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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA, New York, N.Y.
4 v. 08 MJ 2735(DC)
5 BERNARD L. MADOFF,
6 Defendant.

7 -----x

8
9 March 10, 2009
3:04 p.m.

10 Before:

11 HON. DENNY CHIN,
12 District Judge

13
14 APPEARANCES

15 LEV DASSIN
16 United States Attorney for the
17 Southern District of New York
BY: MARC O. LITT
LISA BARONI
Assistant United States Attorney

18 DICKSTEIN SHAPIRO, LLP
19 Attorneys for Defendant
BY: IRA LEE SORKIN
20 DANIEL J. HORWITZ
NICOLE DeBELLO

21 MINTZ, LEVIN
22 Attorney for Defendant
BY: PETER CHAVKIN
23
24
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1 (In open court)

2 THE DEPUTY CLERK: United States of America versus
3 Bernard L. Madoff. Counsel, please state your name for the
4 record.

5 MS. BARONI: Good afternoon, your Honor. Lisa Baroni
6 and Marc Litt for the government. With us is Special Agent
7 Theodore Cacioppi from the FBI.

8 THE COURT: Good afternoon.

9 MR. SORKIN: Good afternoon, your Honor. From the
10 law firm of Dickstein Shapiro, LLP, Ira Lee Sorkin, Daniel
11 Horwitz and Nichole DeBello. And sitting just to the left of
12 Mr. Madoff is Peter Chavkin of the law firm of Mintz Levin.

13 THE COURT: Good afternoon.

14 MR. CHAVKIN: Good afternoon, your Honor.

15 THE COURT: All right. I think the first item of
16 business is addressing the potential conflicts of interest
17 presented by Mr. Sorkin's representation of Mr. Madoff.

18 MS. BARONI: Yes, your Honor. There are two issues
19 the government would like to raise with the Court as set forth
20 in our letter to you of March 3rd, and those issues present
21 potential conflict of interest matters with respect to
22 Mr. Sorkin's continued representation of the defendant in this
23 case. And as set forth more fully in the letter, the first
24 issue is Mr. Sorkin's prior representation of Frank Avellino
25 and Michael Bienes. And the second issue is Mr. Sorkin's

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1 family's investments, prior investments with Bernard L. Madoff
2 Investment Securities. And the government would request, your
3 Honor, that the Court advise the defendant of the potential
4 conflicts --

5 THE COURT: All right.

6 MS. BARONI: -- and any issues that could arise from
7 those conflicts.

8 MR. SORKIN: Your Honor, may I be heard.

9 THE COURT: Yes.

10 MR. SORKIN: Anticipating this the government and I
11 spoke about this issue. And anticipating a Curcio hearing, we
12 went out and sought Mr. Chavkin, who is a partner at Mintz
13 Levin, as I just indicated. He was brought in as independent
14 counsel to advise Mr. Madoff of the potential conflict, and so
15 I'll defer to him, if your Honor has any questions to ask,
16 because it was he who dealt with that issue.

17 THE COURT: All right. That's fine. I gather, then,
18 having had these initial discussions, Mr. Madoff wishes to
19 continue with you?

20 MR. SORKIN: Well, I'll let Mr. Chavkin address that
21 issue.

22 MR. CHAVKIN: Absolutely, your Honor. And we've had a
23 number of meetings on that subject.

24 THE COURT: All right. Mr. Madoff, would you please
25 stand. Mr. Madoff, we're going to place you under oath, and

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1 then I am going to ask you some questions.

2 As you probably know, the purpose of this hearing, the
3 purpose of my questions is to make sure that you understand the
4 potential conflicts and to see whether you indeed want to
5 continue with Mr. Sorkin as your attorney. Understood?

6 THE DEFENDANT: Yes, I do.

7 THE COURT: We're going to place you under oath.

8 (Defendant sworn)

9 THE COURT: Mr. Madoff, would you state your full name
10 for the record, please.

11 THE DEFENDANT: Bernard L. Madoff.

12 THE COURT: And how old are you, sir?

13 THE DEFENDANT: Seventy years old.

14 THE COURT: And what is your highest level of
15 schooling?

16 THE DEFENDANT: I graduated Hofstra University,
17 attended one year at Brooklyn Law School.

18 THE COURT: Are you now or have you recently been
19 under the care or treatment of a doctor or psychiatrist?

20 THE DEFENDANT: No, I have not.

21 THE COURT: Have you ever been hospitalized for any
22 mental illness or treated for any mental illness or any type of
23 addiction, including drug or alcohol addiction?

24 THE DEFENDANT: No.

25 THE COURT: In the past 24 hours have you taken any

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1 drugs, medicine or pills, or have you drunk any alcohol?

2 THE DEFENDANT: No.

3 THE COURT: Is your mind clear today?

4 THE DEFENDANT: Yes.

5 THE COURT: And are you feeling all right today?

6 THE DEFENDANT: Yes.

7 THE COURT: Now, you have been represented in this
8 matter by Mr. Sorkin?

9 THE DEFENDANT: Correct.

10 THE COURT: And are you satisfied with his
11 representation of you so far?

12 THE DEFENDANT: Yes, I am.

13 THE COURT: And do you understand that we are here
14 today to consider the potential conflicts of interest that
15 Mr. Sorkin may have in representing you?

16 THE DEFENDANT: Yes.

17 THE COURT: Now, there are two areas. I guess there's
18 a third area which I will be mentioning, but in particular
19 there are two areas.

20 The first, as I understand it, is that in the 1990s,
21 Mr. Sorkin represented Frank Avellino, Michael Bienes and their
22 accounting firm, Avellino & Bienes. Did Mr. Sorkin discuss
23 this with you?

24 THE DEFENDANT: Yes, he did.

25 THE COURT: And I gather you've also discussed it with

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1 Mr. Chavkin?

2 THE DEFENDANT: I have.

3 THE COURT: And have you had enough time to discuss
4 this matter with both Mr. Sorkin and Mr. Chavkin?

5 THE DEFENDANT: I have.

6 THE COURT: Now, this representation by Mr. Sorkin of
7 Avellino and Bienes was in connection with a civil case brought
8 against them by the Securities and Exchange Commission. And as
9 I understand it, the matter was settled in 1993. You are aware
10 of these facts?

11 THE DEFENDANT: I am.

12 THE COURT: And, Mr. Sorkin, your representation of
13 them terminated when?

14 MR. SORKIN: At the time that the -- I believe the
15 consent injunction was filed. I thought it was '92, maybe '93,
16 but that was the end of my representation.

17 THE COURT: Whether it was '92 or '93, that was it?

18 MR. SORKIN: That was it, your Honor.

19 THE COURT: Thank you.

20 Now, Mr. Madoff, as I understand it, you had a
21 long-standing business relation with both Mr. Avellino and
22 Mr. Bienes, is that true?

23 THE DEFENDANT: That's true.

24 THE COURT: And after Avellino & Bienes dissolved, you
25 or your company took on some of their clients, is that true?

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1 THE DEFENDANT: Correct, yes.

2 THE COURT: Now, these facts create a potential
3 conflict of interest because if this matter were to go to
4 trial, it is possible that the government might call
5 Mr. Avellino or Mr. Bienes to testify as witnesses against you.
6 Do you understand that that is a possibility?

7 THE DEFENDANT: I do.

8 THE COURT: And no one can say with any certainty at
9 this point whether these former clients of Mr. Sorkin would be
10 called to testify if the case were to go to trial. But if that
11 were to happen, Mr. Sorkin might be limited in his ability to
12 defend you. Do you understand that?

13 THE DEFENDANT: I do.

14 THE COURT: Because he might have limitations on his
15 ability to cross-examine them because they would be his former
16 clients. Do you understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And the fact that Mr. Sorkin previously
19 represented these individuals and their company could cause him
20 to have divided loyalties between you and these potential
21 witnesses. Do you understand that?

22 THE DEFENDANT: Yes, I do.

23 THE COURT: And, for example, the communications that
24 Mr. Sorkin had with his former clients while he was
25 representing them would be privileged by the -- covered by the

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1 attorney-client privilege. And unless they waive that
2 privilege, he would not be able to use any of that information
3 that he gained while representing them in his efforts to defend
4 you. Do you understand that?

5 THE DEFENDANT: I do.

6 THE COURT: Because of his prior representation,
7 Mr. Sorkin might not be permitted to cross-examine his former
8 clients were they to testify against you. Do you understand
9 that?

10 THE DEFENDANT: Yes.

11 THE COURT: Do you understand that these are only
12 examples, and that it is possible that other scenarios might
13 unfold where Mr. Sorkin's prior representation of these
14 individuals could ask -- adversely affect his ability to
15 represent you in this case?

16 THE DEFENDANT: I do.

17 THE COURT: Now, so that I can be sure that you
18 understand, would you tell me in your own words what you
19 understand this potential conflict to be.

20 THE DEFENDANT: Well, I understand that if there
21 were -- if there was a trial, and if these gentlemen were
22 called as witnesses, then Mr. Sorkin would be limited in
23 revealing any confidential client privileged information,
24 attorney-client privilege information he may have. I also
25 realize that he might not be -- he would not be able to

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1 cross-examine them. I do realize that if that were to arise, I
2 could have an independent counsel cross-examine them, and that
3 he would have to be available immediately, providing the Court
4 allow that to occur.

5 I understand that his -- he might have compromised
6 interests because his son -- sons had a --

7 THE COURT: Well, let's hold off on the sons for a
8 moment. I'll come to that in a bit. All right. I'm satisfied
9 you understand the potential conflict with respect to the
10 former client, so let's turn to the second area of potential
11 conflict.

12 As I understand it, at some point Mr. Sorkin's parents
13 had invested approximately \$900,000 with your company, the
14 Bernard L. Madoff Investment Securities. And as I understand
15 it, when Mr. Sorkin's parents died, the \$900,000 investment was
16 transferred into trust accounts that had been established for
17 the benefit of Mr. Sorkin's sons. I understand that Mr. Sorkin
18 himself never had a beneficial interest in the funds, and that
19 further, the funds were transferred to Merrill Lynch in
20 approximately August of 2007.

21 You are aware of these facts?

22 THE DEFENDANT: I am.

23 THE COURT: And you've discussed them with both
24 Mr. Sorkin and Mr. Chavkin?

25 THE DEFENDANT: I have.

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1 THE COURT: And have you had enough time to discuss
2 this matter with both Mr. Sorkin and Mr. Chavkin?

3 THE DEFENDANT: Yes.

4 THE COURT: Now, as I understand it, Mr. Sorkin's sons
5 did not lose any moneys because the full \$900,000 was
6 transferred to Merrill Lynch in 2007. But there is a
7 possibility that the Court appointed trustee from Madoff
8 Securities could bring litigation against Mr. Sorkin's sons to
9 try to undo the transfer, to try and bring the moneys back into
10 a larger pot for victims. In other words, it is possible the
11 trustee could sue Mr. Sorkin's sons to get the money back, and
12 if the trustee were to do this, then it is possible that they
13 then would turn around and sue you.

14 Do you understand that that is a possibility?

15 THE DEFENDANT: I do.

16 THE COURT: And if that were to happen, then
17 Mr. Sorkin's loyalties could be divided between you and his
18 sons. Do you understand that?

19 THE DEFENDANT: Yes.

20 THE COURT: For example, these divided loyalties could
21 possibly affect the way Mr. Sorkin represented you in
22 challenging any requests by the government for restitution or
23 for fines. Do you understand that?

24 THE DEFENDANT: I do.

25 THE COURT: These divided loyalties could affect

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1 Mr. Sorkin's representation of you with respect to arguments
2 that he might make to the Court at sentencing, should you be
3 convicted, or as to decisions as to what witnesses to call or
4 what evidence to present, should there be a hearing required
5 for sentencing or should there be a trial required. Do you
6 understand that?

7 THE DEFENDANT: I do.

8 THE COURT: Okay. So now, so that I can be sure you
9 understand, tell me in your own words what you understand this
10 potential conflict to be.

11 THE DEFENDANT: I understand that potentially in the
12 issue of restitution, his interests would be divided or might
13 be divided and that he might not defend me in a way that's most
14 beneficial to me.

15 THE COURT: Okay.

16 MR. SORKIN: Your Honor, may I just make one --
17 respectfully, your Honor said the trust account was
18 transferred. The only point I wanted to make is the trust
19 account was closed to Bernard L. Madoff on my mother's death,
20 and then the money was transferred out.

21 THE COURT: All right. The accounts were closed first
22 and then the moneys?

23 MR. SORKIN: First, and then the money was transferred
24 out, the one account was closed and then the accounts -- the
25 account was transferred out. Thank you.

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1 THE COURT: Okay. That doesn't affect the analysis.
2 Thank you for pointing that out. Let me just mention the third
3 area, then I'm going to ask you some more general questions. I
4 don't think the third area presents a problem or even a
5 potential conflict, but I should mention it.

6 As I understand it, in the early 1990s, when
7 Mr. Sorkin was with another law firm, the firm had some kind of
8 a retirement plan and Mr. Sorkin had some \$60,000, a little bit
9 more than that invested in the plan. And the plan invested
10 certain of its funds with Madoff Securities. Are you aware of
11 these facts?

12 THE DEFENDANT: Yes.

13 THE COURT: And did you discuss them with Mr. Sorkin
14 and Mr. Chavkin?

15 THE DEFENDANT: I did.

16 THE COURT: Now, as I understand it, Mr. Sorkin
17 resigned from the law firm in 1995 and the funds were rolled
18 over into a retirement account that he had at Merrill Lynch or
19 that he traded at Merrill Lynch and that Mr. Sorkin has made --
20 has had no further investments with you or your company since
21 then.

22 Now, I think it's unlikely that these facts would
23 present even a potential conflict of interest, but we just
24 don't know. It is possible that they could lead to
25 complications. But you are aware of these facts?

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1 THE DEFENDANT: I am.

2 THE COURT: And you've discussed them with both
3 Mr. Sorkin and Mr. Chavkin?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. Now, do you understand with
6 respect to all of these things that we have discussed that you
7 have the right to be represented by a lawyer, who is free of
8 any conflict of interest?

9 THE DEFENDANT: Yes, I do.

10 THE COURT: You have a right to be represented by a
11 lawyer who is free of any potential conflict of interest?

12 THE DEFENDANT: Yes, I do.

13 THE COURT: You have a right to an attorney whose
14 loyalty to you is absolutely undivided, who is not subject to
15 any circumstance that might intrude on his loyalty to you?

16 THE DEFENDANT: Yes.

17 THE COURT: For example, you have a right to be
18 represented by a lawyer who would not have any reason to
19 hesitate to cross-examine a witness, as Mr. Sorkin might have
20 if he had to cross-examine a former client who was testifying
21 against you. Do you understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: You have a right to be represented by a
24 lawyer who would not hesitate to make any argument with respect
25 to a request for restitution or fines because the lawyer's

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1 family member might be arguably a victim of your conduct and
2 your firm's conduct. Do you understand that?

3 THE DEFENDANT: I do.

4 THE COURT: Do you understand that it may be ill
5 advised to be represented by a lawyer who is operating under a
6 potential conflict of interest?

7 THE DEFENDANT: I do.

8 THE COURT: And Mr. Chavkin is independent of
9 Mr. Sorkin, and he is not affiliated with Mr. Sorkin, is that
10 correct, Mr. Chavkin?

11 MR. CHAVKIN: That's correct, your Honor.

12 THE COURT: Have you consulted with any other lawyers
13 about these potential conflicts?

14 THE DEFENDANT: No, I have not.

15 THE COURT: And just for the record, Mr. Chavkin, you
16 are not operating under any potential conflicts of interest
17 yourself, correct?

18 MR. CHAVKIN: That is correct, your Honor.

19 THE COURT: Now, Mr. Madoff, if you want more time to
20 think about these issues, or if you want more time to consult
21 further with Mr. Chavkin or some other independent counsel, I
22 would be prepared to adjourn these proceedings and to give you
23 the opportunity to have that further consultation. Do you
24 understand you have that right?

25 THE DEFENDANT: Yes, I do.

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1 THE COURT: Would you like more time --

2 THE DEFENDANT: No, your Honor.

3 THE COURT: -- to talk to someone else about these
4 matters?

5 THE DEFENDANT: No, your Honor.

6 THE COURT: And have you had adequate time to consult
7 with Mr. Chavkin about these matters?

8 THE DEFENDANT: I have.

9 THE COURT: Now, after having heard what I've said
10 today, is it your wish to continue with Mr. Sorkin as your
11 lawyer in this case?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: And that is so even in light of the
14 potential conflicts we have discussed?

15 THE DEFENDANT: Yes.

16 THE COURT: Do you believe it is in your best interest
17 to continue with him as your lawyer?

18 THE DEFENDANT: I do.

19 THE COURT: Do you understand that by choosing to
20 continue with Mr. Sorkin as your attorney, you are waiving your
21 right to be represented by an attorney who is free of any
22 conflict or any potential conflict of interest?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: Do you understand that if you choose to
25 continue with Mr. Sorkin as your lawyer now, you will not be

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1 able to appeal, should you be convicted and receive a sentence
2 you do not like, on the grounds that you were deprived of
3 effective assistance of counsel because of these matters that
4 we have discussed?

5 THE DEFENDANT: I do, your Honor.

6 THE COURT: Do you understand that you are giving up
7 your right to appeal or to otherwise complain at a later date
8 that Mr. Sorkin was operating under a conflict of interest or
9 potential conflict of interest?

10 THE DEFENDANT: Yes, I do.

11 THE COURT: Do you agree to waive any post conviction
12 argument, on appeal or otherwise, that by virtue of
13 Mr. Sorkin's prior representation of Mr. Avellino, Mr. Bienes,
14 their company or by virtue of Mr. Sorkin's sons' investments
15 with your company, that you were denied effective assistance of
16 counsel?

17 THE DEFENDANT: Yes.

18 THE COURT: Is there anything else you would like me
19 to explain to you?

20 THE DEFENDANT: No, your Honor.

21 THE COURT: Do you have any questions for me?

22 THE DEFENDANT: No, your Honor.

23 THE COURT: Are you knowingly and voluntarily waiving
24 your right to conflict-free representation?

25 THE DEFENDANT: Yes.

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1 THE COURT: Ms. Baroni, have I covered everything?

2 MS. BARONI: Yes, your Honor.

3 THE COURT: And the parties agree that these potential
4 conflicts are waivable conflicts, yes?

5 MS. BARONI: Yes, from the government, your Honor.

6 THE COURT: Mr. Sorkin?

7 MR. SORKIN: Yes, your Honor.

8 THE COURT: Mr. Chavkin, you agree as well?

9 MR. CHAVKIN: I do agree.

10 THE COURT: Mr. Madoff, you can be seated. Thank you.

11 I find that the conflicts here are waivable. I find
12 further that Mr. Madoff understands his right to conflict-free
13 counsel and that he is waiving that right. I find that he is
14 doing so knowingly and voluntarily. And accordingly, I hold
15 that the conflicts are waived and Mr. Sorkin may continue to
16 represent Mr. Madoff in this matter.

17 MR. SORKIN: Your Honor, may I just make one factual
18 point.

19 THE COURT: Yes.

20 MR. SORKIN: Since we do have several members of the
21 fourth or fifth estate here, your Honor, I know the government
22 sent a letter to the Court saying that the total amount
23 invested was \$18,860. And I believe I sent to your Honor --

24 THE COURT: When I described the fact pattern before,
25 I used a number 60,000-plus to incorporate the additional

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1 information --

2 MR. SORKIN: And that came a little bit later in '95
3 with additional contributions to the plan.

4 THE COURT: There was another 3,000 or so. So all
5 together it was roughly 64, \$65,000.

6 MR. SORKIN: And that information only came to my
7 attention last night when I provided it to the Court and
8 government this morning.

9 THE COURT: I understand that, and it does not change
10 my analysis.

11 MR. SORKIN: Thank you.

12 THE COURT: Now, I believe the next order of business
13 is that Mr. Madoff is prepared to waive indictment and to
14 consent to being charged on an information?

15 MR. SORKIN: Yes, your Honor.

16 THE COURT: We'll do the waiver now.

17 THE DEPUTY CLERK: You are Bernard L. Madoff?

18 THE DEFENDANT: Yes.

19 THE DEPUTY CLERK: Did you sign this waiver of
20 indictment?

21 THE DEFENDANT: I did.

22 THE DEPUTY CLERK: Before you signed it did you
23 discuss it with your attorneys?

24 THE DEFENDANT: Yes.

25 THE DEPUTY CLERK: Do you understand what you are

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1 doing?

2 THE DEFENDANT: Yes, I do.

3 THE DEPUTY CLERK: Do you understand you are under no
4 obligation to waive indictment?

5 THE DEFENDANT: I do.

6 THE DEPUTY CLERK: Do you understand that if you do
7 not waive indictment and if the government wants to prosecute
8 you, they have to present this case to a grand jury, which may
9 or may not indict you?

10 THE DEFENDANT: Yes.

11 THE DEPUTY CLERK: Do you realize that by signing this
12 waiver of indictment, you've given up your right to have this
13 case presented to a grand jury?

14 THE DEFENDANT: I do.

15 THE DEPUTY CLERK: Do you understand what a grand jury
16 is?

17 THE DEFENDANT: Yes.

18 THE DEPUTY CLERK: Have you seen a copy of the
19 information?

20 THE DEFENDANT: Yes.

21 THE DEPUTY CLERK: Would you like me to read it to
22 you?

23 THE DEFENDANT: No.

24 THE DEPUTY CLERK: Thank you.

25 THE COURT: All right. Mr. Madoff, you may be seated.

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1 All right. So the government will file the
2 information promptly after this hearing and, among other
3 things, get us a docket number.

4 MR. LITT: Yes. We've provided the package to the
5 courtroom deputy, and we would ask that it be filed as soon as
6 possible.

7 THE COURT: All right.

8 MR. LITT: We've also supplied, through your deputy,
9 the Court with a Pimentel letter in this case, and we would ask
10 that that, too, be filed and be made part of the Court record
11 in this matter.

12 THE COURT: Yes. I have a Pimentel letter dated
13 March 10, 2009, addressed to Mr. Sorkin. And we will file that
14 as well.

15 MR. SORKIN: Your Honor, we have seen the Pimentel
16 letter. We've gone over it. We would like the opportunity to
17 respond with our own letter, which we'd ask the Court's
18 permission to hand up and it be filed as well.

19 THE COURT: You can hand it up and I will have it
20 filed.

21 MR. SORKIN: Thank you, your Honor.

22 THE COURT: This sets forth the defendant's
23 calculation as to a guideline range or --

24 MR. SORKIN: No. It addresses certain issues with
25 respect to -- if I may for just a second, certain issues, your

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1 Honor, with respect to how the government arrived at the
2 number. And in this letter we've asked the Court to request of
3 the government at this point to provide us with the necessary
4 documents so that we can review them independently to determine
5 how the government arrived at the number that's listed in the
6 Pimentel letter.

7 Prior to your Honor taking the bench, Mr. Litt and I
8 chatted, and we would agree at this point that maybe we can
9 work it out before invoking the Court's authority to direct the
10 government to provide us with those documents. So we'd like to
11 hand this up. We don't have time obviously to withdraw the
12 request that your Honor direct the government to do so, and
13 maybe we can work it out before we have to invoke the Court's
14 authority.

15 THE COURT: You can hand it up. I'll refrain from
16 ruling on the request.

17 MR. SORKIN: Thank you, your Honor.

18 THE COURT: Now, I gather it is the expectation that
19 Mr. Madoff will plead guilty to the information on Thursday?

20 MR. SORKIN: I think that is a fair expectation, your
21 Honor.

22 THE COURT: And that would be to all eleven counts of
23 the information?

24 MR. SORKIN: Yes, your Honor.

25 THE COURT: Okay. Now, in light of the Crime Victim's

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1 Protection Act, I issued an order last week that gives
2 victims -- that gave notice to victims. And we need to talk a
3 little bit about the opportunity for victims to speak.

4 And so I think it would be helpful if the government
5 were to describe the information, what the counts are, and then
6 just to tell us what the government's position is with respect
7 to a guideline range. And the reason for that is Thursday I
8 think there are two issues to address. One is whether to
9 accept the plea, should Mr. Madoff plead guilty. Two is I
10 don't know whether the government is going to ask for a remand,
11 but there is the issue of remand or bail.

12 Now, under the statute victims have a right to be
13 reasonably heard with respect to, among other things, both plea
14 and release. Those are the words in the statute. And so with
15 respect to plea, I think it would be helpful if the government
16 could give a description of what's anticipated, including, for
17 example, whether there is a plea agreement.

18 MR. LITT: Yes, your Honor. I'm happy to do so. The
19 information which the government filed contains eleven counts.
20 They are securities fraud, investment adviser fraud, mail
21 fraud, wire fraud, three counts of money laundering, false
22 statements, perjury, false filing with the SEC and theft from
23 an employee benefit plan. There is no plea agreement with the
24 defendant.

25 THE COURT: And that means if Mr. Madoff wishes to

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1 plead guilty on Thursday, as far as the government's concerned,
2 he would have to plead guilty to the entire information?

3 MR. LITT: That's correct.

4 THE COURT: All right. Would you tell us what the
5 exposure is in terms of the maximum possible sentence of
6 imprisonment, taking the eleven counts together?

7 MR. LITT: In total it's 150 years. The guidelines
8 range is life, but the guidelines further provide that in a
9 case where no count, no individual count provides for a life
10 sentence --

11 THE COURT: Which is the case here.

12 MR. LITT: -- which is the case here, the recommended
13 guideline sentence is the statutory maximum, which is 150
14 years.

15 THE COURT: And this calculation is the government's
16 calculation based on currently available information;
17 apparently Mr. Madoff may challenge that, but in any event the
18 calculation is not binding on the Court or the probation
19 department, correct?

20 MR. LITT: That's correct. And I would just note with
21 respect to Mr. Sorkin's letter, responding to the Pimentel
22 letter, which we just received that, it relates to a very
23 narrow part of the government's Pimentel letter, and that is
24 the sums of money related to the forfeiture allegations. So
25 that's what Mr. Sorkin's letter addresses. It doesn't address

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1 the guidelines calculation in any way.

2 THE COURT: All right. Now, thank you.

3 With respect to Thursday, I have reviewed the e-mails
4 that have been submitted to the government, and I know that
5 there are investors and victims from all around the country who
6 have expressed a desire to be heard, a desire to address the
7 Court on Thursday.

8 And I just want it to be clear, there really are only
9 the two issues I've mentioned on Thursday: Whether, assuming
10 Mr. Madoff pleads guilty, I will accept that plea; and second,
11 whether he will remain out on bail or whether he will be
12 remanded. I am not sentencing Mr. Madoff on Thursday. Even if
13 he pleads guilty then, the sentence would not take place -- the
14 sentencing would not take place for several months. And
15 victims will be given a chance to be heard before or at
16 sentencing, depending on how many victims want to be heard.
17 We'll have to figure out the mechanics. But the point is
18 Thursday is not the time for victims to be heard with respect
19 to sentencing.

20 With respect to pleading guilty, some of the e-mails
21 or many of the e-mails objected to a -- what was called a plea
22 bargain, or some kind of a deal whereby Mr. Madoff would be
23 permitted by the government to plead guilty to lesser charges.

24 I think as these proceedings this afternoon make
25 clear, there is no plea agreement. There is no plea bargain

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1 here. And so as I understand it, if Mr. Madoff wishes to plead
2 guilty, he must plead guilty to all eleven counts of the
3 information. And, therefore, those victims who objected to a
4 plea bargain no longer have a basis to object, and I would
5 think they would not need to be heard on Thursday.

6 And so on Thursday, if Mr. Madoff still wishes to
7 plead guilty, I will conduct an allocution. I will ask him a
8 series of questions. When we complete the allocution, I will
9 indicate whether I am inclined to accept the allocution. If
10 so, if I am inclined to accept the allocution, I will then give
11 victims who wish to object to my accepting the plea an
12 opportunity to be heard. I will then make a final decision on
13 whether to accept the plea.

14 And we'll do the same thing with respect to release.
15 I'll give the lawyers a chance to be heard. I'll give a
16 preliminary indication of what I am inclined to do. I would
17 then give victims a reasonable opportunity to be heard. In
18 other words, there's no reason for someone to speak if they
19 agree with my decision. I'm trying to do this in a way that
20 will streamline it but give those who wish to be heard an
21 opportunity to be heard.

22 Any thoughts on that?

23 MR. LITT: I think it's -- that's an acceptable
24 approach to the government. I think the only issue is going to
25 be a logistical one in terms of --

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1 THE COURT: I'll come to that in a second. But the
2 logistics are difficult. Mr. Sorkin?

3 MR. SORKIN: No, your Honor.

4 THE COURT: I think the government should contact the
5 victims who have indicated a desire to be heard. The
6 government can explain what we've just discussed, that the
7 proceedings on Thursday are limited to plea and release, that
8 sentencing will take place at some point in the future. So,
9 therefore, those who want to be heard on sentencing will have
10 to be heard on another day. And only those who want to address
11 these issues will be permitted to speak. And we'll see how
12 many want to speak, and only those really who are -- want to
13 try to convince me to do something different from what I am
14 inclined to do would be given a chance to be heard.

15 I don't think, otherwise, there is any reason for them
16 to speak. And depending on how many people express a desire to
17 speak, we'll put some limits on the number of speakers, the
18 amount of time that each person may speak. And the government
19 should just remind victims who want to speak that if they are
20 going to speak, they must do so in a respectful and dignified
21 manner. I understand that emotions are high, but we have to
22 remember to conduct ourselves in a manner that is appropriate
23 to a courtroom proceeding.

24 So the government will let me know how many victims
25 still want to be heard on Thursday, and we'll make a final

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1 decision before that.

2 MR. LITT: We will. Your Honor's earlier order
3 provided that individuals could notify us up until 10:00
4 Wednesday morning, so we will endeavor to collect the
5 information as soon as possible thereafter so that early
6 Wednesday afternoon we can communicate with the Court and with
7 Mr. Sorkin.

8 THE COURT: Many of the people who wanted to be heard
9 don't really explain what they want to say or what they want to
10 be heard on. And it's just not the time for victims to speak
11 in terms of sentencing.

12 Mr. Sorkin?

13 MR. SORKIN: One point, your Honor, and I won't
14 belabor it, because I don't think we need to belabor it now.

15 What I'm about to say by no means suggests that there
16 were no victims, but one of the difficulties we have, your
17 Honor, in setting forth to some extent our response to the
18 Pimentel letter is that we have been unable to review a vast
19 amount of documents reflecting moneys going in and moneys
20 coming out. And in certain instances which have been public
21 since Mr. Madoff's arrest, there are certain individuals but I
22 think more likely institutions that have claimed they lost
23 money but after analysis discovered that they received
24 redemptions that exceeded the amount of money that they claimed
25 they lost.

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1 And so one of the points I want to raise is, again,
2 and I emphasize we're not suggesting there weren't victims, but
3 unless and until we get to see records that were viewed by the
4 government, and perhaps even reviewed by the trustee in
5 bankruptcy, Mr. Pickard, for us to identify loss as well as
6 victims, because I think they go together. I'm not going to
7 make a determination respectfully as to whether someone who
8 appears is a victim who has lost money. I think that's one of
9 the difficulties we have at this point.

10 THE COURT: Well, the statute, you know, contemplates
11 giving victims an opportunity to be heard even before there is
12 a finding of guilt. And I suppose one could argue that we
13 should use the phrase alleged victims for now, but I don't
14 know. But I understand you to be saying that you're not --
15 obviously Mr. Madoff isn't agreeing to the extent of the losses
16 or the specifics.

17 MR. SORKIN: I don't think we possibly can. And,
18 again, it's difficult to identify at this point the real
19 victims of this until we have access to the appropriate
20 records. And that's the point I want to make.

21 THE COURT: All right. I understand.

22 Anything else today?

23 MR. SORKIN: There is one other thing, your Honor.
24 Mr. Chavkin has something.

25 MR. CHAVKIN: Your Honor, if I may take one more

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1 moment of the Court's time. I've been reflecting on one of the
2 questions your Honor asked, and although I don't believe that
3 it poses any potential conflict, I thought out of an abundance
4 of caution I would just bring the Court's attention to the
5 following.

6 First, my firm has represented several investors in
7 guiding them to file claims with the SIPC, period. Secondly, I
8 understand that I may be considered as a potential counsel for
9 Mrs. Madoff in the regulatory or civil sphere. I don't believe
10 either of them changes the analysis, but I wanted to make sure
11 the record was clear.

12 THE COURT: That's fine.

13 Does the government have a problem with either of
14 those?

15 MS. BARONI: No, your Honor.

16 THE COURT: I don't have a problem.

17 MS. BARONI: Thank you.

18 MR. SORKIN: Thank you, your Honor.

19 THE COURT: Anything else today from the government?

20 MR. LITT: The only thing is just in an effort to get
21 out the information as quickly as possible, I would ask the
22 permission of the Court to publish the information in the
23 Pimentel letter prior to them getting docketed, in case it
24 takes time to do that.

25 THE COURT: Permission granted. The docketing

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1 sometimes doesn't move as quickly as we would like. Permission
2 granted.

3 We're adjourned.

4 MR. SORKIN: Your Honor, may we also ask that our
5 letter be filed as well?

6 THE COURT: Yes.

7 (Adjourned)

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