NIAP

Network for Investor Action and Protection

November 4, 2010

Honorable Burton R. Lifland
Judge, United States Bankruptcy Court
Southern District of New York
Alexander Hamilton Custom House
One Bowling Green
New York NY 10004

Re: In re Bernard Madoff Investment Securities LLP

This letter is respectfully submitted by the Network for Investor Action and Protection ("NIAP"), a not-for-profit organization devoted to the protection of investors' rights.[1] We do so to call the Court's attention to what we view as a most egregious attempt to deprive more than 1,000 Madoff investor victims of the most fundamental right under our judicial system -- the due process right not to have their su`bstantive rights determined in the absence of being afforded proper notice and an opportunity to be heard.

Specifically, the Trustee has demanded in advance of commencing any actual case or controversy that this Court significantly restrict the rights and ability of perhaps 1,000 or more currently unnamed (indeed unknown) future potential defendants to defend themselves properly against claw back actions that may subsequently be brought.

[1] NIAP is a not-for-profit organization with approximately 1,000 members. Its purpose is to educate the public about, and seek protection against, fraud and misconduct that victimize investors. NIAP arose because of the Madoff fraud, has a deep interest in that fraud, and most of its members are victims of that fraud. But NIAP's goals and efforts also extend beyond the Madoff case to other forms of fraud and misconduct that victimize investors.

For the Court's information, NIAP was granted Amicus status by the Second Circuit in connection with the pending Net Equity appeal and in that capacity, NIAP filed amicus papers in support of the final account statement method and in opposition to the Trustee's Cash in/Cash out approach.

P.O Box 2159 Halesite NY 11743 Phone 800 323-9250 Fax 631 421-5701 *www.investoraction.org*

In that regard, the Trustee is seeking, *inter alia,* the following relief *now* against persons not yet jurisdictionally present before the court, victims who have received no notice that their rights may be adversely affected at this time:

I. Dramatically limiting the scope of discovery essentially to allow the Trustee to withhold vital and relevant facts and information in his possession which would bear directly on (a) the validity of the cash in/cash out method, and (b) the proper calculation of a customer's Net Equity (even under the Trustee's methodology). Thus, the Trustee would preclude all inquiry into transactions and profits in the various Madoff Investor accounts during all relevant time periods even though it is now virtually undisputed that the accounts in fact produced significant income and profits of at least hundreds of millions of dollars, if not more. The Trustee should have credited those profits to the accounts of the Madoff investor victims but has not done so. Discovery on this and other related profit and transaction issues is imperative for a fair determination of any claw back claim.[2]

II. The Trustee also seeks to exempt himself from being deposed even though as a party, he is clearly subject to discovery under the Federal Rules of Civil Procedure. Thus even before there are actual defendants who wish to seek such discovery, the Trustee wants this Court to exempt him from that obligation -- and do so on essentially an *ex parte* basis.

---

[2] Indeed, the Trustee would even preclude discovery concerning when the alleged scheme actually commenced -- even though that, too, is essential in order to demonstrate the *bona fides* of thousands of transactions over the years executed for customers by Madoff *prior* to that commencement date. Those real transactions, and the profits they generated, should be credits to the investor accounts even under the Trustee's cash in/cash out methodology. Without discovery of the facts from the Trustee, however, the task of demonstrating that entitlement will be rendered intolerably more difficult.

P.O Box 2159 Halesite NY 11743 Phone 800 323-9250 Fax 631 421-5701 *www.investoraction.org*

III. The Trustee also seeks to restrict, in advance of any litigation, the scope of the issues in any of the future litigations and to impede the ability of future defendants to assert various available defenses or to make dispositive motions to the Court, except on the Trustee's personal terms and time table. But until there is an actual complaint and a responsive answer served it is literally impossible to know what the issues will be and what will or will not be relevant. Certainly, these future defendants and their counsel should have the opportunity to argue the need for such significant and potentially outcome determinative limitations. But if the Trustee has his way, those issues will have already been determined – before anyone is actually served or otherwise identified as a defendant.

IV. The request to defer dispositive motions until late in the proceedings will be of great concern to many Madoff victims ultimately named as defendants. It must be remembered that so many of these innocent Madoff victims are already in dire financial circumstances. If any such defendant has a motion which, on the law, entitles that defendant to a dismissal, there is no logical reason to require that he or she defer making the motion and instead remain as a party through protracted proceedings which will be costly and will continue the ongoing anxiety. (This is particularly true with respect to dispositive issues which are common to the Madoff victims. Such issues should certainly be addressed up front.)

V. The so-called Case Management relief the Trustee seeks is, in reality, a transparent attempt to trump the pending appeal in the Second Circuit and to infringe on that Court's jurisdiction. It is also directly at odds with the factual positions previously taken by the Trustee and by this Court. In that regard, following this Court's Net Equity decision, the

P.O Box 2159 Halesite NY 11743 Phone 800 323-9250 Fax 631 421-5701 *www.investoraction.org*

Trustee urged this Court to certify a direct appeal to the Second Circuit precisely because the proper determination of Net Equity impacted on virtually all other matters that would need to be addressed during the balance of the SIPC liquidation; and this Court agreed to certify the direct appeal for that precise reason. Now the Trustee is seeking to impose specific Case Management time frames for specific functions which clearly anticipate that the Cases will proceed on the merits even before the Second Circuit rules. This is contrary to the Trustee's, and this Court's stated rationale for certification of a direct appeal. It is also harmful to any Madoff victim against whom an adversary proceeding is commenced. There is no reason to force him or her to incur legal fees and expenses prematurely when those costs may ultimately prove unnecessary.

VI. The Trustee's motion also demands compulsory mediation, before particular mediators he has designated. For various reasons, these present issues which should not be brought before the Court on an *ex parte* basis. At the very least, the issue of compelled mediation raises fiscal concern for these victims since it will necessarily increase their legal costs which many can ill afford. There is no need for a present determination now which will deprive those ultimately named as defendants the opportunity to be heard nor should they be placed in the unfair posture of seeking to undo something the Court has already put in place. Both sides to a controversy should be allowed an equal say, on a clean slate, with neither side having prior *ex parte* access to the Court.

VII. Moreover, even if mediation is to be compelled, the mediators should not be limited to only those selected by the Trustee. Rather, the panel should consist of all of the approved mediators on the Court list or, in the alternative, the investor defendants should have the same opportunity to select mediators that the *investor* is comfortable with. Otherwise any

P.O Box 2159 Halesite NY 11743 Phone 800 323-9250 Fax 631 421-5701 *www.investoraction.org*

perception of fairness and impartiality in the ongoing process will be further seriously undermined.

VIII. The Trustee's demand to supplant the carefully crafted discovery rules set forth in the federal rules of civil procedure with his own self-created rules severely limiting discovery from the Trustee is yet another item that, in fairness, should not be decided only on the Trustee's unilateral presentation. Those Madoff victims who are ultimately named as defendants by the Trustee should have equal and timely access to be heard in opposition to this crucial attempt to limit disclosure -- and the failure to insure this will surely reinforce the already existing impression that many victims have that the Trustee is their adversary and that he makes the rules to suit himself and SIPC's financial interests. [3]

IX. The settlement process proposed by the Trustee is slanted in favor of the Trustee and necessarily carries with it a coercive threat that unless the investors come in now, and settle, in a manner deemed correct by the Trustee, they will be dealt with more harshly in

[3] This negative impression of SIPC and the Trustee is not limited to the Madoff victims. It is apparently shared by the Congressional Committee reviewing SIPC and the Trustee's actions in the Madoff liquidation. In that regard, at the recent hearing conducted by the House Financial Services Committee on September 23, 2010, SIPC and the Madoff Trustee were strongly criticized by the Committee, on a bi-partisan basis, for the adversarial stance they have consistently adopted in addressing the rights and needs of the Madoff victims. Several of the Committee members decried the fact that SIPC and its Trustee were treating innocent victims as if they were criminals, terrorizing them instead of protecting and reassuring them. Other Committee members criticized the failure of SIPC and its Trustee to share necessary vital information with the victims, noting that this created an unfair and un-level playing field. SIPC's Chairman promised the Committee that if permitted to do so, SIPC would adopt an open discovery policy providing all investors -- simply on request – with all information developed during the lengthy SIPC liquidation process. Clearly, the Trustee's motions here are an unmistakable repudiation of that commitment, as well as a rejection of Congress' desire for a level and fair playing field. A copy of the complete hearing transcript is annexed for the Court's convenience.

P.O Box 2159 Halesite NY 11743 Phone 800 323-9250 Fax 631 421-5701 *www.investoraction.org*

the future. This attitude does violence to the mandate of protecting these investors which is at the very core of the SIPA statute.

*****

Thus, the Trustee's motions concern significant issues which can seriously affect the rights of the potential (and as yet unidentified) investor-defendants; indeed, it is no overstatement to say that the relief, if granted, may literally prove to be outcome determinative. Given all that, it is, bluntly, incomprehensible that the Trustee would choose to proceed in this fashion. At a minimum, due process and fundamental fairness absolutely demand that all potential defendants be first served with process and then be given a reasonable opportunity to consult with and retain counsel to protect their rights before the Court even considers the relief requested. Otherwise the adversary process will properly be viewed as a mockery with all pretense of fairness eliminated. Ultimately, this serves no legitimate purpose for anyone – certainly not the Madoff victims who, after all, are the parties that a SIPC liquidation is ostensibly designed to protect.

*****

There is a human dimension to these proceedings that cannot be emphasized too strongly. Clearly, these Madoff customers have already suffered a life altering event of epic proportions -- not only a drastic financial shock but an emotional one as well. Many of them have lost everything. Already traumatized, they are frightened and fearful about the future, particularly those victims who are faced with the prospect of avoidance actions (despite their acknowledged innocence). As Congress has recently noted, the manner in which the Trustee has acted leaves these victims with deep feelings of mistrust and those feelings are exacerbated each time the Trustee demonstrates his apparent lack of concern for their tragic circumstances. The

P.O Box 2159 Halesite NY 11743 Phone 800 323-9250 Fax 631 421-5701 *www.investoraction.org*

current motions by the Trustee, seeking to obtain relief against investors without notice to them or an opportunity to be heard, is only the latest example of this fear engendering conduct.

*****

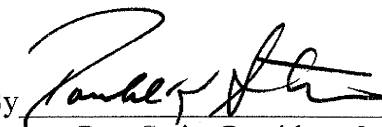
We have reviewed the brief submitted by Lawrence Velvel in opposition to the Trustee's motions and we incorporate the points and arguments in that brief as if set forth at length in this letter.

******

For the reasons set forth above, the Trustee's motions cannot be allowed to proceed at this time or in this manner. We respectfully urge the Court to deny the motions without prejudice and to defer all motion practice by the Trustee until after he has actually commenced the adversary proceedings. That way, those Madoff victims who are to be actual defendants will know they are and will know that they must act to protect their legal rights in the actions before this Court. Not only is this mandated by due process of law, it is also compelled by logic and fundamental fairness.

Respectfully submitted

Network for Investor Action and Protection

By 
Ron Stein, President &
David B. Bernfeld

cc: Baker & Hostetler
Attorneys for Trustee Irving Picard

P.O Box 2159 Halesite NY 11743 Phone 800 323-9250 Fax 631 421-5701 *www.investoraction.org*