BakerHostetler

Baker&Hostetler LLP

45 Rockefeller Plaza
New York, NY 10111

T 212.589.4200
F 212.589.4201
www.bakerlaw.com

Keith R. Murphy
direct dial: 212.589.4686
kmurphy@bakerlaw.com

January 28, 2016

VIA ECF AND E-MAIL
(BERNSTEIN.CHAMBERS@NYSB.USCOURTS.GOV)

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

Re: Marshall v. Capital Growth Co. et al., 15-01293 (Bankr. S.D.N.Y.)

Dear Judge Bernstein:

We are counsel to Irving H. Picard (the "Trustee"), as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa–*lll*, and the substantively consolidated estate of Bernard L. Madoff, individually. Although briefing was to be completed in the above matter on January 15, 2016, Plaintiffs' reply papers included a declaration from Bernard Madoff (the "Madoff Declaration") in support of Plaintiffs' arguments. (*See* Exhibit B to Reply Declaration of Helen D. Chaitman, dated January 14, 2016, ECF No. 31 (the "Chaitman Reply Declaration").) While the Trustee believes that the Madoff Declaration and argument thereon should be stricken as improper, to the extent the Court considers those materials, the Trustee respectfully requests that the Court consider this letter as a surreply. *See Am. S.S. Owners Mut. Prot. and Indemn. Ass'n, Inc. v. Am. Boat Co., LLC*, No. 11-CV-6804, 2012 WL 32352 (S.D.N.Y. Jan. 6, 2012) (granting leave to file a surreply given that reply brief put forth new arguments); *In re Residential Capital, LLC*, No. 12-12020, 2014 WL 340027 (Bankr. S.D.N.Y. Jan. 30, 2014) (granting leave to file a surreply given that debtors' reply raised new evidence).

Counsel for Plaintiffs filed the Madoff Declaration in the main BLMIS case in connection with the motion of a BLMIS customer, Aaron Blecker, seeking to compel the Trustee to allow Mr. Blecker's customer claim (the "Blecker Motion"). (*Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC*, No. 08-1789, ECF No. 12319 (filed Dec. 28, 2015).) While the thrust of the Madoff Declaration concerns Blecker's customer claim, there is one gratuitous sentence that

states: "[p]ost 1990, I was put under enormous financial pressure by Jeffry Picower, who created the fraud I perpetrated and who was, by far, the primary beneficiary of the fraud. In order to raise money, I began to defraud my customers . . . ." (Madoff Dec. ¶ 4.)

The Trustee does not know how or why an assertion regarding Mr. Picower, which has nothing to do with the Blecker Motion, found its way into the Madoff Declaration. Regardless, the Madoff Declaration adds nothing to these proceedings. (*See, e.g.*, Transcript of Deposition of Bernard Madoff, ECF No. 1, at 111:14–23 (" . . . [Picower] told me he was wiped out and . . . didn't have the money, which is why I started doing all of this, because I realized he's not going to be able to make me whole, and I'm not going to be able to make the money I lost on the hedges. So that's what started this whole cycle."). Indeed, it is more interesting for what it does *not* say than for what it does. Specifically, even if taken as true,[1] the Madoff Declaration does not state that Picower had control over Madoff or BLMIS, and it does not provide any facts that could support Plaintiffs' control person claim. (*See* Trustee's Brief in Opposition, ECF No. 25, at 21–22.) Nor does it suggest that Picower caused any harm to the Plaintiffs distinct from the alleged harm to the BLMIS estate.

Despite years of access to Madoff, Plaintiffs state that they "have had no chance to question Madoff on whether and how Picower controlled his fraudulent activities." (Pl. Reply Br. at 6.) Tellingly, counsel for Plaintiffs did not swear to this fact in her own declaration. (*See* Chaitman Reply Declaration.) Indeed, Plaintiffs' counsel have admittedly interviewed Madoff numerous times in the last five years and have demonstrated their ability to obtain his declaration. During this same five-year period, Plaintiffs have attempted repeatedly to state an independent claim against Picower. Presumably, at some point during that time, Plaintiffs' counsel sought from Madoff any "facts" that could support Plaintiffs' conclusory assertion that Picower controlled "the overall decision-making at [BLMIS], the day to day activities at [BLMIS] . . ., solicitation of customers, the record keeping for Picower's accounts and other customers' accounts, and the recording of securities transactions and cash transfers in and from all customer accounts, including those of the Class Members." (*See Fox III* Compl. ¶ 127, attached as Exhibit 1 to the Declaratory Judgment Complaint.) But no such factual allegations from Madoff have been forthcoming. The Declaration, like Madoff's *Optimal* testimony, is a red herring.

To the extent that Plaintiffs' introduction of the Madoff Declaration, which concerns a different matter entirely unrelated to Picower, is designed to try to obtain Madoff's deposition, the district court has already denied the Plaintiffs' request for that extraordinary relief at this stage in the proceeding. *Marshall v. Madoff*, 2015 WL 2183939, at *3 (S.D.N.Y. May 11, 2015) (Koeltl, J.). The district court reasoned that Plaintiffs may not take Madoff's deposition in order to create a

[1] Of course, "given he is a convicted fraudster, Madoff's testimony lacks credibility . . . ." *See Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC (In re Madoff)*, 496 B.R. 713, 723 (Bankr. S.D.N.Y. 2013), *aff'd sub. nom. In re Bernard L. Madoff Inv. Secs. LLC*, No. 13-cv-4332 (ALC), 2014 WL 1302660 (S.D.N.Y. Mar. 31 2014) (denying request to compel Madoff to testify). And in addition to the demonstrably untrue statements in Madoff's *Optimal* testimony, the Trustee has noted in the context of the Blecker Motion that certain of Madoff's contentions are inconsistent with the books and records of BLMIS. (Trustee's Opposition to the Blecker Motion at 17–18 and Affidavit of Vineet Sehgal in Support of Trustee's Opposition, *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC*, No. 08-1789, ECF Nos. 12432 and 12433 (both filed Jan. 13, 2016).)

claim that might survive the Permanent Injunction. *Id.* The Court should not allow Plaintiffs to end-run the district court's clear ruling.

Significantly, Picower was a BLMIS customer. Picower's alleged participation in the fraud was limited to fraudulent conduct related to his own transfers into and out of the BLMIS estate through his own accounts. As has been the case since *Fox I*, whether framed as conspiracy, RICO, or now, as control person liability under the securities laws, Plaintiffs have alleged no injury distinct from harm to the BLMIS estate, which harmed all BLMIS customers in the same way. Accordingly, their claims are derivative of the Trustee's fraudulent transfer claims. *See Marshall v. Picard*, 740 F.3d 81 (2d Cir. 2014); *Fox v. Picard*, 848 F. Supp. 2d 469 (S.D.N.Y. 2012); *Marshall v. Picard*, 531 B.R. 345 (S.D.N.Y. 2015).

The Court should deny the Plaintiffs' motion and enforce the Permanent Injunction.

Respectfully submitted,

/s/ Keith R. Murphy

Keith R. Murphy

cc: All counsel of record