

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- v - :

09 Cr. 213 (DC)

BERNARD L. MADOFF, :

Defendant. :

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**GOVERNMENT'S MEMORANDUM IN SUPPORT OF ITS MOTION
PURSUANT TO TITLE 18, UNITED STATES CODE, SECTION 3664(d)(5)**

LEV L. DASSIN
Acting United States Attorney
Southern District of New York
Attorney for the United States of America

LISA A. BARONI
MARC LITT
Assistant United States Attorneys

- Of Counsel -

UNITED STATES DISTRICT COURT
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The sentencing of defendant Bernard L. Madoff is scheduled for June 29, 2009. The Government will submit a memorandum addressing the sentencing factors applicable to the defendant and defendant's offenses under 18 U.S.C. § 3553(a) and the United States Sentencing Guidelines on June 26, 2009. Pursuant to 18 U.S.C. § 3664(d)(5), this motion is respectfully submitted ten days in advance of sentencing to address statutory restitution and the ongoing efforts to identify victims and determine victim losses from the Madoff fraud.

As discussed more fully below, based on the difficulties presented in the reconstruction of the record of defendant's fraud and victim loss in this case – difficulties caused by the condition of the records kept by defendant, as well as the scope and duration of the fraud -- the Government respectfully moves the Court for an Order, pursuant to 18 U.S.C. §§ 3664(d)(5), deferring for ninety (90) days from the date of sentence this Court's determination whether statutory restitution is practicable under 18 U.S.C. § 3663A(c)(3) and, if so, the restitution schedule to be ordered by the Court. As also discussed below, to the extent that the Court

determines during the ninety-day period that restitution is not practicable, the Government will effect victim recompense through the process of forfeiture and remission.

The Government is committed to the distribution of forfeited assets to victims – by restoration pursuant to a court-ordered restitution plan or by the procedure of remission – as soon as possible, and is continuing, along with the trustee for the liquidation of Bernard L. Madoff Investment Securities appointed pursuant to the Securities Investor Protection Act (the “SIPA Trustee”), to marshal and forfeit assets. The requested Order would permit the June 29 sentencing to proceed as scheduled, while allowing the effort to identify victims and losses to proceed apace.

Applicable Law

Restitution to persons “directly and proximately harmed” by the Madoff fraud is mandatory. 18 U.S.C. § 3663A(a)(1). To effect restitution, the Court is authorized to determine a restitution amount and schedule at sentencing. Where such restitution is ordered, the Government is authorized to restore forfeited assets in aid of restitution. See, e.g., United States v. Samuel Israel, 05 Cr. 1039 (CM). In cases, however, where the “number of identifiable victims is so large as to make restitution impracticable,” or determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process,” 18 U.S.C. § 3663A(c)(3), the Court may decide not to order restitution. In such event, in a fraud case such as this one, the Government is authorized to effect victim recompense through a process of “remission” authorized under the forfeiture statutes and related regulations. 21 U.S.C. § 853(i); 28 C.F.R. Part 9. We discuss below general principles

concerning these methods of victim recompense.

1. Restitution

Title 18, United States Code, Sections 3663, 3663A and 3664 govern restitution to victims in criminal cases.¹ In a fraud case, restitution to persons “directly and proximately harmed” by the fraud is mandatory. 18 U.S.C. § 3663A(a)(1). As a procedural matter, however, a court may find that where the victims’ losses are not determinable at the time of sentence, a final determination of losses need not be made at the sentencing hearing. Section 3664(d)(5) provides:

If the victim’s losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing.

18 U.S.C. § 3664(d)(5). This authority permits sentencing to proceed, with a view to the details of restitution being finalized within 90 days from the date of sentence.

Title 18, United States Code, Section 3663A(c)(3) also provides that otherwise mandatory restitution does not need to be imposed as part of a sentence “if the court finds, from facts on the record that – (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the case or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.” 18 U.S.C. § 3663A(c)(3). As discussed immediately below, where a court makes such a finding,

¹ The Attorney General of the United States has the authority to apply forfeited property directly to an order of restitution. 21 U.S.C. § 853(i).

the United States Department of Justice (“DOJ”), to the extent it has obtained forfeited assets, routinely has undertaken a forfeiture remission process.

2. Remission

The Attorney General of the United States is authorized pursuant to 21 U.S.C. § 853(i) to “grant petitions for mitigation or remission of forfeiture” pursuant to the procedures set forth in Title 28, Code of Federal Regulations, Part 9. Specifically, under the remission or mitigation process, the Attorney General “is authorized to – (1) grant petitions for mitigation or remission of forfeiture . . . or take any other action to protect the rights of innocent persons which is in the interest of justice” and is not otherwise inconsistent with the forfeiture statutes. 21 U.S.C. § 853(i). DOJ regulations set forth procedures under which forfeited property may be used to compensate victims of the offenses that have given rise to a forfeiture. See 28 C.F.R. Part 9. Under these regulations and practice, DOJ, primarily through its Asset Forfeiture and Money Laundering Section (“AFMLS”) and in consultation with the United States Attorney’s Office and other relevant law enforcement agencies, evaluates victims’ petitions for remission or mitigation, makes determinations as to their merit and oversees the disbursement of forfeiture proceeds to victims.

Background

On March 12, 2009, Bernard L. Madoff pleaded guilty to securities fraud, investment adviser fraud, mail fraud, wire fraud, three counts of money laundering, false statements, perjury, false filings with the United States Securities and Exchange Commission, and theft from an employee benefit plan, after entering a guilty plea before this Court. The defendant’s guilty plea arises from a multi-billion dollar scheme to defraud thousands of individuals who invested either

directly or indirectly with BLMIS. As part of the scheme, Madoff solicited billions of dollars from investors under false pretenses, failed to invest such funds as promised, and misappropriated and converted investors' funds for his own benefit and the benefit of others. The scheme lasted for decades – from at least as early as the 1980s through on or about December 11, 2008, the day of Madoff's arrest.

The Criminal Information to which the defendant pleaded guilty contained forfeiture allegations, including money judgments totaling more than \$177 billion. The criminal forfeiture statutes applicable in this case provide for mandatory forfeiture of all property constituting or derived from proceeds traceable to the offenses of conviction. See 18 U.S.C. § 981(a)(1)(C); 28 U.S.C. § 2461(c). With respect to the money laundering convictions in this case, the applicable forfeiture statutes provide for forfeiture of any property involved in those offenses. 18 U.S.C. § 983(a)(1). Prior to sentencing in this case, the Government expects to provide to the Court a proposed preliminary order of forfeiture, which would be final as to the defendant.² The proposed preliminary order of forfeiture will include provisions that would impose two personal money judgments against the defendant, order him to forfeit all of his interest in specific property identified in the order, and extinguish his claims to any and all property in which he has an interest.

Efforts To Identify Victims And Their Losses

The Government and the SIPA Trustee have been working to identify victims and their losses and to continue to investigate the facts of the offense, including facts relating to investor

² Pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, “[a]t sentencing . . . the order of forfeiture becomes final as to the defendant and must be made part of the sentence. . . .”

funds. That process principally has involved: (1) locating client files, account records, computer data, and other records from BLMIS's offices and warehouse facilities; and (2) evaluating thousands of customer claims submitted to the SIPA Trustee. The scope of the fraud, its duration, and the lack of a readily available complete set of account records have required the SIPA Trustee to attempt to reconstruct books and records sufficient to identify victims and their losses. Pertinent BLMIS microfilm records that may stretch back as far as 1979 were recently located, and the SIPA Trustee is in the process of digitizing and analyzing that data. To date, the SIPA Trustee has identified approximately 1,341 BLMIS account holders who, through December 11, 2008, collectively suffered estimated losses exceeding \$13 billion.

Obtaining Assets To Distribute To Victims

Both the Government and the SIPA Trustee have been working to obtain assets to distribute to the victims of this multi-billion dollar fraud. In that connection, as noted above, the Government expects shortly to present to the Court a proposed preliminary order of forfeiture that would be final as to the defendant and that would provide for the forfeiture of millions of dollars in personal assets of the defendant. In addition, the SIPA Trustee has recovered hundreds of millions of dollars of corporate assets and BLMIS customer property and has commenced lawsuits against various individuals and entities seeking to obtain billions of dollars of additional funds for distribution to victims. Given the size and scope of the defendant's fraud, the efforts of the Government and the SIPA Trustee to recover assets, liquidate them if necessary, and distribute them to victims, are expected to continue for several years.

Discussion

The Government respectfully submits that the Court should proceed with sentencing on June 29, 2009 and extend for ninety (90) days from sentencing the date by which the Court will determine whether restitution by Court-ordered schedule is practicable, and if so, the contents of such schedule.

While the Government and SIPA Trustee have sought to identify as many victims as possible as well as precise losses, we will not have identified each victim of the Madoff fraud or have ascertained the precise losses of each identified victim as of June 29, 2009. As this Court is aware, there are thousands of potential victims of Madoff's crimes and, during the fraud, Madoff solicited billions of dollars of funds over a period of decades.³ BLMIS's records, as they have been located and analyzed to date, have not allowed for a reliably definitive compilation of victims or a precise computation of the amount of loss suffered by each identified victim. The Government and the SIPA Trustee continue to attempt to determine whether comprehensive BLMIS account statements are available for the entire period of the fraud and are reconstructing data where possible, including by converting microfilm records into a digital format for further analysis. This time-consuming process is likely to take months to complete. In sum, our joint efforts with the SIPA Trustee to attempt to develop a reliable and comprehensive list of victims

³ The difficulty in identifying victims in this case is reflected in the Order, dated March 6, 2009, regarding the victim notification requirements of 18 U.S.C. § 3771. In that Order, the Court found that (a) there are thousands of potential victims in this case; (b) thousands of additional potential victims who have not yet been identified by the Government, and no readily available compilation of such individuals and entities, and (c) it is impracticable to accord all of the potential victims the rights described in Section 3771(a). Given the number of victims and the fact that many had not yet been identified, the Court established a procedure under which victims would be notified about scheduled proceedings through internet postings, rather than through individual notification.

and their losses will consume several more months, and we respectfully submit that waiting for such efforts to conclude would unnecessarily prolong sentencing.

We also note that, given the nature of the Madoff records, it is not yet clear that even with best efforts, the Government and SIPA Trustee will be able to reconstruct the documentary record and generate a list of all victims and corresponding losses. Accordingly, within the ninety-day extension of time requested herein, the Government may make further application to the Court either for additional time to complete the above-described efforts or for a ruling that a Court-ordered schedule of restitution is not practicable within the meaning of 18 U.S.C. § 3663A(c)(3). In the latter event, the Government would undertake to return forfeited property to victims through the process of remission – a process that the Government has employed in other cases of large-scale fraud. See, e.g., In Re W.R. Huff Asset Management Co., LLC, 409 F.3d 555, 563-64 (2d Cir. 2005) (prosecution of owners of Adelphia Communications Corp.); United States v. Ebbers, S3 02 Cr. 1144 (BSJ). As set forth above, the Government would oversee a process, pursuant to DOJ regulations, that would result in forfeited assets being returned to victims of the offenses to the maximum extent possible.

CONCLUSION

For the reasons set forth above, the Government respectfully submits that sentencing on June 29 should proceed, and that the Court should order a ninety-day extension of the time in which the Court will order restitution or find that restitution is impracticable. A proposed order is attached hereto for the Court's consideration.

Dated: New York, New York
 June 19, 2009

Respectfully submitted,

LEV L. DASSIN
Acting United States Attorney

By: *Lisa A. Baroni*
Lisa A. Baroni / Marc Litt
Assistant United States Attorneys
Tel. (212) 637-2405/ 637-2295

DECLARATION OF SERVICE

I, Lisa A. Baroni, declare pursuant to 28 U.S.C. § 1746 that on the 19th day of June 2009, I caused to be placed one copy of the foregoing Motion Pursuant to Title 18, United States Code, Section 3664(d)(5), in an envelope addressed to:

Ira Sorkin, Esq.
Dickstein Shapiro LLP
1177 Avenue of the Americas
New York, NY 10036-2714

and caused the same to be delivered by United States mail, as well as by the Electronic Case Filing system of the United States District Court for the Southern District of New York.

I declare under penalty of perjury that the foregoing is true and correct.



Lisa A. Baroni
Assistant United States Attorney

Dated: New York, New York
June 19, 2009

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

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Upon the motion of the United States of America dated June 19, 2009, pursuant to Title 18, United States Code, Section 3664(d)(5), it is found that the victims' losses are not ascertainable 10 days prior to the defendant's sentencing on June 29, 2009.

It is hereby ORDERED

1. Sentencing of Bernard L. Madoff will proceed on June 29, 2009; and
2. The date for the determination whether restitution is practicable and, if so, the restitution schedule of victims' losses is deferred for a period not to exceed ninety (90) days after sentencing.

Dated: New York, New York
June __, 2009

SO ORDERED:

HONORABLE DENNY CHIN
UNITED STATES DISTRICT JUDGE