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. 3 TO EXCLUDE TESTIMONY FROM ROBERT MORGENTHAU, SANDY KOUFAX, MICHAEL DOWLING, AND ROBERT ROSENTHAL

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Defendants respectfully submit this memorandum of law in opposition to the Trustee's motion *in limine* to exclude at trial the testimony of Robert Morgenthau, Sandy Koufax, Michael Dowling, and Robert Rosenthal.

PRELIMINARY STATEMENT

Defendants do not seek to introduce "character evidence" through these witnesses. To the contrary, their evidence bears on the matters at issue.

The central issue for trial is willful blindness. To demonstrate willful blindness, the Trustee must prove that each Defendant subjectively believed that there was a high probability that Bernard L. Madoff ("Madoff"), through his brokerage, Bernard L. Madoff Investment Securities LLC ("Madoff Securities"), was not trading securities, but, rather, was engaged in a Ponzi scheme, and that each such Defendant deliberately avoided information he, she, or it feared would confirm that subjective belief. *See Global-Tech Appliances, Inc. v. SEB, S.A.*, 131 S. Ct. 2060, 2070 (2011). There is no direct evidence of willful blindness. Indeed, at summary judgment, the Trustee did not even try to challenge the sworn testimony of each Sterling Partner that he never believed there was a possibility, let alone a high probability, that Madoff was running a Ponzi scheme and not trading securities. Nor did he challenge the sworn testimony that no Sterling Partner ever deliberately avoided information concerning Madoff or Madoff Securities for fear it would confirm Madoff's fraud.

Because there is no direct evidence to support the Trustee's claims, he will rely on circumstantial evidence in his effort to prove that individual Defendants actually believed there was a high probability of fraud. The jury will thus have to evaluate all of the circumstances in order to make an inference that Defendants did or did not harbor such a

belief. Defendants' own conduct at the relevant time is highly probative, and therefore relevant, to their state of mind, the key question at issue. Conduct inconsistent with such a belief, such as recommending Madoff to their closest friends or to charities they supported, is strong circumstantial evidence that they did not believe Madoff was a fraud.

In addition, the motive question, raised by the Court in connection with Defendants' motion to dismiss last year, is also central to the circumstantial case: Why would Defendants continue to invest their money with a securities dealer they believed was a fraud? It makes no sense. In response, the Trustee has suggested that Defendants were addicted to the Madoff returns and had become dependent on them to keep their businesses going. But even if that were true, and the evidence will show that it is not, it provides no explanation for why Defendants would recommend Madoff to their closest friends or to charities for investment of their gifts. The jury is entitled to consider evidence of such conduct when assessing whether the Trustee's "dependency" argument makes sense and whether it provides an answer to the motive question.

The proposed testimony of Messrs. Morgenthau, Koufax, and Dowling—far from "character evidence"—is intended to address these points. Each individual has a close and longstanding relationship with either Fred Wilpon or Saul Katz. Each had either his own Madoff Securities account or an account opened to invest a charitable gift. These accounts were opened on the recommendation of Mr. Wilpon and Mr. Katz during the same period as when the Trustee claims they were willfully blinding themselves to Madoff's fraud. It is entirely inconsistent with willful blindness for Mr. Wilpon, Mr. Katz, and the other Sterling Partners to have helped their families, trusts, and charitable foundations to open Madoff Securities accounts. It is equally as inconsistent with willful

blindness that they would help lifelong friends and charities they supported to do the same. Such evidence makes it highly improbable that any Sterling Partner held a subjective belief that Madoff was running a Ponzi scheme.

Although it is true, as the Trustee contends, that these witnesses are "prominent" and "impressive" (Tr. *Limine* Mot. No. 3 at 1, 2), that does not disqualify them from providing relevant evidence. The testimony of these witnesses is entirely proper and should be admitted.

ARGUMENT

To be relevant, evidence must have "any tendency to make a fact more or less probable than it would be without the evidence" where "the fact is of consequence in determining the action." Fed. R. Evid. 401. The "any tendency" threshold is "minimal." *See United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986). Exclusion of evidence under Rule 403 is only appropriate where the risk of *unfair* prejudice is significant. *See Highland Capital Mgmt. v. Schneider*, 551 F. Supp. 2d 173, 177 (S.D.N.Y. 2008) ("Because Rule 403 excludes relevant evidence, 'it is an extraordinary remedy that must be used sparingly.'" (quoting *George v. Celotex Corp.*, 914 F.2d 26, 31 (2d Cir. 1990))). "[R]elevant evidence is always prejudicial to one side." *United States v. Kaplan*, 490 F.3d 110, 122 (2d Cir. 2007).

The testimony of Robert Morgenthau, Sandy Koufax, and Michael Dowling is highly probative of Saul Katz's and Fred Wilpon's lack of subjective belief that Madoff was engaged in a Ponzi scheme. The Trustee says these witnesses are unable to testify about what he deems the relevant "facts" in this case, such as "Defendants' awareness of Merrill Lynch's rejection of Madoff or . . . Noreen Harrington's warnings that Madoff

returns were . . . fiction." (Tr. *Limine* Mot. No. 3 at 3.) But testimony specifically about these "facts" is obviously not the only evidence from which a jury could draw an inference about Defendants' state of mind.

Mr. Morgenthau will testify that in 2006—three years after Noreen Harrington allegedly told Saul Katz and others of her speculation that Madoff's returns might be a "fiction"—Mr. Wilpon donated $500,000 to the Police Athletic League ("PAL"), a charity Mr. Morgenthau, then Manhattan District Attorney, chaired. The donation, which Mr. Wilpon made to support a baseball program and to provide academic scholarships for PAL participants, was in honor of Mr. Wilpon's and Mr. Morgenthau's mutual friend, Robert McGuire, the former New York City Police Commissioner, who was vice-chairman of the PAL board at the time. Mr. Morgenthau will testify that in a discussion regarding how to invest the donation, at Mr. Wilpon's suggestion, it was decided that the bulk of the money would be deposited in a Madoff Securities brokerage account. Mr. Morgenthau will testify that Mr. Wilpon told them that the money would be "safe" with Madoff. From such evidence, the jury is entitled to conclude that there is no reason Mr. Wilpon would have told the Manhattan District Attorney that money donated to the District Attorney's favorite charity would be safe with Madoff if he believed there was a high probability that Madoff was running a Ponzi scheme.

Mr. Dowling will provide similarly relevant testimony. He is the President of the North Shore-Long Island Jewish Hospital System ("North Shore-LIJ") and has worked, and continues to work, closely with Saul Katz, who has been actively involved with and has devoted an enormous amount of time to the hospital system since 1997, serving as chairman of the board from 1997 to 2000 and again from 2006 to 2010. Mr. Katz also

has donated significant funds to North Shore-LIJ. In connection with efforts to create a new hospital devoted solely to women's care, North Shore-LIJ opened a Madoff Securities account at Mr. Katz's suggestion so that his donated funds could be invested for safekeeping until they were needed. The jury could certainly conclude that it would be unthinkable that Mr. Katz would expose millions of charitable dollars earmarked for the hospital system—with no benefit to Mr. Katz himself—by recommending that it be safeguarded by an entity he suspected was engaged in a Ponzi scheme.

Mr. Koufax's testimony is equally relevant. Mr. Koufax and Mr. Wilpon have been lifelong friends, having played high school baseball together in Brooklyn. At Mr. Wilpon's suggestion, Mr. Koufax himself opened a 1KW Madoff Securities account. Mr. Koufax will testify about how he came to open his account and the positive things Mr. Wilpon told him about investing with Madoff Securities. From this evidence the jury can conclude that it strains credulity to think that Mr. Wilpon would expose his oldest and closest friend to potential financial ruin—for no benefit to Mr. Wilpon himself—if he subjectively believed that Madoff Securities might be operating a Ponzi scheme.

None of this testimony is "character evidence." No witness is taking the stand to testify that Saul Katz and Fred Wilpon are "good guys" or to "distract the jury" into concluding that Messrs. Wilpon and Katz are just not the kind of people who would willfully blind themselves to a fraud. (Tr. *Limine* Mot. No. 3 at 4-5.) To the contrary, each of these witnesses is being offered to provide evidence showing the conduct of Messrs. Wilpon and Katz to be the antithesis of willful blindness. The jury is likely to conclude that Mr. Katz and Mr. Wilpon did not willfully blind themselves to Madoff's Ponzi scheme and that Mr. Katz and Mr. Wilpon are "good guys," but neither conclusion

will be based on character evidence offered by these witnesses. Thus, no such testimony runs afoul of Rule 404.

Finally, the evidence offered by Messrs. Morgenthau, Dowling, and Koufax cannot be excluded under Rule 403 simply because the Trustee does not like it. He contends that the probative value of the witnesses' testimony is "substantially outweighed" by a danger of "unfair prejudice" because the "legendary" witnesses will "distract[] the jury from 'the main question of what actually happened.'" (Tr. *Limine* Mot. No. 3 at 6.) But the proffered evidence is directly relevant to "what actually happened." The only authority cited by the Trustee for the novel proposition that it is unfairly prejudicial to call "prominent individuals" as witnesses is irrelevant. (*See id.* at 6-7.) In *Lidle v. Cirrus Design Corp.*, testimony offered to prove the "character, skills as a baseball player, preparation habits, and desire to continue playing baseball" of deceased Yankee Cory Lidle was excluded because none of those "minimally relevant" issues was in dispute. No. 08 Cv. 1253, 2011 U.S. Dist. LEXIS 46315, at *3-5 (S.D.N.Y. Apr. 23, 2011). By contrast, the testimony being offered here is directly relevant to the central issue in the case—whether any Defendant was willfully blind.[1]

[1] Mr. Rosenthal will be presented only if necessary in rebuttal if the Trustee seeks to introduce evidence that Saul Katz has the expertise of an investment manager. Mr. Rosenthal, who *is* an investment manager and who has long served as one for Mr. Katz, will dispel that false assertion based on his personal knowledge of the level of Mr. Katz's investment management sophistication, or lack thereof. In light of the Court's exclusion of Dr. Pomerantz, the Trustee's expert who was prepared to offer an opinion that all wealthy investors should be held to the standards of institutional investors, Defendants do not anticipate needing to call Mr. Rosenthal.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny the Trustee's motion to exclude the testimony of Messrs. Morgenthau, Koufax, Dowling, and Rosenthal.

Dated: New York, New York
March 12, 2012

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