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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Main Adv. Case No. 08-01789-brl

- - - - -x

In the Matter of:

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff-Applicant,

- against -

BERNARD L. MADOFF INVESTMENT SECURITIES, LLC.,

Defendant.

- - - - -x

In re:

BERNARD L. MADOFF,

Debtor.

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

June 21, 2011

10:04 AM

B E F O R E:

HON. BURTON R. LIFLAND

U.S. BANKRUPTCY JUDGE

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Adversary proceeding: 08-01789-brl Securities Investor  
Protection Corporation v. Bernard L. Madoff Investment  
Securities, LLC

(4045) BLMIS Customers' Motion to Compel the Trustee to Provide  
a Report of His Investigative Activities and the Financial  
Affairs of BLMIS

Transcribed by: Karen Schiffmiller

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A P P E A R A N C E S :

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P R O C E E D I N G S

THE CLERK: Be seated, please.

THE COURT: Madoff? Good morning all.

IN UNISON: Good morning, Your Honor.

MR. SHEEHAN: Good morning, Your Honor. David Sheehan from Baker & Hostetler for the Trustee Irving Picard.

MS. DAVIS CHAITMAN: Helen Davis Chaitman of Becker & Poliakoff, on behalf of a large group of investors.

MR. GOLD: Matthew Gold, Kleinberg, Kaplan, Wolff & Cohen, for Lawrence Elins, et al.

MR. LEVY: Good morning, Your Honor. Richard Levy of Pryor Cashman for Avrum Goldberg and others.

THE COURT: Go ahead.

MS. DAVIS CHAITMAN: Thank you, Your Honor. Your Honor, a group of investors have joined together seeking an order of the Court to compel the trustee to comply with certain statutory reporting requirements. And the trustee has opposed the motion. And what I would ask Your Honor to do under these circumstances is simply order the trustee to produce the documentary evidence, so that the investors will have access to the same information that the trustee has.

I understand that it's difficult to order the trustee to do a report, but there shouldn't be any problem in the trustee simply turning over all of the BLMIS trading records and all of the BLMIS bank records. And if I can explain to

1 Your Honor why we feel this is so important. As Your Honor  
2 will recall, there's been no discovery in this case of the  
3 records of BLMIS. And early on in the case, one of the  
4 investors had sought discovery and Your Honor had denied it.  
5 And we're now two and half years into the case.

6 And we've all been operating under the proposition  
7 that this was a Ponzi scheme, like all the investor Ponzi  
8 schemes, which are recognized by numerous judicial decisions as  
9 being cases where there's no bona fide business, where someone  
10 sells a swamp in Florida, supposedly for residential  
11 construction. There's no swamp that's owned by the business  
12 person who's inviting all these investors, and people are  
13 simply paid with other people's money. There's no bona fide  
14 business.

15 Well, BLMIS was one limited liability company. And we  
16 know that at various times during the period from 1992 through  
17 2008, BLMIS conducted trades equal to up to ten percent of the  
18 daily volume on the New York Stock Exchange. So, certainly,  
19 BLMIS was not a Ponzi scheme. It was one of the major traders  
20 in the United States. Now, BLMIS had three businesses. It had  
21 proprietary trading business; it had a market making business;  
22 and it had an investment advisory business.

23 But those businesses were not operated under different  
24 legal entities. They were all operated under BLMIS, the same  
25 limited liability company. And moreover, Your Honor, the

1 trustee has admitted in the Looby certification that was filed  
2 in August of 2009, I believe, that investors' funds were  
3 deposited directly and indirectly into the trading accounts.  
4 So, based on what the trustee has admitted, some investors'  
5 money was used to purchase securities. And indeed, it may very  
6 well be that investors' money was used to purchase the very  
7 securities that were shown on the investor statements.

8 So, in order for the investors to have a clear picture  
9 of what happened here, and to satisfy themselves that the  
10 trustee's basic presumption, that this was a pure Ponzi  
11 scheme -- to satisfy themselves that that's accurate -- we're  
12 asking the Court, two and half years into the case, to give us  
13 access to the banking records and the trading records going  
14 back to 1992, because that will put this issue to rest. And I  
15 think at this point in the case, we're entitled to have that  
16 information. Thank you very much.

17 UNIDENTIFIED SPEAKER: Nothing further, Your Honor.

18 THE COURT: Mr. Sheehan?

19 MR. SHEEHAN: Your Honor, I won't repeat everything  
20 that we said in our papers. I think we put forth a pretty fair  
21 record of what's publicly known here. Probably, there's no  
22 case that I can think of in recent history that has more  
23 published about it than this case, both in the media and in the  
24 court annals.

25 If you just look at our complaints, you look at what

1 the U.S. Attorney had done, the -- quite frankly, intensive  
2 investigation by the U.S. Attorney, the Justice Department, our  
3 cooperation with them. The fact that literally, all of the  
4 BLMIS documents are still subject to a subpoena by the DOJ, and  
5 we only have access to them with their permission, and that  
6 we've done all this with that access. All those strictures,  
7 put those aside for the moment. Just put those aside.

8           What we're being asked for is this, and in fact, this  
9 is a request for discovery. There's no other way to really  
10 look at it, because these people are all adversaries. They all  
11 represent lots of clients; they say so. And we've listed that  
12 for you. So, what we have here is a discovery request. And  
13 the first demand for documents is give me all your documents.  
14 That's what they asked for. Give me all your documents, all  
15 your bank records, all your trading records. That's a  
16 limitation we heard here this morning and the papers tell me  
17 about all your documents.

18           Well, the first thing we would do is object to that,  
19 as being overly broad, et cetera. What does that tell you? It  
20 tells you that what's trying to be done here this morning is as  
21 usual, is to trump and hijack the legal system that's been  
22 created over the last number of decades with regard to how you  
23 handle adversarial proceedings. There's discovery rules.  
24 People ask questions; we respond to them. We object to some,  
25 come to Your Honor with our squabbles, hopefully we resolve

1 them without wasting too much of your time, and we move on.

2 That's not what these parties seek to do here. All of  
3 them are on the other side of adversary proceedings. They  
4 could serve us with repress for production of documents. They  
5 could pursue the legal courses available to them through the  
6 rules and statutes. They haven't done that. What they do is  
7 they try to take two statutory provisions that have nothing to  
8 do with discovery, and suggest to Your Honor that that puts  
9 them on an equal footing with the trustee in terms of access to  
10 all these records and the utilization of them. It's just not  
11 true. It's their own imagination that suggests that's true.

12 There's no case law to support what they're saying.  
13 All the case law goes in favor of the trustee on these issues.  
14 One statute says that the trustee is supposed to report and  
15 file with the SIPC people, how things are going with regard to  
16 cash and customers. We do that all the time. We do it not  
17 only with the U.S. Attorney, we do it also with Your Honor, we  
18 do it with the public, we do it with SIPC. Everybody knows  
19 where the trustee stands with regard to claims, what's allowed,  
20 the cash, the cash we've taken in. We've reported it  
21 accurately. All of those things are done. So, we haven't  
22 violated that statute in any way. We complied with it to the  
23 nth degree.

24 The other statute reference is the Chapter 11  
25 provision under 704, suggesting that somehow that provision,

1 which says that you must furnish info about the estate et  
2 cetera by a party in interest, that somehow that trumps every  
3 rule governing discovery in adversary proceedings in the  
4 federal rules of evidence. They're all out the window. This  
5 Chapter 11 just obviates all of those. Any interested party  
6 can come in and ask for anything anytime. Just stating that --  
7 just stating that tells you that this can't be the law, and it  
8 isn't the law.

9 And in fact, it could not be the law, because at that  
10 end of the day, an orderly administration of this estate, which  
11 has been going on for two and a half years, I would suggest,  
12 Your Honor, in a very orderly fashion and in a very successful  
13 fashion, notwithstanding the criticism received from our  
14 adversaries, I think universally it's acclaimed, and truly the  
15 marketplace being the final arbiter of that, put aside what I  
16 think or Your Honor thinks, what my adversaries think.

17 If the claims' traders are paying seventy, seventy-  
18 five cents for claims allowed by this trustee, I would suggest  
19 he's having a good day; that we are indeed being successful  
20 here. So, if you measure all the indicia that you would take  
21 into account. Have we been forthcoming? I think we've been  
22 forthcoming, more so than probably any trustee in the history  
23 of any of these proceedings before Your Honor. Everything is  
24 out there. There isn't anything held back.

25 With regard to whether or not it's a Ponzi or whether

1 the market making platform somehow obviates that or undercuts  
2 it in any way, that's an issue. It's in the case; we  
3 understand that. It's certainly in the issue in the Madoff  
4 family case, Peter, Mark, his widow now, and then Andrew, all  
5 suggest that they worked in a legitimate operation. That  
6 doesn't mean that they've then therefore asked for all of our  
7 documents. What they're going to ask for is specific documents  
8 in the course of litigation which we've instituted against  
9 them, seeking recovery.

10 That puts in context exactly how this should be  
11 handled here. So, Your Honor, I respectfully suggest that this  
12 application is unfounded and should be denied.

13 MS. DAVIS CHAITMAN: Mr. Sheehan hasn't articulated  
14 one reason why the records of BLMIS should not be produced to  
15 investors. And I would ask that Your Honor order them to be  
16 produced.

17 MR. SHEEHAN: Your Honor, very briefly, I think in our  
18 papers we gave a litany of reasons why, including privilege  
19 associated with all these documents, joint offense privilege  
20 with the U.S. Attorney, the Securities and Exchange Commission,  
21 SIPC, the fact that there is PII involved here. We're very,  
22 very careful with how we deal with this information. Should I  
23 just turn over to all of my adversaries all the social security  
24 numbers of all of the people here? Do you think there would be  
25 to you an outcry about that? I think so.

1           There's a great many limitations on our ability to  
2 deal with these documents, and we wrestle with them every day.  
3 To suggest that we would carte blanche turn them over to our  
4 adversaries here for whatever purpose, undefined, other than  
5 knowledge, which I don't understand, because they have full  
6 access to all this information that's in the public record. I  
7 suggest, Your Honor, that there are many, many limitations in  
8 our ability to do so.

9           THE COURT: Thank you both. As is usual in this case,  
10 sometimes the rhetoric and argument doesn't come up to the  
11 volume and the meat that's placed before the Court in the filed  
12 papers. That doesn't mean that I just sit back and listen to  
13 the argument as disconnected from what's been placed before me  
14 that brings me to the point of having to make a determination  
15 today.

16           It is also clear to me, especially based upon the  
17 rhetoric here in today's argument, that this is in reality a  
18 discovery dispute, rather than a lack of a transparency on the  
19 part of the trustee and a disconnect from his statutory  
20 obligations, which is the framework of the motion, that is that  
21 there is a statutory obligation that's not being met.

22           Before me, is the motion of certain creditors and  
23 customers of Bernard L. Madoff Investment Securities, shorthand  
24 for BLMIS, for an order compelling Irving Picard, the trustee,  
25 to produce a report detailing his investigation into the

1 financial affairs of BLMIS and the results thereof. And every  
2 document the trustee has provided to the Securities Investor  
3 Protection Corporation pursuant to SIPA Section 78fff-1(c),  
4 78fff-1(d) and Section 704(a) of the Bankruptcy Code.

5 Movants argue in their papers that despite spending  
6 more than two years and hundreds of millions of dollars  
7 collecting information about BLMIS, the victims still do not  
8 know how Bernard Madoff was able to carry out the largest  
9 financial fraud in history. Who were his co-conspirators? Who  
10 were his enablers? And who were his primary beneficiaries?  
11 The motion to compel at paragraph 5: "Contrary to these  
12 assertions, the trustee contends that he has satisfied his  
13 reporting duties in accordance with SIPA and the Code, the  
14 constraints of the federal rules relating to litigation, and  
15 the vast public record already available to movants."

16 For the reasons set forth in this ruling, I do not  
17 find an inappropriate lack of transparency. Accordingly, the  
18 motion is denied. The trustee asserts, and this Court agrees,  
19 that movants' motion is consonant with neither SIPA nor the  
20 Bankruptcy Code beyond that which requires the administration  
21 of the estate and the subject of ongoing litigation and  
22 contested matters. Movants currently seek information that  
23 will eventually be disclosed to them during the discovery  
24 process, or when the trustee introduces evidence and expert  
25 testimony with regard to the BLMIS fraud and insolvency before

1 this Court.

2 As is clear from the filed motion papers, any  
3 information that is not disclosed is either privileged or non-  
4 discoverable pursuant to the Federal Rules of Civil Procedure.  
5 Contrary to movants' assertions, SIPA does not require that the  
6 trustee report directly to customers, creditors, or the public,  
7 although there is an information website in place. Under SIPA,  
8 a trustee is required to furnish "to the Court and to SIPC"  
9 written reports "with respect to the progress made in  
10 distributing cash and securities to customers", SIPA 78fff-  
11 1(c).

12 In addition, SIPA requires a trustee to investigate  
13 the acts, conduct, property, liabilities and financial  
14 condition of the debtor, and to report thereon "to the Court",  
15 SIPC 78fff-1(d)(1). The trustee is then directed to submit a  
16 statement of his investigation to SIPC and such other persons  
17 as the Court designates, SIPA 78fff-1(d)(4). As is clear from  
18 the plain language of SIPA, there is no requirement for the  
19 trustee to report directly to movants or any customer of BLMIS.  
20 The trustee must only report to this Court and SIPC.

21 Accordingly, the trustee's requirements to the Court  
22 under SIPA cannot be transformed into reporting requirements to  
23 the movants. The movants also argue that the trustee is  
24 required to investigate the financials affairs of the debtor,  
25 704(a)(4) 11 U.S.C. And unless otherwise ordered by the Court,

1 furnish such information concerning the estate and the estate's  
2 administration as is requested by a party in interest, 11  
3 U.S.C. 704(a)(7). As demonstrated, the trustee has fulfilled  
4 his requirement to provide information concerning the estate  
5 and the estate administration, all of which is in the public  
6 domain, and accessible to the movants.

7 The trustee has satisfied his disclosure obligations  
8 under SIPA and the Code, by creating a thorough and specific  
9 record regarding Madoff's fraud. First, the trustee has filed  
10 interim reports with the Court every six months since his  
11 appointment, in accordance with SIPA Section 78111-c, Section  
12 704(a)(4) and (7) of the Code, and the Claims Procedure order,  
13 which is one this Court entered on December 23rd, 2008,  
14 directing the trustee to file with the Court every six months  
15 an interim report detailing the progress made and the  
16 distribution of cash and securities customers.

17 These reports detail the work that the trustee and his  
18 counsel have completed on behalf of the customers, creditors,  
19 and the estate, and include reports on claims processing,  
20 motion practice, settlement, litigation injunctions,  
21 investigations and other significant issues and events in the  
22 liquidation proceeding. They have been publicly filed on the  
23 docket in the main liquidation proceeding, and are readily  
24 available to every customer, creditor or party in interest.

25 Second, the trustee, and the Court is aware, has filed

1 hundreds of documents during the course of litigation detailing  
2 the BLMIS fraud, the defendants, and other parties he alleges  
3 were complicit in or had knowledge of that fraud, and the  
4 defendants that he maintains received fictitious profits from  
5 BLMIS. All of these filed documents are available for public  
6 inspection through the electronic case filing system for the  
7 Bankruptcy Court, the District Court, and the Second Circuit  
8 Court of Appeals. For example, the transcripts of plea  
9 allocations and Madoff's sentencing and other information  
10 relating to criminal liability standards which movants seek are  
11 available on the respective court dockets.

12 Third, during the course of the Madoff proceedings,  
13 the trustee continuously communicates with the Court,  
14 claimants, and the public about BLMIS, estate and its  
15 administration. For example, the trustee has maintained a  
16 website, [www.madofftrustee.com](http://www.madofftrustee.com) throughout the liquidation  
17 proceeding to keep movants, other interested parties, and the  
18 public informed of activities in the case. Throughout this  
19 website, the trustee and his agent claim to have responded to  
20 more than 6,223 emails from BLMIS customers and their  
21 representatives.

22 Additionally, the trustee has introduced a toll-free  
23 customer hotline in order to address whatever questions or  
24 concerns the claimants may have. As of May 31st, 2011, the  
25 trustee and his professionals claim to have handled more than

1 7,429 calls through the hotline from claimants and their  
2 representatives. Finally, the trustee has conducted a 341  
3 meeting of creditors on February 20th, 2009, and has held  
4 several press conferences regarding the status of customer  
5 claims.

6 Thus, an extraordinary amount of information has been  
7 disclosed by the trustee since his appointment in December  
8 2008, and the trustee has clearly fulfilled his reporting  
9 duties in accordance with SIPA and the Code. Consequently,  
10 movants claim that the trustee "has revealed almost nothing",  
11 simply cannot be true. Indeed, the movants' reply papers do  
12 not seriously dispute the asserted responsiveness by the  
13 trustee.

14 In addition to the specific record created by the  
15 trustee detailing the BLMIS fraud, a vast public record exists  
16 through the filing of litigation by numerous government  
17 agencies, such as the U.S. Department of Justice, the United  
18 States Department of Labor, the United States Securities and  
19 Exchange Commission, and the SEC's office of the Inspector  
20 General, all of which have conducted hearings and investigation  
21 into the BLMIS fraud and have filed numerous actions detailing  
22 information that movants seek. Transcripts and reports of  
23 these hearings and investigations have been published and are a  
24 matter of public record.

25 Therefore, in addition to information filed by the

1 trustee, the movants have access to information that is readily  
2 accessible through the dockets of the state and federal courts.  
3 While the trustee has not made all of his investigative  
4 findings and conclusions publicly available, he has still  
5 fulfilled his reporting duties as certain information sought by  
6 the movants is privileged and non-discoverable. And that's  
7 essentially what I'm hearing in the argument this morning.

8 A trustee's duty to provide information is "not  
9 unlimited" and he may obtain a protective order against  
10 disclosure of information under 704(a)(7) of the Code. "If  
11 disclosure would result in a waiver of the attorney-client  
12 privilege which protects him from disclosure information about  
13 ongoing negotiations with third parties and information that  
14 will be used in other litigation, In re: Revco 336 B.R. 187,  
15 193, Southern District New York, 1985, In re: Leeway Holding  
16 12 B.R. 881, Southern District of Ohio, 1990. A litigation  
17 protective order was filed with this Court on June 6th, 2011,  
18 protecting the disclosure of information deemed confidential  
19 material."

20 Additionally certain reports sought by the movants are  
21 further protected by the Work Product Doctrine codified by the  
22 Federal Rule of Civil Procedure, Rule 26(b)(3), which protects  
23 from disclosure documents prepared in anticipation of  
24 litigation by or for another party of its representative,  
25 Federal Rules of Civil Procedure, 23(b)(3), Hickman against

1 Taylor, 329 U.S. 495, 511. Therefore, it is inappropriate and  
2 in derogation of well established law, for the movants to  
3 require complete disclosure of every document and computer  
4 record underlying the Madoff fraud.

5 Finally, movants seek premature discovery and  
6 contravention of Rule 26, which covers discovery and disclosure  
7 in litigation and contested matters. For movants who are  
8 defendants in avoidance actions in which a notice of  
9 applicability has been filed, Rule 26 states that the  
10 appropriate time to begin receiving this discovery is the later  
11 of 60 from the date of the initial case conference or 180 days  
12 from the date the complaint was filed. Thus, its request is  
13 premature and improper.

14 Movants demands will be satisfied during court  
15 regulated discovery, and as litigation and the objection  
16 process continues. At the appropriate time, movants will have  
17 the opportunity to access and challenge the trustee's evidence  
18 of fraud. Thus, movants' attempts to turn the trustee's  
19 reporting requirements under SIPA and the Code into a vehicle  
20 to obtain parochial discovery is inappropriate, and accordingly  
21 the motion is denied. I am so ordering this record.

22 MR. SHEEHAN: Thank you, Your Honor.

23 THE COURT: The denial is so ordered.

24 MS. DAVIS CHAITMAN: Thank you, Your Honor.

25 (Whereupon these proceedings were concluded at 10:30 AM)

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I N D E X

RULINGS

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more investigative and financial information -- Denied		

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript is  
a true and accurate record of the proceedings.

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KAREN SCHIFFMILLER

AAERT Certified Electronic Transcriber CET\*\*D 570

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Date: June 22, 2011