UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (LGB) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	**ORDER REGARDING TRUSTEE'S MOTION TO COMPEL**
IRVING H. PICARD, Trustee for the Substantively Consolidated SIPA of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff, Plaintiff, v. PARSON FINANCE PANAMA S.A., Defendant.	Adv. Pro. No. 11-02542 (CGM)

On May 10, 2024, the Trustee moved to compel defendant Parson Finance Panama, S.A. ("Parson") to produce additional documents held by nonparties "Anova"[1] and Bamont Trust Company Limited ("Bamont"). The Trustee also sought a finding supporting an extension of the fact discovery deadline should that be necessary. Parson responded to the Trustee's motion on May 31, 2024, after which the Trustee submitted a reply on June 14, 2004.

[1] Although Anova is not further described in the motion papers, the Trustee's First Set of Interrogatories to Parson defines Anova to include "Anova AG, Anova Holding AG, Anova Asset Management AG, Anova Management AG, and Anova Vorsorgestiftung."

Pursuant to a Stipulation and Order signed by Judge Beckerman on April 24, 2024, I was appointed as Discovery Arbitrator to address the parties' discovery dispute. I heard oral argument concerning the motion on July 2, 2024.[2]

For the reasons set forth below, the Trustee's motion is granted.[3]

I. Relevant Facts

Parson is a Panamanian limited company and one of several entities involved in the financial dealings of Stephan Schmidheiny, a wealthy Swiss citizen. Christian Verling ("Verling") is the President and Chief Executive Officer of Parson, as well as one of its three directors.

In 1999, another Parson entity, Parson Finance Limited, retained Bamont to assist Parson with its investments. According to Mr. Verling, Bamont has managed Parson since then. Philip Hjelmer is the president and general manager of Bamont.[4]

In July 2003, Parson made a $10 million investment in the Class B shares of the Fairfield Sentry Limited BLMIS feeder fund. Parson later redeemed that investment, which had grown to approximately $11 million, in or around April 2005. This redemption, in turn, was the basis for the Trustee's commencement of this clawback action in August 2011.

From approximately 2000 until approximately 2008 or 2010, and thus during the period of Parson's Fairfield Sentry investment, Anova functioned as the family office of Mr. Schmidheiny.[5] Frank Gulich was the Chief Executive Officer of Anova, Christian Gresch was Anova's Chief Financial Officer, and Daniel Vock managed its hedge fund investments. The relationship between Parson and Anova was sufficiently close that Parson's personnel used Anova email addresses until Anova and Parson ceased doing business together. Parson maintains that it unwound its Fairfield Sentry investment because of its decision to sever the Anova relationship, not because it suspected Fairfield or BLMIS of any wrongdoing.

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[2] The day after oral argument, Parson submitted a letter challenging the Trustee's reply argument that Parson should have produced a particular email. The Trustee responded to that letter on July 8, 2024. In arriving at my decision, I have not considered the challenged argument for the reason set forth in Parson's letter.

[3] I regret that it has taken me until now to rule with respect to the Trustee's discovery motion and apologize to all concerned.

[4] Mr. Hjelmer was also a Parson board member during the period that Parson held its investment in Fairfield Sentry.

[5] Although Mr. Verling explained at the hearing that Anova was Mr. Schmidheiny's family office, Parson's responses to the Trustee's First Set of Requests for the Production of Documents state that "no documented formal relationship" ever existed between "between Parson and Anova AG, Anova Holding HG, Anova Management AG, Anova Vorsorgestiftung or any of their predecessors or successors in interest."

Mr. Verling contends that Anova did not have any decision making authority with respect to the Fairfield Sentry investment. Rather, Anova simply provided assistance in connection with Bamont's pre-subscription due diligence and for a brief period thereafter.

The documentation adduced by the Trustee in support of his motion confirms that Messrs. Gulich, Gresch, and Vock of Anova, and Hjelmer of Bamont, met with representatives of the Fairfield Greenwich Group at various locations to conduct due diligence regarding Fairfield Sentry prior to Parson's investment in that fund.

After Judge Morris denied Parson's motion to dismiss by order dated August 18, 2022, the parties entered into a Case Management Plan on December 7, 2022. The Trustee then served his First Set of Requests for the Production of Documents ("RFPs"). In its response to those RFPs, Parson objected repeatedly to the production of any documents created "after April 2005, when it redeemed its shares in Fairfield Sentry, as irrelevant and unduly burdensome."

It appears that Parson placed all of its documents concerning its Fairfield Sentry investment in a hard copy file in 2005 around the time of its redemption. Thereafter, when Parson learned of this lawsuit, Cameron Carey, who serves as a director of Parson and President of Bamont, located that file and supplemented it by printing out any electronic documents in Mr. Hjelmer's electronic files. At that time, Mr. Verling also provided Mr. Carey with some additional documents related to Fairfield Sentry that he had obtained from Anova by making a request to Daniel Vock. Although Mr. Carey uploaded all these hard copy documents to Bamont's electronic database, it does not appear that any original electronic files for the period 2003 through 2005 were copied (much less produced to the Trustee) in a manner that preserved the associated metadata.

II. Discussion

A. Motion to Compel

The parties have devoted considerable attention to whether Bamont and Anova should be considered Parson's agents and therefore required to produce documents responsive to the Trustee's RFPs. Resolving the Trustee's motion does not, however, require an extended discussion of agency law.

As numerous cases establish, a party is not required to produce just documents that are in its physical possession. Rather, as Rule 34(a)(1) of the Federal Rules of Civil Procedure makes clear, a party must produce documents and electronically stored information in its "possession, custody, or control."[6] Furthermore, "documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action." In re NTL, Inc. Sec. Litig., 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (emphasis added) (citing Bank of New York v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D.135, 146–47 (S.D.N.Y. 1997)).

[6] Rule 34 is made applicable to bankruptcy proceedings pursuant to Bankruptcy Rule 7034.

Here, Parson and Bamont have a continuing relationship. Indeed, Bamont appears to be the entity through which Parson conducts its investment activities. Accordingly, Parson unquestionably has the practical ability to obtain documents from Bamont. Similarly, although the business relationship between Parson and Anova appears to have been severed, the fact that Mr. Verling was able to request and obtain additional documents from Anova through Mr. Vock in 2014 shows that Parson may have the practical ability to obtain documents from that source as well. Parson will therefore be required to request both Bamont and Anova to produce any additional documents responsive to the Trustee's RFPs that may exist, and to seek the production of those documents in the electronic format that the Trustee requests to the extent that such electronic versions still exist.

B. Extension of Fact Discovery

In his motion, the Trustee also notes that fact discovery is slated to close on January 31, 2025, pursuant to the Case Management Plan entered nearly two years ago. (See ECF No. 116). The Trustee therefore requests a finding that he will have good cause to seek an appropriate extension if he cannot complete fact discovery within the allotted time. Such a finding plainly would have been appropriate in July when I heard argument concerning the Trustee's motion and is even more appropriate now. Indeed, Parson does not oppose this request. Accordingly, because it is clear that additional time for fact discovery will be necessary, and the application is unopposed, I so find.

III. Conclusion

For the foregoing reasons, the Discovery Arbitrator hereby directs as follows:

1. Parson shall re-produce the documents it previously produced in hard copy form in the electronic format requested by the Trustee to the extent that metadata for those documents exists. This directive extends to any documents responsive to the Trustee's RFPs that are maintained by Bamont. Additionally, Parson shall request that Anova re-produce its documents in the electronic format requested by the Trustee to the extent that metadata for those documents exists.

2. Although Parson has represented that the server in use in 2005 no longer exists, Parson shall explore whether any electronic information responsive to the Trustee's RFPs has been preserved on any backup media or elsewhere and, if so, shall endeavor to conduct a search thereof for responsive documents.

3. Parson's boilerplate objection to the production of any documents created after the date it divested its investment in Fairfield Sentry is overruled. Accordingly, Parson shall search, and cause Bamont to search, for responsive electronic and hard copy documents created before March 13, 2014. Parson shall further request that Anova conduct such an additional search.

4. Any additional electronic or hard copy documents located pursuant to these rulings shall be produced to the Trustee by Parson by January 31, 2025.

SO ORDERED.

Dated: New York, New York
November 18, 2024

Hon. Frank Maas (Ret.)
Discovery Arbitrator