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May 12, 2015

VIA CMF/ECF

Honorable Stuart M. Bernstein
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, NY 10004-1408

Re: Picard v. A&G Goldman Partnership, Adv. Pro. No. 14-02407 (SMB); Capital Growth Company v. A&G Goldman Partnership, Adv. Pro. No. 14-02408 (SMB) (consolidated)

Dear Judge Bernstein:

We are counsel to Irving H. Picard, as trustee for the substantively consolidated SIPA liquidation of Bernard L. Madoff Investment Securities LLC and the estate of Bernard L. Madoff. Enclosed as Exhibit A please find a copy of the opinion and order issued on May 11, 2015 by the Honorable John G. Koeltl, District Judge for the U.S. District Court of the Southern District of New York, affirming this Court's June 23, 2014 decision in *Picard v. Marshall*, Adv. Pro. No. 14-01840.[1] We are providing notice of this decision as supplemental authority in the above-referenced case.

Respectfully submitted,

/s/ Keith R. Murphy

Keith R. Murphy

Enclosures

cc (via e-mail): All Counsel of Record

[1] The District Court simultaneously issued a memorandum opinion and order denying a petition by Adele Fox, Marsha Peshkin and other plaintiffs (the "Fox Plaintiffs") under Fed. R. Civ. P. 27(a) for a deposition of Bernard Madoff. Please see enclosed as Exhibit B a copy of that decision.

EXHIBIT A

United States District Court
Southern District of New York

In re BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

Debtor,

ADELE FOX, ET AL.,

Appellants,

- against -

IRVING H. PICARD,

Appellee,

- and -

CAPITAL GROWTH COMPANY, ET AL.,

Intervenors.

14 Cv. 6790 (JGK)

OPINION AND ORDER

JOHN G. KOELTL, District Judge:

This bankruptcy appeal arises out of Bernard L. Madoff's Ponzi scheme and the subsequent bankruptcy of Bernard L. Madoff Investment Securities LLC ("BLMIS") in the wake of the public revelation of that scheme. In early 2010, the appellants, Adele Fox and Susanne Stone Marshall, who each had invested money in BLMIS, sought to file separate class action lawsuits in the United States District Court for the Southern District of Florida (the "Florida Actions") asserting state law claims against Jeffrey Picower, an alleged Madoff co-conspirator, and other related defendants (collectively, the "Picower defendants"). The appellee, Irving H. Picard ("Picard" or the

"Trustee"), is the trustee for the BLMIS estate pursuant to the Securities Investor Protection Act of 1970 ("SIPA"), 15 U.S.C. §§ 78aaa *et seq*. After Picard reached a $7.2 billion settlement agreement with the Picower defendants, the United States Bankruptcy Court for the Southern District of New York granted Picard's motion to enjoin the appellants' Florida lawsuits because they were commenced in violation of the Automatic Stay Order in the BLMIS liquidation proceeding, and approved the settlement and a permanent injunction precluding the assertion of claims that were duplicative or derivative of claims brought by the Trustee, or that could have been brought by the Trustee, against the Picower defendants. On March 26, 2012, this Court affirmed the bankruptcy court's Automatic Stay Order and its approval of the settlement and injunction.

The Court of Appeals for the Second Circuit affirmed that judgment. Marshall v. Picard (In re Bernard L. Madoff Inv. Secs. LLC), 740 F.3d 81, 96 (2d Cir. 2014). In the present appeal, the appellants challenge the decision of the bankruptcy court (Bernstein, B.J.), preventing the appellants from filing a Second Amended Complaint in the Florida district court alleging new claims against the Picower defendants. The bankruptcy court held that the appellants' new claims, including a claim under Section 20(a) of the Securities Exchange Act of 1934 ("the Exchange Act"), 15 U.S.C. § 78t(a) (the "Section 20(a) Claim"),

and a claim under the Federal Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et seq*. (the "Federal RICO Claim"), were derivative of the Trustee's claims against the Picower defendants and therefore were precluded by the permanent injunction.

For the reasons that follow, the bankruptcy court was correct in finding that the appellants' proposed complaint was derivative of the Trustee's claims on behalf of all the creditors of BLMIS and was barred by the permanent injunction.

I.

The factual background of this case was set out at length in this Court's prior decision. See Fox v. Picard (In re Madoff), 848 F. Supp. 2d 469, 473-76 (S.D.N.Y. 2012). The Court assumes familiarity with that decision. The following factual and procedural background is presented for its relevance to this appeal.

In May 2009, the Trustee first filed an adversary proceeding against the Picower defendants (the "New York Action"), bringing claims under federal and New York state law for, among other things, fraudulent transfers and conveyances made by the Picower defendants as part of their conspiracy with Madoff. The Trustee's complaint alleged that the Picower defendants, knowing that BLMIS was an elaborate hoax, withdrew

billions of dollars from their BLMIS accounts, money that belonged to defrauded BLMIS customers.

In February 2010, appellants Fox and Marshall filed separate class action lawsuits in the United States District Court for the Southern District of Florida, alleging Florida state law claims against the Picower defendants based on the same factual allegations as the Trustee's complaint (the "Florida Actions"). Indeed, much of the appellants' initial complaints were cut-and-paste repetitions of the Trustee's complaint. The Trustee filed a motion in the bankruptcy court to enjoin those lawsuits, and on May 3, 2010, the bankruptcy court granted the Trustee's motion. The bankruptcy court held that the appellants' claims were covered by the automatic stay provisions of 11 U.S.C. § 362(a) and therefore belonged "exclusively to the Trustee." Secs. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC ("Automatic Stay Decision"), 429 B.R. 423, 432 (Bankr. S.D.N.Y. 2010). The court also found that the Florida Actions violated part of a protective order issued by the District Court for the Southern District of New York on December 15, 2008, which had placed BLMIS customers under the protection of the SIPA. Id. at 433. Finally, the bankruptcy court issued a preliminary injunction pursuant to 11 U.S.C. § 105(a) finding that the Florida Actions threatened the BLMIS estate. Id. at 434.

Thereafter, the Trustee reached a settlement with the Picower defendants pursuant to which the Picower defendants agreed to return $5 billion to the BLMIS estate and forfeit $2.2 billion to the Government. The $7.2 billion represented the entire amount of money withdrawn by the Picower defendants from their BLMIS accounts. On January 13, 2011, the bankruptcy court approved the settlement and issued the following permanent injunction pursuant to the settlement agreement:

> [A]ny BLMIS customer or creditor of the BLMIS estate who filed or could have filed a claim in the liquidation, anyone acting on their behalf or in concert or participation with them, or anyone whose claim in any way arises from or is related to BLMIS or the Madoff Ponzi scheme, is hereby permanently enjoined from asserting any new claim against the Picower BLMIS Accounts or the Picower Releasees that is duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower Releasees . . . .

Murphy Decl. filed Mar. 11, 2014, Ex. A (Permanent Injunction Order and Exhibit, Picard v. Picower, Case No. 09-1197 (Bankr. S.D.N.Y. Jan. 13, 2011), ECF No. 43 (“Settlement Order”), at 7).

On March 26, 2012, this Court affirmed the January 13 Order, holding that the settlement was fair and reasonable, and that the issuance of the permanent injunction was a proper exercise of the bankruptcy court’s power under § 105(a) to protect the BLMIS estate and the bankruptcy court’s jurisdiction over the massive SIPA liquidation. See Fox, 848 F. Supp. 2d at 473. This Court held that the claims asserted in the Florida

Actions were "general claims common to all BLMIS investors" that were "substantively duplicative of the Trustee's fraudulent transfer action." Id. at 481. In particular, this Court noted that both complaints in the Florida Actions explicitly relied on the Trustee's complaint in the New York action and cited to the Trustee's complaint throughout. Id. at 479. Accordingly, the Court affirmed the bankruptcy court's grant of the Trustee's motion to enjoin the Florida Actions, and its issuance of a preliminary injunction. This Court also affirmed the bankruptcy court's approval of the Settlement Agreement, holding that the "substantial sum" of $7.2 billion was "recovered for the estate after arm's length bargaining, and the injunction of derivative claims like the Florida Actions was part of that bargain." Id. at 490.

On January 13, 2014, the Court of Appeals for the Second Circuit affirmed this Court's judgment. See Marshall, 740 F.3d at 96. The Court held that the appellants had merely put new legal labels on the same claims brought by the Trustee against the Picower defendants for fraudulent transfers and withdrawals. Id. at 92. Citing with approval an opinion in a related case by Judge Sullivan of this Court, the Court of Appeals stated that the "[c]omplaints plead nothing more than that the Picower Defendants traded on their *own* BLMIS accounts, knowing that such 'trades' were fraudulent, and then withdrew the 'proceeds' of

such falsified transactions from BLMIS." Id. (emphasis in original) (quoting A&G Goldman P'ship v. Picard (In re Bernard L. Madoff Inv. Secs., LLC), No. 12cv6109, 2013 WL 5511027, at *7 (S.D.N.Y. Sept. 30, 2013)).

Ultimately, the Court of Appeals held that the Florida Actions were derivative of the Trustee's claims against the Picower defendants, because although they alleged different legal claims and sought different types of damages, the Fox and Marshall complaints alleged "nothing more than steps necessary to effect the Picower defendants' fraudulent withdrawals of money from BLMIS, instead of 'particularized' conduct directed at BLMIS customers." Id. at 84. As an example of "particularized" actions that were lacking, the Court noted that the appellants did not allege that "the Picower defendants made any misrepresentations to appellants." Id. at 93. Finally, the Court of Appeals noted that it was affirming "without prejudice to appellants seeking leave to amend their complaints," and stated:

> There is conceivably some particularized conspiracy claim appellants could assert that would not be derivative of those asserted by the Trustee. That question, however, is not properly before us, and is a question in the first instance for the United States District Court for the Southern District of Florida.

Id. at 94.

Less than a month after the Court of Appeals' decision, on February 5, 2014, appellants Fox and Marshall, together with appellants Marsha Peshkin and Russell Oasis, moved in the Florida District Court to re-open the Fox action, and for leave to file a Second Amended Complaint (the "New Fox Complaint"). See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC ("Injunction Decision"), 511 B.R. 375, 383 (Bankr. S.D.N.Y. 2014). The New Fox Complaint asserts a Section 20(a) claim, a Federal RICO claim, a claim under the Florida Civil Remedies for Criminal Practices Act, Chapter 772 of the Florida Statutes (the "Florida RICO Claim"), and claims under Florida common law. See Murphy Decl. Ex. B (New Fox Complaint). Plaintiffs Fox and Oasis make their claims on behalf of "net winners"—BLMIS customers who withdrew more money than they deposited with BLMIS over the span of their participation in the BLMIS Discretionary Trading Program-and plaintiffs Marshall and Peshikin seek to represent "net losers"—BLMIS customers who withdrew less money than they deposited with BLMIS.[1] New Fox Compl. ¶¶ 8-11. The New Fox Complaint removes all citations to the Trustee's complaint in the New York Action, and adds allegations that the

[1] As explained in this Court's previous decision, the Trustee's method of calculating each customer's *pro rata* share of the BLMIS property, or their net equity, entitles "net losers" to receive all of their principal investments before "net winners" receive any compensation for the fictitious profits they believed they had made. The Court of Appeals has affirmed this method of reimbursement. See In re Bernard L. Madoff Inv. Secs. LLC, 654 F.3d 229, 235 (2d Cir. 2011).

Picower defendants controlled the BLMIS investment scheme, and that Picower caused BLMIS to make misrepresentations to customers in order to induce them into investing with BLMIS, so that Picower could make more fraudulent gains from the BLMIS scheme. New Fox Compl. ¶¶ 46-56.

On February 18, 2014, the Picower defendants sought an immediate stay of the action before the Florida district court. Injunction Decision, 511 B.R. at 383. In their motion, they included a letter from the Trustee stating his intention to file an injunction motion in the bankruptcy court. Id. The Florida district court ultimately stayed the proceedings in that court, and denied the plaintiffs' request for an emergency hearing on their cross-motion to allow them to proceed in the Florida district court, after the Trustee had filed an injunction motion in the bankruptcy court. Id. The Florida district court stated:

> The Court declines to conduct an emergency hearing on the question of whether to enjoin the New York action. Rather, this Court defers to the Bankruptcy Court for the Southern District of New York for a ruling on Picard's motion to enjoin the instant action.

Id. (citing the Florida district court's Order dated March 14, 2014). The plaintiffs filed a notice of appeal, and moved before the Court of Appeals for the Eleventh Circuit to expedite the appeal and for an injunction pending appeal. Id. On May 7,

2014, the Eleventh Circuit Court of Appeals denied both motions. Id. at 383-84.[2]

On June 23, 2014, the bankruptcy court granted the Trustee's motion to enjoin the Fox Plaintiffs from prosecuting the New Fox Complaint in the Florida Actions. Id. at 394-95.[3] The court held that the New Fox Complaint did not contain "any particularized allegation that the Picower Defendants participated in the preparation of any financial information sent to the proposed class members or directed BLMIS to send false information to the customers." Id. at 394. The court found the new allegations as to the Picower defendants' misrepresentations to BLMIS customers to be "wholly conclusory," and concluded that the appellants were attempting to "plead around" the permanent injunction by attaching new legal claims to allegations that were derivative of the Trustee's action. Id. at 394-95.[4]

[2] After the bankruptcy court granted the Trustee's motion to enjoin the filing of the New Fox Complaint, the Eleventh Circuit Court of Appeals dismissed the appeal as moot.

[3] The Court also granted the Trustee's motion to enjoin the proposed amended class action complaint which plaintiffs Pamela Goldman and A&G Goldman Partnership (collectively, the "Goldman Plaintiffs") sought to file in the Florida district court. Id. at 393. The Goldman Plaintiffs initially appealed from that decision, but subsequently withdrew their appeal and filed another amended complaint in the Florida district court. The Trustee moved to enjoin that complaint as well, and the Trustee's motion is currently pending before the bankruptcy court. See Picard v. Goldman (In re Bernard L. Madoff), Adv. Pro. No. 1402407 (Bankr. S.D.N.Y. 2014).

[4] Because the bankruptcy court found that the New Fox Complaint violated the permanent injunction, it declined to reach the question of whether the New Fox Complaint violated the automatic stay. Id. at 395.

On appeal, the appellants principally argue that (1) by acting on the Trustee's injunction motion, the bankruptcy court violated the directions of the Court of Appeals in Marshall which stated that whether there is "some particularized conspiracy claim" that the appellants could bring against the Picower defendants "is a question in the first instance for the United States District Court for the Southern District of Florida," 740 F.3d at 94; and (2) the claims in the New Fox Complaint allege particularized injuries traceable to the Picower defendants and thus are independent claims that they may permissibly bring against the Picower defendants.

A district court reviews a bankruptcy court's findings of fact for clear error and its legal conclusions *de novo*. See In re Bell, 225 F.3d 203, 209 (2d Cir. 2000); In re Metaldyne Corp., 421 B.R. 620, 624 (S.D.N.Y. 2009).

II.

As an initial matter, the appellants argue that the bankruptcy court violated the mandate from the Second Circuit Court of Appeals by exercising jurisdiction over the Trustee's motion and enjoining the New Fox Complaint. They contend that when the Court of Appeals stated in Marshall that whether the appellants could assert claims that were not derivative of the Trustee's claims was a "question in the first instance" for the

Florida District Court, 740 F.3d at 94, the Court reserved that question for the Florida district court alone.

This argument is without merit. In making the statement on which the appellants rely, the Court of Appeals noted that a sufficiently particularized non-derivative claim was not "properly before" it. Id. Any discussion by the Court of what such a claim could "conceivably" look like would have been strictly hypothetical. Id. Therefore, the Court made clear that the appellants should seek to file any amended complaint in the court where its claims were pending, the United States District Court for the Southern District of Florida. The Court of Appeals did not state, in its January 13 Opinion or the Mandate issued on February 5, that only the Florida district court could consider whether the appellants had stated non-derivative claims. As the bankruptcy court properly found, the Court of Appeals did nothing to disturb the bankruptcy court's jurisdiction to interpret its own orders, including the permanent injunction issued as part of the Trustee's settlement with the Picower defendants. See Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151 (2009) (stating that "the Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders," including an injunction it had issued).

In any event, the parties' actions in this case were consistent with the language that the appellants quote from the

Court of Appeals' decision in Marshall. The appellants sought to file the New Fox Complaint in the Florida district court in the first instance, and that court decided to stay the action so that the bankruptcy court could determine whether the Complaint violated its own prior injunction. See Injunction Decision, 511 B.R. at 383. The appellants thus availed themselves of both the Florida district court and the Eleventh Circuit Court of Appeals before the bankruptcy court issued its decision.

Accordingly, the bankruptcy court appropriately considered the merits of the Trustee's motion to enjoin the appellants' claims as derivative of the Trustee's claims in violation of the permanent injunction.

III.

The Court of Appeals has defined "derivative claims" in the context of a bankruptcy as "ones that 'arise from harm done to the estate' and that 'seek relief against third parties that pushed the debtor into bankruptcy.'" Marshall, 740 F.3d at 89 (quoting Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Secs. LLC), 721 F.3d 54, 70 (2d Cir. 2013) (brackets omitted)). "While a derivative injury is based upon 'a secondary effect from harm done to the debtor,' an injury is said to be 'particularized' when it can be 'directly traced to the third party's conduct.'" Id. (quoting St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 704 (2d Cir.

1989) (brackets omitted)). Although the same factual allegations may give rise to both derivative and independent claims, appellants may not state independent claims merely by asserting new legal claims or seeking different forms of relief than the Trustee. Id. at 91-93. Rather, courts should "inquire into the factual origins of the injury" and the "nature of the legal claims asserted." Id. at 89 (citing Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.) ("Manville III"), 517 F.3d 52, 67 (2d Cir. 2008)).

The appellants argue that the claims they have added in the New Fox Complaint, principally the Section 20(a) claim, allege particularized injuries to themselves and others similarly situated and thus are independent from the Trustee's claims against the Picower defendants. The Section 20(a) claim alleges that BLMIS committed a primary violation of § 10(b) of the Exchange Act, and that the Picower defendants controlled BLMIS and participated in convincing additional customers to invest in BLMIS by inducing BLMIS's misleading statements to customers. See New Fox Compl. ¶¶ 109-20.

The Goldman plaintiffs, who are also parties that sought to file class actions against the Picowers, had brought a similar Section 20(a) claim that an earlier bankruptcy court decision found derivative of the Trustee's claims. In an Opinion dated September 30, 2013, the district court affirmed the bankruptcy

court's order. See Goldman, 2013 WL 5511027, at *1. Judge Sullivan acknowledged that a creditor's claim may be non-derivative if "some direct legal obligation flowed from the defendants to the creditor," and that a Section 20(a) claim provides that direct legal obligation. Id. at *5-6. However, Judge Sullivan noted that the court must analyze the factual allegations to ensure that the claim is a "bona fide" Section 20(a) claim, or else parties could "easily plead around the protections of the Bankruptcy Code by deceptively labeling their claims." Id. at *6. The court held that the appellants had not alleged bona fide Section 20(a) claims because the only substantive factual allegations against the Picower defendants pertained to their fraudulent withdrawals from their BLMIS accounts, the same subject matter as the Trustee's claims. Id. at *6-9. The only allegations pertaining to elements of "control person" liability were conclusory or involved BLMIS and not the Picower defendants. Id.

The appellants in this case argue that unlike the appellants in Goldman, they have alleged a "bona fide" Section 20(a) claim against the Picower defendants. The appellants argue that their Section 20(a) claims "involve direct injuries . . . based [on] their own reliance on fraudulent statements and misrepresentations made to them." Medkser v. Feingold, 307 F. App'x 262, 265 (11th Cir. 2008) (holding that Section 20(a)

claims were non-derivative of bankruptcy trustee's claims). However, like the plaintiffs in Goldman and unlike the plaintiffs in Medkser, the appellants have not made particularized allegations about any misrepresentations made by the Picower parties or direct involvement of the Picower parties in misrepresentations by Madoff. In fact, the New Fox Complaint does not provide any specific misrepresentations, and with respect to the only misrepresentations it generally discusses—the "inflated account values" sent by BLMIS—the allegations regarding Picower's involvement are entirely conclusory. New Fox Compl. ¶¶ 51-55. Therefore, the bankruptcy court properly found that the allegations supporting the Section 20(a) claim were conclusory and simply "based on the secondary effects of the fraudulent transfers to the Picower Defendants," and thus "inseparable from the Trustee's claim." Injunction Decision, 511 B.R. at 394.[5]

The appellants point to a handful of paragraphs of the New Fox Complaint to argue that there are sufficient, particularized allegations of Picower's direct involvement in misrepresentations made by BLMIS. However, the paragraphs contain allegations similar to the control person allegations

[5] The appellants argue at length that the bankruptcy court improperly treated the Trustee's motion as a motion to dismiss and found that the appellants Section 20(a) claim does not state a claim upon which relief can be grounded. The bankruptcy court did no such thing. The court's discussion of the merits of any of the appellants' claims only related to whether they were derivative of the Trustee's claims and could properly be enjoined.

that Judge Sullivan rejected in Goldman in the opinion cited with approval by the Court of Appeals. The portions of the New Fox Complaint identified by the appellants, along with the rest of the Complaint, are replete with the type of derivative allegations that Judge Sullivan identified: (1) They allege actions taken by the Picower defendants regarding "their *own* BLMIS accounts," and are thus duplicative of the Trustee's fraudulent transfer claims, 2013 WL 5511027, at *7 (emphasis in original); see New Fox Compl. ¶ 44 ("[Picower] directed Madoff . . . to document fictitious gains in the accounts of the Picower Parties . . . ."); id. ¶ 47 ("[The Picower Parties] demanded that BLMIS manufacture fictitious losses for the Picower Parties."); (2) They make particularized factual allegations regarding the BLMIS fraud, but the Picower defendants are nowhere to be found, see id. ¶¶ 34-40; or (3) They make conclusory allegations of control person liability with no particularized factual support, see id. ¶ 46 ("Picower fully and knowingly participated in the fraud that BLMIS perpetrated on customers . . . and actively encouraged people to enter into investment advisory agreements with BLMIS."); id. ¶ 119 ("Picower directly or indirectly induced the material misrepresentations and omissions giving rise to the securities violations alleged herein."). As the bankruptcy court correctly concluded: "The New Fox Complaint does not include any

particularized allegations that Picower solicited any investor or induced Madoff to do so. Indeed, the Fox Plaintiffs do not even allege that they were solicited directly or indirectly by Picower to invest in BLMIS. Thus the allegations in the New Fox Complaint are wholly conclusory." Injunction Decision, 511 B.R. at 394.

The appellants cite cases with examples of meritorious Section 20(a) claims, but the descriptions of the facts alleged in those cases present a telling contrast with the paucity of specifics in the New Fox Complaint. For example, the appellants cite In re Global Crossing, Ltd., 322 F. Supp. 2d 319 (S.D.N.Y. 2004), but the court in that case made clear that the factual allegations supporting the Section 20(a) claims were "fully developed" and "considerably more specific" than other claims that the court had dismissed. Id. at 351 (holding that the plaintiffs stated Section 20(a) claim against the defendant because they alleged specific scenarios showing "actual control and culpable participation" by the defendant). In another case relied upon by the appellants, the court lists several paragraphs of specific facts showing that the defendant acted with "severe recklessness." See In re Sunbeam Secs. Litig., 89 F. Supp. 2d 1326, 1344-45 (S.D. Fla. 1999). In this case, the appellants have alleged no particularized actions on the part of the Picower defendants. The purpose of this comparison is not

to opine on whether appellants' Section 20(a) claim would survive a motion to dismiss, but rather to make clear that any allegations purporting to show an injury directly traceable to the Picower defendants' conduct are too conclusory to present a "bona fide" claim independent from the Trustee's action. See Goldman, 2013 WL 5511027, at *9.

The appellants have offered little explanation for how the rest of the claims in the New Fox Complaint are independent from the Trustee's claims, and indeed, the bankruptcy court was plainly correct in finding those claims to be derivative. See Injunction Decision, 511 B.R. at 394-95. None of the Federal RICO claims and claims under Florida state law in the New Fox Complaint allege particularized injuries directly traceable to the Picowers' conduct. See New Fox Compl. ¶¶ 123-93. Accordingly, Counts Two through Six of the New Fox Complaint are also derivative of the Trustee's claims against the Picower defendants.

In sum, the appellants seek to bring claims based on legal theories that Judge Sullivan in Goldman and the Second Circuit Court of Appeals in Marshall explained could qualify *theoretically* as independent claims. However, the appellants have merely repackaged the same facts underlying the Trustee's claims without any new particularized injuries of the appellants that are directly traceable to the Picower defendants. Thus,

all of the claims in the New Fox Complaint "impermissibly attempt to 'plead around' the bankruptcy court's injunction barring all 'derivative claims,'" Marshall, 740 F.3d at 96, and the bankruptcy court properly granted the Trustee's motion to enjoin the filing of the New Fox Complaint in the Florida district court.[6]

Accordingly, the bankruptcy court's June 23 Order is **affirmed.**

[6] The Trustee argues that the claims in the New Fox Complaint violate the automatic stay provisions of 11 U.S.C. § 362(a)(3). The bankruptcy court found it unnecessary to reach this question in light of its holding that the New Fox Complaint violates the permanent injunction, and this Court agrees.

CONCLUSION

The Court has considered all of the arguments raised by the parties. To the extent not specifically addressed, the arguments are either moot or without merit.

The bankruptcy court's Order enjoining the appellants from filing the New Fox Complaint in the United States District Court for the Southern District of Florida is **AFFIRMED.**

This Opinion and Order finally disposes of the above captioned appeal.

The Clerk is directed to close this case and to close any open motions.

SO ORDERED.

Dated: New York, New York
May 11, 2015

_____/s/_____
John G. Koeltl
United States District Judge

EXHIBIT B

United States District Court
Southern District of New York

SUSANNE STONE MARSHALL, ET AL.,

Petitioners,

-against- **15 mc. 56 (JGK)**

BERNARD L. MADOFF, ET AL.,

MEMORANDUM OPINION AND ORDER

Respondents.

JOHN G. KOELTL, District Judge:

The petitioners move pursuant to Rule 27(a) to take the deposition of Bernard L. Madoff, who is presently serving a 150-year sentence for carrying out a multi-billion dollar Ponzi scheme. Rule 27(a) authorizes a deposition to perpetuate testimony, under certain circumstances, before an action is filed. The petitioners, Susanne Stone Marshall, Adele Fox, Marsha Peshkin, and Russell Oasis, are plaintiffs in a pending class action against the estate of Jeffrey Picower and related parties (the "Picower Parties") in the United States District Court for the Southern District of Florida (the "Florida Action"). The petitioners contend that a deposition of Madoff will provide further evidence against Jeffrey Picower as a co-conspirator in Madoff's scheme. The Picower parties and Irving H. Picard, the Trustee for the Bernard L. Madoff

Investment Securities LLC ("BLMIS") estate, oppose this petition.

For the reasons that follow, the petition is **denied.**

I.

After the petitioners brought the Florida Action in early 2010, the Bankruptcy Court for the Southern District of New York (Bernstein, J.) enjoined the petitioners from proceeding with that action, holding that their claims were derivative of claims brought against the Picower Parties by the Trustee. Shortly thereafter, the bankruptcy court approved a $7.2 billion settlement between the Trustee and the Picower Parties on behalf of all BLMIS investors, and issued a permanent injunction enjoining all claims against the Picower Parties that are derivative of the Trustee's claims. The petitioners then sought to file new claims against the Picower Parties in a proposed second amended complaint in the Florida Action, and on June 23, 2014, the bankruptcy court again found their claims to be derivative and granted the Trustee's motion to enjoin the proposed complaint pursuant to the Permanent Injunction.

In an Opinion and Order issued together with this order, this Court affirmed the bankruptcy court's June 23 order. See Opinion and Order, Fox v. Picard (In re Bernard L. Madoff Inv. Secs. LLC), No. 14cv6790. The factual background and procedural history of this case is recounted in more detail in that opinion

and in this Court's prior opinion affirming the bankruptcy court's earlier Orders. See Fox v. Picard (In re Madoff), 848 F. Supp. 2d 469, 473-76 (S.D.N.Y. 2012), aff'd sub nom. Marshall v. Picard (In re Bernard L. Madoff Inv. Secs. LLC), 740 F.3d 81, 96 (2d Cir. 2014). The Court assumes familiarity with those decisions.

While the appeal of the bankruptcy court's June 23 order was pending, the petitioners moved in the bankruptcy court pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure and Rules 27(a) and 27(b) of the Federal Rules of Civil Procedure to take Madoff's deposition. On October 30, 2014, the bankruptcy court denied the motion. See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, No. 09-11893, 2014 WL 5486279, at *1 (Bankr. S.D.N.Y. Oct. 30, 2014). The court denied the request under Rule 2004, which generally authorizes examinations of persons or entities with respect to the financial condition of the debtor and matters that may affect the administration of the debtor's estate, because the discovery sought was not for use in the bankruptcy proceeding and was not sought for a proper purpose under Rule 2004. Id. at *3. The bankruptcy court held that the Rule 27(a) petition should have been filed in a district court, and thus allowed the petitioners to withdraw the Rule 27(a) request without prejudice to filing in an appropriate district court. Id. at *4. As to

the request under Rule 27(b), which authorizes a deposition to perpetuate testimony pending appeal, the court noted that such a request is only made for use in further proceedings in the court in which an appeal is pending. Id. at *5. The bankruptcy court held that any further proceedings in the bankruptcy court would only deal with "purely legal issues" and would not require testimony, and thus denied the Rule 27(b) request because the Madoff testimony would not be required. Id.

The petitioners filed the present petition on January 2, 2015, in the United States District Court for the District of Delaware. On February 25, 2015, the Delaware district court transferred the petition to this Court pursuant to 28 U.S.C. § 1404(a).[1]

II.

Rule 27 of the Federal Rules of Civil Procedure sets forth a procedure for making an application to the Court to "perpetuate testimony about any matter cognizable in a United States court" prior to the filing of an action in court. Fed. R. Civ. P. 27(a)(1). Rule 27(a)(1) provides that a petition under that Rule "must" show: (A) that the petitioner expects to be a party to an action that may be cognizable in a court of the United States but the action is unable to be brought presently;

[1] Following the Delaware district court's decision, the petitioners filed a petition for a writ of mandamus in the Court of Appeals for the Third Circuit to reverse the district court's decision. On or about April 6, 2015, the court of appeals denied that petition. Apr. 7, 2015, Hr'g Tr. 54.

(B) the subject matter of the expected action and the petitioner's interest in such an action; (C) facts which the petitioner seeks to establish through the proposed testimony and the reasons for desiring to perpetuate that testimony; (D) the names or description of the expected adverse parties; and (E) the names and addresses of the witnesses to be examined and the substance of the testimony the petitioners expect to obtain from those witnesses. Id. Whether to grant discovery pursuant to Rule 27 is within the district court's discretion. In re Petition of Allegretti, 229 F.R.D. 93, 97 (S.D.N.Y. 2005) (citing Mosseller v. United States, 158 F.2d 380, 382 (2d Cir. 1946)).

Courts have made clear that Rule 27 may not be used for "the purpose of discovery before action is commenced" to enable parties to "fish for some ground for bringing suit." In re Petition of Austin, No. 13mc252, 2013 WL 5255125, at *1 (S.D.N.Y. July 16, 2013) (citing 8A C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2071 at 384–85 (3d ed. 2010)). The first factor of the Rule 27(a)(1) requirements may not be met by showing that the claim cannot be brought because it would not be meritorious, or that it would be difficult or inconvenient to sue. See Frigerio v. United States, No. 10cv9086, 2011 WL 3477135, at *1 (S.D.N.Y. Aug. 5, 2011) (denying Rule 27(a) petition where petitioner sought to "remedy

the deficiencies in his pleadings"); Wright, Miller & Marcus, supra, § 2072 at 393-94 ("If plaintiff is able to sue presently, Rule 27(a) cannot be satisfied by contentions that it would nevertheless be difficult or inconvenient for plaintiff to file suit.").

With respect to the first Rule 27(a)(1) factor, the petitioners argue that the cognizable action to be brought is a third amended complaint in the Florida Action, but they have not sufficiently explained why that complaint cannot be brought presently. This Court has now affirmed the bankruptcy court's injunction barring the petitioners from filing the second amended complaint in the Florida district court. The petitioners argue that they would have to dismiss their appeal of this case in order to bring the new complaint, but that is not a legal impediment to the petitioners filing a third amended complaint in the Florida court.[2] The petitioners also suggest that they are currently without sufficient guidance as to what would constitute a non-derivative claim, and that when they file a new complaint, the Trustee will once again move to enjoin that complaint. But concern about the sufficiency of their pleadings in the future cognizable action is not a valid impediment for the purposes of Rule 27. See Frigerio, 2011 WL 3477135, at *1.

[2] Indeed, the Goldman plaintiffs, whom the Bankruptcy court also enjoined from filing an amended complaint in its June 23 decision, withdrew their appeal and filed another amended complaint in the Florida district court.

Moreover, the petitioners appear to be bringing this petition for an improper purpose—namely, to seek discovery to frame their third amended complaint in the Florida Action. Although the petitioners denied at oral argument that they filed this petition to seek discovery, Apr. 7, 2015, Hr'g Tr. 58, the petitioners' motion in the bankruptcy court stated that the petitioners were seeking to take depositions to "amplify the factual allegations against the Picower Defendants to show that those claims are non-derivative." Harris Decl. Ex. 1, at ¶ 19. It is true that the petitioners made that argument in the context of their Rule 2004 motion, but it plainly bears on their motivation in this petition because they are seeking the same relief. Moreover, the general facts that the petitioners claim that Madoff will testify to appear to be geared towards filling in the gaps that courts have identified when finding claims brought against the Picower Parties to be derivative. See Pet. ¶ 16 (stating that Madoff is expected to testify to "detailed facts of Picower's knowledge and participation in Madoff's fraud"); see, e.g., A&G Goldman Partnership v. Picard (In re Bernard L. Madoff Inv. Sec., LLC), No. 12cv6109, 2013 WL 5511027, at *7 (S.D.N.Y. Sept. 30, 2013) (noting that the complaints lacked "any allegation that the Picower Defendants were involved" in the BLMIS fraud unconnected to trading on their own accounts). Because the petitioners have not satisfied

Rule 27(a)(1)(A), and because the Court finds that the petition's "purpose is to obtain facts in order to frame a complaint," the petition must be dismissed. Shuster v. Prudential Sec. Inc., No. 91cv0901, 1991 WL 102500, at *1 (S.D.N.Y. June 6, 1991).

The petitioners stress the urgency of deposing Madoff to preserve his testimony due to Madoff's age—he is 77 years old—and his apparently poor health. They also note that his deposition has never been taken in the approximately six years since the BLMIS scandal was revealed. The petitioners argue that even if they are presently able to file a suit, the balance of "the equities or the costs and inconveniences" between the parties favors granting the petition. In re Town of Amenia, NY, 200 F.R.D. 200, 203 (S.D.N.Y. 2001). However, the petitioners have presented little actual evidence demonstrating Madoff's poor health to support the purported urgency of preserving his testimony. Indeed, in the only other Rule 27 petitions for Madoff's deposition that this Court is aware of,[3] a judge in this district and a judge in the United States District Court for the Middle District of Florida rejected motions to take Madoff's deposition on the basis that the petitioners had not shown that

[3] Although neither party informed the Court in the petition papers or at oral argument of the other two matters, the Picower Parties informed the Court by letter after oral argument that they had learned of the two other petitions, one of which was made by counsel for the petitioners in this case. See Letter from Picower Parties Dated April 9, 2015, Marshall v. Madoff, No. 15mc56 (ECF No. 25).

Madoff's health warranted a court-ordered deposition. See Order Dated January 21, 2015, Dusek v. JP Morgan Chase & Co., No. 14cv184 (M.D. Fla.) (ECF No. 69) (declining to lift discovery stay under the Private Securities Litigation Reform Act because the petitioners did not present sufficient evidence of Madoff's poor health); Transcript of Civil Case for Motion Conference, Cent. Laborers Pension Fund v. Dimon, No. 14cv1041 (S.D.N.Y.) (ECF No. 13), at 6 (stating that any motion made to take Madoff's deposition would be denied due to lack of medical evidence of his poor health).

In any event, Rule 27(a)(1) makes clear that all of the factors "must" be satisfied, Fed. R. Civ. P. 27(a)(1), and the petitioners may not substitute a balance of the equities for their failure to satisfy Rule 27(a)(1)(A). The petitioners may file a third amended complaint in the United States District Court for the Southern District of Florida and, if they are able to state a non-derivative claim, seek to obtain an expedited deposition under Rule 30.

Accordingly, the Rule 27(a) petition is **denied.**

CONCLUSION

The Court has considered all of the arguments raised by the parties. To the extent not specifically addressed, the arguments are either moot or without merit. For the foregoing reasons, the petitioners' request to take Madoff's deposition under Rule 27(a) is **denied.** The **Clerk is directed to close all pending motions and to close this matter.**

SO ORDERED.

Dated: New York, New York
May 11, 2015

_____/s/_____
John G. Koeltl
United States District Judge