UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor,	Adv. Pro. No. 08-01789 (BRL) SIPA LIQUIDATION (Substantively Consolidated)
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. SAUL B. KATZ, et al., Defendants.	Adv. Pro. No. 10-05287 (BRL) 11 Civ. 03605 (JSR) (HBP)

TRUSTEE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 1 TO EXCLUDE ALL EVIDENCE AND REFERENCES RELATING TO THE FEES PAID TO THE TRUSTEE AND HIS COUNSEL

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

OTHER AUTHORITIES

Irving H. Picard (the "Trustee"), as Trustee for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") and Bernard L. Madoff ("Madoff"), under the Securities Investor Protection Act ("SIPA") 78aa *et seq.*, by and through his undersigned counsel, hereby respectfully submits this Memorandum of Law in Support of Motion in Limine No. 1 to Exclude Evidence or References Concerning the Fees Paid to the Trustee and His Counsel and Supporting March 5, 2012 Declaration of David Sheehan, attached hereto as Exhibit 1 (the "Motion"). For the reasons set forth below, any such evidence or references to the fees paid to the Trustee and his counsel should be excluded from the trial of this matter.

PRELIMINARY STATEMENT

The Trustee anticipates that the Defendants will seek to introduce evidence relating to, or otherwise make comments concerning, the fees paid to the Trustee and his counsel in an attempt to distract the jury from the trial and otherwise imply that the Trustee's action is driven solely by his fees and those of his counsel. All such evidence and any references thereto should be excluded because the fees paid to the Trustee and his counsel are not relevant to any issue at trial. Indeed, this Court rejected the Defendants' attempt to depose the Trustee on the fees paid to him, among other matters, because of lack of relevance. Even if such evidence were somehow relevant, any theoretical "probative value" would be substantially outweighed by the danger of unfairly prejudicing the Trustee and misleading and confusing the jury about the central issue at trial—the Defendants' willful blindness to Madoff's fraud.

I. BACKGROUND

A. The SIPA Framework for the Fees Paid to the Trustee and His Counsel

The fees paid to the Trustee and his counsel in the BLMIS liquidation are dictated by SIPA. Because of SIPA's customer protection goals, the fund of money that a trustee has

recovered is first used to satisfy customer claims. Until all claims are satisfied, the administrative expenses such as fees for a trustee and counsel are paid out of funds advanced by SIPC. SIPA §78fff-3(b)(2).

In this case, all administrative expenses are being paid with funds advanced by SIPC, and are not paid out of any recoveries obtained by the Trustee for the benefit of BLMIS customers. One hundred percent of all recoveries achieved by the Trustee shall be distributed ratably to customers with valid customer claims in accordance with SIPA. The fees paid to the Trustee and his counsel over the past 38 months[1] are unaffected by the results of this or any other litigation.

Certain claimants (other than the Defendants here) have objected in the Bankruptcy Court to the fees paid to the Trustee and his counsel, notwithstanding the compensation framework mandated by SIPA. Those objections have been overruled by the Bankruptcy Court, and attempts to seek leave to appeal the orders of the Bankruptcy Court approving interim fee awards to the Trustee and his counsel have been denied by three judges of this Court.[2] No controversy exists with regard to the Trustee's compensation, much less one that is relevant to this case. Any attempt by the Defendants to create a sideshow should be prohibited.

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[1] The Trustee and his counsel were appointed pursuant to an order entered by Judge Stanton, dated December 15, 2008. Order, *Secs. and Exch. Comm. v. Madoff*, No. Civ. 08-10791 (S.D.N.Y. Dec. 15, 2008), Dkt. No. 4.

[2] The District Court denied the motions for leave to appeal the First, Third, and Fifth Orders of the Bankruptcy Court. *Secs. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. M-47, 2010 U.S. Dist. LEXIS 3037 (S.D.N.Y. Jan. 11, 2010) (GBD); *Secs. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. M-47, 2010 U.S. Dist. LEXIS 81492 (S.D.N.Y. Aug. 6, 2010) (SAS); *Secs. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 11 Misc. 285, 2011 U.S. Dist. LEXIS 139812 (S.D.N.Y. Dec. 6, 2011) (RPP). The motions for leave to appeal the Second and Sixth Orders remain pending before the District Court. Nos. M47-b (DAB) and 11 Misc. 265, respectively.

B. The Defendants Have Improperly Attempted to Raise the Issue of the Fees Paid to the Trustee and His Counsel

Throughout this litigation, the Defendants have periodically injected the Trustee's compensation into their narrative. For example, the Defendants previously attempted to depose the Trustee regarding his fees and retention of his counsel. The pretext cited by the Defendants was a need to understand the "motivations" in bringing suit against the Defendants, and in particular "any pecuniary incentive tied specifically to this litigation." *See* Nov. 29, 2011 email correspondence between Dana M. Seshens and Fernando Bohorquez, Jr., copy attached as Ex. 1 to the Declaration of David J. Sheehan dated March 5, 2012. When raised in a telephonic conference on December 1, 2011, this Court rejected the assertion that the Trustee's fees were relevant to this matter and denied the Defendants' request to depose the Trustee.

The Defendants then raised the issue of the fees paid to the Trustee and his counsel during the deposition of the former Comptroller for the City of New York, Harrison J. Goldin, an expert proffered by the Trustee regarding the Defendants' willful blindness to fraud in the face of their 401(k) responsibilities to employees. Goldin Dep. Tr. at 8:19-22, Jan. 12, 2012 ("Let me ask a preliminary question. Are you aware of how much the Trustee and his counsel have billed in legal fees in connection with the Madoff liquidation proceedings?"). Throughout this litigation the Defendants have peppered their briefs with gratuitous comments concerning the Trustee's compensation. Some examples include:

- Describing Madoff's fraud as "a fraud so complex that the Trustee and his counsel have charged SIPC hundreds of millions of dollars so far to unravel it…" (Reply Mem. of Law in Further Support of the Sterling Defs.' Mot. to Dismiss the Am. Compl. or, in the Alternative, for Summary Judgment at 45, filed July 7, 2011, Dkt. No. 26).

- Asserting that the Trustee "has an unlimited budget and has spent tens of millions of dollars trying to find support for his baseless allegations." (Mem. of Law in Support of Defs.' Mot. for Summary Judgment at 6, filed July 7, 2011, Dkt. No. 20).

- Stating that "[t]he Trustee has spent literally hundreds of millions of dollars to document the extreme steps taken by Madoff and his band of co-conspirators." (Reply Mem. of Law in Further Support of Defs.' Mot. for Summary Judgment at 11, filed February 16, 2012, Dkt. No. 134).

The issues for trial relate to the Defendants' knowledge and conduct regarding their two decade-plus investment relationship with Madoff. Any comments or evidence about fees paid to the Trustee and his counsel will distract the jury from the relevant evidence to be introduced at trial.[3]

II. ARGUMENT

Evidence or references concerning the fees paid to the Trustee and his counsel is irrelevant and creates a substantial risk of a verdict influenced by a jury's passion or its view of the Trustee generally, as opposed to the actual merits of the specific claims against the Defendants. An order excluding evidence or references to the fees is warranted under Federal Rules of Evidence ("Rules") 401, 402 and 403.

A. Evidentiary Standards Under Rules 401, 402 and 403

Consistent with Federal Rule of Evidence ("Rule") 401, "[i]f an item of evidence tends to prove a fact that is of consequence to the determination of the action, it is relevant. If it does not tend to prove a material fact, it is irrelevant." *Arlio v. Lively*, 474 F.3d 46, 52 (2d Cir. 2007) (citing *Weinstein's Federal Evidence* § 401.04[2][a] at 401-19 (2d ed. 2006)). "A material fact is one that would affect the outcome of the suit under governing law." *Id*. (citing *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 579 (2d Cir. 2006)). Rule

[3] The failure of the Defendants to ever avail themselves of the established process for challenging the fees paid to the Trustee and his counsel reveals their efforts here as nothing more than a litigation tactic, as opposed to a legitimate principled position. If the Defendants or their counsel had a real objection to the fees paid to the Trustee and his counsel, they could have raised it during the established fee approval process.

402 of the Federal Rules of Evidence establishes that "[e]vidence which is not relevant is not admissible." *Id*.; *see also Arlio*, 474 F.3d at 52 (same) (citing Fed. R. Evid. 402). Rule 403 of the Federal Rules of Evidence provides that although relevant, evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," among other reasons. *Id*. As this Court has recognized, evidence should be excluded under Rule 403 when it has no probative value and is "only likely to inject irrelevancy and confusion into this case if allowed into evidence." *U.S. v. Al Kassar*, 582 F. Supp. 2d 498, 500 (S.D.N.Y. 2008).

Judges are "accorded 'wide latitude' in excluding evidence that poses an undue risk of harassment, prejudice or confusion of the issues or evidence that is repetitive or only marginally relevant." *U.S. v. Purdy*, 144 F.3d 241, 246 (2d Cir. 1998) (Rakoff, J.) (citation and internal quotations omitted); *see also PRL USA Holdings, Inc. v. United States Polo Ass'n, Inc.*, 520 F.3d 109, 119 (2d Cir. 2008) (noting the "considerable discretion" afforded the trial court). Under these well-established standards, the Court should exercise its discretion to exclude any evidence concerning the fees paid to the Trustee and his counsel from the trial of this matter.

B. Evidence of Fees Paid to the Trustee and His Counsel Are Irrelevant to Any Issue in this Case and In any Event are Unfairly Prejudicial

Any evidence or references concerning the Trustee's fees, the manner in which they are determined, or any objections to the Trustee's fee applications is irrelevant to this action and should be excluded. Fed. R. Evid. 401; *U.S. v. Al Kassar*, 582 F. Supp. 2d at 500. Such evidence would not tend to prove or disprove any facts that are of consequence to the determination of this action as it has no bearing on any of the disputed issues, which involve only the good faith or lack thereof of the Defendants. Moreover, as set forth above, the fees paid to the Trustee and his counsel are paid pursuant to SIPA and have no correlation to this or any other

avoidance action. All evidence or references to the fees paid to the Trustee and his counsel should therefore be excluded. *See Barbarian Rugby Wear, Inc. v. PRL USA Holdings, Inc.*, No. 06 Civ. 2652 (JGK), 2009 WL 884515, at *8 (S.D.N.Y. Mar. 31, 2009) ("[U]nless Barbarian is able to demonstrate that the amount of its attorneys' fees is independently relevant to some other claim or defense in this case, it should be precluded from informing the jury of the amount of those fees"); *Loussier v. Universal Music Grp., Inc.*, No. 02 Civ. 2447 (KMW), 2005 WL 564421, at *2 (S.D.N.Y. July 14, 2005) (excluding evidence of wealth, financial condition, and unrelated revenues under Rule 401 and 402 as not relevant to either liability or damages at issue); *Gonzales v. Barret Bus. Servs., Inc.*, No. CV-05-0104-EFS, 2006 WL 1582380, at *22 (E.D. Wash. June 6, 2006) (excluding evidence concerning counsel's fee arrangement under Rules 401 and 402).

Alluding to the fees paid to the Trustee and his counsel in the presence of the jury would create danger of prejudice against the Trustee. *See PRL USA Holdings, Inc.*, 520 F.3d at 119 (excluding evidence with high capacity for prejudice). The Defendants' references to "unlimited budgets" and "millions spent" are tantamount to improper and prohibited commentary on the parties' relative financial conditions. *See Brough v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1178 (11th Cir. 2002) ("The general rule is that, during trial, no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's."); Timothy J. Conner, *What You May Not Say to the Jury*, 27 No. 3 LITIG 36 (Spring 2001) ("[C]ourts have found comments regarding the wealth or size of a party, and questions designed to elicit evidence related to that issue (where it is clearly irrelevant), to fall outside the scope of legitimate advocacy.") (citing *City of Cleveland v. Peter Kiewit Sons Co.*, 624 F.2d 749 (6th Cir. 1980)).

Comments or evidence concerning the fees paid to the Trustee and his counsel would further confuse and mislead the jury by creating the impression that such fees were somehow all related to this case, or otherwise tied to its outcome, which of course they are not. These are the precise circumstances where the Court should exercise its discretion under Federal Rule of Evidence 403 to exclude evidence that will be unfairly prejudicial to the Trustee, and which will result in misleading and confusing the jury. *See Barbarian Rugby Wear*, 2009 WL 884515, at *8 (finding evidence of the amount spent on counsel would create the danger of unfair prejudice that would outweigh any probative value of such evidence). *Cf. Loussier*, 2005 WL 564421, at *2 (excluding evidence under Rule 403 because any probative value of evidence of wealth or financial condition "is substantially outweighed by the danger of unfair prejudice that might result from jurors basing their conclusions on the relative wealth of the parties.").

CONCLUSION

For the foregoing reasons, the Court should issue an order in limine excluding any evidence concerning the fees paid to the Trustee and his counsel.

Dated: New York, New York
March 5, 2012

Respectfully submitted,

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