the willful blindness test by showing "motive" and "likely something more than negligence"—in this instance the failure to investigate. (Tr. Opp. Mem. at 40-41.) He appears to contend that the finder of fact may infer that this alleged failure to investigate was deliberate because, he asserts, Defendants had a motive to avoid

learning of Madoff's fraud. He claims that the Sterling Partners made a "conscious decision," renewed regularly over twenty-three years, to risk the financial security of their families, their businesses, and their reputations to invest in a Ponzi scheme because they were dependent on BLMIS' returns and concerned about loan defaults. The claim is implausible on its face and completely belied by the evidentiary record.

The record shows that, like every person who deposits his paychecks into a bank, the Sterling Partners relied on BLMIS' continued existence. Over their nearly twenty-five year relationship, Defendants, in the aggregate, deposited in excess of $1.4 billion of monies generated by *their own businesses* with BLMIS for investment. They then relied on the evidence, set forth in their brokerage statements, that BLMIS had used that money to invest and trade in securities on their behalf and on their ability to access those funds as needed.[9] The Trustee points to no evidence—because there is none—that BLMIS *returns*, as opposed to the capital in BLMIS accounts, were necessary for the operation of any business or to consummate any transaction.[10] For example, his assertion that the

[9] According to the Trustee's own numbers, Defendants, in the aggregate, withdrew approximately $1.7 billion from the various BLMIS accounts at issue, which is how the Trustee arrives at his "lifetime" "fictitious profits" number of $295 million. (Tr. Mem. of Law in Supp. of Mot. for Partial Summ. J. at 11, 15 (doc. no. 100).) The Trustee cannot contend that the many Sterling-related businesses ran on $295 million over nearly twenty-five years.

[10] The Trustee contends that the Sterling Partners' "business plans" became overly-dependent upon Madoff as evidenced by projections of BLMIS income that comprised a significant portion of operating cash flow for a number of years. (Tr. Opp. Mem. at 5.) But he relies upon *projections* provided to lenders, not any business plan. And he ignores the fact that the Partners relied on their deposits with BLMIS for liquidity. For example, he states that the Sterling Partners projected $34 million of BLMIS income for 2002 based on an estimated 14% rate of return (the same rate used to project income earned on cash deposits elsewhere). (SE_T731593 at 605 (Bohorquez Decl., Ex. 9).) But
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Mets could not make payroll without "BLMIS" is entirely disingenuous. (Tr. Opp. Mem. at 6.) The Mets, indeed, deposited funds into their BLMIS accounts—monies from ticket sales, concessions, and other team-generated revenue—and then withdrew that money as needed to make payroll and cover team expenses. (L. Labita Tr. 62:24-63:22 (Seshens Supp. Decl., Ex. EE); L. Labita Tr. 137:14-138:7 (Bohorquez Decl., Ex. 8).) But the suggestion that the Mets relied on BLMIS *returns* to pay their players, as opposed to monies generated by the team's operations, is a complete distortion—and there is no evidence to support it.

Also like every person who deposits his paychecks in a bank and would suffer liquidity problems if the bank failed, the Sterling Partners, too, experienced a liquidity crunch upon BLMIS' collapse. Again the Trustee argues that this evidences dependency because, "[w]ith Madoff's steady *income stream* dried up instantly, Sterling had only $10 million in cash, and no other accessible source of liquidity." (Tr. Opp. Mem. at 32 (emphasis added).) But the Partners' lack of liquidity was not caused by loss of BLMIS *returns*—it was caused by loss of *capital*. The Trustee has not shown, and cannot show, otherwise.

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those projections were based upon *$244,946,178* of BLMIS deposits. (*Id.*) For each of the years in question, the Partners' aggregate deposits with BLMIS ranged from $241,598,895 in 2002 to $432,682,000 in 2007. (Tr. Opp. Mem. at 8 n.8.) Moreover, the Trustee's contention that projected BLMIS income comprised a significant portion of "operating cash flow" is even more unfounded, as the Trustee's analyses *exclude* most of the cash projected to be generated by *Sterling's businesses*. The Trustee has twice deposed the chief financial officer of Sterling Equities and the Mets, but asked no questions about the meaning of these schedules.

The Trustee's notion that fear of *covenant defaults* tied Defendants to BLMIS is particularly nonsensical. (Tr. Opp. Mem. at 11-12.) Defendants openly used their BLMIS accounts as collateral and regularly submitted them to scrutiny by their lenders. (Defs. Mem. at 11.) If any Defendant had thought that there was a high probability that BLMIS was a fraud, a fear of *covenant defaults* would pale in comparison to a fear of discovery of the fraud by some of the most sophisticated financial institutions in the world. Similarly, the Trustee's suggestion that the Sterling Partners were defrauding their banks by hiding from them the $54 million advance provided by Madoff so they could buy out the Mets media rights is entirely contrary to the record. (Tr. Opp. Mem. at 13.) The banks *received* the advance. (S. Katz Rule 2004 Tr. 197:8-199:24 (Seshens Supp. Decl., Ex. FF); M. Peskin Rule 2004 Tr. 269:15-271:2 (Seshens Supp. Decl., Ex. GG).) The Trustee's claim that the letter agreement concerning the $54 million was somehow intended to hide the transaction from the banks has no evidentiary foundation.[11] Finally, the conclusion that the letter agreement could lead a reasonable jury to infer that Defendants "consciously avoided conducting any due diligence into their BLMIS investments" is illogical—particularly because the Partners regularly offered their BLMIS account statements to their banks for review.

[11] No witness who was deposed could recall the origin of the letter agreement, including Saul Katz. The Trustee insinuates that the failure of recollection by its author, Sterling Partner Marvin Tepper, is cause for suspicion. (Tr. Opp. Mem. at 12 n.15.) In fact, Mr. Tepper, who is 80 years old, has sworn that "the facts relating to the 2004 $54 million transfer[] never caused me to consider, let alone believe, that Madoff was engaged in fraud." (Declaration of Marvin Tepper, dated Jan. 26, 2012, ¶ 7 (doc. no. 98).) The Trustee twice sought Mr. Tepper's deposition and twice canceled it. The Trustee, therefore, has no basis upon which to insinuate anything nefarious about this transaction.

III. THE TRUSTEE ADVANCES NO OTHER BASIS TO DENY SUMMARY JUDGMENT

The evidence in this case is entirely consistent. The Sterling Partners have testified that none of them believed that BLMIS was probably, or even possibly, engaged in a Ponzi scheme or any fraud. No witness has testified to the contrary, and no document contradicts their testimony. As there is no dispute as to any Defendants' state of mind, the Trustee cannot defeat summary judgment simply by saying this case involves Defendants' state of mind. (Tr. Opp. Mem. at 34.) There is no factual issue for the jury to consider. And nothing in the Trustee's deluge of irrelevant and largely inadmissible documents, or in his improper Rule 56.1 Statement, raises any such issue either.

The Trustee has put before this Court 219 exhibits, including fifty-three credit agreements and loan-related documents, forty-one documents neither to, from, nor authored by any Defendant (and largely having nothing to do with any of them), and eleven documents concerning the Sterling Equities 401(k) Plan, which has nothing to do with this case. (*See, e.g.*, Bohorquez Decl., Exs. 45-47, 55, 61-95, 102, 106-08, 159, 162, 182-84, 186-89, 194, 196, 202-12, 216-19.) Nothing in those exhibits creates any dispute of fact as to willful blindness. Large swaths of the documents are inadmissible, including the numerous emails and other documents from third parties laden with inadmissible hearsay. *See* Fed. R. Evid. 801(c). Inadmissible evidence cannot raise a dispute as to any material fact. *See, e.g.*, *Estate of Hamilton v. City of New York*, 627 F.3d 50, 53 (2d Cir. 2010) (recognizing that a district court in awarding summary judgment can only rely on admissible evidence); *Barua v. Credit Lyonnais-U.S. Branches*, No. 97 Civ. 7991, 1998

U.S. Dist. LEXIS 20338, at *10 (S.D.N.Y. Dec. 30, 1998) (awarding summary judgment for defendant where "much of plaintiff's proffered 'evidence' [was] either inadmissible hearsay or so conclusory as to fail to satisfy the requirements of Rule 56(e)"); S.D.N.Y. Local Rule 56.1(d) (requiring citation to *admissible evidence* in effort to controvert any statement of material fact). And the Trustee has not even attempted to meet his burden of demonstrating the admissibility of any of these exhibits.[12] *See Evans v. Port Authority of N.Y. & N.J.*, 192 F. Supp. 2d 247, 262 n.121 (S.D.N.Y. 2002) ("The burden of establishing admissibility, of course, is with the proponent of the evidence.").

The Trustee's improper Rule 56.1 statement is equally unavailing to create a factual issue. The Trustee has not moved for summary judgment and therefore had no procedural right to file a statement of undisputed facts. In addition, where, as here, the statement utterly fails to "streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties," it should be stricken. *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001). Far from offering guidance, the nearly 450-"fact" statement offers no

[12] Most of the exhibits are irrelevant in any event. For example, no issue in this case depends upon the existence, or terms, of Defendants' credit agreements. Although the Trustee appears to be making a number of truly astonishing claims based on these agreements—such as the contention that the prohibition of a grant of a second lien on collateral imposed a duty on Defendants to investigate their broker to ensure that it was not engaged in fraud (Tr. Opp. Mem. at 10-11 & n.11)—these claims demonstrate only that the Trustee has no basis for his case. And the terms of Defendants' various credit agreements certainly are not in dispute—indeed, a stipulation between the parties could have avoided the Trustee's paper avalanche.

insight as to the purpose of many of its contentions, such as the "fact" that the definition of "lien" in each of ten credit agreements is the same.[13] (Tr. Rule 56.1 ¶ 116.)

Because the Trustee has demonstrated no dispute of material fact as to any issue pertaining to willful blindness, he has no right to trial simply because this case turns on Defendants' state of mind. (*See* Tr. Opp. Mem. at 34.) If the law were otherwise, intent-based cases could never be dismissed, no matter how baseless. As the Second Circuit has cautioned, "[t]he summary judgment rule would be rendered sterile . . . if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985). The Trustee "may not avoid summary judgment by simply declaring that state of mind is at issue," *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir. 1998), nor by "vaguely asserting the existence of some unspecified disputed material facts, or . . . through mere speculation or conjecture," *First Capital Inv. Holdings LLC v. Wilson Capital Grp., Inc.*, No. 10 Civ. 2948, 2011 U.S. Dist. LEXIS 57638, *13 (S.D.N.Y. May 23, 2011). The Trustee has not shown even a "metaphysical doubt as to the material facts," relying instead on "conclusory allegations [and] unsubstantiated speculation." *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (internal quotation marks omitted). The Trustee's efforts in no way suffice.

[13] The Trustee's Rule 56.1 Statement is replete with similarly irrelevant facts, as well as numerous facts that are unsupported by the evidence cited (*see, e.g.*, ¶¶ 93, 195, 358, 408, 411), inaccurate (*see, e.g.*, ¶¶ 10, 37, 42, 177, 376, 406), misleading (*see, e.g.*, ¶¶ 43, 207, 274, 325), and that rely solely on inadmissible evidence (*see, e.g.*, ¶¶ 161, 212, 248, 252, 271).

No material dispute of fact as to willful blindness is shown. In addition, Defendants have demonstrated that there is no basis for avoiding transfers of "profits." Accordingly, Counts One, Nine, and Eleven of the Trustee's Complaint must be dismissed as to all Defendants.

IV. THE TRUSTEE HAS LARGELY ABANDONED HIS UNSUPPORTABLE IMPUTATION THEORIES

The Trustee fails to support his sweeping imputation arguments.

First, the Trustee does not set forth his imputation theory in any meaningful way. His claims are for avoidance of specific transfers to specific Defendants from their respective brokerage accounts. As to most Defendants he has alleged nothing, and certainly not willful blindness. He relies exclusively, therefore, on imputation theories that he has not supported, and cannot support, as his basis for their liability. He does not suggest which facts were known to which Defendants, or whose state of mind, if anyone's, he seeks to impute to which other Defendants or by what chain of fact or logic he intends to do so. As a result, no claim can survive as to any Defendant based on any imputation theory.

Second, the Trustee has abandoned his veil-piercing and alter ego theories. Although he states that he will be able to establish them at trial (Tr. Opp. Mem. at 49 n.44), he was required to put in evidence to support his claims in response to Defendants' motion for summary judgment, which has refuted those claims. (Defs. Mem. at 32-35.) Instead, the Trustee has burdened the Court with numerous credit agreements and related documents that, in fact, demonstrate the care with which corporate and personal

separations were maintained. (*See, e.g.*, Bohorquez Decl., Ex. 102; *see also id.* Exs. 67, 82.) These claims must be dismissed.

Third, no evidence supports the Trustee's alternative theory based on agency law. He asserts that, "[a]t a minimum, the Sterling Partners were the agents for all Defendants, on whose behalf they acted" (Tr. Opp. Mem. at 47), but refers to no evidence to establish any agency relationship. He claims that the "undisputed facts show that at all relevant times, Defendants' BLMIS accounts were all jointly managed, controlled and administered by the Sterling Partners, including Saul Katz and Arthur Friedman" (*id.* at 46), but cites to nothing in support. And he does not dispute the evidence submitted by Defendants that Arthur Friedman had no control over BLMIS accounts other than his own. (Defs. Mem. at 35). In fact, the Trustee's own evidence demonstrates the limits of Arthur Friedman's administrative role. (*See* Tr. Rule 56.1 Response ¶¶ 14, 99-102.)

The Trustee's equally false assertion that "one of the primary benefits to the Defendants of the BLMIS relationship was the Sterling Partners' ability to access cash and purported income from *all* of the Defendants' BLMIS accounts" (Tr. Opp. Mem. at 47) is based solely on the irrelevant evidence that Bank of America internally referred to some of the Defendants as the Katz/Wilpon "Super Family." (*Id.* at 44 & n.39.) And the Trustee offers no support whatsoever for the statement that "the individual Partners were also members, partners and/or officers of the limited liability companies, partnerships, and corporations through which they invested with BLMIS, meaning that most if not all of the Sterling Defendants already are directly liable for the Partners' knowledge, without implicating concepts of agency or equitable ownership." (*See id.* at 48.)

Fourth, the Trustee egregiously distorts the record to argue that the "Sterling Partners collectively decided not only which entities would invest in Madoff and how much, but also which entities would be created for the express purpose of investing in Madoff, including the double-up entities." (*Id.* at 45.) Although *business decisions* are made collectively amongst the Sterling Partners, such as what property to buy, who should run the property, and to whom it should be sold, there is no evidence that any such collective decision-making process carried over to how each Sterling Partner chose to manage his own personal funds—because it did not. The evidence is undisputed that each account holder made his, her, or its own decision to invest in each account. (Defs. Mem. at 33-35.)

Fifth, the Trustee's focus on the restructuring of Sterling-related debt following the BLMIS collapse continues to be a red herring. After untold depositions and document productions, the evidence is clear that the Partners' lenders required restructuring of all loans (S. Kenny Tr. 111:10-24 (Bohorquez Decl., Ex. 167)), but there is no evidence that corporate formalities were not preserved or respected as part of that process. That all parties were represented by a designated negotiator is probative of nothing. (*See* Tr. Opp. Mem. at 46.)

Finally, the obligations that gave rise to the transfers at issue here were securities entitlements created under UCC Article 8. Those entitlements are subject to attack under Article 8 where the entitlement holder was willfully blind to the adverse interest. UCC § 8-105(a)(2); *see also* Tr. Opp. Mem. at 38, 40, 42. For purposes of such an attack, "willful blindness" may be imputed from one person to another, but only under very limited circumstances, none of which is present here.

> "Under the two prongs of the willful blindness test, the individual or individuals conducting a transaction must know of facts indicating a substantial probability that the adverse claim exists and deliberately fail to seek further information that might confirm or refute the indication. For this purpose, information known to individuals within an organization who are not conducting or aware of a transaction, but not forwarded to the individuals conducting the transaction, is not pertinent in determining whether the individuals conducting the transaction had knowledge of a substantial probability of the existence of the adverse claims." UCC § 8-105 cmt. 4.

The Trustee's imputation arguments are unsupported as a matter of fact, unsupported as a matter of law, and fail to raise any issue of material fact for a jury to decide. Accordingly, all claims against any Defendant predicated on the Trustee's imputation theories must be dismissed.

V. THE SUBSEQUENT TRANSFER CLAIMS ARE RIPE

Finally, the Trustee claims that his subsequent transfer claims are not ripe because, he says, discovery is ongoing. (Tr. Opp. Mem. at 49.) He is wrong. This Court reopened discovery with regard to these claims following their reinstatement. (Seshens Supp. Decl. ¶¶ 4-5.) The Trustee sought additional discovery, to which Defendants responded in a timely fashion. (*Id.* ¶¶ 6-8.) As a result of diligence undertaken in connection with this discovery, Defendants learned, and informed the Trustee, that a significant number of his subsequent transfer claims could not be sustained because no monies were transferred as alleged. (*Id.* ¶ 10.) The Trustee did not respond to Defendants' offer of sworn testimony or other evidence to that effect. (*Id.*) Thus, the Trustee cannot avoid summary judgment by claiming that he needs more discovery. Accordingly, Count Nine of the Trustee's Complaint must be dismissed for the independent reason that there is no evidence to support it.

CONCLUSION

For the reasons set forth above, and in their initial memorandum of law, Defendants respectfully request that the Court enter judgment for them as a matter of law, dismissing all remaining Counts of the Complaint. The Trustee has failed to raise any genuine issue of material fact as to Defendants' lack of willful blindness.

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