UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In re:	Adv. Pro. No. 08-01789 (BRL)
BERNARD L. MADOFF,	SIPA LIQUIDATION
Debtor.	(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. 10-5287 (BRL) Case No. 11-Civ-03605 (JSR)

TRUSTEE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE THE EXPERT REPORTS AND TESTIMONY OF JOHN MAINE

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Irving H. Picard, as trustee ("Trustee") for the substantively consolidated liquidation proceedings of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa *et seq.*, and the estate of Bernard L. Madoff ("Madoff"), by and through his undersigned counsel, hereby submits this memorandum of law in support of the Trustee's Motion to Strike the Expert Reports and Testimony of Mr. John Maine ("Maine").

PRELIMINARY STATEMENT

The Defendants proffer Maine – a professional witness-for-hire for the last twenty-two years – as their lone "expert" witness in the case at bar. In connection with his retention, Maine prepared and signed an initial 15-page Expert Report dated November 22, 2011 ("Maine Report"),[1] and a December 13, 2011 Rebuttal Report ("Maine Rebuttal")[2] (collectively, the "Reports").

Neither Maine's qualifications and experience, the Reports nor his testimony speak directly or even indirectly to the facts at issue in this litigation. His testimony does not contain reliable testimony about red flags at BLMIS and in the Defendants' accounts, the Defendants' due diligence, or lack thereof, on their Madoff investments, or any other relevant topics that go directly to whether the Defendants willfully blinded themselves to the high probability of fraud at BLMIS. *See Picard v. Katz*, --- B.R. ----, 11 Civ. 03605, 2011 WL 4448638, at *5 (S.D.N.Y. Sept. 27, 2011).

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[1] Declaration of David J. Sheehan in Support of the Trustee's Motion to Strike the Expert Reports and Testimony of John Maine, dated January 26, 2012, Exhibit 1 (hereinafter "Sheehan Decl. Ex. ___").

[2] Sheehan Decl. Ex. 2.

The Reports are instead sprinkled with random, generalized conclusions which have no application to the evidence. The opinions presented are of the "because I say so" variety routinely excluded by courts in this Circuit. As set forth more fully below, Maine and the Reports are rightly excluded from this litigation for many independent and cumulative reasons, including the following:

- Maine has not worked in the securities or investment management industry for over 20 years;
- Maine's experience from the 1970's - 1980's as a retail stockbroker, salesperson, and administrative/office manager, as well as his brief stint trying to raise trout, are outside the scope of the issues to be tried to the jury in this litigation;
- Maine has no experience in connection with red flags or due diligence practices as Maine has never conducted any form of operational, transactional, quantitative, qualitative or ongoing/monitoring due diligence;
- The opinions in the Reports are mostly conclusory;[3]
- The opinions in the Reports lack any reliable principles, methods, sources or foundation, and Maine confirms having performed no analyses in connection with the Reports;
- The opinions in the Reports will not aid the jury on any relevant issues at trial;
- The opinions in the Reports are often divorced from a sufficient review of the record evidence;
- The opinions in the Reports include facially irrelevant information; and
- The opinions in the Reports include impermissible speculation and conjecture about, among other things, the state of mind of wealthy people generally, and the Defendants in particular.

At bottom, the opinions in the Reports and Maine's would-be-testimony are nothing more than Maine's *ipse dixit*. They are unreliable. Accordingly, pursuant to the applicable laws in this Circuit governing the admissibility of expert witnesses, as well as the Federal Rules of Evidence, Maine, the Reports and his testimony should all be excluded by this Court.

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[3] The specific opinions Maine offers are unclear. Maine purports to render opinions on the following topics: (i) the private wealth management industry; (ii) the operations of broker dealers; and (iii) the nature of the securities industry. *See* Ex. 1 at 1. But, the Maine Report itself does not connect any of Maine's opinions to the Defendants or the record evidence. There is, in fact, no substantive reference to the Defendants at all in the Maine Report.

APPLICABLE LEGAL STANDARDS

I. THIS COURT'S ROLE AS GATEKEEPER OF EXPERT TESTIMONY

It is well-established that this Court serves the key role of "gatekeeper" in connection with the admissibility of expert testimony. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-92 (1993). In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147-53 (1999) the Supreme Court made clear that the *Daubert* gatekeeping obligation applies not only to "scientific" testimony, but to all expert testimony. It is the trial court's duty under the Federal Rules of Evidence to ensure that an expert's opinions are consistent with this mandate. *See Nimely v. City of New York*, 414 F.3d 381, 396 (2d Cir. 2005) (quoting *Kumho*, 526 U.S. at 152).

II. FEDERAL RULE OF EVIDENCE 702: ARE MAINE'S NON-SCIENTIFIC OPINIONS BOTH RELIABLE AND HELPFUL?

To be admitted, expert testimony must be both helpful and reliable. Federal Rule of Evidence 702 ("Rule 702") requires that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702 (2000). The threshold question in a Rule 702 assessment is whether the proposed expert is qualified to offer his opinions on the relevant issues. *See, e.g.*, *Andrews v. Metro N. Commuter R.R.*, 882 F.2d 705, 709 (2d Cir. 1989) (excluding expert where "his qualifications as an expert in [the relevant] area were questionable at best"); *U.S. v. Chang*, 207 F.3d 1169, 1173 (9th Cir. 2000) (finding proposed expert witness's expertise in one sub-set of the financial industry insufficient to qualify witness to testify in another sub-set of the financial industry); *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 800 (4th Cir. 1989) (expert lacking experience in the relevant area did not satisfy Rule 702's "specialized knowledge" requirement). For a non-scientific expert such as Maine, this Court will determine if the expert, "whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the

practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152; *Nimely*, 414 F.3d at 396 (same).

The Defendants, as proponents of this testimony, also bear the burden under Rule 702 of establishing by a preponderance of the evidence that Maine's expert testimony: (i) consists of specialized knowledge that will help the trier of fact to understand the evidence or to determine a fact at issue; (ii) relies on sufficient facts or data; (iii) utilizes reliable principles and methods; and (iv) applies these reliable principles and methods to the facts of the case by way of relevant testimony. *See, e.g.*, *Bourjaily v. U.S.*, 483 U.S. 171, 175–76 (1987); *S.E.C. v. Badian*, --- F. Supp. 2d ----, 2011 WL 4526104, at *2 (S.D.N.Y. Sept. 29, 2011) (same); *see also Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) ("[*A*]*ny* step that renders the analysis unreliable under the *Daubert factors renders the expert's testimony inadmissible*.") (internal citation omitted) (emphasis in original).

The admissibility of expert testimony is case-specific and fact-specific. *See Kumho*, 526 U.S. at 150-51. But some categories of expert testimony can never be reliable under Rule 702 and are per se inadmissible. Expert testimony on someone else's state of mind, for example, will never assist the trier of fact. *See, e.g.*, *Marvel Worldwide, Inc. v. Kirby*, 777 F. Supp. 2d 720, 729-30 (S.D.N.Y. 2011) (excluding expert testimony about what others thought or understood); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004) ("Inferences about the intent or motive of parties or others lie outside the bounds of expert testimony."). Likewise, experts are never qualified to offer legal conclusions.[4] *See, e.g.*, *Highland Cap. Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 182-83 (S.D.N.Y. 2008) (excluding legal conclusions offered by expert); *Kidder, Peabody & Co., Inc. v. IAG Int'l Acceptance Grp.*, 14 F. Supp. 2d 391, 404

[4] The only exception, inapplicable here, is when the issue concerns foreign law. *See Marx & Co., Inc. v. The Diners' Club Inc.*, 550 F.2d 505, 511 (2d Cir. 1977).

(S.D.N.Y. 1998) (excluding expert testimony tracking legal test for ultimate legal conclusion). The trial judge is the only legal expert. *Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992) (expert "is not qualified to compete with the judge in the function of instructing the jury [on issues of law]").

III. FEDERAL RULES OF EVIDENCE 401, 402 AND 403: ARE MAINE'S OPINIONS RELEVANT AND/OR PREJUDICIAL?

As with all evidence, expert testimony must be relevant to the issues at bar. Evidence is relevant if it has the "tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401 (2011). It is axiomatic that "[e]vidence that is not relevant is not admissible." Fed. R. Evid. 402 (2011); *Daubert*, 509 U.S. at 599 (relevance is one of the "touchstones of the admissibility of expert testimony"). Even if 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. Fed. R. Evid. 403 (2011).

As further set out below: (i) Maine is not qualified to serve as an expert witness here; (ii) the opinions in his Reports are wholly unprincipled, unreliable, and lack any discernible methodology; (iii) the Reports include impermissible opinions about the Defendants' state of mind; and (iv) the opinions in his Reports are irrelevant, containing rank speculation and conjecture. For all of these reasons, this Court should exclude Maine, his Reports and his testimony *in toto*.

ARGUMENT

I. MAINE'S QUALIFICATIONS AND EXPERIENCE ARE INADEQUATE

On this motion, the threshold question is whether Maine is qualified to offer expert testimony that is probative of whether Defendants willfully blinded themselves to warning signs tied to their BLMIS accounts (*e.g.*, whether there were red flags associated with these investment

accounts and/or what a reasonable level of due diligence would have uncovered). *See Katz*, 2011 WL 4448638, at *5. Proposed experts are qualified to offer testimony only if they have the requisite "knowledge, skills, experience, training, or education" relevant to the issues at trial. *Daubert*, 509 U.S. at 587, 592-93. Courts look to the totality of the expert's qualifications when making this determination. *The Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Amer. Secs., LLC*, 691 F. Supp. 2d 448, 460 (S.D.N.Y. 2010); *Rosco, Inc. v. Mirror Lite Co.*, 506 F. Supp. 2d 137, 144-45 (E.D.N.Y. 2007). Ultimately, the focus is whether an expert such as Maine possesses the practical experience and background necessary to offer opinions concerning the subject matters to be tried to the jury. *See, e.g.*, *U.S. v. Roldan–Zapata*, 916 F.2d 795, 805-06 (2d Cir. 1990) (qualification analysis should focus on area of expertise relevant to issues of fact at bar); *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994) ("The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.").

Maine's expertise and qualifications fall well outside the scope of the issues to be tried to the jury here. Maine describes his relevant experience as his time in the 1970's - 1980's when he worked as a retail stockbroker and salesperson, held several positions as an administrative manager, and had brief tenure as a director and executive at a broker-dealer. (Maine Report at 1, Ex. 1).[5] As a preliminary matter, these functions, in and of themselves, do not qualify Maine to serve as an expert here. *See Nimely*, 414 F.3d at 399 n. 13 ("[B]ecause a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no means follows that he or she is qualified to express expert opinions as to other fields.") (internal citation omitted). Among

[5] Exhibit A to the Maine Report is his curriculum vitae.

other things, Maine has no due diligence or "red flag" experience,[6] has never performed qualitative or quantitative analyses,[7] and does not have significant experience managing client accounts, or dealing with customers.[8] The fact that Maine's career for the last 20 plus years has been as a paid litigation consultant also does not qualify him as an expert on matters germane to this litigation.[9] Indeed, "it would be absurd to conclude that one can become an expert simply by accumulating experience in testifying." *Lorillard*, 878 F.2d at 800; *see also Pension Comm.*, 691 F. Supp. 2d at 460 ("[I]t would be troubling if [an expert's] only relevant experience arose from his duties as a litigation consultant.").

Maine's purported expertise in the securities industry is also extremely dated. Maine testified that he retired from the securities industry in 1990 and has had no practical experience in any industry since.[10] A current understanding of the securities and financial industries is a prerequisite to being able to meaningfully opine as an expert with "specialized knowledge" about the facts and circumstances specific to this case. *See, e.g.*, *In re Blech Secs. Litig.*, 94 Civ. 7696 (RWS), 2003 WL 1610775, at *22 (S.D.N.Y. Mar. 26, 2003) (proposed expert that lacked specialized knowledge about relevant securities issues in the case was not qualified to offer expert testimony). Maine's historical experience as a regional stockbroker cannot reliably inform the jury about issues relevant to whether the Defendants turned a blind eye to a high

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[6] *See Picard v. Katz, et al.*, Expert Deposition of John Maine, 11 Civ. 03605, dated Jan. 5, 2012, 9:1-2; 13:22-25; 14:1-3; 30:15-25; 31:19-25; 32:18-22) (hereafter the "Maine Deposition"). The Maine Deposition is Ex. 3 to the Sheehan Decl.

[7] Maine Deposition at 67:2-17.

[8] Maine Deposition at 14:1-25 – 15:1.

[9] Maine has provided expert testimony in an adversarial proceeding around 40 times during his twenty-plus year "consulting career." (Maine Deposition at 38:10-15).

[10] Maine Deposition at 32:18 – 41:19.

probability of fraud at BLMIS and what a reasonable investigation by the Defendants would have uncovered. Maine is not properly qualified to offer any expert testimony here.

II. MAINE'S OPINIONS ARE UNRELIABLE

Maine's opinions are replete with all the classic characteristics of expert testimony routinely excluded by courts under Rule 702. The Reports do not demonstrate any semblance of a methodology, much less a reliable one. *See, e.g.*, *Compania Embotelladora Del Pacifico v. Pepsi Cola Co.*, 650 F. Supp. 2d 314, 319-20 (S.D.N.Y. 2009) (excluding expert testimony for lack of a methodology); *Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 529 (S.D.N.Y. 2001), *modified*, 137 F. Supp. 2d 438 (S.D.N.Y. 2001) (securities experts cannot opine on customs and practices of broker-dealers when they do not reveal in their testimony how they have made use of their expertise by way of a methodology). Maine's opinions are conclusory and only connect to the facts of this case through nothing more than his "*ipse dixit*." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the experts."); *Nimely*, 414 F.3d at 399 (district court has a duty to exclude *ipse dixit* expert conclusions). The Reports also frequently rely upon incomplete, insufficient, and/or incorrect facts and data. *See Pepsi Cola*, 650 F. Supp. 2d at 319-20 (excluding expert testimony that relied on inaccurate factual premises); *Badian*, 2011 WL 4526104, at *4 (excluding expert testimony that was incomplete). Finally, Maine does not, as he must, apply his opinions to the facts of this case. For each and all of these reasons, Maine's opinions are rightly excluded.

A. All of Maine's Opinions Lack Reliable Principles or Methods

The Reports authored by Maine lack any principle or methodology. They literally cite to nothing – no surveys, sources, books, treatises, industry guides, periodicals, studies, or any other

objective third-party analysis that might corroborate any of his would-be testimony. *See Pepsi Cola Co.*, 650 F. Supp. 2d at 319-20 (excluding expert testimony because proffered expert did not point to any analysis, studies, or facts in his expert report to confirm the reliability of his methods and failed to do so during his deposition); *Li v. Aponte*, 05 Civ. 6237 (NRB), 2009 WL 1285928, at *6 (S.D.N.Y. May 5, 2009) (excluding expert opinion presented without documented support); *In re Apollo Grp. Inc. Secs. Litig.*, 527 F. Supp. 2d 957, 961 (D. Ariz. 2007) ("Offering the expert's qualifications, conclusions, and an assurance of reliability [without more] is insufficient."); *see also Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank*, 253 N.Y. 23, 35, 170 N.E. 479, 483 (1930) (Cardozo, J.) (a witness's opinion "has a significance proportioned to the sources that sustain it"). The lack of any methodology is dispositive. *See, e.g.*, *Algarin v. N.Y.C. Dep't of Correction*, 460 F. Supp. 2d 469, 477 (S.D.N.Y. 2006) ("An anecdotal account of one expert's experience, however extensive or impressive the numbers it encompasses, does not by itself equate to a methodology."). All of Maine's unsupported opinions are inadmissible.

B. Maine's Testimony Will Offer No Assistance to the Jury

Many of Maine's opinions are too general to aid the jury in understanding the evidence in this case or determining any fact in issue. As such they are properly excluded.

1. Maine's Opinions About Wealthy People Generally Are Inadmissible[11]

Maine's generalized opinions about private wealth management practices in the financial industry offer absolutely no assistance to the jury. For example, Maine's Report contains numerous generalizations about what he characterizes as wealthy, successful investors:

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[11] Maine seems to vacillate between saying that Madoff is a private wealth manager (Maine Report at 2-4, 13), and a retail broker dealer. (Maine Report at 13; Maine Rebuttal at 6). The "labels" to Maine's opinions are of no moment to this Motion.

- "[S]uccessful people are generally busy doing whatever has made them successful." (Maine Report at 3);
- "Most wealthy individuals hire professionals to manage their investment securities, whether they invest through a broker or in a fund." (*Id.*);
- "Monitoring the markets requires an enormous investment of time, time that a successful person normally does not have." (*Id.* at 4); and
- Most wealthy "retail investors" need only rely on the "bottom line" of their investments. (*Id.* at 10-11).

None of these generic "opinions" about wealthy people will aid the jury. Maine offers no explanations as to how he reaches any of his opinions. Maine fails to disclose even a single source upon which he purportedly relies when formulating his opinions. *See Bragdon v. Abbott*, 524 U.S. 624, 653 (1998) (when assessing reliability of expert testimony the district court must determine whether the expert has "a traceable, analytical basis in objective fact"). Again, without a discernible methodology, Maine's proposed testimony is neither reliable nor helpful to the jury. *See Askin*, 130 F. Supp. 2d at 529 (excluding proposed expert on broker-dealers because his testimony lacked a reliable methodology); *Mid-State Fertilizer Co. v. Exch. Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989) ("[N]othing but a bottom line supplies nothing of value to the judicial process."). This Court should not admit Maine's opinions based solely on his say-so.

Maine's opinions here are offered in the abstract, without any application to the facts of this case. An expert witness must apply specialized knowledge to the facts of the case at bar. Rule 702. Generalizations about wealthy investors, without more, are simply not probative of the Defendants' investment relationship with Madoff or anything else having to do with this litigation.[12] *See* Fed. R. Evid. 401 (2011) (evidence must have a "tendency to make a fact more

[12] The Maine Rebuttal (Maine Rebuttal at 4) cannot (and does not) cure the deficiencies in the Maine Report. *See Point Prods. A.G. v. Sony Music Entm't*, 2004 WL 345551, at *7, *11 (S.D.N.Y. Feb. 23, 2004) (rejecting expert's "eleventh hour effort to rescue [his] deficient expert

or less probable than it would be without the evidence”).

Maine also disregards evidence at odds with his generalized opinions about how wealthy people do not monitor their investments, or only look at the bottom line. *Amorgianos*, 303 F.3d at 269 (expert testimony based on faulty assumptions is not admissible); *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997) (excluding expert testimony, in part, because the expert ignored critical facts in the record that cut against the expert’s opinions). Maine does not, for example, consider record evidence demonstrating (among other things) that certain Defendants:

- Oversaw, facilitated and monitored hundreds of direct investment accounts with BLMIS (Defendants’ Answer and Defenses to the Trustee’s Amended Complaint (“Answer”),[13] dated Oct. 11, 2011, at ¶¶ 4, 681, 755, 756, 757, and 758);
- Closely monitored their monthly returns (Answer at ¶ 1053);
- Were present when investment returns were discussed and reported at partner meetings (Answer at ¶ 1053);
- Attempted to recreate Madoff’s split-strike conversion strategy (Answer at ¶ 764) and (Arthur Friedman Rule 2004 Transcript (“Friedman Transcript”),[14] dated June 22, 2010, 144:14 – 146:8);
- Created and reviewed “hell sheets” to track their Madoff balances on a monthly basis (Answer at ¶ 761) and (Friedman Transcript, dated June 23, 2010, 336:3 – 337:10);
- Employed a leverage strategy by borrowing against their Madoff returns (Answer at ¶ 820) and (David Katz Rule 2004 Transcript (“Katz Transcript”),[15] dated Sept. 1, 2010, 264:3 – 265:5); and
- Were Fiduciaries and Plan Sponsors to a 401K plan featuring Madoff as the plan option of choice (Answer at ¶ 752).

Expert testimony that ignores material facts contained in the record is not admissible.

Report.”); *Pepsi Cola*, 650 F. Supp. 2d at 320 (expert analysis conducted after submission of his expert report will not cure the report’s deficiency).

[13] The Answer is Ex. 4 to the Sheehan Decl.

[14] The Friedman Transcript is Ex. 5 to the Sheehan Decl.

[15] The Katz Transcript is Ex. 6 to the Sheehan Decl.

Minasian, 109 F.3d at 1216 (excluding expert testimony, in part, because the expert ignored critical facts in the record that cut against the expert's opinions); *see also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("[W]hen indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

Finally, if an expert's opinions are not necessary for the resolution of a factual dispute, their testimony is not helpful. *See, e.g.*, *U.S. v. Mejia*, 545 F.3d 179, 196 (2d Cir. 2008) (excluding expert testimony "about matters outside the scope of any conceivable expertise"); *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986) ("Rule 702 makes inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance."). Such is the case here concerning Maine's subjective view of wealthy people.

2. Maine's Generalizations About the Securities Industry Are Not Admissible Expert Opinions

The Maine Report posits that because BLMIS was a regulated broker-dealer and a member of certain regulatory agencies, investors in general were justified in relying upon customer statements and trade confirmations. (Maine Report at 9, 12-13). Maine also suggests that Madoff's alleged stature as a market-maker allows customers to rely on their customer statements. (*Id.* at 13-14). Maine's opinions here, once again, amount to nothing more than his subjective beliefs. "[Maine] does not reveal how (in rendering his opinions) he has made use of his . . . qualifications." *Askin*, 130 F. Supp. 2d at 529 (expert testimony that "[b]roker-dealers are expected to act with the highest integrity[,]" without more, is not admissible testimony).

Maine's further opinion that investors "are not required to be concerned" about the

reliability of broker-dealers is equally deficient as a legal conclusion.[16] (Maine Report at 11). Maine cannot opine as to the Defendants' legal duties. *Jacobs*, 961 F.2d at 363 (expert testimony that offers a legal conclusion will be excluded); *Kidder*, 14 F. Supp. 2d at 404 (excluding expert that impermissibly offered commentary on defendant's legal duties). Expert testimony that offers "nothing more than what lawyers for the parties can argue in closing arguments" is not admissible under Rule 702. *Cook v. Sheriff of Monroe Cnty*., 402 F.3d 1092, 1111 (11th Cir. 2005) (internal citation omitted).

3. The Opinions in Maine's Rebuttal about Red Flags Are Conclusory, Without Foundation and Unprincipled

The Maine Rebuttal seems to offer three "rebuttal opinions" with respect to red flags: (i) The Defendants could not have identified red flags pertaining to their direct BLMIS accounts; (ii) red flags cannot be attributed to the Defendants as a whole; and (iii) BLMIS's trading volume was not a red flag. Specifically, Maine offers that "none of the items listed" in the Expert Report of Dr. Steve Pomerantz (the "Pomerantz Report") would be suspicious to a retail investor" (Maine Rebuttal at 3) and that "it is highly unlikely that a single investor would know" some of the red flags in the Pomerantz Report. (*Id.* at p. 6) Maine also speculates that it would have taken an "expert" to determine that BLMIS's trading volumes were, at times, impossible. (*Id.* at p. 6). Finally, he offers that it was "impossible" to impute knowledge of red flags to the

[16] Maine offers no record or other support for his apparent assumption that the Defendants—over their twenty plus years and more than $1 billion in investments—invested through Madoff's proprietary trading or market making business units, as opposed to his Investment Advisory business (where they did invest). Nor does Maine offer any basis, factual support or methodology for his apparent assumption that Madoff held himself out as a "retail broker" when soliciting, implementing or executing his purported global investment strategy. The Defendants themselves have admitted unequivocally that they invested money with Madoff's Investor Advisory Business. (Answer at ¶ 30).

Defendants. (*Id.* at p. 6).[17]

These opinions fail to meet several of Rule 702's requirements for admissibility. As with all of Maine's opinions, the Maine Rebuttal opinions on red flags suffer from a complete lack of methodology. He offers no analysis, let alone a high-level one expected of a proffered expert with "specialized knowledge." *See generally Pepsi Cola*, 650 F. Supp. 2d at 319-21. Further, Maine cannot reasonably render any opinions on this critical subject area based upon his professional experience. By his own account, Maine never monitored investments for red flags and has no due diligence experience. (Maine Deposition at 67:13-20.)[18] Because his opinions are lacking in any expert foundation, and fall well outside his professed experience, they amount to the type of conjecture and rank speculation violative of Rule 702. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008) (expert testimony that was neither accompanied by any evidentiary citation nor corroborated by objective analyses was entirely conclusory and, thus, inadmissible); *Lewis v. Parish of Terrebonne*, 894 F.2d 142, 146 (5th Cir. 1990) ("An expert's opinion must be preceded by facts in evidence and cannot be the basis of speculation or conjecture.").

Further, the Maine Rebuttal opinions are conclusory and not based on a meaningful review of the record evidence. Maine reviewed only a handful of account documents and the Defendants' deposition testimony when formulating his opinions. (Maine Deposition at 46-47.) Where, as here, an expert's conclusory opinions rest on an insufficient amount of facts and data,

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17 This too represents an impermissible legal conclusion and is, therefore, inadmissible. *See Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992) (excluding expert testimony on ultimate legal conclusion); *Kidder, Peabody & Co., Inc. v. IAG Int'l Acceptance Grp.*, 14 F. Supp. 2d 391, 399-401, 404 (S.D.N.Y. 1998) (same).

18 While Maine's curriculum vitae identifies him as a purported expert in many things, he does not represent or identify due diligence or red flags as one of his qualifications or areas of expertise. (Maine Report at 1, Ex. A.)

the testimony is not reliable. *Badian*, 2011 WL 4526104, at *4 (excluding expert testimony that was incomplete). Finally, Maine does not specifically apply his red flag opinions to any facts in the case. *Loyd v. U.S.*, 08 Civ. 9016 (KNF), 2011 WL 1327043, at *5 (S.D.N.Y. Mar. 31, 2011) (excluding expert for failure to review and consider relevant records). He simply offers a conclusion. This is not admissible expert testimony.

4. Maine's "Because I Say So" Opinion About the Defendants' Level of Business Sophistication is Inadmissible

Maine's Rebuttal opinions on the Defendants' level of sophistication is not admissible expert testimony.[19] Maine opines that the Defendants are not "sophisticated investors":

> From the information I have been provided, Defendants appear to be high net-worth customers, not sophisticated investors . . . [They] do not have the knowledge, skills and sophistication of professional investors, and generally lack the time or interest to manage their own securities investments.

(Maine Rebuttal at 3.)

Maine's Rebuttal opinion on sophistication fails because it has no foundation. *Badian*, 2011 WL 4526104, at *4-7 (excluding expert testimony that was incomplete); *Algarin*, 460 F. Supp. 2d at 477 (excluding expert testimony that had insufficient reliance on facts and data). By his own admission, Maine relies solely on the Defendants' own testimony when rendering this particular opinion. (Maine Deposition at 57:24-25, 58:1-10, 119-20) Maine again ignores or disregards many facts in the record that squarely contradict his opinion about the Defendants' knowledge and skills, as well as their supposed lack of interest in managing their investments. (Maine Rebuttal at 2-5).

For example, in due diligence questionnaires and other investment solicitation materials,

[19] The Maine Report offers generic commentary as to the sophistication of wealthy investors. (Maine Report at 2-4.)

Sterling Stamos Capital Management LP – a funds of funds in which certain Defendants are General Partners – describes and touts the high level of professional investment experience and sophistication of Sterling Equities, and Defendants such as Saul Katz and Fred Wilpon:

- In response to a due diligence questionnaire from Merrill Lynch, Wilpon and Katz are described as "active hedge fund investors for 20 years," that have "developed deep expertise in hedge funds [and] private equity...," and whose networks offer "unique proprietary sourcing and due diligence capabilities."[20]
- In soliciting investments from a third party, Saul and David Katz are identified as "investment professionals" and part of the Senior Investment Team, and Fred Wilpon as an investment professional, identifying his relevant experience as a member of Sterling Equities and his service on the Bear Stearns Board of Directors.[21]

As such, Maine's opinion is not reliable. *Algarin*, 460 F. Supp. 2d at 477 (excluding expert report that "cannot be read to express any more than simply his personal disagreement"). Because there "is simply too great of an analytical gap between the data and the opinion proffered," *Joiner*, 522 U.S. at 146 (affirming district court's exclusion of expert's *ipse dixit* opinions), Maine's subjective opinion based solely on the Defendants' testimony is rightly excluded.

[20] *See* Trustee Exhibit 257, which is Ex. 7 to the Sheehan Decl. (SSMSAA1855447 at SSMSAA1855451).

[21] *See* Trustee Exhibit 258, which is Ex. 8 to the Sheehan Decl. (SSMSAA1238214 at SSMSAA1238242-44). *See generally* Trustee Exhibits 187 and 110, which are Exs. 9 and 10, respectively, to the Sheehan Decl.

III. MAINE OFFERS A SERIES OF IRRELEVANT OPINIONS

Maine's testimony offers several opinions that have no bearing on whether the Defendants willfully blinded themselves to red flags suggesting the high probability of fraud at BLMIS. Testimony that does not make an issue of fact more or less probable is not relevant and, thus, inadmissible under Rules 401 and 402. *Daubert*, 509 U.S. at 587, 591, and 599; *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 60 (2d Cir. 2002) (expert evidence that was not probative of key issue in case was not relevant and, thus, inadmissible); *Borsack v. Ford Motor Co.*, 04 Civ. 3255 (PAC), 2009 WL 5604383, at *2 (S.D.N.Y. Feb. 3, 2009) (excluding irrelevant expert testimony and noting that district court's "duty under *Daubert* is to examine the fit between the expert's proposed testimony and the relevance to the jury in deciding the issue") (internal citation omitted).

A. Maine's Narrative About Retail Broker-Dealers Is Irrelevant

Maine's broad opinions about broker-dealers are emblematic of the disconnect between his opinions and the ultimate issues to be addressed to the jury. The bulk of Maine's Report offers a general commentary on broker-dealers and their customers, as well as a broad description on the nature of securities brokerage accounts. (Maine Report at 2-11).

This narrative is also properly excluded. This case turns on whether the Defendants were willfully blind to a high probability of Madoff's fraud, and in particular, issues concerning red flags and what due diligence would have revealed. Conclusory opinions and commentary about run-of-the-mill broker-dealers and their dealings with hypothetical customers with no connection to the actual facts of this case are wholly irrelevant. *Daubert*, 509 U.S. at 591 (expert evidence

that does not relate to any issue in the case is irrelevant and, thus, not helpful); *Amorgianos*, 303 F.3d at 265-68 (same).[22] As such, his testimony is not reliable and cannot assist the jury here.

B. <u>Maine's Opinion that Investment Professionals Are More Likely to Achieve Better Returns than an Investor is Irrelevant</u>

Maine's testimony about the financial benefits of employing a broker-dealer will not help the jury's resolution of this case. The Maine Report offers that "it is unlikely that customers who are not financial market experts will achieve as good a return as will a professional." (Maine Report at 4). Likewise, the opinion in the Maine Report that "a non-professional investor would likely be unable to achieve results that could compete with those attainable by such specialists" is a red herring and irrelevant to the issues in this litigation. The questions at trial are *not* about whether the Defendants were or could have been better than Madoff in maximizing their investment returns; rather, the issue is whether the Defendants willfully turned a blind eye to the probability of fraud in the face of potential red flags. *Katz*, 2011 WL 4448638, at *5. Because these opinions do not inform the jury on any triable issue, they are rightly excluded. *Amorgianos*, 303 F.3d at 265 (Evidence which is not relevant is not admissible).[23]

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[22] *Cf. S.E.C. v. Badian*, 06 Civ. 2621 (LTS), 2010 WL 4840063, at *3 (S.D.N.Y. Nov. 19, 2010) ("The types of factual situations that constitute red flags probative of possible misconduct are outside of the lay jury's experience and observation.").

[23] To the extent such testimony is potentially relevant, it is still inadmissible under Federal Rule of Evidence 403. Maine's opinions about the advantages of hiring a broker-dealer and the practices and customs of the broker-dealer industry will cause jury confusion because such testimony applies only to hypothetical investors and broker-dealers. *See Nimely,* 414 F.3d at 397 (relevant evidence that causes undue confusion of the issues is excludable under Rule 403); *see also Daubert*, 509 U.S. at 595 (instructing that Rule 403 "exercises more control over experts than over lay witnesses" because expert testimony "can be both powerful and quite misleading") (internal citation omitted).

IV. MAINE OFFERS IMPERMISSIBLE OPINIONS ABOUT THE DEFENDANTS' STATE OF MIND

In further contravention to Rule 702, Maine also offers a few opinions about what he believes some of the Defendants "understood" or "intended." Such "state of mind" opinions are also rightly excluded. *See, e.g.*, *Kirby*, 777 F. Supp. 2d at 729-30 (excluding expert testimony about what party thought or understood); *Highland Cap.*, 551 F. Supp. 2d at 182-83, 187-88 (same); *Rezulin*, 309 F. Supp. 2d at 547 ("Inferences about the intent or motive of parties or others lie outside the bounds of expert testimony.").

In the Maine Rebuttal, Maine opines that Defendants Fred Wilpon, Saul Katz and Arthur Friedman did not have a "deep understanding of hedge funds." (Maine Rebuttal at 4). Maine bases this opinion solely on their deposition testimonies. (*Id.*). It is wholly improper for Maine to use portions of the Defendants' deposition in order to "opine" on the Defendants subjective understanding of the investment industry.[24] *See, e.g.*, *Pension Comm.*, 691 F. Supp. 2d at 467 (expert can opine as to what investors would customarily assume but cannot opine as to what defendant investors did assume); *Highland Cap.*, 551 F. Supp. 2d at 182-83 (excluding expert testimony about what he thought defendants understood and explaining that such testimony could not be saved by couching the opinion as industry custom and practice).

For example, Maine speculates during his deposition about certain statements and admissions against interest contained in documents obtained by the Trustee during discovery. Maine "opines" without foundation that these statements were mere "puffery." (Maine Deposition at 87:13-19). Maine broadly surmises that the Defendants took "poetic license" when

[24] In Maine's Rebuttal, he agrees "that a person with a deep understanding of hedge funds would likely be a sophisticated hedge fund investor …" (Maine Rebuttal at 4), but then rejects the documents describing certain of the Defendants as "having a deep understanding of hedge funds." *See* Sheehan Decl. Exs. 7, 8, 9 and 10.

they described in documents certain Defendants as "investment professionals" with a "deep expertise in hedge funds." (Maine Deposition at 79:14-20). Opinions like these invade the jury's province as the finder of fact and are rightly excluded. *See Taylor v. Evans*, 94 Civ. 8425, 1997 U.S. Dist. LEXIS 3907, at *5 (S.D.N.Y. Apr. 1, 1997) ("[M]usings as to defendants' motivations would not be admissible if given by any witness – lay or expert.").

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court strike the Reports, all expert opinions, and Maine's appearance as a witness at trial in this matter.

Dated: New York, New York
January 26, 2012

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