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 SUPPORT OF DEFENDANTS' MOTION IN LIMINE TO BAR USE OF PREJUDICIAL PHRASE

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Defendants respectfully submit this memorandum of law in support of their motion *in limine*, under Federal Rules of Evidence 402 and 403, to bar the Trustee's counsel and witnesses from referring to or using the phrase "Other People's Money," or any like wording, to suggest that the Trustee is attempting to recover by this action money on behalf of other victims of Bernard L. Madoff's ("Madoff") fraud. Such references would be inflammatory, irrelevant and prejudicial.

PRELIMINARY STATEMENT

The Trustee repeatedly referred to "Other People's Money" throughout the pre-trial proceedings when describing the transfers to Defendants that he seeks to recover. He has asserted that this action is part of an overarching mission to recover money received by those of Madoff's customers who received more than they invested, whom he refers to as the "net winners," so that it can be redistributed to those who received less, whom he refers to as the "net losers." In doing so, the Trustee has attempted to cloak himself in garb of a later day Robin Hood, taking from the unjustly enriched in order to give back to the innocent victims. This, however, is not a trial to determine fairness in some larger moral sense, and even if it were, there will be nothing before the jury on which they could assess the innocence or lack thereof of the other investors. Where the money for the transfers at issue came from is entirely irrelevant.

Moreover, the reference to "Other People's Money" when describing or discussing before the jury the transfers at issue would be both inaccurate and highly prejudicial to Defendants. In fact, in light of the Court's recent ruling on summary judgment, which granted the Trustee's motion with respect to the so-called "fictitious profit" portion of the transfers, even under the Trustee's theory none of the remaining

transfers at issue involve "Other People's Money." It is common ground that what remains for trial is only whether transfers that represented the return of Defendants' principal can be avoided because Defendants were allegedly willfully blind to Madoff's fraud when they invested. The trial has nothing to do with where or how Madoff got the money to make the transfers. This is not a case about the other victims of Madoff's scheme. It is about Defendants' own conduct and state of mind. To invite the jurors to base their decision on sympathy or concern for the other alleged victims, about whom they will have heard no evidence, would be improper and prejudicial. Consequently, neither the Trustee's counsel nor his expert or fact witnesses should be permitted to use this phrase or any like wording in front of the jury.

ARGUMENT

A district court's "inherent authority to manage the course of its trials encompasses the right to rule on motions *in limine*." *Highland Capital Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 176 (S.D.N.Y. 2008) (citing *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984)). Pretrial resolution of motions *in limine* forecloses the need for futile attempts to "unring the bell" once jurors have seen or heard inadmissible evidence.

Motions *in limine* under Rules 402 and 403 of the Federal Rules of Evidence permit courts to preclude the introduction of evidence that does not tend to make the existence of any material fact more or less probable, *see* Fed. R. Evid. 401-402, or that, even if relevant, its probative value is "substantially outweighed by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence," Fed. R. Evid. 403; *see also United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1193 (2d Cir. 1989) (citing Fed. R. Evid. 403).

Where language has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one," it may be excluded under Rule 403. Fed. R. Evid. 403 advisory committee's note; *see also United States v. Kaplan*, 490 F.3d 110, 122 (2d Cir. 2007) (the "unfair prejudice" addressed by Rule 403 is "the risk that the jury would draw improper inferences"). Consequently, courts have directed under Rule 403 that parties or counsel refrain from using prejudicial language before a jury. For example, in *Plew v. Limited Brands, Inc.*, No. 08 Civ. 3741, 2012 U.S. Dist. LEXIS 14966, at *6 -7 (S.D.N.Y. Feb. 6, 2012), the Court ruled that the words "stole" and "stealing" were prejudicial and should not be used before the jury in a patent infringement case.

> "Defendants move to prevent [Plaintiff] from using pejorative terms or phrases at trial. Specifically, Defendants contend that [Plaintiff] is likely to repeat allegations she has made in the press that Victoria's Secret 'stole' her bra. Courts may prohibit the use of pejorative terms under Federal Rule of Evidence 403 'when such categorizations [are] inflammatory and unnecessary to prove a claim.' The Court agrees that characterizing Victoria's Secret actions as 'stealing' risks prejudicing the jury and will not aid in its finding of facts." *Id.* (citations omitted).

In *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Ams.*, No. 04 Civ. 10014, 2009 U.S. Dist. LEXIS 89183, at *19-20 (S.D.N.Y. Sept. 28, 2009), the use of certain language deemed inflammatory in connection with the adjudication of a hedge fund's claim was precluded.

> "This Court has prohibited the use of pejorative terms when such categorizations were inflammatory and unnecessary to prove a claim. . . . The term 'tax haven,' . . . when considered in isolation, appears irrelevant and inflammatory on its face and is precluded. The Court declines to speculate on all other possible terms that the parties may use during trial and whether such terms would be inflammatory. Instead, the Court cautions the parties against using inflammatory terms and making derogatory statements that do not bear on the issues being tried, including,

> but not limited to, 'tax haven' and statements linking the Bondholders, or hedge funds in general, to the financial crisis." *Id.*

See also A.I.A. Holdings, S.A. v. Lehman Bros., No. 97 Civ. 4978, 2002 U.S. Dist. LEXIS 22559, at *2-3 (S.D.N.Y. Nov. 21, 2002) (prohibiting use of the phrase "rat trading" by plaintiffs, their witnesses, and counsel); *Highland Capital Mgmt.*, 551 F. Supp. 2d at 191-92 (precluding party from using terms such as "securities fraud" to characterize conduct where the only apparent reason for doing so was convincing the jury "that [the] defendants are bad people"); *cf. Faulkner v. Nat'l Geographic Soc'y*, 576 F. Supp. 2d 609, 613 (S.D.N.Y. 2008) (precluding intent evidence in copyright infringement action, notwithstanding slight possible probative value, because the evidence would unduly "prejudice the jury's assessment . . . by portraying defendants in an unflattering light"); *Kinsey v. Cendant Corp.*, 588 F. Supp. 2d 516, 518-19 (S.D.N.Y. 2008) ("The parties are not permitted to argue to the fact finder's potential economic sympathies or prejudices.").

It is apparent that the Trustee intends to use the term "Other People's Money" to prejudice Defendants before the jury by suggesting that the transfers in issue were stolen from other investors. The phrase "Other People's Money" appears seventeen times in the Trustee's Amended Complaint. His counsel has used it repeatedly in oral argument before this Court, in his papers, and to the press. *See, e.g.*, Tr. of Feb. 23, 2012 Oral Argument (doc. no. 139) at 72:25, 74:16, 78:15-16; Teri Thompson, Wayne Coffey & Nathaniel Vinton, *Wilpon Defends Honor, Will Not Make Deal That Sullies Reputation*, N.Y. Daily News, May 22, 2011, at 62 (Declaration of Dana M. Seshens in Support of Defendants' Motions *In Limine* ("Seshens Decl."), dated Mar. 5, 2012, Ex. O) ("'Fred Wilpon, Saul Katz and the Sterling Partners are holding $300 million in fictitious profits

consisting of 'other people's money,' stolen money that they received from Bernard Madoff. Yet they refuse to return this stolen money,' said David J. Sheehan, counsel to Picard and a partner at Baker & Hostetler LLP, the counsel for the [T]rustee.")

Further, the Trustee's forensic accounting expert, Bruce G. Dubinsky, was apparently told to assume that, because part of Madoff Securities was a Ponzi scheme, Madoff Securities customers were equity investors who made invalid "redemptions" using "Other People's Money."[1] (*See* Initial Expert Report of Bruce G. Dubinsky, dated Nov. 22, 2011, ¶¶ 237, 240, 246, 247, 248, 249, 250, 263, 273, 286, 304 (Declaration of Bruce G. Dubinsky, dated Jan. 26, 2012, Ex. 1 (doc. no. 107).)

> "A Ponzi scheme begins as an investment opportunity—sometimes legitimate, other times not. The fraudster solicits investors with promises of returns within a specified time period (e.g., a return of 50% in 6 months). *Before the return becomes due, the fraudster will have solicited investment from other individuals and use that investment to pay the previously promised return (hereinafter referred to as 'Other People's Money').* In strict accounting terms, money is paid out as a return, described as income, but *is actually a distribution of capital.* Instead of returning profits, the fraudster spends cash reserves." (*Id.* ¶ 237 (emphasis added).)
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> "The only source of cash available sufficient enough for House 17 to pay *purported investment profits as well as redemption requests to its investors* was from *Other People's Money*." (*Id.* ¶ 240 (emphasis added).)
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> * * *

[1] When questioned at his deposition about his use of the "Other People's Money" mantra, Mr. Dubinsky admitted that the term was "*thrown around with counsel* as a term to describe the money that was coming from one investor, *so there would be, I think, across the case a generic term that was being used*." (Deposition Transcript of Bruce G. Dubinsky, Jan. 11, 2012, 81:4-21 (emphasis added) (Seshens Decl., Ex. P).) He testified, however, that all customer cash was commingled with other cash, including cash from legitimate businesses, and conceded that "once cash is co-mingled, it's fungible." (*Id.* 81:22-82:7.)

> "House 17 had no legitimate income-producing activities. Although acting as an investment adviser, no trades were executed and the entity was dependent on an increasing supply of investor funds in order to continually meet *investor redemptions*." (*Id.* ¶ 247 (emphasis added).)

Mr. Dubinsky's report demonstrates that the Trustee intends to argue that Defendants received "Other People's Money." But there is no evidence that Defendants received anyone else's money other than their own when they made withdrawals from their accounts. "Madoff Securities was a registered securities brokerage firm" and Defendants were its customers. *See Picard v. Katz*, No. 11 Civ. 3605 (JSR), 2011 U.S. Dist. LEXIS 109595, at *8-9 (S.D.N.Y. Sept. 27, 2011). They withdrew from their brokerage accounts sums to which they were legally entitled under Article 8 of the UCC and contract law. The only transfers in issue at the trial will be transfers of Defendants' principal. To permit the Trustee nonetheless to refer to such transfers as "Other People's Money" would be highly inaccurate, unfair and prejudicial.

The Trustee must prove willful blindness by putting forth evidence that at the time of investment a Defendant subjectively believed there was a high probability that Madoff Securities was engaged in a fraud, and that such Defendant deliberately turned away from available information he, she, or it feared would confirm that. Invocation of these terms prejudices Defendants by implying that the high standard of "willful blindness" is met where a Defendant takes "Other People's Money." If a Defendant was willfully blind at the time of investment, then that investment was not made in good faith and is subject to avoidance under this Court's rulings. If not, then the investment was in good faith and not voidable, regardless of where the money to make the transfer came from. What ultimately turned out to be the source of the funds Madoff used at a later

time to make transfers when that Defendant withdraw principal is therefore irrelevant. *See In re Sharp Int'l Corp.*, 403 F.3d 43, 55 (2d Cir. 2005).

Accordingly, the Trustee's counsel and witnesses should be precluded under Rules 402 and 403 of the Federal Rules of Evidence from referring to "Other People's Money" or like terms to suggest the source of funds used by Madoff to make the transfers in issue.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court preclude the Trustee's counsel and witnesses from employing the term "Other People's Money" or any similarly prejudicial terms, at the trial of this case.

Dated: New York, New York
March 5, 2012

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