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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant,	Adv. Pro. No. 08-01789 (LGB) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff, Plaintiff, v. BANQUE INTERNATIONALE À LUXEMBOURG S.A. (*f/k/a* Dexia Banque Internationale à Luxembourg S.A.); CACEIS BANK S.A. (*d/b/a* CACEIS Bank, Luxembourg Branch), as successor in interest to RBC Dexia Investor Services Bank S.A.; RBC INVESTOR SERVICES TRUST (*f/k/a* RBC Dexia Investor Services Trust); BANCO INVERSIS, S.A., as successor in interest to RBC Dexia Investor Services España S.A.; and BANQUE INTERNATIONALE À LUXEMBOURG (SUISSE) S.A. (*f/k/a* Dexia Private Bank (Switzerland) Ltd.), Defendants.	Adv. Pro. No. 12-01698 (LGB) **MEMORANDUM OF LAW IN SUPPORT OF TRUSTEE'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND COMPLETE ANSWERS TO INTERROGATORIES WITHIN 30 DAYS**

Irving H. Picard, as Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS"), under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa-*lll*, substantively consolidated with the chapter 7 estate of Bernard L. Madoff ("Madoff"), by and through his undersigned counsel, respectfully submits this memorandum of law and the accompanying declaration of Antonio J. Casas ("Casas Decl.") in support of the Trustee's motion to compel defendants Banque Internationale à Luxembourg S.A. (*f/k/a* Dexia Banque Internationale à Luxembourg S.A.) ("BIL") and Banque Internationale à Luxembourg (Suisse) S.A. (*f/k/a* Dexia Private Bank (Switzerland) Ltd.) ("BIL Suisse," and together with BIL, the "BIL Defendants") to produce all documents responsive to the Trustee's First Set of Requests for Production of Documents (the "Requests") and provide complete answers to the Trustee's First Set of Interrogatories to Defendants (the "Interrogatories") within 30 days of the Court's order approving the motion.

PRELIMINARY STATEMENT

In addition to admittedly spoliating crucial ESI, the BIL Defendants have stonewalled the Trustee on discovery for the past two years, including after this Court got involved with the discovery process at the Trustee's request last summer. At that time, in a letter to the Court requesting a discovery conference, the Trustee summarized the BIL Defendants' substantial failures to fulfill their discovery obligations, including their failure to produce documents they had agreed months earlier to produce and their multiple months-long periods of complete unresponsiveness to the Trustee's communications. At the ensuing July 22, 2025 conference (the "Conference"), the Court questioned the BIL Defendants about the outstanding documents. Counsel for the BIL Defendants represented that they were close to making a substantial production that they expected to complete within 60-90 days. The Court accepted that

representation. The Court also ordered the BIL Defendants to send a letter to the Trustee within four weeks detailing the documents they agree and do not agree to produce, directed the Trustee and the BIL Defendants (together, the "Parties") to attempt to work out their differences, and granted the Trustee permission to file a motion to compel if necessary.

This motion is, unfortunately, necessary. The BIL Defendants have produced a total of just 146 documents in two years, and in the more than five months since the Conference, *they have not produced a single document.* These failures are inexcusable and inexplicable, as the BIL Defendants have agreed/not objected to producing the vast majority of documents at issue, and were supposedly ready to begin doing so months ago. The BIL Defendants have not even been willing to provide the Trustee with a date certain by which they will make such productions, and they have been non-responsive to the Trustee's numerous emails and calls since at least early December, when they told the Trustee they would not further meet and confer. The BIL Defendants have also failed to answer interrogatories, in whole or in part, seeking information about the documents they have preserved (as addressed herein, most of their relevant documents were spoliated) and persons with relevant knowledge. In light of the upcoming discovery deadline of March 30, 2026, the Trustee has no choice but to file this motion.

RELIEF SOUGHT

The Trustee requests that the Court (i) compel the BIL Defendants to, within 30 days of the Court's order approving the motion, (a) produce all responsive documents and provide complete interrogatory answers, (b) provide signed verifications of their interrogatory answers, and (c) provide a privilege log, and (ii) award the Trustee his reasonable expenses, including attorney's fees, incurred in making this motion necessitated by the BIL Defendants' failure to

comply with their discovery obligations voluntarily. The Trustee reserves all rights to seek relief for any spoliation of evidence by the BIL Defendants.

BACKGROUND

I. Relevant Procedural History

On June 30, 2022, after years of litigating threshold legal issues across the Trustee's cases, the Trustee filed an Amended Complaint in this action seeking to recover approximately $65.9 million in subsequent transfers of BLMIS customer property made to the BIL Defendants and their co-defendants by Madoff feeder funds including Fairfield Sentry Limited and Fairfield Sigma Limited (together, "Fairfield"). The Trustee is seeking approximately $54.8 million of Fairfield transfers from the BIL Defendants. *See Picard v. Banque Internationale à Luxembourg S.A., et al.*, Adv. Pro. No. 12-01698 (LGB) (Bankr. S.D.N.Y.) ("RBC-BIL Docket"), ECF No. 134. The BIL Defendants and their co-defendants are represented by different counsel and the Trustee has sought discovery from them separately.

On September 2, 2022, the BIL Defendants filed a motion to dismiss the Amended Complaint. *Id.*, ECF Nos. 141, 143.

After briefing on the motion was complete, on March 14, 2023, this Court issued a decision denying the BIL Defendants' motion to dismiss. *Id.*, ECF No. 174.

On May 1, 2023, the BIL Defendants filed their Answers to the Amended Complaint, in which they asserted a number of affirmative defenses, including good faith and lack of personal jurisdiction. *See id.*, ECF Nos. 184-85. As to good faith, the BIL Defendants asserted that at the time the subsequent transfers at issue were made, the BIL Defendants were not "on inquiry notice of a possible fraudulent purpose behind any alleged transfers [they] received," and even if they had been, "a diligent inquiry would not have discovered such a fraudulent purpose." *Id.* at 21-22.

On June 30, 2023, the Court entered a Case Management Plan. *Id.*, ECF No. 191.

On July 29, 2025, the Court entered a stipulation and order pursuant to which the Amended Complaint was deemed further amended to reflect a change to one of the BIL Defendants' co-defendants. *Id.*, ECF No. 207.

On July 30, 2025, the Court entered an Amended Case Management Plan extending the fact discovery cut-off date to March 30, 2026. *Id.*, ECF No. 208.

II. BIL's Spoliation of Fairfield-Related ESI

Before discovery commenced in this action, this Court concluded in the Fairfield liquidators' chapter 15 cases (the "Fairfield Action") that BIL engaged in intentional spoliation with respect to all of its Fairfield-related ESI, and sanctioned BIL. *See* Order Granting Mot. for Sanctions, *Fairfield Sentry Ltd. (In Liquidation), et al. v. ABN AMRO Schweiz AG, et al.*, Adv. Pro. No. 10-03636 (CGM) (Bankr. S.D.N.Y.) ("Fairfield Docket"), ECF No. 1098 (Mar. 17, 2023).

The Court's findings, which came at the jurisdictional discovery stage of the case, were based on a deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure (the "Rules"),[1] in which BIL's in-house counsel admitted that:

- Shortly after BLMIS's fraud was publicly revealed, BIL set up a Madoff "task force" (the "Madoff Task Force") to preserve documents relating to loans BIL had made to four non-Fairfield Madoff feeder funds. The Madoff Task Force did not preserve any Fairfield-related documents. *See* Tr. of Dep. on Dec. 14, 2022, Fairfield Docket, ECF No. 1090, Ex. B at 38:22-41:2, 49:2-24, 218:17-219:23, 226:10-228:17.

- BIL failed to preserve *any* Fairfield-related ESI. *See id.* at 85:1-90:1, 147:12-148:8, 227:21-228:20.

- As a result of these and other preservation failures, the only Fairfield-related documents BIL preserved were (i) hard copies of subscription and redemption documents (*see id.* at 50:11-18, 51:17-52:13) and (ii) a limited set of emails that the custodians in their sole

[1] Pursuant to a stipulation so-ordered by this Court on December 29, 2025, the Parties have agreed to treat this deposition as if it was taken in the Trustee's case. RBC-BIL Docket, ECF No. 211.

discretion deemed worth printing out for archiving (*see id.* at 106:8-23, 108:24-109:18, 117:9-119:6).

Based on this deposition and related briefing and argument, the Court in the Fairfield Action determined that (i) BIL intentionally deprived the liquidators of evidence for purposes of Rule 37 because BIL engaged in a "conscious dereliction" of its duty to preserve, and (ii) the liquidators were prejudiced because the documents would have contained additional evidence supporting personal jurisdiction. Tr. of Hr'g on Mar. 15, 2023, Fairfield Docket, ECF No. 1100 at 130:7-131:21. Accordingly, the Court precluded BIL from making certain arguments as to the scope and nature of its communications regarding Fairfield, and entered an adverse inference that any spoliated evidence would have demonstrated jurisdictional contacts by BIL. *Id.* at 131:21-132:23.

Particularly relevant to this action, the Court pointed out that "[t]he types of emails necessary to make a showing of personal jurisdiction are not different than the emails that would be relevant to any other litigation associated with these kind of claw-back cases. All emails regarding [and] to and from Fairfield and BLMIS at a minimum should've been preserved." Tr. of Hr'g on Mar. 15, 2023, Fairfield Docket, ECF No. 1100 at 126:12-17.

III. The BIL Defendants' Deficient Discovery Responses

A. The BIL Defendants' Deficient Responses Leading Up to the Conference

As summarized below, the BIL Defendants were consistently delinquent in fulfilling their discovery obligations in the over a year-and-a-half period from the time the Trustee served the Requests and was first forced to get the Court involved. This included repeatedly failing to respond to the Trustee's communications for months on end, giving unclear and at times evasive responses regarding the documents they agreed and did not agree to produce, and failing to produce numerous documents they had agreed to produce. *See Casas Decl.*, ¶ 3.

Obstacles arose from the start as the Trustee sought in vain to obtain documents from the BIL Defendants. On November 9, 2023, the Trustee served the Requests, and a month later, the BIL Defendants served their responses and objections. At the Parties' ensuing meet and confer on January 25, 2024, BIL informed the Trustee it had preserved only three types of easily searchable responsive documents, consistent with the findings in the Fairfield Action: (i) hard-copy documents relating to BIL's Fairfield transactions, including emails, that employees chose to archive based on their subjective determinations of the documents' importance; (ii) back-office files containing transactional documents for most of the Fairfield subscriptions and all of the Fairfield redemptions BIL made; and (iii) documents collected by the Madoff Task Force in December 2008 and January 2009 in connection with assessing BIL's exposure to BLMIS based on loans it had made to four non-Fairfield Madoff feeder funds. BIL acknowledged it preserved no Fairfield-related ESI. BIL Suisse advised that it preserved even fewer documents and also failed to preserve any Fairfield-related ESI.

Rather than facilitate production of the documents that still existed, the BIL Defendants erected further barriers to discovery. At the January 25, 2024 meet and confer, the BIL Defendants only agreed to search for and produce certain responsive documents, depending on whether they fell within six to seven unspecified, self-determined categories. The BIL Defendants promised to begin rolling productions within the next few weeks, and to set forth and provide more detailed information on those categories, but the BIL Defendants did not follow through on those promises. Rather, over the course of the next year and a half leading up to the Conference:

- The Trustee had to send the BIL Defendants numerous letters and emails, and met and conferred with them four separate times, in an effort to pin down their objections to the Requests and the Interrogatories, which as detailed herein, the Trustee has still been unable to do.

- For extended periods of time, the BIL Defendants completely failed to respond to the Trustee's letters and emails or engage with the Trustee on document discovery, including from March through December 2024 (other than making one minimal production) and then again from February through June 2025.

- Though the BIL Defendants eventually agreed to produce numerous categories of documents—beyond the original six to seven and broken down with more specificity—and on numerous occasions indicated a production would be forthcoming shortly, they never produced anything other than a mere 146 documents, from just a few of those categories, and over a third of which were just documents from the Fairfield Action and some publicly available annual reports.

- The BIL Defendants refused to tell the Trustee when they would make any meaningful productions.

- At a June 10, 2025 meet and confer, the BIL Defendants claimed for the first time that their production delays were due to a need for extensive, time-consuming redactions of client-identifying information. When the Trustee questioned this dubious rationale, given that most types of responsive documents do not plausibly contain such information, the BIL Defendants could only identify two types that might.

As to the documents the BIL Defendants agreed to produce, the Trustee memorialized those commitments in two letters he sent to the BIL Defendants at the end of 2024 and the beginning of 2025. *See Casas Decl.*, Ex. A (Trustee's 12/20/24 letter); Ex. B (Trustee's 2/27/25 letter).

With regard to the Interrogatories, the Trustee served them on February 1, 2024. On April 1, 2024, the BIL Defendants served their responses and objections, in which they refused to answer five of the Interrogatories and gave partial answers to the remaining seven. The BIL Defendants also did not provide signed verifications of their answers, as required by Rule 33(b)(5)—and still have not done so. Fed. R. Civ. P. 33(b)(5). On May 28, 2024, the Trustee sent a letter in response contesting the BIL Defendants' deficient answers and asking for additional information.

B. The Conference and the BIL Defendants' Continuing Non-Production and Non-Responsiveness

On July 9, 2025, the Trustee submitted a letter to the Court outlining the BIL Defendants' failures to comply with their discovery obligations and requesting a Court conference. *Casas Decl.*, Ex. C (RBC-BIL Docket, ECF No. 202). The BIL Defendants submitted a responsive letter on July 18, 2025. *Casas Decl.*, Ex. D (RBC-BIL Docket, ECF No. 205).

On July 22, 2025, the Parties participated in the Conference. The Court ordered the BIL Defendants to send a letter to the Trustee within four weeks detailing the documents they agree and do not agree to produce, and directed the Parties to attempt to work out their differences. *Casas Decl.*, Ex. E (RBC-BIL Docket, ECF No. 206, at 21:21-22:11). In response to the Court's question regarding the timing of the BIL Defendants' outstanding productions, their counsel said, "realistically, we're looking at 60 to 90 days. . . . [H]onestly, we are reaching the end of the road. . . . [T]here is huge volumes of stuff that is sort of bursting at the seams and ready, you know, close to being ready to go out." *Id.* at 22:14-23:9. The Court ruled that the Conference counted as a pre-motion conference and that the Trustee had permission to file a motion to compel if necessary. *Id.* at 24:19-23.

On August 19, 2025, four weeks after the Conference, the BIL Defendants sent the Trustee a letter setting forth various documents they agree and do not agree to produce, which was not entirely consistent with their prior representations, and was not comprehensive nor clear as to certain of their positions regarding the Requests. *Casas Decl.*, Ex. F (BIL Defendants' 8/19/25 letter). As set forth in the Trustee's September 8 response letter, among other things, the letter did not acknowledge the BIL Defendants' prior agreement to produce communications with Fairfield from after 2008; used more narrow language when referring to the BIL Defendants' prior agreement to produce documents concerning solicitation, promotion, or marketing of any Madoff

feeder fund; and omitted the BIL Defendants' prior agreements to produce certain responsive documents if located. *Casas Decl.*, Ex. G (Trustee's 9/8/25 letter), at pp. 1-3. In addition to requesting clarification as to the scope of documents the BIL Defendants agree to produce, the Trustee's response demanded (i) production of responsive documents the BIL Defendants have not agreed to produce, (ii) complete answers to the Trustee's Interrogatories, (iii) the BIL Defendants' signed verifications of their Interrogatory answers, (iv) a privilege log, and (v) a timetable for the BIL Defendants' outstanding productions. *Id.* at pp. 3-6. On September 15, the BIL Defendants sent a response letter, in which they addressed only the Trustee's document discovery questions and demands—and still failed to provide complete clarity—and said they would write separately as to the Interrogatories. *Casas Decl.*, Ex. H (BIL Defendants' 9/15/25 letter). They did not provide the requested timetable and never followed through as to the Interrogatories.

On October 27, 2025, in light of the BIL Defendants' ongoing failure to produce documents, lack of clarity as to the scope of documents they agree and do not agree to produce, and non-responsiveness as to the Interrogatories, the Trustee sent them another letter comprehensively addressing the Parties' positions on document discovery and the outstanding interrogatory responses. *Casas Decl.*, Ex. I (Trustee's 10/27/25 letter). The letter also noted that more than 90 days had passed since the Conference, and the BIL Defendants had still not produced anything new or even advised the Trustee of the status of their promised productions. *Id.* at p. 1.

The BIL Defendants did not respond to the Trustee's letter and ignored several follow-up communications, until the Trustee sent an email stating that if the BIL Defendants do not respond by December 3, the Trustee will assume they do not intend to produce the documents they have promised and that the Parties are at an impasse as to the issues raised in the Trustee's October 27

letter. On December 3, the BIL Defendants sent a letter to the Trustee that again engaged with only some of the document discovery issues, failed to clarify uncertainties, and failed to address the status of the BIL Defendants' long overdue productions and interrogatory answers. *Casas Decl.*, Ex. J (BIL Defendants' 12/3/25 letter). The letter also turned away the Trustee's offer to meet and confer, suggesting that further discussion of the issues addressed in the letter would not be productive. *Id.* at p. 1. The Trustee responded the following day by email, acknowledging receipt of the letter and asking the BIL Defendants to immediately address the status of their outstanding productions and interrogatory answers. *Casas Decl.*, Ex. K (Trustee's 12/4/25 email). The BIL Defendants have yet to respond to that email or to fulfill any of their outstanding discovery obligations.

C. The Outstanding Documents

Based on the communications summarized above, the BIL Defendants' outstanding responsive documents (collectively, the "Outstanding Documents") include (i) documents the BIL Defendants promised to produce, without objection, in some cases with the caveat the documents might not exist (collectively, the "Promised Documents"), (ii) documents for which the BIL Defendants failed to answer the Trustee's clarification questions (collectively, the "Questioned Documents"), and (iii) documents the BIL Defendants have refused to produce on alleged relevance grounds, which do not withstand scrutiny (collectively, the "Objected-to Documents"). The Outstanding Documents, listed below along with their current status (in bold), are all relevant to issues in this case, including without limitation the BIL Defendants' good faith defense, personal jurisdiction, and the Trustee's claims to recover transfers.

The Promised Documents[2]

- Back-office files for Fairfield subscriptions and redemptions, including emails and other communications concerning the transaction – **first promised in BIL Defendants' 12/3/24 letter (*see Casas Decl.*, Ex. A)**

- Account-related agreements for each BIL Defendant customer involved in Fairfield subscriptions and redemptions – **first promised in BIL Defendants' 12/3/24 letter (*see id*)**

- Customer account statements reflecting Fairfield subscription and redemption payments, including account statements reflecting redemption payments to an RBC-Dexia joint venture entity and statements reflecting the 2/14/2003 $1.9M and 11/17/2005 $6.3M transfers alleged in this action, if located – **first promised in BIL Defendants' 12/3/24 letter (*see id.*)**

- Documents concerning the alleged $39.8 million transfer in or about April 2007 – **first promised in BIL Defendants' 12/3/24 letter (*see id.*)**

- Due diligence of BLMIS or any Madoff feeder fund, including without limitation, BIL credit committee presentations and minutes concerning lending to four non-Fairfield feeder funds – **first promised in BIL Defendants' 12/3/24 letter (*see id.*)**

- Documents concerning meetings, refusals to meet and/or decisions to refrain from investing as applied to BLMIS and/or Fairfield, if located; this includes documents concerning any decision to refrain from investing in or structuring leveraged or other products with BLMIS or any Madoff feeder fund, including without limitations, any formal or informal directives related to same – **first promised in BIL Defendants' 12/3/24 letter (*see id.*)**

- Documents sufficient to show BIL's lending to four non-Fairfield feeder funds from 2003 through 2008 – **first promised in BIL Defendants' 12/3/24 letter (*see id.*)**

- Communications with Fairfield, Fairfield affiliates, and/or BLMIS, wherever located and regardless of subject matter, including any agreements, through June 2009 – **first promised in BIL Defendants' 12/3/24 letter (*see id.*); date range extended in BIL Defendants' 12/3/25 letter (*see Casas Decl.*, Ex. J)**

- Emails and other communications with BIL Defendant customers concerning BLMIS or any Madoff feeder fund from December 2008 through June 2009 – **first promised at February 2025 meet and confers (*see Casas Decl.*, Ex. B)**

[2] The date range of the Promised Documents is as early as possible through 2008, unless otherwise noted. As to some of the Promised Documents, the BIL Defendants have made minimal productions totaling approximately 80 documents.

- For the period December 2008 through June 2009, minutes and other materials (agendas, presentations, etc.) for the BIL Board of Directors, the BIL Executive Committee, and the Madoff Task Force to the extent they discuss BLMIS or any Madoff feeder fund – **first promised at February 2025 meet and confers (*see id.*)**

- Prospectuses for Dexia Multi Alternatif, if located – **first promised at February 2025 meet and confers (*see id.*)**

- Marketing materials (i.e., prospectuses, private placement memoranda, etc.) and similar documents (i.e., general materials prepared for distribution to potential investors) relating to Fairfield or any other Madoff feeder fund – **first promised at February 2025 meet and confers (*see id.*)**

- BIL Defendant policies concerning due diligence for investments, without date limitation – **first promised at February 2025 meet and confers (*see id.*)**

- The agreement establishing the RBC-Dexia joint venture – **first promised at February 2025 meet and confers (*see id.*)**

- RBC-Dexia joint venture organizational charts – **first promised at February 2025 meet and confers (*see id.*)**

- Principal pleadings (including the equivalents of complaints, summary judgment submissions, and dispositive motion submissions), any deposition, hearing, or trial testimony transcripts, and any judgments from BIL customer lawsuits in Luxembourg concerning non-Fairfield feeder fund investments – **first promised at February 2025 meet and confers (*see id.*); scope of documents expanded in BIL Defendants' 12/3/25 letter (*see Casas Decl.*, Ex. J)**

<u>The Questioned Documents</u>

- Communications concerning (as opposed to with) Fairfield, Fairfield affiliates, and/or BLMIS, except for purely transactional communications concerning the four non-Fairfield feeder funds marketed by BIL – **the BIL Defendants are unclear as to whether they agree to produce these communications with this one exception, or whether they maintain there should be other exceptions (*see Casas Decl.*, Exs. I-J)**

- Emails and other communications with third parties other than BIL Defendant customers, insurers, or government regulators concerning BLMIS or any Madoff feeder fund from December 2008 through June 2009 – **the BIL Defendants agree to produce these communications as to customers and refuse as to insurers and regulators, leaving open whether they will produce as to other third parties (*see id.*)**

- Emails and other communications with BIL Defendant customers concerning BLMIS or any Madoff feeder fund prior to December 2008 – **the BIL Defendants agree to produce**

such communications from after December 2008 but fail to address whether they will produce the earlier communications (*see id.*)

- Other fund documents for Dexia World Alternative and Dexia Multi Alternatif—the apparent beneficiaries of certain transfers at issue in this action—including any articles of association, partnership agreements, and subscription agreements – **the BIL Defendants fail to address these documents (*see id.*)**

The Objected-to Documents

- Agreements between the BIL Defendants and any non-Fairfield feeder fund, including any fee or distribution agreements – **the BIL Defendants refuse to produce these documents on alleged relevance grounds (*see Casas Decl.*, Ex. I)**

- Minutes and other materials (agendas, presentations, etc.) for the BIL Board of Directors, the BIL Executive Committee, and the Madoff Task Force, to the extent they discuss BLMIS or any Madoff feeder fund, prior to 2008 – **the BIL Defendants agree to produce such documents from after 2008 but refuse to produce such documents from earlier on the grounds that they have "no reason to believe there would be any references to Fairfield" in those documents (*see id.*)**

D. The Outstanding Interrogatories

In addition, the BIL Defendants have impermissibly failed to give complete answers to certain Interrogatories (collectively, the "Outstanding Interrogatories") and to provide signed verifications of their answers. The Outstanding Interrogatories and the BIL Defendants' deficient answers (in bold) are listed below.

- No. 1, which asks about individuals who were directed to preserve documents and the steps they took – **the BIL Defendants said they would produce a copy of any document preservation notice sent in connection with this action, and they did produce such a notice, including a list of recipients; however, they did not say whether any other individuals were directed to preserve documents and, if so, provide their names**

- No. 2, which asks about all locations where relevant ESI is stored – **the BIL Defendants refused to answer**
- No. 3, which asks about documents regarding any other BLMIS- or Madoff feeder fund-related litigations in which the BIL Defendants have been involved – **the BIL Defendants refused to answer**

- Nos. 6-8 and 11, which ask for the names and employment-related information of employees involved in various relevant activities – **the BIL Defendants provided**

employee names and contact information but refused to provide the other information requested, including their positions at the banks, the business units to which they belonged, and the relevant dates of their employment

- No. 12, which asks about any third parties that may have relevant documents – **the BIL Defendants provided employee names and contact information, as opposed to the names of any third parties, and did not say whether they know of any third parties that may have relevant documents**

ARGUMENT

I. The Court should compel the BIL Defendants to produce all the Promised Documents within 30 days.

The motion to compel production of the Promised Documents should be summarily granted pursuant to Rule 37 because there is simply no justification for the BIL Defendants to withhold them. Despite having promised to produce them, in many instances more than a year ago, they have failed to do so or even respond to the Trustee's many communications demanding their production. As to the Promised Documents there are no issues regarding relevance, burden, or otherwise before the Court. Thus, there can be no justification for any further delays or excuses, particularly as the BIL Defendants represented to the Court and the Trustee at the Conference more than five months ago that they were ready to start the productions.

These circumstances warrant not only an order compelling production of the Promised Documents but also, as discussed in Point III below, an award of sanctions against the BIL Defendants for necessitating this motion.

II. The Court should compel the BIL Defendants to produce the Questioned Documents and the Objected-to Documents and provide complete answers to the Outstanding Interrogatories within 30 days.

A. The legal standard allows for fulsome discovery.

Under Rule 37(a)(3)(B)(3), a party may move to compel responses if "a party fails to answer an interrogatory submitted under Rule 33" or a production if "a party fails to produce

documents . . . as requested under Rule 34." Fed. R. Civ. P. 37(a)(3)(B)(iii)-(iv); *Pegoraro v. Marrero*, 281 F.R.D. 122, 127 (S.D.N.Y. 2012) ("Motions to compel made pursuant to Fed. R. Civ. P. 37 are 'entrusted to the sound discretion of the district court.'") (quoting *United States v. Sanders*, 211 F.3d 711, 720 (2d Cir. 2000)). Under the Rule, "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Fed. R. Civ. P. 37(a)(4).

The scope of permissible discovery under Rules 33 and 34 is broad. Rule 26(b)(1), which is applicable here through Federal Rule of Bankruptcy Procedure 7026, provides:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1); *see also, e.g., Homeward Residential, Inc. v. Sand Canyon Corp.*, Nos. 12-cv-5067 & 12-cv-7319, 2017 WL 4676806, at *5 (S.D.N.Y. Oct. 17, 2017) (quoting Fed. R. Civ. P. 26(b)(1)). As this Court previously observed, "[e]ven after the 2015 amendment to Rule 26(b), relevance is still to be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any party's claim or defense." *Picard v. Roman (In re BLMIS)*, Adv. Pro. No. 10-04292, 2017 WL 4685525, at *3 (Bankr. S.D.N.Y. Oct. 17, 2017) (cleaned up).

A court has "broad discretion" under Rule 26 "to impose limitations or conditions on discovery . . . which extends to granting or denying motions to compel . . . on just terms." *Coty Inc. v. Cosmopolitan Cosmetics Inc.*, No. 18-cv-11145, 2020 WL 3317204, at *1 (S.D.N.Y. June

18, 2020) (cleaned up); *see also In re Agent Orange Prod. Liability Litig.*, 517 F.3d 76, 103 (2d Cir. 2008) ("A district court has wide latitude to determine the scope of discovery.").

The BIL Defendants bear the burden of establishing their affirmative defenses and thus, at a minimum, must produce documents supporting those defenses. Given that "[p]laintiffs are generally not in a position to know what information the opposing party might rely on to meet its burden of proof for affirmative defenses[,] Rule 26(a) of the Federal Rules of Civil Procedure addresses this problem by providing that even absent a discovery request, any party must produce documents that it 'may use to support its claims or defenses.'" *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 109 (S.D.N.Y. 2013) (holding that defendants are "clearly obligated to turn over documents supporting their defenses").

To the extent the BIL Defendants object to producing the Questioned Documents or the Objected-to Documents or to answering the Outstanding Interrogatories, they "bear[] the burden of showing why discovery should be denied." *Mason Tenders Dist. Council of Greater N.Y. v. Phase Constr. Services, Inc.*, 318 F.R.D. 28, 36 (S.D.N.Y. 2016). And when an objection is based upon burden, a party must show with specificity "how each question is overly broad, burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden." *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 298 F.R.D. 184, 186 (S.D.N.Y. 2014) (citation omitted).

B. The Trustee is entitled to the Questioned Documents and the Objected-to Documents.

Discovery of the Questioned Documents and the Objected-to Documents satisfies the Rule 26 standard. Such discovery is proportional because the documents are relevant and important to the issues in this case, particularly the BIL Defendants' good faith defense. The BIL Defendants have not, and cannot, claim an undue burden in light of their admission that the universe of

potentially responsive documents is not large or hard to search, in part because the BIL Defendants spoliated all Fairfield-related ESI. Document discovery is especially warranted in light of such spoliation, which renders the remaining documents all the more important to litigating the issues in this case.

The only objection the BIL Defendants have made to producing the Questioned Documents and the Objected-to Documents is that the documents are not relevant because they concern Madoff feeder funds other than Fairfield, whose transfers are not at issue. This objection is baseless. The BIL Defendants' good faith defense makes relevant anything they knew or believed about BLMIS or *any* Madoff feeder fund, not just Fairfield, as the feeder funds were interchangeable vehicles for accessing BLMIS. *See* Tr. of Hr'g, *Picard v. Alpha Prime Fund Ltd.*, Adv. Pro. No. 09-01364 (SMB) (Bankr. S.D.N.Y Sept. 19, 2019), ECF No. 569 at 54:14-57:10 (finding actual knowledge adequately alleged based on what Madoff feeder fund's directors learned about another feeder fund and from communications with service providers and third parties); Tr. of Hr'g, *Picard v. Square One Fund Ltd (In re BLMIS)*, Adv. Pro. No. 10-04330 (SMB) (Bankr. S.D.N.Y. May 29, 2019), ECF No. 181 at 42:16-43:11 (finding defendant's knowledge that two Madoff feeder funds whose transfers were not at issue were unable to answer questions concerning BLMIS's purported investment strategy and returns supported a finding that defendant suspected BLMIS was a fraud). Non-Fairfield-related documents may help establish, among other things, whether the BIL Defendants were on inquiry notice as to red flags of fraud at BLMIS and, if so, whether they conducted a diligent investigation in response. *See In re Bernard L. Madoff Inv. Sec. LLC*, 12 F.4th 171, 191-92 (setting forth the inquiry notice standard applicable to determining whether defendants received transfers in good faith).

For these reasons, the BIL Defendants have no legitimate grounds for further delaying production of, or refusing to produce, the Questioned Documents and the Objected-to Documents.

C. The Trustee is entitled to complete answers to the Outstanding Interrogatories and signed verifications of all answers.

The BIL Defendants are obligated to completely answer the Outstanding Interrogatories under the Rule 26 standard. As to Interrogatory Nos. 1 (asking for the names of any other individuals who were directed to preserve documents for the BIL Defendants), 2 (asking about all locations where relevant ESI is stored), 3 (asking about documents regarding any other BLMIS- or Madoff feeder fund-related litigations in which the BIL Defendants have been involved), and 12 (asking about any third parties that may have relevant documents), the information requested is discoverable because it concerns basic facts as to the universe of the BIL Defendants' responsive documents, which are critical given the BIL Defendants' admission that they spoliated evidence. *See* LBR 7033-1(a) (permitting interrogatories seeking "the existence, custodian, location, and general description of relevant documents"); Fed. R. Bankr. P. 7026 (incorporating Rule 26(f)(3)(C)) (requiring parties to discuss "any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced"); *O'Toole v. Vesnic (In re Reifler),* No. 19-09004, 2023 WL 1785716, at *2 (Bankr. S.D.N.Y. Feb. 6, 2023) (court entered order compelling party to answer document requests and interrogatories with, *inter alia*, "a detailed and complete description of any documents that existed, but were destroyed, deleted, and/or no longer exist; including, but not limited to, the full and complete details about the programs, emails, providers, software and/ or applications or devices (i.e., smart phone, laptops and/or ipads) used and settings used and when those settings were changed and/or modified and by whom"); *Harris v. City of N.Y.*, No. 20-cv-2011, 2025 WL 1420424, at *1

(S.D.N.Y. Apr. 22, 2025) (even privileged litigation hold communications are discoverable where there has been a showing of spoliation).

As to Interrogatory Nos. 6-8 and 11 (asking for the names and employment-related information of employees involved in various relevant activities), the information requested is discoverable because it is "of a similar nature" to discoverable information specified in Local Rule 7033-1(a). *See* LBR 7033-1(a). Information as to employees' positions at the BIL Defendants, the business units to which they belonged, and their relevant dates of employment provides context for understanding the relevance of the "names of witnesses with knowledge or information relevant to the subject matter of the action" and the "custodian . . . of relevant documents." *See id.*; *see also Cathay Pac. Airways, Ltd. v. Fly & See Travel, Inc.*, No. 90-cv-0371, 1991 WL 156381, at *2 (S.D.N.Y. Aug. 8, 1991) (ordering defendants to provide, in response to interrogatory, names, addresses, and employment statuses of individuals who may have been involved in allegedly fraudulent activity).

The Court should also order the BIL Defendants to provide signed verifications of their answers to the Interrogatories. *See* Fed. R. Civ. P. 33(b)(5).

III. The Court should order the BIL Defendants to pay the Trustee's expenses in bringing this motion, including attorney's fees.

Under the circumstances here, cost-shifting sanctions against the BIL Defendants are mandatory. Rule 37(a)(5) provides, in relevant part, that if a motion to compel is granted, "the court *must*, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5) (emphasis added).

This Rule is subject to three exceptions, none of which apply here, because, as detailed above, (i) the Trustee made numerous good faith attempts to obtain discovery from the BIL Defendants without involving the Court, (ii) the BIL Defendants' baseless relevance objections, improper refusals to produce responsive documents, and repeated failures to respond to the Trustee's communications were not "substantially justified," and (iii) there are no "other circumstances [that] make an award of expenses [here] unjust." *Id.*; *see, e.g.*, *Wager v. G4S Secure Integration, LLC*, No. 1:19-cv-03547, 2021 WL 293076, at *4 (S.D.N.Y. Jan. 28, 2021) ("once a motion to compel is granted, the losing party bears the burden to show that an exception applies to avoid Rule 37(a)(5)(A)'s fee-shifting mandate").

Courts routinely impose Rule 37(a)(5) sanctions on parties, like the BIL Defendants, that fail to produce promised documents before a motion to compel is filed. *See, e.g., Underdog Trucking, L.L.C. v. Verizon Servs. Corp.*, 273 F.R.D. 372, 377-79 (S.D.N.Y. 2011) (awarding cost-shifting sanctions where plaintiffs produced promised documents only after defendants filed a motion to compel, and plaintiffs had "repeatedly assured Defendants that the documents existed, were in Plaintiffs' possession, and would be produced 'shortly'"); *see also Novi Footwear Int'l Co. v. Earth OpCo LLC*, 740 F. Supp. 3d. 73, 78-79 (D. Mass. 2024).

The BIL Defendants' evasive and incomplete responses as to the Questioned Documents and certain Outstanding Interrogatories, and their refusals to produce/answer as to the Objected-to Documents and certain Outstanding Interrogatories, are also grounds for imposing cost-shifting sanctions under the Rule. *See, e.g.*, *Nike, Inc. v. Top Brand Co. Ltd.*, 216 F.R.D. 259, 267-69 (S.D.N.Y. 2003) (granting motion to compel and awarding cost-shifting sanctions, in part due to defendant's evasive and incomplete affidavit regarding the existence of certain responsive documents, and his refusal to produce those documents); *Izzo v. ING Life Ins. and Annuity Co.*,

235 F.R.D. 177, 188-89 (E.D.N.Y. 2005) (awarding cost-shifting sanctions where defendant failed for over a year to produce certain responsive documents or clearly state it did not have them, and instead "stonewalled the plaintiff, causing this protracted dispute and necessitating judicial intervention").

CONCLUSION

Based on the foregoing, the Trustee respectfully submits that the Court should (i) compel the BIL Defendants to, within 30 days of the Court's order approving the motion, (a) produce all responsive documents and provide complete interrogatory answers, (b) provide signed verifications of their interrogatory answers, and (c) provide a privilege log, and (ii) award the Trustee his reasonable expenses, including attorney's fees, incurred in making this motion.

Date: New York, New York
January 23, 2026

/s/ *Kim M. Longo*

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