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Via Facsimile

March 10, 2009

Honorable Denny Chin
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007

Re: United States v. Bernard L. Madoff 09 Cr.

Dear Judge Chin:

We respectfully submit this letter on behalf of this Firm's client, Bernard L. Madoff, in response to the government's letter to us, and filed with the Court, dated March 6, 2009 pursuant to *United States v. Pimentel*, in which the government indicated, among other things, that it intended to seek forfeiture from Mr. Madoff of $177,000,000,000 under 18 U.S.C. §§ 981(a)(1)(C) and 28 U.S.C. § 2461. The government has indicated that this figure represents the "proceeds" of specified unlawful activity ("SUA") alleged in the Information it filed in this matter.

We respectfully suggest that the amount of the government's forfeiture demand is grossly overstated – and misleading – even for a case of this magnitude. The purpose of this letter is not to minimize Mr. Madoff's culpability. However, we wish to notify the Court that the issues related to forfeiture, restitution and sentencing in this matter are highly complex and will require extensive time to resolve and warrant discovery to the defense. However, it is important for us to inform the Court at this early stage that it disagrees with the government's theory as to what constitutes the "proceeds" of the specified unlawful activity in this case.[1]

The government has informed us that the purported $177,000,000,000 of "proceeds traceable to the commission of SUA offenses" represents the total amount of money deposited in the Bernard L. Madoff Investment Securities, LLC ("BLMIS") bank account related solely to Mr. Madoff's investment advisory business. Even assuming the accuracy of that number, however, the government's theory of the proceeds of SUA – in this case securities fraud, mail fraud, wire fraud and theft from an employee benefit plan - fails to account for or offset the

[1] We intend to address the other matters discussed in the *Pimentel* letter in our sentencing submission and at sentencing.

substantial amounts of money that Mr. Madoff paid from the aforementioned account to investors in the form of redemptions, a number likely in the billions. Under both statutory[2] and case law, including recent decisions by the Supreme Court[3] and Judge Patterson of this Court,[4] in a case like this – involving a lawful activity (investment advisory business) conducted in an illegal manner – the proceeds subject to forfeiture are limited to Mr. Madoff's net profits and should not include his gross receipts. That distinction is of vital importance because, according to the Information, "Mr. Madoff used most of the investors' funds to meet the periodic redemption requests of other investors."[5] While we do not ask the Court to resolve this issue now, we have serious doubts that the government's definition of proceeds subject to forfeiture comports with the law under *U.S. v. Santos* and *U.S. v. Kalish*. Moreover, if the government really thought this was in fact a $177 billion fraud, it would have alleged it as such in the three counts of money laundering charged in the Information.

We have not had an opportunity to analyze the government's claim about the proceeds of SUA because we do not have access to a full set of the books and records of Mr. Madoff's business or its bank accounts. Although the government has provided us with some records, to date we have not seen documentation that would support a finding of gross receipts by Mr. Madoff's investment advisory business amounting to $177 billion. To effectively represent Mr. Madoff, and assist the Court, on questions of forfeiture, restitution and sentencing, we respectfully request that the Court, pursuant to a set schedule, instruct the government to produce any and all records that inform questions of forfeiture and restitution, including all bank records for Mr. Madoff's firm, the firm's general ledger(s) and customer account statements.

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[2] 18 U.S.C. § 981(a)(2)(B).

[3] *United States v. Santos*, 128 S. Ct. 2020 (2008) (applying the rule of lenity to affirm the district court's determination that the term "proceeds" should be interpreted in favor of the defendant as "net proceeds").

[4] *See United States v. Kalish*, 2009 WL 130215, 06 Cr. 656(RPP) (Jan. 13, 2009) (applying *Santos* and holding that "proceeds" means "net proceeds" in a mail and wire fraud scheme).

[5] *United States v. Madoff*, 09 Cr. ___, ¶8.

In light of the government's filing of its *Pimentel* letter, we respectfully request the Court's permission to file this response have included a SO ORDERED block below for the Court to endorse should it grant our request.

Respectfully submitted,

Daniel J. Horwitz

cc. Marc Litt, Assistant United States Attorney

SO ORDERED