Baker & Hostetler LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan

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.	Adv. Pro. No. 09-01239 (LGB)
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. FAIRFIELD INVESTMENT FUND LIMITED, STABLE FUND, FAIRFIELD GREENWICH LIMITED, FAIRFIELD GREENWICH (BERMUDA), LTD., FAIRFIELD GREENWICH ADVISORS LLC, FAIRFIELD INTERNATIONAL MANAGERS, INC., THE ESTATE OF WALTER M. NOEL, JR., MONICA NOEL, in her capacity as Executor of the Estate of Walter M. Noel, Jr., JEFFREY TUCKER, ANDRES PIEDRAHITA, AMIT VIJAYVERGIYA, PHILIP TOUB, CORINA NOEL PIEDRAHITA, FAIRFIELD GREENWICH CAPITAL PARTNERS and SHARE MANAGEMENT LLC, Defendants.	**TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Irving H. Picard (the "Trustee"), as trustee for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa *et seq.*, and the chapter 7 estate of Bernard L. Madoff ("Madoff"), through his counsel, respectfully submits this Memorandum of Law in Opposition to the Motion for Partial Summary Judgment filed by Defendants Fairfield Investment Fund Limited, Stable Fund, L.P., Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda) Limited ("FG Bermuda"), Fairfield Greenwich Advisors, LLC, Fairfield International Managers, the Estate of Walter M. Noel, Jr., Monica Noel, in her capacity as Executor of the Estate of Walter M. Noel, Jr., Jeffrey Tucker, Andres Piedrahita, Amit Vijayvergiya, Philip Toub, Corina Noel Piedrahita, Fairfield Greenwich Capital Partners, and Share Management LLC (collectively, "Defendants").

PRELIMINARY STATEMENT

Madoff did not carry out his Ponzi scheme alone. The success of his scheme depended on the willing, consistent, and knowing participation of the Defendants. Fairfield Greenwich Group ("FGG") grew Fairfield Sentry Limited ("Sentry")[1] into the largest of the Madoff feeder funds, while the Defendants and their families enriched themselves with hundreds of millions of dollars from BLMIS. Now, to keep that money at the expense of real victims of BLMIS, the Defendants move for partial summary judgment, contending that: (1) Section 546(e) of the Bankruptcy Code shields the Defendants' fraudulent transfers from avoidance, notwithstanding their complicity in and knowledge of Madoff's fraud; and (2) this Court should prematurely make credibility determinations and give credence to their self-serving testimony and expert opinions, while

[1] Sentry and its foreign currency sub-funds, Fairfield Sigma Limited and Fairfield Lambda Limited, are collectively referred to as the "Sentry Funds." The Sentry Funds, together with domestic FGG feeder funds Greenwich Sentry, L.P. and Greenwich Sentry Partners, L.P., are collective referred to as the "Fairfield Funds."

ignoring contradictory evidence and drawing all inferences in the Defendants' favor. Summary judgment should be denied on both grounds. The Defendants' claimed ignorance is contradicted by evidence and expert opinions proffered by the Trustee, which indicate that the Defendants knew BLMIS was not trading, and intentionally participated in and helped perpetuate Madoff's fraud.

The Defendants were not victims of Madoff's Ponzi scheme. They were sophisticated financial industry participants with decades of experience. By the time of BLMIS's collapse, they had been exposed to almost two decades of trading information and documents that unequivocally showed that BLMIS was not trading securities. Notwithstanding this knowledge, the Defendants acted as BLMIS's marketing arm, ensuring that Madoff had a continuous stream of new investor money and enabling the fraud to continue for their own massive personal profits. The Defendants thwarted inquiries that threatened to uncover the fraudulent nature of Madoff's operations, including by deliberately misleading the SEC, rating agencies, and other third-parties. FGG lied about its access to information concerning BLMIS's operations and lied to assuage investor concerns. In fact, because they knew that Madoff was not trading securities, Defendants purposely restricted third-party diligence aimed at fraud detection or prevention.

All of FGG's decisions were deliberate and orchestrated by Jeffrey Tucker, Walter Noel, and Andres Piedrahita, who exercised complete control over FGG, and whose directions were carried out by Amit Vijayvergiya, Philip Toub, Corina Noel Piedrahita and others at FGG. Under their direction, the Defendants blatantly lied to third-parties about BLMIS's lack of trading; the scope of due diligence they and their agents conducted; Madoff's conflicting roles as custodian, broker and investment adviser; and the existence and identity of counterparties for BLMIS's trades when they knew none existed. FGG also lied about Madoff's auditor, Friehling & Horowitz

("F&H"). FGG knew F&H was a two-person firm, with insignificant revenue (and therefore, no real client base), and that it was not qualified to perform audits.

Finally, FGG used the legitimacy and expertise of its globally-known and well-regarded third-party service providers, Citco,[2] and PwC,[3] as advertising to attract, obtain, and maintain investments in BLMIS. The Defendants intentionally hid that Citco repeatedly raised concerns with FGG about the risks of Citco acting as custodian in name only, while Sentry's assets were actually custodied by BLMIS. The Defendants hid their unique arrangement with Citco, wherein rather than acting like a true custodian and maintaining custody of assets, Citco merely copied purported trade and asset information from BLMIS records into Citco's own records, with no independent verification of information. And the Defendants hid Citco's concerns about the existence of the assets. The Defendants hid the fact that FGG deliberately fed misinformation to PwC, prevented both Citco and PwC from conducting complete audits, and also prevented Citco from conducting due diligence, including that Madoff maintained assets. The Defendants used Citco and PwC as marketing props, to help deflect investor inquiries, and to enable FGG and Madoff to fool investors, regulators and exchanges into believing that BLMIS was actually trading securities—all of which enabled Madoff's fraud to continue. The lies, the misrepresentations, and the machinations were all used to hide what Defendants knew: that BLMIS was not trading securities.

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[2] Citco Global Custody NV and Citco Bank Nederland NV Dublin Branch entered into contracts with Fairfield Sentry to provide financial services roles for the Fairfield Funds, including administrator, custodian, bank, and depository. Notwithstanding the two contracting entities, services were provided to the Funds by approximately ten separate entities, including: Citco Group Ltd.; Citco Global; Citco Fund Services (BVI); Citco Fund Services (Europe) B.V.; Citco Fund Services (Bermuda) Ltd.; Citco (Canada) Inc.; Citco Global Security Services; Citco Bank; and Citco Banking Corporation N.V. (collectively referred to herein as "Citco").

[3] PricewaterhouseCoopers LLP entered into contracts with a number of FGG funds, including the Fairfield Funds, to provide audit services.

This Court should deny the motion for summary judgment. The Trustee's claims to avoid and recover six-year transfers turn on whether Defendants had actual knowledge of the lack of trading at BLMIS, and exemplify the competing inferences, factual disputes, and issues of credibility that fall squarely within the jury's purview. The Trustee has set forth ample evidence to support his allegations that Defendants had actual knowledge of lack of trading at BLMIS and is entitled to a trial to determine the Defendants' credibility and state of mind.

ARGUMENT

I. THE RELEVANT LEGAL STANDARDS REQUIRE DENIAL OF THE MOTION

A. There Are Numerous Genuine Disputed Issues of Material Fact.

Summary judgment can be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Baltas v. Jones*, 162 F.4th 68, 72 (2d Cir. 2025); *see also Beard v. Banks*, 548 U.S. 521, 529 (2006). In considering the Defendants' motion, the Court must resolve all ambiguities and draw all reasonable inferences in favor of the Trustee, the non-moving party. *See Beard*, 548 U.S. at 529; *Goldzweig v. Consol. Edison Co. of New York, Inc.*, No. 25-0089-CV, 2026 WL 21005, at *1 (2d Cir. Jan. 5, 2026).

On summary judgment, the Court's role "is not to resolve disputed questions of fact but solely to determine whether, as to any material fact, there is a genuine issue to be tried . . . the court may not make credibility determinations or weigh the evidence[.]" *Moll v. Telesector Res. Grp., Inc.*, 94 F.4th 218, 227 (2d Cir. 2024) (internal citations omitted); *see also Kee v. City of New York*, 12 F.4th 150, 166 (2d Cir. 2021). A dispute about a material fact is "genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Borley v. United States*, 22 F.4th 75, 78 (2d Cir. 2021). Conflicting evidence on a factual issue, including dueling expert witness opinions,

may not be resolved on summary judgment, as the evaluation of competing expert opinions falls to the jury. *See Anderson*, 477 U.S. at 255; *see also Scanner Techs. Corp. v. Icos Vision Sys. Corp., N.V.*, 253 F. Supp. 2d 624, 641 (S.D.N.Y. 2003).

The Defendants' motion should be denied because they have failed to meet their burden of showing the absence of any disputed material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Hammonds v. Burlington Coat Factory Warehouse Corp.*, 708 F. Supp. 3d 446, 449 (S.D.N.Y. 2023). Selectively omitting key facts, as the Defendants have done in their Rule 56.1 Statement, does not eliminate disputed material issues. The Trustee's accompanying Counter-Statement of Material Facts demonstrates the existence of numerous genuine factual disputes which preclude granting the Defendants' motion.

B. Disputes Concerning The Defendants' Knowledge and State of Mind Cannot Be Resolved on Summary Judgment

Here, the key question is whether the Defendants knew BLMIS was not trading securities. A party's state of mind is universally understood to be an issue of fact for a jury to decide. As the Second Circuit has "consistently observed, 'subjective issues such as good faith are singularly inappropriate for determination on summary judgment.'" *Tiffany and Co. v. Costco Wholesale Corp.*, 971 F.3d 74, 88 (2d Cir. 2020) (citations omitted). *See also Savino v. Town of Se.*, 983 F. Supp. 2d 293, 300-01 (S.D.N.Y. 2013), *aff'd,* 572 F. App'x 15 (2d Cir. 2014). "Summary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles." *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 16 (2d Cir. 1993) (internal quotation marks and citations omitted).

The Defendants' intent, motive, state of mind, sincerity, and other disputed issues that require assessment of the Defendants' credibility and demeanor, are properly reserved for the factfinder. *See, e.g.*, *GMA Accessories, Inc. v. Croscill, Inc.*, No. 06 Civ. 6236 (GEL), 2008 WL

591803, at *8 (S.D.N.Y. Mar. 3, 2008) ("[T]he issue of defendants' good faith ultimately turns on the credibility of defendants' witnesses and the inferences to be drawn from their testimony[.]"); *De Sole v. Knoedler Gallery, LLC*, 139 F. Supp. 3d 618, 650 (S.D.N.Y. 2015) (summary judgment is inappropriate and trial is indispensable where subjective issues regarding a litigant's state of mind, motive, sincerity or conscience are squarely implicated). As the Defendants themselves recognize, their subjective state of mind during the relevant period is the core issue here.

The Defendants' self-serving testimony concerning the BLMIS fraud does not establish their lack of knowledge of Madoff's Ponzi scheme, it merely demonstrates the existence of disputed issues of material facts that should be determined at trial. Self-serving testimony such as the Defendants' resolves no factual issues, but only implicates the witness's credibility. "The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sartor v. Arkansas Nat. Gas Corp.*, 321 U.S. 620, 628 (1944) (quotations omitted). *See also Abu Dhabi Com. Bank v. Morgan Stanley & Co. Inc.*, 888 F. Supp. 2d 431, 458–59 (S.D.N.Y. 2012) ("[I]t is the rare defendant who admits to having had fraudulent intent."). Courts in the Second Circuit consistently hold that "the self-serving nature of a witness's statement goes not to their admissibility but to their weight," and is an issue for the jury. *St. Pierre v. Dyer*, 208 F.3d 394, 405 (2d Cir. 2000).

The Trustee has proffered ample evidence to contradict the Defendants' self-serving statements and show that their hindsight explanations and claims of innocence are inconsistent with the contemporaneous documents and evidence.

II. SECTION 546(E) DOES NOT APPLY TO THE TRUSTEE'S SIX-YEAR AVOIDANCE CLAIMS

Section 546(e) permits the avoidance of two-year transfers under 11 U.S.C. § 548(a)(1)(A) and precludes the avoidance of six-year transfers. 11 U.S.C. § 546(e). But as numerous courts have

ruled, by its express terms, Section 546(e) does not apply when both parties (here, Madoff and Defendants) knew that the transfer was being made in connection with a Ponzi scheme "because there was no securities contract that could trigger its application." *In re Bernard L. Madoff Inv. Sec. LLC,* No. 23-CV-0294 (VEC), 2023 WL 3317926, at *4 (S.D.N.Y. May 9, 2023); *see also Picard* v. *Multi-Strategy Fund*, 657 B.R. 325, 330–31 (S.D.N.Y. 2022) ("[A] customer with actual knowledge of the fraud would not fall under Section 546(e)'s express terms."); *SIPC* v. *BLMIS*, No. 12 MC 115, 2013 WL 1609154, at *3 (S.D.N.Y. Apr. 15, 2013) (hereinafter, "*Cohmad*") (Rakoff, J.) (holding that transferee with actual knowledge "must have known that the transfers could not have been made in connection with an actual 'securities contract.'"). Thus, the overarching questions as to whether the Trustee can recover six-year transfers in this case are: (i) what proof of the Defendants' knowledge is sufficient; and (ii) whether there are disputed material facts sufficiently showing the Defendants' knowledge.

A. Knowledge Can Be Shown Through Actual Knowledge, Conscious Avoidance or Willful Blindness

In *Cohmad*, Judge Rakoff held that actual knowledge was required to preclude the application of Section 546(e). 2013 WL 1609154, at *3. Actual knowledge ("knew") is distinguishable from constructive knowledge ("should have known"). Actual knowledge is "direct and clear knowledge." Black's Law Dictionary (12th ed. 2024). "Actual knowledge may be proven or disproven by direct evidence, circumstantial evidence, or a combination of the two." *Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 122 (2d Cir. 2017) (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003)).

Despite the Defendants' argument to the contrary, an explicit admission is not required to establish actual knowledge. It is the rare case in which participants in a fraud record their knowledge thereof in written confessions. For this reason, New York courts have recognized that

because "[p]articipants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud," actual knowledge does not need to be based on an explicit acknowledgement of the fraud. *Oster v. Kirschner*, 77 A.D.3d 51, 55–56 (N.Y. App. Div. 2010). Instead, knowledge of fraud can be inferred from the totality of the circumstances, such as the relationship among the parties, and the defendants' conduct, representations, and economic incentives. *See, e.g.*, *Oster,* 77 A.D.3d at 56 ("[I]ntent to commit fraud is to be divined from surrounding circumstances," which is not constructive knowledge, "but actual knowledge of the fraud as discerned from the surrounding circumstances."); *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (N.Y. 2009) (same).

It is an open question in the Second Circuit as to whether willful blindness or conscious avoidance[4] are legally equivalent to actual knowledge such that they can be used as proxies to establish actual knowledge. At least three panels have noted the issue without resolving it. *See, e.g.*, *Zamora v. FIT Int'l Grp. Corp.*, 834 F. App'x 622, 628 (2d Cir. 2020); *Krys v. Pigott*, 749 F.3d 117, 132–33 (2d Cir. 2014) (noting it is unclear whether aiding and abetting claim is sustainable on conscious avoidance rather than actual knowledge); *Krys v. Butt*, 486 F. App'x 153, 157 n.5 (2d Cir. 2012) (noting that "[l]ower courts disagree whether conscious avoidance is legally equivalent to actual knowledge" but declining to resolve question since complaint did not allege any conscious avoidance facts).

Some courts that have accepted conscious avoidance as a proxy for actual knowledge have reasoned that because conscious avoidance is sufficient for criminal liability for aiding and

[4] Some cases refer to willful blindness and conscious avoidance interchangeably, *see, e.g.*, *State v. United Parcel Serv., Inc.*, 253 F. Supp. 3d 583, 666 (S.D.N.Y. 2017), *aff'd*, 942 F.3d 554 (2d Cir. 2019), while others treat them as similar but distinct legal theories. *See In re Agape Litig.*, 773 F. Supp. 2d 298, 308 (E.D.N.Y. 2011).

abetting,[5] it is also sufficient for civil claims. *See, e.g.*, *In re Refco Sec. Litig.*, 759 F. Supp. 2d 301, 334 (S.D.N.Y. 2010) ("If conscious avoidance is enough to satisfy a criminal charge of aiding and abetting, it should certainly suffice for a civil claim."); *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 368 (S.D.N.Y. 2007) (same); *SEC v. Musella*, 678 F. Supp. 1060, 1063 (S.D.N.Y. 1988) (stating that court "cannot accept that conscious avoidance of knowledge defeats scienter in a stock, [sic] fraud case any more than it does in the typical *mens rea* criminal context.").

Numerous courts have permitted plaintiffs to show knowledge through conscious avoidance. *See Vasquez v. Hong Kong & Shanghai Banking Corp. Ltd.*, No. 18 CIV. 1876 (PAE), 2019 WL 2327810, at *15 (S.D.N.Y. May 30, 2019) ("Courts have generally held that allegations of conscious avoidance, where adequately pled, can satisfy the actual knowledge requirement in the context of an aiding and abetting claim."); *In re Refco Inc. Sec. Litig.*, No. 07-MD-1902 (JSR), 2013 WL 12158586, at *9 n.20 (S.D.N.Y. Aug. 7, 2013), *report and recommendation adopted*, No. 07-MDL-1902 JSR, 2014 WL 1302988 (S.D.N.Y. Mar. 19, 2014) ("[T]he difference between actual knowledge and conscious avoidance is 'at most minuscule' because 'consciously avoiding something is tantamount to knowing it.'") (internal citations omitted); *Banco Indus. de Venezuela, C.A. v. CDW Direct, L.L.C.*, 888 F. Supp. 2d 508, 514 (S.D.N.Y. 2012) (conscious avoidance can be used to show actual knowledge for aiding and abetting fraud claim but dismissing case for insufficient allegations); *S.E.C. v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 493 (S.D.N.Y. 2002) ("The conscious avoidance of knowledge constitutes sufficient scienter under the federal securities laws.").

[5] There is a wealth of caselaw discussing the means of proving actual knowledge in the aiding and abetting context, because actual knowledge is an element of the claim. Thus, although the Trustee has not alleged an aiding and abetting claim, these actual knowledge cases are instructive here.

Similarly, many courts (both within and outside the Second Circuit) have held "willful blindness is tantamount to knowledge" with respect to a variety of civil causes of action. *See Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 110 n.16 (2d Cir. 2010) (collecting cases). In *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 768 (2011), the Supreme Court used willful blindness as a means to establish knowledge in a civil patent infringement case. The Court required two showings: (1) the defendant subjectively believes there is a high probability that a fact exists, and (2) the defendant takes deliberate actions to avoid learning of that fact. *Id.* at 769. The Court concluded that these requirements appropriately limited willful blindness to a scope surpassing recklessness and negligence and "[u]nder this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id*.

In *Cohmad*, Judge Rakoff went the other direction. While conceding that "in some contexts 'willful blindness' is sufficient to substitute for actual knowledge," he found that "the overwhelming weight of authority holds that actual knowledge is required, rather than a lower standard such as recklessness or willful blindness." 2013 WL 1609154, at *4 n.2 (citing *Rosner v. Bank of China*, No. 06 CV 13562, 2008 WL 5416380, at *7 (S.D.N.Y. Dec.18, 2008), *aff'd*, 349 F. App'x 637 (2d Cir. 2009)). Part of Judge Rakoff's rationale for his refusal to accept willful blindness as a form of actual knowledge was that a "securities customer has no duty to inquire as to his broker's *bona fides*." *Id.* The ruling in *Cohmad*, though, found actual knowledge had been pleaded through the defendants' conduct, notwithstanding the defendants' claims that they were innocent investors.

In this case, there is a question of fact concerning whether the Defendants—as investment managers with unique access to BLMIS who knew of and in fact required third-parties to rely on

the Defendants' representations—were fiduciaries who *did* have a duty to inquire as to whether Madoff was running a fraud. *See Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 415 (S.D.N.Y. 2010) ("A fiduciary relationship arises where 'one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party,' and the defendant was 'under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.' Whether the duty exists is a fact-specific inquiry.") (internal citation omitted).

Regardless of whether the standard permits the use of conscious avoidance or willful blindness as a proxy for actual knowledge and, contrary to the Defendants' arguments, the awareness of red flags does not negate (nor is it irrelevant to) their knowledge of Madoff's fraud. Red flags are present in nearly any case involving fraud, because they are indicators of fraud. Thus, awareness of cumulative and significant red flags over the course of a lengthy relationship, when considered within the context of industry standards and procedures together with what the parties said and did in light of what they knew to be true, can constitute circumstantial evidence of what a party knew. *See Cupersmith v. Piaker & Lyons P.C.*, No. 3:14-cv-01303-TJM-DEP, 2016 WL 5394712, at *14 (N.D.N.Y. Sept. 27, 2016), *aff'd sub nom. Ayers v. Piaker & Lyons, P.C.*, 748 F. App'x 368 (2d Cir. 2018) (citations omitted).

Where a plaintiff can show a deep awareness of wrongdoing, courts allow the cases to move to trial. In *Silvercreek Mgmt., Inc. v. Citigroup, Inc.*, 346 F. Supp. 3d 473 (S.D.N.Y. 2018), the plaintiffs, a group of investment funds, asserted aiding and abetting fraud claims against a set of financial institutions for their conduct related to the issuance of debt securities by Enron. *Id.* at 479. The court found a genuine issue of material fact existed as to whether the financial institutions had actual knowledge of Enron's fraud, which was based on a "a plethora" of evidence, including

employee testimony and emails acknowledging defendants' "awareness of Enron's wrongdoing and the fraudulent nature of its financials." *Id.* at 490. The court also considered the banks' marketing, promotion, and support of Enron's atypical financing transactions. *Id.* at 491.

Similarly, in *Abu Dhabi Com. Bank*, 888 F. Supp. 2d at 477, the court denied summary judgment, finding plaintiffs produced sufficient evidence—for example, emails showing a campaign of pressure and manipulation by the defendants—from which a jury could infer that Morgan Stanley had actual knowledge of the fraud. *Id.*

B. Defendants Knew That BLMIS Was a Fraud

Regardless of the standard used to show knowledge, the Defendants knew that BLMIS was a fraud. *See infra*, section IV; Trustee's Counter-Statement of Material Facts. To deflect from the numerous damning facts concerning their knowledge and conduct, the Defendants make a number of specious arguments. They attempt to cast the Trustee's case as relying solely on generic generalized "red flags," and argue throughout their brief that awareness of red flags is irrelevant to the actual knowledge inquiry (*see* Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment at 28 (hereinafter, "Def. Br.")), has no bearing on a party's actual knowledge, Def. Br. 27; 29, and is "immaterial for purposes of summary judgment." Def. Br. 31. Indicia of fraud, or so-called "red flags" are present in nearly any case involving fraud, because they are the objective evidence of fraud. The proper analysis is not whether such red flags existed, but whether a particular defendant understood what those red flags showed. Thus, contrary to the Defendants' argument, their awareness of cumulative and significant hallmarks of fraud over the course of their eighteen-year relationship with Madoff, considered together with what the Defendants did and said in light of what they knew to be true, is precisely what supports the conclusion of actual knowledge. *See Abu Dhabi Com. Bank,* 888 F. Supp. at 477 (denying defendant's motion for summary judgment, based on consideration of defendants' conduct in light

of what defendants knew).

A jury could easily find that the Defendants knew that Madoff was not trading securities, based on the facts in this case. Indeed, in the memorandum decision denying the Defendants' motion to dismiss the Second Amended Complaint in this action, the Bankruptcy Court found that numerous allegations in the Trustee's Second Amended Complaint, taken as true for purposes of that motion, establish the Defendants' knowledge of Madoff's fraud if proven, (s*ee* Mem. Decision Den. Mot. to Dismiss 9–13, Dkt. No. 336), including, (i) FGG's awareness that Madoff was not trading pursuant to the split-strike conversion ("SSC") strategy, Ex. 176,[6] Ex. 314; (ii) FGG's awareness of the large volume of options Madoff claimed to be trading, often in excess of the market volume, Ex. 177, Ex. 254 at -149, Ex. 45 at 78:13-79:23, Ex. 236 at 459-460, Ex. 315, and *compare* Ex. 254 *with* Ex. 316, *see also* Hirsch Declaration Ex. A (the "Hirsch Rept.") ¶¶ 180, 181, 183, 193; (iii) FGG's awareness of rumors that Madoff was engaged in fraud, as early as May 2001 when articles were published in Barron's and MAR/Hedge, Exs. 317-18; (iv) the Defendants' continual, intentional deception of investors, throughout their relationship with Madoff, about the safety of the Fairfield funds, Ex. 167, Ex. 169, Ex. 170 Ex. 319; (v) Tucker's acknowledged concern in 2001 that the assets purportedly held by BLMIS were not "there," Ex. 40 at 97:8–21; *see also* Trustee's Counter-Statement of Facts ¶ 253; (vi) FGG engaged Citco to act as custodian in name only, with the understanding that custodial duties were delegated to BLMIS, *see* Trustee's Counter-Statement of Facts section II.C.; (vii) FGG's continual receipt of communications from Citco questioning the existence of assets purportedly sub-custodied with BLMIS, Ex. 344; (viii)

[6] References to "Ex." in this Memorandum of Law in Support of the Opposition to Defendants' Motion for Partial Summary Judgment, the Trustee's Counter-Statement of Material Facts, and the Trustee's Responses to Defendants' Statement of Material Facts refer to exhibits annexed to the January 26, 2026 Declaration of Erika Thomas in Support of Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment.

FGG's deliberate lies to the SEC to assist Madoff in covering up his fraud, Ex. 159; (ix) FGG's knowledge that BLMIS was purportedly being audited by an uncertified accounting firm incapable of performing the work that would have been necessary if Madoff were trading actual securities, Ex. 180; (x) Vijayvergiya's December 2008 attempts to liquidate a significant portion of his investment in Sentry, Ex. 322; and (xi) Piedrahita's knowledge of FGG's lies to investors and the SEC, and efforts to prevent investors from sharing their concerns about BLMIS. Ex. 165.

The Defendants argue that the Trustee is limited to proving their knowledge through explicit admissions. This not only grossly oversimplifies the ways in which a party can prove knowledge of fraud, it ignores the real world. It is exceptionally rare for fraud participants to provide contemporaneous, written confessions; in most cases, such knowledge is proved through circumstantial evidence. *See supra*, section II.A.

By setting forth the evidence showing the information and documents available to the Defendants, and the Defendants' actions, omissions, conscious avoidance, or willful blindness, the Trustee has more than met this bar. Under any knowledge standard, this evidence creates a genuine dispute of material fact about what the Defendants knew that should be decided at trial.

III. THE COURT SHOULD DISREGARD FUNKHOUSER'S CONCLUSIONS CONCERNING THE DEFENDANTS' STATE OF MIND.[7]

The Defendants criticize the Trustee's experts for failing to opine on the Defendants' state of mind concerning knowledge of Madoff's fraud. But courts have consistently held that expert

[7] Pursuant to the Court's May 5, 2025 Order Modifying the Expert Discovery Schedule and Establishing a Briefing Schedule for Partial Summary Judgment, the scope of the Trustee's opposition is limited to the Defendants' motion for partial motion for summary judgment. ECF No. 416. Opinions of the Defendants' expert, Cameron Funkhouser that reach conclusions about the Defendants' state of mind are irrelevant and exceed the scope of admissible expert opinion. The Trustee reserves the right to move to strike such opinions at the appropriate time, pursuant to Federal Rules of Evidence 702 and 703, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny.

testimony on a party's intent, motive, or state of mind is inadmissible because these are classic jury questions. *See In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 547 (S.D.N.Y. 2004) ("Inferences about the intent or motive of parties or others lie outside the bounds of expert testimony . . . . The question of intent is a classic jury question and not one for the experts." (internal quotation marks and citation omitted)); *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009) (excluding expert testimony on "knowledge, motivations, intent, state of mind, or purposes of the [defendant and] its employees," and noting that regulatory expertise "does not give [the expert] the ability to read minds"). The Trustee's experts navigate this prohibition, opining not on what was in the Defendants' minds, but rather on the inescapable conclusions the Defendants were faced with based on the contemporaneous documents and information before them.

Mr. Funkhouser's opinions, however, fail to navigate that prohibition and are therefore inadmissible. Although the Defendants attempt to recast Mr. Funkhouser's opinions on the Defendants' motivation as statements of general industry practice, citing *In re Term Commodities Cotton Futures Litig.*, 2020 WL 5849142, at *14 (S.D.N.Y. Sept. 30, 2020), Mr. Funkhouser's opinions go far beyond opinions on industry norms and due diligence standards, and purport to assess what was in the Defendants' minds. This improperly invades the jury's province. Whether Defendants knew of BLMIS's fraud is not a matter for expert opinion, it is a quintessential jury question that falls squarely within the jury's common understanding. *See Kidder, Peabody & Co. v. IAG Int'l Acceptance Grp., N.V.*, 14 F. Supp. 2d 391, 404 (S.D.N.Y. 1998) ("[J]uries traditionally decide whether an individual acted knowingly, or willfully, or maliciously, or with specific intent, or with any other relevant state of mind."). While experts may explain ordinary practices in the financial industry to assist the factfinder, courts draw a clear line between describing general

customs on the one hand, and speculating about what is in a party's mind, on the other hand. *See, e.g.*, *United States v. Bilzerian*, 926 F.2d 1285, 1295 (2d Cir. 1991). The question of what inferences should be drawn about a defendant's intent, against the backdrop of industry practice or standards, is a question for the factfinder. *Novartis Pharma AG v. Incyte Corp.*, No. 1:20-cv-400-GHW, 2024 WL 3608338, at *12 (S.D.N.Y. July 29, 2024). *See also In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 643 F. Supp. 2d 482, 505 (S.D.N.Y. 2009) ("[A]n expert may not draw the final inference between relevant evidence and the ultimate conclusion the jury will be asked to make."). Mr. Funkhouser's statements that the "Defendants reasonably believed Mr. Madoff was trading securities" and that their conduct was "indicative of their belief that Mr. Madoff was operating a legitimate business" impermissibly draw the final inference between relevant evidence and the factfinder's ultimate conclusion, and this Court should not be consider those opinions. Funkhouser Decl. Ex. 1 ¶¶ 130, 132.

Even if the Court were to find that some of Mr. Funkhouser's opinions were properly framed as general observations about mental state in the context of industry standards and practices, they are still inadmissible. Mr. Funkhouser is a former FINRA investigator; he is not a forensic psychologist. When an expert relies on experience, he must explain how that experience leads to his conclusions and how it is reliably applied to the facts. *See King* v. *Wang*, No. 14-cv-7694, 2021 WL 5237195, at *10 (S.D.N.Y. Nov. 9, 2021). Mr. Funkhouser does not do this. For example, he asserts that "it is irrational to believe Defendants would invest their personal funds with Mr. Madoff if they were aware Mr. Madoff was operating a Ponzi scheme" without explaining how his expertise supports these conclusions. Funkhouser Decl. Ex. 1 ¶ 85. Defendants themselves concede that Mr. Funkhouser's opinions are based on "common sense." Def. Br. at 35. Expert testimony grounded in "common sense [is] the antithesis of expert knowledge" and is inadmissible.

Betances v. Fischer, No. 11-CV-3200, 2021 WL 1534159, at *3 (S.D.N.Y. Feb. 23, 2021) (citation omitted). A jury is fully capable of applying common sense to the evidence and drawing its own conclusions about Defendants' knowledge. Allowing Mr. Funkhouser to speculate on Defendants' state of mind would improperly substitute his judgment for that of the factfinder and his opinions should be disregarded on summary judgment.

IV. THE DEFENDANTS KNEW BLMIS WAS NOT TRADING SECURITIES

A. The Documents and Information in Defendants' Possession Showed Lack of Trading in the Fairfield Sentry BLMIS Accounts As Far Back As 1997.

The Trustee submitted the expert opinions of Amy Hirsch, who has over 45 years of experience in the financial industry, particularly as an investment manager. Like the Defendants, who were also investment managers, Ms. Hirsch reviewed, analyzed, and conducted due diligence with the contemporaneous information and documents available to Defendants, as well as other publicly available information, and determined that *as far back as 1997* there were trading volumes reported in the Fairfield Sentry BLMIS Accounts that were (i) over the volume reported in the market and (ii) purportedly executed outside the daily reported price range. Trading at volumes that exceed the market volume or at prices above the reported market high or below the reported market low is impossible and indicates lack of trading. Hirsch Rept. ¶¶ 176-93, 194-205.

This evidence of lack of trading did not exist in a vacuum. FGG had other contemporaneous documents and information that demonstrated or further confirmed the lack of trading at BLMIS: (i) the source of returns was inconsistent with the SSC strategy (Hirsch Rpt. ¶¶ 206–228; 309); (ii) the execution of trades was impossible (*Id.* ¶¶ 178–205); (iii) Madoff was consistently out of the market at year-end and quarter-end (*Id.* ¶¶ 229–33); (iv) the strategy was not scalable (*Id.* ¶¶ 234–41); (v) the option trades were speculative (*Id.* ¶¶ 242–53); (vi) the returns far exceeded the returns of peers (*Id.* ¶¶ 254–82; 291–94); (vii) during periods of market stress, returns were inconsistent

with the SSC strategy (*Id.* ¶¶ 295–302); (viii) there was no correlation to the index they were replicating (*Id.* ¶¶ 303–04); (ix) the lack of downside risk (*Id.* ¶¶ 305–08); (x) the excessive concentration of duties (*Id.* ¶¶ 311–22); (xi) BLMIS did not charge fees other than commissions (*Id.* ¶¶ 323–26); (xii) the inexplicable lack of volatility (*Id.* ¶¶ 327–30); (xiii) unknown counterparties (*Id.* ¶¶ 331–44); (xiv) the lack of real-time access to accounts (*Id.* ¶¶ 345–53); (xv) backward trade confirmations (*Id.* ¶¶ 354–56); (xvi) the lack of credentials (*Id.* ¶¶ 357–59); (xvii) the reporting of a security that no longer existed (*Id.* ¶¶ 360–61); and (xviii) the atypical frequency of dividends (*Id.* ¶¶ 362–65).

B. Defendants' Misrepresentations and Conduct Prolonged Madoff's Fraud

The Defendants' actions during the course of their lengthy, lucrative relationship with BLMIS are consistent with their knowledge of the Ponzi scheme. The Defendants' alternate explanations for their conduct do not change the facts. The attempt to characterize the Trustee's actual knowledge case against the Defendants as a "red flags case," and Ms. Hirsch's expert reports as "red flags reports" are red herrings.[8] Throughout the course of their relationship with BLMIS, the Defendants gained cumulative knowledge indicating BLMIS could not have been trading securities. It is undisputed that the Defendants recognized and understood the significance of many indicators of fraud which were sufficient on their own to support the conclusion that Madoff was not trading securities.

C. FGG and BLMIS Had a Mutually Profitable Relationship, with FGG Acting as BLMIS's Marketing Arm to Expand the Ponzi Scheme

The Defendants were and are sophisticated investment managers who had a mutually

[8] Hirsch described a "red flag" as facts or circumstances that indicate risk associated with the investment opportunity" Hirsch Rept. ¶ 115. Hirsch explained that in her experience, as well as industry customs and practices, "investment managers have a fiduciary responsibility to react to every red flag both in isolation and in relation to all the cumulative red flags and anomalies that arise over the life of an investment." *Id.* ¶ 119.

beneficial relationship with Madoff. The Defendants operated as the sales and marketing operation for BLMIS, offering access to BLMIS. And Madoff capitalized on FGG's ability to market access to BLMIS to a larger pool of investors, generating fees and other profits for the Defendants. The Defendants' relationship with Madoff was close and extremely profitable.

BLMIS did not market its investment advisory business and Madoff always relied on others to bring new sources of investment capital to BLMIS. One of BLMIS's largest sources of new investment capital before FGG was Avellino & Bienes ("A&B"), which met its demise in the early 1990's as the result of an SEC investigation. In 1992, after an investigation, the SEC filed a complaint seeking a permanent injunction against A&B for having unlawfully operated as an unregistered investment company. Dubinsky Declaration Ex. A ("Dubinsky Global Rept.") ¶ 149. The SEC required that A&B pay back the investors it had brought into BLMIS, although many of the A&B-sourced investors reinvested their money with Madoff. *Id.* ¶ 154. After that close call with the SEC, Madoff changed his investment strategy. *Id.* ¶ 155.

It was at just this time that FGG was emerging as a major, and growing, source of new investment capital for BLMIS. FGG had many characteristics that appealed to Madoff, including a large, untapped pool of foreign investors seeking low volatility returns. FGG also had an SEC-registered investment advisor and could act as a front office—a sales force, and a buffer between BLMIS and investors, with their inquiries and due diligence questionnaires. It was a match that benefited both BLMIS and FGG.

Noel and Tucker had come together in 1987 when Fred Kolber & Co., where veteran Securities and Exchange commission enforcement attorney Tucker was employed, rented space in Walter Noel's office suite in Greenwich, Connecticut. Ex. 91. In March 1987, Kolber launched a hedge fund called Greenwich Options Fund L.P. *Id.*, Ex. 93 at -4331. Greenwich Options Fund

impressed Noel with its low volatility and its history of steady returns. By early 1989, the Greenwich Options Fund and its offshore counterpart fund had combined assets under management of approximately $125 million. Ex. 91. But at that level of investment, Noel and Tucker made the important realization that their hedged options strategy was not scalable, so they set out to find alternative/non-traditional investments. They were introduced to Bernie Madoff. On the basis of their first meeting with Madoff, FGG opened a BLMIS account in April 1989 and placed $1.5 million with BLMIS as an initial test investment. In December 1990, FGG started Sentry and opened a BLMIS account in Sentry's name.

Tucker and Noel knew from the outset that expanding Fairfield Sentry to invest primarily in BLMIS would be "highly profitable" to FGG and to Tucker and Noel individually. *Id.* at -8696.

D. FGG Used Sophisticated Vendors But Restricted Their Roles

One of the ways FGG created the illusion of credibility was through the retention of well-known third-party service providers, including Citco, PwC, and Gil Berman. Having a reputable administrator/fund custodian handle Sentry and having a "big four" auditor audit Sentry imbued FGG with a marketable trustworthiness – exactly what FGG needed to aid the sale of the Ponzi scheme and pacify inquisitive investors. Similarly, FGG engaged Gil Berman, a former options trader, to add the appearance of independent verification and analysis of BLMIS's trading.

FGG's use of sophisticated vendors—and its entire due diligence function as it related to BLMIS—was designed for marketing purposes. FGG consistently acknowledged risk factors, and purposely downplayed them or lied to investors about the risks. What FGG's victims didn't know was the extent to which FGG circumscribed what its service providers were allowed to do. FGG's retention of Berman, Citco, and PwC was about strategic advertising and not about investor protection. FGG's interaction with its service providers creates numerous questions of fact regarding FGG's knowledge that Madoff was not trading securities; and FGG's manipulation of

these service providers allows for the lies, restrictions and gatekeeping by FGG to be open to interpretation.

1. Berman

FGG used Gil Berman to create the impression that they verified BLMIS's trading and adherence to the SSC strategy. Tucker and Berman had worked together for years at Fred Kolber & Co., before Berman retired from the options industry, and moved to Colorado. In 1995, Tucker contacted Berman out of the blue, and convinced him to take on the task of reviewing and summarizing BLMIS's monthly statements. From the outset, FGG constrained Berman's engagement in several critical ways. Tucker directed Berman to "please just report the activity," and "[d]on't provide any editorial commentary." Ex. 88 at 302:5–11. FGG forwarded the BLMIS daily trading records to Berman, but Berman never reviewed those records. *Id.* Such a review, as both Berman and FGG knew, was simply outside of the scope of this authority. *Id*. And, in practical terms, such a review was rendered impossible by FGG anyway, because Berman typically received the relevant daily records several weeks or months after he had delivered his monthly summary to FGG. *Id.* at 71:4–72:3; 71:17–21. Moreover, as Berman testified, the daily records were simply too voluminous for him to consider in the monthly summaries. *Id.* at 73:8–13. Nor did Berman consider information from independent sources when he was preparing his reports—he looked only at the BLMIS monthly statements he received from FGG. *Id.* Ex. 87 at 46:3–10. His reports were nothing more than summaries of the documents FGG provided him.

FGG did not provide Berman the trading guidelines for the relevant accounts either, so it was impossible for him to analyze whether the trading activity shown in the records fit within guidelines for the trading strategy. But he understood how the SSC strategy operated. Given the limitations of the assignment, Berman had no reason to believe FGG would hold out his work as part of FGG's "risk monitoring" effort, nor did FGG ever tell Berman that it was presenting his

work to its investors as "risk monitoring." Ex. 87 at 54:15–55:4. Nevertheless, FGG created the impression among investors and with PwC that Berman was, in fact, monitoring and verifying BLMIS's trading. The notes of an April 2000 meeting between Tucker and Gert Smit and Sylvie Villoria of PwC show that Tucker created this false impression: "A monthly analysis is prepared on the trading activity and the performance of Sentry off-shore and Sentry domestic fund by Gil Berman (external party performing some work for FG). Gil Berman ensures consistency of the trading prices as well." Ex. 88 at 65:4–66:11, Ex. 99. When Berman was asked at deposition whether Tucker's description to PwC "of what [he was] doing [was] accurate," he testified that he never "ensure[d] consistency of the trading prices" and never did "anything with respect to trading prices." Ex. 88 at 66:5–67:14.

FGG also deliberately led investors to believe that Berman was not just summarizing, but instead "verifying" trading activity. For example, in 2003, FGG told Banco Atlantico, an investor, that Sentry had "retained Mr. Gil Berman to independently review and verify all portfolio activity and proper pricing to market each month. Mr. Berman has been performing these duties for the fund for more than seven years. Each month, he reconstitutes the profit and losses to substantiate the trading activity." *Id.* at 152:15–153:3.

Despite the constraints under which he was operating, Berman became deeply concerned, and conveyed his concern to FGG. Although FGG had not given him the trading guidelines, Berman was struck by how obviously inconsistent the SSC strategy was with BLMIS's purported May 2008 activity. He felt compelled to raise his concerns with the Defendants, particularly since this strange activity had driven the profit for the month. In June 2008, when he delivered his May 2008 monthly summary, Berman wrote to Vijayvergiya to alert him of "several unusual transactions relative to the typical matching of stock and options positions in executing the split-

strike conversion strategy." Ex. 34. Berman pointed out that the "unusual transactions" "produced excess profits"—the profit Madoff was reporting for that month was from a source other than the SSC strategy. Berman knew that "options trading activity to be unusual and difficult to explain" and "encourage[d]" FGG "to investigate it further." *Id.* When they spoke, Berman urged Vijayvergiya to "(1) Request e-m confirm of options trades on day of trade; (2) get info on counterparties for various trades; assess liquidity & counterparty risk in extreme mkt conditions; (3) conduct asset audit—are all funds there?; (4) Assess liquidity risk in poor mkts." Ex. 104. FGG did none of this, and hid Berman's concerns.

The Defendants knew that Berman's role was significantly more limited than FGG represented to investors. The evidence shows that "[t]here was a clear contradiction between Berman's limited responsibilities and FGG's representations to investors, prospective investors, and the Sentry board about his responsibilities." Hirsch Rept. ¶ 477. And when Berman suggested that FGG investigate irregularities, FGG disregarded his suggestions. *Id.* ¶¶ 463–67. After reviewing and analyzing all available Berman Reports, the Trustee's expert concluded that Berman's reports:

> did not confirm all trades in the Fairfield BLMIS Accounts, and there was no analysis of the trades, calculation of the components of profit and loss for the month, or verification that the stock portfolio was hedged in accordance with the strategy. Rather, his reports were merely a condensed summary of the statements; Berman's only source of information was the monthly BLMIS reports he received from FGG. Even when he did receive trade confirmations, he confirmed that he did not rely on them.

Id. ¶ 477. Despite what FGG was representing to its investors, "[t]here was no independent verification." *Id.*

2. Citco

Citco Bank Netherlands served as custodian for the Sentry Funds and at least a dozen other

FGG products. What differentiated Citco's role was that, unliked what it did for all the other FGG products, for the Sentry Funds, Citco was custodian in name only: Citco never had custody of the securities BLMIS allegedly purchased. *See* Ex. 323; Ex. 125; Hirsch Rept. ¶ 394. As its employees noted with increasing frustration and alarm, Citco did not perform any meaningful functions for Sentry whatsoever. *See* Ex. 325; *see also* Ex. 125. FGG omitted that fact from its representations to investors and potential investors. *See, e.g.*, Exs. 126–127. FGG needed to hold out Citco as its custodian to create an air of credibility and to help sell Sentry (by appearing to meet the requirements for listing on the Irish Stoch Exchange). For a dozen years or more, FGG did not disclose Citco's "name only" custodial relationship in Sentry private placement memoranda. Hirsch Rept. ¶¶ 391–395. That changed only in 2006 when Citco insisted on accurate disclosures and also wanted to relinquish its nominal role as custodian. FGG placated Citco by revising the private placement memorandum and by offering Citco a hefty fee increase to stay on as "custodian." *See* Ex. 124; Ex. 128 at 250:5–251:24; Ex. 145; Hirsch Rept. ¶¶ 184–185, 396, n.540, n.541.

The Defendants prevented Citco from conducting any meaningful assessment of or due diligence on BLMIS. FGG's CFO, Dan Lipton, inserted himself at the center of the Citco–FGG relationship to not only control the flow of information, but in many instances, to prevent key information from flowing to Citco. *See* Ex. 147; Ex. 50 at 42:3–15. Citco could not compare FGG's trade records to independent sources of information. The only source of information was BLMIS. *See* Ex. 146. Citco asked Lipton for independent information on BLMIS's trading, but Lipton did not provide it. *See id.* When Citco met with BLMIS, FGG employees were always present, ensuring that Citco's analysis was conducted on FGG's terms. *See, e.g.*, Exs. 67–68. When Citco tried to conduct due diligence during a meeting at BLMIS in 2002, Citco reported internally that

the mission had "failed," and that it couldn't complete certain walkthrough procedures because PwC, acting on its instruction from FGG, blocked them. *See* Ex. 52 at 440:23–441:23; Hirsch Rept. ¶ 319; *Id.* Fig. 117; Ex. 216. When Citco needed to contact Sentry's auditor, PwC, FGG required that Lipton be involved in all communications. *See* Ex. 149. Lipton was dismissive of concerns raised by Citco regarding BLMIS's trading irregularities (*see* Ex. 152), and Citco could not perform due diligence of any kind on BLMIS without going through Lipton. *See* Ex. 153; Ex. 75; Ex. 154; Ex. 76. When Citco was desperately trying to conduct due diligence for over 10 months in 2008, Lipton and others at FGG ignored multiple communications from Citco, preventing any due diligence from occurring. *See* Exs. 69–70. This was a deliberate act to prevent Citco from uncovering what the Defendants already knew—that BLMIS was not engaged in trading.

Lipton was intent on thwarting Citco's efforts because Citco had expressed numerous concerns about BLMIS that the Defendants wanted to prevent from ever reaching investors. Citco employees suspected serious problems at BLMIS with both the existence and the custody of the assets. Hirsch Rept. ¶¶ 319, 394–95. This information was shared directly with FGG. Ex. 252. From at least as early as 2000 through the collapse of BLMIS, Citco was worried about whether Madoff actually possessed the assets he claimed to possess. The most vocal Citco employee, Ger-Jan Meijer, was in Citco's internal audit department. For years, Meijer raised his suspicions and concerns about BLMIS throughout Citco, questioning whether BLMIS had custody of the assets, whether the assets even existed, whether BLMIS's auditor was capable of performing the audit, and the outsized risk presented by the lack of segregation of duties at BLMIS. Ex. 52 at 42:15–42:25, 57:23–58:13, 174:20–176:18, 181:2–181:8, 188:11–188:19. These concerns, which were shared with FGG (Ex. 324), proved to be right.

Tucker's actions with respect to Citco had much the same effect as Lipton's. Tucker was

not only aware of Citco's concerns about BLMIS (Ex. 324), but he tried to stifle them, telling Citco not to ruffle Madoff's feathers when they met with him—the relationship was simply too financially important to FGG. Ex. 250 at 90–91. Furthermore, FGG promulgated a feeling within Citco that if Citco were to do any on-site audit of BLMIS, it might hurt the FGG–BLMIS relationship. *Id.* at 140:9–140:12, 207:11–207:25. As early as 2000, Citco wanted the most basic comfort from F&H – that the assets existed and were custodied with Madoff – but Citco never got that reassurance because Tucker ignored Citco's concerns. Ex. 252.

A key component of FGG's marketing was to have Sentry listed on the Irish Stock Exchange ("ISE"). The listing helped Sentry's "optics" for marketing purposes and it also helped to prevent undue scrutiny of BLMIS. To obtain the ISE listing, FGG needed Citco as Sentry's custodian so that no one – and especially no regulator – would view BLMIS as the real custodian. This relationship – Citco being custodian in name only – raised concern and suspicion. Hirsch Rept. ¶ 412, n.571. Citco knew it was not really the custodian, doing nothing more than "typing over" the statements FGG received from BLMIS. *Id.* ¶ 413, n.579. Citco's concerns reached a breaking point by 2006, when it informed FGG that it wanted to withdraw as custodian. Ultimately, based on FGG's entreaties that a change in custodian would negatively impact FGG's ability to attract foreign investors and FGG's offer to pay a hefty increase in Citco's fees, Citco agreed to remain as nominal custodian. *See id.* ¶ 413-28; Exs. 326, 124. "There were and are no legitimate reasons to make misrepresentations to a regulatory agency. Therefore, there was no reason to hide BLMIS's and Madoff's actual roles as investment advisor, broker and custodian and there was no reason to hide that Fairfield Sentry had a discretionary account at BLMIS, except for the fact that if BLMIS was listed as both the custodian and the investment advisor, it would violate the ISE listing requirements stating that you have to have a separate custodian." Hirsch Rept. ¶ 428. FGG's

manipulation of Citco served both FGG and BLMIS well because it kept BLMIS hidden from regulatory scrutiny and enabled FGG to continue to raise assets for investment with BLMIS, increasing their performance and management fees. *Id*.; *see also* Exs. 327–28. The issue of whether FGG's manipulation of Citco's role and by extension, the ISE, is probative of the Defendants' knowledge of BLMIS's fraud.

3. PwC

FGG's hiring of PwC was strategic as well, but not for the reasons commonly associated with hiring a "Big Four" auditor. FGG hired PwC not for its auditing acumen or for its ability to deliver a complete audit, but rather to further enhance the appearance of legitimacy. The terms of the engagement were limited: Lipton engaged PwC to audit Sentry's financial statements and not to audit any transactions associated with or the overall performance of the fund. *See* Ex. 58, Ex.106, Ex.107; Ex. 50 at 123:9-124:2; Ex. 57; Hirsch Rept. ¶ 445. That is a distinction with a significant difference when it came to FGG's advertising its use of PwC, it allowed FGG to lie to customers about the scope of the audit but simultaneously appear credible and trustworthy.

Lipton, having hired PwC, orchestrated FGG's relationship with PwC for the benefit of both FGG and BLMIS. Lipton controlled the audit plan and controlled the flow of information to PwC in order to steer PwC toward issuing clean audit reports for Sentry when, in fact, PwC did anything but a full audit. Sentry was deliberately structured without an audit committee, which forced PwC to run everything through Lipton. This arrangement allowed Lipton to share only what he wanted to share. And as a consequence, PwC could only draw from limited sources—offering memoranda, working papers, and discussions with Lipton. *See* Ex. 112 at 151:18–152:4; 81:19-82:9. PwC did not conduct its own fact finding. *Id.* at 122–26. *See* Ex. 112 at 54:25–55:14, 122:15–124:25, 148:23-25; Ex. 116; Ex. 117 at 91:16-92:4. Lipton chose the information to provide, including how to educate PwC about fraud risk. *See* Ex. 110 at 69-78. If PwC wanted information

from Citco, it had to go through Lipton. Lipton controlled the narrative, and shared lies and misinformation, all while knowing that Madoff could not be engaged in actual trading. Lipton lied to PwC about why BLMIS registered as an investment advisor. He chose not to disclose the SEC's investigation of BLMIS, including FGG's involvement therein. *See* Ex. 112 at 87:21–88:16; Ex. 59 at 219:15–220:16; Ex. 120; Ex. 50 at 252:19–253:17. Lipton also failed to communicate the presence of suspicions regarding BLMIS's fraud, despite the fact that he was obligated to share that information with PwC pursuant to the FGG - PwC engagement agreements. *See* Ex. 58, Ex. 106. When Barron's published its "Don't Ask, Don't Tell" article, Lipton dismissed the article as out of date and as a manifestation of "professional jealousy." He rejected the inclination to further investigate the other concerns raised in the article. *See* Ex. 112 at 266:19–267:11; 268:9–16. With the Lipton-orchestrated "clean audits" in hand, FGG sales reps could bring in more investors and perpetuate the Ponzi scheme.

Lipton told PwC in 2006 that F&H was a reputable and qualified auditor (a "boutique firm specializing in broker dealers") knowing full well that that F&H was not AICPA registered to conduct audits. *See* Ex. 117 at 229:2-230:4; Ex. 112 at 216-23; Ex. 331 at 121-29. Lipton's lie to PwC discouraged PwC from looking into F&H any further and prevented the revelation that BLMIS's auditor was illegitimate. Lipton also told PwC that the fact BLMIS was always entirely in cash or Treasury bills at year-end was part of BLMIS's strategy and an overall effort to protect the strategy. Ex. 117 at 114:22-116:24. While technically true – BLMIS did purportedly go into T-bills at year-end – the real purpose was not to protect the strategy itself, but to protect the strategy from regulatory scrutiny, a fact the Defendants knew. Finally, because of Lipton's campaign to restrict PwC's access to information, PwC was forced to make an exception when it issued the financial statements. *See* Ex. 331 at 241-242. But no investor knew any of this. FGG's

manipulation of PwC allowed FGG to maintain its illusion of credibility and trustworthiness to the detriment of its many victims.

4. FGG's Lack of Candor Thwarted the SEC's Investigation Into BLMIS

FGG cannot credibly disclaim responsibility for the SEC's failure to uncover the Ponzi scheme during its 2005–2006 investigation. The SEC reasonably relied on FGG's representations as accurate, complete, and good faith, but Fairfield's omission of key, highly suspicious facts about Madoff and BLMIS deprived the SEC of information that could have materially impacted the focus of its investigations—and likely would have led to earlier discovery of the fraud.

FGG failed to disclose Madoff's unethical statements during his preparatory call with Vijayvergiya and McKeefry. Madoff started the call with the warning, "Obviously this call never took place," to which Vijayvergiya and McKeefry responded in agreement, and then proceeded to explain the contrivance to the SEC. Rather than discuss how FGG might truthfully frame the disclosure to the SEC of this blatant violation of BLMIS's trading authorization, Madoff stated that he would send a courier to FGG with his trading guidelines and that FGG should produce this document in response to the SEC's information request. Vijayvergiya and McKeefry accepted Madoff's instruction without hesitation. Madoff also repeatedly instructed FGG not to mention options, which he said were no longer part of the model, a statement that was patently untrue. Ex. 221; Ex. 159. Rather than react with surprise or concern, FGG followed Madoff's instructions, and failed to inform the SEC of these facts, as well as trading anomalies that on their face indicated no securities were being traded, Hirsch Rept. ¶¶ 201, 203, Figure 53; *Id.* ¶¶ 360–361, and withheld from the SEC that FGG created FG Bermuda at Madoff's specific request in order to avoid SEC scrutiny.

If FGG had made candid disclosures to the SEC—as it should have—this would have signaled to the SEC that deeper investigation was warranted. "A competent investment manager,

particularly one managed by a former SEC enforcement attorney," as Tucker was, "should not need to be told how to speak with a regulator." Hirsch Rept. ¶ 434. Instead, FGG made representations that were "inconsistent with [its own] documentation," *id.* ¶ 435, based on Madoff's script as to "what should and should not be said at an upcoming SEC inquiry with FGG regarding the operational and compliance aspects of Madoff's investment strategy and BLMIS's relationship with Fairfield Sentry." *Id.* ¶ 429. But "[t]here should be no need for a script; the only responses to the SEC inquiries should be the truth." Hirsch Rept. ¶ 429. As BLMIS's largest investor, FGG's disclosure of these suspicious facts to the SEC would have provided reason for investigators to look more closely at Madoff's operations. Instead, FGG withheld material information and reduced the likelihood of the SEC exposing the Ponzi scheme. This is conduct consistent with knowledge of Madoff's fraud.

E. FGG's Lies

1. Tucker Did Not Verify Trades or the Existence of Sentry's Assets During a May 2001 Visit to BLMIS

A cornerstone of FGG's purported sophisticated due diligence is the claim, repeated often, that FGG verified Sentry's assets by tracing them from Sentry's BLMIS account to the DTC. Tucker's story that he confirmed BLMIS's purchase of a single stock in Sentry's portfolio by viewing a DTC screen in real-time is provably false, based on the known facts about BLMIS's operations and computer system. Dubinsky Global Rept. ¶¶ 197–206; *Id.* ¶ 205, n.198. Even if BLMIS's system had the capacity to generate fake DTC screens on-demand, which is a disputed fact, everything about Tucker's story supports the conclusion that as early as 2001 he knew that Madoff was not trading securities.

It is undisputed that in May 2001, two financial industry publications, MAR/Hedge and Barron's, published articles critical of BLMIS and Bernie Madoff. The articles voiced questions

about BLMIS that had been percolating in the investment industry for nearly as long as BLMIS had been operating an investment advisory business. How was Madoff consistently able to beat the market's performance with a strategy that, at its essence, tracked the market, but with less potential for upside gain and downside loss?

The MAR/Hedge article observed that the "Gateway fund," a publicly traded fund also using the SSC strategy, had "experienced far greater volatility and lower returns [than BLMIS] during the same period." Ex. 317. The article questioned whether it was "market timing" that generated those results. *Id.* at -2746. (noting the industry's questioning Madoff's "seemingly astonishing ability to time the market and move to cash"). The article also acknowledged one of the prevailing theories about Madoff in May 2001: that "at least part of the returns must come from other activities related to Madoff's market making"—i.e., a brand of fraud known as front running. *Id.* at –2747.

A few days later, a similar article filled with reports of skepticism about whether Madoff's purported strategy could actually generate the purported returns, appeared in Barron's. Ex. 318. The Barron's article quoted a former Madoff investor: "Anybody who's a seasoned hedge fund investor knows the split-strike conversion is not the whole story. To take it at face value is a bit naïve." *Id.* at -0157. Although FGG unquestionably had the goal of marketing the Sentry Funds, Tucker bristled at the attention the Barron's article brought to FGG and BLMIS out of the spotlight. Tucker is quoted: "Why Barron's would have any interest in [Sentry], I don't know." *Id.* at -0156.

Behind the scenes, both Madoff and FGG tried to control the narrative. FGG scrambled to draft a letter to investors disparaging the financial journalists who wrote the articles. Ex. 319. Madoff reached out to Tucker and together, they set in motion a plan designed to gain the confidence of investors—a meeting in which Tucker claimed that Madoff showed Tucker proof of

his trading and proof that Sentry's assets were there. Tucker's testimony concerning the purported focus of the May 2001 meeting is telling. The inference can be drawn that Tucker and Madoff met in an effort to get ahead of rumors concerning what they both knew to be true – that Madoff wasn't trading securities at all. Notably, the MAR/Hedge and Barron's articles focused on other rumors, such as front-running, neither article had suggested that BLMIS wasn't trading at all or that the assets might not be "there."

Nearly every aspect of this purported meeting raises issues of credibility on material issues. There are no contemporaneous written records evidencing that the meeting actually took place, although there are building entry records from BLMIS's offices in the Lipstick Building for virtually all visitors, there is no record showing that Tucker was there in May 2001; Madoff kept written calendar entries for his meetings, and there are no datebook or calendar entries for a May 2001 meeting with Tucker. Based on Madoff's travel records, he appears to have been in Europe, not New York City, for the majority of May 2001. Tucker did not take notes, he did not obtain a hard copy of the purported screenshot, nor did he ask for the screenshot to be emailed or faxed to him; and there are no recorded notes or memoranda from the meeting. Yet FGG made this alleged meeting the cornerstone of its due diligence story, and strategically disseminated the story to FGG personnel, who themselves dutifully disseminated the story to FGG investors. The story contributed to the aura around FGG, of unmatched access to BLMIS and to more sophisticated, farther-reaching due diligence than any of FGG's competitors. But the story is probably not true.

Tucker's testimony concerning what supposedly occurred during the meeting, given in various proceedings the last twenty years, is fraught with conflicts. Tucker's testimony to the SEC in 2006, when the Ponzi scheme was still active, was different than the testimony he gave after Madoff was arrested. But all versions of the story, whether they were given while the Ponzi scheme

was active or after Madoff was arrested, were designed to protect FGG's interests. *See* Ex.40 at 97:15–22; Ex. 95 at 39:2–4; Ex. 161 at 116:3–4.

What did Tucker claim to have done at the meeting? As Tucker testified to the Massachusetts Securities Division in 2009, the meeting was entirely controlled by Madoff. Tucker claimed that he passively observed as Madoff and DiPascali put BLMIS documents in front of him. He had no documents of his own to compare them to and claimed to rely on his memory of trades that had taken place six months before. Ex. 40 at 97:9–100:4.

Tucker testified that he relied on the representation that the computer screen he was shown was a "DTC screen," but that he had never before that day seen a DTC screen, and therefore had no point of comparison. He also did not get a printout of what he had been shown. *Id.* at 100:5–100:21.

Even if that event could have occurred as Tucker described in any of the various re-tellings, it defies common sense to believe that a sophisticated hedge fund relied in perpetuity on this singular event as "proof" of the existence of billions of dollars of invested assets. In fact, FGG took Tucker's story and used it as part of their marketing – adding the necessary lie that they did this type of confirmation on a regular basis. *See* Hirsch Rept. ¶ 373, Figure 112; Ex. 332; Ex. 32 at -6479.

2. FGG Lied to Investors About BLMIS's Options Counterparties

Another key part of FGG's purported due diligence with respect to the SSC strategy involved its assessment of BLMIS's options counterparties. Since FGG had no idea of the counterparties' identities or their risk profiles, it was impossible to assess one of the fundamental risks of the SSC strategy. There were three aspects of BLMIS's purported options trading that made knowing the identity of counterparties particularly important: (1) the massive volumes and notional values of the options contracts needed to support BLMIS's strategy; (2) the fact that

options contracts are premised upon the counterparty's creditworthiness; (3) BLMIS's claim that it was trading options over-the-counter, rather than on a market with public reporting.

FGG took advantage of its close relationship with BLMIS, and, in particular, Tucker's May 2001 visit, to create the appearance that it had investigated the risk associated with the options counterparties. Tucker testified to SEC investigators in 2006 that the options counterparties "would almost have to be the big ones [due to] the size that they do there from Merrill [Lynch], Deutsche [Bank], Goldman [Sachs], Morgan Stanley, whoever does the big derivatives business and whoever has a reasonable credit rating or a good credit rating is probably a counterparty at some point, if not always." Ex. 95 at 35:3–20. Through its representations concerning options counterparties to third parties—that the counterparties were top-tier, highly capitalized derivatives dealers—FGG demonstrated that it was aware of the importance of having information about the counterparties and purposely led investors to believe that FGG had thoroughly vetted the counterparty risk. *See* Ex. 167 at -1950, -1952; Ex. 169.

FGG, however, had not vetted the issue at all. Internally, FGG acknowledged that verifying the identity of options counterparties "won[']t be possible." Ex. 333 at -9039 - 9040. Ex. 224 at 119:14–120:2; Ex. 277 at 103:20–104:2; Ex. 278 at 340:14–16. Tucker's 2006 testimony to the SEC typified FGG's representations to third parties. In March 2005, for example, two investors asked FGG who BLMIS's options counterparties were. Ex. 334 at -888. Vijayvergiya lied and told them that Merrill Lynch and Deutsche Bank were among Madoff's counterparties. Vijayvergiya Ex. 12 at FG-06606530.

Vijayvergiya practiced giving this kind of response in internal training sessions for FGG sales employees. In a May 16, 2005 "Mock Due Diligence Meeting," Vijayvergiya responded to questions about options traded over-the-counter, commenting, "[t]here's an element to counter-

party risk. However, the way that the fund's mitigated that is, by spreading across very well capitalized, well established series of counterparties, which number between 8 to 12 on a given implementation." Ex. 33 at -618.

The information FGG peddled to investors about knowing the identity of options counterparties was false. Hirsch Rept. ¶¶ 450–460. After Madoff was arrested, Tucker admitted to the Massachusetts Securities Division that he never knew the identities of the options counterparties. Ex. 40 at 114:20–115:7. As the Trustee's expert concluded, even though "the information that FGG had in its possession confirmed that there were no options contracts and no options counterparties" FGG "made repeated misrepresentations regarding the existence and identities of the options counterparties" that were "blatant lie[s]." Hirsch Rept. ¶¶ 451, 460.

3. FGG Lied to Downplay Risks and Rumors

FGG was aware of the similarities between Madoff and the Bayou Hedge Fund but lied to investors to deflect their attention from what FGG knew to be a significant fraud risk. Ex. 80; Ex. 181. FGG claims now to have relied on Madoff's reputation as "a prominent and respected member of the investing community", and his status as a well-recognized and well-respected leader in the industry. *See* Defs.' Statement of Material Facts In Supp. of Mot. For Partial Summ. J. ¶ 57; Funkhouser Dec. Ex. 1, ¶¶ 22, 26. For the reasons described in the Hirsch rebuttal expert report, Hirsch Rebuttal Rept. ¶ 8; Opinion V, investment professionals are expected to invest with individuals who have a good reputation, reputation is not a substitute for due diligence and common sense. Hirsch Rebuttal Rept. ¶ 8; Opinion V. Not only was Fairfield aware at least as early as 1995 of Citco's concerns about its inability to verify BLMIS's trades or the existence of Sentry's assets, FGG was repeatedly faced with negative rumors concerning Madoff in the industry and from specific investors, and repeatedly chose to deny the rumors and defend Madoff – even going so far as to chastise investors for stating the truth about their concerns relating to the risks

associated with investing in Sentry/BLMIS. Ex. 319; Ex. 335; Ex. 350. Equally indicative of their knowledge of Madoff's scheme and desire to continue deceiving investors, the Defendants would reach out to investors who redeemed based on concerns about Madoff and BLMIS and ask them not to share their concerns with anyone. Ex. 165.

With respect to rumors about BLMIS's unqualified auditor, FGG knew the rumors to be true, based on its own limited investigation. Hirsch Rept. ¶¶ 478–509; Vijayvergiya Decl. Ex. 20 at FG-06607302; Ex. 287 at -251; Ex. 170; Ex. 230 at 151:23–152:7. Despite this, FGG made misrepresentations about F&H and its capabilities to investors, even after learning the truth. As early as 2005, FGG knew that F&H had a single employee and sales of only $180,000. Hirsch Rept. ¶ 480. Despite this, FGG continued to follow "Madoff's direction . . . to deflect unwanted inquiries into the credibility and qualifications of F&H and to give investors confidence that there was a reputable, independent auditor checking BLMIS." *Id.* ¶ 478. Despite acknowledging the importance of a reputable auditor, FGG continued to follow Madoff's directive and deflect the ongoing requests from its investors for information on the auditor. *See id.* ¶¶ 481, 483-489 (detailing requests from FGG investors for details on BLMIS's auditor). Each of these lies reflects Defendants' knowledge of lack of trading at BLMIS and their efforts to perpetuate the fraud at BLMIS.

Within the confines of Rule 26 and the Federal Rules of Evidence, the Trustee's expert identified the relevant documents, analyzed the due diligence that Defendants conducted, opined that as an investment advisor and manager, the contemporaneous documents and information in the Defendants' possession showed lack of trading throughout the Sentry Funds' investment with BLMIS as early as 1997, if not earlier. Namely, the Trustee's expert identified impossible options volumes, out of range trades, and impossible execution of trades—each of which, together and

separately—show that BLMIS was not trading. The Trustee's expert further concluded that the lack of trading did not change through 2008, and that additional information and documents and cumulative red flags only confirmed the absence of real trading at BLMIS. The facts discerned during discovery and the Trustee's expert opinions demonstrate a triable issues of fact regarding the Defendants' knowledge of lack of trading at BLMIS.

V. KNOWLEDGE IS IMPUTED AMONG THE DEFENDANTS

The Defendants' contention that the Trustee must provide individualized proof of actual knowledge for each defendant misstates controlling law. Knowledge held by the individual Defendants as authorized decision-makers of the Defendant entities is attributed to those entities. *See, e.g.*, *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465-66 (N.Y. 2010) (knowledge and actions of corporate agent are generally imputed to the corporation, even if the agent acts fraudulently and even if the agent does not actually communicate the information to the principal); *In re CBI Holding Co., Inc.*, 529 F.3d 432, 448 (2d Cir. 2008) (management's knowledge imputed to the company, subject to the adverse inference exception); *In re Firestar Diamond, Inc.*, 654 B.R. 836, 880–81 (Bankr. S.D.N.Y. 2023) (holding that managers' misconduct within the scope of employment is imputed to the principal). These doctrines are routinely applied in fraudulent transfer and analogous corporate-liability contexts. S*ee, e.g.*, *Wight v. BankAmerica Corp.*, 219 F.3d 79 (2d Cir. 2000). The affirmative communication of that knowledge is not required to impute insider knowledge to the corporate entity. *See Kirschner*, 15 N.Y.3d at 465–66.

Similarly, a partner's knowledge and wrongful acts are generally imputed to the partnership and its partners. Imputation applies equally to individuals operating as a *de facto* partnership. *See* 14 N.Y. Prac., New York Law of Torts § 9:8. Courts have consistently held that the critical inquiry is whether knowledge was gained while acting within the scope of the partnership or with the co-partners' authority. *See Kirschner*, 15 N.Y.3d at 465.

Courts likewise recognize that third-party administrators may act as agents of a principal fund when the principal manifests an intent to confer authority upon the administrator, such that the administrator's knowledge may be imputed to the fund. *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 285, 305 (Bankr. S.D.N.Y. 2011), *aff'd sub nom In re Aozora Bank Ltd. v. Sec. Inv. Prot. Corp.*, 480 B.R. 117 (S.D.N.Y. 2012), *aff'd sub nom In re Bernard L. Madoff Inv. Sec. LLC*, 708 F.3d 422 (2d Cir. 2013).

Imputation is not a mechanical exercise; it is a fact-driven inquiry that turns on the specifics of roles, authority, information flow, and whether actions were undertaken in furtherance of the entity's business. Courts in this Circuit hold that these determinations are for the jury and not for resolution on summary judgment. *See generally In re CBI Holding Co.*, 529 F.3d 432; *Presbyterian Church of Sudan v. Talisman Energy*, 453 F. Supp. 2d 633, 670 (S.D.N.Y. 2006) (issues of knowledge and intent—central to imputation—are "exquisitely fact intensive" and not appropriate for summary judgment); *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 537–38 (2d Cir. 1999) (cautioning against summary judgment where intent or scienter is disputed). These cases underscore the principle that when imputation hinges on disputed facts, summary judgment is improper.

The Defendants cite *Whelan v. AMR Corp.*, No. 98 CV 265, 2005 WL 8160049, at *5 (E.D.N.Y. Nov. 23, 2005), for the unremarkable point that a plaintiff must raise a triable issue as to each defendant. But *Whelan*, an E.D.N.Y. decision, does not override Second Circuit authority, which permits proof of knowledge and intent through circumstantial evidence and reasonable inferences, *see S. Cherry St., LLC v. Hennessee Grp. LLC,* 573 F.3d 98, 110–11 (2d Cir. 2009); *Rombach v. Chang,* 355 F.3d 164, 176–77 (2d Cir. 2004), and imputation of scienter to corporate entities, *see Jackson v. Abernathy,* 960 F.3d 94, 98–99 (2d Cir. 2020). The Defendants' attempt to

interpret *Whelan* as requiring separate or individualized proof for each individual and entity, beyond their agents' conduct, conflicts with controlling imputation principles and should be disregarded. Properly understood, *Whelan* rejects only undifferentiated group pleading; it does not preclude attributing an agent's knowledge to a principal when the agent is acting within the scope of the agent's authority.

CONCLUSION

The Defendants' motion for summary judgment should be denied because a jury should be permitted to hear facts concerning Defendants' knowledge, conduct, and misrepresentations, and draw inferences for themselves as to whether these facts in their totality are sufficient to prove the Defendant's knowledge that BLMIS was not trading securities. For all the foregoing reasons, the Court should deny the Defendants' motion.

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/s/ David J. Sheehan

BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4200
David J. Sheehan
dsheehan@bakerlaw.com

Attorneys for 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