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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.	No. 08-01789 (SMB) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. FEDERICO CERETTI, *et al.* Defendants.	Adv. Pro. No. 09-1161 (SMB)

THE KINGATE FUNDS' MEMORANDUM OF LAW IN OPPOSITION TO THE TRUSTEE'S MOTION TO COMPEL DISCOVERY

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The Joint Liquidators for defendants Kingate Global Fund Limited ("Kingate Global") and Kingate Euro Fund Limited ("Kingate Euro" and, together with Kingate Global, the "Kingate Funds" or "Funds") respectfully submit this memorandum of law in opposition to the motion to compel (Doc. No. 253, the "Motion") filed by plaintiff Irving Picard, the Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC (the "Trustee").

PRELIMINARY STATEMENT

The Trustee's Motion against the Kingate Funds seeks three categories of documents. First, the Trustee seeks to compel the Funds to produce the "Bermuda Productions," documents that were produced to the Funds by several of the Non-Fund Defendants (the "Production Defendants"[1]) in an ongoing Bermuda action and that, as of now, the Funds cannot turn over without the consent of those parties or permission of the Bermuda court. Second, he seeks to have the Funds collect documents from another grouping of the Non-Fund Defendants (the "Service Providers"[2]) even though the Funds have already done so and produced hundreds of thousands of documents to the Trustee. Finally, he asserts that the Funds have to produce or log documents created after they entered liquidation—or long after the events leading up to BLMIS's collapse—even though he refuses to do the same.

As to the *first* category, the Bermuda Productions, the motion is misdirected. The Kingate Funds are not resisting discovery; rather, it is the Production Defendants that have prevented the Funds from producing the documents to the Trustee. It is these defendants that produced the documents to the Funds as part of legal proceedings in Bermuda, and that have

[1] In more detail, the Production Defendants are (a) Kingate Management Limited ("KML"), (b) FIM Limited, FIM Advisers LLP, Carlo Grosso, and Federico Ceretti (collectively, "FIM"), and (c) the various trusts that together own the shares of KML (collectively, the "Trust Defendants").

[2] The Service Providers are (a) KML, (b) FIM, (c) HSBC Bank Bermuda Limited ("HSBC Bank Bermuda"), and (d) Citi Hedge Fund Services Limited and its predecessors ("Citi Hedge").

invoked the "implied undertaking" under Bermuda law to block production by the Funds. Because these Production Defendants have the documents, and because—unlike the Kingate Funds—they can produce the documents to the Trustee *without violating applicable foreign law*, they are the only appropriate targets of the Trustee's Motion.

The Trustee's Motion against the Kingate Funds is also grounded on the Trustee's assertion that the Funds have refused to produce the documents. But nothing could be further from the truth. The Funds have undertaken extensive and expensive efforts to produce documents to the Trustee. In BVI, for example, the Funds sought and obtained permission from the Court to produce the so-called "Voluntary Productions" to the Trustee, over the objections of various shareholders in the Funds (who also appeared briefly in this Court to voice their objections). As a result of that extensive application, the Funds have now produced *hundreds of thousands* of documents to the Trustee, and are cooperating with the Trustee to ship boxes containing tens of thousands more documents to him. Similarly, in Bermuda, as the Trustee's own counsel has seen by attending the court hearings, the Funds have sought the court's waiver of the implied undertaking asserted by the Production Defendants. While those efforts have yet to meet with success, the Funds have pushed vigorously for the right to produce the Bermuda Productions to the Trustee. Any suggestion that the Kingate Funds are resisting discovery in this action, accordingly, is absurd.

Under these circumstances, there is absolutely no reason to compel the Kingate Funds to produce the Bermuda Productions to the Trustee. Forcing the Kingate Funds to choose between violating the laws of Bermuda—one of the jurisdictions in which they are in liquidation—and violating an order of this Court is not only inequitable, but wholly unnecessary. Case law interpreting Rule 26(b) makes clear that discovery should not be ordered from a party if it "can

be obtained from some other source that is more convenient [or] less burdensome." The Production Defendants, who can produce the documents without any violation of international law, are such a source. The Trustee should thus look to them for production of the Bermuda Productions. That would be really no different than how the Trustee's adversaries are required to seek third-party productions in the Trustee's possession. When defendants like the Kingate Funds request third-party productions from the Trustee, those third-parties are given an opportunity to object to the request. And when there is such an objection, the requesting party is expected to negotiate with the original producing party, rather than the Trustee, to get access to the documents. The Trustee's Motion against the Kingate Funds, of course, takes *exactly the opposite approach*.

The Trustee's continued targeting of the Kingate Funds—when other defendants are the source of the Bermuda Productions and can produce them without violation of law—is consistent with a strategy to put the Funds in a "no-win" situation, where their compliance with Bermuda law could lead to discovery sanctions in the U.S. Indeed, while the Trustee could have sought discovery from the Production Defendants months ago, he instead threatened the Funds—and only the Funds—with contempt language in an order to show cause seeking production of the documents. And the Trustee's papers on this Motion suggest that even if he obtains the Bermuda Productions from the Production Defendants, he will nonetheless continue to seek an order against the Funds for the very same documents.[3] This whole approach appears structured to punish the Funds, even though they are the only ones that have long been trying to make the Bermuda Productions available to the Trustee.

[3] *See* Mot. 9 n.27 (stating that, if the Trustee receives the Bermuda Productions from the Production Defendants, he will withdraw this Motion but only as to them).

Turning to the ***second*** category—the Service Providers' documents—the Trustee argues that, since the Kingate Funds had contract rights that allowed them to obtain documents from their Service Providers when the Funds were operating in the normal course of business, the Funds should now be compelled to step in and take over the Service Providers' files and servers to locate responsive documents for this case. As an initial matter, the Funds did not have contracts with all of the Service Providers. And for the Service Providers the Funds did have contracts with, the Trustee noticeably offers no ideas for how the Funds are supposed to collect and review documents that do not relate to them or might concern a privilege that does not belong to them under the guise of generic contract rights to access certain information about their own affairs.

The Trustee's argument also ignores the fact that the Funds have already sought all documents "relating to the Funds" from these parties. The Joint Liquidators sought these documents pursuant to BVI law and, as a result, obtained hundreds of thousands of documents (in the form of the "Voluntary Productions" mentioned earlier). The Funds already have produced—or are in the process of producing—these documents to the Trustee. The Joint Liquidators' rights to obtain such documents under BVI law, pursuant to which they collected these documents, are at least as broad as any contractual rights to obtain documents. Once again, the Trustee's real complaint is with the *other*, Non-Fund Defendants—he may believe that they did not produce enough documents to the Funds when productions were demanded under BVI law. But, even were that so (a proposition for which no evidence has been offered), that is hardly the Funds' fault, and there is no basis whatsoever for believing that a contract-based demand for documents would have yielded, or could now yield, any broader productions from the other defendants.

Finally, as to the *third* category, the Trustee argues that the Funds have impermissibly limited their production by not producing documents created after May 9, 2009, when their liquidations commenced. To be clear, the Funds are *not* withholding documents they *received* after that date. In fact, nearly all of the hundreds of thousands of documents they have produced were received after May 9, 2009. Rather, the limitation concerns only documents that were created after the commencement of liquidation, when the Joint Liquidators and their professionals were pursuing their own legal claims and defending against the Trustee's claims in this action. The Trustee has not explained why such documents are relevant, or why the Funds should be put to the burden of reviewing or logging mounds of obvious work product. Even more telling, *the Trustee himself has refused to review documents that he has from after the initiation of the BLMIS liquidation*. In response to nearly all of the Funds' document requests to the Trustee, the Trustee asserted that he would "not search for, review, or produce" documents prepared after December 11, 2008, the day that the BLMIS liquidation commenced. Needless to say, if the Trustee is not searching for or reviewing documents from after that date, the Trustee cannot possibly be determining whether such documents are relevant or responsive to the Funds' requests. Apparently, the Trustee does not subscribe to the notion that what is good for the goose, is also good for the gander.

Accordingly, the Trustee's Motion as to the Kingate Funds should be denied.

ARGUMENT

I. THE TRUSTEE'S MOTION TO COMPEL THE KINGATE FUNDS TO PRODUCE THE BERMUDA PRODUCTIONS SHOULD BE DENIED

The Trustee's Motion first seeks to compel the Kingate Funds to produce the Bermuda Productions even though, as the Trustee himself recognizes, the Funds are precluded from doing so under Bermuda law. (*See* Mot. 7-8.) He does not contend that the documents are otherwise

unavailable from other sources, and in fact his motion also seeks to compel production of the same documents from the very parties, the Production Defendants, that provided the information to the Funds in the first place. (*See id.* at 8-9.) Nor does he contend that a comity analysis weighs in favor of compelling the Funds to produce the documents despite competing foreign law. (*See id.* at 8 n.26.) The Trustee's primary argument is rather that the documents are in the Funds' "possession" or "custody" and that this alone makes Bermuda law "irrelevant." (*See id.* at 7.)

The Trustee does not cite a single authority for this overreaching proposition, and he cannot do so because case law makes clear that "possession" and "custody" are not the test by which to determine whether a court should compel the production of documents protected by foreign law.[4] Rather, courts weigh the five factors set forth in section 442(1)(c) of the Restatement (Third) of the Foreign Relations Law of the United States.[5] *See CE Int'l Res. Holdings, LLC v. S.A. Minerals Ltd. P'ship*, No. 12-CV-08087 (CM) (SN), 2013 WL 2661037, at *16 (S.D.N.Y. June 12, 2013) (denying motion to compel documents protected by foreign banking laws because comity analysis weighed in favor of movant using alternative avenues to obtain the information sought); *Tifany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 151 (S.D.N.Y. 2011) ("Where a party from whom discovery is sought asserts foreign law as a bar to production,

[4] In that regard, the Trustee's citation to *In re Bankers Trust Co.*, 61 F.3d 465 (6th Cir. 1995), is inapposite. That case did not involve documents that were protected from disclosure by foreign law; rather it concerned issues related to the bank examiner privilege, which are entirely distinct. The Trustee's reliance on *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 205-06 (1958), is equally misplaced as the Supreme Court's decision in that case was motivated by unique "policies underlying the Trading with the Enemy Act" not present here.

[5] These factors are: "[i] the importance to the investigation or litigation of the documents or other information requested; [ii] the degree of specificity of the request; [iii] whether the information originated in the United States; [iv] the availability of alternative means of securing the information; [v] and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 442(1)(c).

courts perform a comity analysis to determine the weight to be given to the foreign jurisdiction's law."); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 530 (S.D.N.Y. 1987) (denying discovery even though information was relevant since production would violate foreign law). Courts also consider the hardship of compliance and the good faith of the party concerned (here, the Funds). *See CE Int'l Res. Holdings*, 2013 WL 2661037, at *14-15 (noting that hardship includes possibility of sanctions in an international forum).

The Trustee makes no attempt to show that the Restatement factors support an order compelling production in this case other than to state summarily in a footnote that they do. (*See* Mot. 8 n.26.) That is hardly sufficient, and an actual balancing of the factors weighs decidedly in favor of denying discovery against the Kingate Funds. Although no one factor is dispositive, there is no dispute here that the Bermuda Productions originated outside of the U.S. or that an implied undertaking under Bermuda law prevents the Funds from producing the documents to the Trustee without consent of the Production Defendants or an order from the Bermuda court. (*See* Mot. 16-17 (citing authority as to the strict obligations imposed on a litigant receiving documents in a Bermuda proceeding).) The information also is not vital to the litigation because the Funds already have produced over two hundred thousand documents to the Trustee (and are now producing tens of thousands more) that they obtained in their liquidation proceedings in the BVI, including from FIM and KML, the Production Defendants that played roles in the Funds' management.[6] The Funds also have acted in good faith by devoting considerable resources in

[6] The Funds believe that the productions they received from KML and FIM in connection with their liquidation proceedings are largely duplicative of these parties' Bermuda Productions. The Funds, however, are unable to confirm that finding because the manner in which the documents were produced to the Funds in the BVI does not permit an accurate electronic comparison against the Bermuda Productions. Moreover, according to the Production Defendants, the Funds' U.S. counsel is not even permitted to review the Bermuda Productions (and thus has not reviewed them) because the implied undertaking restricts their use to the Bermuda proceedings. (*See* May 20, 2016 Declaration of R. Loigman ("Loigman Decl."), Ex. 1 (Mar. 11, 2016 Ltr. to A. Potts).)

applying for an order in Bermuda, over the objections of the Production Defendants, that would permit production to the Trustee.

Moreover, the Trustee can obtain the documents directly from the Production Defendants and thus has "alternative means of securing the information." The Bermuda Productions originated from the Production Defendants who are all parties to this litigation. Nothing prevents the Trustee from moving to compel the documents from these defendants. (*See* Mot. at 8-9.) And, whereas the Kingate Funds are prohibited by Bermuda law from producing the documents to the Trustee, the Production Defendants are not similarly restricted. The Production Defendants are thus not only an "alternative" source of the documents but the far more appropriate one. As a result, if any party should be required to produce the documents, it should be them.

Even in situations that do not involve foreign law, courts will deny discovery against a party if, as here, there is another, more convenient source of the information. For example, in *S.E.C. v. Strauss*, No. 09-CV-4150 (RMB) (HBP), 2009 WL 3459204 (S.D.N.Y. Oct. 28, 2009) (relied on by the Trustee), the defendant sought to compel the plaintiff to produce certain work papers that the plaintiff had subpoenaed from a third party. Notwithstanding the court's finding that the plaintiff had "control" over the documents, the court still denied the motion to compel, concluding that, under Rule 26(b)(2)(C)(i), the documents were more easily accessible from the third party than from the plaintiff. *See id.* at *10-12 ("Even when the documents at issue are within the opposing party's possession, custody or control, it may be inappropriate to compel discovery when the discovering party could easily obtain the documents elsewhere without any of the difficulties that might result from compelled production."). The reasoning in *Strauss*

applies with equal, if not greater, force in this case because the Production Defendants can turn over the documents without foreign court approval, while the Funds cannot.

The Trustee's remaining arguments are equally unconvincing. He argues that the Court should not conduct a comity analysis at all because the Bermuda Productions are not "located abroad." (*See* Mot. 8 n.26.) In that respect, he claims the Bermuda Productions are located in the U.S. for the simple reason that they were placed on a web-based electronic platform, and the internet is accessible in the U.S. (*See id.*) The Trustee's reasoning has no support and, indeed, would transform the location of any document that is placed on a standard review database, regardless of origination, to be anywhere the internet is available (which is virtually everywhere).[7] Even if the documents were located in the U.S., the Restatement factors would still apply because the need to conduct a comity analysis does not turn on the *present* location of the documents. Rather, it depends on whether the documents *originated* outside of the U.S, and here there is no dispute that the documents were created overseas, produced as part of a foreign proceeding, and are barred from production by the Funds by foreign law. *See Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 209-10 (E.D.N.Y. 2007) (concluding that documents' presence in U.S. did not mean they "should be accorded any less protection" under foreign law since they originated abroad); *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 42 (E.D.N.Y. 2007) (same).[8]

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[7] While the Trustee cites to *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 544 & n.28 (1987), that case says nothing as to the Trustee's interpretation of where documents are "located" but instead merely held that the Hague Convention is not the exclusive procedure for obtaining documents located overseas.

[8] The Trustee also asserts that the documents are located in the U.S. because the Funds' U.S. counsel has access to them via the database. (*See* Mot. 8 n.26.) But the Funds have never advised the Trustee that U.S. counsel has access to or reviewed the Bermuda Productions. And even if U.S. counsel had access to the Bermuda Productions, their disclosure would still be barred by the implied undertaking because documents sent to the U.S. solely for attorney review maintain any restrictions imposed by foreign law by virtue of the attorney-client privilege. *See In re Sarrio, S.A.*, 119 F.3d 143, 146 (2d Cir.

Finally, the Trustee has no argument that the Kingate Funds acted in bad faith as to the Bermuda Productions. He claims that the Funds "have delayed compliance with their discovery obligations" in this case by applying to the Bermuda court for permission to produce the Bermuda Productions to the Trustee instead of seeking relief from this Court. (*See* Mot. 6.) He also suggests that the Funds are to blame for the Bermuda court's slow deliberation of their application. (*See id.*) These arguments are contradicted elsewhere in his papers. The Funds, as he concedes, are precluded from turning over the Bermuda Productions without leave of the Bermuda court (*see id.* at 16-17 (citing Bermuda authority)), and thus it made complete sense for the Funds to seek relief in Bermuda first. The Trustee also concedes that, rather than delay, the Funds objected to the recent adjournment of the Bermuda court's hearing on their application whereas the Production Defendants argued in favor of it. (*See id.* at 6.)[9] The reality is that the Funds are the only parties really trying to move discovery forward.[10] Accordingly, the Motion against the Funds as to the Bermuda Productions should be denied.[11]

1997) ("[T]he policy of promoting open communications between lawyers and their clients … would be jeopardized if documents unreachable in a foreign country became discoverable because the person holding the documents sent them to a lawyer in the United States for advice as to whether they were subject to production.") (citing *Fisher v. United States*, 425 U.S. 391 (1976)).

[9] The Funds also recently served discovery requests on the Production Defendants for production of the Bermuda Productions in this case but those defendants again refused to waive the implied undertaking. (*See* Loigman Decl. Exs. 2 - 4 (May 19, 2016 Ltrs. from Production Defendants).)

[10] In stark contrast to the hundreds of thousands of documents the Funds have produced and were able to produce only after expensive motion practice in the BVI, it took months for the Trustee to begin production of documents from BLMIS's servers, which for obvious reasons is a key source of discovery in this case. Moreover, that production was only after the Trustee had first ignored the Funds' proposed search terms for a month and a half, followed by the Trustee making the extreme assertion that conducting an inexpensive and industry-standard "hit-count" on those terms so the parties could have informed negotiations about them would be "wasteful activities." (*See* Loigman Decl., Ex. 5 (February 29, 2016 email chain).) In light of this history, the Trustee's claims that the Funds' effort to comply with international law is a delay tactic are both backwards and ironic.

[11] To the extent the Court is inclined to grant this part of the Trustee's Motion, the Court should still deny the Trustee's request for an order requiring compliance within 10 days, and instead require compliance no earlier than within 45 days so that the Funds may alert the Bermuda court as to the Court's ruling and re-commence their application there for leave to produce the documents.

II. THE TRUSTEE'S MOTION TO COMPEL THE KINGATE FUNDS TO UNDERTAKE ANOTHER COLLECTION OF DOCUMENTS FROM THE SERVICE PROVIDERS SHOULD BE DENIED

The Trustee next moves to compel the Kingate Funds to collect and review the documents belonging to certain of the Production Defendants, as well as other defendants in this case (which he collectively refers to as the "Service Providers"). He argues that, as the Service Providers' clients, the Funds have unlimited contractual rights to their documents. (*See* Mot. 13-19.) From this, the Trustee claims that Rule 34 requires the Funds to take possession of the Service Providers' email servers and other document repositories, review those sources in their "entirety" to identify documents relating to the Funds, presumably conduct a privilege review on behalf of the Service Providers even though the Funds do not share in that privilege, and produce the results to the Trustee. (*See, e.g.*, *id.* at 18 (" … the Funds must review the [KML] server in its entirety …").) The Trustee thus seeks to hold the Funds responsible for fulfilling the discovery obligations of most of the other defendants in this case.

Even if the Trustee's assertion that the Kingate Funds "control" the documents in the possession of the Service Providers is correct—which, as explained below, it is not—his claim that the Funds have not already collected responsive documents from them is wrong. As the Trustee knows, the Funds already have produced or are in the process of producing to him several hundred thousand documents that the Funds obtained from the Service Providers pursuant to the Joint Liquidators' statutory powers in the Funds' liquidation in the BVI. These "Voluntary Production" documents include emails relating to the Funds' business, registers and account statements, and more than 200 boxes of hard copy documents regarding the Funds' administration. These documents were also the subject of the Trustee's original motion to compel (*see* Doc. No. 245), which was mooted after the Funds successfully petitioned the BVI

court, over the objections of some of their own investors, to produce the documents to the Trustee.

If the Trustee had any sincere doubt as to the nature of the documents the Funds obtained from the Service Providers and are producing to him, he can rest assured that the scope of the Joint Liquidators' requests to the Service Providers was more than sufficiently broad. For example, as to FIM, the Joint Liquidators requested "all papers, books and records (whether in physical or electronic form) in [its] possession, custody or power *relating to the Funds*." (Loigman Decl., Ex. 6 (Sept. 25, 2009 Ltr. to FIM Advisers) (emphasis added).) Similarly, as to KML, the Joint Liquidators sought "all of the records held by [KML], insofar as they *relate to the Funds*." (Loigman Decl., Ex. 7 (Aug. 28, 2009 Ltr. to KML) (emphasis added).)[12] Afterward, as in any other litigation, the Funds and the Service Providers negotiated search parameters for electronic documents, identified hard copy documents for collection and otherwise agreed on a reasonable scope of production of documents "relating to the Funds."

Because the Joint Liquidators previously sought and obtained documents from the Service Providers that "relate to the Funds," the Trustee will already receive all documents to which the Funds were possibly entitled under their agreements with the Service Providers. In fact, the Trustee will receive more than that. Whereas the Service Provider contracts permitted the Funds to request information relating to the management or administration of their business, the Joint Liquidators' investigation was pursuant to their statutory powers under the BVI Insolvency Act and more broadly concerned any information "related to the Funds." The Joint Liquidators were thus permitted to seek documents that not only reflected the Service Providers' having conducted business *for* the Funds but that also concerned the Service Providers'

[12] The Funds also sent similar requests to HSBC Bank Bermuda and Citi Hedge. (*See* Loigman Decl., Exs. 8 & 9 (relating to Citi Hedge) and Exs. 10 & 11 (relating to HSBC Bank Bermuda).

discussions *about* the Funds and their dealings with BLMIS. The Joint Liquidators sought and obtained these documents, and have now produced them to the Trustee. Provisions in the service provider contracts would provide no more.[13]

The Trustee's argument that the Funds must review the Service Providers' documents "in their entirety" misses the point for the additional reason that the Funds do not have direct access to these documents. Indeed, the only way for the Funds to do what the Trustee seeks is for them to commandeer the Service Providers' document systems. Yet the Trustee does not even attempt to explain how the Funds are supposed to do that. The contract provisions on which the Trustee relies certainly do not confer that power. And the Trustee does not identify any authority under either U.S. or foreign law that would interpret the Funds' run-of-the-mill access rights as having granted them carte blanche to the Service Providers' document systems. The contracts required the Service Providers to provide certain information upon termination of their services to the Funds or upon "reasonable" request in the normal course of the Funds' business.

The Trustee's arguments about the Kingate Funds' purported ability to seize documents from the two Service Providers that are his key focus—FIM and KML—are incorrect. First, the

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[13] The Trustee's assertions, of course, assume that the Kingate Funds' contract rights vis-à-vis the Services Providers even apply where, as here, the Funds' are in liquidation and no longer conducting any business in the ordinary course. For example, Kingate Global's 2006 agreement with KML required KML to provide information only "[u]pon termination of [KML's] appointment [as] Manager." (*See* Gruppuso Decl., Ex. L (Jan. 2006 Kingate Global Management Agreement), § 5.8(d).) The Trustee, however, does not show that Kingate Global's liquidation amounted to a "termination" of KML's appointment, nor does he explain how a provision that is obviously for the purpose of enabling Kingate Global to continue its normal affairs with a subsequently-appointed "Manager" could be enforced by a statutorily-appointed liquidator in a court proceeding.

The Trustee also asserts that the Funds have previously received documents "upon request to the Service Providers without formal legal action" (Mot. 14), perhaps to suggest that they can do so again now. But, the reality is, the Funds are no longer in business and cannot obtain documents from the Service Providers without legal process. Even if the Funds had received documents voluntarily from the Service Providers that still would not show "control." Indeed, the Funds voluntarily provided documents to the Trustee at the start of BLMIS's liquidation. Surely, the Trustee does not mean to suggest that he has control over the Funds or that he has a discovery obligation in his other cases to collect documents from them.

Funds did not even have a contract with FIM. FIM's contract was with KML, to which FIM acted as a consultant. The Trustee's assertion that the Funds had a right to FIM's documents that "flow[ed] through" KML is similarly unsupported. (*See* Mot. 12.) Although FIM had an obligation to deliver information to KML upon the termination of FIM's agreement with that defendant, the Funds had no ability to enforce that provision on behalf of KML. (*See, e.g.*, Gruppuso Decl., Ex. Y (Apr. 2001 FIM Consultancy Agreement), § 14.3.) If anything, the Funds were empowered to request that KML produce certain information; if that information resided with FIM, then *KML*, and not the Funds, had the ability to seek it, and even then KML could only demand disclosure from FIM, not, as the Trustee contends, obtain unfettered access to FIM's servers.

As to KML, the Trustee's arguments regarding the Funds' "control" fail to take into account that KML, similar to the Funds, is in liquidation, and is being overseen by the Official Receiver of Bermuda, a statutorily-appointed liquidator and government official. As a consequence, even though the original server in KML's possession "has been imaged and preserved," to the extent the Funds seek additional documents from KML, they cannot, as the Trustee asserts (*see* Mot. 18), unilaterally search the server on their own.

The fact that the Kingate Funds cannot do more under the contracts than demand certain information from the Service Providers, and have, as a practical matter, obtained in the BVI proceedings at least those documents to which they were contractually entitled, shows that the Trustee's Motion is again directed at the wrong parties. Even if the Voluntary Productions were less than what the Funds could have obtained under the contracts, requiring the Funds to serve as a pass through for the Trustee's complaints would inefficiently insert the Funds into and prolong a dispute the Trustee can take up directly with the Service Providers. The Trustee's Motion

would accomplish nothing more than that because neither the Trustee nor any authority the Funds are aware of suggests that Rule 34 requires the Funds to bring additional legal claims against the Service Providers to compel compliance with the contracts.[14]

The Trustee further argues that (a) the Kingate Funds can produce some of the Bermuda Productions without the Bermuda court's approval because the documents that were produced by the Service Providers in that proceeding are the same documents the Funds could have obtained under the contracts, and (b) the Funds can circumvent the implied undertaking as to this subset of the Bermuda Productions simply by collecting duplicate copies of the documents pursuant to their purported contract rights.[15] (*See* Mot. 17.) Neither argument is correct. As to the first, just because the Funds may have had other theoretical means to obtain the documents does not waive the implied undertaking as to the Bermuda Productions, and the Trustee cites no authority to the contrary. As to the second, the Funds cannot, as a practical matter, simply collect a duplicate set

[14] None of the Trustee's cited authorities comes close to suggesting that a contractual right to certain books and records grants the right holder with unrestricted access to the counterparty's documents or otherwise requires the right holder to take extraordinary measures to ensure compliance. Indeed, most of these cases involved the uncontroversial proposition that companies can be compelled to produce documents that they can obtain in the ordinary course from their subsidiaries and affiliates. *See In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195-96 (S.D.N.Y. 2007) (finding company could obtain documents from affiliate); *Cooper Indus., Inc. v. British Aerospace*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984) (same); *M.L.C., Inc. v. N. Am. Philips Corp.*, 109 F.R.D. 134, 136 (S.D.N.Y. 1986) (finding subsidiary controlled parent company documents where the two companies shared the same counsel and had produced requested documents in a different case); *Am. Rock Salt Co. v. Norfolk S. Corp.*, 228 F.R.D. 426, 457 (W.D.N.Y. 2004) (finding acquiring company controlled documents of acquired company); *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 236 F.R.D. 177, 181 (S.D.N.Y. 2006) (finding corporate officer had "control" over corporate documents).

The Trustee also cites to *Marc Rich & Co., A.G. v. United States*, 707 F.2d 663, 667 (2d Cir. 1983), but that case does not even concern the issue of one party's control over another's documents. And, *Golden Trade S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 526 n.9 (S.D.N.Y. 1992), only further undermines the Trustee's arguments as it recognized that the actual collection and review of documents would have to be performed by the party holding the documents (here, the Service Providers), not the party that also "controlled" the documents because of an access right (here, purportedly the Funds).

[15] The Trustee does not direct these arguments to the Trust Defendants' Bermuda Productions as the Trust Defendants were not "Service Providers" and did not otherwise have any contracts with the Funds. (*See* Mot. 10 n.30.)

of the Bermuda Productions. The Funds have already obtained as part of the Voluntary Productions all documents "related to the Funds." To the extent there are documents in the Bermuda Production to which the Funds are contractually entitled and that were not produced in the Voluntary Productions, the Funds cannot now identify those documents without creating a further dispute with the Production Defendants, who assert that the implied undertaking prohibits the Funds' counsel from reviewing the Bermuda Productions for any reason unrelated to the Bermuda litigation. (*See* Loigman Decl., Ex. 1 (Mar. 11, 2016 Ltr. to A. Potts).) Yet again, the Trustee's arguments demonstrate that the *other* defendants—and not the Funds—are the appropriate parties to this dispute. Thus, the Trustee's Motion to compel the Funds to collect additional documents from the Service Providers should be denied.

III. THE TRUSTEE'S MOTION TO COMPEL THE KINGATE FUNDS TO PRODUCE DOCUMENTS AFTER THE DATE BY WHICH THE TRUSTEE HIMSELF OBJECTS TO DISCOVERY SHOULD BE DENIED

Finally, the Trustee argues that the Kingate Funds should be compelled to produce documents created after May 9, 2009, the date on which the Funds entered liquidation. (*See* Mot. 19.) This prong of the motion does not concern documents that the Funds *received* after May 9, 2009, since the Funds have produced hundreds of thousands of documents they obtained after that date. Nor does it concern documents relating to the management of the Funds' business after May 9, since the Funds have not conducted normal course activities since entering liquidation.

As a result, this prong of the motion is necessarily aimed primarily at the Joint Liquidators' work product and attorney-client communications. Yet, the Trustee offers no reason or authority why these materials are discoverable in the first place. To the extent the Trustee seeks to have the Funds incur the substantial cost and burden of reviewing over seven years of attorney-client communications and analysis simply to record them on a privilege log,

he offers no support for that tactic either. And, if the Trustee means to seek documents concerning the Funds' liquidations, he makes no showing whatsoever—nor could he—as to the relevance of this information.

The Trustee's arguments are also contradicted by his own actions. While he purports to seek post-liquidation documents from the Funds, *the Trustee has refused to search for or produce documents prepared after December 11, 2008*, the day Bernie Madoff was arrested. Thus, the Trustee seeks to have the Funds conduct an expansive review of documents created in the seven years since the fraud was uncovered when he refuses to do the same and, instead, has unilaterally imposed a cut-off date to his own review and collection efforts that is five months earlier than the start of the Funds' liquidation.

In an effort to skirt this contradictory position, the Trustee claims that he is reviewing documents created after December 11, 2008, for production, and asserts that he "has stated that documents prepared or received by him or his professionals after the date of his appointment will not be subject to discovery, only if the documents are irrelevant or are protected by a privilege or other protection from disclosure." (*Id.* at 19.) That is simply inconsistent with the plain record. In his specific objections to the Funds' document requests, the Trustee made clear that the December 11, 2008, cut-off date would not be limited to irrelevant or privileged documents. As the Trustee repeatedly stated, he will not "search for, review, or produce" documents from after December 11, 2008. (*See* Loigman Decl., Ex. 12 (Dec. 7, 2015 Trustee Responses and Objections), at page 6 ("Response to Request No. 1").) It is impossible, of course, to determine what documents are relevant or privileged without even searching for them. The Trustee incorporated this same objection in his responses to 60 of the Funds' 75 document requests, including requests for documents the Trustee used to prepare his complaint in this case (Nos. 46

& 47), and requests regarding the Trustee's communications with regulatory agencies concerning BLMIS (*see, e.g.*, Nos. 37 & 39). Moreover, the Trustee indicated that he will not log such materials in response to the Funds' requests.[16] The Trustee simply cannot explain why the Funds should be required to review and log all of their communications in the last seven years, and cannot possibly square that request with his own refusal to do the same. Accordingly, the Motion should be denied.

CONCLUSION

The Trustee's Motion against the Kingate Funds should be denied in its entirety.

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[16] In his Motion, the Trustee claims that he informed the Funds that he would review documents post-December 11, 2008, in a letter dated March 28, 2016. (*See* Mot. 19 n.57.) What the Trustee does not say is that, after receiving this letter, the Funds sought clarification from the Trustee as to how he could reconcile that position with his actual objections, which plainly indicated that he would not "search for, review, or produce" documents from after December 11, 2008. (*See* Loigman Decl., Ex. 13 (Mar. 30, 2016 email from L. Weber).) That the Funds received no response shows that the Trustee has no answer.