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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. 4 TO EXCLUDE ALL EVIDENCE AND ARGUMENTS RELATING TO THE BLMIS-MERRILL LYNCH TECHNOLOGY PARTNERSHIP

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Defendants respectfully submit this memorandum of law in opposition to the Trustee's motion *in limine* to exclude all evidence and arguments relating to the joint venture entered into by Bernard L. Madoff Investment Securities LLC ("Madoff Securities") and Merrill Lynch.

PRELIMINARY STATEMENT

In 1999 Madoff Securities entered into a joint venture with Merrill Lynch, Goldman Sachs, Morgan Stanley, and other prominent financial institutions to form Primex Trading N.A. ("Primex"), an electronic stock trading platform that launched at the end of 2001. Saul Katz was aware of this widely publicized joint venture, which confirmed his view of Bernard L. Madoff's ("Madoff") stellar reputation. That three of the largest and most sophisticated financial firms in the world were entering into a joint venture with Madoff Securities was a strong indicator to Mr. Katz that Madoff was both legitimate and sophisticated and is relevant to Mr. Katz's state of mind and actual belief concerning Madoff Securities. Nonetheless, the Trustee seeks to preclude this evidence because it undercuts irrelevant testimony the Trustee intends to elicit from a former Merrill Lynch executive that the Trustee *knows* is factually inaccurate. Based on that erroneous testimony, the Trustee intends to argue that Merrill Lynch would not do business with Madoff Securities, which he contends should have been a "red flag" to Defendants.

The Trustee has no basis to preclude evidence of the Primex joint venture from trial. The principal issue in this case is whether Defendants were willfully blind when they invested with Madoff Securities. Saul Katz's knowledge of a joint venture involving

Madoff Securities and, among others, Merrill Lynch is plainly relevant to his subjective beliefs about the legitimacy of Madoff Securities and its principal, Madoff.

ARGUMENT

Rule 401 of the Federal Rules of Evidence creates a liberal standard of relevance. *United States v. Southland Corp.*, 760 F.2d 1366, 1375 (2d Cir. 1985). Under Rule 401, evidence is "relevant" if "it has *any* tendency to make a fact more or less probable than it would be without the evidence" and that fact "is of consequence in determining the action." Fed. R. Evid. 401 (emphasis added). Rule 403 permits the exclusion of relevant evidence, but only "if its probative value is substantially outweighed by a danger of . . . *unfair* prejudice, confusing the issues, [or] misleading the jury." Fed. R. Evid. 403 (emphasis added). Evidence is unfairly prejudicial "only when it tends to have some adverse affect upon a [party] beyond tending to prove the fact or issue that justified its admission into evidence." *United States v. Quattrone*, 441 F.3d 153, 186 (2d Cir. 2006) (quoting *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980)); *see also George v. Celotex Corp.*, 914 F.2d 26, 31 (2d Cir. 1990) (stating that Rule 403 is "an extraordinary remedy that must be used sparingly").

Evidence of the Primex joint venture—including testimony from Saul Katz and an article from the files of Sterling Partner Arthur Friedman—is highly relevant to the issue of whether any Defendant was willfully blind to Madoff's fraud. *See Vinieris v. Byzantine Mar. Corp.*, 731 F.2d 1061, 1064 (2d Cir. 1984) (holding that the trial court should "follow[] a liberal policy in admitting evidence directed towards establishing . . . subjective state of mind"). To support his effort to keep this relevant evidence out, the Trustee contends that the joint venture is not probative because it involved "House 5" of

Madoff Securities and not "House 17" where Defendants were invested. (Tr. *Limine* Mot. No. 4 at 3-4.) But the Trustee's division of Madoff Securities into independent "houses" was an internal Madoff Securities construct discovered during the investigation by the Trustee's "fraud" expert, Mr. Dubinsky. (*See, e.g.*, Expert Report of Bruce G. Dubinsky ("Dubinsky Report"), Nov. 22, 2011, ¶¶ 138-42, 154-58, 185-90 (Seshens Decl. (doc. no. 90), Ex. C).) There is no evidence that Madoff Securities ever held itself out to its customers as three separate and distinct businesses, nor any evidence that Defendants viewed it as such, let alone that any Defendant understood there to be a "House" anything. The account statements, trade confirmations, and other Madoff Securities documentation stated that they came from Madoff Securities, not "House 17." And as the Trustee consistently has recognized, Madoff Securities was a sole proprietorship whose founder, chairman, chief executive officer, and sole owner was Madoff. (*See, e.g.*, Am. Compl. ¶ 29; Tr. Rule 56.1 ¶ 1; *see also, e.g.*, Dubinksy Report ¶ 39 (Seshens Decl., Ex. C) ("Madoff was the principal of BLMIS and oversaw both House 5 and House 17 businesses.").)

A joint venture with Madoff Securities, therefore, was a joint venture with Madoff. It also was a joint venture with all of Madoff Securites and not a segregated part of the business that was legitimate. It defies common sense that Merrill Lynch would enter into a business relationship with Madoff Securities if it believed that its principal—Madoff—was engaged in fraud *in any part* of Madoff Securities. And there is no evidence that Saul Katz or any other Defendant recognized such an artificial distinction within Madoff Securities or would have had any reason to believe that the willingness of the other joint venture partners to work with Madoff was anything other than an endorsement of the firm

as a whole. It is therefore another "green flag" probative as circumstantial evidence of Mr. Katz's state of mind.

The Trustee further argues that admitting evidence of the Primex joint venture—the existence of which the Trustee does not dispute—will "confuse [the Merrill Lynch executive's] testimony and mislead the jury." (Tr. *Limine* Mot. No. 4 at 4.) But it is the Trustee who is introducing the confusion. The Trustee intends to elicit testimony from the Merrill Lynch executive that Merrill demanded that *Sterling Stamos* divest hundreds of millions of dollars it had invested with Madoff Securities before Merrill would go forward with its acquisition of an interest in Sterling Stamos because Madoff Securities self-cleared—a "House 5" concern. (*See id.* at 1-2.) The testimony is not only mistaken, but it is also irrelevant. The Trustee, as the keeper of all Madoff Securities records, *knows* that, in fact, Sterling Stamos never had a direct Madoff Securities investment and the Merrill executive was simply mistaken or confused when he testified that it did. Even if the testimony were accurate, which it is not, there is no evidence that anything about the supposed demand by Merrill Lynch for divestiture of Sterling Stamos' investment at Madoff Securities was communicated to any Defendant, including Saul Katz. Nor is there any evidence that the Merrill Lynch executive gave any fraud warning or had a fraud concern. The Primex joint venture is entirely consistent with his testimony. It is unfathomable under these circumstances that the Trustee could argue that evidence grounded in fact might give rise to jury confusion because it conflicts with testimony the Trustee knows is false because based upon a mistake.[1]

[1] The Trustee's counsel is ethically prohibited from offering at trial testimony he knows to be mistaken and false. *See* 22 N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0 (…continued)

Finally, because there is no dispute that the Primex joint venture did exist and was known to Saul Katz, there is no basis for exclusion of either fact on the basis of prejudice. The evidence in this case will prejudice the Trustee, but not because it is unfair. *See Celotex Corp.*, 914 F.2d at 31 ("Any prejudice . . . was derived from the [evidence]'s probative force and thus it did not *unfairly* prejudice [the defendant]." (emphasis in original)).

(continued…)

(Rule 3.3(a)(3) of the New York Rules of Professional Conduct) ("A lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false."). Based on records obtained by the Trustee from Madoff Securities and the evidence from Sterling Stamos, it is undisputed that Sterling Stamos had no direct investment at Madoff Securities. The Merrill executive's belief otherwise is clearly mistaken and therefore false.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny the Trustee's motion *in limine* to exclude all evidence and arguments relating to the joint venture entered into by Madoff Securities and Merrill Lynch.

Dated: New York, New York
March 12, 2012

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