

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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

**DECLARATION OF DANA M. SESENS IN SUPPORT OF
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

I, Dana M. Seshens, declare, pursuant to 28 U.S.C. § 1746, that the following is true:

1. I am a partner with the firm of Davis Polk & Wardwell LLP, attorneys for Defendants. I submit this declaration in support of Defendants’ motion for summary judgment.
2. In my role as counsel for Defendants, I was involved in and responsible for Defendants’ response to the Trustee’s discovery requests in this action, including, but not limited to, the production of documents. As a result, I am personally familiar with the facts set forth herein.
3. Prior to discovery taken in this action, the Trustee had carried out exceedingly broad discovery under Bankruptcy Rule 2004 in connection with his Rule 2004 investigation of Defendants (“Rule 2004 Discovery”). The breadth and scope of that discovery is set forth in my March 20, 2011 and June 20, 2011 declarations submitted in support of Defendants’ prior motion to dismiss or, in the

alternative, for summary judgment (“Motion to Dismiss”) and are incorporated herein by reference. *See* Mot. to Dismiss the Am. Compl. or, in the Alternative, for Summ. J. (doc. no. 20) and papers filed in support thereof (docs. nos. 23 (Seshens Decl.); 27 (Supp. Seshens Decl.)).

4. On August 19, 2011, the Court held oral argument on Defendants’ Motion to Dismiss and, reserving decision on the Motion at that time, ruled that the Trustee should be allowed to take some additional discovery, which was to be cabined by the discovery that already had been taken. (Aug. 19, 2011 Oral Arg. Tr. 63:10-16.)

5. On September 27, 2011, the Court granted Defendants’ Motion to Dismiss in part and declined Defendants’ invitation to convert the Motion to one for summary judgment, finding that “the Trustee has made a reasonable argument that he is entitled to further discovery before a motion for summary judgment is fully ripe.” *Picard v. Katz*, No. 11 Civ. 3605, 2011 U.S. Dist. LEXIS 109595, at *20 n.8 (S.D.N.Y. Sept. 27, 2011).

6. On September 16, 2011, the Trustee served Defendants with a First Set of Requests for Production of Documents (“Trustee Requests”), containing eighty-one document requests.

7. The parties met and conferred several times regarding the Trustee Requests. Ultimately, Defendants agreed to produce non-privileged documents dated on or before March 1, 2009 that were responsive to the Trustee Requests as agreed upon by the parties through the meet-and-confer process, subject to and without waiver of Defendants’ relevance and other objections.

8. To determine the universe of electronic documents “potentially responsive” to the Trustee Requests, Defendants ran 155 search terms requested by the Trustee across every Sterling Partner and employee email box and personal document folder and across a number of select drives and folders maintained on the Sterling Equities’ network file server. Defendants also ran these same search terms through certain electronic document repositories maintained by the New York Mets.

9. As a result of the application of these search terms, counsel for Defendants reviewed hundreds of thousands of documents and produced approximately 30,000 documents and native files, totaling approximately 260,000 pages of non-native documents, in response to the agreed upon Requests.

10. Defendants also collected and produced approximately 1,200 hard copy documents, totaling approximately 6,000 pages, from the files of the Sterling Partners, Sterling employees, and the New York Mets.

11. At the Trustee’s request, and subject to and without waiver of Defendants’ relevance objection, Defendants ran thirty-five new search terms across the email box of Sterling’s chief financial officer to identify certain communications sent after March 1, 2009 that were potentially related to the restructuring of debt in 2009. Defendants produced an additional 2,300 documents and native files, totaling approximately 18,000 pages of non-native documents, in response to the agreed upon Requests.

12. Based upon a review of all of Defendants’ documents responsive to the Trustee Requests, not one document reflected a warning from anyone, or a

belief by any Defendant, that Madoff might be running a Ponzi scheme or engaged in fraud.

13. In addition to taking discovery from Defendants, the Trustee also sought discovery about Defendants from numerous third parties. Between October 11, 2011 and December 15, 2011, the Trustee served twenty-one document subpoenas on third parties and an additional document subpoena on Defendants' expert.

14. In response to the twenty-one third-party subpoenas, thirteen parties produced documents, while others informed the Trustee that they had no responsive documents to produce. Together, these third parties produced approximately 43,000 documents and native files, totaling approximately 280,000 pages of non-native documents. These productions did not include documents previously produced to the Trustee by certain of the third parties during Rule 2004 Discovery (*See infra.*)

15. Between November 7, 2011 and the close of discovery on January 13, 2012, the Trustee took twenty fact depositions and one expert deposition. Eighteen of these depositions were conducted between December 9, 2012 and January 13, 2012.

16. Of the twenty fact depositions taken, four were depositions of Sterling Partners, including Fred Wilpon and Saul Katz, three were employees of Sterling Equities, and one was an employee of the New York Mets. The remaining twelve depositions were third-party witnesses.

17. The Trustee also sent a private investigator to question acquaintances of Defendants and others.

18. On September 20, 2011, Defendants served the Trustee with a First Set of Requests for the Production of Documents (“Defendants’ Requests”). Among other things, Defendants sought from the Trustee the Rule 2004 Discovery to which Defendants previously did not have access.

19. In response to Defendants’ Requests, the Trustee disclosed, among other documents, his Rule 2004 Discovery, including, but not limited to, document productions from Sterling Stamos Partners, Bank of America, Frank Crystal & Co., American Securities, and J.P. Morgan.

20. In response to Defendants’ Requests for the Trustee’s Rule 2004 Discovery and any third-party documents produced in other Rule 2004 investigations that related to any Defendant or to certain portions of the Trustee’s complaint against Defendants, the Trustee produced approximately 248,000 documents and native files, totaling approximately 2.7 million pages of non-native documents.

21. The Trustee also produced to Defendants previously undisclosed deposition testimony taken as part of Rule 2004 Discovery, including, but not limited to, the deposition of Charles Klein of American Securities.

22. The Trustee provided Defendants with a privilege log reflecting Rule 2004 Discovery documents withheld from production on the basis of the attorney-client privilege or work product doctrine, which reflected, among other things, that attorney notes and summaries from an interview on July 13, 2010 with

Robert Duran of Frank Crystal & Co. had been withheld from production on work product grounds.

23. In total, Defendants produced over 100,000 documents and native files, totaling nearly 1 million pages of non-native documents, in response to the Trustee's requests as part of Rule 2004 Discovery and discovery in this action.

24. In total, third parties produced approximately 291,000 documents and native files, totaling approximately 3 million pages of non-native documents, consisting of documents produced to Defendants by the Trustee, as described *supra*, and documents provided to Defendants by third parties as a courtesy in response to the Trustee's document subpoenas in this action.

25. Attached hereto as Exhibit A is a true and correct copy of excerpts from the deposition of Christopher Stamos, dated January 4, 2012.

26. Attached hereto as Exhibit B is a true and correct copy of excerpts from the deposition of Peter Stamos, dated January 5, 2012.

27. Attached hereto as Exhibit C is a true and correct copy of the Expert Report of Bruce G. Dubinsky, dated November 22, 2011.

28. Attached hereto as Exhibit D is a true and correct copy of excerpts from the deposition of Bruce G. Dubinsky, dated January 11, 2012.

29. Attached hereto as Exhibit E is a true and correct copy of an article by Peter Chapman, entitled *Before the Fall: Bernard L. Madoff*, Traders Magazine, dated March 2009.

30. Attached hereto as Exhibit F is a true and correct copy of an article entitled *NASDAQ and Primex Announce End of Exclusive Rights Agreement*, PR Newswire, dated December 21, 2003.

31. Attached hereto as Exhibit G is a true and correct copy of an article entitled *3 Firms Plan to Develop New System For Trading*, N.Y. Times, dated June 8, 1999.

32. Attached hereto as Exhibit H is a true and correct copy of excerpts from the Bankruptcy Rule 2004 deposition of Fred Wilpon, dated July 20, 2010.

33. Attached hereto as Exhibit I is a true and correct copy of excerpts from the deposition of Fred Wilpon, dated January 10, 2012.

34. Attached hereto as Exhibit J is a true and correct copy of excerpts from the Bankruptcy Rule 2004 deposition of Arthur Friedman, dated June 22-24, 29 2010.

35. Attached hereto as Exhibit K is a true and correct copy of excerpts from the Rule 27 deposition of Arthur Friedman, dated June 29, 2010.

36. Attached hereto as Exhibit L is a true and correct copy of excerpts from the deposition of Saul B. Katz, dated January 13, 2012.

37. Attached hereto as Exhibit M is a true and correct copy of excerpts from the deposition of David Katz, dated December 28, 2011.

38. Attached hereto as Exhibit N is a true and correct copy of excerpts from the Bankruptcy Rule 2004 deposition of Saul B. Katz, dated August 4, 2010.

39. Attached hereto as Exhibit O is a true and correct copy of excerpts from the deposition of Mark Peskin, dated December 29, 2011.

40. Attached hereto as Exhibit P is a true and correct copy of excerpts from the Bankruptcy Rule 2004 deposition of Mark Peskin, dated July 29, 2010.

41. Attached hereto as Exhibit Q is a true and correct copy of excerpts from the deposition of Steven Kenny, dated December 9, 2011.

42. Attached hereto as Exhibit R is a true and correct copy of a Memorandum from Barry Gonder to the files of Sterling Doubleday, dated August 24, 1990, which was produced by Sterling to the Trustee in the course of discovery.

43. Attached hereto as Exhibit S is a true and correct copy of an Analysis of Bernard L. Madoff's Investment Mgmt. for Saul B. Katz (Account KW024) performed by J.P. Morgan, dated July 1993, which was produced by Sterling to the Trustee in the course of discovery.

44. Attached hereto as Exhibit T is a true and correct copy of a Letter from Robert J. Grossman to Marvin B. Tepper, dated May 25, 2000, which was produced by Sterling to the Trustee in the course of discovery.

45. Attached hereto as Exhibit U is a true and correct copy of a Letter from Sharon Bonelli to Arthur Friedman, dated January 2, 2003, which was produced by Sterling to the Trustee in the course of discovery.

46. Attached hereto as Exhibit V is a true and correct copy of excerpts from the Bankruptcy Rule 2004 deposition of David Katz, dated August 31 and September 1, 2010.

47. Attached hereto as Exhibit W is a true and correct copy of excerpts from the Bankruptcy Rule 2004 deposition of Peter Stamos, dated August 19, 2010.

48. Attached hereto as Exhibit X is a true and correct copy of excerpts from the Bankruptcy Rule 2004 deposition of Charles D. Klein, dated November 8, 2010.

49. Attached hereto as Exhibit Y is a true and correct copy of excerpts from the Bankruptcy Rule 2004 deposition of Ashok Chachra, dated October 8, 2010.

50. Attached hereto as Exhibit Z is a true and correct copy of excerpts from the deposition of Michael Katz, dated December 9, 2011.

51. Attached hereto as Exhibit AA is a true and correct copy of excerpts from the deposition of Noreen Harrington, dated December 30, 2011.

Dated: New York, New York
January 26, 2012

s/ Dana M. Seshens
Dana M. Seshens