UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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Defendants respectfully submit this memorandum of law in opposition to the Trustee's motion *in limine* seeking to exclude all evidence and references relating to the fees paid to the Trustee and his counsel.

ARGUMENT

The Trustee seeks to bar Defendants from referring to the amount of fees charged by him and his counsel in this and other actions. As well he might. Those fees have been staggering. Fees and expenses to the Trustee's law firm alone totaled nearly $275 million just through September 30, 2011. That sum has undoubtedly grown substantially over the last six months. An additional $100 million plus has been spent by the Trustee in fees paid to FTI Consulting, non-testifying consultants assisting the Trustee and his counsel with their investigation of the bankrupt Madoff securities firm. Notwithstanding that all of these fees are public knowledge, and indeed must be submitted to and approved by the Bankruptcy Court, the Trustee apparently fears, perhaps justifiably, that if the jury is told how much money his lawyers and consultants are making on this and other cases arising out of the Madoff collapse, it may prejudice the jury against the Trustee.

At the same time, however, the Trustee proposes to inundate the jury with evidence pointing to how wealthy the Defendants are and how much they allegedly profited from their Madoff securities accounts. The Trustee has publicly argued that Defendants' wealth is itself evidence that somehow bears on their alleged "willful blindness"—which it most certainly does not. The Trustee appears not to have any qualms about the extent to which such references to Defendants' wealth might similarly evoke juror prejudice against them having nothing to do with the factual or legal merits of the claims in issue.

If the Trustee is permitted nonetheless to argue Defendants' wealth to the jury at trial, then Defendants should in fairness be entitled to have the jury consider the hundreds of millions of dollars the Trustee has incurred—spending no more than reasonably necessary, one presumes—to investigate and unravel the Madoff fraud. If Madoff's fraud scheme were as easy to uncover and recognize as the Trustee now contends it was when accusing the Defendants of willful blindness, then the Trustee's own investigation would presumably have been considerably shorter and less costly. That it took his counsel and a large team of certified fraud investigators and forensic analysts that much money over multiple years to untangle Madoff's fraud, even with the considerable benefit of hindsight and multiple criminal confessions not available to Defendants before December 2008, makes it far less probable, if not entirely implausible, that Defendants' failure to discover that same fraud was a result of their turning a blind eye to easily accessible information that would have confirmed it.

At a minimum, if the Trustee's motion to bar reference to his and his counsel's fees is granted, the Court should likewise bar the Trustee from making any reference at trial to his supposed representation or work on behalf of other victims of the Madoff fraud or the amount of recoveries that he has achieved to date for the estate. He cannot have it both ways, at once portraying himself before the jury as a tireless champion of the defrauded victims—putting on the white hat, as it were—while keeping from them the fact that the trusteeship has been a very lucrative assignment indeed for him and his law firm. Moreover, this trial does not concern any of the other potential claimants in the Madoff bankruptcy, and the jury will have no evidence before it regarding the relative culpability or innocence of any of the other investors. Consequently, to the extent

references to the Trustee and his counsel's fees are irrelevant because they do not make the facts the jury must find more or less probable, references to the Trustee's efforts on behalf of other victims are equally irrelevant and non-probative of anything at issue.

Finally, Defendants are certainly entitled to question the Trustee's testifying expert witnesses with respect to their fees and expenses and the fees and expenses of any experts or consultants on whose work they relied. Defendants do not understand anything in the Trustee's motion to challenge that right, but would of course object to the extent that it did. Fees paid to a testifying witness are and have always been relevant for purposes of impeachment so that, in assessing the weight and credibility of the testimony, the jury may consider any financial incentive to the witness in providing that testimony.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny the Trustee's motion *in limine* seeking to exclude all evidence and references relating to the fees paid to the Trustee and his counsel.

Dated: New York, New York
March 12, 2012

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