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April 5, 2017

VIA ECF AND ELECTRONIC MAIL

Honorable Stuart M. Bernstein
United States Bankruptcy Court
Southern District of New York
One Bowling Green, Room 723
New York, New York 10004-1408
Bernstein.chambers@nysb.uscourts.gov

Re: *In re: Bernard L. Madoff*, Adv. Pro. No. 08-1789

Dear Judge Bernstein:

We are counsel to Irving H. Picard, as trustee (“Trustee”) for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.* and the estate of Bernard L. Madoff. We write to request a conference pursuant to Local Bankruptcy Rule 7007-1 to seek permission for the Trustee to file a motion requesting that the Court adopt the rulings of the discovery arbitrator in similarly-situated cases or entering its own orders providing the same rulings.

As the Court is aware, there have been multiple discovery disputes in adversary proceedings over the past two years. In an effort to resolve the disputes, the Court appointed the Honorable Frank Maas (Ret.) as discovery arbitrator in October of 2016 to “establish a uniform, efficient and fair framework for dealing with discovery disputes” *See* ECF No. 14227 at ¶ 1, (the “Order Appointing Discovery Arbitrator”). On December 13, 2016, counsel for the Trustee and Ms. Chaitman, counsel for defendants in numerous adversary proceedings, participated in a day-long arbitration (the “Arbitration”) with Judge Maas to discuss discovery disputes in nine adversary proceedings.¹ As a result of the Arbitration and multiple telephone

¹ The nine adversary proceedings at issue are *Picard v. Train Klan*, Adv. Pro. No. 10-04905 (SMB); *Picard v. Benjamin*, Adv. Pro. No. 10-04621 (SMB); and *Picard v. DiGuilian*, Adv. Pro. No. 10-04728 (SMB), *Picard v. Wilenitz, et al.*, Adv. Pro. No. 10-04995 (SMB), *Picard v. Perlman, et al.*, Adv. Pro. No. 10-04541 (SMB); *Picard v. Gordon*, Adv. Pro. No. 10-04914 (SMB); *Picard v. Harwood*, Adv. Pro. No. 10-04818 (SMB); *Picard v. Estate of Boyer Palmer*, Adv. Pro. No. 10-04826 (SMB); *Picard v. DiGuilian*, Adv. Pro. No. 10-04728 (SMB); and *Picard v. Dusek*, Adv. Pro. No. 10-04644 (SMB).

April 5, 2017
Page 2

conferences with counsel for all parties, Judge Maas entered discovery orders on January 4, 2017 and January 9, 2017, in those nine adversary proceedings.

Judge Maas' orders provide a well-defined road map for the discovery process in these adversary proceedings. The January 9, 2017 Discovery Arbitrator's Amended Order, (the "Amended Order") establishes language for a stipulation of facts regarding the transfers at issue, for those defendants willing to stipulate, and identifies specific discovery requests that are no longer relevant should a defendant stipulate.² For those defendants that cannot or choose not to stipulate, the Amended Order also provides a procedure for resolving remaining discovery issues.³ The Amended Order also clarifies the information and/or documents that are to be provided in response to other, non-transfer related discovery requests, regardless whether a defendant enters into a stipulation under Paragraph A.2.⁴ Simply put, the Amended Order streamlines discovery, and provides certainty to the process, thus minimizing the need for judicial intervention in the parties' discovery disputes.

Judge Maas also entered orders permitting depositions of defendants to proceed, within certain guidelines.⁵ Despite these orders being entered, the Trustee's counsel is encountering difficulties in scheduling the depositions. In some instances, defendants are not making themselves available for deposition and in others, despite the Trustee's counsel waiting several weeks for defendants' availability, the dates offered are as far out as late August, more than five months after the request was made. Such unwillingness to provide dates and late availability is impacting the Trustee's ability to prosecute these cases in a timely manner.

In keeping with the intent of the Order Appointing Discovery Arbitrator, the Trustee requests a conference with the Court to discuss the adoption of Judge Maas' orders in full, applying them to all similarly situated adversary proceedings, and any procedural requirements of such application. This will provide a clear path for the parties to resolve discovery disputes and will avoid inconsistencies in discovery between adversary proceedings. Further, the Trustee requests a conference to discuss how the parties can timely schedule the depositions of defendants in order to prevent further unnecessary delay.

Respectfully submitted,

/s/ Edward J. Jacobs

Edward J. Jacobs

Enclosures

² See ECF No. 14820, January 9, 2017 Discovery Arbitrator's Amended Order, at ¶ 1A.2 and A.3, attached hereto as Exhibit A.

³ *Id.* at ¶ A.4.

⁴ *Id.* at ¶ A.6, A.7, B.1-B.7, C.1-C.3, and D.1.

⁵ See ECF Nos. 14808, January 4, 2017 Discovery Arbitrator's Order and 14819, January 9, 2017 Discovery Arbitrator's Order, attached hereto as Exhibits B and C.

April 5, 2017
Page 3

cc: Helen Davis Chaitman (hchaitman@chaitmanllp.com)
Gregory Dexter (gdexter@chaitmanllp.com)
Jennifer Allim (jallim@chaitmanllp.com)
Chaitman, LLP
465 Park Avenue
New York, New York 10022

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff-Applicant,

-against-

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (SMB)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

-against-

TRAIN KLAN, a Partnership, et al.

Defendants.

Adv. Pro. No. 10-04905 (SMB)

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

-against-

BRUNO DIGIULIAN,

Defendant.

Adv. Pro. No. 10-04728 (SMB)

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

-against-

DONALD A. BENJAMIN,

Defendant.

Adv. Pro. No. 10-04621 (SMB)

DISCOVERY ARBITRATOR'S AMENDED ORDER

The Discovery Arbitrator, having conducted a hearing on December 13, 2016, regarding defendants Donald A. Benjamin (“Benjamin”), Patsy DiGiulian, as Executrix of the Estate of Bruno L. DiGiulian (“DiGiulian”), and Train Klan, a partnership, and its individual partners (collectively, “Train Klan,” and together with Benjamin and DiGiulian, the “Defendants”), as well as a follow-up conference call on December 22, 2016, and having considered (a) the Trustee’s letter-applications dated November 3, 2016, seeking to compel the Defendants to produce documents and provide further interrogatory responses or withdraw affirmative defenses; (b) the Defendants’ responsive letter dated November 10, 2013; (c) the email sent by the Defendants’ counsel, Helen Chaitman, of Chaitman LLP, on December 24, 2016, in response to my email to counsel dated December 23, 2016; (d) the Trustee’s follow-up letter dated December 28, 2016; (e) Ms. Chaitman’s reply letter dated December 29, 2016; and (f) the email sent by Mr. Hunt of Baker Hostetler on December 29, 2016, it is hereby ORDERED as follows:

A. General Rulings

1. Baker Hostetler, counsel for the Trustee, and Chaitman LLP, counsel for the Defendants, shall endeavor, insofar as possible, to apply my rulings regarding discovery issues to other comparable adversary proceedings, including, but not limited to adversary proceedings in which Chaitman LLP represents the defendants.
2. Insofar as possible, the parties represented by Chaitman LLP in adversary proceedings shall stipulate as follows:

In connection with any motion practice, trial, or appeal, the Defendants: (a) will not challenge the accuracy or completeness of the deposit and withdrawal-related information set forth in columns 1 through 5 of Exhibit B to the Trustee's complaint; (b) concede that the funds reflected in Column 5 of Exhibit B were withdrawn from the Defendants' BLMIS account and received by the account holder; and (c) shall withdraw the Defendants' Twentieth Affirmative Defense, alleging that the Trustee has "fraudulently calculated the Defendants' liability" by charging the Defendants with "withdrawals that the Trustee has no proof were taken," Twenty-Seventh Affirmative Defense, alleging that the Trustee failed to credit properly "inter-account transfers, profit withdrawals, and other adjustments," and Forty-Sixth Affirmative Defense, alleging that the Trustee failed to credit properly "all of the Defendants' deposits."

3. In adversary proceedings in which the parties enter into the foregoing stipulation, the Defendants need not supplement their prior answers to the Trustee's interrogatories concerning: (a) the persons or entities that directly or indirectly received funds withdrawn from the Defendants' account and the amounts received; (b) the use of the funds received; (c) the banks or other institutions where the Defendants held accounts; and (d) instances in which the Defendants challenged the accuracy of the deposit or withdrawal information on the Defendants' BLMIS account statements.
4. In adversary proceedings in which the Defendants disagree with any of the dates, deposits, or withdrawals set forth in Exhibit B to the Trustee's complaint, counsel shall confer in an effort to stipulate, insofar as possible, to information therein which will not be contested and to discuss the effect of that stipulation on the Defendants' affirmative defenses. In such proceedings, after the parties have had an opportunity to confer, the Discovery Arbitrator will rule with respect to the effect of any stipulation on the discovery sought by the Trustee.

5. Any affirmative defenses that are withdrawn by stipulation may not later be reasserted in connection with any motion practice, trial, or appeal.
6. Within ten days after the entry of this Order, the Defendants shall produce any documents within their possession, custody, or control that relate to any remaining affirmative defenses that the Defendants assert. Any such documents that the Defendants have failed to produce within that time period may not be used by the Defendants for any purpose in connection with any motion practice, hearing, or trial.
7. Any documents that the Defendants or the Trustee receive from any third-party custodian in connection with an adversary proceeding in which Chaitman LLP represents the defendant must be made available to opposing counsel within ten days after their receipt.

B. Train Klan

1. For the period from the opening of its account at BLMIS through the present, Train Klan shall produce: (a) any agreements relating to the formation and operation of the partnership; and (b) copies of original documents sufficient to identify the general partners of the Train Klan partnership.
2. Document Request Nos. 3, 4. If Train Klan produces the foregoing documents, Train Klan need not further respond to Document Request Nos. 3 and 4.
3. Interrogatory No. 1. Interrogatory No. 1 shall be reworded to read as follows:

Provide the Partnership's legal name, the type of entity it is, the date on which it was established and whether it was formed out of a predecessor entity, the state or country under whose laws it was formed, the names and addresses of its current and former general partners, its current and former business addresses, and its current and former principal places of business.

Train Klan shall promptly answer revised Interrogatory No. 1.
4. Interrogatory Nos. 2, 3. The Discovery Arbitrator reserves decision with respect to Interrogatory Nos. 2 and 3 pending the service of Train Klan's amended answer to Interrogatory No. 1.
5. Interrogatory Nos. 5, 7, 10, 14, 15, 17; Document Request No. 9. At the hearing, Train Klan agreed to the stipulation set forth in paragraph A.2 above. Accordingly, Train Klan need not further respond to Interrogatory Nos. 5, 7, 10, 14, 15, and 17 or Document Request No. 9
6. Interrogatory No. 6. It is insufficient simply to identify BLMIS personnel with knowledge of the Transfers. Accordingly, Train Klan must identify any persons,

D. Benjamin

1. For the reason set forth above, Benjamin must identify any persons, including, accountants, attorneys, and other advisors, who have knowledge of any of the Transfers.

SO ORDERED.

Dated: New York, New York
January 4, 2017

/s/

FRANK MAAS
Discovery Arbitrator

Copies to Counsel via ECF

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff-Applicant

-against-

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (SMB)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

-against-

KENNETH PERLMAN, et al.,

Defendants.

Adv. Pro. No. 10-04541 (SMB)

3. A further telephone conference shall be held on January 5, 2016, at 11 a.m., to discuss the remainder of the Defendants' application.

SO ORDERED.

Dated: New York, New York
January 4, 2017

/s/

FRANK MAAS
Discovery Arbitrator

Copies to Counsel via ECF

Exhibit C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff-Applicant

-against-

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (SMB)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

-against-

KENNETH PERLMAN, et al.,

Defendants.

Adv. Pro. No. 10-04541 (SMB)

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

-against-

EDYNE GORDON,

Defendant.

Adv. Pro. No. 10-04914 (SMB)

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

-against-

TOBY HARWOOD,

Defendant.

Adv. Pro. No. 10-04818 (SMB)

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

-against-

ESTATE OF BOYER PALMER, et al.,

Defendants.

Adv. Pro. No. 10-04826 (SMB)

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

-against-

BRUNO DIGIULIAN,

Defendant.

Adv. Pro. No. 10-04728 (SMB)

IRVING H. PICARD, Trustee for the Liquidation
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

-against-

RUSSELL L. DUSEK,

Defendant.

Adv. Pro. No. 10-04644 (SMB)

DISCOVERY ARBITRATOR'S ORDER

The Defendants in the above-captioned adversary proceedings having moved for a protective order and to quash deposition notices served by the Trustee, and the Discovery Arbitrator having held a follow-up telephone conference on January 5, 2017, it is hereby

further ORDERED that, unless the Discovery Arbitrator otherwise directs, any deposition of any of the above-named Defendants shall be limited to a maximum of four hours

SO ORDERED.

Dated: New York, New York
January 9, 2017

/s/

FRANK MAAS
Discovery Arbitrator

Copies to Counsel via ECF