

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 3663A(c)(3)**

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In advance of Bernard L. Madoff’s sentencing on June 29, 2009, this Court issued an order deferring to September 28, 2009, the date by which the Court will determine whether restitution is practicable. The Government is committed to the distribution of forfeited assets to victims in this case 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 assets for that purpose. 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 moves the Court for an Order finding that restitution under Section 3663A(c)(3) is impracticable. Such a ruling would trigger recompense to the victims of the defendant’s offenses through the well-established process of forfeiture and remission administered by the United States Department of Justice (“DOJ”).

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 to victims by applying such funds to a restitution order entered as part of sentencing. See, e.g., United States v. Samuel Israel, 05 Cr. 1039 (CM) (Attorney General, at the request of the U.S. Attorney’s Office, authorized forfeited funds to be applied to restitution order pursuant to Attorney General’s discretionary authority under 21 U.S.C. § 853(i)). There are cases, however, where the Court may determine that an order of restitution is not appropriate because the “number of identifiable victims is so large as to make restitution impracticable,” or because the determination of 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). Where restitution is found to be impracticable, the Government is authorized to compensate victims through the process of remission authorized under the forfeiture statutes and related regulations. 21 U.S.C. § 853(i); 28 C.F.R. Part 9. These two methods of victim recompense – restitution and remission – are discussed more fully below.

1. Restitution

Title 18, United States Code, Sections 3663, 3663A and 3664 govern restitution to victims in criminal cases.¹ In a fraud case, subject to the exception discussed below, restitution

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

to persons “directly and proximately harmed” by the fraud is mandatory. 18 U.S.C. § 3663A(a)(1).

Title 18, United States Code, Section 3663A(c)(3) 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 (1) the number of identifiable victims is so large as to make restitution impracticable; or (2) 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, DOJ, to the extent it has obtained forfeited assets, regularly uses a forfeiture remission process, and would do so here.

2. The Attorney General’s Authority to Use Forfeited Property To Compensate Victims Through Remission

The Attorney General has discretionary authority to use forfeited property to compensate victims of a federal criminal offense giving rise to the forfeiture. Title 21, United States Code, Section 853(i) authorizes the Attorney General to “grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims, or take any other action to protect the rights of innocent victims which is in the interest of justice” and is not otherwise inconsistent with the forfeiture statutes.

The criteria used in deciding petitions for mitigation or remission of forfeiture for a victim of the offense underlying the forfeiture of property, or a related offense, are set forth in Title 28, Code of Federal Regulations, Part 9. The victim must satisfactorily demonstrate that:

(1) he or she incurred pecuniary loss of a specific amount; (2) the pecuniary loss was a direct result of the illegal act; (3) the victim did not knowingly contribute in, participate in, or benefit from, or act in a wilfully blind manner toward the commission of the offense; (4) the victim has not been compensated for the loss; and (5) the victim does not have recourse to other assets to obtain compensation. 28 C.F.R. §§ 9.2(v), 9.8(a).

It is the policy of DOJ, consistent with the Crime Victims' Rights Act, to ensure that crime victims receive "full and timely restitution as provided in law." *See* 18 U.S.C. § 3771(c)(1). Accordingly, when the Government seizes property in connection with a fraud case, the Government's goal is to forfeit the property and then, in proceedings administered by the Attorney General through his delegee, the Chief of the Asset Forfeiture and Money Laundering Section ("AFMLS") at DOJ,² to distribute funds to victims on a *pro rata* basis. In keeping with this policy, the United States Attorney's Office has sought and obtained the commitment of the chief of AFMLS to authorize distribution of property forfeited in connection with this case to the victims of Madoff's fraud, consistent with applicable DOJ regulations. (*See* Letter from Richard Weber to Lev Dassin, Acting United States Attorney, dated April 9, 2009 (attached hereto as Exhibit A)).

The petition for remission or mitigation process is well established. The regulations set

² *See* 28 C.F.R. § 9.1(b)(2) (delegating the authority of the Attorney General to grant petitions for remission or mitigation in criminal and civil judicial forfeitures to the chief of AFMLS); *see also* Attorney General Order No. 2088-97 (June 14, 1997) (delegating to the chief of the AFMLS the Attorney General's authority, pursuant to any civil or criminal forfeiture statute enforced or administered by the Department of Justice "to restore forfeited property to victims or take other actions to protect the rights of innocent persons in civil or criminal forfeitures that are in the interest of justice and that are not inconsistent with the provisions of the statute").

forth who is a qualified victim and under what circumstances a victim can recover. The United States Attorney's Office and the investigating law enforcement agencies evaluate the petitions submitted by victims, verify the loss amounts they claim, and make a recommendation to AFMLS concerning the disposition of the petitions.³ In a multi-victim or complex case, the process of notifying potential victims, processing petitions, verifying losses and recommending a distribution of available funds may be managed on behalf of DOJ by a Special Master or trustee, as authorized by 28 C.F.R. § 9.9(c).

The DOJ regulations provide that in the event that "petitions cannot be granted in full due to the limited value of the forfeited property," remission to multiple victims generally should be granted "on a pro rata basis." 28 C.F.R. § 9.8(e). However, priority consideration may be given to particular victims in special cases, such as when "a particular victim is suffering an extreme financial hardship." 28 C.F.R. § 9.8(e)(2). The decision as to which victims receive remission and in what amounts is within the sole discretion of the Attorney General, as determined by the Chief of AFMLS.

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 U.S. Securities and Exchange Commission, and theft from an employee benefit plan. The defendant's guilty plea arose from a multi-billion dollar scheme to defraud

³ In a case where victims already have filed claims in a related proceeding, such as a SIPA proceeding, AFMLS may accept other communications in place of actual petitions for remission. For example, AFMLS could use the claim form submitted by a victim of the offenses to the SIPA Trustee to the extent it provides the information necessary for the remission determination.

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 Madoff pleaded guilty contained forfeiture allegations, including money judgments totaling more than \$177 billion. Under the criminal forfeiture statutes applicable in this case, forfeiture of all property constituting or derived from proceeds traceable to the offenses of conviction that constitute "specified unlawful activity" is mandatory upon 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 require forfeiture of any property involved in those offenses. 18 U.S.C. § 982(a)(1).

At sentencing on June 29, 2009, the Court imposed on the defendant a term of imprisonment of 150 years and also incorporated by reference the Preliminary Order of Forfeiture, Final as to the Defendant, that the Court previously had entered on June 26, 2009.⁴ The Preliminary Order of Forfeiture included provisions that imposed two personal money judgments against the defendant, ordered him to forfeit all of his interest in specific property identified in the order, and extinguished his claims to any and all property in which he has an interest. With respect to restitution, on application of the Government prior to the sentencing, the Court entered an Order, "deferring for 90 days from the date of sentencing (1) the

⁴ 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. . . ."

determination whether statutory restitution is practicable, and if so, (2) the calculation of victims' losses." See Order dated June 24, 2009. The Court found that "the number of victims, the difficulties posed by the lack of proper record-keeping, and the scope, complexity, and duration of the fraud make it impossible, at this stage, to determine whether restitution is practicable." Id. at 2.

The Efforts to Identify Victims And Their Losses

Both before and since June 29, 2009, the Government and the SIPA Trustee each have worked to identify victims and their losses. That process, which is ongoing, 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 date back to 1979 were located, and the SIPA Trustee recently completed the process of digitizing that data. To date, the SIPA Trustee has identified approximately 2,336 BLMIS account holders who, through December 11, 2008, collectively suffered estimated net losses exceeding \$13 billion. The process of analyzing customer losses is ongoing.

The SIPA Trustee's experience with victim claims sheds some light on the difficulty of identifying and verifying victim losses. Thousands of BLMIS account holders have submitted claims to the SIPA Trustee and to the Bankruptcy Court in connection with the pending liquidation proceeding. The total number of claims received by the Trustee was approximately 15,870. There were approximately 8,094 customer accounts at BLMIS from at least 2000

through December 2008. As of December 11, 2008, the date of Madoff's arrest, there were approximately 4,902 active customer accounts.

The SIPA Trustee has received claims from most of the customers who had active customer accounts directly with BLMIS. Nearly 50% of the active customers sustained a net loss, in that they contributed more funds to their BLMIS accounts than they withdrew. Approximately 50% of the active customers did not sustain a net loss, in that they withdrew more funds from their BLMIS accounts than they contributed.

Approximately 83 of the active customer accounts were held by "feeder funds" – investment funds which invested their clients' funds with BLMIS. Of the 83 feeder funds, approximately 60% of them filed customer claims. The SIPA Trustee also has received many claims from individual clients of the feeder funds.

The Government continues to investigate facts relating to the thousands of potential victims. The SIPA Trustee also is continuing to review and evaluate the thousands of customer claims it has received.

The Efforts To Recover Assets For the Purpose of Compensating Victims

The Government and the SIPA Trustee each have been working to locate and recover assets that can be used to compensate the victims of this multi-billion dollar fraud. In that connection, the Preliminary Order of Forfeiture that the Court entered in connection with the defendant's sentencing provides for the forfeiture of millions of dollars in personal assets of the defendant. The United States Marshals Service ("U.S. Marshals") is currently in the process of selling three of the properties owned by the defendant and his wife: a cooperative apartment in Manhattan, and houses in Montauk, New York, and Palm Beach, Florida. The U.S. Marshals are

also in the process of auctioning the yachts and automobiles owned by the defendant. The proceeds of these sales will be distributed to the victims of the defendant's fraud.

In addition, the SIPA Trustee has recovered hundreds of millions of dollars of corporate assets and BLMIS customer property and also 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 fraud perpetrated through BLMIS, 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 well beyond September 28, 2009.

Discussion

The Government respectfully submits that the Court should find that restitution under Section 3663A(c)(3) is impracticable due to the large number of potential victims and the complexity of determining each victim's losses.

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.⁵ BLMIS's records have not yet allowed for a definitive compilation of victims or a precise computation of the amount of loss suffered by each identified victim. The Government will not be able to completely reconstruct, by September 28, 2009, the documentary record necessary to generate a list of all

⁵ 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.

victims and corresponding losses. Given these facts, the Government respectfully submits that a Court-ordered schedule of restitution is not practicable within the meaning of 18 U.S.C. § 3663A(c)(3).

The Government further submits that the goal of victim compensation can be addressed appropriately 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). In the Adelphia case, the Second Circuit upheld the District Court’s finding that restitution was impracticable on the basis that “there are potentially tens of thousands of victims of the [] crimes. . . . [and] the amount of losses of those victims has not been established and doing so would indisputably take a great deal of time.” In Re W.R. Huff Asset Management Co., LLC, 409 F.3d at 563. The Government proposes to oversee a process, pursuant to the DOJ regulations described above, that would result in forfeited assets being returned to victims of the defendant’s offenses to the maximum extent possible. As explained above, these regulations set forth who is a qualified victim and under what circumstances a victim can recover, and allow the U.S. Attorney’s Office, AFMLS, and the investigating law enforcement agencies, to evaluate victims’ petitions for remission or mitigation, determine their basis and merit and oversee the disbursement of forfeiture proceeds to victims.

Under the well-established remission regulations, DOJ would exercise discretion with respect to how to accomplish the objective of maximizing compensation to victims. In other complex fraud cases such as Adelphia, for example, DOJ has employed special masters to assist in evaluating remission petitions, verifying loss amounts, recommending to the Attorney General

a *pro rata* distribution and disbursing funds to victims. In this case, in anticipation of the possibility that the Court will determine that restitution is impracticable, the Government is evaluating different procedures that could be used to maximize victim recovery and effect the distribution of funds through DOJ's remission process. Among other things, the Government is evaluating the possibility of retaining Irving Picard, the SIPA Trustee, in a capacity that would be distinct from his role as the SIPA Trustee, to assist DOJ in administering the remission process. In such circumstance, and in accordance with DOJ regulations, DOJ and Mr. Picard would coordinate closely and share analyses in connection with the review of customer claims submitted in connection with the liquidation of BLMIS. This would serve to avoid the duplication of efforts, conserve resources, and create an efficient remission process that would result in maximum recovery for victims.

CONCLUSION

For the reasons set forth above, the Government respectfully submits that the Court find that, pursuant to 18 U.S.C. § 3663A(c)(3), the determination of restitution is impracticable in this case. A proposed order is attached hereto as Exhibit B for the Court's consideration.

Dated: New York, New York
 September 22, 2009

Respectfully submitted,

PREET BHARARA
United States Attorney

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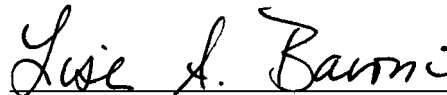
DECLARATION OF SERVICE

I, Lisa A. Baroni, declare pursuant to 28 U.S.C. § 1746 that on the 22nd day of September 2009, I caused to be placed one copy of the foregoing Motion Pursuant to Title 18, United States Code, Section 3663A(c)(3), 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
September 22, 2009