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April 20, 2018

**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: Picard v. Wilenitz*, Adv. Pro. No. 10-04995 (SMB)

Dear Judge Bernstein:

We write in response to Ms. Chaitman's April 11, 2018 letter (the "Letter") and accompanying declaration (the "Declaration") requesting permission to file a motion for sanctions against the Trustee pursuant to Fed. R. Civ. P. 37(b)(A).<sup>1</sup> Ms. Chaitman's submissions contain many misrepresentations and material omissions, all of which require some historical and factual context in order to fully understand the dispute and adequately correct the record.

Since Ms. Chaitman's first request for purported "trading records" in 2016, the Trustee has produced over 260,000 documents and 4,700,000 pages—including restoring and producing all documents stored on 206 microfilm reels. The Trustee has also produced three comprehensive indices that provide an itemized accounting of the hard-copy and electronic BLMIS data in the Trustee's possession (including microfilm), furnishing Ms. Chaitman with a wealth of information upon which to base specific and informed requests for relevant materials. In multiple emails, letters, and court filings, the Trustee has explained to Ms. Chaitman the nature of the data in his possession, how it is structured, and what portions of it have been affirmatively produced or otherwise made available—all of which the Trustee had previously

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<sup>1</sup> The Trustee does not object to Ms. Chaitman's request that this conference be scheduled for May 30, 2018, provided that this date is acceptable to the Court. For the sake of clarity, the Trustee does not object to the scheduling of a discovery conference pursuant to Local Bankruptcy Rule 7007, but objects to the scheduling of a formal hearing on Ms. Chaitman's proposed motion unless and until authorized by this Court, and after the Trustee has the opportunity to respond to any such motion.

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explained in written disclosures and discovery responses.<sup>2</sup> As detailed below, the Trustee has taken these measures, and many others, in a good faith effort to provide Ms. Chaitman with the “trading records” she has been demanding, despite the fact that the focus of her requests has been in a constant state of flux and evolution.

The Letter and Declaration omit all of these details and many others. Instead, Ms. Chaitman claims that the Trustee is in violation of two orders—one from this Court on May 17, 2016 (the “May 2016 Conference”), the other entered by Judge Maas on January 4, 2017 (the “January 2017 Order”)—and falsely states that, “[o]n March 23, 2018, the Trustee’s counsel made its first production of documents to the Defendants of the Trading Records we had been seeking since March 8, 2016.” Chaitman Decl. ¶ 20. These claims are false.

As a threshold matter, Ms. Chaitman mischaracterizes the May 2016 Conference and improperly omits relevant language by the Court that provides necessary context. At that conference, the Court went through each of Ms. Chaitman’s discovery requests in an attempt to resolve the dispute, but the Court nevertheless permitted Ms. Chaitman, on her own insistence, to file a motion to compel, which she eventually filed on August 29, 2016. After fully briefing the motion in this Court, the parties referred the dispute to Judge Maas for arbitration, which took place on December 13, 2016 (the “December 2016 Arbitration”).

Since the December 2016 Arbitration, the Trustee has fully complied with Judge Maas’s directives. On December 15, 2016, two days after the arbitration, the Trustee sent Judge Maas and Ms. Chaitman a letter detailing the steps the Trustee would take to identify the pre-1992 “trading records” Ms. Chaitman was, at the time, requesting. In that letter, the Trustee noted that he had identified 95 records from the pre-1992 period related to the National Securities Clearing Corporation (“NSCC”), an affiliate of the DTCC. In addition, the Trustee stated that he ran searches for “Depository Trust” and “National Securities” across the approximately 30 million records in the BLMIS Database, which hit on 16,042 documents (excluding 2,264 already in E-Data Room 1), and would immediately produce all of these documents. The Trustee also explained that he had identified 167 reels of microfilm that potentially contained records from these earlier time periods, and that he would restore and search those documents for additional DTCC or NSCC records. Finally, the Trustee agreed to produce two comprehensive indices: a searchable index of hard-copy materials stored at the BLMIS Warehouse (the “Warehouse Index”) and an index of electronic media obtained from BLMIS (the “Media Index”). Ms. Chaitman never objected to these measures.

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<sup>2</sup> For example, in the Trustee’s Responses and Objections to Ms. Chaitman’s original discovery requests in this adversary proceeding, served on April 8, 2016 and attached hereto as Exhibit A, the Trustee stated that he “preserved the nearly 20,000 pieces of BLMIS ESI and millions of pages of BLMIS Hard-Copy Documents in his possession, but did not include all such documents in the BLMIS Searchable Database. The Trustee did not process or scan, for example, backup tapes believed to contain redundant data, some floppy discs or CDs, and broken media. In responding to discovery requests, the Trustee does not search for BLMIS documents outside of the BLMIS Searchable Database.” In addition, the Trustee has routinely disclosed the enormous volume of unrestored data in his possession, including microfilm, in his Fed. R. Civ. P. 26 initial disclosures, and first made these disclosures in a case involving Ms. Chaitman on August 1, 2011.

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After the Trustee completed these productions, Ms. Chaitman filed a second motion to compel additional pre-1992 records without specifying the documents she was seeking or what she thought the Trustee was withholding. In a good faith effort to provide Ms. Chaitman with everything she was interested in, the Trustee agreed to produce, while the motion was still pending, the following additional materials: (i) the balance of the documents that were restored from the 167 microfilm reels described above; (ii) all documents restored from 34 additional reels with pre-1992 labeling that he had since identified; and (iii) all documents responsive to 147 search terms applied across the approximately 30 million records in the BLMIS Database. As explained to Ms. Chaitman, the Trustee based the 147 search terms on internal BLMIS reports reflecting purported trading activity that he identified in BLMIS's books and records.

Critically, based on the Trustee's productions and restorations described above, Judge Maas denied Ms. Chaitman's second motion to compel on March 15, 2017 (the "March 2017 Order," attached hereto as Exhibit B)—an order Ms. Chaitman neglects to mention in her papers. The March 2017 Order directed Ms. Chaitman to: (i) use the indices the Trustee had produced, which he recognized "should enable Ms. Chaitman to formulate more focused requests for trading records;" (ii) "send the Trustee's Counsel a letter specifically identifying the additional documents Ms. Chaitman seeks to have produced, and where she believes they may be found;" and (iii) "confer in person regarding Defendants' request for BLMIS trading records." *Id.* at 6. If the dispute persisted, Judge Maas directed the parties to send him "a joint letter . . . detailing their remaining areas of disagreement." *Id.* Judge Maas concluded by reminding the parties that Fed. R. Civ. P. 26 "requires that discovery requests be limited to items that are relevant to a party's claims or defenses and proportional to the needs of the case." *Id.* (emphasis in original).

Ms. Chaitman has ignored this order for the past year. Instead, Ms. Chaitman has repeatedly raised the issue in this Court, improperly demanding in June of 2017 (in connection with the Madoff "Day 2" Deposition briefing) that the Trustee restore all 5,300 available microfilm reels, which Ms. Chaitman falsely stated the Trustee had never disclosed (a request this Court denied). At the same time, and further ignoring Judge Maas's March 2017 Order, Ms. Chaitman broadened her request to include "all documents showing BLMIS' or Madoff's ownership of securities, regardless of whether it is House 5 or House 17, and covering the entire period from 1975 – 2008," and demanded that the Trustee produce millions of documents responsive to 22 search terms based on well-known financial institutions, such as "Barclays," "Morgan Stanley," and "Fidelity." The Trustee repeatedly reminded Ms. Chaitman of her obligations under the March 2017 Order, explained that the wholesale production of millions of irrelevant documents was beyond the scope of permitted discovery under Fed. R. Civ. P. 26, and invited her to meet and confer with the Trustee in good faith. For months, Ms. Chaitman refused these offers.

The Trustee nevertheless continued to seek compromise with Ms. Chaitman, eventually agreeing to her proposal that we produce documents responsive to two of her 22 search terms. Following these productions, Ms. Chaitman finally agreed to meet and confer with the Trustee on November 14, 2017 (the "November Meet and Confer"). At the November Meet and Confer,

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Ms. Chaitman clarified the specific types of records she was seeking and, for the first time, proposed a particularized method for identifying them. The parties agreed that the Trustee would run BLMIS bank account numbers across the Rule 2004 materials in the Trustee's possession—which the Trustee obtained from various third parties in response to Rule 2004 subpoenas—and produce any third-party business records that appear to reflect any BLMIS securities ownership or trading. Ms. Chaitman subsequently served a formal request for production, and the Trustee served responses and objections on December 21, 2017.

The Trustee's search across the Rule 2004 materials using the BLMIS/ Bernard Madoff bank account numbers yielded approximately 15,000 documents—the majority of which were already in E-Data Room 1. The Trustee reviewed the approximately 3,200 documents not in E-Data Room 1 and identified documents that appear to reflect BLMIS securities ownership or trading. Based on Ms. Chaitman's evolving definition of "trading records" and her history of criticizing the Trustee for allegedly withholding documents, the Trustee decided to produce all 3,200 of these documents, subject to the restrictions on confidential materials articulated in the Litigation Protective Order. Consequently, the Trustee's March 23, 2018 production included: (i) approximately 978 documents that appear to reflect BLMIS securities ownership or trading (all but 82 were duplicates of documents already in E-Data Room 1, but with different Bates numbering); (ii) other non-confidential documents containing the agreed-upon search terms; and (iii) documents responsive to Ms. Chaitman's request for materials related to the "509 Account" BLMIS maintained with JPMorgan & Chase. The production contained 2,112 documents.

The Trustee also informed Ms. Chaitman that he would produce the balance of documents containing the agreed-upon search terms once the Trustee completed the notification steps mandated by the Litigation Protective Order. These additional documents contain the agreed-upon search terms, but the Trustee has determined that they do not reflect securities ownership or trading. In light of Ms. Chaitman's complaints that the Trustee's March 23, 2018 production included non-responsive materials, the Trustee will hold this production in abeyance pending further requests from Ms. Chaitman or guidance from the Court.

As detailed above, the Trustee has fully complied with the agreements reached at the November Meet and Confer and all extant orders. Ms. Chaitman's request to file a sanctions motion should therefore be denied.

Respectfully submitted,

*/s/ Maximillian S. Shifrin*

Maximillian S. Shifrin

cc: Helen Davis Chaitman (via email)

## **EXHIBIT A**

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

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendants.

In re:

BERNARD L. MADOFF,

Debtor.

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

Plaintiff,

v.

TRUST U/ART FOURTH O/W/O ISRAEL  
WILENITZ, EVELYN BEREZIN WILENITZ,  
individually, and as Trustee and Beneficiary of the  
Trust U/ART Fourth O/W/O Israel Wilenitz, and  
SARA SEIMS, as Trustee of the Trust U/ART Fourth  
O/W/O Israel Wilenitz,

Defendants.

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

SIPA Liquidation

(Substantively Consolidated)

Adv. Pro. No. 10-04995 (SMB)

**TRUSTEE IRVING H. PICARD'S RESPONSES AND OBJECTIONS TO  
DEFENDANTS' DOCUMENT DEMANDS AND INTERROGATORIES**

Irving H. Picard (the "Trustee"), as trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS"), under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa-III ("SIPA"), and the estate of Bernard L. Madoff by and through the Trustee's counsel, Baker & Hostetler LLP, hereby provides the following Responses and Objections to the First Set of Interrogatories ("Interrogatory" or "Interrogatories") served by Defendants Trust U/ART Fourth O/W/O Israel Wilenitz, Evelyn Berezin Wilenitz, individually, and as Trustee and Beneficiary of the Trust U/ART Fourth O/W/O Israel Wilenitz, and Sara Seims, as Trustee of the Trust U/ART Fourth O/W/O Israel Wilenitz (collectively, the "Defendants") on March 8, 2016.

**OBJECTION TO DEFINITIONS**

1. The Trustee objects to the term "Identify" (with respect to persons) in Definition 1(c) as inconsistent with Local Rule 26.3(c)(3) of the United States District Court for the Southern District of New York and this Court, insofar as it purports to require the Trustee to identify "the relationship between such person and (i) the Responding Party, (ii) Madoff, and/or (iii) BLMIS." The Trustee will respond to Interrogatories containing "Identify" (with respect to persons) as it is defined by Local Rule 26.3(c)(3).

2. The Trustee objects to the term "Identify" (with respect to documents) in Definition 1(d) as inconsistent with Local Rule 26.3(c)(4) of the United States District Court for the Southern District of New York and this Court, insofar as it purports to require the Trustee to identify the "Bates-Stamp Number if said document has previously been produced or filed in E-Data Room." The Trustee will respond to Interrogatories containing "Identify" (with respect to documents) as it is defined by Local Rule 26.3(c)(4).

3. The Trustee objects to the term “Identify” in Definitions 7 and 8 as inconsistent with Local Rules 26.3(c)(3)-(4) of the United States District Court for the Southern District of New York and this Court. The Trustee will respond to Interrogatories containing “Identify” as it is defined by Local Rules 26.3(c)(3)-(4).

### **OBJECTION TO INSTRUCTIONS**

1. The Trustee will respond to these Document Demands and Interrogatories consistent with Rules 26, 33 and 34 of the Federal Rules of Civil Procedure, Rules 7026, 7033, and 7034 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), applicable Local Civil Rules of the United States District Court for the Southern District of New York and this Court (the “Local Rules”), and any applicable orders of the Court, including the Court’s June 6, 2011 Litigation Protective Order [ECF No. 4137] and October 17, 2013 Order on the Third-Party Data Rooms [ECF No. 5475] (the “Third-Party Data Room Order”).

### **SOURCES OF INFORMATION RELEVANT TO THE CLAIMS OR DEFENSES IN THE TRUSTEE’S POSSESSION, CUSTODY OR CONTROL**

1. Hard-copy documents from the offices of BLMIS, offsite storage used by BLMIS, and other locations (“Hard-Copy BLMIS Documents”).

2. Electronic documents obtained from among approximately 20,000 pieces of media from the offices of BLMIS, offsite storage used by BLMIS, and other locations (“BLMIS Electronic Documents” or “BLMIS ESI”).

3. Documents produced by third parties to the Trustee during his investigation or adversary proceedings (“Third-Party Documents”).



## **I. BLMIS DOCUMENTS**

From the Hard-Copy BLMIS Documents and BLMIS ESI (collectively, “BLMIS Documents”), the Trustee created a searchable electronic database containing approximately 4.7 million Hard-Copy BLMIS Documents and 25 million BLMIS Electronic Documents (“the **BLMIS Searchable Database**”). Defendants do not have direct access to the BLMIS Searchable Database because it contains documents relating to thousands of customers, many of which are not relevant to this proceeding. Instead, the Trustee provides all Defendants in these proceedings with documents as described below:

**A. Proof of BLMIS’s Fraud and Insolvency:** The Trustee created E-Data Room 1 from documents in the BLMIS Searchable Database as well as some Third-Party Documents. E-Data Room 1 contains documents relevant to the issues of the fraud conducted at BLMIS and its insolvency, and includes documents relating to BLMIS operations, regulatory disclosures, and financial records. *See Appendix A* for a description of documents available to Defendants in E-Data Room 1.

**B. BLMIS Core Account Documents:** The Trustee identified and segregated BLMIS core account documents for all customers (“Core Account Documents”). These Core Account Documents include account opening agreements, correspondence to and from BLMIS, transfer and/or redemption requests, customer statements, Portfolio Management and/or Portfolio Management Transaction Reports, which contain transaction history, and other documents that were specific to each account, and/or the Trustee’s calculation of net equity of a particular BLMIS account. Collectively, the Core Account Documents and the Bank Transfer Documents represent the documents produced to the Defendants by the Trustee with his initial disclosures

(the “Initial Disclosure Documents”), on April 1, 2016. *See Appendix B* for a summary of the Core Account Documents produced. The Core Account Documents produced are for Defendants’ accounts, 1CM806 and 1CM837, and the accounts affecting the principal balance calculation of Defendants’ accounts, 1CM000, 1CM007, 1CM188, and 1CM807.

**C. Proof of Transfers:** In addition to the Core Account Documents relevant to transfers described above, the Trustee identified and segregated BLMIS bank account records that reflect transfers to customers. Collectively, the Core Account Documents and the Bank Transfer Documents represent the documents produced to the Defendants by the Trustee with his initial disclosures (the “Initial Disclosure Documents”), on April 1, 2016. *See Appendix C* for a summary of the Bank Transfer Documents produced.

**D. Other Documents:** The Trustee preserved the nearly 20,000 pieces of BLMIS ESI and millions of pages of BLMIS Hard-Copy Documents in his possession, but did not include all such documents in the BLMIS Searchable Database. The Trustee did not process or scan, for example, backup tapes believed to contain redundant data, some floppy disks or CDs, and broken media. In responding to discovery requests, the Trustee does not search for BLMIS documents outside of the BLMIS Searchable Database. The Trustee will produce additional BLMIS Documents (meaning other than those described in Paragraphs A and B) from the BLMIS Searchable Database provided that the parties agree to narrowly tailored case-specific search terms and parameters that target documents relevant to the claims or defenses and

proportional to the needs of the case in accordance with Federal Rule 26(b)(1). *See Appendix D* for a description of sources of documents in the BLMIS Searchable Database.<sup>1</sup>

## **II. THE SQL DATABASES**

Information contained in certain BLMIS Hard-Copy Documents, BLMIS ESI, and certain Third-Party Documents was processed and input into multiple Microsoft Structured Query Language (“SQL”) Server tables and databases (the “SQL Databases”). To the extent feasible, the underlying documents used to build the SQL Databases are contained in E-Data Room 1. Some or all of the data in the SQL Databases is responsive to most of the Interrogatories. SQL Databases are used by the Trustee’s experts and are available for production to any Defendants upon request. Use of the SQL Databases requires some technical expertise. *See Appendix E* for the sources of data loaded into the SQL Databases.

### **THE TRUSTEE’S OBJECTIONS**

1. **Materials Prepared Post-December 11, 2008:** The Trustee will not produce or log Documents prepared by and/or received by him, his counsel, his professionals and/or other agents from on or after December 11, 2008 that are not relevant and/or are protected by the attorney work product doctrine, the attorney-client privilege, and/or any other applicable privileges or protections (“Materials Prepared Post-December 11, 2008”).

2. **Redundant, Cumulative, and Marginally Relevant Documents:** The BLMIS Searchable Database may contain documents that are responsive to the Interrogatories

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<sup>1</sup> Certain defendants with proper credentials have direct access to millions of Third-Party Documents in the Trustee’s possession. These documents are governed by the Third-Party Data Room Order. Per that Order, the Third-Party Data Rooms are not available to Defendants in this proceeding.

but which are redundant, cumulative, or marginally relevant (for example, the Defendants' names or account numbers appear on a list of customer names or account numbers and there is no other unique information). The Trustee objects to the production of these Documents to the extent that such production is not proportionate to the needs of the case under Federal Rule 26(b)(1) ("Redundant, Cumulative, and Marginally Relevant Documents").

3. **Information Outside the Scope of Relevance:** The Trustee objects to the disclosure of any information or identification of any Documents outside the scope of relevance articulated in Federal Rule 26 and Section 4(G) of the Litigation Procedures Order ("Information Outside the Scope of Relevance").

### **RESPONSES TO DOCUMENT DEMANDS AND INTERROGATORIES**

#### **REQUEST NO. 1:**

List the name and address of every former BLMIS employee with whom you spoke about the meaning of entries on the customer statements and state the substance of what you questioned each person about and what that person told you. Produce all documents you reviewed with each such employee and all documents indicating what each person said.

#### **RESPONSE:**

The Trustee objects to this Interrogatory and Document Request because it calls for Materials Prepared Post-December 11, 2008. The Trustee further objects that it seeks Information Outside the Scope of Relevance because it calls for documents that relate to customers other than the *Wilenitz* Defendants, and such documents are not relevant to the claims or defenses or proportional to the needs of the *Wilenitz* case. For these reasons, the Trustee will

not respond to this Interrogatory and Document Request.

**REQUEST NO. 2:**

With respect to Madoff's and BLMIS' books and records, list every single factual error you found in those books and records including, without limitation, inconsistencies between the deposits and withdrawals shown on the customer statements and the cancelled checks and copies of cancelled checks in the Trustee's possession.

**RESPONSE:**

The Trustee objects to this Interrogatory on the grounds that BLMIS' "books and records" and "errors" is vague because the Interrogatory does not specify which books and records and what kind of "errors." The Trustee further objects that it seeks Information Outside the Scope of Relevance because it calls for documents that relate to customers other than the *Wilenitz* Defendants, and such documents are not relevant to the claims or defenses or proportional to the needs of the *Wilenitz* case. Notwithstanding that information about other BLMIS customers is not relevant to the *Wilenitz* case, the Trustee responds that customer statements and canceled checks are in E-Data Room 1. The Trustee states pursuant to Federal Rule 33(d)(1) that Defendants may determine the response to this request by comparing the customer statements with the checks and that the burden of ascertaining the information is substantially the same for either party.

With respect to the cash activity and principal transactions that affect the principal balance calculation (or net equity) in the *Wilenitz* accounts, the Trustee has not identified any errors. The documents that the Trustee produces that reflect these transactions are in the Initial Disclosure Documents. Further, nothing in the Initial Disclosure Documents indicates that the

*Wilenitz* Defendants ever brought any errors to the attention of BLMIS; nor have they pointed out any errors to the Trustee or set forth a specific, good-faith statement that they dispute any particular transaction. To the contrary, the *Wilenitz* Defendants have admitted in their claims submission to the Trustee that the BLMIS records match their personal bank records. *See* Appendix F, Defendants' June 26, 2009 claims submission.

**REQUEST NO. 3:**

List every single factual error asserted by any Madoff or BLMIS customer in their statements and produce all documents relating to such error.

**RESPONSE:**

Trustee's Response to this is the same as Trustee's Response to No. 2.

**REQUEST NO. 4:**

List every single "PW" entry on a customer statement where there is no documentary evidence that the customer requested to receive profit withdrawals and produce all documents relating thereto.

**RESPONSE:**

The Trustee objects to this Interrogatory on the grounds it seeks Information Outside the Scope of Relevance because it calls for information that relates to customers other than the *Wilenitz* Defendants, and such information is not relevant to the claims or defenses or proportional to the needs of the *Wilenitz* case. There are no PW entries on the customer statements for the *Wilenitz* accounts. There is one or more PW transactions in accounts affecting the net equity of the *Wilenitz* accounts and such customer statements were included in the Initial

Disclosure Production. The Trustee states pursuant to Federal Rule 33(d)(1) that Defendants may determine the response to this request by reviewing the Initial Disclosure Production and that the burden of ascertaining the information is substantially the same for either party. Notwithstanding that information about other BLMIS customers is not relevant to the *Wilenitz* case, the Trustee will produce a list of PW transactions that indicates whether the transaction reconciles to BLMIS bank records, customer files, or documents produced to the Trustee. This list was made available in connection with the Trustee's Motion Affirming Treatment of Profit Withdrawal Transactions, ECF Nos. 10660-10664, attached as Exhibit 7 to the Declaration of Lisa M. Collura, ECF No. 10664.

**REQUEST NO. 5:**

If you contend that Madoff's and BLMIS' customer statements were not "riddled with fraud" with respect to the deposits and withdrawals, produce all reports and documents on which you base that conclusion.

**RESPONSE:**

The Trustee objects to this Interrogatory because it violates Local Rule 33.3(c), which prohibits interrogatories that "seek the claims and contentions of the opposing party" until after the conclusion of other discovery unless the Court has ordered otherwise. This Interrogatory seeks information about the Trustee's contentions. Discovery is ongoing in *Wilenitz*. Defendants have not sought permission from the Court to ask contention interrogatories.

While the foregoing protects the Trustee from having to respond at all to this Interrogatory, the Trustee nonetheless states that he further objects to this Interrogatory and

Document Request to the extent that it calls for “reports and documents” that are Materials Prepared Post-December 11, 2008. The Trustee will not produce such materials.

The Trustee also objects to the unexplained use of “riddled with fraud” with respect to the customer statements, and has no way of knowing the source of that quote. As the Trustee explained during the meet and confer about this Interrogatory, it is the Trustee’s position that the cash activity reflected in the BLMIS customer statements is accurate and not fraudulent.

The Trustee also objects to the Interrogatory and Document Request because it seeks Information Outside the Scope of Relevance. Specifically, this Interrogatory and Document Request seeks information that is not relevant to the claims or defenses or proportional to the needs of the *Wilenitz* case given that it calls for information and documents relating to thousands of other BLMIS customers. The Trustee further responds that, with respect to the cash activity and principal transactions that affect the principal balance calculation (or net equity) in the *Wilenitz* accounts, the Trustee has not identified any fraud. Further, the *Wilenitz* Defendants have not pointed out any fraud in the *Wilenitz* customer statements to the Trustee; nor they have pointed out any fraud to the Trustee or set forth a specific, good-faith statement that they dispute any particular transaction. To the contrary, the *Wilenitz* Defendants have admitted in their claims submission to the Trustee that the BLMIS records match their personal bank records. *See* Appendix G, Defendants’ claims submission.

Finally, the Trustee objects to the extent this Interrogatory prematurely seeks to have the Trustee disclose expert materials well in advance of the deadline for disclosure of this information as provided in the Court-approved case management order entered in this adversary proceeding. The Trustee will supplement his productions with additional documents considered



by his experts, if any, following submission of their expert reports during expert discovery. The Trustee further notes that to the extent fact witness relied on by the Trustee may also qualify as expert witnesses pursuant to Federal Rule 26(a)(2)(C), the Trustee will identify such witnesses in expert discovery.

**REQUEST NO. 6:**

As of the date you respond to these interrogatories, list every customer whose allowed claim has not been paid in full and state the amount of that customer's allowed claim and the amount that customer has received to date. Produce all documents from which you derived your answer. If you take the position that you cannot reveal the names of the account holders, list the accounts by account number and indicate whether the account is (a) an individual; (b) a hedge fund; (c) a family investment fund; (d) an IRA account; or some other category.

**RESPONSE:**

The Trustee objects to this Interrogatory and Document Request because it seeks information that is not relevant to the claims or defenses or proportional to the needs of the *Wilenitz* case given that it calls for information relating to claimants other than *Wilenitz*. The Trustee responds specifically as to the *Wilenitz* Defendants, and states their claims have not been allowed.

**REQUEST NO. 7:**

With respect to your most recent distribution to allowed claimants, how much did you distribute in total and how much did you distribute to each allowed claimant. Produce all documents evidencing the distribution schedule including a list of the amount paid to each claimant, showing the name of each claimant. If you take the position that you cannot reveal the

names of the account holders, list the accounts by account number and indicate whether the account is (a) an individual; (b) a hedge fund; (c) a family investment fund; (d) an IRA account; or some other category.

**RESPONSE:**

The Trustee objects to this Interrogatory and Document Request seeks information that is not relevant to the claims or defenses or proportional to the needs of the *Wilenitz* case given that it calls for information that (i) is not relevant to the issue of whether the Trustee may avoid and recover the avoidable transfers from the *Wilenitz* Defendants and (ii) relates to hundreds of claimants other than the *Wilenitz* Defendants. The Trustee responds specifically as to the *Wilenitz* Defendants, and states their claims have not been allowed and, accordingly, no interim distribution was made to them. The Trustee further refers the Defendants to information regarding the claims process and interim distributions, located on the Trustee's website at [www.madofftrustee.com](http://www.madofftrustee.com).

**REQUEST (UNNUMBERED)**

List the name of every customer who sold an allowed claim to a claims purchaser, the amount paid to the customer by the claims purchaser, the allowed amount of the claim, and the date of the purchase. Produce all documents from which you derived your answer.

**RESPONSE:**

The Trustee's Response to this is the same as Trustee's Response to No. 7.

**REQUEST NO. 8:**

List every claims purchaser to whom you have made payment and state the amount, to date, that you have paid each claims purchaser.

**RESPONSE:**

The Trustee objects to this Interrogatory and Document Request because it seeks information that is not relevant to the claims or defenses or proportional to the needs of the *Wilenitz case*. The information called for by this Interrogatory has no bearing on whether the Trustee may avoid and recover the avoidable transfers in the *Wilenitz case*. For this reason, the Trustee will not respond to this Interrogatory and Document Request.

**REQUEST NO. 9:**

Provide a list of every allowed claim with the amount of the allowed claim. If you take the position that you cannot reveal the names of the account holders, list the accounts by account number and indicate whether the account is (a) an individual; (b) a hedge fund; (c) a family investment fund; (d) an IRA account; or some other category.

**RESPONSE:**

The Trustee's Response to this is the same as Trustee's Response to No. 7.

**REQUEST NO. 10:**

State the precise fee arrangement you have had with Baker & Hostetler LLP from inception of your appointment as Trustee. Produce the document which sets forth that compensation arrangement.

**RESPONSE:**

The Trustee states that, in light of the March 18, 2016 Order Implementing Court's March 17, 2016 Bench Ruling Granting Protective Order, the Trustee is not required to respond to Interrogatory No. 10. *See* Adv. Pro. No. 08-01789, Docket No. 12912.

**REQUEST NO. 11:**

State the precise amount you have received in compensation since joining Baker & Hostetler LLP in December 2008 through the date you respond to these interrogatories. Produce all documents from which you derived your answers.

**RESPONSE:**

The Trustee states that, in light of the March 18, 2016 Order Implementing Court's March 17, 2016 Bench Ruling Granting Protective Order, the Trustee is not required to respond to Interrogatory No. 11. *See* Adv. Pro. No. 08-01789, Docket No. 12912.

**REQUEST NO. 12:**

In the event that any other attorney at Baker & Hostetler LLP receives a percentage of the gross fee revenues relating to this proceeding other than you, state the name or names of such persons and the precise fee arrangement each of them has with Baker & Hostetler LLP Produce all documents from which you derived your answers.

**RESPONSE:**

The Trustee states that, in light of the March 18, 2016 Order Implementing Court's March 17, 2016 Bench Ruling Granting Protective Order, the Trustee is not required to respond to Interrogatory No. 12. *See* Adv. Pro. No. 08-01789, Docket No. 12912.

**REQUEST NO. 13:**

List the name, address and phone number of every BLMIS employee who worked in the market-making business and in the proprietary trading business as of January 1, 2008 and explain his/her function and compensation.

**RESPONSE:**

The Trustee objects to Interrogatory No. 13 to the extent it seeks Information Outside the Scope of Relevance. The Trustee nonetheless states that, approximately 4 million documents that relate to the operations of BLMIS are in E-Data Room. The purpose of E-Data Room 1, among others, was so that the Trustee could produce documents relating to the operations of BLMIS on a global basis. It is not proportional to the needs of the case in *Wilenitz* to respond to this Interrogatory and require the Trustee to undertake any additional burden when the Defendants have not requested access to the source of more than 4 million documents which includes lists of BLMIS employees. The Trustee directs the Defendants to MADTNN00081805 located in E-Data Room 1, which lists the persons employed by BLMIS, to the best of the Trustee's knowledge, for a time period including January 1, 2008. The Trustee also directs the Defendants to Bates No. FIDTAA0000166-FIDTAA0000325, located in E-Data Room 1, that contains additional information responsive to this request. In addition, attached as Exhibit A is a list of readily available employee addresses and phone numbers we were able to identify after a reasonable search. We make no representations as to the accuracy of any the contents of Exhibit A.

**REQUEST NO. 14:**

Explain the basis on which you determined that the Defendants have no net equity and produce the front and back of each deposit into and withdrawal from the Account and from any account which transferred funds into the Defendants' account.

**RESPONSE:**

In a meet and confer regarding these Interrogatories and Requests, defense counsel clarified that this Interrogatory should state, "produce the front and back of each check deposited

into and withdrawn from the Account and from any account which transferred funds into the Defendants' account."

The Trustee responds that the Trustee's expert calculated the principal balance by reviewing the Initial Disclosure Documents, which were produced to Defendants on April 1, 2016.

It is not proportional to the Wilenitz case for the Trustee to be required to produce the backs and fronts of every check deposited into and withdrawn from the Defendants' accounts and from any account which transferred funds into the Defendants' account when the Defendants have not set forth a specific, good-faith reason that the calculation is incorrect.

Finally, the Trustee objects to the extent this Interrogatory prematurely seeks to have the Trustee disclose expert materials well in advance of the deadline for disclosure of this information as provided in the Court-approved case management order entered in this adversary proceeding. The Trustee will supplement his productions with additional documents considered by his experts, if any, following submission of their expert reports during expert discovery. The Trustee further notes that to the extent fact witness relied on by the Trustee may also qualify as expert witnesses pursuant to Federal Rule 26(a)(2)(C), the Trustee will identify such witnesses in expert discovery.

**REQUEST NO. 15:**

Explain how you intend to establish that Madoff was insolvent in each year from 1960 – 2000 and produce all documents on which you will rely to establish insolvency for each of those years.

**RESPONSE:**

The Trustee responds that he intends to put forth an expert on the insolvency of BLMIS. The documents upon which the expert relies to establish insolvency are in E-Data Room 1.

The Trustee objects to the extent this Interrogatory prematurely seeks to have the Trustee disclose expert materials well in advance of the deadline for disclosure of this information as provided in the Court-approved case management order entered in this adversary proceeding. The Trustee will supplement his productions with additional documents considered by his experts, if any, following submission of their expert reports during expert discovery. The Trustee further notes that to the extent fact witness relied on by the Trustee may also qualify as expert witnesses pursuant to Federal Rule 26(a)(2)(C), the Trustee will identify such witnesses in expert discovery.

**REQUEST NO. 16:**

Provide the gross trading volume by both number of shares traded and total dollar volume for each year of Madoff's operation, broken down by (a) investment advisory business (b) proprietary trading business; and (c) market making business. Produce the documents on which you base your responses.

**RESPONSE:**

The Trustee objects to this Interrogatory because it violates Local Rule 33.3(c), which prohibits interrogatories that "seek the claims and contentions of the opposing party" until after the conclusion of other discovery unless the Court has ordered otherwise. This Interrogatory seeks information about the Trustee's contentions. Discovery is ongoing in Wilenitz. Defendants have not sought permission from the Court to ask contention interrogatories.

While the foregoing protects the Trustee from having to respond at all to this Interrogatory, the Trustee nonetheless states that there were no securities purchased by the investment advisory business unit, of which the *Wilenitz* Defendants were customers. With respect to the proprietary trading business and the market making business units, records from BLMIS and third parties, including the Depository and Trust Clearing Corporation (“DTCC”), which reflect trading activity by those business units of BLMIS, are in E-Data Room 1. The purpose of E-Data Room 1, among others, was to provide Defendants, including the *Wilenitz* Defendants, the documents upon which the Trustee relies to establish that no trades were being made by the investment advisory business unit and that no trades were being made by the market making and proprietary trading business unit on behalf of customers of the investment advisory business unit. It is not proportional to the needs of the case in *Wilenitz* to respond to this Interrogatory and Document Request and require the Trustee to undertake any additional burden when the Defendants have not requested access to the source of more than approximately 4 million responsive documents or articulated a specific reason as to whether and why the Defendants contend that BLMIS was not a fraudulent enterprise scheme or insolvent during the relevant time period.

Finally, the Trustee objects to the extent this Interrogatory prematurely seeks to have the Trustee disclose expert materials well in advance of the deadline for disclosure of this information as provided in the Court-approved case management order entered in this adversary proceeding. The Trustee intends to establish the insolvency of BLMIS through his experts. The Trustee will supplement his productions with additional documents considered by his experts, if any, following submission of their expert reports during expert discovery. The Trustee further notes that to the extent fact witness relied on by the Trustee may also qualify as expert witnesses



pursuant to Federal Rule 26(a)(2)(C), the Trustee will identify such witnesses in expert discovery.

**REQUEST NO. 17:**

Provide the number of employees who worked in each of the trading areas set forth in interrogatory # 17 for each year of Madoff's operations and produce the documents on which you base your responses.

**RESPONSE:**

The Trustee's Response to this is the same as Trustee's Response to No. 13.

**REQUEST NO. 18:**

For each security listed on the Defendants' account statements for each year from 1982 on, set forth the number of shares of the listed companies' stock that BLMIS held at that time; and, if the stock was specified as belonging to a particular customer, specify the customer and the number of shares shown on BLMIS' records as being owned by that customer. Produce the documents on which you base your responses.

**RESPONSE:**

The Trustee states pursuant to Federal Rule 33(d)(1) that Defendants may determine the response to this request for Defendants by comparing the DTCC records in E-Data Room 1 with the Initial Disclosure Documents and that the burden of ascertaining the information is substantially the same for either party.

**AS TO OBJECTIONS:**

**BAKER & HOSTETLER LLP**

Dated: April 8, 2016  
New York, New York

By: /s/ David J. Sheehan  
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*Attorneys for Irving H. Picard, Trustee for  
the Substantively Consolidated SIPA  
Liquidation of Bernard L. Madoff  
Investment Securities LLC and the Estate  
of Bernard L. Madoff*

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**VERIFICATION**

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STATE OF NEW YORK     )  
                                      )  
COUNTY OF NEW YORK    )

I, Irving H. Picard, as the Court-appointed Trustee of the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, hereby state that the foregoing Interrogatory Responses and Objections (“Responses”) have been assembled and prepared by my counsel. I sign for purposes of being bound by the foregoing Responses, but further state that as the Trustee, I have no personal knowledge of the facts and information herein. The Responses set forth herein, subject to inadvertent or undiscovered errors, are based on and therefore necessarily limited by the records and information still in existence, presently recollected, and/or thus far discovered in the course of the preparation of these Responses. Consequently, I reserve the right to make changes to the Responses if at any time it appears that an error or omission has been made therein or if additional or more accurate information becomes available.

Dated: April 8, 2016

  
\_\_\_\_\_  
Irving H. Picard

## **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-

TRUST U/ART FOURTH O/W/O ISRAEL  
WILENITZ, et al.,

Defendants.

Adv. Pro. No. 10-04995 (SMB)

**DISCOVERY ARBITRATOR'S ORDER**

One of the continuing areas of disagreement in this and other adversary proceedings in which Helen Davis Chaitman of Chaitman LLP (“Ms. Chaitman”) serves

as defense counsel relates to the date that Bernard L. Madoff (“Madoff”) began his Ponzi scheme. The Trustee maintains that the trades recorded on behalf of investment advisory customers of Bernard L. Madoff Investment Securities LLC (“BLMIS”) were entirely fictitious as far back as the early 1970s, when Madoff allegedly was pursuing a convertible arbitrage trading strategy. The Wilenitz Defendants and other defendants represented by Ms. Chaitman (collectively, the “Defendants”), along with other defendants, contend that the investment advisory fraud first began in or around 1992, when Madoff allegedly began to pursue a split-strike trading strategy. This dispute is significant because its resolution might affect the calculation of at least some of the Defendants’ net equity positions and, hence, the two-year fictitious profits that the Trustee potentially may recover. See, e.g., In re Bernard L. Madoff Inv. Secs. LLC, 773 F.3d 411, 415, 423 (2d Cir. 2016) (limiting the Trustee’s avoidance powers in constructive fraud cases to transfers made within two years of the filing of the bankruptcy petition); id., 654 F.3d 229, 241 (2d Cir. 2011) (rejecting reliance on BLMIS customers’ brokerage statements because that “would require the Trustee to establish each claimant’s ‘net equity’ based on a fiction created by the perpetrator of the fraud”).

To date, the principal evidentiary support for the Defendants’ position is the deposition testimony of Madoff himself – a witness whose credibility the Trustee questions. In particular, the Trustee points to the report of one of his experts, Bruce G. Dubinsky, who concludes, in substance, that Madoff’s testimony regarding the fraud onset date is false. The Defendants, however, are not required to accept Mr. Dubinsky’s findings. Indeed, even if Mr. Dubinsky is correct, BLMIS also engaged in extensive

trading of securities as part of its “House 5” proprietary trading and market-making businesses. In the Defendants’ view, if BLMIS actually purchased and held certain securities in connection with those aspects of its business, and those same securities are reflected on their contemporaneous trade confirmations or periodic statements, they are entitled to a credit for those actual trades when the Trustee calculates their net equity positions.<sup>1</sup>

For these reasons, the Defendants have moved to compel the production of any records in the Trustee’s possession that reflect actual securities trading by BLMIS during the period prior to 1992, when Madoff contends that he was engaging in actual trading for his investment advisory customers. (See letter to the Discovery Arbitrator from Ms. Chaitman, dated Feb. 21, 2017) (“February 21 Letter”). Certain such records were made available to the Defendants through E-Data Room 1, an electronic database that contains documents concerning “all aspects of the operations and financials of . . . BLMIS.” (See Tr. of Discovery Arbitration on Dec. 13, 2016, at 134). In addition, on December 13, 2016, after this issue first came before me, I directed that, “[t]o the extent that there are any additional relevant records of securities trading that have not been made available to [the Wilenitz Defendants] through [E-]Data Room 1, they must promptly be produced.” (See Picard v. Trust U/Art. Fourth o/w/o Israel Wilenitz, Adv. Pro. No. 10-

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<sup>1</sup> The Trustee contends that a finding that the fraud first began in 1992 would affect the Trustee’s demand amounts with respect to only two of the Defendants who were permitted to participate in the Madoff deposition. (See letter to the Discovery Arbitrator from Edward J. Jacobs, Esq., dated Mar. 6, 2017) (“March 6 Letter”), at 4-5. The Defendants disagree with this calculation. (See letter to the Discovery Arbitrator from Ms. Chaitman, dated Mar. 7, 2017 (“March 7 Letter”), at 1).

4995, ECF No. 76, ¶ 13) (Discovery Arbitrator’s Order dated Jan. 4, 2017) (memorializing Dec. 13th ruling). I further directed that the Trustee indicate, by December 20, 2016, how long it would take to make “a good faith determination as to whether there are any BLMIS trading records for the years prior to 1992.” (Id. ¶ 4).

On December 15, 2016, the Trustee stated that he had located certain additional trading records, and had retained a vendor to process “167 reels of microfilm that may contain additional BLMIS trading records from 2002 and earlier.” (See letter to the Discovery Arbitrator from Mr. Jacobs, dated Dec. 15, 2017 (“December 15 Letter”), at 2). The Trustee also agreed to produce several indices of BLMIS records, including (i) a searchable index of hard copy BLMIS documents contained in more than 13,000 boxes of documents, and (ii) an index of the electronic media obtained from BLMIS. (Id.). The Trustee nevertheless cautioned that the extraordinary volume of hard copy documents meant that it had not been possible to scan all the papers obtained from BLMIS, nor was it possible to restore all the data from electronic media “given the associated expense and the redundancies in the data that had already been processed.” (Id. at 3).

More recently, rather than attempting to cull relevant trading records from the reels of microfilm that were the subject of the December 15 Letter, the Trustee agreed to produce every document that the vendor had restored. (March 6 Letter at 3). The data on the first 167 reels was produced to the Defendants on March 6, 2017. (See letter to Sarah Holwell from Mr. Jacobs dated Mar. 6, 2016). Additionally, the Trustee promised to produce, on a rolling basis over the coming weeks, all of the documents on an additional 34 reels of microfilm that the Trustee had identified as potentially containing



pre-1992 trading records. The cost of restoring and processing the 167 reels was \$390,920, and the estimated cost of restoring and processing the remaining reels is estimated to be \$125,000. (See Aff. of Nicole L. Tineo, sworn to on Mar. 6, 2017, ¶¶ 5-6). Thus, the Trustee will likely have spent more than \$500,000 by the time that the second set of microfilm documents is produced.

In the March 7 Letter, the Defendants complain that, despite these efforts, the Trustee has not complied with my directive to produce all relevant records of BLMIS securities trading. (See March 7 Letter). Indeed, there is language in the Trustee's March 6 Letter which suggests that the Trustee may have cabined his response to the Defendants' request. Specifically, the Trustee's counsel states that the Trustee is continuing to search for "additional records, including records reflecting Treasury purchases, and will supplement [his] production to the extent any such records are readily accessible and can be identified." (March 6 Letter at 4) (emphasis added). Counsel similarly notes in his letter that the Trustee is committed to producing or making available "relevant, proportional, and non-objectionable records to the extent they are readily accessible and identifiable." (Id.) (emphasis added). The Trustee complains that "Ms. Chaitman nonetheless appears to be demanding the production of all records of purported trading activity, wherever they exist, without regard to their relevance to any particular case," suggesting further that she "has failed to meet her burden to demonstrate relevance and proportionality." (Id.) (emphasis in original).

It is unclear from counsel's March 6 Letter whether the Trustee's observations concerning securities trading records constitute substantive objections based

upon which documents have been withheld or are merely an indication that every box and microfilm reel has not been exhaustively searched. The continuing existence of this ambiguity is no doubt attributable (at least in part) to counsels' failure to have any face-to-face discussions regarding the Defendants' claim that the Trustee's response to their requests for trading records is inadequate. Ms. Chaitman, however, now has indices of the documents and electronic files in the Trustee's possession. These indices should enable Ms. Chaitman to formulate more focused requests for trading records.

In these circumstances, I will direct that Ms. Chaitman and counsel for the Trustee confer in person regarding the Defendants' request for BLMIS trading records. I further will direct that, at least three days before that meeting occurs, Ms. Chaitman shall send the Trustee's counsel a letter specifically identifying the additional documents she seeks to have produced, and where she believes they may be found. I note that, pursuant to Bankruptcy Rule 7026, Rule 26 of the Federal Rules of Civil Procedure applies to adversary proceedings. Rule 26, in turn, requires that discovery requests be limited to items that are relevant to a party's claims or defenses and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Accordingly, when they meet, counsel for both sides should keep these requirements in mind.

After the parties have conferred in good faith, if there are continuing disputes regarding the appropriate scope of discovery concerning trading records, or the completeness of the Trustee's search for such documents, counsel should promptly send me a joint letter, no more than five single-spaced pages in length, detailing their

remaining areas of disagreement. I will then either resolve those disputes based upon their submission or schedule a further conference.

Conclusion

For the foregoing reasons, the Defendants' February 21 Letter application seeking to compel the Trustee to produce further trading records is denied without prejudice to its renewal after counsel have conferred in good faith in an effort to resolve – or at least narrow – the issues concerning trading records. .

SO ORDERED.

Dated: New York, New York  
March 15, 2017

A handwritten signature in blue ink, appearing to read "Frank Maas", is positioned above a horizontal line.

FRANK MAAS  
Discovery Arbitrator

Copies to Counsel via ECF