

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re: : SIPA LIQUIDATION  
: :  
BERNARD L. MADOFF INVESTMENT : No. 08-01789 (BRL)  
SECURITIES LLC, : :  
: :  
Debtor. : :  
-----X : Adv. Pro. No. 09-01265 (BRL)  
: :  
Mary Albanese, Brow Family Partnership, :  
Allan Goldstein, Laurence Kaye, :  
Suzanne Kaye, Rose Less, Gordon Bennett, :  
on behalf of themselves and all Others Similarly :  
Situated, :  
Plaintiffs, :  
vs. :  
IRVING H. PICARD, as Trustee for the :  
Liquidation of Bernard L. Madoff Investment :  
Securities LLC, :  
Defendant. :  
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**DECLARATION OF BRIAN J. NEVILLE IN SUPPORT OF  
MOTION FOR CLASS CERTIFICATION**

I, Brian J. Neville, declare as follows:

1. I am a partner in the law firm of Lax & Neville, LLP, a member in good standing of the Bars of New York and this Court, and am fully familiar with the facts and circumstances contained herein.
2. Pursuant to Local Rule 9077-1 of this Court, there have been no previous applications for the relief sought in the Motion for Class Certification associated with this Declaration.
3. My firm represents Plaintiffs Mary Albanese, the Brow Family Partnership, Allan Goldstein, Laurence Kaye, Suzanne Kaye, Rose Less and Gordon Bennett

(collectively, “Plaintiffs”), on behalf of themselves and the Class,<sup>1</sup> who have commenced this above-captioned adversary proceeding (the “Proceeding”) arising from the liquidation of Bernard L. Madoff Investment Securities LLC (“Madoff”) under the Securities Investor Protection Act, 15 U.S.C. § 78aaa, *et seq.* (“SIPA”), in the United States Bankruptcy Court for the Southern District of New York (the “Court”) against Irving Picard, the Trustee of the Madoff liquidation (the “Trustee”), seeking to obtain a declaratory judgment, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, that: (i) the Trustee’s definition of “net equity” as deposits minus withdrawals is incorrect as a matter of law; (ii) a customer’s “net equity” under SIPA is the value of the securities positions reflected in that customer’s Madoff account(s) as of the SIPA filing date; (iii) the Amended Class Action Complaint be deemed a written statement of claim for all class members who fail to file their individual SIPC Customer Claim Forms prior to the Bar Date; (iv) the Amended Class Action Complaint is not a waiver of any Plaintiff’s or prospective class member’s right to a jury trial, nor may it be used by the Trustee to contest any Plaintiff or prospective class member’s right to a jury trial; (v) the Amended Class Action Complaint does not confer jurisdiction over any prospective class member, nor may it be used by the Trustee to assert jurisdiction over any prospective class member; (vi) the Trustee cease and desist from requiring the execution of a release as a condition precedent to the distribution of SIPC funds to a class member; and (vii) all releases executed by any class member in the Madoff liquidation be declared void.

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<sup>1</sup> The Class is defined as all persons and entities who: (i) maintained one or more customer accounts with Madoff as of December 11, 2008, the value of which is/are adversely affected by the Trustee’s unlawful calculation of “net equity” in contrivance of 15 U.S.C. § 78lll(11); and (ii) have suffered and will suffer damages thereby. Excluded from the Class are the (i) Trustee, members of his immediate family and their legal representatives, heirs, successors, or assigns and any entity in which Defendant has or had a controlling interest; and (ii) Bernard L. Madoff, members of his immediate family and their legal representatives, heirs, successors, or assigns and any entity in which Bernard L. Madoff has or had a controlling interest, including their officers, directors, agents and employees.

4. As the Court established an immovable bar date of July 2, 2009, (the “Bar Date”) for filing all claims in the Madoff liquidation, the issues raised in this Proceeding and in the proposed Order to Show Cause require this Court’s attention in advance of that deadline to allow those class members, who have not yet filed their claims with the Trustee, the opportunity to do so. Hundreds of class members are simply refusing to file their SIPC claims due to the defective and prejudicial notices that have advised them that they will receive nothing pursuant to the Trustee’s unlawful definition of “net equity” as they have withdrawn more funds than they have invested, and they believe that the filing of a SIPC claim will not only initiate a “claw-back” action against them but also place them in jeopardy of waiving their right to a jury trial and subjecting them to this Court’s jurisdiction. In order to include these non-filers in the SIPC liquidation so that they are not excluded if this Court rules in favor of the Class on the “net equity” definition, the Order to Show Cause also seeks the determination that the filing of the Amended Class Action Complaint be deemed a written statement of claim pursuant to SIPA. It would be a tragedy even if one Madoff victim class member is denied their rightful SIPC distribution.

5. Plaintiffs each held at least one customer account with Madoff, and other than the Brow Family Partnership and Gordon Bennett, have filed claims with the Trustee. Plaintiffs have a “net equity” of approximately \$11 million, which is the total balance reflected in Plaintiffs’ November 30, 2008 Madoff account statements.

6. Plaintiff Mary Albanese is 73 years old and currently resides in New Jersey. In 1993, Ms. Albanese opened the Mary Albanese IRA Account at Madoff. Ms. Albanese is the wife of deceased Dominick Albanese and trustee for the Dominick Albanese Trust Account B. In 1993, Dominick Albanese opened the Dominick Albanese Trust Account B at Madoff. Ms. Albanese remained a Madoff customer as of December 11, 2008 and her SIPC

claims are adversely affected by the incorrect definition of “net equity” currently being used by the Trustee to process Madoff claims, and is suffering damages thereby.

7. Plaintiff the Brow Family Partnership is a partnership organized under Florida law. The Brow Family Partnership opened the Brow Family Partnership account at Madoff in 1992. The Brow Family Partnership remained a Madoff customer as of December 11, 2008 and its SIPC claim is adversely affected by the incorrect definition of “net equity” currently being used by the Trustee to process Madoff claims, and is suffering damages thereby. The Brow Family Partnership has not yet filed a SIPC claim form. The Brow Family Partnership has concerns, like many other class members, about the risks of filing a claim with the Trustee, including, the fear of “claw-back” litigation and possibly waiving the right to a jury trial.

8. Plaintiff Allan Goldstein is 76 years old and currently resides in California. In 1997, Mr. Goldstein opened the Allan Goldstein IRA Account at Madoff. Mr. Goldstein remained a Madoff customer as of December 11, 2008 and his SIPC claim is adversely affected by the incorrect definition of “net equity” currently being used by the Trustee to process Madoff claims, and is suffering damages thereby.

9. Plaintiffs Laurence and Suzanne Kaye, both 66 years old, are married and reside in California. In 1998, Mr. Kaye opened the Laurence Kaye IRA Account at Madoff. In 1990, the Kayes opened the Laurence Kaye Susan Kaye Trustees account at Madoff. The Kayes remained Madoff customers as of December 11, 2008 and their SIPC claims are adversely affected by the incorrect definition of “net equity” currently being used by the Trustee to process Madoff claims, and is suffering damages thereby.

10. Plaintiff Rose Less is 88 years old and resides in New York. In 1993, Mrs. Less opened the Rose Less Account at Madoff. Mrs. Less remained a Madoff customer as of December 11, 2008 and her SIPC claim is adversely affected by the incorrect definition of net

equity currently being used by the Trustee to process Madoff claims, and is suffering damages thereby.

11. Plaintiff Gordon Bennett is 63 years old and currently resides in California. In 1992, Mr. Bennett opened the Gordon Bennett 1988 Trust Account at Madoff. Mr. Bennett remained a Madoff customer as of December 11, 2008 and his SIPC claim is adversely affected by the incorrect definition of “net equity” currently being used by the Trustee to process Madoff claims, and is suffering damages thereby. Mr. Bennett has not yet filed a SIPC claim form. Mr. Bennett has concerns, like many other class members, about the risks of filing a claim with the Trustee, including, the fear of “claw-back” litigation and possibly waiving the right to a jury trial.

12. Bernard Madoff’s fraud in this case is now well-documented through among other methods, the Trustee’s investigation, Mr. Madoff’s criminal allocution, filings made with this Court and news articles and other matters in the press. Simply stated, Madoff ran a massive Ponzi scheme wherein individual account holders of Madoff received monthly account statements and trade confirmations listing a series of trades in the largest capitalized companies traded on the organized exchanges and also listed options trades in the same securities. Madoff did not purport to use margin and, upon information and belief, none of the Madoff customer accounts listed debit balances or otherwise indicated any amount owed to Madoff.

13. The Trustee has stated at public meetings, on his website, in press releases and in claim determination letters that a customer’s “net equity” equals the deposits to their Madoff account minus withdrawals, without regard to the value of securities appearing on the customer’s final account statement. As set forth in the Amended Class Action Complaint for Declaratory Judgment in this Proceeding (the “Amended Complaint”), the Trustee’s position

contradicts the plain language of SIPA, its legislative history, and the position that the Securities Investor Protection Corporation (“SIPC”) has itself taken in a similar case in this Circuit.

14. In addition to Plaintiffs, my firm represents a prospective class with an undetermined number of investors believed to be over 4,000 based on conversation with counsel for the Trustee, many of whom lost their life savings and entire investments, and in many cases, their only source of income, in the massive Ponzi scheme uncovered when Bernard Madoff was arrested on December 11, 2008. Over the past six months, I and attorneys at my firm have had countless conversations with numerous class members, who are generally adversely affected in the following ways:

- Those who filed SIPC claims for the balance reflected on their final Madoff statement, which claims were either denied or substantially limited on the basis of the Trustee’s “cash in/cash out” definition of “net equity.”
- Those who filed SIPC claims but have not yet received determination letters from the Trustee. It is expected that these claims will be either denied or substantially limited on the basis of Trustee’s “cash in/cash out” definition of “net equity.”
- Those who are still waiting to file claims on the hope that the Trustee will conform his definition of “net equity” to SIPA before the filing deadline of July 2, 2009.
- Those who have decided not to file claims at all because 1) they will receive nothing under the Trustee’s “cash in/cash out” definition of “net equity”; 2) have serious concerns about their possible waiver of their right to a jury trial on “claw back” claims by the Trustee, simply by having filed a SIPC claim form; and 3) have serious concerns about their possibly subjecting themselves to the jurisdiction of the United States Bankruptcy Court, Southern District of New York.

15. I have first-hand knowledge, based on e-mails, phone conversations and in-person conversations, that attorneys from my firm, as well as other firms, have had numerous communications with counsel for the Trustee and the Securities and Exchange Commission (“SEC”) seeking the amicable resolution of the “net equity” issue, notification requirements, jury waiver and jurisdictional matters.

16. The notice provided by the Trustee to the members of the Class was wholly defective and inadequate because, among other things, the SIPC Customer Claim Form, the Madoff Customer Claim Instructions, the Madoff Explanatory Letters and the Notice prejudiced customers by discouraging them from filing their written statements of claim. As set forth in Plaintiffs’ Amended Class Action Complaint, the Trustee’s definition of “net equity” during this Proceeding represents an unprecedented deviation from the SIPA-compliant definition of “net equity.” By taking this unprecedented step and incorporating this new definition of “net equity” into all the of the Notice materials that were disseminated to the Class, the Trustee radically shifted the landscape for economic relief under these proceedings. Indeed, hundred of class members, whose claims under the Trustee’s present definition of “net equity” are worthless, would have absolutely no incentive and no reason to file a claim when they believe that the filing of a SIPC claim will not only initiate a “claw-back” action against them, but also place them in jeopardy of waiving their right to a jury trial and subjecting them to this Court’s jurisdiction. As such, these individuals were clearly prejudiced by the misleading Notice, thereby making the Notice inadequate and defective.

17. Recently, on or about June 19, 2009, two weeks prior to the Bar Date, and in light of the fact that hundreds of class members have yet to file their claims, the Trustee undoubtedly attempted to cure the Notice deficiency with a Final Reminder Notice (“Final Notice”), which was mailed to customers who “have or had customer account(s) at BLMIS.”

The Final Notice is attached hereto as Exhibit D. A copy of this Final Notice was also posted by the Trustee on the Trustee's website. (*See* [www.madofftrustee.com](http://www.madofftrustee.com)). The Final Notice indicates that the Trustee is aware of lawsuits challenging the "net equity" definition and the Trustee's approach under SIPA, and notably asserts that should the "court determine that the Trustee is incorrect, the Trustee *may* be required to redetermine all previously allowed claims . . . and to the allowance of other customer claims that would have been denied." *Id.* (*Emphasis added*). However, the Final Notice is not only a tacit acknowledgment that the Trustee's notice was defective but also does not cure the deficiency of notice, as class members are required to speculate as to the Court's final determination regarding the "net equity" definition, while also requiring them to potentially forfeit their right to a jury trial, and subject themselves to this Court's jurisdiction, for a claim that under the Trustee's present definition is worthless.

18. All of these investors fell victim to Madoff's elaborate Ponzi scheme and are now being victimized again as a result of the Trustee's incorrect valuation of their "net equity" under SIPA. As of the date of this declaration, a substantial number of these investors are struggling to pay for basic living and medical expenses, and they are hoping that swift payment of the SIPC funds will help them avoid destitution.

19. There are also hundreds of members of the Class who received incorrect determination letters from the Trustee based on its unlawful definition of "net equity." These letters require the execution of a release as a condition precedent for the distribution of any funds by the Trustee. Considering that many of these Madoff customers are destitute and in need of money to pay basic living expenses, they have executed (or will execute) the release; thereby, potentially waiving any rights that they may have if this declaratory judgment action is successful. The most glaring example of the Trustee's rigid policy regarding releases is forcing

the class members that qualify for the Hardship Program<sup>2</sup> to choose between receiving money to pay for necessary living expenses and sign a release forever waiving any potential right to future compensation from the Trustee, in any circumstance, or get nothing while reserving all rights. Hence, the Class requests that these releases be declared void and that the Trustee cease from requiring the execution of a release to distribute uncontested SIPC funds to a class member as there is no legal basis for requiring such a release. Indeed, to do so is simply violative of public policy.

20. Counsel for Plaintiffs and proposed Class have actively engaged in negotiations with counsel for the Trustee seeking the relief requested in both the Order to Show Cause and the Class Certification Motion.

21. Under the approach sought in this Proceeding, and in the proposed Order to Show Cause, an individual in prospective class will retain the benefit of opting out of the class once the “net equity” issue has been resolved, thus preserving their jurisdictional defenses and/or right to a jury trial, if needed. The approach is beneficial for a number of reasons. First, each class member will be deemed to have filed in compliance with the Bar Date preserving their right to a SIPC disbursement; second, each class member will have the benefit of a definitive determination on the definition of “net equity”; and third, each class member will benefit from the passage of time allowing them to see if the Trustee is going to file a claw-back or preference claim regarding their individual account in which they may wish to receive the benefit of a jury trial.

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<sup>2</sup> At the urging of the undersigned and others, and with the understanding that many of the Madoff class members are destitute and in need of money to pay basic living expenses, the Trustee instituted a Hardship Program in early May 2009. This Hardship Program expedites the processing of the Determination Notice for qualifying individual Madoff victims.

22. Attached hereto as Exhibit A is a copy of the Trustee's January 5, 2009 notice titled "Madoff Liquidation Trustee Mails more than 8,000 Customer Claim Forms, Publishes Notice in Major Newspapers."

23. Lax & Neville, LLP is a full-service broker-dealer, securities, regulatory, and employment litigation firm dedicated to the representation of employees, employers, brokers, investment bankers, investment advisors, traders, hedge funds, public customers, and broker-dealers.<sup>3</sup> Our attorneys are competent and experienced in class actions, SIPC liquidations, and broker/dealer and bankruptcy litigation. (Attached hereto as Exhibit B are Lax & Neville, LLP attorney biographies for those attorneys representing the Plaintiffs and the proposed Class.)

24. Attached hereto as Exhibit C is a true and correct copy of the Martin Rappaport Objection to Trustee's Determination of Claim and the Chaitman/Schwebel Objection to Trustee's Determination of Claim filed in Adv. Pro. No. 08-01789, cited in the Brief.

25. Attached hereto as Exhibit D is a copy of the Trustee's June 19, 2009 Final Notice.

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

Executed on June 23, 2009.



Brian J. Neville

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<sup>3</sup> Lax & Neville, LLP's website contains a detailed description of the firm and the attorneys working on this matter, and can be found at [www.LAXNEVILLE.com](http://www.LAXNEVILLE.com).